The United Kingdom and European Union Labor Policy: Inevitable Participation and the Social Chapter Opportunity

Greg A. Friedholm

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INTRODUCTION

On November 12, 1996, the Court of Justice of the European Communities (the “ECJ” or the “Court”) issued its opinion in United Kingdom v. EU Council, thereby rejecting the United Kingdom’s (the “UK”) vehement objections to the legality of Council Directive 93/104, better known as the Working Time Directive.¹ The Court held that the Working Time Directive, which regulates maximum working hours, rest periods, and night and shift work, was sufficiently related to the “health and safety of workers” so as to be appropriately based upon Article 118a of the Treaty of Rome.² By so holding, the Court served notice to the European Union (the “EU”) that it will interpret Article 118a expansively, enabling the Council of Ministers (the “Council”) to legislate with a majority of votes in a broader area of social policy than many, including the UK, had anticipated.³ The Court’s decision effectively weakened the British opt-out of the Social Protocol and served as a sharp reminder to the traditionally reluctant UK that the Council retains significant authority to enact labor legislation applicable to the entire EU.⁴

Part I of this note will discuss the UK’s unique position in the EU and the relationship it has maintained with its European counterparts, marked by ideological differences with respect to social, and more specifically, labor legislation. This uneasy relationship was emphasized by the UK’s unprecedented decision to opt-out of the Social Protocol in 1992. Part II of this note will highlight the provisions of the Working Time Directive and the UK’s unsuccessful attempt to invalidate it. Part II will also examine the significant effects of the Court’s decision to uphold the legislation, most importantly the erosion of the British

² See United Kingdom, 3 C.M.L.R. at 717.
⁴ See id.
opt-out secured four years earlier and the creation of new momentum in the continental push for social reform. Part III of this note will discuss the innovative role granted the social partners by the Social Protocol and will encourage the UK to take advantage of this opportunity. To do so would allow the UK to utilize its long held preference for workplace negotiation over government intervention while playing an active role in the creation of EU labor policy.

I. THE UNITED KINGDOM IN THE EUROPEAN COMMUNITY AND SOCIAL LEGISLATION

A. European Community

The European Economic Community (the "EEC") was formed by six nations—Belgium, France, Germany, Italy, Luxembourg, and the Netherlands—in 1957 with the signing of the Treaty of Rome. The stated intent of these "Member States" was to create a common market and to "promote through Community a harmonious development of economic activities." Although some basic provisions regarding social protection were included in the document, the original members' motivation for integration was unequivocally economic.

Despite impressive fanfare in 1957, no concrete agenda for the actual creation of a unified European market was promoted until the publication of the European Commission's (the "Commission") White Paper in 1985. The "Single Market Program" advocated by the White Paper established as its primary objective the elimination of the three barriers the Commission perceived to be dividing the Member States: physical barriers, technical barriers and fiscal barriers. Although the White Paper indicated the importance of a "social Europe," it was

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9 See id.
absent any plans to address social barriers, including marked differences in employment and labor standards among the Member States.\textsuperscript{10}

The 1986 Single European Act (the "SEA") raised the White Paper's Single Market Program to the functional equivalent of European constitutional law.\textsuperscript{11} Like the White Paper, the SEA largely ignored the existing differences in social and labor standards among the Member States.\textsuperscript{12} The SEA, however, did revise the Treaty of Rome in two significant aspects important to this discussion.\textsuperscript{13} It amended Article 100 of the Treaty so that only by a unanimous vote can the Council enact harmonizing legislation in areas which directly affect the establishment and functioning of the common market.\textsuperscript{14} The SEA also inserted Article 118a into the Treaty, granting the Council the power to pass legislation designed to encourage improvements in the working environment, particularly legislation concerning the health and safety of workers.\textsuperscript{15} Unlike Article 100, however, legislation enacted pursuant to Article 118a does not require unanimity; the Council can enact legislation with only a majority of votes.\textsuperscript{16} This difference would prove critical with respect to the Working Time Directive.

B. United Kingdom as Member

The UK joined the EEC on January 1, 1973.\textsuperscript{17} Since its admission, the UK has had an uneasy relationship with the other Member States because of its resistance to complete integration.\textsuperscript{18} This resistance is most apparent in the UK's consistent refusal to join the other Member States in the development of any substantive labor policy.\textsuperscript{19}

\textsuperscript{10} See id. at 44–45, 50. France, Germany and Denmark are renowned for high levels of employee protection and worker-friendly atmospheres. See id.
\textsuperscript{11} See id. at 50; Single European Act, Feb. 17, 1986, O.J. (L 169) (1987) [hereinafter SEA].
\textsuperscript{12} See Dowling, supra note 8, at 50. Dowling asserts that the advocates of social harmonization intentionally did not press their objectives in the early stages of the Single Market Program for fear that such pressure would alienate both Britain's and Europe's business communities, two essential players in the success of the program. See id. at 51.
\textsuperscript{13} See Susan L. Belgrave, All Work and No Play?, 140 SOLIC. J. 1192, 1192 (1996).
\textsuperscript{14} See id.; SEA, supra note 11.
\textsuperscript{15} See SEA, supra note 11.
\textsuperscript{16} See id.
\textsuperscript{17} See European Communities Act, 1972, ch. 68 (Eng.)
\textsuperscript{18} See Henderson, supra note 6, at 806. Henderson partly attributes this reluctance to Britain's desire to preserve its diminishing influence over world affairs and to an island geography that breeds isolationism. See id.
With the election of Margaret Thatcher's Conservative government in 1979, EU legislation in the social field was significantly curtailed in the face of the UK's rejection of almost all proposals from the Commission. This rejection of a large majority of proposals led one observer to describe the development of labor norms as "spasmodic, episodic and unsystematic."

The British reluctance to support the development of EU labor law is based upon a fundamental difference in ideology between Great Britain and many of its continental counterparts. Historically, the prime purpose of labor legislation in the UK has been merely to maintain countervailing power in the labor market. Unlike most of the other Member States, which created substantive labor legislation granting protections and benefits directly to the individual worker, British labor legislation instead stressed procedure; it aimed at protecting the channels by which employees can collectively fight for and obtain the desired benefits and protections. This non-substantive approach towards labor policy was based upon an implicit recognition by both management and labor that due to the need for mutual survival, neither side would press intolerable claims during workplace negotiations.

This difference in ideology led to continuing confrontations between the UK and the majority of Member States during the first half of this decade. The UK, led by Prime Minister John Major, consistently advocated a low wage strategy, at heart an "economy now, benefits later" scheme. The UK contended that, initially, the EU should

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21 Bercusson, supra note 19, at 4–5; see also Angela Broughton, et al., International Employment, 32 INT’L LAW. 303, 305–04 (1998). The Thatcher and Major governments championed the position that employment issues were not "properly a part of the E.U.’s 'competence.'" Broughton, et al., supra.
22 See Bob Hepple, The Future of Labour Law, 24 INDUS. L.J. 303, 313–14 (1995). Whereas many of the continental Member States turned to varieties of socialism and governmental interventions to address the inequality of the employment relationship, the British answer to the problem lay in "Labourism," by which organizational rights of the workers won by employees through industrial struggle are defended on a pragmatic basis using law only when voluntary means are inadequate. See id.
23 See id. at 315. Theoretically, this countervailing power assures equality of position between employers and collective organizations of workers, while leaving ample room for the continuing effects of market forces. See id.
24 See id.
25 See id.
26 See Roberts, supra note 7, at 369.
27 Id.
relieve its businesses of any social legislation that might affect their ability to compete on the international scene. The resultant healthy market would in turn provide significant employment growth, demand for workers, and increased general prosperity. Ultimately, this demand for workers would create a climate in which improvements regarding social and working conditions could be collectively negotiated by the employees, presumably at the workplace level.

The majority of the Member States, on the other hand, maintained that Europe could not compete in a low wage contest with the likes of South America and Asia. They contended that the EU would be better served by pursuing a “high-productivity” strategy. This strategy was based on the idea that improved technology, training, and innovation would provide the EU with the products and the manufacturing processes necessary to succeed at the international level, while at the same time allowing it to maintain higher labor standards. In turn, higher paid workers would not only create more consumers for the products, but also better educated employees more capable of attracting North American investment. Thus, the large majority of Member States were convinced that labor legislation should be developed to ensure a flexible, well-informed workforce. This basic disagreement concerning the appropriate direction of labor policy provided the subject of one of the most extreme examples of British resistance to the EU.

C. Maastricht and the Social Protocol

1. The Social Chapter

In 1990–91, the Commission, consisting of representatives of the thirteen Member States, rewrote the Treaty of Rome, thereby creating the Treaty of European Union (“TEU”). This revision was largely viewed as an effort to take the next step beyond the Single Market

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28 See id. at 369, 384. In the words of then British Prime Minister John Major, “[a]voiding burdens for British businesses and British jobs is at the top of the Government’s agenda.” DTI Press Release P/69/849, Nov. 12, 1996.
29 See Roberts, supra note 7, at 369, 384.
30 See id.
31 See Roberts, supra note 7, at 384.
32 See id.
33 See id.
34 See id.
Program and to create a more cohesive Europe through political and economic integration. The Council held an intergovernmental conference at Maastricht in November 1991, during which the heads of state of the Member States were expected to conclude discussions and sign the revised treaty. One of the most prominent features of the new TEU was the "Social Chapter," an article designed to propel employment policies, among other social issues, to the forefront of future Community legislation.

The Social Chapter set forth three key objectives previously beyond the scope of EU legislation. First, the Council would be given the power to enact, by majority vote, minimum requirements dealing with improvements in several areas: working environment and conditions; information and consultation of workers; equality between the sexes with regard to employment opportunities and treatment; and integration of individuals traditionally excluded from the labor market.

Second, the Social Chapter granted unprecedented legislative power to the so-called "social partners." The social partners are recognized pan-European lobbying associations representing employers and labor at the Community level. Discussed in detail below, the Social Chapter permitted the social partners to jointly recommend changes to a Council provision or to enter into a collective agreement, thereby pre-empting the proposed Council provision.

Finally, the Social Chapter sought to ensure that the principle of equal pay for male and female workers was applied uniformly. This means that the pay for the same work must be calculated on the basis of the same unit of measurement regardless of the worker's gender, and that hourly rates for the same job should be identical.

36 See Dowling, supra note 8, at 53.
37 See id. at 54.
39 See Dowling, supra note 8, at 54.
40 See Social Protocol, supra note 38, arts. 2(1), (2).
41 See id. arts. 2(4), 3; Dowling, supra note 8, at 55.
42 See Dowling, supra note 8, at 55.
43 See Social Protocol, supra note 38, art. 4.
44 See id. art. 6.
45 See id.
2. The UK Opt-Out

Prime Minister Major arrived at Maastricht unwilling to accept the revised Treaty of Rome solely because of the inclusion of the Social Chapter. Consistent with its history within the EU, the UK was the only Member State which refused to support the Social Chapter. Major feared that the UK would forfeit two of its perceived advantages over the rest of Europe: liberal labor laws and lower wages. He instead advocated postponing any social and labor legislation until after the Single Market was firmly established.

Thoroughly frustrated by the UK's continued inflexibility on labor and employment reform, the other eleven Member States and the UK came to an unprecedented compromise. Called an "opt-out" by the UK, the Member States agreed to remove the Social Chapter from the text of the 1992 Treaty and annex it at the end, thereby creating the Social Protocol. The result of this compromise was a two tiered approach to EU employment policy. The Council could still pass employment legislation pursuant to Article 100 of the TEU if it achieved unanimity. If it could not, the other eleven Member States could regulate a wide variety of European employment policies pursuant to the Social Protocol, which would be held inapplicable to the UK. It was through the Social Protocol that the UK argued the Working Time Directive should have been properly enacted.

II. THE WORKING TIME DIRECTIVE

A. The Directive and UK Objections

The Working Time Directive (the "Directive") was passed on November 23, 1993, on the basis of Article 118a, the recent addition to the

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46 See Dowling, supra note 8, at 54.
47 See Roberts, supra note 7, at 369.
48 See id. at 385.
49 See id. at 369.
50 See Dowling, supra note 8, at 54.
51 See id. It is because of its position annexed to the TEU that it is now referred to as the Social Protocol. See id.
52 See id. at 55.
53 See TEU, supra note 35, art. 100.
54 See Social Protocol, supra note 38, preamble.
55 See Case C-84/94, United Kingdom v. Council, 3 C.M.L.R. 671, 709 (1996); see also Belgrave, supra note 13, at 1192.
Treaty providing for worker health and safety legislation. The Directive was approved by a majority of votes in the Council, with the UK abstaining from the vote.

The Directive requires every worker to be given a minimum daily rest period of eleven consecutive hours per 24-hour period and a rest break when the working day is longer than six hours. It also requires that for every seven-day work period, the employee be entitled to a minimum uninterrupted rest period of at least 24 hours, this period preferably being Sunday. It restricts the average employee working week to 48 hours, while requiring paid annual leave of at least four weeks. Finally, the Directive regulates the amount and patterns of shift and night work, taking into account the special hazards to health caused by extensive work under these conditions.

The Council, however, attempted to leave room for the Member State or employer to negotiate. Employees can work more than the 48-hour week if they agree to do so, but may not be punished if they do not so agree. Likewise, the Member State has the option of requiring only three weeks of paid vacation for a transitional period of three years.

This discretion was small consolation for the UK, which never envisioned Article 118a, relating to health and safety of workers, to be used in such a broad manner by the Council. In fact, the British had felt

56 See Working Time Directive, supra note 1, preamble. Article 118a of the TEU reads in relevant part:

(1) Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers, and shall set as their objective the harmonisation of conditions in this area, while maintaining the improvements made.

(2) In order to achieve the objective laid down in the first paragraph, the Council, acting in accordance with the procedure referred to in Article 189c and after consulting the Economic and Social Committee, shall adopt by means of directive, minimum requirements for gradual implementation. . . . Such directives shall avoid imposing administrative, financial and legal constraints . . . of small and medium sized undertakings.


58 See Working Time Directive, supra note 1, arts. 3, 4.

59 See id. art. 5

60 See id. arts. 6, 7.

61 See id. arts. 8–13.

62 See id. art. 18.

63 See Working Time Directive, supra note 1, art. 18.

64 See id.

particularly insulated from significant legislation on the basis of Article 118a because it viewed its existing system of worker health and safety law to be superior to those of the other Member States. Instead of legislation designed to improve worker health and safety, the Directive was viewed suspiciously by the British as the typical continental response to tough economic times and unemployment: to spread around existing work by forcing employers to cap hours.

The Conservative government immediately turned to the ECJ to invalidate the Directive. Although the UK challenged the Directive on several grounds, including inadequate or defective reasoning and a failure to comply with the principle of subsidiarity, the primary argument asserted by the British government was that the objectives of the Directive were beyond the scope of Article 118a. The UK contended that the regulations did not have a genuine and objective link to worker health and safety and that “working environment” as provided in Article 118a concerned only the physical conditions and risks at the workplace. This interpretation has been described as the “hard hat” approach. The UK felt an employee’s working and vacation times are too tenuously linked to physical risks and conditions at the workplace to support legislation. It asserted that the Directive was, at its core, social legislation and thus more appropriately based on Article 100, the Treaty article conferring the authority to enact this type of social legislation, and requiring unanimous approval in the Council.

B. The ECJ Decision

The ECJ overwhelmingly rejected the UK’s objections and upheld the Directive in United Kingdom v. EU Council. The Court first interpreted the scope of Article 118a, and then determined that the Direc-

66 See id. at 118–19.
67 See Dowling, supra note 8, at 57.
68 See Belgrave, supra note 13, at 1192; Case C-84/94, United Kingdom v. Council, 3 C.M.L.R. 671 (1996). The principle of subsidiarity permits Community legislation in areas in which competence is shared only if the objectives of the proposed action cannot be sufficiently achieved by the individual Member States. See United Kingdom, 3 C.M.L.R. at 714.
69 See United Kingdom, 3 C.M.L.R. at 710, 713–14.
71 See United Kingdom, 3 C.M.L.R. at 713–14.
72 See TEU, supra note 35. Article 100 provides that the Council shall act unanimously to enact "laws, regulations or administrative provisions of the Member States as directly affects the establishment or functioning of the common market." Id. at art. 100.
73 See United Kingdom, 3 C.M.L.R. at 723.
tive fell within the scope. Ultimately, it found Article 118a to be the appropriate basis for legislation where the primary objective of the measure in question is to protect the health and safety of workers. This is true despite any ancillary effects the legislation may have on the establishment and functioning of the internal market.

Necessarily, the Court dismissed the UK's restrictive interpretation of the term "health." It instead defined health consistent with the preamble to the Constitution of the World Health Organisation, an organization to which all the Member States belong. Health is there identified as "a state of complete, physical, mental and social well-being that does not consist only in the absence of illness or infirmity." Thus, Article 118a embraced "all factors, physical or otherwise, capable of affecting the health and safety of the worker in his working environment, including in particular certain aspects of the organisation of working time."

Guided by this expansive interpretation of Article 118a, it was not difficult for the Court to find that the principal aim of the Directive was to protect the health and safety of workers. Significantly, the Court relied almost exclusively upon the Directive's stated objectives in determining purpose, rather than looking at more objective factors and external evidence. It held that where the primary aim of the

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74 See Barnard, supra note 57, at 43. The author asserts that the Court's decision should come as no surprise because it, in fact, set out to prove that Article 118a was the correct legal basis. See id. at 45. According to the author, at no point did the court take a step back and consider what would have been the most appropriate basis starting afresh. See id.

75 See United Kingdom, 3 C.M.L.R at 716.

76 See Fitzpatrick, supra note 65, at 122.

77 See id. at 118-19; United Kingdom, 3 C.M.L.R. at 710.

78 See United Kingdom, 3 C.M.L.R. at 710-11.

79 See id. at 711.

80 See id. at 710; see also Opinion of Advocate General Leger, United Kingdom v. Council, 3 C.M.L.R. 671, 684-85 (1997) [hereinafter "Leger Opinion"]). The Advocate General in his advisory opinion interpreted working environment and Article 118a even more expansively. See Leger Opinion, supra. According to its Danish origins, working environment ("arbejdsmiljø") includes non-traditional measures, including working hours, psychological factors, and training in hygiene. See id. It is meant to reflect the social and technical evolution of society. See id.

81 See United Kingdom, 3 C.M.L.R. at 716.

82 See id. at 713. The Court gave considerable weight to the Directive's stated intentions of improving safety, hygiene, and health and of not subordinating health and safety factors to purely economic considerations. See id. At least one commentator argues that the biased view of the Commission reflected in the preamble should not be relevant if the choice of Treaty basis must be based on objective factors. See Barnard, supra note 57, at 45.
measure came within the scope of Article 118a, any ancillary effects on the internal market did not detract from that basis in the Treaty.83

Similarly, the Court held that the Directive's contents largely remained true to its stated purpose.84 With the exception of Sunday being the preferred day off, the Court found that a sufficient nexus existed between the regulation of working hours and employee health and safety so as to fall within the scope of Article 118a.85 The Court then proceeded to reject the other claims raised by the UK and dismissed the remainder of the UK's complaint, thereby upholding the application of the Directive to Great Britain.86

C. Effects of the United Kingdom Decision

1. A Changed Relationship

When Prime Minister Major returned from Maastricht, he heralded the Protocol opt-out as a victory for England and proclaimed he had secured a competitive advantage for British business.87 This victory was significantly lessened by the ECJ approval of the Directive.88 The Court’s broad interpretation of Article 118a’s scope and its failure to scrutinize the aims of the legislation significantly undermined the British opt-out and jeopardized the unanimity rule that the UK used to its advantage for years.89

The Court’s ruling, in essence, asserted the autonomy of Article 118a.90 Rejecting the UK’s narrow interpretation of workplace health and safety, the Court chose instead to take a “stress and strain” approach towards health and safety, and ultimately endorsed a broad scope of Article 118a.91 Compounding the problem of the expansive scope of Article 118a was the unwillingness of the Court to investigate

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83 See Fitzpatrick, supra note 65, at 122.
84 See United Kingdom, 3 C.M.L.R. at 715.
85 See id. at 714–15. The ECJ chose to annul the second sentence of Article 5 which encourages employers to designate Sunday as the weekly rest day because the Council failed to explain why Sunday rest is more closely related to the health and safety of the workers than any other day of the week. See id.
86 See id. at 722.
87 See Dowling, supra note 3, at 422.
88 See id. at 423.
89 See Bercusson, supra note 19, at 4.
90 See Fitzpatrick, supra note 65, at 117.
91 See id. at 120. This broad scope is consistent with the legislation’s Danish origins explained supra note 80. Although the Court chose not to take the same approach as the Advocate General, the author asserts that the result was ultimately the same. See id.
the aims of the legislation beyond the Council's stated intentions. The clear inference from the Court's reliance upon the Directive's stated intentions in the United Kingdom decision is that the Court will allow the Council to characterize an increasing number of social employment laws as "health and safety" regulations and support them on the basis of Article 118a.

2. New Momentum

By opposing the validity of Article 118a as the treaty basis for the Directive, the UK furnished the Court the opportunity to adopt a more generous interpretation of health and safety. Ironically, this interpretation may be more generous than even the Commission and the Council contemplated when considering the legislation. The decision, therefore, may provide a new catalyst to a social policy movement that has been largely restrained by British intransigence and its Social Protocol opt-out.

While condemned by the UK as a means of blunting employer competitiveness, there were few signs of radical measures being enacted pursuant to the Social Protocol prior to the Court's decision. At the time of this article, only two measures had been enacted through this channel: the Directive on European Works Councils and the Directive on Parental Leave. Other proposals apparently in the works include the extension of general consultation rights to employees and additional legislation regarding equal employment opportunities for women. It certainly has not been the source of extensive legislation that many feared might return to haunt the UK by eventually exposing them to extensive EU labor policies they had no hand in forming.

On the contrary, the Social Protocol was invoked only grudgingly after a UK veto of a proposed amendment under the original TEU
provisions.\textsuperscript{101} Despite the stated intentions of the other eleven Member States to continue along the path of social reform, they did so with little enthusiasm in the absence of the UK.\textsuperscript{102} The reluctance to use the Social Protocol as a basis for legislation was caused in large part by the fear of the other Member States that imposing more stringent worker protection measures upon their businesses would lead to unfair competitive advantages for British companies operating without such restraints.\textsuperscript{103} Thus, the social measures envisioned during the drafting of the Social Chapter were greatly inhibited because of this fear of an uneven playing field within the EU.\textsuperscript{104}

These concerns seem to have been largely alleviated by the \textit{United Kingdom} decision.\textsuperscript{105} The expansive scope granted Article 118a allows the Council much leeway to pass legislation by majority voting that is applicable to all Member States, including the UK.\textsuperscript{106} Social Affairs Commissioner Padraig Flynn, one of the most outspoken advocates for an aggressive social agenda, applauded the broad interpretation and promised that the decision would guide him in drafting future employment laws.\textsuperscript{107} It seems the \textit{United Kingdom} decision has brought new life to a social reform movement mired by consistent British intransigence.\textsuperscript{108}

3. New Leadership

The Labour Party advocated joining the Social Protocol well before the Court’s decision regarding the Directive.\textsuperscript{109} True to its word, shortly upon assuming control the Labour government led the way in negotiating the Treaty of Amsterdam, amending the TEU and securing British membership in the Social Chapter.\textsuperscript{110} Although the government

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\textsuperscript{101} See Dowling, \textit{supra} note 3, at 423.
\textsuperscript{103} See Belgrave, \textit{supra} note 97, at 536.
\textsuperscript{104} See id. at 536–37.
\textsuperscript{105} See Dowling, \textit{supra} note 3, at 423.
\textsuperscript{106} See id.
\textsuperscript{107} See id.
\textsuperscript{108} See id.
\textsuperscript{110} See Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, 1997 O.J. (C 340) [hereinafter “Treaty of Amsterdam”]. The Treaty is a significant step for Community involvement in employment issues as it expands the scope of permissible legislation under the majority voting system beyond worker health and safety to now include work conditions, worker information and
celebrated this involvement as extending to British workers the same rights enjoyed by workers throughout Europe, Prime Minister Tony Blair and other Labour leaders have been clear that they will not allow the Social Protocol to serve as an open floodgate for a wave of legislation that will hinder competitiveness of British business or the creation of jobs. In contrast, Prime Minister Blair maintains that the government will test all future proposals by whether they promote this competitiveness.

The involvement of the social partners in the legislative process as permitted by the Social Protocol provides the Labour government with the means by which to secure the support of its businesses while participating in labor reform. The encouraged collective representation scheme should ensure that British business maintains a voice in the process and is able to protect itself from excessive burdens or unacceptable rigidities in the labor market.

III. SOCIAL PARTNERS AND COLLECTIVE BARGAINING

A. Collective Bargaining in the UK

Collective bargaining has traditionally maintained a prominent position in UK labor policy despite varied public support from World War II until the late 1970s. Termed "collective laissez-faire," the British government largely relied upon a voluntary system of collective bargaining to regulate terms and conditions of employment without the use of legal mechanisms to promote, support or regulate the system. On the other hand, the Conservative government, guided by its classical market approach to employment and labor issues, attempted to
actively obstruct collective bargaining beginning in 1979. The Conservatives viewed collective bargaining as a potential distortion of the market, hindering an employer and an individual employee from striking a deal which best suited them.

Despite these Conservative restraints, the UK has relied almost exclusively upon collective bargaining as the mechanism to represent the employees' collective interests. It has refused to resort to the employee-based works councils that are legally required by many of its European counterparts. For this reason, collective bargaining essentially remains the only institutional means of employee representation at the plant and company level in the UK. One observer has gone so far as to say that collective bargaining constitutes "the one effective method presently in place in the British labor arena for giving practical expression to the notion of industrial democracy." With the entrance into power of the Labour party, it is reasonable to believe that government support of collective bargaining will only increase.

B. The Role of the Social Partners in the Social Protocol

Borrowing from this collective bargaining scheme, the Social Protocol's most innovative aspect is the opportunity it creates for representatives of management and labor, the social partners, to actively participate in employment legislation. Although the idea of management and labor being involved in EU action is not a new one, the actual authority granted the social partners to legislate in a formalized structure is unprecedented. Opportunity for participation by the social

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115 See id. at 167–68, 172–73. The Conservative government passed what has been described as "negative law" to rein in collective bargaining. See id. at 173. It imposed restrictions on the legal freedom of trade unions and the ability to organize. See id. It also privatized and separated public sector business, thus allowing the new private managers of individual units to depart entirely from applicable collectively agreed norms. See id. at 174–75.

116 See id. at 168.

117 See id. at 169.

118 See Hepple, supra note 22, at 307–08.

119 See Davies, supra note 113, at 169.

120 See id. at 170.

121 See generally Davies, supra note 113; Broughton, et al., supra note 21, at 304.

122 See Dowling, supra note 8, at 55.

123 See id.; see also Marc H. Klein, The Single European Act and Social Dumping: A New Appeal for Multinational Collective Bargaining, 12 U. Pa. J. Int'l Bus. L. 411, 412. Although the Single European Act of 1986 indicated the Commission's desire to facilitate collective bargaining through Article 118(b), the provision itself was so vague as to have very little impact in establishing a dialogue between trade unions and multinational corporations. See Klein, supra, at 412.
partners is maintained and encouraged at two distinct levels: in the development of EU law through multi-national negotiation, and also at the national level by allowing domestic social partners to implement Council directives through collective agreement. 124

At the international level, the Social Protocol requires that the Commission consult the relevant management and labor representatives, in effect to test the waters before taking any steps beyond basic overtures for legislation. 125 If, after this consultation, the Commission still deems legislative action appropriate then it must again consult with the social partners on the actual content of the envisioned proposal. 126

It is at this point in the legislative process that the social partners have been given unprecedented authority. 127 The social partners have the option of either (a) forwarding to the Commission an opinion or recommendation regarding the proposal or (b) informing the Commission of their desire to initiate the process of negotiating amongst themselves in the particular area. 128 In the event of the latter, the international level social partners are permitted a minimum nine-month period in which to reach agreement. 129

If an agreement is reached between the social partners, Article 4(2) of the Social Protocol mandates that it "shall be implemented . . . in accordance with the procedures and practices specific to management

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125 See Social Protocol, supra note 38, art. 3(2). Article 3(2) provides that in order to facilitate dialogue between social partners, "before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Community action." Id.
126 See id. art. 3(3).
127 See Dowling, supra note 8, at 55. Bercusson points out that "content of the envisaged proposal" is both ambiguous and critical to the negotiations between the social partners. See Bercusson, supra note 124, at 20–21. Described as "bargaining in the shadow of law," if the parties already know the scope and extent of the intended legislation then there may be less of an incentive for a party to negotiate if it is content with the proposed legislation. See id. If the parties only are told the possible direction of the legislation, there will be more pressure on the parties to negotiate and agree in order to avoid an imposed standard that may be unsatisfactory. See id.
128 See Social Protocol, supra note 38. Article 3(3) and (4) read in pertinent part:

3. [T]he Commission . . . shall consult with management and labor on the content of the envisaged proposal. Management and labor shall forward . . . an opinion or, where appropriate, a recommendation.
4. [M]anagement and labour may inform the Commission of their wish to initiate the process provided for in Article 4 . . . .

Id.
129 See id. art. 3(4).
and labour and the Member States . . . "\[130\] Significantly, there is no mention of voting requirements of the Member States with respect to the agreements reached.\[131\] A straightforward reading of Article 4(2) thus suggests a competence of the social partners to legislate in a distinct and far less restrictive form than the requirement of majority or unanimous voting required for Council decisions.\[132\] If this is true, an agreement reached between the social partners at the international level effectively becomes EU law.\[133\]

At the national level, the Social Protocol authorizes the domestic social partners to implement the EU directives directly through collective agreements and independently of State measures.\[134\] Article 2(4) of the Social Protocol reads "[a] Member State may entrust management and labour, at their joint request, with the implementation of directives."\[135\] Although the approval of the Member State is required to delegate this authority, the provision presumably allows the representatives of management and labor to choose the levels of collective bargaining and the actual participants involved that representatives determine most appropriate and advantageous for the implementation.\[136\] This provision also could potentially allow the domestic social partners to avoid state regulation altogether by substituting a collective agreement, with the only guideline being that the agreement promotes the results imposed by the Directive.\[137\]

C. UK and the Social Partners

The survival of collective bargaining in the UK despite the Conservative government's sustained attack emphasizes the importance of the process to both management and organized labor in the British labor system.\[138\] For the employer, collective bargaining provides a force of stability in setting wages and terms of employment.\[139\] It can also reduce many of the costs associated with non-union bargaining, including the

\[130\] See id. art. 4(2).
\[131\] See Bercusson, supra note 124, at 25.
\[132\] See id. at 25-26.
\[133\] See id.
\[134\] See id. at 16.
\[135\] See Social Protocol, supra note 38, art. 2(4).
\[136\] See Bercusson, supra note 124, at 17-18.
\[137\] See id. at 18.
\[138\] See Davies, supra note 113, at 170.
\[139\] See Hepple, supra note 22, at 306.
time and resources involved in negotiating with each individual employee.\textsuperscript{140}

The benefits of collective bargaining for the workers are more readily apparent.\textsuperscript{141} Studies demonstrate that employees covered by collective agreements are generally better off than those who are not.\textsuperscript{142} They enjoy advantages in pay, job security, health and safety, grievance procedures, and consultation rights.\textsuperscript{143}

Although the British collective bargaining process has survived the Conservative attack, the Social Protocol may very well provide a plan for a better mousetrap.\textsuperscript{144} The UK collective bargaining system is based primarily on an adversarial relationship, in which the union demands employee benefits at the expense of the employer and management attempts to protect the profits of the enterprise from these demands.\textsuperscript{145} The traditional scene of the two parties sitting on opposite sides of the table epitomizes this attitude of a zero-sum game.\textsuperscript{146}

The decline in relative international strength of the UK during the late 1980s and early 1990s provided notice that this type of adversarial system was not the most efficient.\textsuperscript{147} The ascension of Japan and Germany in the international economic arena caused many observers to suggest that a more cooperative approach at the level of workplace negotiation may be the way of the future.\textsuperscript{148} The cornerstone of this cooperative approach is the recognition that employees must be treated

\textsuperscript{140} See id. The author notes William Brown's somewhat dramatic view that if the parties fail to bring some degree of order to bargaining through collective representation "a myriad of leapfrogging, emulative pay settlements will ratchet a country's economy into an inflationary spiral from which the only escape is through massive unemployment." \textit{Id.}

\textsuperscript{141} See id. at 306–07.

\textsuperscript{142} See id. at 307.

\textsuperscript{143} See id. Consultation rights usually refer to the employee's ability to gain access and influence key decisions about work and employment. See id.


\textsuperscript{145} See id. at 468. "[W]hat any particular group gets is not just a matter of what they choose or want but what they can force or persuade other groups to let them have." Heppel, \textit{supra} note 22, at 306 (quoting Philip Abrams, \textit{Historical Sociology} 15 (1982)).

\textsuperscript{146} See Summers, \textit{supra} note 144, at 468.

\textsuperscript{147} See id. at 477. The widening growth in inequality of wages and earnings seen in Britain in comparison to other industrial nations in recent years has paralleled widening inequalities of influence and access by employees to key decisions about work and employment. See Hepple, \textit{supra} note 22, at 308.

\textsuperscript{148} See Summers, \textit{supra} note 144, at 475, 477. In particular, German employers have accepted the notion that their employees should have some input in all decisions which affect their working lives and have allowed this input generally by way of the works councils. See id. at 475.
by management as partners in the enterprise, and not merely as sellers of services.\textsuperscript{149}

As one commentator points out, law cannot compel cooperation in labor relations but it can send powerful messages.\textsuperscript{150} The Social Protocol reflects this attitude by inviting the representatives of labor and management to pre-empt Council legislation by reaching agreement on a targeted issue.\textsuperscript{151} This system of encouraging negotiation, with the very real risk that failure to reach agreement will result in legislative activity, has been labeled "bargaining in the shadow of the law."\textsuperscript{152} By creating this type of bargaining atmosphere, the pressure upon the British representatives to agree and to avoid an imposed standard that may be unfavorable seems to be increased.\textsuperscript{155} In this way, the procedures established by the Social Protocol may very well encourage a measure of cooperation which traditional British collective bargaining has lacked.\textsuperscript{154}

\section*{Conclusion}

The ECJ's decision in \textit{United Kingdom} to uphold the Directive on the basis of Article 118a sent an unmistakable warning to the British government that the opt-out of the Social Protocol it had secured at Maastricht would not completely shield it from EU labor reform. This warning came in the form of the Court's expansive interpretation of what constitutes workplace health and safety and its failure to examine the purposes of the Directive beyond the Council's stated objectives. The \textit{United Kingdom} decision signaled to both the UK and the Council that it was prepared to grant a wide berth to future employment legislation applicable to all Member States. The decision was heralded by leading advocates of EU labor reform as an unprecedented opportunity to implement their more protective policies.

Despite indicating a strong interest in participating and possibly leading such reform, the Labour Party and Prime Minister Blair have been clear that they are unwilling to accept any sweeping changes that may adversely affect the strength of British business. The Social Proto-

\textsuperscript{149} See \textit{id}. at 477.
\textsuperscript{150} See \textit{id}.
\textsuperscript{151} See Social Protocol, \textit{supra} note 38, art. 4.
\textsuperscript{152} See Bercusson, \textit{supra} note 124, at 20–21. The effects of this bargaining environment are discussed \textit{supra} note 127.
\textsuperscript{155} See \textit{id}.
\textsuperscript{154} See \textit{id}. at 20; Summers, \textit{supra} note 144, at 477.
col, finally accepted by the UK with the signing of the Treaty of Amsterdam, furnishes the UK the means to accomplish both of these objectives. The use of the social partner system described in the Social Protocol provides the UK with a unique opportunity to lead in labor policy reform while remaining largely faithful to the traditional British view of government non-intervention and preferred workplace negotiation.

Greg A. Friedholm