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Introduction

The most important/main question to be answered is specified by the Study Specification as the following:

> **Are there any deficiencies in law or practice as regards trade union rights in the EU Member States and, if so, why?**
>
> **How can these be overcome? Perhaps with use of the rights contained in the current or revised Treaty on European Union?**

This Study outlines a fiamework to address this most important/main question.

1.1 Trade union density

One starting point is the level of trade union membership in the Member States. The author of a leading study has pointed out:'

> "It is not difficult to be impressed by the differences in unionization levels across countries. **The range of variation in unionization levels among advanced industrial societies is larger than in any other social-economic or political indicator".**

Visser's analysis of patterns of development in unionization in ten Western European countries, eight of them EU Member States' demonstrated certain similarities:

- a general surge in unionization around and **in** the First World War;
- membership losses following the peak **in 1919-1920** and even more in the course of the economic depression after **1929;**
- another increase during and after the Second World War which this time, for most countries, is not followed by massive decline, with density rates remaining fairly level for the **1950s** and **1960s;**
- another upward trend at the end of the 1960s lasting until the latter **1970s;**
- a decline beginning in the early 1980s.

The following table illustrates this pattern:[3]

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1 Jelle Visser, In Search of Inclusive Unionism, Bulletin of Comparative Labour Relations, no. 18, 1990, Kluwer, Deventer, at p. 36 (the author's emphasis).

2 Austria, ***Denmark,*** France, Germany, Italy, the Netherlands, Sweden, the United Kingdom, and also Norway and Switzerland.

3 Ibid., Table S on **p. 45.**

Table 1: Gross trade union density rates: (including retired workers)

Year	AU	DE	FR	GE	IT	NE	SW	UK
1913	...	23.1	...	21.5	...	16.9	9.4	23.1
1920	51.0	48.2	7.2	52.5	...	35.8	27.7	45.2
1930	37.6	36.9	7.2	32.7	...	30.1	36.1	25.4
1939	...	46.6	23.6 *a*	...	...	32.5	53.7	31.6
1950	62.3	58.1	20.5 b	34.7	50.3	43.0	67.7	44.1
1960	63.4	63.1	19.3 c	38.3	35.2	41.8	73.0	44.2
1970	62.1	64.4	21.3	37.6	38.3	39.7	73.2	48.5
1980	58.4	79.8	17.2	41.0	54.4	35.3	88.0	52.9
1985	57.9	82.2 *d*	14.5	39.3	51.0	28.6	91.5	44.2

a = 1936 b = 1954 *c* = 1962 *d* = 1984

In analysing the cross-national variation in unionization, Visser distinguishes three groups:

i. countries with a **high** level of unionization (50% or more of the eligible labour force. Over the last few decades (in some cases over the last half century) this group includes Sweden, Denmark, Austria, Britain (in the 1970s), Belgium, Luxembourg, Finland, Ireland (1970s); **8** Member States of the EU have maintained this level for a consistent period;

ii. countries with a **medium** level of unionization (between *3* 1-50%): Germany, Italy, Britain (most of the time) and the Netherlands (until recently); *3* EU Member States;

iii. countries with a **low** level of unionization *(30%* and less): France, the Netherlands (recently), Portugal, Spain and Greece; **4** EU Member States.

Visser notes that after 1979, the gap between highly and weakly unionized countries has widened. Those with high levels of unionization incurred the smallest losses or continued to grow; weaker movements grew more feeble. He poses a question pertinent to this study:

> "Why is it that, today, four out of five Swedish workers join a trade union against only one out of seven, or even less, in France? Why are Scandinavian unions so much more resilient in the face of economic adversity than, say, British or Dutch unions"?

This Study cannot provide the answer. But the information and analysis will address the question:' what's law got to do with it?[5]

1.2 The structure of the Study

The law on trade union rights in each of the Member States is the product of a long history embedded in a specific national context. Membership of the European Union has exposed these laws to new forces emerging from a transnational economy. The resulting European labour law is "a complex distillation of national labour laws into something original and distinct - and genuinely European in character".[6]

This background Study on trade union rights in the Member States aims to elaborate both these dimensions.

Part I is an exposition of the law on trade union rights in the Member States. The variety, complexity and sophistication of Member State laws on trade union rights are revealed. They pose a serious challenge to attempts at supranational level to find common ground among all the Member States, or to remedy deficiencies on the part of individual Member States.

Part II addresses the question of how these national systems are affected by membership of the EU. Member State laws are exposed to two major influences: the harmonization of law through the development of the common market and Single European Market programmes; and the integration through European social dialogue foreseen by the Protocol and Agreement on Social Policy of the Maastricht Treaty on European Union.'

The conclusion of the Study is that the search for common ground may be difficult, but imperatives of harmonisation and integration may dictate the pace.

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4 With apologies to Tina Turner.

5 This is not the **only** or even obvious question. In Visser's attempts to address the question he focuses on, inter alia, the changing structure of the labour force and the business cycle.

6 B. Bercusson, European Labour Law, London, Butterworths, 1996, "Preface", p. vii.

7 Ratification of the Treaty of Amsterdam of 15-16 June 1997 will secure the incorporation of the Protocol and Agreement into the EC Treaty.

PART I: TRADE UNION RIGHTS IN THE MEMBER STATES

1. The Structure of Part I of the Study

PART I of the Study addresses the question whether there is common ground among the Member States, and what deficiencies exist. There are entire shelves in libraries in each of the Member States with treatises concerned with the law and practice on trade union rights. The subject is of enormous scope and complexity in the context of even one country. To provide a workable overview for the purposes of this Study requires a degree of simplification which, of necessity, omits the refinements painstakingly elaborated by the labour laws in the Member States. The justification for this is that the Study aims to provide a broad approach to the issues involved, as the background to an initiative by the European Parliament.[8] Three techniques of simplification have been adopted.

First, simplification of substantive content. The Study groups together a number of trade union rights into three categories: rights of association, rights of autonomy, and rights of action.

Rights of association: A number of legal issues fall under this heading. The first is whether there is a legal definition of a "trade union" in the Member State concerned. The situation is rendered complex because in some Member States there is a legally defined concept of "most representative" trade union, with special rights attached. There are also legally recognised forms of worker representation which may involve or overlap with trade unions.

A second issue is whether the law of the Member States grants trade unions formal legal personality. Again, complexity arises when Member State laws treat trade unions as unincorporated associations, but with special rights nonetheless; or there are systems of formal registration which bring with them some of the aspects of formal legal personality.

The third issue concerns rights of association properly so called - the rights to form and join trade unions. Again, the position is complicated when rights of association in general are granted constitutional protection, and trade unions are given specific recognition, or partial, or no special status regarding such rights. Similarly, the right not to join may be explicit, or implied in the "negative right of association", and the issue spills over into questions of the legality of union security agreements, including the closed shop.

Rights of autonomy: The degree of autonomy enjoyed by trade unions in the organisation of their internal affairs is regulated by Member States to different degrees, ranging from constitutional guarantees of complete independence, to acceptance of autonomy, but with access to some rights being conditional on compliance with legal standards. The internal constitutional structure of trade unions, including systems of election or appointment of officials and processes of decision-making are highly sensitive and reflect national contexts. Again, the overlaps with other legally sanctioned forms of worker representation highlight degrees of relative autonomy. The issue is particularly sensitive on the point of the financing of trade unions and their political activities.

Rights of action: Beyond rights of association and autonomy, each Member State has sought to place the activities of trade unions in a legal framework. The rights of trade unions to carry out their

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[8] **Further studies will be necessary to bring out the complexities presented by each national system in adapting to trade union rights established at EU level.**

functions as representatives of the workers cover a wide range: recognition, trade union activities, information and consultation, collective bargaining and strikes. These rights are often woven into complex patterns of articulation between trade unions and other workers' representative bodies, especially works councils. At present, some rights of action have their origin not in Member State law, but in EC law requirements.' The most important outcomes of these functions are collective agreements, again the subject of a variety of legal approaches, including extension.

Secondly, simplification of legal form. The wide variation in substantive content is further highlighted by the absence of any formal provision in some Member States for trade union rights which, in others, are guaranteed constitutional status. The attempt to identify formal provisions on trade union rights common to the Member States soon reaches its limits.

However, formal diversity does not mean that there is no common recognition of trade union rights. In substantive terms, other Member States do guarantee trade union rights through a variety of formal provisions and effective practices. These practices may have achieved varying degrees of legal recognition, as when they take the form of collective agreements, which may in turn be elevated to almost legislative status. For the sake of simplicity, and overlooking complexities and subtleties which are the stuff of much learned academic debate in legal doctrine, the Study attempts to indicate where specific trade union rights are primarily legislative (including judicial interpretations of legislation) and where there is no legislation, or it is secondary to a collective practice which embodies the trade union right concerned.

Thirdly, simplification of presence or absence. **A** judgment has to be made as to whether a particular right is legally provided for in a Member State. The variable definitions of the right in question, its scope and content, and the degree to which in any Member State there was a consensus view on whether such a right existed, and, if so, to what extent, make it very difficult to establish whether there is a common basis of trade union rights, and, if so, what it consists of Bearing these difficulties in mind, the Study adopts **an** admittedly rough and ready, yes or no approach to the question whether there is a specific trade union right in the law/practice of a Member State. The Study tries to sustain this robust approach as far as possible, though sometimes the ambiguity, complexity and subtlety of national laws makes a combined yes/no answer unavoidable, or even impossible to answer at all (indicated in the Tables **as** ?). In a number of countries where there are "dual channel" representation systems, this approach breaks down as legal rules on works councils overlap with those on trade union rights. This appears in the Tables as **"DC" -** dual channel systems.

The Tables in the Study build on these three techniques of simplification. They indicate, for each Member State, a series of trade union rights under each of the three categories (association, autonomy, action), whether these are established in law or practice, and whether legal provision exists or not. The text of the Study does not seek to elaborate further these substantive rights in each and every Member State. They are, as already noted, the subject of many learned treatises in the legal literature of each Member State. Any attempt at summary would be a travesty. The text of the Study

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9 Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies, OJ L 48/29 of 22.2.1975, as amended by Directive 92/56/EEC of 24 June 1992. OJ L 245/3 of 26.8.92; Council Directive 77/187/EEC of 14 February 1997 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 61/26 of 5.4.1977.

will provide only illustrations from some of the Member States' laws.[10]

The Study's **Tables** elaborate the position of the 15 Member States regarding trade union rights, specifically:

- whether the right in question is regulated by legislation **(L)** or collective practice **(CP),** and
- whether there exists such a right or provision (e.g. **a** legal definition of trade union): yes (+) or no (-).

Further clarification **is** provided in the text. The **Annex** Tables summarise the position of trade union rights in each Member State. Finally, the **Supplement** provides summaries of the position in each Member State.

2. Rights of Association

Ratification by all Member States of ILO Convention No. **87** of 1948 (Freedom of Association and Protection of the Right to Organise) has produced this common foundation of trade union rights in all Member States of the EU. The substance of ILO Convention No. **87** can be summarised in the following **8** basic propositions:[11]

1. All workers and employers, without distinction whatsoever, have the right to establish, and subject only to the rules of the organisation concerned, join organisations of their own choosing without prior authorisation (Article **2).** "Organisation" for these purposes means any organisation of workers or employers for furthering and defending the interests of workers or of employers (Article 10).

2. Workers' and employers' organisations have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities, and to formulate programmes (Article 3(1)). The public authorities must refrain from any interference which would restrict these rights or impede their exercise (Article **3(2)).**

3. Workers' and employers' organisations must not be dissolved or suspended by administrative authority (Article **4).**

4. Workers' and employers' organisations have the right to form and join federations and confederations (Article 5). Such federations and confederations in turn have the right to affiliate to international organisations of workers and employers (Article 5), and also to enjoy the guarantees provided by Articles **2, 3,** and **4** (Article ***6).***

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[10] In a ***Supplement,*** I provide a very brief comment on the trade union rights in each Member State under all or most of the headings; not a comprehensive ***summary*** (which for 15 Member States would produce a report of hundreds of pages, and still be deemed inadequate to convey the complexity of the legal position in each Member State). The Supplement aims rather to give an indication of each Member State system of trade union rights in a few pages.

[1] W.B. Creighton, "Freedom of Association", chapter 17 in R. Blanpain (ed.), Comparative Labour Law and Industrial Relations in Industrialised Market Economies, 4th ed., Kluwer, Deventer, 1990, vol. 2, pp. 19-44, at p. 29.

5. The acquisition of legal personality by organisations, federations and confederations must not be made subject to conditions of such a character as to restrict the application of Articles 2, 3 and 4 (Article 7).

6. In exercising their rights workers, employers and their organisations are to respect the law of the land (Article 8(1)), which in turn must not be such as to impair, or be applied so as to impair the guarantees provided by the Convention (Article 8(2)).

7. According to Article 9 the extent to which the guarantees provided by the Convention are to apply to the armed forces and the police is to be determined by national laws or regulations. These are the only permissible exceptions to the generality of the Convention.

8. Ratifying States must take "all necessary and appropriate measures" to ensure that employers and workers may freely exercise the right to organise (Article 11).

Further, all Member States have also ratified ILO Convention No. 98 of 1949 (Application of the Principles of the Right to Organise and to Bargain Collectively). The propositions to be found in ILO Convention No. 98 also summarise trade union rights common to all EU Member States in 5 propositions:[12]

1. Workers are to enjoy adequate protection against acts of anti-union discrimination at the time of hiring, during employment, and in relation to termination (Article 1).

2. Worker and employer organisations are to enjoy adequate protection against interference by other organisations and by employers in their establishment, functioning or administration (Article 2).

3. Machinery appropriate to national conditions is to be established, where necessary, to ensure respect for the rights guaranteed by Articles 1 and 2 (Article 3).

4. Article 5 confers upon ratifying States a discretion similar to that of Article 9 of Convention No. 87 in relation to the armed forces and the police.

5. According to Article 6, the Convention does not deal with the position of public servants engaged in the administration of the State. It also provides that the Convention is not to be construed as prejudicing the position of such workers in any way.

In the following sections, specific aspects of trade union rights of association in the 15 Member States will be examined. **Table 2** elaborates the position of the 15 Member States regarding rights of association, specifically:

- whether the right in question is regulated by legislation **(L)** or collective practice **(CP),** and
- whether there exists such a right or provision (e.g. a legal definition of trade union): yes **(+)** or no (-).

In some cases it has been necessary to answer by indicating a combined legislation-and-collective practice (**L/CP**), and/or that it is not possible to give a clear answer (**?**).[13]

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12 Ibid., at p. 30.

13 Further clarification is available in the Supplement's summaries of the position in each Member State.

TABLE 2: Rights of association

MEMBER STATES	Legal definition	Legal personality	Right of association/ to join	Right not to join	Closed shop
Austria	L +	L +	L +	L +	L -
Belgium	L +	? -	L +	L +	CP ?
Denmark	CP -	L +	L/CP +	L +	CP ?
Finland	CP -	L +	L +	L +	CP -
France	L +	L +	L +	L +	L -
Germany	L +	L -?	L +	L +	L -
Greece	L +	L +	L +	L +	L -
Ireland	L +	CP +?	L +	L +	L -
Italy	CP -	CP -?	L +	L +	L -
Luxembourg	L +	L +	L +	L +	L -
Netherlands	CP ?	L +	L +	L +	L +
Portugal	L +	L +	L +	L +	L -
Spain	L +	L +	L +	L +	L -
Sweden	L +	CP -	L/CP +	CP +	L/CP ?
United Kingdom	L +	L -?	L +	L +	L -

KEY:

L = **legslation**
CP = **collective practice**
+ = **there exists a right or provision**
- = **there exists no right or provision**
L/CP = **combined legislation-and-collective practice**
? = **not possible to state clearly that there is legslation and/or collective practice,** or **that there exists a right or provision.**

2.1 Legal definition

A large majority (11) of Member States have a legal definition of a trade union, and this is accomplished mainly through legislation. At one end of the spectrum, such definitions are not always specifically crafted for trade unions; for example, legal definitions of "associations" in general, which may include trade unions.

Austria

Since 1945, a trade union is a voluntary association in accordance with the Association Law (Vereinsgesetz) of 1951 (BGBL **233).**

At the other extreme, the legal definition of the trade union may aim specifically to identify trade unions which are "most representative" organisations.

Belgium

The concept of "most representative organisations" is defined as:
- an inter-industry wide organisation of workers, established at national level and represented on the Central Economic Council and the National Labour Council and with at least 50,000 members;
- an industry wide organisation of workers affiliated to, or forming part of, an inter-industry wide organisation of workers.

In between there may be a straightforward specific legislative definition of a trade union.[14]

United Kingdom

A trade union is defined in the Trade Union and Labour Relations (Consolidation) Act 1992, section 1, as an organisation which consists wholly or mainly of workers of one of more descriptions and whose principal purposes include the regulation of relations between workers of that description or those descriptions and employers or employers' associations.

2.2 Legal personality

Again, a large majority (10) of Member States attributes legal personality to trade unions; again, mainly through legislative provisions.[15]

France

Corporate capacity was finally granted to unions only by an Act of 12 March 1920. Article L411-10 of the Labour Code provides that trade unions benefit from legal personality in private law. The union has the right to take legal action in its own name to these ends (Article L135-5), and may even take the initiative on behalf of its members (Article L135-4). It can also take legal action to protect collective interests.

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[14] **See also France, Ireland, Portugal, Spain, Sweden.**

[15] **See also Ireland, Netherlands.**

United Kingdom

The legal status of a trade union is governed by the Trade Union and Labour Relations (Consolidation) Act 1992, section 10, which provides that although a union is not a body corporate and is not to be treated as if it were a body corporate, it is capable of making contracts and of suing and being sued in its own name in any cause of action.

In other Member States, trade unions obtain legal personality as de facto organisations.[16]

Italy

Article 39, 2nd paragraph, of the Italian Constitution provides for the registration of trade unions, and the consequent recognition of their legal personality, so as to enable them to conclude collective agreements with "erga omnes" effect. But this provision has remained a dead letter.

In law, therefore, unions are non-legally recognised de facto private associations (a status taken for granted by the Workers' Statute 1970). They are, in this capacity, subject to Articles 36-38 of the Civil Code. They are private associations and cannot obtain normal legal personality since Article 39 is considered to pre-empt this.

2.3 Right of association/Right to join

The ratification by all Member States of ILO Conventions 87 and 98 makes this right unanimous across the European Union. This trade union right has acquired constitutional status in some Member States. Sometimes this is a part of a constitutional guarantee of a general right of association.[17]

Netherlands

Trade-union freedom is not explicitly mentioned as a fundamental right in the Dutch Constitution. Since 1872, however, it has not been disputed that the general freedom of association enshrined in the Constitution (Article 8) also extends to employers' and employees' organizations.

Sometimes, the guarantee of the right of association is granted not by the Constitution, but by ordinary legislation.[18] The right of association granted, however, may be specific to trade unions.[19]

Germany

Currently, Article 9, section 3 of the Constitution of the Federal Republic provides the right "to form associations, to safeguard and improve working and economic conditions" and states that "any agreement to abridge or to impede this right is void and any measures tending to the same are illegal".
Freedom of association includes two basic collective rights: to establish a union and to act as a union, and two basic individual rights: to join a union and to act within a union as a member.

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16 See also Germany.
17 *See* also Austria.
18 See Belgium.
19 See also Finland, France, Italy, Portugal, Spain

Greece

Article 12 of the 1975 Constitution provides for the right to associate, to establish unions in full compliance with the law, which may not impose prior authorisation.

Ireland

The Constitution provides in Article 40.6.1.iii.2:

"1. The state guarantees liberty for the exercise of the following rights, subject to public order and morality...

iii. The right of citizens to form associations and unions. Laws, however, may be enacted for the regulation and control in the public interest of the exercise of the foregoing right."

Luxembourg

Article 11, paragraph 5 of the Constitution guarantees union freedom. It is also a corollary of the freedom of association in Article 26.

2.4 Right not to join

This right is almost unanimously treated as the analogue to the right to join.[20]

Finland

Like the right of association, the right not to join a trade union is also regulated in Section 5 of Chapter 47 of the Criminal Code, which provides that no one shall force or attempt to force an employee to join a trade union or to remain a member of a trade union.

Spain

Article 28.1 of the Spanish Constitution states that nobody can be obliged to join a trade union. The Organic Law of Trade Union Freedom, in Article 2.1.b recognises the worker's right to dissociate him/herself from the union s/he has joined.

The analogy between the right to join and the right not to join a trade union was reinforced by the European Court of Human Rights in Strasbourg, as the Danish experience shows.

Denmark

In 1982, following the Strasbourg European Court of Human Rights decision against British Rail in 1981, an Act of Protection of Wage Earners against Dismissal because of Membership of a Trade Union (LAGF) was passed (amended in 1990). It states in article 1 that an employer must not dismiss an employee because he belongs to a trade union or a specific trade union.

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[20] See also Austria, Belgium.

2.5 Closed shop/Union security

The closed shop is often seen in legal terms as the negation of the right not to join. Consequently, it is sometimes expressly prohibited, but with some qualification in practice.[21]

Austria

Any provision in a collective or works agreement intended to bring about a closed or union shop is unlawful and void (Antiterrorgesetz 1930, article 1; BGBL 113). Nonetheless, there are some collective agreements with closed shop clauses. Austrian law protects individual employees against closed shops only after the start of the employment relationship.

On the one hand, the closed shop may simply not operate in practice. In Belgium, in practice, union security clauses, such as the closed shop, are almost unknown. On the other hand, in other Member States the practice of union security is not unknown.[22]

France

Articles L412-2 and L413-2 prohibit union security clauses. Benefits reserved to union members and hiring preferences are nullified. Despite this, the practice of a hiring monopoly exists in the printing industry, dating fiom an agreement of 1900. Similarly, in the docks, until a law of 9 June 1992 ended it; nowadays, Articles L5 11-3 ff of the Code of maritime ports regulate hiring through a paritary organ.

3. Rights of Autonomy

Trade union autonomy means that the trade union should not be subject to external determining conditions as to its establishment, financing and internal constitution and decision-making processes. While there are usually rules governing these matters, they are often the result of collective practice, with legislation much less frequent than in the case of rights of association.

Table 3 illustrates the position of the 15 Member States regarding the rights of autonomy.

21 **See also the Netherlands.**
22 **See also Denmark.**

TABLE 3: Rights of autonomy

MEMBER STATES	Autonomous organisation	Financial autonomy	Elections/ decision-making
Austria	L +	L +	L +
Belgium	CP +	CP +	CP +
Denmark	CP +	CP +	CP +
Finland	CP +	CP +	CP +
France	L +	L +	CP +
Germany	CP +	CP +	CP +
Greece	L +	L +	L +
Ireland	L +?	CP -	CP +
Italy	CP +	L +	CP +
Luxembourg	L +	L +	?
Netherlands	CP +	?	?
Portugal	L +	L +	L +
Spain	L +	L -	L +
Sweden	CP +	CP +	CP +
United Kingdom	L +	CP -	L -

KEY:

L = legslation
CP = collective practice
\+ = there exists a right or provision
\- = there exists no right or provision
? = not possible to state clearly that there is legislation and/or collective practice, or that there exists a right or provision.

3.1 Autonomous organisation

The principle is unanimously upheld that trade unions should be autonomous organisations free from control by the public authorities, let alone employers.

Where legislation exists, it is usually cautious in attempting to exercise any controls over this autonomy.[23]

[23] See also Belgium, France, Ireland, Sweden, United Kingdom

Netherlands

The Constitution guarantees freedom of association: the permission of the government is not required in order to found an association, and, subject to provisions in the Civil Code, the internal structure of an association is left in the hands of its members. At present every union has complete freedom of action and may freely establish its constitution. No legal form is laid down.

Portugal

Workers have "Freedom in the organisation and internal regulation of trade union associations" (Constitution of the Republic of Portugal (CRP) Article 55.2.c). Trade unions "shall not be subject to any authorisation or recognition" (CRP Article **55.3)** They "shall be independent of employers, the State, religious denominations". (CRP Article **55.4)**

This is also the case with doctrine.

Germany

Trade unions themselves set their own rules and codes of behaviour as bye-laws. But to qualify for the rights of a trade union, associations have to meet requirements: autonomy, independence from their industrial counterpart (Gegnerfreiheit) and a degree of power (Machtigkeit) enabling them to function effectively.

Trade unions have refused to accept intervention.

Italy

Article **39,** 2nd paragraph, of the Italian Constitution provides for the registration of trade unions, but this provision was never implemented, in part because trade unions feared the registration procedure would lead to State interference in their internal affairs, though the Article formally only refers to ascertaining the democratic character of unions' internal statutes. There is no legislation regulating the administration and functioning of unions; their internal structure is governed by their own constitution and bye-laws.
The autonomy of trade union associations may allow for autonomous regulation by the trade unions themselves.

Denmark

The absence of legislation means there is the **right** to autonomous organisation. The September **1899** Agreement, the foundation of the social partners' relationship, and its successors prohibit interference in the formation of trade unions by employers. There is a complex articulation of autonomy between the LO (Landsorganisationeni Danmark, the Federation of Danish Trade Unions), national unions and local unions, with varying degrees of autonomy prescribed by union statutes.

3.2 Financial autonomy

Finances are a key element in trade unions' ability to function. This is reflected in widespread provisions for trade union financial autonomy.[24]

Germany

As private voluntary associations under the German Civil Code (BGB), trade unions are financed by contributions of their members. They must be so to be covered by the Grundgesetz, Article *9.3,* which requires them to be independent.

A notable contrast with the norm of autonomous financing is Spain.[25]

Spain

Trade union subsidies are established in the Budget law and are distributed among the trade unions in proportion to their representation. This autonomy may be made conditional as regards expenditure of union funds for certain purposes.[26] Outside regulation is largely confined to the question of the check-off automatic deduction by the employer of trade union subscriptions from the pay of employees who are members of the union and direct payment to the union of this money.[27]

Finland

Collectively agreed rules on deduction of union dues from wages and salaries are very important. Deduction requires written authorization of the employee. The employer is then bound to remit the amount to the trade union. The system is supported by the employee's right to treat trade union dues as deductible for income tax purposes. However, this legal right of trade unions may not reflect their practice.[28]

3.3 Autonomy in elections and internal decision-making

Similarly, with internal decision-making, including elections, the principle of autonomy leaves the rule-making to the trade unions themselves for the most part.[29]

Sweden

There is no legislation regarding the structure and activity of idealistic associations, e.g. trade unions. Trade unions decide without any external restrictions their own and their members' rights and obligations. The internal organs of the union stipulate the aims and activity of the organisation. **A** member of a trade union is bound by decisions made by the union.
There are exceptions, however, to the complete autonomy of trade unions as regards elections and

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24 See also Austria.
25 To some extent, also France.
26 For example, political purposes, as in Ireland and *the* United Kingdom.
27 See also France, Greece, Italy, Portugal, the United Kingdom.
28 See Belgium, Luxembourg.
29 See also Belgium, Finland, France, Germany, Ireland, Italy, Spain.

internal decision-making.[30]

Greece

Law **1264** of 1 July **1982** respecting the democratisation of the trade union movement has a chapter (IV, Articles **10-13**) entitled "Democratic electoral procedures". This includes detailed procedures on the holding of elections, the electoral system and voting.

United Kingdom

The Trade Union Act **1984** imposed requirements on unions' internal affairs, including compulsory ballots for high union officers, for establishing political funds, and as a necessary condition for legal protection of industrial action.
The Employment Act **1988** gave members rights to be balloted before being called out on industrial action and to challenge disciplinary action. Full postal ballots were made mandatory for elections. Candidates must be given opportunities to prepare election addresses, produced and distributed by the union. An independent scrutineer must be appointed to oversee the election. It established the office of Commissioner for the Rights of Trade Union Members to assist members taking legal action to enforce rights against their union.
The Employment Act 1990 extended the range of circumstances where a union will be responsible for the actions of its officers and members and extended the powers of the Commissioner to assist union members in taking action to enforce union rules.
The Trade Union Reform and Employment Rights Act **1993** introduced a broad right not to be excluded or expelled fiom a union, a requirement for periodic renewal of check-off arrangements for collecting union subscriptions, and increased control over union financial affairs.

4. Rights of Action

Due to the background of ILO Conventions Nos. **87** and **98,** it is possible to formally elaborate certain basic rights of association and autonomy in the **15** Member States.

It is beyond the elementary, though hndamental, rights of association and autonomy that difficulties of formulation of common trade union rights become acute. **L O** Convention No. **98** does prescribe the beginnings of the foundation in Article **4,** which:[31]

> "...directs that where necessary, measures appropriate to national conditions must be taken to encourage and to promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations 'with a view to the regulation of terms and conditions of employment by means of collective agreements'".

But trade union rights in the Member States have developed a wide variety of permutations on the rights to trade union recognition, worker representation, information and consultation, and collective bargaining. The search for categories of uniform regulation must begin with the reality of diversity.

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30 ***See* also Portugal.**
31 **Creighton, op.** cit., **p.** 30.

The trade union rights in question are distinguished fiom the organisational rights of association and autonomy; they are functional rights of action of the organisations once created. In each national system a certain equilibrium has been reached regarding the scope of these rights (representation, information/ consultation, collective bargaining), and the levels at which they are exercised (national, regional, multi-sector, sector, enterprise, establishment).

An example of such an equilibrium **is** in **Germany,** with a system of enterprise-based worker representation in works councils and a sector-based trade union movement. The symbiotic relationship between works councils and trade unions can be traced through a rich and complex system of legal rules involving trade union and works councils' rights. But few would argue that any other system replicates the equilibrium of the German system, or that its particular characteristics should be formulated as trade union rights at EU **level.**[32]

For example, the absence in the German model of a plurality of trade unions based on religious or ideological divisions means this dimension is ignored in the German legal framework, whereas it is a key element in the formulation and operation of trade union rights in other Member State systems. *An* EU system of trade union rights which accommodated this dimension would be at once necessary, and also pose risks of disruption for unitary systems premised on the elimination of such divisions.

Yet the principle of equilibrium between enterprise-based and sector-based workers' representational organisations and their symbiotic collaboration is worth bearing in mind as a potential inspiration for EU regulation - both of national trade union rights, and trade union rights at EU level. Especially as such models are also to be found in Austria, Belgium, France, Greece, Luxembourg, Netherlands, Portugal and Spain.

In contrast to the relatively uniform approach of most of the Member States to issues of rights of association and autonomy, **Table 4** of rights of action reflects much greater diversity. It is noticeable, however, that there is more consensus around rights to trade union activities, and the right to strike, than with regard to the other rights of action: recognition, information and consultation, and coliective bargaining.

One reason for this variety is the existence in a number of Member States of so-called "dual channel" systems of worker representation. A brief exposition is required, both of this system and its parallel in so-called "single-channel" systems.

4.1 Trade unions and works councils: Different functions

A primary function of trade unions is worker representation. Yet trade unions are not the only organisations of workers which undertake representative functions. There are other forms of worker representation, in particular those based on the enterprise or workplace. The law on trade union rights **is** inevitably confronted with the law on enterprise/workplace representation.

The critical feature which distinguishes trade unions fiom enterprise/workplace representative bodies

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[32] Indeed, such formulation at EU level might adversely affect the delicate equilibrium established by national rules in Germany as well.

is that unions have much wider representative functions.[33]

Trade unions perform representative functions beyond the enterprise/workplace, often at the macro-economic level quite beyond the competence and capacity of enterprise/workplace based organisations. But trade unions are also involved at enterprise/workplace level. **A** key element is the extent to which enterprise/workplace representation is independent of, integrated with, or dominated by trade unions.

4.1.1 Single-channel representative systems

Trade unions will be influenced by whether enterprise/ workplace representation bodies are directly linked to them in single-channel systems of representation. This may take various forms. But two groups may be distinguished depending on the extent of the autonomy - the strength or weakness of independence - of enterprise/workplace representatives from the trade union.

The enterprise/workplace representative body may achieve a degree of autonomy from the trade union. The relationship of representatives on the enterprise/workplace body may be the subject of various provisions in trade union law, including union constitutions and rule-books, granting the enterprise/workplace representative bodies varying degrees of autonomy from the union.

This is the case in the UK, Denmark and Italy, despite the vast differences in the nature of the union movements in these three countries and of the collective labour law that governs their relationship with employers and the State. Much divides them: multi-unionism, the role of collective bargaining, functional differences of the representative organs in general - yet the trade union law in all of them has in common the maintenance of a delicate autonomy of enterprise/workplace representatives from trade unions.

What characterises all these systems of trade union law is a requirement of direct representational democracy. The trade unions, and the law that regulates them, allow for relatively autonomous workplace organisation and less external control, despite the formal mechanisms relating trade unions with workplace representatives being very different.

In contrast, external trade unions may directly designate the representatives on the enterprise/workplace representative body. This is the case, for example, in Sweden. The defining feature of these systems is the relative weakness of the position of the enterprise/workplace representative. Representative fbnctions are primarily performed by the trade union.

4.1.2 Dual- or plural-channel representative systems

With regard to systems of representation characterised by plural channels, there is a spectrum of countries, ranging from those, at one extreme, where trade union bodies dominate, through those where fbnctions are generally shared with enterprise/workplace bodies, to, at the other extreme, where bodies elected at the enterprise/workplace dominate. The key **is** the dominance or subordination of trade unions in relation to other elected representative bodies.

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[33] **This is particularly evident in those unions which espouse a political connection, but is even the case in so-called autonomous unions.**

The spectrum would run from, at one end, Belgium, Germany (where the battle between the vertrauensleute and the works councillors has been won by the latter, but at the same time the works councils are dominated by union members), Austria and Spain, to the Netherlands, Portugal, Greece and France at the other end.

In this context one should also place elected unitary bodies with representative functions. In the case of these bodies, the same criterion applies: whether or not there is effective union dominance over ostensibly unitary and independent bodies. There are distinctions to be made with respect to the degree of employer initiative and participation in elected unitary bodies (as in Belgium and France) as contrasted with the degree of trade union initiative and control (Germany, Spain and Greece). In the latter case, there are degrees of trade union control or domination over employee members of these bodies - ranging from Belgium and France, to Spain, the Netherlands, Germany, Portugal and Greece - in some of these countries there is de facto control by the trade unions of these bodies.

4.1.3 Conclusion

The significance of the relationships of trade unions to enterprise/workplace representation bodies is that the law on trade union rights will be vitally affected by the degree to which the latter bodies are autonomous alternatives to trade unions. To the extent that certain representative functions are reserved to them, or are shared with trade unions, or are even usurped by trade union representatives, the significance of trade union rights is altered. This does not obscure the wider representative hnctions of trade unions on behalf of their members, going beyond the enterprise/workplace, which fundamentally distinguishes them. But the potential overlap with enterprise/workplace representative organs makes the latter a vital factor in the laws on trade union rights.

The inter-relation of works councils and trade unions at enterprise/workplace level in 9 Member States makes it impossible to indicate in tabular format the allocation of rights of action as between them. Hence, **Table 4** merely signals the existence of a dual channel system.[34] The explanation which follows refines the distribution of rights of action.

TABLE 4: Rights of action

MEMBER STATES	Recognition	Inform/ consult	Collective bargaining	Trade union activity
Austria	DC	DC	DC	DC
Belgium	DC	DC	DC	DC
Denmark	CP +	CP +	CP +	CP +
Finland	CP -	CP +	CP +	L +
France	DC	DC	DC	DC
Germany	DC	DC	DC	DC
Greece	DC	DC	DC	DC
Ireland	CP +	CP -?	CP -	L +

[34] More detailed information is given in the **Supplement.**

MEMBER STATES	Recognition	Inform/ consult	Collective bargaining	Trade union activity
Italy	CP -	CP -	L +	L +
Luxembourg	DC	DC	DC	DC
Netherlands	DC	DC	DC	DC
Portugal	DC	DC	DC	DC
Spain	DC	DC	DC	DC
Sweden	L +	L +	L +	L +
United Kingdom	CP -	L -?	CP -	L +

Table 4 (cont): Rights of action

MEMBER STATES	Collective agreements	Extension of agreements	Strikes
Austria	L +	L +	CP +?
Belgium	L +	L +	CP +
Denmark	CP +	?	CP ?
Finland	L +	L +	L +
France	L +	L +	L +
Germany	L +	L +	LICP +
Greece	L +	L +	L +
Ireland	LICP +	L +	L -?
Italy	CP +	L -	L +
Luxembourg	L +	L +	L +
Netherlands	L +	L +	L +
Portugal	L +	L +	L +
Spain	L +	L +	L +
Sweden	L +	CP -	L +
United Kingdom	L/CP +	CP -	L -?

KEY:

L = **legislation**
CP = **collective practice**
L/CP = **combined legislation-and-collective practice**
+ = **there exists a right or provision**
- = **there exists no right or provision**

? = not possible to state clearly that there is legislation and/or collective practice, or that there exists a right or provision.

4.2 Right to recognition

The "right to recognition" does not in general manifest itself in Member State laws. Trade union recognition is usually a matter of collective practice, not legislation. Recognition has two specific aspects.

The first is through trade unions' overlap with works councils. Where there is a dual channel of representation (as with works councils), trade unions' participation in or even domination of the latter, together with a legal requirement on the employer to recognise these representative bodies, combine to produce a form of de facto recognition of the role of trade unions.

Netherlands

Enterprises employing at least **35** people are obliged to set up a works council. When an employer has several enterprises, and has consequently set up several works councils, it may be felt necessary to establish a works council that covers the interests of employees at all these enterprises. Employers may, for this purpose, set up a central works council alongside the various councils for each enterprise.
The works council is elected by all employees in the enterprise by free elections, with the exception, however, of the manager of the enterprise. The works council is thus representative of all personnel in the enterprise.
Unions are not authorized to make appointments, but they may present lists containing their own candidates (Law on Works Councils (LWC), Article **9).** In practice and in most enterprises, most members of works councils are union activists. They sit alongside a group of "independent" members elected from independent lists. The result is that unions exert some influence over works councils but do not control them totally.

The second aspect of recognition is the legal concept embodied in some Member State laws of the "most representative" trade union.[35]

France

Designation as a representative union has significant legal consequences, ranging from eligibility to sit on numerous government bodies to the capacity to sign, or requesting or opposing the extension of collective agreements. At the level of the enterprise only they can present a list of candidates for the Enterprise Committee or for workers' representatives at the first ballot.
A ministerial decision of 31 March **1966** designated the five major union federations (CGT, CGT-FO, CFDT, CFTC and CGC) as representative at national level. At lower levels, the status was attributed to unions affiliated to these federations by an Act of **28** October **1982.** For unions not so affiliated, the **1982** Act requires proof of representativeness. Section **L133-2** of the Labour Code lists four criteria: the number of members, independence vis-a-vis the employer, the amount of membership dues, and the experience and age of the union. None are absolutely predominant, all being influential. New autonomous criteria, such as the 'audience' or the 'activity' of a union have also

[35] ***See* also Belgium, Italy, Spain.**

been developed by the courts.
The Trade Union Section in the enterprise is the result of the right in Article L412-1, paragraph 2: to freely organise in all enterprises. Only representative unions may form Trade Union Sections (Article L412-4). Each representative union which constitutes a Trade Union Section designates one or more union delegates to represent it as regards management (Article L412-11, paragraph 1). Notification to the employer suffices to ensure legal protection of the delegate.
The right to recognition in the Member States is now affected by the decision of the European Court in Commission of the EC v. UK[36], decided 8 June 1994. The Court decided that two Directives which required information and consultation of workers' representatives in the circumstances of collective redundancies and transfers of undertakings made it mandatory for Member States to secure that worker representatives were present.[37]

4.3 Trade union activity

Trade union rights to undertake their activities at the workplace exist in Member State laws as independent entitlements, or, where there are dual channel representative structures, in an often complex equilibrium with the activities of works councils or other representative bodies. In such cases, there is likely to be legislation regulating the right to undertake union activities. Constitutional provisions may provide explicitly for the right to union activity within the enterprise and be complemented by legislation.

Portugal

There is safeguarded to workers "The right to engage in trade union activity within the enterprise" (CRP Article 55.2.d).
CRP Article 55.6: "The law shall secure adequate protection to the elected representatives of workers against any form of constraint, coercion or limitation of the legitimate performance of their duties".
Legislative Decree no. 215-B/75 of 30/04; "Lei das Associacoes Sindicais", Article 25 gives workers and unions the right to carry out union activities within the enterprise.
The relationship between trade unions and works councils may be the subject of legislation and collective agreement.[38]

Austria

The rights of unions with respect to individual establishments are provided in the regulations on works councils in Part 2 of the Arbeitsverfassungsgesetz (ArbVG). Works councils are to cooperate with trade unions. Union representatives only have the right to enter the establishment if requested by the works council for the purposes of consultation. In the case of works councils with more than 3 members, officials of the union can also be elected as works councils members, though at least 3/4 of the council members must be employees of the establishment. Union members have the right to attend every general staff assembly, but not a works council meeting. They can call a general staff meeting if there is no works council, in particular in order to elect one.

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36 Cases 382/92 and 383/92, [1994] European Court Reports 2435,2479.
37 This is discussed in more detail in chapter 8 below.
38 See also Netherlands, Spain.

However, this legal framework does not correspond to the reality. Union work in the establishment in reality is done by and through the works council and its members, who are overwhelmingly also members of the union. In reality, union activities are regulated by the law governing works councils and their members.

The ArbVG obliges the enterprise owner to provide the works council, electoral committee and central works council, free of charge, with any facilities (space, office equipment, telephone, perhaps secretary) necessary for the proper fulfilment of their tasks. Similarly, subject to practicability, also space for staff assemblies.

Belgium

"Master" Agreement No. 5, concluded in the National Labour Council of 24 May 1971, laid down specific rules protecting union delegates. Union delegates are entitled to participate in training programmes during working time.

Works councils, convened at least once a month, meet and are paid as if in working time; premises and supplies are provided by the employer and representatives are given paid time off and facilities to enable them to perform their duties.

Sweden

A representative of an established trade union has the right to carry out union work pertaining to his own work place during working hours paid for by the employer (Act (1974:358) on the Position of a Trade Union Representative at the Work Place). Collective agreements cover questions regarding trade union activity: e.g. protection of freedom of association, order of negotiations, co-determination at work.
Most frequently, it is legislation which sets the rules for the relationship.[39]

Greece

Law 1264 of 1 July 1982, in Chapter V (Articles 14-18), provides for protection and facilitation of trade union activities, and includes provisions for notice boards, assemblies, office space, distribution facilities and leave of absence for union activities. Law 1767 of April 1988 on works councils includes provisions for premises for meetings and offices, leave for trade union activity, and protection of members of works councils (Articles 8-10).
In systems where legislative works councils are not in place, the right is more likely to emerge from collective practice.

Denmark

There are no general legislative rules for protection of employee representatives as shop stewards or trade union officials. Dismissal of an employee for reasons related to his trade union work is regarded as illegal and the case is handled under the rules of the Main Agreement between the LO and DA (the main employers' confederation).
The LO and DA agreed in Article 8 of the 1992 Main Agreement that collective agreements should contain rules on shop stewards. Most collective agreements contain detailed stipulations relating to

[39] See also France, Germany, Italy, the United Kingdom

the protection of shop stewards, but not trade union officials.
The Member State may prescribe specific sanctions for violation of these rights.[40]

Ireland

The Unfair Dismissals Act **1977,** section 6(2)(a) establishes a strong presumption that a dismissal of an employee is unfair if it "results wholly or mainly from... the employee's engaging in activities on behalf of a (licensed) trade union" outside working hours or, with the employer's permission, within working hours.

4.4 Rights to information and consultation

The quality of the participation of workers' representatives as defined by legislation ranges along a spectrum.

Austria

The ArbVG distinguishes degrees of intensity of involvement of the works council, ranging from the right to:

a. demand information;
b. receive information automatically;
c. be heard;
d. be consulted;
e. co-decisiodco-determination.

The subject-matter to which a participation right refers decides its practical significance. Participation rights of a higher intensity only refer to certain issues, though on any one issue there may be several rights of participation.
ArbVG Article **92** obliges the employer to consult with the works council monthly. CO-determination requires the consent of works councils to take action.

Greece

As part of the duty to bargain in Law No. 1976 of **7** March 1990 concerning free collective bargaining, there is provided in Section **4.4** that:

> "The workers shall be entitled to comprehensive and precise information from the employers, as well as any other information likely to facilitate negotiations on the issues under consideration; this **shall** apply to information on the financial situation, economic policy and personnel policy of the enterprise".

Law **1767** of April **1988** on works councils provides that works councils "shall decide jointly with the employer" on a number of issues "provided they are not regulated by law or a collective labour agreement, and provided there is no trade union organisation in the enterprise" (Article **12.4).** Article **13** provides for the disclosure of information to works councils and Article **14** for consultations "[If there is no trade union organisation in the enterprise".

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[40] *See* also Finland.

These rights can also develop over time.

Denmark

The "September agreement" stated expressly that the employer had the exclusive right of direction, unless limited by agreement. In most agreements there are provisions that working rules should be made through joint cooperation committees.
Danish labour legislation does not deal with works councils, but in many enterprises joint committees have been set up: in the private sector, by agreements between unions and employers' organisations; in the public sector, by administrative decrees after union negotiations. The first Agreement on Co-operation between the LO and DA was concluded in **1936** and since then has been altered many times to allow more competence and influence of committees in the running of the enterprise. The current agreement was concluded in **1986.**

The processes concerned can operate at different levels, For example, at the highest level.[41]

France

Central union confederations are consulted by the government, the Economic and Social Council (regarding legislative programmes), participate in the commissions of the Commissariat Generale au Plan; they participate in the various social security institutions (e.g. unemployment insurance: UNEDIC, ASSEDIC), labour market institutions (ANPE), and numerous others.
But an articulated structure is also possible.

Germany

Statutory rights concerning information, consultation and participation cover mainly decisions at enterprise and plant level, and are conferred on works councils and individual workers, rather than trade unions. The Works Councils Act **1972** extended works councils' information and participation rights in economic, social and personnel matters. It introduced, above the plant works councils, also the enterprise and combine works council.

Member States have had to introduce legal entitlements reflecting EC law requirements of Directives.[42]

Ireland

There are statutory obligations requiring employers to deal with trade unions about health and safety (Safety, Health and Welfare at Work Act **1989,** section 13), dismissals procedures (Unfair Dismissal Act **1977,** section 14), collective dismissals (Protection of Employment Act **1977)** and transfer of enterprises (European Communities (Safeguarding of Employees' Rights on Transfer of Undertakings) Regulations, **1980).**

The law has not always been the preferred option for trade unions seeking participation.

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41 **See also Greece, Spain.**
42 **See also the United Kingdom.**

Italy

No legislation exists on worker participation, as collective bargaining has generally been preferred by the trade unions. A few experiments in this direction have occurred in the past decade in the form of agreements with major state-controlled groups (IFU).

But even in countries where collective practice is the norm for setting rules, there is legislation.

Sweden

Established trade unions are given special rights in the Act **(1974:358)** on the Position of a Trade Union Representative at the Work Place, the Act **(1977:1160)** on Working Environment, the Act **(1987: 1245)** on Representation on the Board for Employees in the Private Sector, and the Act **(1974:981)** on Paid Leave of Absence for Education.

At the opposite extreme, Member States may prescribe the rules with constitutional protection.

Portugal

CRP Article **54.1:** "Workers shall have the right to set up committees...". **CRP** Article **54.2:** "The members of the committees shall enjoy the protection afforded by law to trade union delegates". **CRP** Article **54.5** provides that "Workers' committees shall have the right to" information and participation.

4.5 Rights to collective bargaining

The trade union right to collective bargaining has various dimensions:

a. an entitlement to conclude collective agreements;
b. a corresponding employer obligation to negotiate;
c. an area of trade union autonomy

4.5.1 An entitlement to conclude collective agreements

First, it qualifies the trade union right to conclude collective agreements, often explicitly distinguishing the trade union from other workers' representative bodies which do not have this right.[43]

Belgium

The right to conclude collective agreements, in the legal sense, is exclusively reserved to the most representative trade unions. The union delegation has a demanding role. They can present and discuss individual and collective grievances and demands and supervise the application of collective agreements and maintenance of labour law standards in the enterprise. Article **11** of Agreement No. **5** lays down the competence of the union delegation, which includes negotiations for the purpose of

[43] **See also Austria, Germany, Ireland, Portugal.**

entering into a collective agreement at the enterprise level, while respecting agreements concluded at higher levels.
Union delegations are not competent to conclude legally binding agreements in the sense of the legislation of **1968,** but they can conclude agreements binding in civil law.

Spain

Law 8/1980, Articles 87 ff establishes a duty to bargain. The law allows unitary workers' representatives, which are not unions but global employee representation bodies in the undertakings, to sign agreements at plant and company levels. Union sections (secciones sindicales) in the company are also allowed, but are split into two or more trade unions; and the Statute requires that to sign an agreement at that level there must be a majority of representatives in the workers' committee.

The right to make collective agreements may be carefully allocated by the trade unions or the social partners themselves.

Italy

At present, collective agreements in the private sector are negotiated in accordance with a tripartite agreement of **23** July **1993** between the social partners, the government and various other organisations (Protocollo sulla politica dei redditi e dell'occupazione, sugli assetti contrattuali, sulle politiche del lavoro e sul sostegno al sistema produttivo). Section **2** of the agreement sets up different levels of bargaining and allocates issues among them. Legislation prescribes the collective bargaining structure for the public sector (D.Lgs. 3 February **1993,** no. **29,** Title **111,** Article **45).**

Denmark

The articulation of autonomy between the LO, national unions and local unions stipulates which levels of worker representatives may conclude collective agreements.
The LO has limited competence to make agreements on behalf of the individual national unions which are members of the LO, though it has a real influence in negotiations with employers' organisations.
In most statutes of national trade unions it is stated that the local trade unions are not allowed to conclude agreements without the consent of the national union.

Finland

Collective bargaining at company level has gained importance in recent years. Sector level agreements have left several issues, such as arrangements of working time, to be regulated at company level, or the local parties have been given the power to derogate from the sector level agreement. It is possible to conclude an independent plant level collective agreement between the employer and the local union, on condition that the agreement is not in conflict with another collective agreement binding the local parties.

The allocation of bargaining rights may be made by legislation.

Greece

From the late 1970s, the centralised bargaining system provided for by legislation of 1955 (Law 3239) came increasingly to coexist with a more decentralised and informal system based on the company level, which was not recognised by the law. The re-structuring of the system was formalised by Law No. 1976 of 7 March 1990 concerning free collective bargaining.
The law (Section 3.1) provides for five types of collective agreement: national general agreements applicable to all workers, sectoral agreements, company agreements, national occupational agreements and local occupational agreements. The new law recognises agreements made at the level of the individual enterprise as legally binding provided they improve upon the minimum provisions guaranteed in national or regional agreements.

4.5.2 An employer obligation to negotiate

Secondly, the law can place an obligation on the employer to negotiate, a delicate operation.

France

The law of 13 November 1982 created a duty to bargain at least once a year in enterprises having at least one trade union section.
Organisations bound by a sectoral agreement are bound to negotiate (Article L132-12) at least once a year on pay issues; and at least once every five years on the revision of classifications. The negotiation must examine the employment situation and the development of pay and benefits by wage categories and by sex; also every five years regarding vocational training (Article L933-2).
The duty to bargain in the enterprise (Article L132-27) regards pay scales, the duration and organisation of working time and the employment situation; also, every three years, regarding the right of expression (droit d'expression) (Article L461-3).

Greece

The Constitution recognised the necessity to preserve the existence of trade unions at the same time as it affirms the right to collective bargaining, without making explicit the link between trade unions and collective bargaining (Article 22).
Law No. 1976 of 7 March 1990 concerning free collective bargaining provides in Section 4.1 that:

> "Workers' and employers' organisations and individual employers shall have the right and the obligation to bargain with a view to drawing up collective agreements".

The remainder of Section 4 prescribes a procedure for negotiations "in good faith" (Section 4.3).

Luxembourg

The law obliges the employer requested to enter into negotiation to conclude a collective agreement. He is released from this obligation if he chooses to negotiate within an employers' group. The law binds the parties to an agreement to enter into negotiations six weeks before the expiry of the term of the agreement with a view to concluding a new agreement.
This obligation to negotiate can be carefully graded.

Sweden

A trade union which has not managed to reach a collective agreement with the employer still has a general right to negotiate, though the employer has the right to refuse to sign a collective agreement. A union which has reached a collective agreement is given a privileged position by the CO-determination Act: its special rights include a strengthened right to negotiate.

In some countries, legislation does not address the issue explicitly, and when it has come before the courts, the results have been different. Contrast:

Ireland

The Trade Union Acts 1871-1990 and the Industrial Relations Acts 1946-1990 impose no general obligation on employers to bargain with trade unions. In Abbott v. Irish T&GWU (2 December 1980) McWulliam J. said that employers have no legal duty to recognise and bargain with trade unions. The constitutional right to join the union of one's choice does not oblige employers to deal with or take part in any particular form of negotiations with their workers' chosen unions.

Italy

Article 14 of the Workers' Rights Statute 1970, which guarantees the right of all workers to undertake union activities within the workplace, was held to include collective bargaining at the workplace as an essential component both for workers and their unions (Trib. Firenze 27-6-1980, Mass.g.lav. 80, 716).

4.5.3 An area of trade union autonomy

Thirdly, the right to collective bargaining may characterise an area of autonomy for trade union action on which the State and law may not trespass.

Germany

The right to collective bargaining between trade unions and employers or employers' associations (Tarifautonomie) is guaranteed by legislation and court decisions, and above all by the Grundgesetz, Article 9.3. This implies:

a) a distinction between norm-setting by the State (generally binding minimum standards and procedural regulations) and by the social partners (collective self-regulation through substantive and procedural rules for their members);

b) the relationship between State regulation and collective self-regulation is governed by the principle of "favour" (Günstigkeitsprinzip): State regulation may not exclude autonomous regulation; autonomous regulation must be able to alter "in meiius" standards and procedures set by the State;

c) a constitutional obligation of the State to guarantee (i.e. establish and maintain) a statutory framework of collective agreements, their form, legal nature and enforcement (Tarifvertragsgesetz);

d) a State obligation not to interfere with the normal course of negotiation and conclusion of collective agreements; the State is limited to keeping public order and guaranteeing the rule of law.

4.6 Collective agreements and their extension

Legal rules concerning the status of collective agreements, and in particular, the possibility of extending their coverage, are well established in most Member States, often in legislation, but sometimes in common law.

4.6.1 Common law[44]

Italy

Collective agreements are private contracts in accordance with the general principles of civil law (Article 1372 of the Civil Code). Hence, they are binding only on the parties to the agreements (trade unions, employers and their associations) and, in principle, on individual employers and workers belonging to the organisations parties to the agreements.

United Kingdom

A collective agreement is usually not legally enforceable between the trade union and employer or employers' association. Its effect is mainly by way of incorporation of the terms agreed into the individual contracts of employment of workers and employers covered by it.

4.6.2 Legislation

Portugal

Legislative Decree **No. 5**19-V1/79 (Lei das Relacoes Colectivas) prescribes two possibilities: (i) a collective agreement; (ii) extension of the agreement through administrative order. Article 7 stipulates that agreements may regulate relations between contracting parties.
Agreements bind subscribing employers and all the members of the employers' associations and their employees members of the trade unions. To be legally binding, agreements must be registered with the Minister of Labour.

4.6.3 Enforcement/sanctions

Luxembourg

Inspectors control the application of collective agreements, The law punishes by a fine the failure to comply by employer or employee with obligations owed under a collective agreement. By law employers and employees bound by a collective agreement can go to court individually to enforce

[44] **See also Denmark, Ireland**

the agreement.
Unions parties to the agreement may go to court to defend cases, but not in cases involving damages, whether as plaintiff or defendant.

There are various legal characterizations of the collective agreement, as regards its effects on the social partners parties to it, on the members of the signatory organizations, and on others.

4.6.4 Effects on social partners parties[45]

Austria

A collective agreement is a legally binding contract in civil law. The provisions bind the parties to the agreement. The normal period of validity is one year, during which a peace obligation (Friedenspflicht) exists binding both sides.

Sweden

A written collective agreement is legally binding. Breach involves liability to pay damages to the other party and damages can be awarded even if no economic damage can be proved.

4.6.5 Effect on members of signatories[46]

Belgium

The 1968 Act, article 5, describes a collective agreement as a contract, though one with a normative, regulatory effect. Clauses of an individual employment contract or works rules contrary to the collective agreement are null and void (Article 11), though individual agreements can improve on the minimum standards stipulated in the agreement.

Finland

Under Section 4 of the Collective Agreements Act, a collective agreement is binding upon the parties and on all associations, employers and employees as are - directly or through one or more intermediate associations - members of associations which are parties to the agreement.
A member association resigning from its parent association is not bound, nor are the individual members of the association. In such a case the resigning association may join another federation and thus fall under another collective agreement. But if an individual employee withdraws from a union bound by a collective agreement, s/he will remain bound by it as long as it is in force. Joining another union does not alter the situation.

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45 See also Germany.
46 See also Austria, France, Greece.

4.6.6 Effects on others (extension)[47]

Finland

The Employment Contracts Act 1970 introduced general applicability of collective agreements. Under Section 17, even non-organized employers are obliged in certain cases to observe the terms of the relevant collective agreement as minimum conditions of employment. To be generally applicable, a collective agreement must be made at national level and shall be deemed to be general practice in the branch concerned. By virtue of Section 17 of the Act, employees derive only rights, not obligations. There is no peace obligation implied with a generally applicable collective agreement (except for the parties bound by the agreement in the ordinary way under the rules of the Collective Agreements Act).

France

An agreement may be extended to employers who are not members of the signatory organisations through a special procedure. To be extended, the agreements must include certain mandatory provisions: collective (e.g. union rights, employee delegates, health and safety, collective bargaining) and individual (freedom of expression, equality, wages, holidays, hiring). The extension may be to a sector or a region.

Luxembourg

Collective agreements may be declared generally binding for all workers and employers of the profession for which they were concluded. The declaration is made in the form of a Grand Ducal regulation.

Spain

The vast majority of agreements fulfil the requirements of representativeness and requisite legal formalities and are therefore applicable to all the workers in the sector or company, including non-unionised workers. Some are merely contractual and do not fulfil these requirements and are therefore only applicable to the members of the signatory union.

Sweden

There is no procedure of general legal effect of collective agreements, but in practice their effects apply to non-union employees.

4.7 Right to strike

At one extreme, there are Member States with minimal strikes, minimal regulation and minimal protection.[48]

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47 **See also Belgium, *Greece*, Portugal.**

48 **See also Austria, Ireland.**

United Kingdom

There is no "right" of either workers or trade unions to strike. A worker who takes part in a strike breaks the contract of employment and entitles the employer to dismiss him or her. A trade union calling or supporting a strike is liable for various criminal and civil wrongs (torts) for which the employer can turn to the courts to provide a remedy. Trade unions were given "immunity" from some of these when engaged in a trade dispute. But the courts' narrow interpretation of this immunity, and legislation **of 1980,1982,1984,1988,** 1990 and **1993** have eroded this immunity and subjected its availability to detailed conditions.

In other Member States, by contrast, there is a general freedom, but different kinds of action are restricted by regulations.[49]

Belgium

Since the Act of **1921** abolished the provisions of the Penal Code outlawing strikes, complete freedom to strike has existed. But not all forms of strike action are acceptable and some kinds of strike are considered to be illegal. Wild-cat strikes which violate the peace obligation in collective agreements have been held to be unlawful, though there are divisions of opinion on this in doctrine.

Germany

The Basic Law (Grundgesetz) states: (Article 9(3)) "The right to form associations to safeguard and improve working and economic conditions is guaranteed to everyone and to all trades, occupations and professions. Agreements which seek to impair this shall be null and void; measures directed to this end shall be unlawful...". The courts have interpreted this provision to legitimise strikes. But civil servants (Beamte) are prohibited from taking strike action.

Only the trade union, not individual workers, have the right to strike (so strikes where there is no trade union representation are unlawful). Only industrial action leading towards a collective agreement is lawful. Sympathy, solidarity and political strike action are in principle regarded as unlawful.

Luxembourg

Article 11(5) of the Constitution provides that the law must guarantee trade union freedoms, implicitly also the right to strike, an interpretation formally confirmed by the Cour de Cassation (Supreme Court) in **1952** and in an "interpretative motion" passed by the Luxembourg Parliament Chamber of Deputies in **1956.** Article 28(4) of the Employment Contracts Act **(24** May **1989)** stipulates that participation in a strike is not grounds for dismissal.

Netherlands

In May **1980,** the Netherlands government ratified the European Social Charter of the Council of Europe, which includes the right to engage in collective action. The High Court (Hoge Raad) on **30** May **1986** formally endorsed the right to strike as provided for in the Charter.

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[49] **See also Denmark, France, Greece, Italy.**

Portugal

CRP Article 57:
"1. The right to strike shall be safeguarded.
2. Workers shall be entitled to decide what interests are to be protected by means of strikes. The sphere of such interests shall not be restricted by law."

Spain

The Labour Relations Royal Decree Act 16/1977 of **4** March 1977 established a legal framework for strikes. This was followed by the 1978 Constitution, Article 28(2) of which affirms that "the right of workers to strike in defence of their own interests is recognised". Article 37(2) **also** provides that the "law recognises the right of workers and employers to adopt collective dispute measures". Ruling on a challenge to the 1977 law, the Constitutional Tribunal on **8** April 1981 held the 1977 law to be not unconstitutional, but certain of its provisions were held to contravene the Constitution by unduly limiting its general guarantees (e.g. the 1977 law's prohibition on secondary action was ruled unconstitutional).

The 1977 Law, in Article 6, required the strike committee to guarantee the maintenance of "necessary" services during the strike. It was to be the employer's duty to "designate workers responsible for performing such services". This latter provision was overruled by the Constitutional Tribunal on the grounds that such tasks were the workers' responsibility. The task of designating such workers should be shared by the strike committee and the employer.

Sweden

The Constitution (Regierungsformen), Chapter **2,** section 17, provides for the right to engage in industrial action as long as it does not conflict with obligations imposed by law or collective agreement. The right was extended to cover public employees in 1965. Legal restrictions were imposed by the 1976 CO-determination Act. These include that industrial action must be taken in accordance with the rules of the union.

4.7.1 Peace obligations in agreements[50]

France

Collective agreements may contain provisions on strike notice which can bind the signatory. But clauses in agreements must not make a collective stoppage of work impossible.

Germany

The peace obligation (Friedenspflicht) binds the parties to the collective agreement not to take industrial action over issues subject to the agreement. A strike, or even balloting for industrial action, is illegal where it violates a peace obligation (Federal Labour Court BAG, 3 1.10.1958).

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50 ***See*** **also Denmark, Sweden.**

4.7.2 Procedural requirements[51]

Belgium

Legislative procedural requirements do not exist, but most collective agreements include strike warning clauses (usually 7 days) and union rules commonly require pre-strike ballots, often by show of hands, though there is a tendency towards postal ballots of all workers involved.

Denmark

It is usual for collective agreements to contain rules on initiating industrial action. These tend to follow the rules laid down in the "September Agreement" of **1899,** Article **2** of which provides that "no stoppage of work may lawfully be initiated unless it has been approved by at least three quarters of the votes cast by a competent assembly under the rules of the relevant organisation and due notice has been given...".

France

The right to strike is vested in individuals, not unions. There are no legislative requirements for ballots or notice (except in public services, where *5* days is required; law of **13** July **1983).**

Germany

The Federal Labour Court has established principles for a legal strike which include the requirement that the strike must be preceded by a secret ballot of union members. The rules of most unions require a ballot of members between a strike, and require at least **75%** voting in favour. But a **1976** decision held this did not apply to a spontaneous short or "warning" strike. Local rotating short strikes were developed into a strategy by some unions; this was confirmed as lawful by the Federal Labour Court in 1984.

Greece

For industrial action at plant or enterprise level, a majority vote by secret ballot at a general meeting is required. Management must be provided with **24** hours' notice stating the starting time and its projected duration.

Ireland

The Industrial Relations Act 1990 provides that the rules of every union shall contain a provision requiring a secret ballot before organising, participating in, sanctioning or supporting a strike or other industrial action. Entitlement to vote is to be given to all members whom it is reasonable at the time of the ballot for the union concerned to believe will be called upon to engage in the action. Immunities are removed in proceedings arising out of or relating to a strike in disregard of or contrary to the outcome of a secret ballot.

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[51] See also Finland, Luxembourg, Portugal, Sweden, the United Kingdom.

Netherlands

Trade union rule books provide for ballots before industrial action requiring varying majorities. Employers must receive notice of the commencement of industrial action.

Spain

The Royal Decree Law of **1977** states that a strike may be called by a decision of the workers' representatives ("majority decision taken at a meeting of at least **75%** of such representatives").

However, the **1977** Law's requirements allowing for the decision to be taken by the workers themselves - conditional on the decision to strike being taken in each workplace, that a certain percentage of the workforce be present, and that at least **25%** must decide to put the issue to a vote - were held unconstitutional. Such requirements, it was held, allowed workers' constitutionally guaranteed individual rights (the right to strike being an individual right, exercised collectively) to be "unduly restricted or impeded by opposing minorities or abstentionists". Similarly, compulsory ballots to approve strike action were held to be "an impediment to the right to strike" and may even be "a means of stifling strikes at birth" if a basic quorum for voting is required.

The **1977** Law requires a strike decision to be communicated at least **5** days in advance (10 days in public services).

4.7.3 Essential services[52]

France

Some groups of workers are forbidden to strike as their work is considered vital to public order; other groups are required to maintain a minimum service (hospitals, public broadcasting, air traffic control). The government has the general right, under the judicial control of the Conseil d'Etat, to restrict or remove the right to strike for certain workers deemed indispensable to public safety.

Greece

In essential services, unions must provide **4** days' advance notice to management, the relevant state agencies and the Ministry of Labour.
Article **21** of Law **1264** provided that in the first two weeks of January unions must nominate staff to maintain essential services in the event of industrial action during the year. If there is no agreement, the issue goes to arbitration. Law **1915** of **28** December **1990** (Article **4)** amended Article **21** of Law **1264** transferring to the employer the right to stipulate the number and type of staff needed, and to choose by name those who must remain on duty. The unions can appeal against the employer's list, but the employer's requirements must be met until the appeal is decided.

Italy

Law **146** of **14** June **1990** was the first, and so far only, legislation on strike action and applies to a specified number of essential services. Strike notice of ten days must be given to the employer. The

[52] See also Belgium, Spain, the United Kingdom.

law requires that a minimum level of service be maintained during a strike, to be determined by collective agreement. To this end, specified individuals may be required to remain at work.

Sweden

Concerning the exercise of public authority and work that is necessary for that exercise, the right to take industrial action is limited. In the public sector industrial action is not permitted which aims at affecting domestic political interests. According to the main collective agreement in the public sector (state area), certain groups of employees cannot be covered by industrial action taken by the labour market organisations; certain restrictions also apply if the conflict is considered as a danger to society.

4.7.4 Lock-outs[53]

Germany

The right to lock-out is not regarded as equivalent to the right to strike. It is not clear if employers have the right to an "offensive" lock-out. Employers have the right to lock-out employees as "retaliation" when trade unions focus on specific employers in the bargaining area when organising a strike aimed at all employers in the area.

Italy

Article 28 of the Workers' Statute has been held to make the lock-out a form of anti-strike activity and hence unlawful. Employers have been ordered by the courts, on pain of criminal sanctions, to reopen plants and pay wages for the period of the lock-out.

5. Summary and Conclusions to Part I

It appears fiom the account of trade union rights in the legislation and practice of the Member States that there is a general consensus regarding what have been called "rights of association" and, to a slightly lesser extent, "rights of autonomy". Owing to the existence of international organisations to which all Member States adhere, notably the ILO, Member States have incorporated these rights into their domestic law and practice.

Less consistently, a majority consensus extends also to some of what have been called "rights of action", in particular, the legal recognition of collective agreements and entitlements to take part in trade union activity, including strikes. The consensus begins to disintegrate when confronted with certain functional rights: recognition, information and consultation, and collective bargaining. Part of the explanation for this greater degree of diversity lies in the existence of "dual channel" systems: worker representation bodies other than trade unions in some countries have assumed some trade union rights of action.

Any attempt to represent trade union rights in tabular form is bound to be simplistic. Characterisation of trade union rights in the Member States as manifest in either legislation **(L)** or collective practice

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53 **See also Belgium, Netherlands, Portugal.**

(CP), and as demonstrating either the presence (+) or absence (-) of legal provision is admittedly crude, given the complexity of the law.

Tables **2-4** gave only a rough idea of a much more sophisticated cross-national image. Attempting to combine these Tables compounds the problem. The following **Table 5** calculates in how many of the 15 Member States:

- there is legislation and/or collective practice with regard to different trade union rights;
- there **is** present or absent legal provision on the trade union right in question, though the extent of the right is variable.

It is presented only as an approximation of a representation of the position of trade union rights in the Member States.

Table *5:* Law on Trade Union Rights in the 15 Member States**

Trade union right	Legislation	Collective Practice	Presence of right	Absence of right
Legal definition	11	**4**		**3**
Legal personality	11	**3**	10	**5**
Right of associatiodto join	15	0	15	0
Right not to join	14	1	15	*0*
Closed shop	12	**3**		
Autonomous organisation	8	*7*		*0*
Financial autonomy	7 1	7	11	**3**
Elections/decision-making **autonomy**	**5**	**8**	**12**	1
Recognition*	1 + 9 DC	**5**	3 + 9 DC	**5**
Information/consultation*	2 + 9 DC	**4**	3 + 9 DC	**2**
Collective bargaining*	2 + 9 DC	**4**	4 + 9 DC	**2**
Trade union activity*	5 + 9 DC	1	6 + 9 DC	*0*
Collective agreements	11	**3**	15	0
Extension of agreements	**12**	**2**	11	**3**
Strike	**12**	*3*	**12**	**2**

* = **presence of dual channel system affects calculations.**

** = **Less than 15 means one or more Member States' position is unclear.**

5.1 Trade union rights: Consensus and majority

There is a general consensus (all Member States) in favour of four trade union rights: to

- associate/join trade unions
- autonomous organisation
- trade union activity (including in works councils)
- legal status for collective agreements.

There is a general consensus (all Member States) in favour of the right not to join a trade union.

There is a substantial majority (10 or more Member States) around six other trade union rights: to

- legal definition (11)

Austria	Belgium	France	Germany
Greece	Ireland	Luxembourg	Portugal
Spain	Sweden	United Kingdom	

- financial autonomy (11)

Austria	Belgium	Denmark	Finland
France	Germany	Greece	Italy
Luxembourg	Portugal	Sweden	

- elections/decision-making autonomy (12)

Austria	Belgium	Denmark	Finland
France	Germany	Greece	Ireland
Italy	Portugal	Spain	Sweden

- informatiodconsultation (including works councils) (12)

Austria	Belgium	Denmark	Finland
France	Germany	Greece	Luxembourg
Netherlands	Portugal	Spain	Sweden

- extension of agreements (11)

Austria	Belgium	Finland	France
Germany	Greece	Ireland	Luxembourg
Netherlands	Portugal	Spain	

- strike (12)

Austria	Belgium	Finland	France
Germany	Greece	Italy	Luxembourg
Netherlands	Portugal	Spain	Sweden

There is a substantial majority around no right to a closed shop (11 Member States).

Austria	Finland	France	Germany
Greece	Ireland	Italy	Luxembourg
Portugal	Spain	United Kingdom	

There is a clear majority for a right to legal personality: (9 Member States)

Austria	Denmark	Finland	France
Greece	Luxembourg	Netherlands	Portugal
Spain			

The legal rights to recognition as trade unions, and to collective bargaining of trade unions are not clearly established, perhaps due to the overlap with legal requirements for the establishment of workers' representative bodies (works councils) in dual channel systems.

5.2 Trade union rights in legislation

All the Member States have legislation on the right of associatiodto join trade unions (all favourable).

All but one (Sweden) of the Member States have legislation on the right not to join a trade union (all favourable).

All but one (Denmark) of the Member States have legislation on the right to trade union activity (including works councils legislation) (all favourable).

There is a substantial majority (10 or more Member States) which have legislation concerning trade unions as regards:

- legal definition (11) (all favourable)

Austria	Belgium	France	Germany
Greece	Ireland	Luxembourg	Portugal
Spain	Sweden	United Kingdom	

- legal personality (10) (9 favourable)

Austria	Denmark	Finland	France
Greece	Luxembourg	Netherlands	Portugal
Spain	United Kingdom		

- closed **shop (12)** (11 against)

Austria	France	Germany	Greece
Ireland	Italy	Luxembourg	Netherlands
Portugal	Spain	Sweden	United Kingdom

- informatiodconsultation (including works councils) (11) (all favourable)

Austria	Belgium	France	Germany
Greece	Luxembourg	Netherlands	Portugal
Spain	Sweden	United Kingdom	

- legal status for collective agreements **(13)** (all favourable)

Austria	Belgium	Finland	France
Germany	Greece	Ireland	Luxembourg
Netherlands	Portugal	Spain	Sweden
United Kingdom			

- extension of agreements (12) (all favourable)

Austria	Belgium	Finland	France
Germany	Greece	Ireland	Italy
Luxembourg	Netherlands	Portugal	Spain

- strike (12) (10 favourable)

Finland	France	Germany	Greece
Ireland	Italy	Luxembourg	Netherlands
Portugal	Spain	Sweden	United Kingdom

In a substantial majority of Member States, there is legislation concerning a right to recognition involving trade unions (mainly through works councils): (10) (all favourable)

Austria	Belgium	France	Germany
Greece	Ireland	Luxembourg	Netherlands
Portugal	Spain		

There is a majority of 8 Member States which have legislation concerning trade unions as regards autonomous organisation: (all favourable)

Austria	France	Greece	Ireland
Luxembourg	Portugal	Spain	United Kingdom

In a substantial minority of Member States, there is legislation concerning a right to collective bargaining (sometimes through works councils): ***(6)*** (all favourable)

France	Greece	Italy	Luxembourg
Spain	Sweden		

5.3 Trade union rights in collective practice

There is a majority of 8 Member States which have collective practice rather than legislation concerning trade unions as regards elections/decision-making autonomy: (all favourable)

Belgium	Denmark	Finland	France
Germany	Ireland	Italy	Sweden

The legal rights to recognition as trade unions and to collective bargaining of trade unions are not clearly established either in legislation or collective practice, perhaps due to the overlap with legal requirements for the establishment of workers' representative bodies (works councils) in dual channel systems.

5.4 Trade union rights in a balance of legislation and collective practice

There are similar numbers of Member States with a preference for collective practice (CP) or for legislation (L) concerning trade unions as regards:

- autonomous organisation: (all favourable)
  CP: Belgium, Denmark, Finland, Germany, Italy, Netherlands, Sweden (7)
  L: Austria, France, Greece, Ireland, Luxembourg, Portugal, Spain, United Kingdom **(8)**

- financial autonomy:
  CP: Belgium, Denmark, Finland, Germany, Ireland, Sweden, United Kingdom (7) (5 favourable)
  L: Austria, France, Greece, Italy, Luxembourg, Portugal, Spain **(7)** ***(6*** favourable)

- collective bargaining.
  CP: Denmark **,** Finland, Ireland, United Kingdom **(4) (2** favourable)
  L: France, Greece, Italy, Luxembourg, Spain, Sweden ***(6)*** (all favourable)

5.5 Summary: Trade union rights in legislation and practice in the 15 Member States

Correlating trade union rights with legislation and practice produces the following summary.

All the Member States have legislation on the right of associatiodto join trade unions.

All but one (Sweden) of the Member States have legislation on the right not to join a trade union. Sweden has collective practice.

All but one (Denmark) of the Member States have legislation on the right to trade union activity (including works councils legislation). Denmark has collective practice.

There are **13** Member States which have legislation concerning trade unions as regards legal status for collective agreements:

Austria	Belgium	Finland	France
Germany	Greece	Ireland	Luxembourg
Netherlands	Portugal	Spain	Sweden
United Kingdom			

The other Member States (Denmark, Italy) achieve this result through collective practice.

There are **8** Member States which have legislation concerning trade unions as regards autonomous organisation:

Austria	France	Greece	Ireland
Luxembourg	Portugal	Spain	United Kingdom

The other Member States achieve this result through collective practice.

On these five trade union rights:
- to associate/join trade unions
- not to join trade unions
- autonomous organisation
- to trade union activity (including in works councils)
- legal status for collective agreements

There is a consensus in the EU in favour. For three of them, all or all but one of the Member States have legislation in place. In the other two, a majority have legislation in place.

There is a substantial majority (1 1 Member States) against the closed shop, in either legislative form or through collective practice:
CP: Finland
L: Austria, France, Germany, Greece, Ireland, Italy, Luxemburg, Portugal, Spain, United

Kingdom

But collective practice is ambivalent in Belgium, Denmark and Sweden, and the Netherlands appears to authorise it in certain cases.

There is a substantial majority (11 Member States) for trade union rights, in either legislative form or through collective practice, regarding the following:

- financial autonomy: (11)
  CP: Belgium, Denmark, Finland, Germany, Sweden *(5)*
  L: Austria, France, Greece, Italy, Luxembourg, Portugal *(6)*

- elections/decision-making autonomy: (11)
  CP: Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Sweden **(8)**
  L: Austria, Portugal, Spain

There is a substantial majority (10-11 Member States) for trade union rights in legislative form regarding the following rights: to:

- legal definition (11): Austria, Belgium, France, Germany, Greece, Ireland, Luxembourg, Portugal, Spain, Sweden, United Kingdom
  However, the other Member States do not appear to have produced legal definitions.

- informatiodconsultation (including works councils) (10): Austria, Belgium, France, Germany, Greece, Luxembourg, Netherlands, Portugal, Spain, Sweden.
  Denmark and Finland have collective practice.

- extension of agreements (11): Austria, Belgium, Finland, France, Germany, Greece, Ireland, Luxembourg, Netherlands, Portugal, Spain
  However, the other Member States do not appear to have formalised collective practice or preclude this possibility (Italy).

There is a clear majority (9 Member States) in favour of trade union rights in legislative form regarding the right to strike.

Finland	France	Greece	Italy
Luxembourg	Netherlands	Portugal	Spain
Sweden			

Belgium has collective practice, and Germany is a mix of law and collective practice. However, the law or collective practice in the other Member States is either ambiguous or negative.

There are 9 Member States with legislation for the trade union right to legal personality.

Austria	Denmark	Finland	France
Greece	Luxembourg	Netherlands	Portugal
Spain			

But the other Member States appear to either resist this or are ambivalent.

Regarding the two remaining trade union rights: the legal rights to recognition as trade unions, and to collective bargaining of trade unions are not clearly established, perhaps due to the overlap with legal requirements for the establishment of workers' representative bodies (works councils) in dual channel systems.

PART II: TRADE UNION RIGHTS IN THE EUROPEAN UNION

6. The Emergence of European Labour Law on Trade Union Rights

It is easy to demonstrate that national labour law systems have been subjected to mutual influences. One can cite the influences of Germany on Denmark,[54] France on Belgium,[55] various foreign influences on French labour law,* the revolution wrought by the German trained Otto Kahn-Freund on British labour law,'' and, more recently, that of the Italian Workers' Statute of 1970 on Spanish labour law.

National labour laws in the original six Member States were not conceived of in terms of the European Community and its labour law. But the labour law of the EC was influenced by the national labour laws of the original Member States and of later adherents.

EC labour law is not wholly autonomous and independent. It is easy to point to many developments due to the influence of highly developed and technically sophisticated national labour law systems. Not surprisingly, in formulating EC labour law, the law- and policy-making institutions of the EC had to come to terms with these systems and were influenced by them.

Conversely, as EC labour law developed, it began to influence national labour laws. The two processes are thus linked in a specific symbiosis.[58]

A major premise in understanding EC labour law is, therefore, to appreciate the relationship of EC labour law and national labour law systems.

But also, European legal developments are intruding upon national systems. Member State labour laws are increasingly influenced by EC labour law. The dynamic of national labour laws is no longer determined solely or even mainly by domestic developments. It is not merely that Member States' labour law is required to incorporate EC norms. EC norms are themselves the reflection of the national labour laws of Member States. In this indirect way, national labour laws are influential in the development of each other.

This will be particularly so for Member State labour laws following the incorporation into the EC Treaty of the Maastricht Treaty's Protocol and Agreement on Social Policy by the Treaty of Amsterdam (1997). EC labour law will reflect ever more the experience of the labour laws of the Member States, including their laws on trade union rights.

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54 O. Hasselbach, "Denmark", in S. Edlund (ed.), Labour Law Research in Twelve Countries, Stockholm, 1986, p. 12.

55 R. Blanpain, "Belgium" in Edmund, ibid., p. 139.

56 G. Lyon-Caen, "Les apports du droit compare au droit du travail", Livre du centenaire de la societe de legislation comparee, 1969, pp. 315-328.

57 Lord Wedderburn, R. Lewis and J. Clark (eds.), Labour Law and Industrial Relations: Building on Kahn-Freund, Oxford, Clarendon Press, 1983.

58 The EC influence is most obvious in the case of the later adherents to the EC, especially those emerging from dictatorships in the 1970s, Spain, Portugal and Greece. EC labour law was an established body of norms to which the new Member States were required to conform. This also occurred in countries of the European Economic Area and may be expected to occur in those countries of central and eastern Europe professing their intention to join the EC.

The labour law of the Member States, is, and will become, more truly European than appears from the formal imprint of EC labour law. It is European rather as reflecting the cumulative experience of national labour laws, filtered through the prism of the EC institutions and refined in the crucible of the developing European polity. The tendency towards convergence of the labour laws of the Member States of the EC is driven in the main by the institutional pressures of EC membership, and, to a lesser extent, is the consequence of the workings of an international economy and, though less significant, a single European labour market.

The dynamic of this convergence process is complex and its results are far from complete. In **Part II** of this Report an attempt is made to show how the development of trade union rights in the Member States is being driven by this process.

7. Two Catalysts: The European Social Dialogue and the "Spill-over" Effect of Harmonization of Labour Law

Trade union rights in the Member States have developed following a pattern dominated by the internal balance of forces within each Member State. To some extent, as shown in Part I, a degree of uniformity has been achieved as the result of the pressures of membership of the ILO, and ratification of Conventions Nos. **87** and 98.

However, membership of the European Union has had a significant impact on trade union rights in the Member States. There have been two catalysts of change.

First, the attempts made to harmonize conditions throughout the common market and then the Single European Market have influenced the development of trade union rights in the Member States. Council Directives and decisions of the European Court of Justice have led to the emergence of EC law concerned with collective labour rights. This EC law reflects in part trade union rights established in some Member States. Their impact is the result of a "spill-over" effect manifest in two ways.[59]

(i) Directives concerned with apparently limited collective rights require interpretation. Experience shows that the European Court of Justice is capable of providing interpretations which indicate that the significance of the Directives for trade union rights in the Member States has spilled over into areas beyond what was expected.

(ii) The principles of national trade union law inspiring EC Directives have had to be transposed into Member States where they are less familiar. Trade union rights from one system have spilled-over into others. In addition, these principles have often undergone changes as they have had to be adapted into EC law and then transposed back into the Member States. Decisions of the European Court of Justice have emphasised the need for national systems to adapt to the principles embodied in these Directives.

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[59] **The "spill-over effect" is an element in neo-functionalist theories of European integration: "Neofunctional integration** sees **integration as a process based on spill-over from one initially non-controversial technical sector** to **other sectors of possibly greater political salience, involving a gradual reduction in the power of national government and a commensurate increase in the ability** of **the centre to deal with sensitive, politically charged issues". J. Lodge, The European Community and the Challenge** of **the Future, 1993, "Introduction", p.** xix.

Secondly, the emergence of the European social dialogue and its formal institutionalization in the Agreement on Social Policy attached to the Protocol on Social Policy of the Treaty on European Union (hereafter the "Agreement"[60]) will have a potentially enormous impact on trade union rights in the Member States:

- the constitutional linkage of national trade unions with transnational organisations, in particular the ETUC and its Industry Committees, has implications for rights of association in the Member States and will affect their rights of autonomy;
- the articulation of the European social dialogue with national systems of industrial relations will engage the rights of action of trade unions in the Member States.

In Part II of the Study, these two catalysts of change are analysed. The Study describes how each has, and potentially will continue to have, a catalytic effect on the development of trade union rights in the Member States. As a result, the shape and content of future trade union rights in the Member States will increasingly reflect the developments in the collective labour law of the EU and of the European social dialogue.

8. The "Spill-over" Effect of Harmonization of Labour Law in the EC on Trade Union Rights in the Member States

It is not easy to anticipate in the law of a European common market a role for trade union rights. Freedom of association was not one of the founding principles and collective bargaining was not one of the operating mechanisms of the common market.

Instead, the collective labour law of the EU is to be found embedded in a variety of legal measures which do not have the regulation of collective labour relations as their primary objective. These measures include those aimed at harmonising national labour laws, or regulating the implications for labour of transnational economic activities. However, more important than their regulation of discrete areas and issues is their spill-over effect.

The spill-over effect arises, in part, fiom the interpretation of these measures by the European Court, particularly in its review of national legislation implementing EU law.[61] But in addition, spill-over occurs because these EU measures incorporate in their substantive provisions principles of collective labour law reflecting national experience. Both their reflection and recognition in European Court judgments and their incorporation in EU legal measures transform these principles fiom having purely national effect into EU law. In this way, principles derived from some national experiences are imported into other Member States where their full implications can have unexpectedly spectacular effects.[62]

The content of the collective labour law of the EU reflects the principles manifest in some of these EU law measures. The dynamic of its development has been the spill-over effect of these principles, through their translation into the status of EU law, and their development by decisions of the

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60 The social dialogue provisions of the Maastricht Agreement are now reformulated by the Treaty of Amsterdam 1997 as new Articles 118a and 118b of the Treaty of Rome.

61 A role as engine of institutional change already played in the constitutional development of the EU. J.H.H. Weiler, "The Transformation of Europe", (1991) 100 Yale Law Journal 2403.

62 As has already been demonstrated in Commission of the EC v. United Kingdom, Cases 382/92 and 383/92, (1994) European Court Reports 1-2435,2479 discussed in more detail below.

European Court.[63] It is even at this early stage arguable that these principles constitute a future framework of the collective labour law of the EU, which will eventually have to be absorbed or accommodated in the Member States' laws on trade unions.

The adoption of the Protocol and Agreement on Social Policy attached to the Maastricht Treaty on European Union has created the potential for autonomous development of EU collective labour law. The expansion of the substantive social competences of the EU by the Protocol and Agreement opens the way for development of the collective labour law of the EU without the considerable constraints of strict adherence to the objectives of market integration. Even more important to the development of such collective labour law is the principle of collective negotiation of labour and social policy embodied in the new institutional arrangements for the production of EU labour law introduced by the Agreement. This may be seen as the founding constitutional basis for the collective labour law of the EU.

The Agreement is the most direct and dramatic illustration of how transnational legal developments will affect trade union rights in the Member States. But the Agreement is only one such development. EC law has over the years produced a number of legal developments which have had such an impact. These are specifically relevant to trade union rights in the Member States. They include:

- collectively bargained labour standards
- workers' collective representation
- workers' participation, and
- protection of strikers against dismissal.

8.1 Workers' collective representation

The collective representation of workers has been a principle manifested in numerous policy initiatives of the Commission. They owe their origin to national labour law provisions for representation of workers in enterprises, in the form of organs based on the workplace'" or based on corporate structures.[65]

Although many of these proposals did not succeed in gaining the approval of the legislative organs of the Community, in two areas the EU has provided for workers' collective representation: regarding health and safety, and in the form of European works' councils. Further, on the basis of two other Directives, the European Court has declared that workers' collective representation is mandatory.

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[63] The spill-over effect is not specific to collective labour law, but applies also to individual labour law. For example, the Working Time Directive 94/104/EC of 23 November 1993, Article 18(1)(b)(i), allows overtime working above the 48 hour weekly limit by individual agreement of the worker; but the worker is to be subject to no detriment for refusal to work more than 48 hours. Discipline or dismissal of a worker for refusing to work more than 48 hours is likely to be the starting point for the development of principles in this area of the individual labour law of the EU.

[64] Draft Directive on procedures for informing and consulting employees, OJ C 297 of 15.11.80 and OJ C 217 of 12.08.83.

[65] Drafl Fifth Directive concerning the structure of public limited companies and the powers and obligations of their organs, OJ C 240 of 19.08.83; drafl Directive concerning the European Company Statute, OJ C 263 of 16.10.89.

8.1.1 Mandatory representation

Mandatory recognition of employee representatives has been declared in Cases 382/92 and 383/92, Commission of the EC v. UK, decided by the Court on 8 June 1994.[66] The cases concerned complaints by the Commission about defective implementation by the UK of the EC Directives on "acquired rights"[67] and "collective redundancies"[68] with respect to the duty to designate worker representatives.

Both Directives require workers' representatives to be informed and consulted. The UK legislation implementing the Directives provides for information and consultation only where there are "recognised" trade unions.[69] The Commission complained that the UK had not provided rules for the designation of workers' representatives where this did not take place on a voluntary basis.

The Commission argued that the Directives impose an obligation on employers to inform and consult in every instance. The UK argued that the obligation arises only if national law and practice provide for representatives. In both cases the Court held that "The United Kingdom's point of view cannot be accepted". The Court took identical views with respect to both Directives:[70]

> "26. ...as United Kingdom law now stands, workers affected by (collective redundancies/the transfer of an undertaking) do not enjoy protection under... the directive(s) in cases where an employer objects to worker representation in his undertaking.
>
> 27. In those circumstances, United Kingdom law, which allows an employer to frustrate the protection provided for workers by... the directive(s), must be regarded as contrary to those (directives)...".

In this, the Court subscribed to the views of Advocate-General Van Gerven, in an opinion delivered on 2 March 1994:[71]

> "... to make the activity of workers' representatives totally dependent on voluntary recognition by employers is incompatible with the protection of workers as apparent from the directives in the light of their objective, structure and wording".

The nature of workers' collective representation is likely to become hrther regulated by EU law. Designation of worker representatives was made mandatory by the Court due to the consequences for the rights of workers under the Directive:[72]

> "which require(s) Member States to take all measures necessary to ensure that workers are informed, consulted and in a position to intervene through their representatives in the event of collective redundancies (or the transfer of an undertaking)".

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66 [1994] European Court Reports I-2435,2479,

67 Directive 77/187, OJ L61/26.

68 Directive 75/129, OJ L 48/29.

69 Trade Union and Labour Relations (Consolidation) Act 1992, section 1SS(1); the Transfer of Undertalungs (Protection of Employment) Regulations 1991, Regulation 10(2)).

70 Case 383/92, paragraphs 26-27, in terms identical to those of Case 382/92, paragraphs 29-30.

71 Paragraph 9.

72 Case C-383192, paragraph 23; Case C-382/92, paragraph 26.

In order to effectively perform the tasks of information and consultation specified in the Directives, worker representatives must possess the experience, independence and resources required to protect the interests of the workers they represent. In order to achieve the objective of the EC Directive, Member State laws or practices for the designation of workers' representatives must ensure that the national law on workers' representation is adequate to attain this.

The implications for trade union rights in the Member States are illustrated by the aftermath of this decision of the European Court. In response to the Court's condemnation in its judgment of **8** June **1994,** the **UK** government produced in April **1995** a consultative paper on a legislative proposal concerning collective dismissals and business transfers, and, in October **1995,** The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995.[73] These Regulations, as explained in the accompanying guidance notes issued by the Department of Trade and Industry, allow the employer to choose whether to consult representatives of a trade union or other representatives elected by employees, even where the employer already recognises a trade union for collective bargaining **purposes**.[74]

The key phrase in the new provisions defining who are the appropriate employee representatives is in the final words: "as the employer chooses". Moreover: "There is no requirement for permanent representation and it will therefore be sufficient for an employer to invite the employees to elect representatives as and when required"." However: "The legislation does not specify how many representatives must be elected or the process by which they are to be **chosen**".[76]

The Regulations came into force on **26** October **1995,** but are to apply in practice only to dismissals taking effect or transfers taking place after 1 March **1996. A** challenge to the validity of the Regulations was lodged through an application by three trade unions for judicial review, and heard in the High Court on **29** February and 1 March **1996.** The grounds for the challenge included that:

- the essence of representation is that the workers' choose their representatives independently of employer choice, interference or constraint;
- an employer invitation to elect representatives, in the absence of any legally prescribed timing or procedure of election, is inadequate to guarantee worker representation as required by the Directives;
- there is no provision for resources, time or independence of the representatives to perform their functions under the Directives.

Each of these challenges arguably raises questions of interpretation of the EU law on worker representation which may be referred to the European Court of Justice. The determination of these questions will require that Court to decide issues of fundamental importance to trade union rights in the Member States under the collective labour law of the EU.

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73 **S.I.** No. 2587.

74 Reg. 3(2) substituting new subsection 1B of section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992; and Reg. 9(4) inserting a new paragraph (2A) into Reg. 10 of the Transfer of Undertakings (Protection of Employment) Regulations 1981.

75 Guidance issued by the Department of Trade and Industry, "Revised Arrangements for Consultation about Redundancies and Business Transfers", October 1995, paragraph 8.

76 Ibid., paragraph 10.

The challenge has failed at first instance, but leave to appeal to a higher court was granted.[77] The UK court at first instance did hold that if the employer fails to consult with appropriate representatives or to invite an election, individual employees can bring a complaint. The burden of proof is on the employer to justify any failure. Further, while the Regulations need not set out detailed procedures for the election of employee representatives, whether representatives are "appropriate" is an objective test, and the "appropriateness" of representatives can be challenged before a tribunal.

8.1.2 Health and safety representatives

The relevant law is the "Framework" Directive 89/391/EEC of 12 June 1989.[78] The objective, structure and wording of the Framework Directive require that safety be the concern of multiple categories of workers and their representatives. Close analysis of the provisions reveals that the Directive appears to support a distinction between general representatives,[79] who fulfil certain functions in health and safety, and specialist representatives[80] in health and safety. The method of appointment for each category of workers' representative is similar:

- general workers' representatives - in accordance with the laws and/or practices of the Member States;
- workers' representatives with specific responsibility for the safety and health of workers - in accordance with national laws and/or practices.

This may seem an excessive enumeration of different categories. However, the Directive was formulated in a European context, where there is a variety of experience. There is no need to emphasise the social and human aspects of safety and health, or its economic significance. Safety and health warrants more than the one set of representatives. Specialisation and diversification of responsibilities may be needed to secure the objective of safe and healthy workplaces. The Directive's multiple categories are an indication of this.

Specifically, the Directive prescribes a role in health and safety for general workers' representatives. They have rights to be consulted over the planning and introduction of new technologies;[81] to submit observations during inspection visits,[82] and generally to be consulted and take part in discussions on all questions relating to safety and health at work.[83]

The Directive requires the appointment of workers' representatives. This requirement is not conditional on employer recognition of trade unions. Nor can it be substituted by information and consultation of individual employees. EU law prescribes the system of appointing representatives as being in accordance with national laws and/or practices.[84] The Directive does not permit the functions of safety representatives appointed by trade unions to be limited to employees represented

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77 Decision of the High Court in R. v. Secretary of State for Trade and Industry, ex parte UNISON, GMB & NASUWT, judgment delivered on 15 May 1996; [19961 Industrial Relations Law Reports 438-450 (August).

78 Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work. OJ L 183/1.

79 Articles 6(3)(c), 11(1), 11(6).

80 Articles 3(c), 11(2), 11(3).

81 Article 6(3)(c).

82 Article 11(6).

83 Article 11(1).

84 Article 3(c).

by those trade union representatives. The representatives act on behalf of all employees.

8.1.3 European works councils

Directive 94/45/EC of 22 September 1994 requires the establishment of a European Works Council (EWC) or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees.[85] The Directive is to be implemented by the Member States no later than 22 September 1996.[86] In the short term, the priority is the establishment of the Special Negotiating Bodies (SNBs) which negotiate the creation of the EWCs. Once the SNB is established, the next phase is the negotiation of an agreement creating a EWC and defining its composition, functions, and so on.

The method of election or appointment of SNB members appears to be by delegation to Member State rules:[87]

> "...a SNB shall be established in accordance with the following guidelines:
> (a) The Member States shall determine the method to be used for the election or appointment of the members of the SNB who are to be elected or appointed in their territories...".

The members of the SNB arguably must be employees' representatives. The SNB members-representatives from each Member State will reflect national criteria of election or appointment of employees' representatives. A Member State might try to legislate rules for the election or appointment of members of the SNB which ignore or exclude trade union representatives. This is challenged by various provisions of the Directive.

Subparagraph (2) of Article 5(2)(a) provides:

> "Member States shall provide that employees in undertakings and/or establishments in which there are no employees' representatives through no fault of their own, have the right to elect or appoint members of the SNB".

It is arguable that this creates a presumption that employees only elect or appoint where "there are no employees' representatives through no fault of their own...". Otherwise, it is employees' representatives who are, or elect or appoint, the SNB.[88]

The function of the SNB is to establish the EWC by agreement with the central management. The structure and objective of the Directive, and in particular the subsidiary requirements of the Annex, support the view that the SNB should reflect the eventual composition of the EWC. The Annex to the Directive prescribes:[89]

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85 OJ L 254/64 of 30.9.94.

86 Article 14(1).

87 Article 5(2).

88 The meaning of "through no fault of their own" becomes clear in light of the following subparagraph 3 of Article 5(2)(a): "This second subparagraph shall be without prejudice to national legislation and/or practice laying down thresholds for the establishment of employee representation bodies". Such thresholds are not the fault of employees; hence, they then have the right to elect or appoint the SNB.

89 Paragraph 1(b).

"The EWC shall be composed of employees... elected or appointed from their number by the employees' representatives, or, in absence thereof, by the entire body of employees.

The election or appointment of the EWC shall be carried out in accordance with national legislation and/or practice".

The Annex envisages an EWC composed of, or elected or appointed by, the employees' representatives. An **SNB** which agrees to an EWC not so elected or appointed **is** arguably not achieving the objective of the Directive.

The Annex's subsidiary requirements apply where[90] the **SNB** and the central management so decide; central management refuses to commence negotiations within ***6*** months of a request; or ***3*** years elapse after a request without an agreement. The negotiating strategy inherent in the structure of the Directive is based on an SNB composed of employees' representatives. The SNB is in a strong negotiating position. If central management refuses to negotiate within ***6*** months, or refuses to agree to employees' representatives nominated by the **SNB** within *3* years, the EWC will be set up comprising those elected or appointed by the employees' representatives alone.

A relationship between nationally based representatives of the enterprise and the EWC is thus envisaged by the Directive. Yet, as mentioned in Part **I,** the principle of equilibrium between enterprise-based and sector-based workers' representational organisations and their symbiotic collaboration is worth bearing in mind as a potential inspiration for EU regulation - both of national trade union rights, and EU trade union rights.

For example, this could take the form of an equilibrium between representative bodies in transnational enterprises in the EU and EU-level sector organisations (Industry Committees), and their symbiotic operation. The EWCs Directive provides a legal structure for workers' representation in transnational enterprises. However, whereas national systems operate to support trade union rights at sector level, there is a gap at the EU sector level.

This is a theme to be revived when EU-level trade union rights are discussed. EU regulations could have an impact on trade union organisations and their functions in Member States. For example, the representatives of workers in transnational enterprises on EWCs could be determined by

- national works councils in each country, and/or
- the relevant trade unions in the sector, and/or
- EU (sector) trade unions.

Again, the promotion of sector trade union rights at EU level could not fail to influence the operation of sector-level organisations within Member States, perhaps reinforcing them vis-à-vis enterprise-based organisations.

The equilibrium reached between trade unions and workers' representation at enterprise level is complex and variable among Member States. Formulation of trade union rights at EU level would be bound to impact upon this equilibrium. The question is how, and whether the impact should be oriented in a specific policy direction.

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[90] Article 7(1).

A weakness of trade unions at EU level has heretofore been precisely the absence of a direct link or interaction with enterprise level representatives, such as is characteristic of trade unions in Member States. Links are established between EU and national organisations at inter-confederal level, and, through the ETUC Industry Committees, with Member State sector trade unions. But the vital legitimising link with representatives of workers at the enterprise or workplace level has been lacking.

Given the existing links with Member State trade unions, it would strengthen the legitimacy of EU-level trade union organisations if trade union rights formulated at EU level reinforced trade union representation over enterprise- or workplace-based representation. The strengthening of sector or multi-sector trade union organisations in Member States is another choice to be made.

The creation of European works councils does, for the first time, promote a transnational system of worker representation based on the enterprise. It poses the possibility, for the first time, of a direct legitimising link being forged between enterprise representatives and EU level organisations.

An emerging trend (for example, in Denmark, Sweden, Finland and Germany) is for the key personnel in the composition of the EWCs to be sectoral trade union representatives, together with representatives from the enterprise. To some extent, this is consistent with the important role attributed to the sector level in countries where the transnational enterprise has its central management, or a significant presence. But it is not surprising, given the often relatively important position occupied by these multinational enterprises in the sectors in which they operate. Hence, equally, the representatives of large enterprises in a Member State will often play an important or even dominant role in the sector trade unions in that Member State (for example, in Germany, the agreement between sector representatives and Volkswagen is not a works council agreement but a collective agreement).

Transnational enterprises may resist the role of ETUC Industry Committee representatives on enterprise representation bodies at EU level. But such sector representation on EWCs is a powerful impulse favouring the legitimacy of those sector organisations, linked now not only with Member State sectoral trade unions, but also directly with workers in transnational enterprises which are sectorally significant.

In the case of sectors dominated by one or more transnational enterprises, coordination of EWCs in these enterprises, or even the formation of a combine committee comprising representatives of EWCs in the same sector, would in practice overlap with sector bargaining. Insofar as sector bargaining at EU level has been held back, for example, by problems of organisation on the side of employers, this could be a welcome stimulus to sector organisation of transnational employers.

EU level formulation of trade union rights highlights the themes of equilibrium and support. EU-level legal intervention will affect the equilibrium. There are factors, conducive to strengthening the links with, and legitimation of, EU- level trade unions, which would indicate reinforcement of trade union, as opposed to workplace/enterprise representation. Further, the emerging role of sector trade union representation on EWCs would indicate that reinforcement of specifically sector trade union rights would be desirable.

The promotion of sector trade union rights, at least in those sectors where EWCs are significant, is indicated. It is an open question whether it constitutes a model for trade union rights at EU level in general.

8.2 Workers' participation

The Directives on Acquired Rights and Collective Redundancies have long provided for obligatory information and consultation of workers' representatives. To these have now been added further elaborations of collective participation by Directives on health and safety and on European works councils.

8.2.1 Participation in health and safety: beyond consultation?

The 1989 Framework Directive draws a distinction between consultation of workers' general representatives and consultation of workers' representatives with specific responsibility for safety and health.

With respect to workers' general representatives, Article 11(1) provides that employers:

> "**shall** consult workers and/or their representatives and allow them to take part in discussions on all questions relating to safety and health at work.
> This presupposes:
> - the consultation of workers,
> - the right of workers and/or their representatives to make proposals,
> - balanced participation in accordance with national laws and/or practices".

A statement was entered in the record by the Council and Commission at the conclusion of the Council discussions on the common position on the Directive. It sought to give a very broad "formal" latitude to the meaning of "balanced participation":[91]

> "The notion of balanced participation embraces a range of multiple forms of worker participation which vary considerably between Member States. The present directive places no obligation on the Member States to provide a specific form of balanced participation".

Whatever else it may mean, and however it may be formally defined, it seems clear that "balanced participation" is not the same as consultation. Arguably, it must include some different and additional element of involvement of workers' representatives.

Similarly, with respect to workers' representatives with specific responsibility for safety and health, the Directive appears to highlight the difference in the two concepts by providing for alternatives:[92]

> "...workers' representatives with specific responsibility for the safety and health of workers shall take part in a balanced way, or shall be consulted in advance and in good time by the employer, with regard to (the items listed)".

The scope of "balanced participation" is thus beyond the concept of "consultation" - perhaps even as is defined in the European Works Council Directive 94/45/EC of 22 September 1994.

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91 **Council Document 9869/88 RESTRICTED SOC 82 of 12 December 1988, p. 22, quoted in Laurent Vogel, Prevention at the Workplace: an initial review of how the 1989 Community "Framework" Directive is being implemented. European Trade Union Technical Bureau for Health and Safety (TUTB), Brussels, 1994, p. 83.**

92 **Article 11(2).**

8.2.2 European works councils

The purpose of the Directive "... is to improve the right to information and to consultation of employees...".[93] The consultation prescribed by the Directive is defined as:[94]

> "...the exchange of views and establishment of dialogue between employees' representatives and central management or any more appropriate level of management".

The establishment of dialogue required by the Directive implies an active and continuous process of communication and interaction between the European works council and management.

The Directive requires the creation of a EWC for the purposes of information and consultation. Equipped with information, the EWC is, through consultation, to influence the decision-making of central management. Consultation takes time, and the EWC can use the threat of delay to influence management decisions.

In an apparently paradoxical provision, the Annex stipulates that a meeting "shall not affect the prerogatives of the central management".[95] But the whole purpose of the Directive is to subject management decision-making to a procedure of information and consultation. Breach of the procedure must lead to an EU law remedy capable of restraining unilateral management action - hence, the special Article on "Compliance with this Directive".%Management prerogatives are to be subject to procedures of information and consultation of the EWC, procedures which are to be enforced by effective EU law remedies.

8.3 Collective agreements

EU law has been inspired by recourse to collective agreements as labour standards in the labour laws of a number of Member States.

8.3.1 Collective agreements as "essential" standards

The Commission's proposal for a Directive on proof of an employment relationship[97] was clearly inspired by the experience of the UK requirement that employers provide employees a written statement of particulars of terms and conditions of employment.[98] UK law reflected the role of collective bargaining in determining terms and conditions of employment by offering employers an alternative to individual detailed written statements specifying all or any of the prescribed terms and conditions. The alternative was to refer the employee to "some document which the employee has

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93 **Article 1(1).**

94 **Article 2(1)(f).**

95 **Paragraph 3, subparagraph 4.**

96 **Article 11(1) and (3).**

97 **Commission Proposal for a Council Directive on a form of proof of an employment relationship, COM(90) 563 final, Brussels, 8 January 1991.**

98 **Employment Protection (Consolidation) Act 1978, sections 1-6, replaced by the provisions of the Trade Union Reform and Employment Rights Act 1993, Schedule 4 (now in the Employment hghts Act 1996, sections 1-6). The Explanatory Memorandum accompanying the Commission's proposal included a Table (p. 6) which indicated that only in the UK and Ireland was such a requirement imposed on employers.**

reasonable opportunities of reading in the course of his employment or which is made reasonably accessible to him in some other way", which in practice usually meant reference to the collective agreement.

The EC Directive[99] modified the UK law slightly but significantly, by making such reference to collective agreements explicit and direct. Among the "essential aspects of the contract or employment relationship" to be included in the written document provided by the employer under the Directive are "the collective agreements governing the employee's conditions of work".[100]

There is scope for litigation where employers fail to include information on collective agreements; or include information contradicting collectively agreed provisions. If there is no reference to agreements which arguably govern conditions of work, this is a violation of the EU law which requires an adequate and effective remedy. Complaints to national tribunals could require a reference to the European Court to clarify these ambiguities.

EC law has clearly linked the determination of individual workers' terms of employment to the provisions of collective agreements; this will now be a requirement in the labour law of every Member State.

8.3.2 Collective agreements as universal standards

On 1 August 1991, the Commission published a Proposal for a Council Directive concerning the posting of workers in the framework of the provision of services.[101] This was concerned to implement the commitment in the Commission's Action Programme relating to the Community Charter of Fundamental Social Rights of Workers, as regards the "working conditions applicable to workers from another State performing work in the host country in the framework of the freedom to provide services, especially on behalf of a subcontracting undertaking".[102]

The Commission posed the question "as to which national labour legislation should be applied to undertakings which post a worker to carry out temporary work in a Member State".[103] Formally, the solution depends on conflict of law rules, but given that these vary among Member States, the

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99 Council Directive 91/533 of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship. OJ 1991 L288/32.

100 There is much that requires clarification in these provisions of the Directive:
- which collective agreements, and at which levels, must be covered?
- what information about the agreement needs be provided: parties, date, establishments and/or categories of employees covered, etc.?
- is coverage required of substantive terms of employment and/or also procedural provisions affecting the worker's representatives? E.g. representational rights, or others not so easily incorporated into individual contracts;
- does "governing" mean :
  - legally binding on the employer as party to collective agreement; apparently not, since both the EC and UK provisions envisage the employer not being a party to the agreement;
  - legally binding in that they are incorporated into individual contracts of employment;
  - effectively governed, in that the employer observes in practice the same (or similar) terms?
  - if a mere reference *is* made to an agreement in the employee's contract, does this imply that all provisions of the agreement apply, not only those specified in Directive?

101 COM(91) 230 final-SYN 346, Brussels, 1 August 1991.

102 Action Programme, Part II, Section 4B.

103 Explanatory Memorandum, paragraph 2.

outcome may give rise to distortions of competition between national and foreign undertakings. The Commission therefore proposed to coordinate the laws of the Member States "to eradicate practices which may be both detrimental to a fair competition between undertakings and prejudicial to the interests of the workers concerned".[104]

The element of competition between firms as regards labour conditions was described as follows:[105]

> "A particular problem arises, however, where a Member State places obligations, notably with regard to pay, on **firms** based in and working on is territory, and these **firms** are faced with competition - for a specific task carried out within that same Member State - from a **firm** based elsewhere and not subject to the same obligations. Legitimate competition between **firms** is then overlaid by potentially distortive effects between national requirements.
>
> The question is therefore one of finding a balance between two principles which find themselves in contradiction. On the one hand, free competition between **firms,** including at the level of subcontracting across borders, so that the full benefits of the Single Market can be realised, including by **firms** based in Member States whose main comparative advantage is a lower wage cost. On the other, Member States may decide to set and apply minimum pay levels applicable on their territory in order to ensure a minimum standard of living appropriate to the country concerned".

This competition between firms would not occur, of course, if national labour laws were harmonized. The fact is, however, that the disparities among Member States regarding labour standards are such as to produce what has been termed "social regime competition" - competition among Member States as to the costs imposed on employers by national regimes of social and labour regulation.[106] The Commission's Explanatory Memorandum elaborates this difference as regards pay levels and working time standards. The conclusion was:[107]

> "National differences as to the material content of working conditions and the criteria inspiring the conflict of law rules may lead to situations where posted workers are applied lower wages and other working conditions than those in force in the place where the work is temporarily carried out. **This** situation would certainly affect fair competition between undertakings and equality of treatment between foreign and national undertakings; it would from the social point of view be completely unacceptable".[108]

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104 Ibid., paragraph 3.

105 Ibid., paragraph 9 bis.

106 W. Streeck, "La dimensione sociale del mercato unico europeo: verso un'economia non regolata?" [1990] Stato e Mercato, no. 28, pp. 31-68.

107 Op. cit., paragraph 12.

108 The legal framework proposed by the Commission to combat **this** problem drew upon a number of sources of inspiration. One in particular is of interest, the case of Rush Portuguesa Lda. v. Office national d'immigration, Case 113/89, [1990] European Court Reports 1417, not least because it derives fiom the European Court, which may eventually be faced with interpretation of the Community instrument regulating this issue. But see now Michel Guiot, Climatec **SA** Case C-272194 of 28 March 1996.

The Commission clearly opted to subordinate the competition imperative to a social policy - a profoundly important policy choice:[109]

> "the need to eradicate discrimination between national and non-national undertakings and workers with respect to the application of certain working conditions, justify a Community proposal which... intends to create a hard core of mandatory rules laid down by statues or by erga omnes collective agreements, without disrupting the labour law systems of the Member States and particularly their legislative or voluntaristic approach and their collective bargaining systems".

Hence Article 3(1) of the subsequently proposed Directive provided:

> "Member States shall see to it that, whatever the law applicable to the employment relationship, the undertaking does not deprive the worker of the terms and conditions of employment which apply for work of the same character at the place where the work is temporarily carried out, provided that:
> (a) they are laid down by laws, regulations and administrative provisions, collective agreements or arbitration awards covering the whole of the occupation and industry concerned having an 'erga omnes' effect and/or being made legally binding in the occupation and industry concerned..."[110]

There remain many issues of interpretation and application of the requirement that certain collective agreements be observed - not least arising from the differences in the nature and legal effects of collective agreements in different Member States. But the proposal by the Commission requiring employers to adhere to collectively agreed standards as those which Community law demands is of fundamental significance.

As with much of EC labour law, this relatively minor proposal creates potentially important consequences. The proposed Directive, by providing an entitlement of posted workers to collectively agreed standards, raises a legitimate expectation that posted workers should not be better off in this respect than host country workers. To maintain the difference would be to discriminate against host country workers. Countries which extend generally applicable agreements to posted workers will be under pressure to extend them to all undertakings. Hence, the proposed Directive is a step towards the objective that all workers, whether posted or not, should not be deprived of the terms and conditions of employment laid down by law or collective agreements.

This would give a great new potential to collective agreements. Those countries where there are generally applicable agreements would have to extend them to cover first posted workers, and then all workers not **so** covered.

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109 **Explanatory Memorandum, op.** cit., **paragraph 18.**

110 **The proposed Directive went through a number of revisions. A final version was approved by the Council of Ministers in September 1996 and has become Council Directive** 96/71 **concerning the posting of workers. OJ** L18/1 **of21.1.1997.**

8.3.3 Collective agreements as EU standards: working time

The Commission's first proposal for a Directive on Working Time stated its intention "to propose a groundwork of basic provisions on certain aspects of the organization of working time".[111] However, "other issues mentioned in the action programme in the field of the adaptation of working time should be left to both sides of industry and/or national legislation".[112]

The role of the social partners in negotiating flexibility of capacity utilization through agreements on working time was acknowledged,[113] with reference to experience in Germany, the Netherlands, Belgium, Greece, France, Italy and Portugal.[114] The Explanatory Memorandum carefully outlined the division of competences between legislation and collective bargaining:[115]

> "...given the differences arising from national practices, the subject of working conditions in general falls to varying degrees under the autonomy of both sides of industry who often act in the public authorities' stead and/or complement their action. To take account of these differences and in accordance with the principle of subsidiarity the Commission takes the view that negotiation between the two sides of industry should play its full part within the framework of the proposed measures, provided that it is able to guarantee adherence to the principles set out in the Commission's proposals...".

The first two drafts of the Working Time Directive reflected this explicit recognition of the role of collective bargaining in the form of an important, if cautious, initiative by providing for the possibility of general derogation in Article 12(3), and also allowing for the possibility of implementation of the Directive through collective agreements.[116]

This traditional approach was transformed into a radical advance in the final draft, which gave collective bargaining a central role in the setting of some EC standards on working time.[117] This was a significant qualitative change from being confined to the role of derogating from established standards to itself independently prescribing standards. The present Directive allows for collective agreements to fix or define relevant standards. In one exceptional case, collective agreement are even given priority over Member State legislation. **As** regards rest breaks during working hours, the Directive gives priority to collective agreements over legislation in determining the EC standard:

> ***Breaks***
>
> "Member States shall take the measures necessary to ensure that, where the working day is longer than six hours, every worker is entitled to a rest break, the details of which, including duration and the terms on which it is granted, shall be laid down in collective agreements or agreements between the two sides of industry or, failing that, by national legislation".

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111 COM(90) **317 final** - SYN **295, Brussels, 20 September 1990;** OJ **C254** of 9 **October 1990, p. 4; Explanatory Memorandum, page 2, paragraph 2.**

112 **Ibid., p. 3.**

113 **Ibid., p. 4, paragraph 4.**

114 **Ibid., p. 13, paragraph 25.**

115 **Ibid., p. 4, paragraph 3 and again in paragraph 32 on pp. 16-17.**

116 **Article 14.**

117 **Council Directive** 93/104/EC **of 23 November 1993 concerning certain aspects of the organisation of working time.** OJ L307/18 **of** 13.12.93.

Collective bargaining determines the EU standard.[118] Only in its absence is the standard to be prescribed by legislation.

In addition, according to the Directive's provisions, collective bargaining is engaged in setting substantive EU standards in relation to night work, daily rest breaks, maximum weekly working hours, including overtime and annual holidays. Member States are to consult the social partners before legislating standards on night work, and it is arguable that Article 13 requires employers to consult workers and their representatives when s/he "intends to organize work according to a certain pattern". Any derogations at enterprise level are explicitly subject to framework agreements negotiated at national or regional levels.

It becomes evident that the Directive is likely to engage national courts, and eventually the European Court, in questions of collective labour law not previously encountered. The Directive will bring before these courts issues of proper consultation of trade unions, by Member States or employers; the relations between collective agreements and law, different levels of collective agreements, and individual contracts and collective agreements. In this sense the Working Time Directive breaks new ground in the development of a European collective labour law, with probable consequences for trade union rights in the Member States.

8.4 Strikes

EU law provides no right to strike. But a right to strike is largely a right to protection against dismissal of strikers. Does EU law provide some legal support or protection for strikers?

EU law does have rules on collective dismissals. Council Directive 75/129 of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies[119] contains the potential for defending strikers against dismissal. Directive 75/129 requires the employer to inform and consult workers' representatives when s/he contemplates redundancy dismissals. The Directive defines "collective redundancies" as meaning:[120]

> "dismissals effected by an employer for one or more reasons not related to the individual workers Concerned".

The amendment of the Directive in 1992 reinforced this by adding a new paragraph that "terminations of an employment contract which occur to the individual workers concerned shall be assimilated to redundancies".

Where workers go on strike, the employer may contemplate dismissing strikers. These dismissals related to a strike would arguably be "for one or more reasons not related to the individual workers concerned". Hence, the Directive applies. If the employer tries to dismiss strikers before carrying out the procedures of information and consultation of the workers' representatives, a national tribunal could make a reference to the European Court for an interpretation of the Directive under Article 177 of the Treaty. An interim injunction to stop dismissals of strikers could be granted; alternatively,

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118 Though without specifying the **appropriate** level.

119 As amended; Council Directive 92/56/EEC of 24 June 1992 amending Directive 75/129/EEC on the approximation of the laws of the Member States relating to collective redundancies. OJ L 245/3 of 26.8.92.

120 Article 1(1)**(a).**

an undertaking in damages to compensate all workers affected if the claim is subsequently upheld.

The Directive could be particularly effective in the case of employers refusing to recognise, or withdrawing recognition from a trade union (de-recognition). ***An*** employer refusing union recognition, or attempting de-recognition may contemplate dismissals of employees (trade union members) refusing to accept this decision. Dismissals of trade union members for refusal to accept derecognition are dismissals by reason of "one or more reasons not related to the individual workers concerned". The Directive applies.

The employer who contemplates that dismissals may result from the decision to derecognise "shall begin consultations with workers' representatives in good time with a view to reaching an agreement".'*' The employer must examine "ways and means of avoiding collective redundancies or reducing the number ofworkers involved".[122] ***An*** employer genuinely concerned to avoid dismissals could easily continue recognition to avoid the dismissals. Continuing union recognition is even implicit in the provision that these consultations "shall begin... with a view to reaching an agreement". They are premised on there being an agreement with (union) representatives.

It should, belatedly, be recognised that the Collective Redundancies Directive embodies an EU policy that striking workers may be defending collective interests. **As** such they are covered by EU law against dismissals effected for such collective "reasons not related to the individual workers concerned".

In conclusion, compliance with these EU law standards may require changes in Member State trade union laws on strikes, and much else besides.

9. The European Social Dialogue and Trade Union Rights in the Member States

9.1 The vacuum of transnational trade union rights

Member State trade union rights of association and autonomy explicitly recognise trade unions' right to form, join and take part in autonomous international trade union confederations. The rights of action of such international trade union organisations are much less recognised. This is due to the fact that their activities rarely raised the question of whether rights of action should be attributed to them.

As a result of the lack of activities associated with information, consultation, collective bargaining or strikes, the attribution to transnational trade unions of rights of association and autonomy was less contentious. Associated rights of action, such as the legal status of collective agreements or extension procedures did not arise. The lack of activity at transnational level, coupled with the uncertain status of the international balance of forces between trade unions and employers' organisations (compared with relatively well-established national equilibria) made for a vacuum regarding trade union rights at transnational level.

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121 **1992 amending Directive, inserting new Article 2(1).**

122 **Article 2(2).**

9.2 Transnational trade union rights in the European social dialogue: The implications for trade union rights in the Member States

The emergence of the European social dialogue and its institutionalisation in the Protocol and Agreement on Social Policy of the Maastricht Treaty on European Union has transformed this situation.

The Agreement of 1991 reflected a consensus between the social partners at European level that the social dialogue should become a, if not the, primary instrument for social and labour regulation in the EU. This transformation of the industrial relations system at European level puts in the forefront of attention the trade union rights of the participants in the social dialogue process. This raises questions of transnational trade union rights in Europe: not only those which had scarcely existed (rights of action), but also those which had been established (rights of association and of autonomy), but under very different conditions.

The emergence of a transnational industrial relations/social dialogue system has implications also for trade union rights at national level. The existence of a consensus among Member States on certain trade union rights, of association and of autonomy, might be sufficient grounds for a proposal to consecrate these rights at EU level, as necessary elements in a structure of transnational EU industrial relations. However, such an exercise would raise the question of how far national trade union rights were consistent with the emerging European level system. What forms of association and what degree of autonomy, let alone what rights of action, were consistent with the establishment of trade unions and social dialogue at European level?

The emergence of the European social dialogue requires consideration, therefore, of transnational trade union rights and their implications for trade union rights in the Member States.

10. The European Social Dialogue and Rights of Association

The rights of association identified at national level included:

- legal definition of a trade union
- legal personality
- right of association/right to join
- right not to join
- closed shop/union security.

The analogues of these rights at transnational level have not been developed. Transnational organisations of labour do exist: at European level, for example, the ETUC. But their legal status and rights are not specifically reflected in either national or EC law.

The fact that almost all national trade union confederations experience no legal difficulty in affiliating to transnational trade union organisations indicates that the latter fall within the legal definition of a trade union adopted in the Member States.

It should be possible to devise a legal definition at European level which could be inserted into EC law to formally qualify organisations as transnational trade unions.

Similarly, transnational trade unions have obtained legal personality without difficulty. However, in the absence of specific recognition in EC law, this legal personality has been obtained under national law.

It should be possible to create a specific legal status in EC law for transnational trade union organisations (analogous to the proposed statute for a European company).

The lack of a right of association/right to join at EC level appears, in one sense, not to have given rise to difficulties. For example, almost all national trade union confederations have been able to affiliate to the ETUC, and its Industry Committees. The specificity of the EU level lies in the contrast with the right of associatiodto join at national level. At national level, the right is formulated primarily with a view to individual workers forming organisations. At EU level, it is national or sectoral organisations which associate/join together.

A right of association defined in terms of this specificity - a right of organisations to associate - suffices at **EU** level, **on the assumption that the right at national level guarantees to affiliating organisations the right of association of workers.** In this way, the right of association at EU level must imply a guarantee at EU level of the right of association of workers at Member State level.

The formulation of an EC law right of associatiodto join - necessary for those organisations at EU level which bring together national trade unions ostensibly founded on rights of association of workers at Member State level - will impact on the Member State formulations of this right. In particular, the EC right must ensure that Member State trade unions, affiliated to EU trade union confederations, are guaranteed an effective right of association, necessary to substantiate the EC right.

This issue is implicit in the Agreement annexed to the Protocol on Social Policy of the Maastricht Treaty, and has already given rise to controversy. The dispute arose over the question of which organisations the Commission was obliged to consult when implementing Article *3* of the Agreement. This was found to raise the question of the "representativeness" of the EU-level organisations concerned; and, hence, of the Member State trade union organisations. This brings to the fore very clearly the extent of the "rights of association" guaranteed those Member State organisations by their national laws.

10.1 Representativeness

The Commission must promote the consultation of management and labour[123] and shall consult management and labour.[124] Management and labour may initiate the social dialogue[125] which may lead to contractual relations including agreements between them. Such agreements shall be implemented in accordance with practices specific to management and labour, or at their joint request, by a Council decision.[126]

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123 Article 3(1) of the Agreement on Social Policy; now Article 118a(1) of the EC Treaty, as amended by the Treaty of Amsterdam, 1997.

124 Article 3(2) and 3(3); now Article 118a(2) and 118a(3) of the EC Treaty, as amended by the Treaty of Amsterdam, 1997.

125 Article 3(4); now Article 118a(4) of the EC Treaty, as amended by the Treaty of Amsterdam, 1997.

126 Article 4(2); now Article 118b(2) of the EC Treaty, as amended by the Treaty of Amsterdam, 1997.

Who are "management and labour"? Which organisations can claim the rights to consultation, to initiate social dialogue and reach and implement agreements? The Agreement never uses the word "representative-ness". But the Commission was clearly drawn to this criterion for identifying the relevant organisations of management and labour. Annex 3 to a Communication by the Commission on the application of the Agreement is entitled: "Main Findings of the 'Social Partners Study (Representative-ness)'".[127] The concept of representativeness plays a key role in the Communication's discussion of the application of the Agreement.

As regards criteria for representativeness, the conclusion is that:[128]

> "(a) the diversity of practice in the different Member States is such that there is no single model which could be replicated at European level...".

Despite this, the Commission's Communication without more immediately sets out the criteria it proposes for organisations to be consulted.[129] The Commission side-stepped the problems that bedevil the use of "representativeness" as a criterion. Rather than facing the difficult option of explicitly renouncing the criterion of representativeness, the Commission put forward criteria which refer only to representativeness of Member States, and then only as far as possible. The Commission effectively opted for administrative decision as the short term solution to the problem of selecting which organisations fall within the scope of labour and management in the Agreement.

Social partners at national level will be judged representative according to national law and practice. The criteria of representativeness of trade union organisations vary among Member States. Quantitative criteria are not the only ones used; qualitative criteria are also invoked in deciding whether an organisation should be recognised.

But the legitimacy of the Member State trade unions as representative organisations, and consequently of the ETUC as a legitimate interlocutor at EU level, depends at least in part on quantitative criteria, on whether individual workers have joined trade unions in sufficient numbers. The extent of Member States' provision for a right to join, for trade union rights of association, is therefore critical at EU level.

The fact that the representativeness of national trade union confederations affiliated to the ETUC is very different in quantitative terms reinforces the need for rights of association at EU level which can increase this representativeness, which in turn is crucial to the legitimacy and legal status of trade union organisations at EU level.

What specifically could be done at EU level to enhance the rights of association at Member State level?

Beyond the minimum threshold represented by the ILO Conventions 87 of 1948 and 98 of 1949, Member States have made considerable advances in their law and practice on trade union rights. These advances are particularly important in relation to growing numbers of atypical workers,

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127 Soon after the ratification of the Maastricht Treaty the Commission presented to the Council and the European Parliament a Communication concerning the application of the Agreement on social policy. COM(93) 600 final, Brussels, 14 December 1993.

128 Ibid., paragraph 23.

129 These are relevant to the question of autonomy of the organisations of labour at EU level, and will be discussed in the following chapter 11: "The European Social Dialogue and Rights of Autonomy".

women and the unemployed, changing production methods, flexible work practices and the use of information technology, the complex structure of enterprises, and increasing internationalisation of the economy.

10.2 Recruitment and Incentives

The formulation of the right of association enshrined in the ILO Conventions predates the radical changes in the labour force, the organisation of work, the structure of enterprises and the internationalisation of the economy which characterise the environment in which trade union rights must now operate. The decline, sometimes precipitous, in trade union membership in some Member States is attributed by some observers to these factors.

It is not only that these changes have contributed to this decline because, for example, losses of employment are greatest in heavily unionised sectors. More important is the inability of workers to form associations, and unions to organise among those segments of the workforce or sectors of the economy in which the number of workers has increased.

The protection of the autonomy of labour organisations, and of those belonging to those organisations is not enough. There has been felt a need, given the transformations outlined, for further development of trade union rights which bring together the organisation and its potential members - rights relating to the active recruitment of new trade union members, and the incentivising of trade union membership for workers in general, and certain categories in particular.

10.2.1 Entry, meetings, distribution of information/material

The right to recruit could provide for the trade union to enter premises, distribute materials and address workers, subject to conditions. The right to recruit would extend to all workers, typical and atypical, and in particular would protect the position of unemployed workers to join unions. In light of their position, there would be special rights to recruit atypical workers, such as an enhanced right to circulate information, and providing for the diffusion of collective agreements among them. For unorganised workers, there would be a right to benefit from the activities of a legally protected Labour Protection Representative with special powers to enhance trade union rights and promote recruitment.

There is a variety of law and practice on such trade union rights in the Member States which would repay further detailed study.

10.2.2 Small and medium enterprises

The discrepancy between relatively high unionisation rates in large compared to small enterprises has meant trade union rights in the latter have come in for special attention with the aim of strengthening trade union rights in small enterprises. The right to some form of representation of labour has emerged in different ways.

In Germany, there is the right of trade unions to establish works councils in small establishments. They can apply to a court and get a committee to organise a works council. This right is invoked

where an employer rejects a trade union or is anti-union. In Italian law, individual workers or groups of workers can nominate a safety representative. In France there is a formal procedure whereby a worker can ask for a Labour Protection Representative for six months.

10.2.3 Atypical workers

It is known that trade union density varies across different occupations and industries. There is particular concern with the fact that certain categories of workers which are increasing in numbers are not joining trade unions.

These include categories such as self-employed workers. The efforts made to combat this trend are revealing of ways in which trade union rights can be formulated to attract these new categories. In Germany, some independent workers can conclude collective agreements - though they are formally independent. For example, taxi-drivers come under the Works Councils Act. In ***Spain,*** formally self-employed persons can be considered as workers using the criterion of "economic dependence". In ***France,*** "droit syndicale" is conceived of in much wider terms than "droit de travail"; the former includes many more workers, such as doctors and other professional workers. It is possible to have "syndicats mixtes", with both types of workers. In ***Italy,*** the new law on employment in the public sector has meant the widespread application of labour law, including trade union rights, to the public sector.

There are ways in which union membership can be made more attractive. In ***France,*** the AXA Insurance company has introduced a "service voucher" which may be used with any union. Certain career advantages are available to trade union activists. In the ***Netherlands*** subscriptions are tax deductible. If certain activities of trade unions are permitted or promoted, this could attract members. In ***Germany,*** trade union provision of legal services is a very important factor attracting and maintaining membership. Other incentives to attract trade union membership could include vocational training, in the form of paid educational leave. In ***Italy,*** the problem has been confronted through the July 1993 fiamework agreement by involving public authorities, (State and local) in cooperation with trade unions towards the inclusion of new segments of the labour force in trade unions and their coverage by the collective bargaining system.

10.3 Conclusion

At EU level, are trade union rights of association aimed at increasing recruitment desirable and feasible?

Certainly, there are problems which can be foreseen. Such rights may anticipate that a new trade union could seek to recruit on premises, raising problems of trade union competition where there are systems of trade union pluralism.

But if falling trade union density is a serious problem, then such trade union rights are needed. The question becomes how to formulate rights which will encourage trade union membership. It becomes an inevitable and necessary adjunct to freedom of association. It might be that trade union rights at EU level are left to be implemented through the subsidiarity principle - by the social partners and/or at Member State level.

Finally, an EC legal measure to provide for a right of association at EU level confronts two provisions.

i. the 1989 Charter of Fundamental Social Rights of Workers, Article 11: Freedom of Association, includes a commitment of the Member States (except for the UK) to this objective. An analysis of the content of this provision indicates what has already been done in this direction;
ii. the Agreement on Social Policy annexed to the Protocol includes a reference in Article 2(6) which appears to exclude rights of association from Community competence. Again, a precise analysis is required.

10.4 The Charter of Fundamental Social Rights of Workers: Article 11 (right/freedom to belong/join)

Article 11 of the Charter provides:

> "Employers and workers of the European Community shall have the right of association in order to constitute professional organizations or trade unions of their choice for the defence of their economic and social interests.
> Every employer and every worker shall have the freedom to join or not to join such organizations without any personal or occupational damage being thereby suffered by him".

The EC Treaty, as amended by the Treaty of Amsterdam, now includes a new Article 117 (formerly Article 1 of the Maastricht Agreement). That Agreement included a reference to the 1989 Social Charter only in its Preamble. The Charter is now elevated to a new status in the revised Article 117 of the EC Treaty, which sets out the social policy objectives of the Community and the Member States agreed at Maastricht, and adds:

> "having in mind fundamental social rights such as those set out in the European Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers".

These instruments, therefore, become reference points for both the Community and the Member States.[130]

There are a number of potential difficulties. Does "having in mind" require that the law of the EC and the Member States conforms to these Charters? Must the European Court of Justice have the Charters in mind in interpreting EC law? But then the two instruments are not always precisely in agreement.

Further, the Social Charter of the Council of Europe contains a number of provisions from which ratifying States may select only some, and not all Member States have selected the same provisions. What if a Revised European Social Charter is adopted by the Council of Europe? How will the EC institutions regard the results of the supervision system, as improved by the 1991 amending Protocol and the 1994 Collective Complaints Protocol? In particular, the status of the voluminous conclusions of the Committee of Independent Experts responsible for applying the Charter is not clear.

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130 **The Turin Social Charter of the Council of Europe includes in Part I, "the right to freedom of association"; see also Article 5 ("The Right to Organise").**

The new Article 117 seems to take the legal status of the two Charters further even than the Amsterdam Treaty's addition of a new fourth paragraph in the Preamble to the Treaty on European Union:

> "Confirming their attachment to hndamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers".

While thus reinstating the reference in the Preamble of the Single European Act 1986 to the 1961 Social Charter, dropped by the Maastricht Treaty, this does not give the Charter even the status of the European Convention on Human Rights. The Convention is explicitly referred to in Article F of the Maastricht Treaty, but even Article F is not subject to the jurisdiction of the Court of Justice, though it may become an interpretative aid."

10.4.1 Right of association

The first paragraph of Article 11 provides for a "***right of association*** in order to constitute *professional* ***organisations or trade unions***". The second paragraph of Article 11 specifies a *freedom* to join "such organisations".

The difference between a **"freedom"** and a "right" requires definition. A "freedom" may be said not to give rise to a positive legal action - a claim - but renders unlawful restraints upon it.

A freedom granted also has to compete against other freedoms (an example would be the freedom to picket competing with the freedom of passage along the public highway). However, the relative weakness of *freedoms* granted becomes evident when ***rights*** are concerned. Rights granted may be limited by competing rights; for example, the workers' right to strike by the employer's right to fulfillment of contractual employment obligations. But rights granted will usually overcome competing freedoms.

Experience of similar provisions in national constitutional orders indicates that this distinction could have implications for the substance of a Community legal instrument. A mere freedom to join (as in the second paragraph of Article 11) has to compete with other freedoms, and is subordinate to other rights.

10.4.2 Constitutive activities

The inclusion of a "right to join" in Article 11's "right of association" is supported by a phrase which did not appear in earlier drafts. The final Draft specifies that the right of association is "in order to constitute professional organisations or trade unions of their choice". To constitute - i.e. to bring into being - is more like active joining than passive belonging.

There is considerable debate over whether and how far a hndamental "freedom of association" protects the activities of the trade union established by workers. The upgrading by Article 11 of this freedom into a "right of association" could be interpreted in light of this debate. Thus, the additional phrase "in order to constitute professional organisations or trade unions of their choice" may enhance the substance of Article 11's "right of association" by implying a right to engage in activities

necessary to constitute such organisations. Examples would be meetings of workers (at the work-place, or during working time) to discuss constituting trade unions; or strikes in pursuit of claims for union recognition pure and simple. A right of association should protect such activities aiming to constitute trade unions.

10.5 Community competence on rights of association

Article 2(6) of the Agreement on Social Policy annexed to the Protocol provides:[131]

> "The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs".

This exclusion appears to contradict the expressed intention in the Protocol that 14 Member States "wish to continue along the path laid down in the 1989 Social Charter; that they have adopted among themselves an Agreement to this end...". The Social Charter contained explicit guarantees related to pay (Article 5), the right of association (Article 11) and the right to strike (Article 13). The implication must be that the exclusions in this paragraph are to be interpreted narrowly. For example, the meaning of "pay" cannot have been intended to exclude Community competence over "equal pay for men and women".

More particularly, there is doubt as to whether this provision operates to limit the scope of "agreements concluded at Community level" under Article 4 of the Agreement.[132] In contrast to the legislative procedure for enacting Directives on the new competences outlined in Article 2 of the Agreement,[133] Article 4 agreements may be reached without the direct involvement of EC institutions, and are not subject to any explicit restriction either as to content or to majority or unanimous voting.

A ***double set of EC competences*** emerges:

i. the new competences envisaged by the Agreement applicable to the measures adopted by EC institutions; but also
ii a different set of competences allotted to the social partners, and carrying with it the obligation to implement "agreements concluded at Community level". These latter would thus fall within the scope of EC law.

This proposition is argued on the basis of the Agreement's adoption of extraordinary new procedures for the development of EC law, restricting the direct participation of Community institutions, and, in particular, rendering inapplicable the consequent restrictive voting requirements closely tied to specific areas of competence. This new approach to formulating EC labour law may imply that the limits of competences carefully attached to the old institutions and procedures are not necessarily to be carried over to the new institutions and procedures.

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131 Now Article 118(6) of the EC Treaty, as amended by the Treaty of Amsterdam, 1997.
132 Now Article 118b of the EC Treaty, as amended by the Treaty of Amsterdam, 1997.
133 Now Article 118 of the EC Treaty, as amended by the Treaty of Amsterdam, 1997.

Looking again at Article 2(6):[134]

> "The provisions of this Article **shall** not apply to pay, the right of association, the right to strike or the right to impose lock-outs" (emphasis added).

The question is whether this exclusion of competences as regards the procedures in Article **2** applies to the radically different procedures laid down in Articles *3* and 4.[135] If not, by implication, under Article *3*, the Commission may make a proposal in a social policy field specified in Article 2(6) which, under Article 3(4), is then taken up by management and labour, with the possible result of an agreement on the subject at Community level,[136] which "shall be implemented" in one of the ways specified in Article 4(2). This difference in potential competences may be understood because of the particular delicacy of the matters listed in Article 2(6) touching, as they do, upon the area of the autonomy of the social partners (right of association, the rights to strike or impose lock-outs) and the most central of collective bargaining subjects (pay).

If it is possible to justify and understand this difference between Community competences for procedures involving the Commission, Council and Parliament on the one hand, and competences for procedures involving the Commission, management and labour on the other, then it may be that the competences listed generally in Article 2 are not to limit the potential of the social dialogue procedure prescribed in Articles 3 and 4.[137]

The Maastricht Agreement's apparent exclusion of competence regarding "the right of association, the right to strike or the right to impose lack-outs" has been replicated in the revised Article 118(6) of the EC Treaty inserted by the Treaty of Amsterdam 1997. Its ambit may have been tempered, however by the Amsterdam Treaty's revision of Article 118c.

The revised Article 118c is an amalgam of Article *5* of the Maastricht Agreement and the old Article **118** of the EC Treaty. The old Article 118, unlike Article 5 of the Agreement, included a specific reference to the:

> "task of promoting close co-operation between Member States in the social field, particularly in matters relating to:... the right of association and collective bargaining between employers and workers".

The new Article 118c specifically provides for the Commission to:

> "encourage cooperation between the Member States and facilitate the coordination of their action in all social policy fields under this chapter, particularly in matters relating to... the right of association and collective bargaining between employers and workers".

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134 Now Article 118(6) of the EC Treaty, as amended by the Treaty of Amsterdam, 1997.

135 Now respectively Articles 118, 118a and 118b of the EC Treaty, as amended by the Treaty of Amsterdam, 1997.

136 Article 4(1); now Article 118b(1) of the EC Treaty, as amended by the Treaty of Amsterdam, 1997.

137 It may be argued that the reference in Article 2(1) to "the Community" implies that the competences referred in Article **2** exhaust those which the EC can exercise in the field of social policy. The question remains whether the scope of EC competences can be separated from the mechanisms for the implementation of those competences, and whether Article 2(6) refers to the scope of the competences defined in Article 2, or only to the institutional mechanisms outlined in Article **2**, paragraphs **2** and 3.

Article 5 of the Maastricht Agreement merely specified that it applied:

"in all the social policy fields under this Agreement".

This raised a question of whether this encompassed subjects excluded by Article 2(6) of the Agreement; in particular, "the right of association, the right to strike or the right to impose lock-outs".

It might have been argued that this limited the Commission's activities under Article 5 of the Agreement as regards initiatives under Article **2.**

The explicit detail referring to the right of association and collective bargaining in the new Article 118c makes it clear that this argument cannot apply. It also raises the question of whether the scope of Article 2(6) has been narrowed, specifically regarding rights of association and collective bargaining.

This is particularly significant in light of the above debate over whether the Commission has the competence to take initiatives under Articles *3* and **4** of the Agreement, even if the Council could not adopt directives under Article 2, in the areas covered by the Article 2(6). It was argued that the Commission can do so, and these initiatives could in turn lead to EU level agreements between management and labour under Articles *3* and 4. This argument is now reinforced by the new Article 118c, which makes it explicit that the Commission should encourage cooperation and facilitate action "particularly in matters relating to:... the rights of association and collective bargaining between employers and workers".

11. The European Social Dialogue and Rights of Autonomy

The rights of autonomy identified at national level included establishment of an autonomous organisation, financial autonomy and autonomy in internal elections and decision-making.

The establishment, finances and internal constitutional structure of trade unions at transnational level have not been the subject of regulation by the EU, though, in fact, their evolution followed closely the development of the EC.

For example, it was the establishment of the European Economic Community by the Treaty of Rome in 1957 which led the European affiliates of the International Confederation of Free Trade Unions (ICFTU) to meet in Dusseldorf in 1958. The trade union confederations of the then Member States agreed to establish a European Trade Union Secretariat, which adopted in 1969 the name of the European Confederation of Free Trade Unions, with new statutes and a new governing body. At the same time, the ICFTU trade unions fiom the member countries of the European Free Trade Association (EFTA) formed a separate organisation (EFTA-TUC). The enlargement of the EC in 1973 gave rise to further developments, leading to a founding congress of national confederations from EC and EFTA Member States and of other European countries in Brussels in February 1973. The new organisation was the European Trade Union Confederation (ETUC). These ICFTU foundations were expanded in 1974 to include also Christian and Communist federations

The internal constitution of the ETUC has undergone changes over this period. For example, the new statutes of the European Confederation of Free Trade Unions set up in 1969 aimed to establish a

balance between the large affiliates and others and strengthen internal democracy. The unanimous voting system which had operated up to then was replaced with two-thirds-majority voting. The principle of geographical representation is completed by sectoral representation. The **15** European organisations (Industry Committees) of affiliated unions organised on a sector or industrial basis are also independent members of the ETUC.

These internal constitutional changes, like the establishment of the **ETUC** itself, and also its financial arrangements, were not subject to legal regulation at transnational level but are the autonomous initiatives of the organisation. The guarantees contained in ILO Conventions, protecting the freedom of trade unions at national level to affiliate to international organisations, served to preclude interference by national regulations with this autonomy.

However, once again, the development of the European social dialogue, and its formal institutionalisation in the Maastricht Protocol and Agreement on Social Policy, create dilemmas at EU level with important implications for trade union rights of autonomy both at transnational level and in the Member States.

11.1 Dilemmas for transnational trade union rights of autonomy

The identification of organisations claiming to fall within the meaning of the "management and labour" given entitlements under the Agreement led the Commission to undertake its study on the social **partners**.[138] It concluded that there was an extraordinary diversity of practice in Member States and:[139]

> "the different Member States' systems having all taken many years to grow and develop, it is difficult to see how a European system can be created by administrative decision in the short term".

Despite this negative message regarding the feasibility of developing criteria for identifying labour and management at European level, the Commission's Communication without more immediately sets out the criteria it proposes for organisations to be consulted. They **should**:[140]

"- be cross industry or relate to specific sectors or categories and be organised at European level;
- consist of organisations which are themselves **an** integral and recognised part of Member State social partner structures and with the capacity to negotiate agreements, and which are representative of all Member States, as far as possible";
- have adequate structures to ensure their effective participation in the consultation process".

Annex 2 to the Communication gives an overview of the organisations which, in the Commission's view, "currently comply broadly with these criteria". In addition, the Commission inevitably acknowledged the special status of certain organisations:[141]

> "...the Commission recognises that there is a substantial body of experience behind the social

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138 Annex 3 to the Commission's Communication concerning the application of the Agreement on social policy. COM(93) 600 final, Brussels, **14** December 1993.

139 Ibid., paragraph **23.**

140 Ibid., paragraph 24.

141 Ibid., paragraph 25.

dialogue established between the UNICE, CEEP and ETUC"

Commenting on this aspect of the Commission's Communication, the Economic and Social Committee (ECOSOC) concluded:[142]

> "the social partners at EC level are to be selected having regard to the nature of the **process** and of the **outcome** of EC social dialogue. These would indicate transnational criteria linked to national social partners and organizational capacity".

The ECOSOC Opinion focussed on this issue:[143]

> "2.1.12. The criteria proposed by the Commission in paragraph **24** are ambiguous as to the need for a **negotiating** capacity of the EC social partners. Article **3(4)** of the Agreement links consultation with **dialogue** and agreements (Article **4).** Criteria should also include capacity to **negotiate** for and bind national structures.
>
> Agreements negotiated by the social partners at EC level should be capable of binding national social partners concerned, and affect directly, or by extension, all workers and employers in the Member States.
>
> **2.1.13.** The Commission's view is that (paragraph **26):** 'Only the organizations themselves are in a position to develop their own dialogue and negotiating structures'. A criterion requiring negotiating competence and ability to make agreements could assist EC level partners to achieve this.
>
> **2.1.14.** Member State social partners comprising the EC level organizations should be encouraged to grant bargaining mandates to the EC level social partner organizations. Member States should be encouraged to provide the procedures and guarantees securing the general effect of EC level agreements reached. Both these are implicit in the means of implementing agreements provided in Article 4(2)".[144]

In ECOSOC's more explicit view, criteria of selection were linked to the functions of the organisations concerned as envisaged by the Agreement. Article **3(4)** of the Agreement links consultation with dialogue and agreements.[145] During the consultation phase envisaged by Article 3, the participating organisations have to be potentially capable of negotiating agreements which can bind national structures. Only European organisations which can meet the criterion of capacity to negotiate for and bind national structures can satisfy the requirements for participation in the consultation phase.

The exigencies of engagement in the processes envisaged by the Protocol and Agreement on Social Policy create pressures for the identification of organisations of labour at transnational level, and hence the elaboration of criteria for their composition, structure and internal decision-making machinery. Rights of autonomy guaranteed at national level have not been established at transnational level. In their absence, the Commission has been forced to devise criteria and adopt

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142 ECOSOC Opinion on the Commission's Communication, Opinion 94/C 397/17, OJ 397/40 of 31.12.1994; paragraph 2.1.9.b.

143 Opinion, paragraph 2.1.12-2.1.14.

144 Now Article 118b(2) of the EC Treaty, as amended by the Treaty of Amsterdam, 1997.

145 Article 3 of the Agreement is now Article 118a of the EC Treaty, as amended by the Treaty of Amsterdam, 1997.

procedures which, not surprisingly, have given rise to controversy.

There is potential for much discord at EU level if transnational rights of trade union autonomy are not elaborated and carefully monitored.

11.2 The implications for trade union rights of autonomy in the Member States

The risks are not only apparent at EU level. The identification of transnational labour organisations identified as eligible social partners under the Agreement (such as the ETUC) has already raised important issues regarding their relationships with their national affiliates, issues which intrude upon the autonomy of the latter. If, as indicated above, the criteria of transnational trade unions depends on their negotiating capacity, and includes the binding effect of their decisions on national affiliates, this obviously impacts on the autonomy of the decision-making within those national affiliates.

The potential implications for trade union rights of autonomy in the Member States can be illustrated with respect to the constitution of the ETUC and also of its Industry Committees, which group together sectoral federations of trade unions within the Member States.

11.3 The ETUC and the autonomy of national trade union confederations

Decision-making within the ETUC engages the affiliated national confederations in the European social dialogue. The autonomy of national confederations can be subjected to decision-making in the organs of the ETUC. An illustration is the new Article 11b of the Constitution of the ETUC, adopted at its 8th Statutory Congress in May 1995: (my underlining)

> "The Executive Committee shall determine the composition and mandate of the delegation for negotiations with European employers' organisations in each individual case, in accordance with the voting procedures set out in Article 16. The decision shall have the support of at least two thirds of the member organisations directlv concerned by the negotiations.
>
> In case of urgency, decisions concerning the mandate for composition of the delegation may be made in writing.
>
> The Executive Committee shall establish the internal rules of procedure to be followed in the event of negotiations. The Secretariat shall supervise the bargaining delegation.
>
> The Executive Committee shall be given regular progress reports on bargaining in process.
>
> Decisions on the outcomes of negotiations shall be taken by the Executive Committee in accordance with the voting procedures set out in Article 16. The decision shall have the support of at least two thirds of the organisations directly concerned by the negotiations, which shall have had the opportunity to hold internal consultations.
>
> Regular reports on European sectoral bargaining, carried out by European industry committees, shall be made to the Executive Committee. Its consistency with ETUC policy shall thus be ensured".

At its meeting at the end of June **1995,** the ETUC Executive Committee adopted Rules of Procedure for implementing Article 11b of the Constitution. These included the following:

> "*3.* The 'organisations concerned' shall be confederations fiom EU Member States, including the TUC, regardless of the UK opt-out, confederations from EEA countries, European industry committees and the Women's Committee..
>
> *6.* ...Once the agreement has been transmitted to the Council by the Commission, the latter may adopt a Decision on the agreement which makes it legally applicable by the **14** Member States under the scope of the Protocol.
>
> In the UK and EEA countries, however, the union and employers' organisations may decide to implement the agreement on a voluntary basis".

The implication is clear. The decisions reached by the internal structures of national trade union confederations may be overruled by the requisite majority approving the outcome of negotiations in the European social dialogue. This may require national trade unions to implement agreements reached as the outcome of the social dialogue.

11.4 Industry Committees and the autonomy of sectoral union federations in the Member States

The role of transnational trade unions in the European social dialogue and the implications for trade union rights of autonomy in the Member States can be illustrated by looking at recent experience in two sectors in which the different strategies adopted at the European level impact on national autonomy in different ways.

11.4.1 The construction sector

At European level, labour is represented by the European Federation of Building and Woodworkers (EFBWW), established **in 1958 as** a consultative committee representing construction workers in the original six Member States of the EEC. Its purpose was limited to collation of information. In **1974** it formally separated itself from the International Federation of Building and Wood Workers (IFBWW) and by **1979** had decided to expand its role "to actively co-ordinate the interests of building workers in Europe". **In 1983** the Federation decided to seek formal entry into the ETUC.

Today, the EFBWW has 50 affiliated member unions[147], including unions from all EC Member States, except Greece. In some Member States more than one union is affiliated; in France and Italy there are three affiliated unions which organize within the construction industry, in the UK four, and in Denmark, nine. The EFBWW reflects the range of national unions. However, the level of union membership within the industry varies greatly between countries, as is indicated in the following Table.

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146 European **Federation of** Building and Woodworkers, **#at is** the EFBWW? - origins, history, **functions, 1992, at p.** 5.

147 **As of** 1 **January** 1992.

Table 6: Unions and Unionization Rate in the European Construction Sector[148]

Country	Unions	Unionization rate
Belgium	CCTBB; CG	95 *Yo*
France	FNTC; FCNB; FO; BATI-MAT; CGC	3 - 5 %
Germanv	IGBSE	48 *Yo*
Italv	FILLEA; FILCA; FENEAL	38 %
Spain	FICOMA; FEMCA; FCM	n/a
UK	UCATT; TGWU; GMBATU; FTAT	30 *Yo*

Supreme authority within the EFBWW rests with its General Assembly which meets every four years.[149] Voting at General Assembly meetings is in relationship to affiliated union size measured by the amount of affiliation fee paid. The General Assembly elects the Federation's Executive Committee, its president, vice president and general secretary.

Between General Assemblies it is the Executive Committee which assumes authority within the Federation. This committee meets at least twice a year and endeavours to "achieve the widest possible measure of agreement" (Article 7). The Secretariat, operating with a full-time general secretary since **1988,** is responsible for influencing policy and political lobbying, developing a European trade union policy for the sectors represented by the EFBWW, representation and co-operation with sister and other organizations and research.[150] A Management Committee, consisting of the elected officials and a maximum of four Executive Committee appointees, is the administrative body of the Federation responsible for executing the decisions of the Executive Committee and giving effect to General Assembly mandates. It is the Management Committee members who attend the social dialogue meetings.

The gathering and dissemination of information, not collective bargaining, was the role envisaged for the EFBWW at its inception. Negotiations with employers were the responsibility of national unions. Under its constitution, its responsibilities were defined as the creation of close co-operation between national unions in EC states and hrthering the interests of building and woodworkers on all social and economic problems. This has now changed, most notably with the adoption, by its General Assembly, of a new constitution in December 1991.

The new constitution states that the activities of the EFBWW are to be directed "towards achieving the necessary social reforms with a view to creating the conditions for a sound social policy, strengthening democracy, promoting equal rights and equal treatment of all workers, improving conditions of employment...".[151]

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148 The information for this Table was compiled from a research study undertaken between 1987-89, published by the EC Commission, C. Pellegrini, Collective Bargaining in the Construction Industry: wages, hours and vocational training in Belgium, *the* Federal Republic of Germany, France, Italy, Spain and the United Kingdom, Document EC-MD-99, pp. 44-131.

149 Constitution of the EFBWW, Article 6.

150 EFBWW, What is the EFBWW? 1992, p. 7.

151 Article 3.

The constitution appears specifically to empower the Federation to act to improve conditions of employment. Although it states that affiliated organizations "have autonomy in all matters concerning their national and international activities", it also obliges the same national organizations "to jointly support and develop European and national decisions and positions adopted", and to "undertake to strengthen the co-ordinating role of the EFBWW and to further develop European co-operation through the EFBWW" (Article *3).* Article *3* further states that the tasks of the Federation shall include:

> "to perform all necessary representation activities connected with the above aims and tasks, and to represent the affiliated organizations at European level. In this representative capacity, the policy for the industries represented by the EFBWW, as jointly agreed in the General Assembly and Executive Committee, shall be actively promoted in contacts with all relevant institutions and organizations".

These paragraphs appear to envisage a role for the Federation in collective bargaining at European level on behalf of affiliated unions. Article **4** of the Constitution goes on to elaborate further on this role, stating that in its relations with other trade union organizations it "shall seek to promote the co-ordinated representation of workers' interests at European level". **A** decision at the **1987** General Assembly to enlarge the Federation's Management Committee, which now includes representatives of unions from the UK, Germany, Denmark, the Netherlands, Italy and France, has allowed that body better to reflect the overall membership within Member States.

11.4.2 The strategy in the construction sector: EC-level agreements

The strategic objective of the EFBWW is that the social dialogue at EC level serves as "a basis for future negotiations on conditions of employment at European level whereby we must seek to obtain collective agreements and press for a European social policy".[152] There are addressed the problems of the legal effect of such agreements and the extent to which they can be made binding on affiliated organisations, an issue "closely linked to the degree of internal discipline within the employers' organisations but also within the workers' organisations", which raises the issue of the lack of representativeness of employers' organisations at European level.[153] If clear agreement on delegation of bargaining powers to the EC-level organisations can be achieved, and collective agreements can be reached between them, "then these agreements will filter through into national trade union policy".[154] **As** to its content, many topics are said to suggest themselves: health and safety, environmental questions, vocational training, future outlook of the industry, and so on. The ultimate aim is EC-level collective agreements binding on sectoral organisations within the Member States.

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152 "The social dialogue and the consequences of Maastricht", Working Paper for the EFBWW Thematic Meeting, Luxembourg, 20 November 1992, Discussion memo on "Social dialogue in the industries represented by the EFBWW", **p.** 4.

153 Ibid., **p.** 5.

154 Ibid.

11.4.3 The metalworking sector

The European metalworkers' unions were for long the dominant element in the International Metalworkers' Federation (IMF), "! founded in **1893** when metalworkers in six European countries took joint action for the eight hour day. The European Metalworkers' Federation (EMF) was created as a separate body to co-ordinate IMF work in Europe and held its first European conference in **1969.** The **EMF** has affiliates from unions based in EC Member States and others, with a total affiliated membership of **6** million workers, most of which **is** from EC Member States.

Within the EC Member States there are 26 trade unions affiliated to the EMF; in only half of the Member States does a single organization represent the interests of all metalworkers. The EMF membership of *6* million means that its affiliates directly represent about half of the EC Member State workforce in metalworking. Union density figures, where they are available, are shown in the following Table, based on union membership calculated as a proportion of employees in the industry.[156]

Table 7: Trade unions and unionization rate in the EC Member States affiliated to the EMF

Member State	Union	Union Membership	%
Belgium	CMB; CEMB		
Denmark	CO Metal		
France	FGMM; FOM; FO Defense; FEAE; FM		
Germany	IG Metall	2,727,000	61.5 *Yo*
Greece	POEM		
Ireland	SIPTU		
Italy	FLM	758,304	52.4 *Yo*
Luxembourg	OGB-L; LCGB		
Netherlands	FNV; CNV	282,611 (1)	**48 *Yo***
Portugal	SIMA		

155 MacShane, Denis, "Reflexions sur l'histoire de la Federation Internationale des Ouvriers de la Métallurgie (FIOM)", in Syndicalisme - Dimensions Internationales, ed. G. Devin, 1990, Editions Européennes Erasme, chapter 13.

156 Data reflect the situation pre-dating the new accessions to the EC of 1995. But it is difficult to calculate union density in metalworking. IG Metall, for example, normally calculates its union density rate from figures fi-om establishments with a works council. This tends to over-emphasise its membership base. The data are likely to give an overestimate since, first, union membership figures can be notoriously unreliable, and, secondly, they may include among members those who have left the industry or who are out of work for some other reason but maintain membership. With this proviso, the figures presented do at least give a general picture of the rate of unionization and do allow comparisons to be made between Member States. The unionization rate of 48% for the Netherlands is probably a slight over-estimate since it is derived from statistics which include a minority of workers employed in other sectors. **A.** Marsh et al., Workplace Relations in the Engineering Industry in the UK and the Federal Republic of Germany, Anglo-German Foundation for the Study of Industrial Society, 1981). In the UK, the latest survey suggests a union density rate of 30-32%, but of 56% within the vehicle sector. N. Millward, et al., Workplace Industrial Relations in Transition, Dartmouth, 1992.

Member State	Union	Union Membership	%
Spain	UGT Metal; ELA-STV		
UK	FM/CCOO; AEEU; GMB; ISTC; MSF; TGWU	30-32 %, but in vehicles 56 % rising to 68 % for manual workers[157]	

(1) figure includes workers in some other sectors, like chemicals

IG Metall not only dominates bargaining within Germany but is capable of playing a significant role in Europe. With 2.7 million members in engineering it dwarfs all other Member State metalworking unions. Thus any co-ordinated European bargaining strategy must likely fit its agenda.

Supreme authority within the EMF rests with the General Assembly, which determines the general policy direction, meeting at least every four years. The Assembly is composed of delegates from national unions on the basis of union membership size, by country and by union. The Statutes emphasize that it should do "its utmost to bring about agreement"; a two thirds majority is needed for votes.[158]

The General Assembly elects members of the Executive Committee, again composed of national representatives, weighted by size of membership, which meets at least three times a year. The Executive Committee "endeavours to the best of its ability to reach unanimity. Decisions require a two-thirds majority of the vote".[159] A Secretariat headed by a General Secretary and Assistant General Secretary (elected by the General Assembly on the recommendation of the Executive Committee) direct the day-to-day work of the Federation.[160]

Organizations affiliated to the EMF retain their autonomy "as far as their own trade union activities are concerned". However, the EMF endeavours "to achieve common action by all metalworkers' unions in the Community". Members "pledge themselves to respect and support, as far as possible, the decisions and principles of the competent EMF organs. At their ordinary union conventions, they shall report on EMF policy and activities and submit these reports for discussion". The Statutes oblige national affiliates "in addition... to examine more advanced forms of trade union co-operation within the framework of the EMF".[161] This obligation on members to report on EMF business to all national union fora could lend itself to a prospective of co-ordinated bargaining.

The concern with coordinated activity is expressed through the focus of EMF aims on three areas: "co-operation between affiliates and co-ordination of joint demands, protection of metalworkers' interests with regard to European Community policy, and creation of a trade union counterweight to European employers' organizations and top multinational company management within the EC".[162] A series of committees and working parties have been set up to carry out EMF activities. On sectoral policy, there are working parties in a number of major industrial sectors. A Collective Bargaining

157 **Department of Employment Gazette, May 1993.**
158 **Statutes of the European Metalworkers' Federation (EMF) in the Community, Chapter II, Article 1.**
159 **Ibid., Chapter II, Article 2.**
160 **Ibid., Chapter II, Art. 3.**
161 **Ibid., Chapter I.**
162 **Sheet published by the EMF entitled: "The EMF - 6 Million European Metalworkers", February 1993.**

Committee meets at regular intervals to discuss common collective bargaining policy aims and ways and means of achieving these. On multinational companies, a number of EMF co-ordinating committees exist, often in co-operation with the IMF.

11.4.4 The strategy in the metalworking sector: EC-level co-ordination

The EMF's strategy is premised on the view that "a prerequisite for a co-ordinated bargaining policy in Europe is the strengthening and revival of regional and national trade union bargaining policies in the countries of the Community".[163] The "starting point is the grass roots workers' movement".[164]

> "bargaining policy in Europe must be constituted at grass roots level and must be properly organised at company, regional and national levels, as well as being co-ordinated in a politically effective manner across the whole of Europe. Branches and sectors shall retain their sovereignty with regard to collective bargaining... The European metalworkers' unions shall endeavour to co-ordinate their national collective bargaining structures, institutions and procedures in the interests of an ability to take joint action at European level... The EMF will step up its efforts to coordinate national bargaining policies and implement common goals".

Despite mention of agreements between the European social partners at various points[165], the emphasis of the strategy is on co-ordination of national collective bargaining efforts through the EMF. It is possible that this could be accomplished through agreements with the employers' associations, but the emphasis is on *guidelines to national bargainers,* not EC-level agreed standards imposed on them.

11.5 Conclusions

Trade union rights of autonomy at transnational level have not been given the careful consideration they require in light of the development of the European social dialogue. The institutionalisation of the European social dialogue in the Maastricht Protocol and Agreement will impact at EU level and at Member State level.

At EU level, entitlements of transnational labour organisations under the Agreement may require the scrutiny of their organizational capacity, with criteria emerging which affect the autonomy of existing transnational organisations of labour.

Two examples can illustrate this. First, scrutiny will be exacerbated by issues of financial autonomy. Article 3(1) of the Agreement appended to the Union Treaty provides:[166]

> "The Commission shall have the task of promoting the consultation of management and labour at Community level and shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties".

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163 "Collective Bargaining Policy in a Changing Europe", statement of principle on collective bargaining policy by the EMF, for the EMF Collective Bargaining Policy Conference, Luxembourg, 11-12 March 1993, p. 14.

164 Ibid., p. 15.

165 Ibid., pp. 11, 15 and 16: The last states that "The EMF shall seek to secure collective agreements covering all the qualitative issues which are of importance for the European industrial culture as a whole...".

166 Now Article 118a(1) of the EC Treaty, as amended by the Treaty of Amsterdam, 1997.

The availability of funds to support the European social dialogue depends on whom the Commission identifies as the social partners on the side of labour.

Secondly, conflicts may emerge among European organisations of labour in the course of the procedure of social dialogue envisaged by the Maastricht Agreement. Article 3(4)[167] refers for the first time to "the management and labour concerned", rather than just "management and labour". It is not clear what will happen if one of the partners on one side of the negotiating table decides to end negotiations, and others on that side want an extension of the duration of the negotiations. National experience of divided union movements in France, Italy, Spain have reflected the tendency for some trade unions to sign agreements rejected by others, with implications for trade union autonomy.

In its Communication on the Application of the Agreement, the Commission emphasised that "The social partners concerned will be those who agree to negotiate with each other. Such agreement is entirely in the hands of the different organisations".[168] This implies that negotiations might still continue, with implications for the autonomy of other organisations.

At Member State level, trade union rights of autonomy are also likely to be affected. The composition and constitutional structure of European organisations of labour will engage the autonomy of their affiliates.

Two examples illustrate how the autonomy of national trade unions will be affected by decisions of the European social partners. First, the internal structure of the European organisations of labour may impinge on national autonomy, by binding them to decisions to which they dissent. Majority voting procedures in the internal constitutions of the ETUC and of its Industry Committees may have the consequence of overriding national law's guarantees of trade union autonomy.

Secondly, the procedure of reaching agreements at European level may result in agreements being reached which national trade unions are required to implement. The European social dialogue may engage only some of the organisations representing labour in a Member State, but nonetheless produce agreements which are binding on all labour organisations.

12. European Social Dialogue and Rights of Action

The rights of trade unions include recognition, information and consultation, collective bargaining and collective agreements (including extension), trade union activities at the workplace, and strikes.

At transnational level, the natural locus for the operation of these rights would be in the relations between organisations of labour and management at European level - the European social dialogue. Trade union rights in the Member States could be affected by the development of such rights.

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167 Now Article 118a(4) of the EC Treaty, as amended by the Treaty of Amsterdam, 1997.

168 Op. cit., paragraph 31.

12.1 The European social dialogue

The European social dialogue produced a revolutionary outcome during the negotiations over the Maastricht Treaty on European Union in **1991.** The final form, and most of the substance of the provisions which eventually became the Agreement between the eleven Member States were the result of negotiations between the peak organisations of employers (UNICE and CEEP) and of workers (ETUC) at European level.

These negotiations culminated in the Agreement dated *3* 1 October **199**1 between the ETUC and UNICE/CEEP on a new draft of Articles 1**18(4)**, 1**18A** and 1**18B** of the Treaty of Rome.[169] With few modifications, this Agreement was adopted by the eleven Member States as the basis for the future labour and social law of the European Union. This remarkable success of the social dialogue at EC level indicates a hndamental change in the prospects for trade union rights at European level, and consequently, also in the Member States.

The Protocol and Agreement envisage a role for the European social partners in the formulation (and implementation) of EC labour law. The procedures laid down for their role involve the formulation of rights of recognition (exemplified in the criteria for selection of participants, discussed above in the section on rights of association). But the main emphasis is on rights to information and consultation, collective bargaining (or social dialogue) and collective agreements (including extension).[170]

12.2 "Bargaining in the shadow of the law": Supporting bargaining rights

Article *3*, paragraphs **2-4** of the Agreement on Social Policy is as follows:[171]

> "**2.** To this end, before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Community action.
>
> **3.** If, after such consultation, the Commission considers Community action advisable, it shall consult management and labour on the content of the envisaged proposal. Management and labour shall forward to the Commission an opinion or, where appropriate, a recommendation.
>
> **4.** On the occasion of such consultation, management and labour may inform the Commission of their wish to initiate the process provided for in Article **4.** The duration of the procedure shall not exceed nine months, unless the management and labour concerned and the Commission decide jointly to extend it".

The process referred to in Article **3(4)** of the Agreement[172] is the subject of Article 4(1):[173]

> "Should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements".

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169 **Agence** Europe, **No.** 5603, 6 **November** 1991, 12. **These provisions have now become Articles** 118(4), 118a **and** 1**18b of the** EC **Treaty following the Treaty of Amsterdam, 1997.**

170 **See also B. Bercusson, European Labour Law, London,** Butterworths, **1996, chapter 36.**

171 **Now Article** 118a(2)-(4) **of the** EC **Treaty, as amended by the Treaty of Amsterdam, 1997.**

172 **The re-drafted Article** 1 18A(4).

173 **The re-drafted Article** 118B. **Now inserted into the** EC **Treaty by the Treaty of Amsterdam, 1997.**

The present prospect of the EC social dialogue implies rather a tripartite process - involving the social partners and the Commission/Community as a dynamic factor. This is the scenario described as "bargaining in the shadow of the law".[174]

There is a major ambiguity as to the timing of the initiation of the process of social dialogue during the Commission's consultations. Article 3(4)[175] simply states that the process may be initiated by the social partners "on the occasion of such consultation". The question is: which consultation of the two envisaged by Article 3 - before, and/or after the Commission produces its envisaged proposal?

Each possibility has implications for the bargaining tactics of the social partners at EC level. In both cases there occurs a familiar situation of "bargaining in the shadow of the law". If the procedure may be initiated at the stage of consultations when only "the possible direction of Community action" is being considered, but before the Commission presents its envisaged proposal, the parties have to assess whether the result of their bargaining will be more advantageous than the unknown content of the EC action. There will be pressures on the social partners to negotiate and agree to avoid an imposed standard which pre-empts their autonomy, and which may be also a less desirable result.

This incentive is lost if the procedure may be initiated only at the stage of consultations after the Commission presents its envisaged proposal. The parties may be more or less content with the proposal. They may still judge that the result of further bargaining would be more advantageous than the known content of the proposed EC action, taking into account the possible amendment of the Commission proposal as it goes through the EC institutions.[176] The side less satisfied with the envisaged proposal will have an incentive to negotiate and agree to a different standard. The side more contented may still see advantages in a different agreed standard. The social partners are often able and willing to negotiate derogations from specified standards which allow for flexibility and offer advantages to both sides.

Indeed, the negotiation of the Accord which led to the insertion of these provisions into the Maastricht Treaty Protocol can be invoked as a concrete example of the process in action. The combination of expansion of competences and extension of qualified majority voting proposed in the Dutch Presidency's first draft was sufficient to induce UNICE/CEEP to agree to a procedure allowing for pre-emption of what threatened to be Community regulatory standards in a wide range of social policy areas.

12.3 The nature of social dialogue/collective bargaining at EU level

The process envisaged by the Agreement on Social Policy is not the bilateral engagement of labour and management familiar in national models of collective bargaining. At EU level, the process of social dialogue engages the EC institutions, in particular the Commission, in a dynamic of

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174 B. Bercusson, "Maastricht: a fundamental change in European labour law", (1992) 23 Industrial Relations Journal 177.

175 Now Article 118a(3) of the EC Treaty, as amended by the Treaty of Amsterdam, 1997.

176 The Maastricht Agreement provided for the Council of Ministers to adopt directives following the procedure in Article 189c of the Treaty, the "co-operation procedure" (Article 2(2) of the Agreement). The new Article 118 introduced by the Treaty of Amsterdam replicates Article 2 of the Agreement, except that the Council is now to "act in accordance with the procedure referred to in Article 189b...". This is the "co-decision" procedure. This change means that the European Parliament will have a much more important role in determining the content of EC labour law in the future, and further increases the uncertainty surrounding Commission proposals.

"bargaining in the shadow of the law". The rights of the trade unions at EU level have to be considered in this light. A critical analysis of the process as envisaged by the Commission, in its Communication on the Application of the Agreement of December 1993, highlights the substance of trade union rights at EU level regarding information, consultation, collective bargaining and collective agreements. This substance is important, even where the target is not the countemailing employer organisation, but, in the specific context of European social dialogue, also the Commission.

12.3.1 The consultation process: Engaging national bargaining processes

Articles 3(2) and 3(3) of the Agreement[177] set out the two stages of the process of consultation of labour and management. First, consultation "on the possible direction of Community action", and, secondly, "on the content of the envisaged proposal". The Communication specified with precision how the Commission proposed to implement this process:[178]

"- the first consultation of the social partners should take place on receipt of the letter fiom the Commission. The requested consultation may be by letter or, if the social partners so desire, by the convening of an ad hoc meeting. The consultation should not exceed six weeks...
- the second consultation phase will be initiated with the receipt of the second letter sent by the Commission, setting out the content of the planned proposal together with indication of the possible legal basis.

On the occasion of this second consultation, the social partners should deliver to the Commission in writing and, where the social partners so wish through an ad hoc meeting, an opinion setting out the points of agreement and disagreement in their respective positions on the draft text. Where appropriate, they should deliver a recommendation setting out their joint positions on the draft text. The duration of this second phase shall also not exceed *6* weeks".

12.15 Article 3(4) of the Agreement[179] provides an alternative outcome of the consultation process - the social dialogue process. This was acknowledged by the Communication, but it seemed that the Commission saw it following on the second phase of consultation:[180]

> "The social partners consulted by the Commission on the content of a proposal for Community action may deliver an opinion or, where appropriate, a recommendation to the Commission. Alternatively, they may also, as stated in Article 3(4), "**inform** the Commission of their wish to initiate the process provided for in Article 4".

The ECOSOC Opinion on the Commission's Communication was critical of the new procedure envisaged by the Commission. For example, the social partners at EC level are complex organisations comprising a multitude of very different national organisations, often confederations of national trade unions or employers' organisations. Proper consultation of these national organisations, which in turn have complex internal procedures requiring consultation of their affiliates, can be time-consuming. Such internal consultation processes are necessary, however, if the EC level social partners are to undertake to engage themselves and their affiliates to support a social policy initiative at European

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177 Now **Article** 118a(2) **and (3) of the EC Treaty, as amended by the Treaty of Amsterdam, 1997.**

178 **Communication, paragraph 19.**

179 **Now Article** 118a(4) **of the EC Treaty, as amended by the Treaty of Amsterdam, 1997.**

180 Ibid., **paragraph 29.**

level. A period of six weeks seems unlikely to suffice.

12.3.2 The social dialogue process: Implementation of "agreements concluded at Community level"

During the consultation process:[181]

> "management and labour may inform the Commission of their wish to initiate the process provided for in Article 4.[182] The duration of the procedure shall not exceed nine months, unless the management and labour concerned and the Commission decide jointly to extend it".

This process is a:[183]

> "dialogue between them at Community level (which) may lead to contractual relations, including agreements... (which) **shall** be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article **2,** at the joint request of the signatory parties, by a Council decision on a proposal fiom the Commission".

12.3.3 National practices and procedures: Member State obligations

"Agreements concluded at Community level shall be implemented... in accordance with the procedures and practices specific to management and labour and the Member States...".[184] It should be noted that the reference to management and labour is supplemented by "and the Member States". It seems fiom this formulation that some degree of obligation is imposed directly on Member States by the word "shall". One question is: if such implementation is obligatory, how does such an obligation operate? At least three possibilities exist.

(i) The Member States are obliged to develop procedures and practices (which may be peculiar to themselves) to implement the agreements reached at EC level. This would seem to require some formal machinery of articulation of national standards with those laid down in the agreements. The experience of implementation of EC legal measures, such as Directives, through collective bargaining provides a basis for assessing whether Member States have complied with this obligation.

(ii) The Member States are not obliged to develop new procedures and practices to implement the EC-level agreements. But where there exists machinery of articulation of national standards with those laid down in the agreements, this is to be used.

(iii) Given the nature of the parties to EC-level agreements (EC-level organisations of employers and workers), the procedures and practices peculiar to each Member State may consist of mechanisms of articulation of Community agreements with collective bargaining in the Member

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181 Article 3(4). Now Article 118a(4) of the EC Treaty, as amended by the Treaty of Amsterdam, 1997.

182 Now Article 118b of the EC Treaty, as amended by the Treaty of Amsterdam, 1997.

183 Article 4. Now Article 118b of the EC Treaty, as amended by the Treaty of Amsterdam, 1997.

184 Article 4(2). Now Article 118b(2) of the EC Treaty, as amended by the Treaty of Amsterdam, 1997

State concerned. Member States are not obliged to create such mechanisms, but national law may not interfere with such mechanisms which already exist, or which may be created by the social partners within the Member State to deal with the new development at EC level.[185]

12.4 The spill-over effect of the Agreement on trade union rights in the Member States

The evolution of the European social dialogue carries with it important implications for trade union rights in the Member States. Trade union structures will be engaged with organisations of labour at EU level. Earlier sections discussed the issue of representativeness, and the constitutional changes in the ETUC and its Industry Committees (e.g. metal-working and construction) impacting on the national trade unions affiliated with those organisations.

Processes and outcomes of collective bargaining in Member States will also have to be articulated with the European social dialogue and the framework agreements it produces. Two aspects of this articulation can be identified: subsidiarity (delegation and derogation), and extension.

12.4.1 Subsidiarity: Its meaning for trade union rights

The Agreement's confirmation of the hndamental role of the social partners in the implementation of the social dimension at EC level is seen by the Commission's Communication as:[186]

> "recognition of a ***dual form of subsidiarity*** in the social field: on the one hand, subsidiarity regarding regulation at national and Community level; on the other, subsidiarity as regards the choice, at Community level, between the legislative approach and the agreement-based approach".

This is said to be "in conformity with the hndamental principle of subsidiarity enshrined in Article **3B** of the Treaty on European Union".

The concept of subsidiarity was originally invoked in the context of the difficult issue of allocation and exercise of competences as between Member States and the Community. If this concept is also

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185 The extent of Member State obligations is the subject of a Declaration, on Article 4(2), attached to the Maastricht Treaty Agreement:

> "The Conference declares that the first of the arrangements for application of the agreements between management and labour Community-wide - referred to in Article 118B(2) - will consist in developing by collective bargaining according to the rules of each Member State, the content of the agreements, and that consequently this arrangement implies no obligation on the Member States to apply the agreements directly or to work out rules for their transposition, nor any obligation to amend national legislation in force to facilitate their implementation".

The Commission's first Communication concerning the application of the Agreement simply stated that the Article "is subject to the... declaration". This was disputed by the Opinion of the Economic and Social Committee, which contested the legal status of the Declaration, which appears to strip the Article of much of its potential.

Any doubt is now removed. The Amsterdam Treaty attaches the identical Declaration, in italics, to the new Article 118b, but the front page of the Treaty states clearly that:

> "Declarations to the Final Act are in italics, in order to distinguish them from legally-binding Treaty texts".

The obligations anticipated by the Declaration of the Member States in implementing EU agreements may now become operative. It may be noted that their Declaration transforms the obligation from implementation to developing the content of the agreement by domestic bargaining. This is not necessarily implicit in the implementation process; indeed, it goes beyond it.

186 Communication of the Commission, op. cit. paragraph 6(c).

to be invoked in the context of allocation and exercise of competences as between the EC legislative institutions and the social partners, it has to be carefully scrutinised.

There is no indication that Article **3B** has any relevance to the application of the principle of horizontal subsidiarity - the choice between action at EC level by ETUC/UNICE/CEEP or the EC institutions, or at Member State level by social partners or the Member State. The criteria for deciding which set of actors at the same level is appropriate are not necessarily those of deciding which level is appropriate according to Article **3B.** This has important implications for applying the principle of horizontal subsidiarity evident in Articles **3** and **4** of the Agreement:[187] in deciding whether the EC legislative institutions or the social partners should act.

Careful reading of the Protocol and Agreement on Social Policy and the attached Declarations provides examples of horizontal subsidiarity reinforcing rights to collective bargaining at Member State level.

In the Declaration on Article 4(2) of the Agreement, the Member States expressly delegate to collective bargaining the development of the content of EC level agreements and acknowledge no obligation to undertake legislation.[188]

According to Article 2(4) of the Agreement,[189] the implementation of Directives at Member State level may be entrusted to management and labour, subject to a guarantee by the Member State of the results imposed by the Directive.

Decisions of the European Court[190] have emphasised that the competence of the social partners to implement EC measures through collective agreements must satisfy certain conditions. The agreements concerned must cover all employees, and must include all the Directive's requirements.

The competence to implement Directives through the actions of the social partners at national level was confirmed by the Commission in an exchange of letters with the Danish social partners.[191] The Commission recognised the principle that Directives relating to labour market matters may be implemented in Denmark through collective agreements without the need for legislation.[192]

The principle of horizontal subsidiarity is confirmed by a wide range of institutions at European level: the Council, the Court of Justice and the Commission. However, the criteria set out in Article **3B** do not apply to the concept of horizontal subsidiarity, only vertical subsidiarity. The criteria for the application of horizontal subsidiarity remain to be elaborated.

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187 Now Articles 118a and 118b of the EC Treaty, as amended by the Treaty of Amsterdam, 1997.

188 The Amsterdam Treaty attaches the identical Declaration, in italics, to the new Article 118b.

189 Now Article 118(4) of the EC Treaty, as amended by the Treaty of Amsterdam, 1997.

190 In Commission of the European Communities v. the Kingdom of Denmark, (case 143/83, (1985) E.C.R. 427), the European Court of Justice held: "that Member States may leave the implementation of the principle of equal pay in the first instance to representatives of management and labour" (paragraph 8). The Court re-affirmed this principle in a second case involving Italy, Commission of the European Communities v. the Italian Republic, (case 235/84, (1986) E.C.R. 2291) when implementation of Council Directive 77/187 was at issue.

191 This exchange of letters took place on 11 May 1993. A similar exchange of letters took place between the Commission and the Swedish Government on 29 May 1993.

192 This principle had been introduced earlier by the Danish Commissioner Henning Chnstophersen. H. van Zonneveld, "De Europese sociale dialoog", in Jan Jacob van Dijk and Eric Heres (eds.), Werken aan Europa, 1994, Kampen, p. 120.

The criteria for the application of the subsidiarity principle are critical for trade union rights in the Member States. These criteria will determine the extent to which the competence to act in various areas of social and labour policy is allocated to European or national levels.

- if to European level, is the competence to be exercised by the EC institutions or the European social partners through the social dialogue?
  If the EU social partners, trade union rights in the Member States will depend on the precise forms of articulation between the European social dialogue and national systems of collective bargaining.

- if to national level, is the competence to be exercised by the Member States through legislative procedures or through Collective bargaining. Trade union rights in the Member States will depend on how much competence is attributed to the collective bargaining system in which they have a primary role.

Trade union rights in the Member States are therefore vitally affected by the as yet under-developed concept of subsidiarity.

12.4.2 Extension of collective agreements and articulation with the European social dialogue

The legal effects of transnational collective agreements resulting from the European social dialogue, and the ensuing obligations of Member States and social partners at Member State level under the Agreement have been elaborated. It is clear from this that trade union rights in Member State legal systems will also be affected. In particular, their rights concerning the extension of collective agreements beyond the social partners who negotiated them. This can be demonstrated by looking at the prospects for articulation of sectoral agreements in the Member States with the European social dialogue.

In most Member States, save the UK, sectoral bargaining is alive and well. How could this level of bargaining articulate with the European sectoral social dialogue? This is one of the methods envisaged by Article 4(2) of the Maastricht Agreement for implementing EC level agreements.[193]

On the one hand, Member State collective bargaining systems throw up numerous obstacles to articulation aimed at giving effect to EC-level sectoral agreements. Examples include:

- conditions on representativeness of workers' organisations ***(Belgium, Spain, France),***
- requirements of ratification by vote of the membership ***(Denmark),***
- non-legally enforceable agreements (***UK, Ireland),*** and
- regionalisation of sectoral bargaining ***(Germany, Spain).***

These features of national labour law systems would have to be made to conform with the expectation that sectoral agreements negotiated under the European social dialogue envisaged by the Maastricht Agreement were capable of being implemented.

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[193] Now **Article 118b(2) of the EC Treaty, as amended by the Treaty of Amsterdam, 1997. See also** B. **Bercusson, European Labour Law, chapter 35.**

On the other hand, a number of Member State systems have features which could ***reinforce*** the effect of EC-level sectoral agreements; in particular:

- the many procedures, of varying scope and complexity, for extending collective agreements to the whole of a sector ***(Belgium, France, Germany, Greece, Luxembourg, Netherlands, Portugal, Spain),*** or
- even enlargement to other sectors as in ***France.***

In contrast, a number of Member States have no provision for formal extension procedures (e.g. ***Denmark, Italy, UK***).

Attention needs to be directed, both at national and European levels, to the formulation of a set of conditions which would promote the articulation of the European sectoral social dialogue with collective bargaining in Member States. Specifically, the reinforcement of sectoral bargaining, legally enforceable agreements, and erga omnes extension procedures.[194] Each of these conditions has important consequences for trade union rights in the Member States.

13. Summary and Conclusions to Part II

PART II of the Study addressed the dynamic of change in trade union rights in the Member States, particularly in light of the European dimension. This requires an exposition of the emerging framework of industrial relations at EU level. The question is raised of the meaning of trade union rights of association, autonomy and of action projected at EU level, whether they exist, and what their significance is for trade union rights in the Member States.

The key element here is the evolution of the European social dialogue. The question of trade union rights enters into the identification and composition of the actors involved on the side of labour, the processes of social dialogue they are engaged in, and the outcomes in the form of European framework agreements. The Maastricht Agreement on Social Policy and its application by the Commission and the social partners is the starting point for analysis.

The Study examines in detail these aspects of the European social dialogue. It highlights the factors which impinge on trade union rights in the Member States and which will inevitably require a re-thinking of all the trade union rights canvassed in Part I.

Rights of association: the representativeness and efficacy of the labour actors in the European social dialogue (e.g. the ETUC) requires that the national trade unions which comprise them be sufficiently able to recruit and maintain membership. Insofar as trade union rights in the Member States have failed to secure such levels of membership, or are defeated in their efforts by labour market or other conditions, these rights must be improved to secure the result essential to maintaining the European

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194 A survey produced by B.A. Hepple outlined some of the legal and practical difficulties in the 12 Member States. He concluded: "There is a great variation between these countries in the nature and extent of decentralisation of collective bargaining, in the degree of legal support for bargaining and for the extension erga omnes of agreements. While the new institutional arrangements may provide a stimulus, the implementation of European standards will eventually turn on the strength and determination of the social partners in each country". B.A. Hepple, "The interaction between collective bargaining at European and national levels", paper for the ETUC Athens Conference, "From Maastricht to the EMU: role and responsibilities of the social partners", 9-11 November 1992 (mimeo), p. 11.

social dialogue.

Rights of autonomy: the role of the ETUC in the formulation of European labour law and social policy through the Agreement, and through the European social dialogue, requires that affiliated trade unions participate actively in its internal processes, and are engaged by them. This necessarily has implications for the autonomy of Member State trade unions and requires a re-thinking of the concept of their autonomy in national laws.

Rights of action: the consequences of European framework agreements for national systems of collective bargaining will affect the rights of action of trade unions in the Member States. They will be engaged in the process of articulating national systems with such agreements, which must be implemented. Restraints on trade union rights of action which preclude this will have to give way. Further, the principle of subsidiarity will require certain functions to be performed at Member State level. The articulation of EU level agreements with Member State systems gives particular importance to trade union rights of extension of the effect of collective agreements.

14. General Conclusions

14.1 Trade union rights in the Member States

Differences in trade union rights among the 15 Member States are attributable to different national traditions and histories.

This Study addressed three inter-related questions:

- is there a common group of rights shared by all, a majority, or a substantial minority of Member States?
- are there trade union rights not available in some Member States which would be desirable?
- could trade union rights be formulated in EU law so as to become part of Member State laws, and, if so, how?

National labour laws on trade union rights were not developed with transnational industrial relations or collective bargaining in mind. Trade union rights in the Member States need to accommodate the European dimension. Trade union rights in Member States would need adjusting to achieve this accommodation.

Trade union rights established in the laws of the Member States are already reflected in EU legislation[195] and decisions of the European Court of Justice.[196] Principles derived from some national labour laws are exported, through EU law, into other Member States' labour laws. The Study argues

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195 For example, the rights of union representatives and with regard to collective agreements in Council Directive 77/187/EEC (the "Acquired Rights" Directive; OJ L 61/26), the right to information and consultation of worker representatives in Council Directive 75/129 (the "Collective Dismissals" Directive; OJ L 48/29/EEC, as amended by Council Directive 92/56/EEC, OJ L 245/3), and in the European Works Council Directive 1994 (Council Directive 94/45/EC, OJ L 254/64).

196 For example, the principle of adherence to collective agreements in Rush Portuguesa Lda v. Office national d'immigration, Case 113/89, 27 March 1990, (1990) European Court Reports 1417; the principle of mandatory employee representation in Commission of the EC v. UK, Cases 382/92 and 383/92, 8 June 1994, (1994) European Court Reports 2435,2479.

that a fiamework of principles currently embodied in the collective labour law of the EU, includes:[197]

a. recognition of collectively negotiated labour standards;
b. workers' collective representation;
c. workers' information, consultation, participation;
d. protection of strikers against dismissal.

Is there a common group of rights shared by all, a majority, or a substantial minority of Member States? **A** survey of the legislative position of trade unions in each of the Member States and the role played by trade unions in collective bargaining in the Member States reveals wide variation - certainly at the level of formal legislative provisions. This wide variation is further highlighted by the absence of any formal provision in some Member States for trade union rights which, in others, are guaranteed constitutional status. The search for a group of formal legislative provisions on trade union rights common to the Member States is fruitless.

However, as might be expected fiom the fact that all Member States have ratified ILO Conventions Nos. 87 and 98, this formal diversity does not mean that there is no common recognition of trade union rights. In substantive terms, other Member States do guarantee trade union rights through a variety of formal provisions and effective practices.

To move fiom the reality of national trade union rights to a formulation at EU level means addressing a deeper issue - how to act at EU level and:

i. not unduly disturb national equilibria;
ii. support the emerging system of EU-level industrial relations and social dialogue.

14.2 National equilibrium

The prospect of trade union rights enshrined in EU law aspires to neutrality of impact on national systems. This is understandable:

- it aims to retain the specificity of national systems;
- it recognises the possibility of unforeseeable consequences of EU intervention on delicate national equilibria; and
- it is practically more achievable in terms of Member State consensus on a common set of rights acknowledged as neutral in terms of its impact: simply projecting at EU level what already is accepted at Member State level.

But this aspiration is unsustainable. Some impact on national equilibria cannot be avoided. Awareness of the role ofjudicial interpretation in the formation of national systems of trade union rights makes it evident that the existence of such rights in EU legal measures will produce judicial interpretations, by the European Court or national courts, which will be unlikely simply to replicate existing norms. Some deviation is unavoidable.

More important, the congruence of different national systems with an emerging EU system of industrial relations and collective bargaining is variable. The compatibility of trade union rights at

[197] ***See* chapter 8.**

Member State level will be scrutinised to assess the extent to which they require modification to accommodate the EU dimension.

The formulation of trade union rights at EU level is too obvious an opportunity to miss in at least beginning this process. At a minimum, certain trade union rights deemed essential to the desired development of EU-level industrial relations would have to be guaranteed in EU law, regardless of the position at Member State level.

This is not to under-estimate the difficulty. For example, a pre-condition of national trade union participation in the EU social dialogue might be that the representativeness of the national trade union be somehow assessed. This might be rejected by a number of trade unions, either on the ground that national, not EU criteria, were appropriate, or, more fundamentally, on the basis of the principle of trade union autonomy.

Finally, neutrality as a concept in EU-level trade union rights is premised not only on the desirability of national autonomy and trade union autonomy (vertical and horizontal subsidiarity). It also implies an established balance of forces in industrial relations. In Member States, the formulation of trade union rights was often the sequel to years and decades, even a century of struggle while a balance of forces, an "industrial settlement" was established. The current balance, evident in national labour laws, reflects the overall settlement achieved in the post-l945 period.

At EU level, this balance of forces is far from being established. While the Protocol and Agreement on Social Policy mark a defining moment, and the exercise of formulating trade union rights at EU level is an indicator of an attempt to define the settlement at EU level, it is too early to say that there is a "neutral" consensus. The formulation of trade union rights at EU level, therefore, will be perceived as partisan by the actors involved. It would be disingenuous to deny it.

At best, what could be postulated as "neutrality" might be a division of trade union rights into:

- those which aspired to mirror common national norms, and
- those reflecting selected norms, or embodying incentives, towards the support of an EU-level industrial relations system.

14.3 Support for an EU industrial relations system

An EU industrial relations system might require that certain trade union rights be created as necessary supports. Further, certain national rules might have to be overturned to sustain such a system.

For example, systems which were wholly oriented towards decentralisation of collective bargaining, and denied trade unions rights at any level above that of the enterprise, would be incompatible with the evolution of an EU system of industrial relations.

Even if existing systems were not so extreme, the equilibrium established between enterprise and other levels might have to be altered to favour the emergence of an EU system.

Again, the EU rules to this end might take different forms:

- positive rights of trade unions to function at, say, sector or national levels;
- workers' representatives in certain bodies, such as EWCs, to be nominated by sector-level organisations;
- labour standards on public procurement contracts to be those established at sector or national levels;
- incentives; for example, that certain structural finds from EC sources be contingent on involvement of sector or national unions.

The attempt to formulate trade union rights at EU level should ignore the siren call of neutrality and aim, rather, to infuse the postulated rights with the spirit of EU industrial relations. The content of these rights must be acknowledged as normatively driven by a vision of EU industrial relations and the role of trade unions in it.

Rights connected with trade union recognition, worker representation, consultation and information, and collective bargaining are central to the structuring of an EU industrial relations system, and pose difficult challenges to the equilibria of national systems often painstakingly acquired over a long period.

For example, to construct a system of EU social dialogue/collective bargaining at inter-sector level, it might be deemed necessary to impose a duty to bargain on UNICE or CEEP;[198] for example, analogous to that imposed on the central managements of multinational enterprises with respect to Special Negotiating Bodies or EWCs under the European Works Councils Directive.[199]

This pre-supposes that UNICE has the capacity to make collective agreements. But UNICE is an association of national employers' organisations, not all of whom have the same collective bargaining capacities or functions. To attribute to UNICE the capacity, or even the duty to make agreements implies a transformation of the capacities and fbnctions of at least some national employers' organisations, with consequent knock-on effects on national systems which are not structured around a inter-sector level of bargaining.

Alternatively, it has been argued that it is sector-level bargaining which is the key to developing an EU system. A legal structure aiming at this could have a direct impact on Member States, particularly in those where the forces of decentralisation are pushing sector agreements into decline. On the other hand, it might be that a sector (or inter-sector) framework at EU level could be linked to and implemented by enterprise agreements within the Member States, where these are in the ascendant, without the necessity for sector agreements at Member State level to provide the link.

A number of variations are therefore possible. But there is a need for a legal framework to structure and guarantee the conclusion of agreements and their implementation.

There is no avoiding legal pre-conditions for an EU industrial relations and collective bargaining system. The extent of these, whether they include a trade union right and corresponding employer

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198 **Respectively, Union des Confederations de l'Industrie et des Employeurs d'Europe (UNICE) and the Centre Europeen des Entreprises Publiques (CEEP).**

199 **Council Directive 94/45/EC**, OJ L **254/64**; **Article** 6(**1**): **"negotiatein a spirit of cooperation with a view to reaching an agreement";Article 9: "work in a spirit of cooperation with due regard to their reciprocal rights and obligations".**

duty to bargain - by which actors, at which levels, with what content, and what kind of machinery - should leave much scope for the protagonists concerned at different levels to decide the agenda.

But although the need is to design an EU system in light of the experience of Member State systems, the fact must be faced that many of these Member State systems were historically established without law. The ***absence*** of a legal fiamework at Member State level is not necessarily an argument against such a framework at EU level. The functionally equivalent ***practice*** of trade union recognition, worker representation, collective bargaining, and consultation and information is usually present even without a formal legal fiamework. It is the absence of such a practice at EU level which militates in favour of a formal legal framework at EU level. The common law of Europe combines law and practice into a normative framework.

Nor is this merely desirable for European integration. The Member State systems of industrial relations and collective bargaining are threatened by decline unless there is an EU-level framework of trade union rights. National systems are inadequate to protect against the workings of an international economy, The development of an international European economy dictates an EU-level legal framework.

Internationalisation of the economy beyond Europe, the global economy, may also challenge national systems. But the absence of machinery to create a global framework of rules does not mean action at EU level should be postponed. Ultimately, to defend Member State systems in the face of internationalisation, an EU legal framework of trade union rights is needed.

Trade union legal rights are an essential instrument in the development of industrial structures and practices at EU level necessary to promote both European integration of, and to protect national systems of sector bargaining, enterprise representation, information and consultation and labour standards.

14.4 Trade union rights at EU level

The European social dialogue has implications not only for trade union rights in the Member States. It raises the question of the trade union rights of the ETUC, its Industry Committees, their structure and activities, and also those of its affiliated national organisations. Two sets of issues arise.

First, what are/should be the rights of the EU-level organisations themselves in EU law (including the Protocol and Agreement) and national law? For example:

- the right to be informed/consulted about EU policy;
- the right to good faith bargaining by UNICE/CEEP;
- the right to make agreements which will be enforced;
- the right to support from the Commission and/or Member States;
- autonomy: the right of the Commission to decide criteria of representativeness.

Secondly, how are national trade unions, affiliated with the ETUC, affected by its activities? In part this means analysing the constitutional links between the national and EU-level trade union organisations.

But there are also questions about the rights (and obligations) of national trade unions; for example:

- the right to enforce agreements against Member State social partners refusing to comply (the binding quality of EU-level collective agreements);
- the right to negotiate on issues delegated by EU level agreements to Member State-level bargaining;
- the right to facilities, time off and resources to carry out duties/activities connected with EU-level industrial relations;
- the right to strike linked with EU-level industrial relations.

Questions arise as to how far these rights are consistent with purely national level trade union rights. And if, and how, they can be integrated into a harmonious whole.

In sum: the evolution of transnational social dialogue in the EU, and its institutionalisation in the Maastricht Treaty's Protocol and Agreement on Social Policy, raises the question of how it affects trade union rights within Member States. The two inter-related questions are:

- what are/should be the trade union rights of the EU-level organisations of labour in EU law (including the Protocol and Agreement) and national law?
- how are national trade union rights affected by the development of the transnational social dialogue, and the activities of the EU level organisations with which they are affiliated?

The development of a harmonious system of trade union rights integrating Member State systems into an emerging EU system of industrial relations and social dialogue is a delicate task. It entails respect for the principles of national systems, while undertaking their adaptation to a transnational system, which as yet does not possess the accumulated legitimacy of traditional systems, and achieving this adaptation without disturbing national equilibria.

14.5 The process of formulation of trade union rights

The evolution of EU collective labour law has seen contributions from the social partners, the legislative institutions (Commission, Parliament, Economic and Social Committee) and the European Court of Justice. While it may be too soon to speak of a definitive process from which trade union rights at EU level may emerge, there is a recognisable dynamic at **work:** what has been called "bargaining in the shadow of the law".

The positive qualities of this process with respect to the formulation of trade union rights are, arguably, that the social partners, most directly affected, take the primary responsibility. Only if they fail, may the legislative institutions assume the task of formulating EU policy in the form of legal measures.

However, there are a number of developments which cast a shadow of doubt over the future of this process. One risk is that the autonomy of the social partners may be subjected to intervention by EU institutions. *An* illustration is the issue of who are "labour and management" to be consulted under the Social Protocol.[200]

[200] ***See*** chapter 11.

Other developments carry the risk that both the social partners and the legislative institutions may fail to achieve a formulation, or reach one which is challenged before the European Court. The potential intervention of judges in the formulation of EU collective labour law, and specifically of trade union rights, casts a shadow over the social partners and the EU legislative institutions. This can be illustrated by the prospects of litigants:

- challenging workers' representatives: as addressed in the Court's decision in Commission of the EC v. UK;[201]
- challenging the adequacy of agreements reached under Article 13 of the EWCs Directive;
- challenging the validity of EU-level collective agreements under Article **173** of the Treaty.

The process of formulation of trade union rights at EU level, therefore, may not be amenable to the exclusive decisions of the social partners or even of the EU legislative institutions.

Like it or not, a dynamic is at work whereby trade union rights at EU level are being formulated. However it is evaluated, the well-known dynamism of EU law has affected this policy area also. EU legal interventions in areas of social policy and labour law lead inevitably to EU rules being established regarding trade union rights - the "spill-over" effect.

The **only** question, therefore, is what will be the relative contribution of the different actors involved:
- social partners
- EU legislative institutions, or
- the European Court

to the process of formulation of trade union rights. Much depends on the initiatives taken by the different bodies. But abstention is not an option.

Social partners will bargain in the shadow of the legislative institutions. Both they, and the EU legislative institutions, act in the shadow of the Court. But their prospects of influencing the shape of trade union rights in the EU, and the coherence of the framework which emerges, are greater if they actively take systematic and coherent initiatives.

201 **Cases 382192 and 383192,** [1994] **European Court Reports 2435,2479; decided 8 June 1994.**