EDITORIAL

THE OUTCOME OF THE 1996 IGC: MANY PROPOSALS, LITTLE UNANIMITY[1]

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At the beginning of December 1996, the eagerly awaited report of the Conference of the Representatives of the Governments of the Member States, better known as the 1996 Intergovernmental Conference (IGC), was published.

The report contains a number of proposals for amending the Treaties, on which by no means all parties concerned have reached agreement. As is set out at the very beginning, the draft is submitted 'on the responsibility of' (sic) the (Irish) presidency; it is not binding on any of the delegations, which remain free to advocate their own proposals, some of which are to maintain the status quo in a number of areas. Therefore, not too much hope should be focused on the proposals which are included, because their adoption is still very uncertain.

In the areas of employment policy and protection of social rights, quite a few proposals have been put forward. Indeed, the emphasis on fundamental rights protection, employment and social provisions, which figure right at the beginning, is striking. A closer look considerably diminishes the hope that the Community or the Union have taken a decisive step forwards on the road to becoming a true Union of citizens, instead of markets only.

In the following sections, I will briefly examine the proposals with regard to protection of individuals and employment policy.

1. In so far as not otherwise indicated, the references in this contribution are to the 1996 IGC Report on *The European Union Today and Tomorrow. Adapting the European Union for the benefit of its peoples and preparing it for the future. A general outline for a draft revision of the Treaties, Dublin II,* Brussels, 5 December 1996. The relevant parts of this report are included in the Documentation Section of this issue of the Journal (see pp. 37 - 50).

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I. FUNDAMENTAL RIGHTS AND NON-DISCRIMINATION

Part A, Section I (pp. 9 - 36) deals with 'An Area of Freedom, Security and Justice'. It contains chapters on fundamental rights and non-discrimination, free movement of persons, asylum and immigration and safety and security of persons. It focuses entirely on a citizens' Europe. I will concentrate further on provisions concerning workers and employment.

The changes would be aimed at strengthening the Union's commitment to fundamental rights, non-discrimination and equality of men and women. This is to be done by the following means: reaffirmation of fundamental rights principles with regard to present and future Member States, which presumably means that they would have to subscribe to them; adoption of a procedure which will enable the suspension of rights of a Member State which is guilty of serious and persistent breach of those principles; incorporation of a new article into the EC Treaty to clarify judicial control of respect for fundamental rights; extension of the grounds on which action could be taken by the Community to prohibit discrimination.

One or two of these proposals are very interesting, in particular those which aim at setting up procedures to safeguard respect for fundamental rights. There are, however, two reasons for not being too optimistic: the first is that it is highly unlikely that political agreement will be reached on such procedures; the second is that it is, again, unclear whether social rights are included in this concept of 'fundamental rights'.

In a comment on the proposals, it is mentioned that it 'has also been suggested ...that certain social rights should be explicitly mentioned in the Treaty' (p. 11).

Does this mean that they do not form part of the concept of fundamental rights for which the above proposals are meant? Or are they deemed to be so important that as well as being included in this concept, they will, in addition, be mentioned explicitly? I am afraid the latter option is highly unlikely, in view of the reluctance of some Member States to commit themselves to the protection of social rights.

It seems that fundamental social rights have quietly been phased out again. After the explicit inclusion of the European Social Charter, alongside the European Convention on Human Rights, as sources of inspiration for human rights protection in the European Community in the preamble of the 1987 Single European Act, it was left out of Article F (2) TEU. It seems that the Member States are ignoring the arguments for treating social rights on a basis equal to civil and political rights.

This leaves us with the conclusion that the first option is the more likely one. If that is correct, then it is again very disappointing that the Community still has not succeeded in leaving this schismatic treatment of fundamental rights behind; it would be so much more to the point to look at the contents rather than their label.

The proposal is to amend Article F of the Treaty on European Union (TEU), so as to declare expressly that the Union is founded on principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, 'principles which are upheld by the Member States'.

The scope and effect of this proposal is not entirely clear. For some time, there has been discussion about including a statement of principle to which all Member States would have to adhere. This seems to be directed to prospective rather than current Member States, in that the adherence to these principles is a condition for accession to the Union. Now, all existing Member States and most of the candidate Member States are already obliged to uphold these principles, by their own

constitutions and on the basis of their membership of a number of international organisations, of which most relevant in this context is the Council of Europe.

In other words, if a State does violate these principles, it will (possibly) be called to answer for this within the framework of the Council of Europe.

It seems to me that, only if the alleged violation occurs in the framework of Community law, can a State be brought before the ECJ, but that is already the case under the present case law of the Court of Justice. However, further reading suggests that the proposals have another option in mind.

This is suggested, in particular, by a new procedure, included in the proposals for a new Article F (a) TEU. According to this procedure, the European Parliament, as well as the Member States, as a collectivity, would play a role in taking measures against Member States which violate the principle proposed by this amendment. This suggests that this provision does not refer to human rights violations in the framework of Community law, but to an idea that the Union should play a role in the protection of the rule of law and of human rights, *alongside* the Council of Europe.

This could considerably extend the brief of the European Union; it may also be a step towards a merger of the European Union and the Council of Europe. Now that the political procedure for human rights violations is about to disappear from the European Convention on Human Rights,[2] it seems that the idea is to let it re-emerge within the European Union.

The new (proposed) Article F (a) sets out a procedure for dealing with serious and persistent breaches of these principles by a Member State: one third of the Member States have to propose to take a decision and the decision must be taken unanimously. If it has been determined that such a breach has taken (or is taking) place, then the Council, acting on a recommendation by the Commission and after consulting the EP, may decide to suspend certain rights under the Treaties. The Council decision can be taken by a two-third majority - votes are weighted in accordance with the second paragraph of Article 148 EC which means that - if Article 148 itself is not amended - at least ten Member States must have cast their votes in favour of suspension. If the situation of breach ends, the Council shall revoke its measures. The votes of the Member State concerned shall not be counted.

In spite of the extreme tediousness of this procedure, which would probably enhance its chances of being adopted, it is highly unlikely that the necessary unanimity for adoption will be reached.

In the EC Treaty, a new Article 3 (c) is to be added which reads that the Community 'shall respect fundamental rights, as guaranteed by the European Convention ... on Human Rights ... and as they result from the constitutional traditions common to the Member States, as general principles of law'.

This is more or less a rough translation of the ECJ's case law. Its definition is disappointing for a number of reasons:

2. Once the 11th Protocol to the Convention enters into force (12 months after all Contracting States have ratified it), Commission and Council will merge; all procedures will then be brought before the permanent European Court of Human Rights. The Council of Europe Committee of Ministers will no longer examine cases. Its function is limited to the supervision of the implementation of the Strasbourg Court's judgments.

- economic and social rights seem to be excluded from the provision; the ESC or other international instruments on the protection of economic and social rights are not mentioned. They could be included in 'common constitutional traditions' to which the provisions refer, but
- it is submitted that no such common traditions exist; they will even be further away from reality if Eastern European States are to join. It stretches the political reality of the last hundred years a bit too far to call Western and Eastern European constitutional traditions 'common traditions'.
- to label fundamental rights as general principles of law is an unnecessary complication. The protection of fundamental rights may be seen as a general principle of law, but it is against civil law traditions to label human or fundamental rights, which have found expression in written law, as general principles of law, which refer mostly to unwritten principles (such as the principle of proportionality, the principle of legal certainty, etc). The choice of this formula may be inspired by the reluctance to expressly incorporate fundamental rights in the text of the treaties. The express reference to the European Convention is not the same as incorporating its provisions in Community law.

The comments on this amendment (p. 14) mention the view of some Member States that it would have been more appropriate for either the Community or the Union to accede to the ECHR which suggests that the weak wording of Article 3 C is deliberate. Another (not new) suggestion is to amend Article L TEU to bring all three pillars of the TEU under the jurisdiction of the Court in so far as human rights are concerned.

II. Non Discrimination

The non-discrimination provision in a new Article 6(a) is equally carefully worded.

There has been some expectation that a new, general prohibition of discrimination on the basis of sex, religion, creed, race etc., which forms part of so many international treaties, would be included in the EC Treaty as well. The present Article 6 excludes non-Union citizens from the provisions of the Treaty.

From the point of view of the Member States, there is something to be said for maintaining Article 6. Indeed, a general non-discrimination clause would affect the functioning of the internal market as everybody, Union and non-Union citizens, once they have entered one of the member States legally, would have the right to move freely and to be treated equally to nationals in all other Member States.

That is, of course, already the case for the treatment of a non-national at the domestic level if s/he has entered a Member State legally and s/he is residing/working lawfully within that State. International human rights treaties, as well as most national constitutions, prohibit discrimination of these persons. Including a general non-discrimination article in the EC Treaty would have meant that these denizens would gain the rights all Union citizens have with regard to the freedom of movement, establishment etc. For instance, an American businessman who lawfully resides in France, could establish offices in all other Member States

on the same conditions as a French citizen. That effect is clearly unpalatable for Member States.

This suggestion is supported by the wording of the proposed provision which leaves out nationality as a form of prohibited discrimination! This suggests strongly that Member States want to avoid the above-mentioned effect and that they want to maintain the status quo, i.e., to limit preferential treatment to citizens of the Union only.

The presently proposed article promises only that the Council, on a proposal from the Commission and after consultation of the European Parliament, may take appropriate action to prohibit discrimination based on sex, racial, ethnic or social origin, religious belief, disability, age, or sexual orientation.

While leaving out nationality, the provision goes further than most international non-discrimination provisions which do not include disability and age, let alone sexual orientation. The weakness is that the Council may take *appropriate action*. It is unclear what appropriate action is and even when we know that, it is still far from certain that the Council shall decide to take such action.

III. Equal Treatment of Men and Women

More promising is the proposal to supplement the aims mentioned in Article 2 with a provision to promote equality between men and women. The addition is to be placed between the aims of 'promoting a high level of employment' and 'raising the standard of living and quality of life'. It is not limited to equality at work. Article 3 will be amended to the effect that 'the Community shall aim to eliminate inequalities and to promote equality between men and women'.

The principle of equal pay, inserted for economic reasons in Article 119 of the original EEC Treaty, has come a long way!

In relation to the non-discrimination provision discussed above, it seems to be fairly clear that the Member States are much more prepared to commit themselves to equality between men and women than to non-discrimination in general.

III.1 Article 119 EC

Article 119 is to be changed to the effect that equal pay shall no longer be received for equal work, but for work of equal value. The new formula confirms the present status. (See Article 1 of Directive 75/119/EEC which uses the formula of equal pay for work of equal value).

Two paragraphs are to be added to 119: the principle of equal treatment and equal opportunities will be included in paragraph 2.

It is a bit odd, that the words 'including the principle of equal pay for work of equal value' is mentioned here once again. It is not clear what the sense of this repetition is. Admittedly, whereas paragraph 1 refers to the first stage of the establishment of the common market, paragraph 2 does not, but surely that has become obsolete?

Paragraph 3 allows Member States to take measures to promote the vocational activities, or to prevent or compensate for disadvantages in professional careers. These measures are aimed at the 'under-represented sex', and therefore, not exclusively at women. This seems to be a rather confused translation of the ECJ's

judgment in the *Kalanke* case,[3] where positive measures were held to be directed at the stages preceding actual employment.[4] The Court considered that 'absolute and automatic' preferential treatment of women in the actual appointment to a job (for which they are equally qualified as the male candidate) as long as women are *de facto* under represented in a certain profession or sector, fell outside the boundaries of Article 2 (4) of Directive 76/207.

If the provision aimed at assisting the 'under-represented sex' to become equally represented is to adopted, it might be worth looking at the wording again and redefining it in a slightly clearer way. This is an important area, aiming at creating equal opportunities through education and vocational training and may the Community policy be absolutely clear about this.

Finally, the report adds a policy proposal that is to introduce gender neutral language into the Treaties. About time...

IV. The Employment Chapter

Another interesting addition to the EC Treaty is that of the much discussed Employment Chapter, to be included in Section II titled 'The Union and the Citizen' (pp. 38 - 61).

In terms of general objectives (p. 41), it is proposed that the words 'and a high level of employment' are added to the Article B TEU. The words 'a high degree of competitiveness' will be added to the objectives of Article 2 EC and Article 3 (i) will be complemented with the means of 'the promotion of coordination between employment policies of the Member States with a view to enhancing their effectiveness by developing a common strategy for employment'.

The report continues with the proposal to insert a new Title on Employment after the present Title VI (EC Treaty) (pp. 42 - 45). It sets out the steps involved in the development of a common strategy on employment.

The interesting provision is Article 5 on the basis of which incentive measures can be taken by the Council according to the procedure of Article 189 B. What type of measures the drafters have in mind is not clear; the provision states expressly that such measures are not aimed at approximation of national laws and regulations.

One can think of all sorts of incentive measures (a bonus for lowering the level of unemployment; a fine for raising the level; a bonus for active programmes fighting, e.g., youth unemployment, etc), but apparently, that is not the only type of measure the drafters had in mind. According to the comments on this proposal (p. 45), such measures 'would be designed to encourage cooperation on a transnational basis through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences'.

The *a priori* exclusion of approximation of laws suggests that the provision aims basically at study and co-operation programmes between Member States,

3. Case C-450/93 *Kalanke* v. *Freie Handelsstadt Bremen*, [1995] I ECR, 3051

4. See the Opinion of Advocate-General Tesauro who examines this point in detail.

encouraged by the Community. The incentive measures, according to the comments 'would involve neither harmonisation of national laws and regulations, nor major spending programmes (p. 45).

Article 6 contains the proposal to establish an Employment Committee of which the main task seems to be coordination between Member States as regards employment and labour market policies.

The establishment of yet another committee cannot be regarded but with suspicion as, too often, problems are apparently 'solved' by creating a committee which meets often and produces a lot of paper but which, in reality, contributes very little to the solution of a problem. What is wrong with the Commission carrying out the tasks of coordination as it should do at present on the basis of Article 118 EC Treaty?

The Employment Committee has, in the mean time, been established by a Council Decision of 20 December 1996.[5] There must have been a rather urgent desire among Member States to have this committee installed as it was set up only a few days after the 1996 IGC Report was published.

The proposals included in this Title are not prime examples of clarity. That should not come as a surprise as there is a lot of difference of opinion on including the Employment Chapter, let alone on its details (apart, obviously, from the creation of an Employment Committee). Some delegations want the provisions to produce more binding and precise commitments, others do not want an employment chapter at all. The result is a rather confusing mishmash.

V. Social Provisions

According to the proposals, the Employment Chapter would be followed by a Chapter 5 on Social Provisions (pp. 46 - 47).

This refers to the integration of the Maastricht Agreement on Social Policy (MASP) into the Treaty itself. All delegations but one are in favour of this. A widely expected (but by no means certain) change of government in that one Member State might change its position.

The idea is to replace the present provisions of Chapter 1 of Title VIII with those of the Agreement. That is much less straightforward than it seems, if only because Member States might want to take this opportunity to bring about amendments to the present provisions.

Moreover, not all present provisions of the Treaty's chapter on social policy can be discarded. What, for instance, about Article 119 (as amended by proposals in this same report) and what about Article 118 A, the details of which (confusing as they may be), cannot be found in the Agreement's Article 2?

Another problematic issue, in my view, is the actual decision-making procedures in which numerous actors play their respective roles.

First of all, if the decision-making procedures under the MASP were to be taken over unchanged, the standing of the European trade unions and employers' organisations in social policy making of the Community would increase considerably. I use the word 'standing', rather than influence, on purpose, because

5. Decision 97/16/EC OJ L 6/32.

the influence is already there by means of the Maastricht Agreement. However, the status of the latter is still insecure and its transformation into Treaty provisions would incorporate the role of trade unions and employers organisations officially into the Community's decision-making procedure on social matters.

Secondly, the question is what would happen to the so-called Euro Collective Agreements. These Agreements, based on Article 4 of the MASP, give the partners in the social dialogue not only an important say in whether or not to initiate legislation, they can also 'high jack' the procedure once it has started. If their negotiations lead to a Collective Agreement, this can be turned into a Directive by the Council of the 14.[6] If the Agreement does not cover an issue listed in Article 2 of the MASP, it cannot be turned into a Council Directive and it remains a Euro Collective Agreement.[7]

The legal status of such an agreement and its impact on national law is however rather vague. It has to be implemented 'in accordance with the procedures and practices specific to management and labour and the Member States'.[8] This refers, presumably, to collective agreements at the national level, or even to adopting laws, if that is the practice used in these matters. The question is, however, how the implementation of these Agreements is going to be enforced. Neither the MASP nor Community law in general seems to give a clear answer to this question.

One could argue that Member States must enforce them on the basis of Article 5 EC, but I doubt the Court would go as far as to extend this provision to these agreements which are not acts mentioned in Article 189 EC, nor are they (Community) acts *sui generis*. They are not Community acts at all, unless the Treaty is amended to that effect.

It seems that a Euro Collective Agreement can be completely ignored; implementation cannot be forced in court. In that case they can be no more than legally non-binding gentlemen's agreements which may or may not be taken into account at national levels. However, if they are, they will create a lot of confusion, as not every worker in every Member State will be affected by such an Agreement.

It may be a good idea, to eliminate these agreements from the provisions once they are transformed into Treaty provisions. The Agreements are an alien body in Community law, which is becoming diffuse enough as it is. Euro Collective Agreements may not, *in se,* be a bad thing, but the desirability of including them in the EC Treaty is questionable.

A final problem which needs to be addressed in a pragmatic way is that of the institutions involved in decision-making in social policy areas. The role of European workers' and employers' representatives has been described. The role of the European Parliament and the Economic and Social Committee is laid down in the EC Treaty as well as the MASP.

At present, in some procedures, all these bodies must be consulted at some point when a social policy decision is prepared, while in other procedures the position of these bodies, e.g., Parliament and ES-Committee, is not clear. What is

6. The first time this happened was with the 1996 Parental Leave Agreement/Directive.

7. See Article 4 (2) MASP.

8. Article 4 (2) MASP.

the relationship between these institutions going to be - between the EP and the employers' and workers' representatives or between the partners in social dialogue (the international representations of worker and employer federations) and the Economic and Social Committee (the national representatives of ditto) the function of which is as old as the E(E)C Treaty (see Articles 193 - 198 EC)? Are they going to be consulted consecutively or simultaneously? Are they going to consult each other?

Surely some rationalisation is in order here. Moreover, more fundamental decisions have to be taken on the balance between democratic decision-making and a neo-corporatist model, with a decisive role for trade unions and employers' organisations.

VI. CONCLUSIONS

The IGC Report provides exciting reading for those interested in the future of the European Union. I have dealt not only with issues relevant to this Journal but the Report proposes action in much wider areas.

It is clear that the proposed amendments on employment rights and policies fall a long way short of what advocates of an employment-friendly Europe would want. At the same time, in some respects, some of these proposals go further than some would have expected. Most of them suffer from convoluted wording, as a result, probably, of too many compromises.

They are only proposals and it is, at this point in time, wholly unclear how much of their substance will survive the political battle that will continue this year. At the time of writing, it is very unlikely that the final text can be adopted, as planned, in Amsterdam in June 1997. Much depends on the timing and the outcome of the British elections, which John Major plans to have as late in the day as possible. The situation might change after that, but that rests on two assumptions, which are, by no means, foregone conclusions: the first is that Labour will win the elections and the second is that a Labour Government will have a much more favourable attitude towards European social legislation.

Whatever the outcome, surely, the time has come that the Community should no longer aim for the lowest possible standards in social legislation in order to accommodate the UK government as much as possible. If the British elections do not - so to speak - go the Community's way, that may involve the unattractive option of continuing with an active social policy outside the framework of the Treaty itself, *viz.* the Maastricht Agreement on Social Policy. Even then, there is no guarantee that the British position is excluded from the political accounts of pro's and con's of adopting social measures.

Fortunately, the evidence that, in the long term, a strong social policy is an economic asset rather than a burden on the market is gaining ground also in Brussels. In view of the imminence of economic and monetary union, it is time to act upon it, with or without the UK, counting on the knock-on effects rather than having misplaced fear for distortion of competition.