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COMMUNICATION

**concerning the application of
the Agreement on social policy**

presented by the Commission

to the Council

and to the European Parliament

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SUMMARY

1. Entry into force of the Treaty on European Union automatically brings into force at the same time the Protocol on Social Policy and the Agreement on Social Policy ("the Agreement").
2. The Protocol and the Agreement state that eleven Member States "wish to continue along the path laid down in the 1989 Social Charter, but they point out that the Protocol and the Agreement "are without prejudice to the provisions of the Treaty, particularly those relating to social policy which constitutes an integral part of the *acquis communautaire*".
3. At least until 1996, social policy will be governed, on the one hand, by the provisions of the EC Treaty, while on the other, the provisions introduced by the Agreement will form a new basis for Community action, including the possibility for the eleven Member States which signed the Agreement to adopt legislative measures. This situation has never occurred in the Community before.
4. Articles 3 and 4 of the Agreement constitute a significant development of Article 118b of the Treaty. They redefine the Commission's task of promoting the social dialogue by placing an obligation on the Commission, on the one hand to promote the consultation of management and labour (the social partners) and on the other hand to consult them before presenting proposals in the social policy field. These Articles also open up new possibilities as regards the dialogue between the social partners at Community level, which may be implemented in certain closely defined cases, by a Council decision on the basis of a proposal from the Commission.
5. Articles 3 and 4 of the Agreement reproduce in almost identical terms, the agreement concluded on 31 October 1991 between UNICE, ETUC and CEEP within the ad hoc group set up for the purpose of defining the role and place of the social dialogue in the new Community framework.

PROMOTING CONSULTATION OF THE SOCIAL PARTNERS

6. Under the terms of Article 3(1) of the Agreement, the social partners now have a right to be consulted by the Commission both on the direction of Community social policy and on the content of Community action in this area.

In facilitating the social dialogue, the Commission must ensure "balanced support for the parties". Among the different measures which may facilitate the dialogue, mention can be made of working groups and the provision of technical assistance deemed necessary to underpin the dialogue.

THE ORGANISATIONS TO BE CONSULTED

7. Based on some criteria set out below, a number of organisations are potentially eligible to be consulted. At the same time, the Commission recognises fully that there is a substantial body of experience behind the social dialogue established between the UNICE, CEEP and ETUC.

The Commission believes, as a matter of general principle, that the extent to which organisations should be consulted within the terms of Article 3 of the Agreement should depend on the following factors.

The organisations should :

- 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 as part of Member State social partner structures, have the capacity to negotiate agreements and are representative of all Member States, as far as possible;
- have adequate structures to ensure their effective participation in the consultation process.

THE CONSULTATION PROCEDURES

8. Article 3(2) and (3) of the Agreement on Social Policy states that: "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. 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".
9. In the light of experience, the Commission suggests that :
- The first consultation of the social partners will be initiated on receipt of the Commission's letter. The requested consultation may be by letter or, if the social partners so desire, by the convening of an ad hoc meeting. The period of consultation should not exceed 6 weeks.
 - The Commission will determine its position in the light of comments received during this first consultation and will decide whether to proceed to the second phase.

- The second phase consultation of the social partners will be initiated with the receipt of the second letter from the Commission, incorporating the content of the planned proposal initiative, together with an indication of the possible legal base.
- 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.

FROM CONSULTATION TO NEGOTIATION

10. The social partners who are consulted on the content of a proposal for Community action may deliver an opinion or, where appropriate, a recommendation to the Commission. Otherwise they can inform the Commission of their desire to embark, in the context of their bargaining independence, upon a process of negotiation which could lead to a direct agreement between the parties. This negotiation process may take up to nine months and may be extended with the agreement of the Commission.
11. At or before the end of this nine-month period, therefore, the social partners have to submit to the Commission a report taking stock of negotiations. This report may inform the Commission that:
 - a) they have concluded an agreement and jointly request the Commission to propose that the Council adopt a decision on implementation, or
 - b) having concluded an agreement between themselves, they prefer to implement it in accordance with the procedures and practices specific to management and labour and to the Member States, or
 - c) they envisage pursuing the negotiations beyond the nine months and accordingly request the Commission to decide with them upon a new deadline, or
 - d) they are unable to reach an agreement.
12. Where (d) applies, the Commission will examine, in the light of the work already undertaken, whether a legislative instrument in the area under consideration would be appropriate. The Economic and Social Committee and the European Parliament will also be consulted in accordance with the procedures laid down in the Treaty.

THE IMPLEMENTATION OF THE AGREEMENTS

13. Agreements concluded at Community level are to 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 from the Commission.

The Council is to act by qualified majority, except where the agreement in question contains one or more provisions relating to one of the areas referred to in Article 2(3), in which case it shall act unanimously.

14. Under the Agreement, the Commission is not legally required to consult the European Parliament on requests made to it by the social partners concerning implementation of an agreement by means of a Council decision. However, it does intend to inform the European Parliament and to send the text of the agreement, together with its proposal for a decision and the explanatory memorandum, so that Parliament may, should it consider it advisable, deliver its opinion to the Commission and the Council.

THE COUNCIL DECISION

15. The Commission considers that the Council decision can only relate to the text of the agreement as signed by the parties concerned. If the Agreement were to be amended, it could no longer be regarded as an agreement freely concluded between the social partners.
16. If the Council decides in accordance with the procedures set out in the last subparagraph of Article 4(2), not to implement the agreement as concluded by the social partners, the Commission will withdraw its proposal for a decision and will examine whether a legislative instrument in the area under consideration would be appropriate.

THE IMPLEMENTATION OF DIRECTIVES BY COLLECTIVE AGREEMENTS

17. The Agreement establishes the general principle that directives may be implemented by collective agreement. This principle has been recognised in the case law of the Court of Justice. It is also in line with the provisions of the International Labour Organisation and the Council of Europe.

INTRODUCTION

1. Entry into force of the Treaty on European Union automatically brings into force at the same time the Protocol on Social Policy and the Agreement on Social Policy concluded between the Member States of the European Community with the exception of the United Kingdom of Great Britain and Northern Ireland (hereinafter referred to as the Agreement).
2. The aim of this communication is to set out the Commission's approach to the implementation of the Protocol and Agreement taking into account past experience in this field. The Commission will of course be prepared to review and amend these procedures in the light of experience gained and of the debate it expects to stimulate with the other Community institutions, the Member States and the organisations of social partners at Community level. This will be a dynamic process which will grow and develop over time. The Commission firmly believes therefore that it will only be possible to determine the changes and adjustments required through practical experience in applying the Agreement. The opportunity for such revision will be provided by the report on progress in achieving the objectives of Article 1 of the Agreement which the Commission is required to draw up each year under Article 7 of the Agreement. This latter report will, for practical purposes, be merged with the Report on the application of the Community Charter of the Fundamental Social Rights of Workers.
3. In concluding an Agreement on Social Policy at Maastricht in the form of a Protocol accepted by the Twelve, the eleven signatory Member States demonstrated their desire to give the Community the resources required to ensure that the social dimension can progress at the same pace as the other aspects of the construction of Europe, more particularly the economic aspect.

4. The Agreement sets out the social policy objectives, following the same path adopted in the Social Charter of 1989, and embracing the promotion of employment, improved living and working conditions, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment, and the combating of exclusion.
5. These objectives supplement the general and specific tasks of the Community as set out in the Treaty establishing the European Community, as replaced by Article 2 of Title II of the Treaty on European Union, which refers to promoting a high level of employment and of social protection.

The contribution of the Maastricht Treaty

6. The contribution of the Agreement is three-fold:
 - a) It extends and clarifies the Community's powers.
 - b) The Agreement lays down special rules for the adoption of measures presented in this context.

Firstly, it confirms the provision whereby decisions can be taken by qualified majority in respect of health and safety at the workplace and extends this possibility to a number of new areas:

- working conditions;
- the information and consultation of workers;
- equal opportunities and equal treatment between men and women;
- the integration of persons excluded from the labour market.

Secondly, it provides for decisions in the following areas to be taken unanimously by the Eleven signatory Member States:

- financial contributions for promotion of employment and job creation;
- social security and social protection of workers;
- protection of workers where their employment contract is terminated;
- representation of workers and co-determination;
- conditions of employment for third-country nationals legally residing in Community territory.

Finally, it explicitly excludes from the Agreement any matters relating to pay, the right of association, the right to strike and the right to impose lock-outs.

- c) The Agreement confirms the fundamental role of the social partners - as recognised by Article 118B of the Single Act - in the implementation of the social dimension at Community level. In conformity with the fundamental principle of subsidiarity enshrined in Article 3B of the Treaty on European Union, there is thus 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.

Undoubtedly, this third element is likely to have the greatest consequences. The Commission can only express its pleasure at the fact that this principle of dual subsidiarity, which was in fact introduced by

the Commission as part of its contribution to the intergovernmental conference and subsequently adopted by the social partners, has now been incorporated into the Agreement.

It is also important to note that this recognition of the role of the social partners operates at two levels:

- at national level, in that "a Member State may entrust management and labour, at their joint request, with the implementation of directives" adopted pursuant to the Agreement (Article 2 (4));
- at Community level, in that the Agreement introduces a new procedure for consulting the social partners, which may, "should management and labour so desire, ... lead to contractual relations, including agreements" (Article 4).

The scope of the Agreement

7. The Agreement is soundly based in law given that the Protocol on Social Policy, which was adopted by the Twelve and thus ranks as a treaty, allows for measures to be taken by eleven Member States.

Thus, the Community nature of measures taken under the Agreement is beyond doubt, which means that the Court of Justice will be empowered to rule on the legality of directives adopted by the Eleven and to interpret them. The scope of these directives will comply with the territoriality principle; in other words, such directives will not apply on the territory of the United Kingdom, but a UK national - or the

subsidiary of a UK-registered group - resident on the territory of each of the other eleven Member States will be subject to the (harmonised) legislation of the Member State in question. Finally, the Protocol forms part of the *acquis communautaire* like any other provision of the EEC Treaty.

8. It is important to stress, though, that the Treaty on European Union does not preclude institutions having recourse in the social field to the provisions of the EEC Treaty pursuant to procedures governing the twelve Member States.

Social policy is therefore governed:

- by the provisions of the EC Treaty as amended by the Treaty on European Union; and
- by the provisions introduced by the Agreement, which will form a new basis for Community action, including the possible adoption of legislative measures by the eleven Member States which signed the Agreement.

Social policy is thus subject to two free standing but complementary legal frames of reference (see Annex 1).

The Commission's principal objective is to promote the development of a European social policy which will benefit all the citizens of the Union and will therefore enjoy, as far as is possible, the support of all the Member States.

The Commission hopes, therefore, that Community social policy action will once again be founded on a single legal basis. A major opportunity to achieve this will be the conference of representatives of Member State governments in 1996.

The main considerations to be taken into account when deciding which procedure to opt for i.e. EC Treaty or Agreement of the Eleven - are:

- the nature of the proposal;
- the attitude of the social partners to it;
- the need to ensure that the social dimension progresses at the same pace as other Community policies, and hence the possibility for the Council to reach decisions by qualified majority;
- the desire to ensure that all workers throughout the Community benefit from the proposed measure;
- the possibility for all twelve Member States to move forward together.

As far as future proposals are concerned, the Commission will decide on a case by case basis, in the light of the above criteria, whether or not to make use of the Protocol. However, for proposals concerning health and safety at work, the Commission will give priority to instruments which enable a decision to be taken by all twelve Member States.

As regards the proposals presented under the social action programme and still pending at the Council, the Commission will decide on a case by case basis whether or not to make use of the Agreement in order to progress the proposals, should there be an impasse at the Council. In cases where it opts for using the

Agreement, the Commission will do everything possible - in agreement with the social partners concerned, where appropriate - to ensure that work which has already been done is taken into account and thus to speed up the consultative process.

ORIGIN OF ARTICLES 3 AND 4 OF THE AGREEMENT

9. Articles 3 and 4 of the Agreement are heavily inspired by the agreement concluded on 31 October 1991 by UNICE, ETUC and CEEP, and may be regarded as a significant evolution of Article 118b of the Treaty¹. They redefine the Commission's task of promoting the dialogue between management and labour (the social partners) in terms of promotion of consultation of them and an obligation to consult them before submitting proposals in the social policy field. They also open up a new prospect for the Community social dialogue in that it may now lead to the establishment of contractual relations, including agreements, which may be implemented, in defined circumstances, by a Council decision based on a proposal from the Commission.

The functions of the social dialogue

10. The traditional dialogue between the social partners at Community level under the terms of Article 118b of the EC Treaty has always taken the form of discussions and exchanges of views on matters of common interest. Even if these meetings did not always result in formal agreement on the part of the two sides, they did generate joint opinions on a variety of important subjects such as macroeconomic problems, the introduction of new technologies and the

¹ Added by the Single Act; it reads: "the Commission shall endeavour to develop the dialogue between management and labour at European level which could, if the two sides consider it desirable, lead to relations based on agreement".

adaptability of the labour market.

In terms of implementing the Agreement, it is important to distinguish clearly between two different functions of the social dialogue :

- . consultation of the social partners for the purpose of obtaining the opinions or recommendations of the employers' and workers' European organisations on the different proposals in preparation within the Commission;
- . negotiations between the social partners which, in the light of their bargaining autonomy and the terms of Article 3 (4), may lead to an agreement.

CONSULTATION OF THE SOCIAL PARTNERS

PROMOTING CONSULTATION OF THE SOCIAL PARTNERS

11. Under Article 3(1) of the Agreement "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". The social partners now have a right to be consulted by the Commission both on the direction of Community social policy and on the substance of Community action. The obligation on the Commission to promote the social dialogue is stronger than the previous formulation set out in Article 118b of the EC Treaty ("shall endeavour to develop the dialogue between management and labour at European level"). In the Agreement, the

Commission "shall have the task of promoting the consultation" taking "any relevant measure to facilitate their dialogue".

12. The signatories to the Agreement thus assigned to the Commission a dynamic role in promoting this dialogue, and entrusted it with the task of playing an active part in overcoming any difficulties or reluctance which might occur on the part of one or other of the partners and possibly impede progress. The relevant measures to facilitate the dialogue may be grouped under various types of support: the organisation of meetings; support for joint studies or joint working groups; and support for technical assistance deemed necessary to underpin the dialogue.
13. In facilitating the social dialogue, the Commission has the responsibility to ensure "balanced support for the parties". To that end, and to ensure a transparent and balanced approach, the Commission is currently reviewing the assistance granted recently to the different social partners. An annual statement of the support provided will be issued in future years by the Commission.

THE CONSULTATION PROCEDURES

14. Article 3(2) and (3) of the Agreement states that: "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. 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".

Current situation

15. It is essential to recall that, in drawing up its proposals, the Commission has always arranged for wide-ranging consultation. In the social field, this consultation has often taken place through a number of advisory committees, each one having a specific area of responsibility; they are tripartite committees (governments, employers and workers) and the members are appointed by the Council on a proposal from the governments of the Member States. The various joint committees perform a similar advisory role. They are set up by the Commission in sectors where common policies are in operation or are being prepared. In other cases, informal meetings provide for social dialogue and consultation of the social partners in the sector concerned on the different Commission proposals which may have consequences in the social field.
16. Ad hoc consultation procedures have also been established alongside these formal and informal advisory bodies. It is useful to recall that the Commission agreed with the social dialogue steering group² upon the following consultation procedure for certain proposals for legislation to which the social partners attached great importance, but which did not fall within the scope of any of the existing advisory bodies. The social partners are consulted jointly on each proposal in two stages - a first consultation taking place on the basis of a Commission discussion paper, followed by a second one held within the following three months on the basis of a fresh Commission working paper, more detailed and closer to the preliminary draft which the responsible departments envisage presenting to the Commission. After these consultations,

² Set up at political level by representatives of UNICE, CEEP and ETUC and the Commission.

the departments of the Commission draw up an inventory of the points of agreement and disagreement, as expressed by the social partners, and pass it on to the Commission for its final deliberations on the proposal.

17. Alongside this two-stage joint consultation, the Commission departments have conducted additional consultations with representatives of management and labour in some industrial and service sectors more concerned by particular proposals under consideration and also with other major organisations which do not participate in the Community social dialogue.

In the context of this two-stage joint consultation process the Commission departments have extended their consultations to other organisations which are representative in both the economic and social fields.

18. These prior consultations have undoubtedly helped to bring viewpoints closer together and improve mutual understanding, even if differences of view have persisted in certain cases between those who want legislation at Community level and those who oppose it.

New approach

19. The Agreement describes these two stages :

Stage 1

Article 3(2) specifies that "before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Community action".

Stage 2

- . "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" (Article 3(3) of the Agreement).

In the light of the experience already acquired, the Commission proposes to proceed as follows:

- . the first consultation of the social partners would take place on receipt of the letter from 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 period should not exceed six weeks;
- . the Commission will decide its position in the light of comments received during the first round of consultations, and will decide whether to proceed to the second phase;
- 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.

20. The new consultative procedures will not be a complete substitute for the old, especially where these involve the use of well established tripartite consultative committees. In particular, the following committees would be the mechanism for consultation of the social partners, including where appropriate consultation under the terms of Article 3: the Advisory Committee on Safety, Hygiene and Health Protection at Work and the Advisory Committee on the Free Movement of Workers. The two procedures may, on occasion, therefore operate in a parallel way depending on the subject matters of the specific proposal. The Commission will ensure, however, that duplication is avoided and that there is the maximum of transparency at all stages of the different procedures.
21. The Commission thinks it expedient to re-examine the way the social dialogue works at present with a view to promoting dialogue under the Agreement. To this end, it intends to take the appropriate steps to rationalise the various consultation processes, including such processes at sectoral level.

THE ORGANISATIONS TO BE CONSULTED

22. When drawing up the various measures it proposed further to the action programme relating to the implementation of the Community Charter of the

Fundamental Social Rights of Workers, the Commission took the view that it would be advisable for many initiatives of prime political importance to form the subject of in-depth consultation in the context of the social dialogue. These initiatives did not fall within the scope of any of the existing advisory committees. Moreover, the conclusions of the meeting held at the Palais d'Egmont on 12 January 1989, adopted unanimously, authorised the steering group to request the Commission "to consult the two sides of industry on any project or proposal for a decision during its preparatory phase".

In the context of the two-stage joint consultation process which the Commission agreed upon with the representatives of ETUC, UNICE and CEEP, the Commission departments have extended their consultations to other organisations which are representative in both the economic and social fields.

23. Since the adoption of the Maastricht Treaty, the Protocol on Social Policy and the Agreement, a number of the organisations which do not participate in the existing social dialogue have submitted formal requests to the Commission to take part directly in the social dialogue. To take a position on this question in full knowledge of the facts, the Commission carried out a study of European employers' and workers' organisations so as to enable the Commission to understand more clearly the different mechanisms by which representative social dialogues are established at national level, and to assist in assessing how this process might best operate at Community level.

This study on the social partners, the main results of which are set out in Annex 3, is available to the public on request. The Commission draws two main messages from this study:

- (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, and
- (b) 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.

24. As a matter of general principle the Commission believes that organisations should be consulted within the terms of Article 3 of the Agreement in so far as they meet the following criteria.

The organisations should:

- 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 sets out the organisations which currently comply broadly with these criteria. The list will be reviewed in the light of experience acquired in applying the new procedures instituted by the Agreement, and of the way the social dialogue develops.

25. At the same time, the Commission recognises that there is a substantial body of experience behind the social dialogue established between the UNICE, CEEP and ETUC. It has also taken note of their joint position regarding the implementation of the new procedures introduced by the Agreement.
26. There are a number of organisations which meet the criteria set out in para 24 and which are thus potential candidates for involvement in the consultation process. The Commission does not wish to take a restrictive view of this issue, but is at the same time conscious of the practical problems posed by a multiplicity of potential actors. Only the organisations themselves are in a position to develop their own dialogue and negotiating structures. The Commission will endeavour to promote the development of new linking structures between all the social partners so as to help rationalise and improve the process. Special attention will be paid here to the due representation of small and medium-sized undertakings.
27. This raises the question of whether or not it is necessary in a first phase to create some form of consultation body or umbrella liaison committee for the purposes of the procedure foreseen under Article 3 of the Agreement. Having carefully considered the matter, the Commission considers that at this initial stage this is not the best way forward, though this question will undoubtedly need to be re-examined in the light of experience as the process develops.

New approach to consultation: Summary

28. The situation regarding consultation of the social partners on social policy matters is now as follows:
- The Commission will continue its policy of wide-ranging consultation

to ensure that its policy relates as closely as possible to economic and social realities. Such consultation will cover all European or, where appropriate, national, organisations which might be affected by the Community's social policy.

- Within the framework of Article 3 of the Agreement it will undertake formal consultations with the European social partners' organisations which are listed in Annex 2 and which meet the criteria set out in para 24.
- The Commission feels that these specific consultation procedures under the terms of Article 3 of the Agreement should apply to all social policy proposals, whatever legal basis is eventually decided on. The Commission also reserves the right to engage in specific consultations on any other horizontal or sectoral-type proposal which has social implications.
- The formal consultation of the social partners provided for in Article 3 of the Agreement may lead to the adoption of opinions, recommendations or agreement-based relations (including agreements) within the social partners' sphere of competence.

FROM CONSULTATION TO NEGOTIATION

29. 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". Should they decide on this latter course of action, they may embark, independently, upon a process of negotiation which could lead to the establishment of a direct agreement between the parties. The negotiation process may take up to nine months and may be extended with the agreement of the Commission.

30. The question of whether an agreement between social partners representing certain occupational categories or sectors constitutes a sufficient basis for the Commission to suspend its legislative action will have to be examined on a case-by-case basis with particular regard to the nature and scope of the proposal and the potential impact of any agreement between the social partners concerned on the issue which the proposals seek to address.
31. In their independent negotiations, the social partners are in no way required to restrict themselves to the content of the proposal in preparation within the Commission or merely to making amendments to it, bearing in mind, however, that Community action can clearly not go beyond the areas covered by the Commission's proposal. 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. However, the Commission takes the view that the provisions regarding small and medium-sized undertakings referred to in Article 2(2) of the Agreement should be borne in mind by organisations which are signatory to an agreement.
32. The negotiations may not exceed nine months, unless the social partners concerned and the Commission decide jointly to extend them. The Agreement

between the Eleven has associated the Commission in this decision on extension and empowered it to assess the two parties' chances of arriving at an agreement within the period set. This will prevent any prolongation of fruitless negotiations which would ultimately block the Commission's ability to regulate. In making such an assessment, the Commission will respect fully the social partners' independence.

33. At or before the end of this nine-month period, therefore, the social partners have to submit to the Commission a report taking stock of the negotiations. This report may inform the Commission that:

- a) they have concluded an agreement and jointly request the Commission to propose that the Council adopt a decision on implementation, or
- b) having concluded an agreement between themselves, they prefer to implement it in accordance with the procedures and practices specific to management and labour and to the Member States, or
- c) they envisage pursuing the negotiations beyond the nine months and accordingly request the Commission to decide with them upon a new deadline, or
- d) they are unable to reach an agreement.

34. Where point d) applies, the Commission will look into the possibility of proposing, in the light of the work already done, a legislative instrument in the field in question and will forward the result of its deliberations to the Council. The Economic and Social Committee and the European Parliament will also be

consulted in accordance with the procedures laid down in the Treaty.

35. At any event, and without prejudicing the principle of the autonomy of the social partners (a principle which underlies Articles 3 and 4 of the Agreement), the Commission feels that the European Parliament must be fully informed at all stages of any consultation or negotiation procedure involving the social partners.

36. Consultation of the Member States will take place as in the past. As regards the situation in the EFTA countries, the point has already been made that the Protocol forms part of the *acquis communautaire* like any other provision of the EC Treaty. Thus, a decision taken on the basis of Article 4 may be extended to the EFTA countries too. In practice, the social partners' organisations normally cover the EFTA countries, so that they are de facto integrated at all stages of the consultation procedure, with negotiation being a matter for the social partners.

THE IMPLEMENTATION OF THE AGREEMENTS

37. Agreements concluded at Community level are to be implemented:
 - a) either in accordance with the procedures and practices specific to management and labour and the Member States; this provision is subject to the following declaration:

"The 11 High Contracting Parties declare that the first of the arrangements for application of the agreements between management and labour at Community level - referred to in Article 4(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".

- b) or, in matters covered by Article 2, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission.

The Council is to act by qualified majority, except where the agreement in question contains one or more provisions relating to one of the areas referred to in Article 2(3), in which case it is to act unanimously.

In the event of negotiations resulting in an agreement that the social partners decide to implement via the voluntary route, the terms of this agreement will bind their members and will affect only them and only in accordance with the practices and procedures specific to them in their respective Member States.

THE COUNCIL DECISION

- 38. The Commission's view is that implementing an agreement concluded at Community level by means of a Council decision on a proposal from the Commission at the joint request of the social partners would give the Council no opportunity to amend the agreement. For this reason, the Commission will merely propose, following examination of the agreement between the social partners, the adoption of a decision on the agreement as concluded.
- 39. By virtue of its role as guardian of the Treaties, the Commission will prepare

proposals for decisions to the Council following consideration of the representative status of the contracting parties, their mandate and the "legality" of each clause in the collective agreement in relation to Community law, and the provisions regarding small and medium-sized undertakings set out in Article 2(2). At all events, the Commission intends to provide an explanatory memorandum on any proposal presented to the Council in this area, giving its comments and assessment of the agreement concluded by the social partners.

Where it considers that it should not present a proposal for a decision to implement an agreement to the Council, the Commission will immediately inform the signatory parties of the reasons for its decision.

40. Under Article 4(2) of the Agreement, the Commission is not legally required to consult the European Parliament on requests made to it by the social partners concerning implementation of an agreement by means of a Council decision. However, the Commission does intend to inform Parliament and to send it the text of the agreement, together with its proposal for a decision and the explanatory memorandum, so that Parliament may, should it consider it advisable, deliver its opinion to the Commission and to the Council.
41. The Council decision must be limited to making binding the provisions of the agreement concluded between the social partners, so the text of the agreement would not form part of the decision, but would be annexed thereto.
42. If the Council decides, in accordance with the procedures set out in the last subparagraph of Article 4(2), not to implement the agreement as concluded by the social partners, the Commission will withdraw its proposal for a decision and will examine, in the light of the work done, whether a legislative instrument in the area in question would be appropriate.

THE IMPLEMENTATION OF DIRECTIVES BY COLLECTIVE AGREEMENT

43. Article 2(4) of the Agreement states that a signatory Member State "may entrust management and labour, at their joint request, with the implementation of directives adopted pursuant to paragraphs 2 and 3". However, the Member State remains responsible for ensuring that "management and labour have introduced the necessary measures by agreement" and for taking "any necessary measures enabling it at any time to be in a position to guarantee the results imposed by that directive". This implementation of a directive by agreement must take place "no later than the date on which a directive must be transposed in accordance with Article 189".
44. This provision establishes, in the context of the Agreement, the general principle that directives may be implemented by collective agreement. This principle has been recognised in the case law of the Court of Justice³. It is also in line with the implementation requirements of the International Labour Organisation⁴ and the Council of Europe⁵.
45. Article 2(4) of the Agreement must be interpreted in the light of the objectives set out in Article 1 of that same Agreement: promotion of dialogue between management and labour, taking account of the diverse forms of national practices, in particular in the field of contractual relations.
46. Article 2(4) does not require the Member States to introduce any particular or

³ Case 91/81 [1982] ECR 2133; Case 193/83 [1985] ECR 427.

⁴ ILO Conventions Nos 100, 101, 106, 111, 171, 172, etc.

⁵ Article 35 (1) of the European Social Charter.

special procedures or that any explicit formal terms of reference be given to the social partners; nor is there any need for them to submit a joint request prior to negotiations between them on an agreement for implementation of the directive. The actual conclusion of an agreement and its forwarding to the competent authority of the Member State should be regarded as a tacit joint request within the meaning of the first paragraph of Article 2(4).

47. Under the second subparagraph of Article 2(4) the Member State concerned remains responsible for ensuring that, no later than the date on which a directive must be transposed in accordance with Article 189, the social partners have introduced the necessary measures by agreement and for taking "any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that directive". This wording, which is a slightly amended version of corresponding provisions in certain directives⁶, implies that the Member State concerned must provide for procedures to deal, where appropriate, with any shortcomings in the agreement implementing the directive, the purpose being to ensure that the workers concerned are in practice afforded their rights under the directive.
48. Under Article 2(4), the Member State must "guarantee the results imposed by that directive", although it may entrust management and labour with its implementation. In this connection the reference in Article 1 of the Agreement to measures which "take account of the diverse forms of national practices, in particular in the field of contractual relations" is relevant.

⁶ Article 2(1) of Council Directive 92/56/EEC of 24/6/1992; Article 9(1) of Council Directive 91/533/EEC of 14/10/1991.

CONCLUSION

49. The new situation created by the co-existence of two legal frameworks for action in the social field will be complex to manage.

The new role for the social partners is a good step forward but will need time to grow and develop.

The Commission will do all it can to operate these new procedures in an efficient but flexible manner. The important point at this early stage of implementing the new mechanisms is to allow space for natural evolution. The creation of heavy structures is not likely to yield the best results at this early stage.

The Commission feels that this Communication lays down the groundrules for the implementation of the new procedures so that business can be conducted efficiently and openly. The Commission sees this as a dynamic process which will develop with time and will require re-examination at some later stage.

To this end, the Commission has decided to make provision for a regular pattern of appraisal and re-examination in cooperation with the Council, the Parliament and the social partners themselves in the light of experience gained.

OVERVIEW OF THE MAIN LEGAL BASES FOR SOCIAL POLICY MEASURES

MAASTRICHT PROTOCOL

EC TREATY

QUALIFIED MAJORITY (44/66)

QUALIFIED MAJORITY (54/76)

POSSIBLE (Art. 2 (1))

POSSIBLE

improvement in particular of the
working environment to protect
workers' health and safety

.Art. 49: free movement of workers

.Art. 54: freedom of establishment

working conditions

.Art. 57: mutual recognition of diplomas

the information and consultation of
workers

.Art. 125 (new): ES
(application decision)

equality between men and women
with regard to labour market
opportunities and treatment at work

.Art. 127 (new): vocational training

.Art. 118a: health and safety at work

the integration of persons excluded
from the labour market

.Art. 100a, Art. 43: agriculture; Art. 75:
transport

UNANIMITY (11) REQUIRED (Art. 2 (3))

social security and social protection of workers

protection of workers where their employment contract is terminated

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

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

financial contributions for promotion of employment and job creation

UNANIMITY (12) REQUIRED

.Art 51: social security (measures necessary for freedom of movement)

.Art. 100: internal market

.Art. 130d: tasks, priority objectives and organisation of the Structural Funds

.Art. 235

EXPLICITLY EXCLUDED FROM

COMMUNITY

JURISDICTION (Article 2 (6))

pay

right of association, the right to strike, the right to impose lock-out.

Social partners' organisations currently complying with the criteria set out in paragraph 24 of the Communication

1. General cross-industry organisations:

- Union of Industrial and Employers' Confederations of Europe (UNICE)
- European Centre of Enterprises with Public Participation (CEEP)
- European Trade Union Confederation (ETUC)

2. Cross - industry organisations representing certain categories of workers or undertakings:

- European Association of Craft, Small and Medium-Sized Enterprises (UEAPME^{EUROPMI} and other associated organisations)
- Confédération européenne des cadres (CEC)
- Eurocadres

3. Specific organisations:

- EUROCHAMBRES

4. Sectoral organisations with no cross-industry affiliation⁶⁶

- Eurocommerce
- COPA/COGECA

Sectoral organisations of UNICE and committees of the ETUC will also be consulted as required (see category I).

- Association of European Cooperative Insurers, AECI
- International Association of Insurance and Reinsurance Intermediaries, BIPAR
- European Insurance Committee, CEA
- Banking Federation of the European Community
- Savings Banks Group of the European Community, GCECEE
- Association of Cooperative Banks of the EC
- European Timber Association, ETA
- Confederation of the National Hotel and Restaurant Associations in the European Community, HOTREC
- European Construction Industry Federation
- European Regional Airlines Association, ERA
- International Civil Airports Association, ICAA
- Association des transports aériens à la demande
- Association of European Community Airlines, AECI
- Association of European Airlines, AEA
- Organisation européenne des bateliers
- International Union for Inland Navigation
- European Community Shipowners Association
- Community of European Railways
- International Road Transport Union

Main Findings of the "Social Partners Study (Representativeness)"

The main purpose of the study is to get an overview of what is represented by a number of European federations at all-industry level (the exact choice is explained below). It does not aim to give a full description covering all representative all-industry or sectoral social partners' organisations at European or national level.

Key questions dealt with in the initial phase (the expert reports)

In the first phase of the study a report consisting of two parts was made for each Member State by an independent expert from that country. The first part of the expert reports supplied the basic data which show how the following issues of representativeness of employers' and trade union organisations are dealt with within the framework of both formal consultations and collective bargaining:

- if systems for formal or mutual recognition of social partners exist, what criteria are used to establish whether they are representative?
- the existence of formal mechanisms for consulting social partners at national, sectoral or regional levels: who is involved?
- in the context of both **formal consultations** (at national, regional or sectoral levels) and of **negotiations**, an inventory of relevant legal, administrative and political rules concerning trade unions and employers organisations, in particular rules regarding the inclusion and/or exclusion of certain organisations.

The second part of the expert reports consisted of "individual factsheets" for each relevant (within the context of the study) organisation of employers and trade unions in that country, indicating:

- **type:** its area of activity (industries covered);
- **quantitative data:** about its membership and affiliated organisations;
- **qualitative membership data:** what type of membership (e.g. over- or under-representation of certain categories or sectors);
- **collective bargaining role:** to what extent is the organisation involved in concluding collective agreements;
- **role in consultations:** its involvement in formal consultations at national level (if more appropriate, at regional or sectoral levels);

- **links** of the organisation with other organisations, in particular membership of organisations at a higher level (national, EC), and
- **representation**, directly and indirectly, in the annual ILO-meetings.

Choice of organisations covered by the study

The study deals with European federations of employers' and trade union organisations at all-industry level. The selection of "relevant" organisations for the purpose of this study was carried out as follows:

Included are federations with member organisations having a clear vocation to represent the interests of their members as either employers or trade union organisations both in the context of negotiations (with the "other side") and in consultations. Some organisations are included in the study although it was not a priori fully clear to what extent they would satisfy this criterion, one of the purposes of the study being to clarify their nature. Some organisations were added to the list of "relevant" organisations, because they had made explicit requests to the Commission to be considered for inclusion in the Social Dialogue.

More specifically, twelve confederations were chosen, for the following reasons:

- UNICE, CEEP and ETUC because they are already participants in the social dialogue at European level;
- on the trade union side the two following organisations who seek participate in the social dialogue: CEC and CESI;
- on the employers' side UEAPME, EUROPMI and possibly EMSU who have made similar requests on behalf of SME's; AECM and CEDI, which equally represent SME's at the European level, have been added to permit a more complete comparison between these "competing" organisations;
- EUROCOMMERCE, although not an all-industry, but a multi-sectoral organisation also with substantial SME-membership, has also requested to be recognized as the first representative of the trade sector in social affairs, rather than UNICE. ECWITA, a partially competing sectoral federation (with EUROCOMMERCE), was included to clarify the situation regarding the (wholesale) trade sector.

The fact that no other sectoral federations were included, does not imply that they would be of less representative significance, both in their own sector or at European level, but only means that in the other sectors questions concerning representativeness did not arise in a similar way.

The inclusion of certain federations in this study therefore in no way prejudices their representativeness. It mainly means that there was a need to have more information about what they represent and about their (inter)relationships. Some other European organisations, which are in themselves much more important than some of the ones just mentioned, were not included because there was no need, within the context of the application of the Social Protocol, to have such clarification about them.

Methodology used

The study was carried out in the period September 1992 - July 1993. Initially the work was mainly done by the national experts selected by the Commission who were responsible for drafting a report about their own country with the contents described above. In a next phase all twelve country reports were analysed and summarised by the services of DG V in the form of so-called "quick analyses" Part A and Part B, which were largely based upon the reports but which also contained data which were supplied by the expert to the Commission after closure of their final report.

These documents were then sent to the twelve European federations examined to give them an opportunity to react to their descriptions, and to verify the correctness of the data, in particular those relating to their own organisation. In most cases the provisional findings were also discussed with them (in informal, bilateral meetings). Similarly, the documents have been the subject of extensive discussions with the national administrations of the Member States (in most cases the Ministry of Labour or Social Affairs), which have been closely involved in this study project from the beginning in September 1992 through the meetings of the Directors General for Working Relations and have all corrected the initial drafts.

The latest draft is therefore still based on the initial work of the national experts, but it has also incorporated many comments and data coming from the consulted organisations and administrations.

The study addresses the following questions in particular:

1. What systems for recognition of social partners do exist in the Member States?

For collective bargaining, in most countries mutual recognition is the basic mechanism, but additional formal or legal requirements may have to be fulfilled. In several countries there are mechanisms (for example quantitative criteria established by law or otherwise) to make a distinction between organisations with (the most) substantial membership and those which are less representative.

For other purposes (for example representation on consultative bodies),

there are in half of the Member States formal recognition mechanisms which have different or additional features to the ones used for collective bargaining purposes.

The study shows that there is a great diversity in the Member States in the systems and mechanisms used for recognition of social partners' organisations and that it is difficult to identify a common denominator which could easily be transposed to the Community level, apart from the principle of mutual recognition for negotiation purposes.

2. In the formal systems for recognition of social partners, what criteria are used to establish whether they are representative?

These systems, if they exist, make use (sometimes implicitly) of quantitative criteria of various types in about half of the Member States. Generally speaking, qualitative criteria appear to be at least as important. The study confirms the great diversity in approaches used.

3. What formal mechanisms for consulting social partners exist at national level?

Most Member States have at least one formal body for consultation of the social partners, of varying significance. Some kind of "Social and Economic Council" is the most prevailing type.

4. Who is involved in those formal consultations?

As a general rule the major national "umbrella" federations affiliated to UNICE and ETUC occupy most of the seats in the formal consultative bodies listed under 3. However, in most cases a smaller number of seats is attributed to other organisations.

5. What do the twelve independent EC-level organisations of employers or trade unions examined represent in each Member State? What can be inferred from this concerning their "significance" or representativeness at the level of the European Community?

The study summarizes what each of the twelve European federations examined basically represents at the level of each Member State, without going into much detail about any weaknesses or strengths they might have in specific sectors.

However, on the basis of the findings of the study it is possible to come to the following analysis of the organisations examined.

I On the employers' side:

- The most representative general all-industry employers' federation is UNICE; CEEP is also generally recognised as an employers' federation at European level.
- Employers federations or associations which are very representative for specific categories of enterprises or specific aspects of their activities, in particular:
 - When SME's are concerned: **UEAPME** (and its joint structure with **EUROPME**);
 - Possibly under the same heading also **EUROCOMMERCE**, which is a representative multi-sector organisation with many SME-members and which claims that its members employ about 20 million people (but considerable overlap

with UNICE). One could, however, also find arguments for considering it to be a most representative employers' organisation of the trade sector;

- When training or employment initiatives are concerned for instance organisations like **EUROCHAMBRES, CECOP, YES FOR EUROPE**;
- When the liberal professions are directly concerned: **SEPLIS** (not covered by the study, its representativeness remains to be established).

Substantially representative **sectoral** employers federations or associations which will be consulted on proposals directly relating to their specific sectors.

II On the trade union side:

- The most representative general all-industry trade union federation is ETUC. There is another general trade union federation which claims to be representative at European level: CESI. However, its total membership, which is to be found predominantly in the public and semi-public sectors, is believed to be at most approximately a tenth of the ETUC. CESI has no affiliates in Denmark, Greece and Ireland. The role of its member organisations in both collective bargaining and in formal consultations at national level is not very significant in most other Member States. CESI is not likely to be recognized by the employers' federations as a very significant negotiating partner at the EC-level.
- Trade union federations or associations which are very representative for specific categories of workers, in particular in respect of higher white-collar employees and managerial staff: CEC. The same category is also organized inside ETUC in EUROCADRES, which is believed to be at least as representative.
- Substantially representative **sectoral** trade union federations or associations which will be consulted on proposals directly relating to their specific sectors.

The findings of the study are set out in three separate annexes:

Annex I to the study presents its main findings.

Annex II to the study contains summary tables presenting an overview of the national affiliates of the twelve European Federations covered. The answers to question 5 are mainly derived from these tables.

In many cases the Federations have more than one affiliated organisation per country, and the tables do not always give an overview of all affiliates in that country (see explanatory notes to the tables).

Annex III presents in much more detail than Annex I an overview of the answers to questions 1 to 4, in separate chapters for each Member State.

The three annexes to the study are available at the Commission for anyone who is interested.

**Operational Chart
showing the Implementation
of the Agreement on Social Policy**

