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The Social Dimension of the Internal Market: Health and Safety at Work

LL.M. dissertation

by

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PART 1: INTRODUCTION

1. Aim of the thesis

Health and safety at work represents an important part of the social dimension of the internal market, not only because of the annual economic costs caused by occupational accidents and diseases within the European Community, but also because health and safety at work from a legal point of view is unique, since it is the only substantive employment-related social issue, where the EEC Treaty provides for qualified majority voting to establish Community norms.

In 1984 the estimated level of compensation paid out for occupational accidents and diseases was around 16000 million ECU in the Community as a whole, amounting to 7 % of total sickness insurance payments¹. Furthermore, the question of health and safety at work affects some 138 million people and their immediate relatives within the Community². Therefore, because of the considerable economic consequences and public interest regulation of health and safety it may have, this area can not be neglected.

The Single European Act, which came into force on 1 July 1987, included innovations with impact on the health and safety at work sphere, since both article 118 A under the Social Policy Title and article 100 A under the approximation of laws were part of the Act. Within the social policy health and safety at work might be considered a test area for the social dimension of the internal market, since article 118 A as mentioned is the only provision of the social policy allowing for qualified majority voting in the Council.

Despite the fact that health and safety at work might represent such a test area, no thorough legal analysis of the Community's health and safety initiatives has been found. The main focus of this thesis will be on the period following the adoption of the Single European Act, since the insert of article 118 A provided a new and easier way of adopting health and safety at work initiatives. The result is that, in the context of the development of health and safety law, the main emphasis has changed from national laws reflecting local initiatives to primary emphasis on the

¹ OJ C 28 of 3.2.1988 p. 3 Commission communication on its programme concerning safety, hygiene and health at work (the third action programme).

² *Social Europe* 2/90, p. 5.

development and implementation of Community law³ .

The aim of the thesis is to analyse, how the Community has used its given competence within the field of health and safety at work, and, if possible, to determine in what direction the Community seems to be heading. The analysis will include an examination of the potential and actual conflicts, and the possible complementary nature between the social policy, within article 118 A, and the industrial policy based upon articles 100 A and 100.

The last part of the thesis will focus on some of the negative effects of Community regulation, as seen from a Danish point of view. At the time of the adoption of the Single European Act the Danes emphasised especially the importance of the protection of the working environments⁴ . The Danes traditionally see themselves as representing a system with high standards of worker protection. The Community regulation has within a certain area of health and safety at work caused problems in relation to higher Danish standards. The thesis will further examine this area, and will describe some of the possible ways of solving the conflict between Community and Danish standards.

Finally, it should be noted that the research for this thesis was concluded by 30 August, 1992. Therefore initiatives presented after this date will not be dealt with in the following.

2. Background information on legislation on health and safety at work before the Single Act

Health and safety at work was, until 1974, an area in which the European Community showed very little interest. During the period from the outset of the Community in 1958 to 1974 the focus was mainly on the "common market" whereas the social policy remained essentially a national concern. In relation to European Community social policies it may be described as a phase of "benign neglect"⁵ . The Council Resolution of 21 January, 1974 on the adoption of the

³ *Social Europe*, 2/90, p. 32.

⁴ Claus Gulmann, The Single European Act - some remarks from a Danish perspective, *Common Market Law Review*, 1987, p. 33.

⁵ Hugh G. Mosley, *International Labour Review*, Vol. 129, 1990, No. 2 pp. 149-164.

first social action programme⁶ and the Council Decision on the setting up of the Advisory Committee on Safety, Hygiene and Health Protection at Work⁷ marked a turning point in this attitude and led to what may be called the introduction of a European Community policy in the area of health and safety⁸.

The legal basis of Community actions in the health and safety sphere were of an insecure character. In the Preamble of the Treaty of Rome the Member States affirm "as the essential objective of their efforts the constant improvement of the living and working conditions of their people" but article 2 on the other hand confirms that the raising of living standards were perceived as a by-product of economic integration:

"The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it".

This fact may be important in the understanding of the achievements in health and safety regulation in the Community. The Treaty also included a Title on Social Policy, where the legal bases of health and safety actions were dealt with more specifically, although without defining the scope of the actions clearly. The relevant articles were article 117 and 118. In article 117, reference is made to the use of "the approximation of provisions laid down by law regulation or administrative action" which is understood as a reference to article 100 EEC. Article 100 requires that the Council of Ministers act by a unanimous vote and that the Directives must "directly affect the establishment or functioning of the common market". This implies that the health and safety actions must further the aims of the Treaty. Article 118 delimits the Community's competence on social policy, but without limiting the competence on health safety issues since it emphasises the promotion of close cooperation between Member States in matters relating to: working conditions, prevention of occupational accidents and diseases, and occupational hygiene.

⁶ Council resolution of 21 January. 1974, OJ C 13 of 12.2.1974 p. 1.

⁷ Council Decision of 27 June, 1974, OJ C 185, 9.7.1974.

⁸ See Frank B. Wright, "The Development of Occupational Health and Safety Regulation in the European Communities", *The International Journal of Comparative Labour Law and Industrial Relations*, Vol 8, (1992), pp. 32-57 on the early years between 1957 and 1974 which he describes as the "first steps" by which the Communities confined themselves to the encouragement of research, the promotion of exchanges of experience, and the development of common legislative guidelines.

In the Council's *first social action programme*⁹, it adopted the views of the Summit Conference of Heads of State or Government held in Paris in October 1972, that economic expansion should result in an improvement in the quality of life as well as in the standard of living¹⁰. Therefore, the Council gave in the programme priority to and expressed the political will to establish during the period 1974 to 1976 "an initial action programme relating in particular to health and safety at work, the health of workers and improved organization of tasks, beginning in those economic sectors where working conditions appear to be the most difficult". The social action programme was, in other words, one of the factors that gave rise to the first action programme of the European Communities on safety and health at work.

Another important factor was the establishment of *the Advisory Committee on Safety, Hygiene and Health Protection at Work* (the Committee) whose task it is, according to article 2 (2) of the Council Decision¹¹, to assist the Commission "in the preparation and implementation of activities in the area of health, safety and hygiene at work". The Committee is chaired by the Commissioner responsible for DG V, and consists of 72 full members, there being for each Member State two government representatives, two trade-union representatives and two representatives of employer's organizations. From the outset the Committee asked to be informed in good time of any Commission initiative concerning health and safety at work, so that it could respond effectively; one of the effects has been that the Committee played an important role in drawing up the first action programme of the European Communities on safety and health at work¹².

Although the Council in the social action programme expressed the will to adopt the first action programme on health and safety in the period from 1974 to 1976 it was not until the Council Resolution of 29 June, 1978 on *an action programme of the European Communities on safety and health at work*¹³ that this programme was adopted. The legal basis for the programme was according to the preamble articles 117 and 118 EEC. The general objective of this first Commission action programme - which ran until the end of 1982 - was "to increase protection of workers against occupational risks of all kinds by improving the means and conditions of work, knowledge and human attitudes". When adopting the programme the Council listed 14 actions

⁹ OJ C 13, 12.2.1974, p. 1.

¹⁰ *Supra* note 8.

¹¹ OJ L 185, 9.7.74, p. 15.

¹² OJ C 165, 11.7.1978.

¹³ OJ C 165, 11.7.1978, p. 1.

which could be undertaken in particular; of these only 8 actions were aimed at setting common standards, either by establishing a common methodology in the Member States or through common limit levels.

The Council emphasized the importance of a common methodology in order to (1) assess with sufficient accuracy the frequency, gravity and causes of accidents at work, and also the mortality, sickness and absenteeism rates in the case of diseases connected with work, (2) assess the health risks connected with the physical, chemical and biological agents present at the work place, (3) monitor both pollutant concentrations and to measure the environmental conditions at places of work, and (4) make a special monitoring relating to jobs which present higher than average risks.

Further, the Council emphasized the harmonisation of exposure limits for a certain number of substances, the fixing of exposure limit values for carcinogenic substances, the establishing of limit values for certain specific toxic substances in order to guarantee satisfactory conditions of hygiene at the work place, and finally the establishing of limit values for noise and vibrations at the work place.

When measuring the value of the health and safety action programmes, it is important not only to look at the set aims, but also the final results. In the case of the first action programme this does not leave much hope for the improvement of the working environment through Community actions. In relation to the above-mentioned common methodology, points 1, 2 and 4 are all repeated in the second action programme¹⁴ in the proposed actions 17, 2 and 13. In the case of establishing a common statistical methodology, it seems surprising that the Community has found it possible to embark on harmonization actions without having comparable data for the situation in the different Member States. This lack of comparable data is shown very clearly in the Commission Communication on its Programme Concerning Safety, Hygiene and Health at Work (the third programme)¹⁵ pp. 34-38 where e.g. the Commission did not possess information on deaths due to employment in three of the Member States.

The achievements related to the first action programme in the field of establishing common limit values may also be described as severely limited. The will to adopt rules limiting exposure to

¹⁴ Council Resolution OJ C 67, 8.3.1984, p. 2.

¹⁵ COM(87) 520 final.

noise was repeated in the second action programme and a directive on the matter was not adopted until 1986¹⁶; in the case of carcinogenic substances, the Council gave up its aim of reaching common exposure limits in the second action programme, and, instead, simply repeated the need for preventive and protective measures in this field.

It must be recognised on the other hand, that the Council, in the period before the first action programme, adopted *two directives covering safety signs*¹⁷ and *vinyl chloride monomer (VCM)*¹⁸. The latter was a result of world-wide concern over the appearance of a rare liver cancer in workers in the plastics industry¹⁹. It was the first piece of Community legislation in the field of health and safety at work to deal specifically with control of worker exposure to a chemical carcinogen. Apart from the directive on VCM the concern over cancer led to the general Framework Directive to protect workers from exposure to chemical, physical and biological agents at work²⁰. This directive, together with the first daughter directive on metallic lead²¹, was adopted during the period of the first action programme.

An examination of the results of the first programme shows that only two directives emerged from the ambitious list of actions. The achievements of the first action programme may thus be described as severely limited²², or, as the Director for Health and Safety, Mr. Hunter, in the Commission, expressed it "the initiation of Community actions began slowly"²³.

Although the first programme had expired by the end of 1982, *a second programme of action of the European Communities on safety and health at work* was not adopted until the Council Resolution of 27 February, 1984²⁴. This programme was supposed to run to the end of 1988, but already on December 21, 1987 the Council decided to adopt the third action programme²⁵,

¹⁶ 86/188/EEC, May 12, 1986, published in OJ L 137, May 24, 1986.

¹⁷ Council Directive for the provision of safety signs at places of work, 77/576/EEC, July 25, 1977, published in OJ L 229, September 1977.

¹⁸ Council Directive on the protection of workers from the risks related to exposure to vinyl chloride monomer: 78/610/EEC, June 29, 1978, published in OJ L 197, July 22, 1978.

¹⁹ Social Europe 2/90 p. 7.

²⁰ Council Directive 80/1107/EEC, November 27, 1980, published in OJ L 327, December 3, 1980.

²¹ Council Directive 82/605/EEC, adopted July 28, 1982, published in OJ L 247, August 23, 1982.

²² R.F. Eberlie, The New Health and Safety Legislation of the European Community, *The Industrial Law Journal*, Vol. 19, p. 89.

²³ *Supra* note 19.

²⁴ OJ C 67, 8.3.1984, p. 2.

²⁵ Council Resolution on Safety, Hygiene and Health at Work of December 21, 1987: published in OJ C 28/01 of February 3, 1988.

since article 118 A, a new legal basis for actions in the health and safety sphere had been introduced by the Single European Act on July 1, 1987. The second programme, however, still made reference to article 117 and article 118 as the legal bases, and to the social action programme of 1974. Thus harmonization measures proposed in the action programme would still require unanimity. The resolution made a list of 21 actions to be given priority, but as mentioned above, a number of these were simply repetitions from the first programme. Among the new actions were a proposal on lighting at the work place, a coordination of the data contained in the existing cancer registers in the Member States, and possibly a proposal on the establishment of systems and codes for the identification of dangerous substances at the work place. Further, it should be noticed that the Council in its resolution demands cooperation with the World Health Organisation (WHO) and the International Labour Office (ILO), whereas this was not the case in the first action programme.

The achievements of the second action programme were just as disappointing as those of the first for the people that had expected the introduction of a dynamic health and safety policy in the Community. A Council *Directive on the protection of workers from the risks related to exposure to asbestos at work*²⁶ was adopted in 1983, during the two programmes; thus the directive may not even be seen as an achievement of the second programme, while the Council *Directive on the protection from risks related to exposure to noise at work*²⁷ was clearly a result of this. Both directives were daughter directives of the general Framework Directive of 1980²⁸.

2.1. Conclusions

An evaluation of the period from the introduction of a Community health and safety policy in 1974 to the end of 1987 shows that only the six directives that have been mentioned above, which specifically aimed at protecting the health of workers, were adopted²⁹. Further, the Commission proposed three *Council Directives*, one on benzene³⁰, which was never adopted, and another two, which were later adopted on the basis of article 118 A after the Single

²⁶ 83/477/EEC, September 19, 1983, published in OJ L 263, September 24, 1983.

²⁷ 86/188/EEC, May 12, 1986, published in OJ L 137, May 24, 1986.

²⁸ *Supra* note 20.

²⁹ Cf. COM(87) 520 final p. 4 that also mentions the Council Directive on the major accident hazards of certain industrial activities: 82/501/EEC, OJ L 230/1 on August 5, 1982 but protection of workers was not the predominant effect.

³⁰ COM(85)669; OJ C 349 of December 31, 1985.

European Act came into force, one on limit values for about 100 known toxic substances³¹, and the other on specified agents and/or work activities³². When comparing the results with the ambitions expressed in the two action programmes, it becomes clear that there is a great disparity between the two. Although it might be tempting to describe the results as a total failure for the new health and safety policy, one must keep in mind the adopted directives and the proposals that later led to new directives. On the other hand, seen from the point of view of those, like Jacques Delors, President of the Commission, who want to create a European social dimension (l'espace social Européenne), the results can not be anything but unsatisfactory.

The reasons for the lack of results in the period from 1974 to the end of 1987 might be explained by the facts that health and safety at work according to article 2 EEC was perceived as a by-product of economic integration and that all actions required unanimity in the Council of Ministers. This was changed by the European Single Act in 1987; the effects of this will be examined further in Part 2. The unanimity requirement enabled opponents to effectively block undesired proposals. Although health and safety may be considered a relative exception³³ to the conflict that "led to a virtual stalemate in EEC social legislation", a conflict between, on the one hand, those, like the Thatcher Government, who believe that the "regulatory burden" is a major obstacle to "efficiency" and "competitiveness", and, on the other, the people that believe in a regulated social dimension; this examination of the first and the second action programme shows that little was achieved.

³¹ Amendments to Council Directive 80/1107/EEC: 88/642/EEC, December 16, 1988, published in OJ C 164, 2.7.1986, p. 4 and the adoption published in OJ L 356, p. 74 of December 24, 1988.

³² OJ L 179/88.

³³ Bob Hepple, *Comparative Labour Law and Industrial relations in Industrialised Market Economies*, in Blanpain (ed), Vol. 1, Chapter 12, fourth and revised edition, Kluwer, p. 303.

PART 2: HEALTH AND SAFETY LEGISLATION AT A EUROPEAN LEVEL AFTER THE SINGLE ACT:

1. The relationship between the possible legal bases of directives dealing with health and safety at work: Article 100, 100A and 118A.

The Single European Act (SEA), which came into force on 1 July 1987, introduced several provisions of interest to the health and safety of workers. Although a new article 8 A was added to the Treaty of Rome, leaving out a social dimension as one of the fundamental principles of the internal market:

"The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty".

the new article 8 B did, however, require the Council of Ministers:

".....to ensure balanced progress in all sectors concerned".

This balance may be seen as a reference to the social dimension. The more concrete innovation in the SEA with impact on the health and safety sphere were the adoption of article 118 A under the Social Policy Title and article 100 A under the approximation of laws. Both provisions require a qualified majority vote in the Council of Ministers¹ and a co-operation procedure with the European Parliament, but where article 118 A grants power to the Community to enact legislation concerned with the harmonization of the health and safety of workers, article 100 A allows measures to be taken for the establishing of the internal market as described in article 8 A.

Health and safety of workers in article 118 A is the only substantive employment-related social issue where the Treaty expressly and directly provides for qualified majority voting to establish Community norms. This area might be seen as a test area for the Social Dimension of the Internal Market since the President, Jacques Delors, said publicly in early 1987 that the Commission had

¹ Adoption by qualified majority requires a minimum of 54 of the 76 weighted votes cast by governmental representatives in the Council (article 148 of the Treaty of Rome).

taken the decision to develop a Social Dimension and because it believed there was a consensus of support for more health and safety regulations: the Commission had therefore decided to work in this area first² by acting more forcefully on the basis of the newly inserted provision of article 118A. Article 118 A states that:

"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 harmonization of conditions in this area, while maintaining the improvements made

2. In order to help achieve the objective laid down in the first paragraph the Council, acting by a qualified majority on a proposal from the Commission, in cooperation with the European Parliament and after consulting the Economic and Social Committee, shall adopt, by means of directives minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States."

The nature and scope of action in the field of health and safety is based on the interpretation of article 118 A. In this regard it should be stressed that the article originated in a proposal by Denmark covering protection at the workplace³. The Danish notion of the workplace is broad and dynamic and is not confined to the health and safety of workers in the strict sense but also includes ergonomic measures affecting work schedules, psychological factors and training in health and safety.

The problem arises when it has to be determined whether measures may be considered as health and safety issues under the social and labour market policy, and therefore must be dealt with according to article 118 A, or whether they are part of the industrial policy aimed at abolishing trade barriers and must therefore be treated according to articles 100 or 100 A. This double context of health and safety implies that there is an area of potential and actual conflict between a trend towards raising standards of protection for workers and a trend towards deregulation⁴. Examples of this conflict will be examined in Section 1.5. of the thesis. In article 100 A a further problem occurs, since the principal rule in paragraph 1 provides for a qualified majority vote in the Council and it follows from paragraph 3 that this rule may be used for measures dealing with health and safety at work:

² R. F. Eberlie, *The Industrial Law Journal*, Vol. 19, 1990, The New Health and Safety Legislation of the European Community, p. 90.

³ Patrick Venturini, 1992: *The European Social Dimension*, 1989, European Communities / Commission, p. 49.

⁴ Ruth Nielsen and Erika Szyszczak, *The Social Dimension of the European Community*, 1991, p. 181.

"The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection."

In article 100 A (2) however, there is a derogation to the principal rule of majority voting:

"Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons."

It follows from paragraph 2 that in cases relating to the rights and interests of employed persons, a unanimous vote is required following the principal rule in article 100.

The interpretation of the concepts of "working environment" in article 118 A and "rights and interests of employed persons" in article 100 A (2) is important for the use of legal bases for harmonization efforts. By expressing the Commission's and Council's understanding of these concepts, the third action programme concerning safety, hygiene and health at work, and the Community Charter of Fundamental Social Rights of Workers 1989 (the Social Charter) might well be factors that influence both the European Court of Justice and the legislators at Community level in their interpretation. The third action programme and the Social Charter will therefore be further examined in 1.2. In theoretical discussions different views have been expressed on the concepts; some of these views will be presented in 1.3. before examining the actual use in proposed and adopted directives in 1.4.

1.1. Factors that might influence the interpretation of the Articles - the 3rd action programme and the Social Charter.

1.1.1. The 3rd Action Programme concerning Safety, Hygiene and Health at Work⁵

At the end of 1987 the Commission came up with its Third Action Programme on health and safety, although the second programme did not expire before the end of 1988. The third programme was a result of the Commission's desire to demonstrate its willingness to use the new legal instrument, article 118 A, which was introduced by the Single Act, and as a way to give greater emphasis to the social dimension⁶. The programme was to be taken as contributing a

⁵ COM(87) 520 final, Brussels, October 23, 1987. See a summary in OJ C 28/3, 3.2.1988.

⁶ Social Europe 2/90, p. 17.

significant boost for action in the fields of safety, hygiene, and health at work⁷. In its Resolution of 21 December, 1987⁸, the Council welcomed the Commission's action programme, considering it a useful framework for commencing the implementation at Community level of article 118 A, and stressed at the same time the need to place equal emphasis on achieving the economic and social objectives of the completion of the internal market⁹.

In relation to this thesis, the importance of the action programme and the resolution lies not so much in the specific content of the proposed actions, but more in whether these actions express the Commission's and the Council's view on the concept of health and safety of workers in relation to article 118 A. Further, the actions might also help to clarify the borderlines between, on the one hand, social and labour market policy, and, on the other, industrial policy.

Both the Commission and the Council argue that the safety and health of workers must not be limited to the narrowest understanding of the concept. It therefore includes measures concerning ergonomics in connection with health and safety at work. In the Commission's communication, it states in relation to ergonomics at work that:

"Safety must be built in as an integral part of the general work organisation..."

"This concept of built-in safety and the application of ergonomic principles are required at all stages from design through to operation."

The communication does not however define what is to be understood by built-in safety. The introduction of this vague concept may in fact give leeway for a wide interpretation of health and safety as these are presented in article 118 A. Does built-in safety cover such areas as the duration of working time, its organisation and its content, or does it go further to include "working conditions" in the widest sense like industrial diseases?

The communication does not answer the question clearly, although in parts of the text the

⁷ Cf. Frank B. Wright, "The Development of Occupational Health and Safety Regulation in the European Communities", *The International Journal of Comparative Labour Law and Industrial Relations*, Vol 8, (1992), pp. 32-57.

⁸ OJ C 28/1, 3.2.1988.

⁹ This is in line with the conclusions of The Social Council meeting on 22 June, 1984 on the social area, which also seem to reject the idea that community social policy should be relegated to second place in relation to the economic and industrial policy:

"the Community will not be able to strengthen its economic cohesion in the face of international competition if it does not strengthen its social cohesion at the same time. Social policy must therefore be developed at Community level on the same basis as economic, monetary and industrial policy"(OJ C 175/1 of 3/4.7.1984)

Commission expresses a view that may be understood as favouring a wide use of article 118 A. As regards small and medium-sized enterprises (SME), the Commission makes reference to the declaration adopted at the time of the signing of the SEA¹⁰, in which the basic philosophy is that there should be no greater risk to the safety and health of workers by virtue of the size of the enterprise. In that context it points to the fact that:

"Longer working hours which characterise some SMEs may lead to increased fatigue and decreased vigilance, thus increasing the risk of accidents and physical injuries."¹¹

This is a clear acknowledgement from the Commission that the duration of working time is a factor which may have an impact on the health and safety of workers, and a regulation of the working time may be seen as a way to build in safety. This acknowledgement might be interpreted as a signal from the Commission stating that it is willing to extend the use of article 118 A to this area. It does not however take any steps towards proposing a directive on working time based on article 118 A.

In the communication under part 4, occupational health and hygiene, the Commission further recognises that it is necessary to ensure that the exposure of workers to physical factors, biological organisms and chemical substances is reduced to as low a level as is reasonably practicable in order to protect health and prevent the appearance of occupational diseases. Occupational disease is, in other words, used as one of the arguments for directives on exposure limits. The Commission follows up the statement by announcing proposals for directives e.g. on the exposure limits for 100 agents, and on occupational carcinogens.

In the Commission's communication it declared its intention of proposing a number of new health and safety directives, Recommendations, and Actions. The Directives the Commission intended to propose were on the:

- Organisation of safety
- Selection and use of plant and machinery
- Selection and use of personal protective equipment
- Revision of the safety signs directive, 77/576/EEC¹²
- Harmonisation of the composition of pharmacies on board ships
- Protection of agricultural workers using pesticides
- Safety in the construction industry

¹⁰ The Conference of the Representatives of the Governments of the Member States.

¹¹ *Supra* note 5, p. 26.

¹² Council Directive for the provision of safety signs at places of work, 77/576/EEC, July 25, 1977, published in OJ L 229, September 1977.

Carcinogenic agents
Protection against biological agents e.g. pathogenic micro-organisms
Cadmium compounds
Protection of agricultural workers exposed to certain pesticides
Amendment to asbestos directive 83/477/EEC¹³
Amendment to lead directive 82/605/EEC¹⁴
Amendment to noise directive 86/188/EEC¹⁵
Amendment to proscription of dangerous agents
Amendment to exposure limit values, including chemical agents absorbed through the skin

As well as this list of intentions, the Commission gave formal notice at the December 1988 Council of Ministers of its decision to recommend additional directives to cover the following important areas of risk:

Temporary and mobile work sites (i.e. the construction industry)
Health and Safety for fishing vessels
Agriculture
Modes of transport
Extractive industries (open-cast mining, quarries, the "drilling industries")
Nuclear plants

When examining the intended directives, they concentrated on two subjects, safety and ergonomics at work, and occupational health and hygiene, whereas for the last four subjects dealt with in the communication - (1) information, (2) training, (3) initiatives directed at small and medium-sized enterprises, and (4) social dialogue - the Commission simply planned to use other Actions rather than directives.

The Commission made some comments on the relationship between industrial policy and social and labour market policy. It in fact considered that a dynamic link exists between article 118 A and article 100 A. It stated that even if the harmonization of working conditions was not a prerequisite for the accomplishment of the internal market, the fact remains that the single market should not be achieved by means of a sort of social regression. It could be argued, as the Commission does, that a dynamic link exists between article 100 A, and article 118 A. Article 100 A may be used for establishing principal safety requirements at a high level of protection in relation to the product itself by placing demands on the producers and the suppliers. In other words, the provision is used for the early preventive measures on which a qualified majority can agree¹⁶. Article 118 A may then be used for setting the minimum demands on the employer's duty to

¹³ September 19, 1983, published in OJ L 263, September 24, 1983.

¹⁴ Adopted July 28, 1982, published in OJ L 247, August 23, 1982.

¹⁵ May 12, 1986, published in OJ L 137, May 24, 1986.

¹⁶ Cf. Nielsen, Ruth, *Lærebog i Arbejdsret*, third edition, Jurist- og Økonomforbundets Forlag, Copenhagen, 1990, p. 301.

protect his workers¹⁷. Because the directives based on article 118 A are minimum directives, the Member States are free to set further demands on the employers. The protection of the health and safety of workers is then a result of the interaction between article 100 A, article 118 A, and the further demands, which article 118 A permits, set by the Member States. This interaction could possibly be described as a dynamic link. A further element in the protection of the workers may be the involvement of workers through consultations at the level of undertakings. This was acknowledged by the framework-directive in 1989, which will be described further in part 2.1.3. The involvement of workers in the decision-making process on health and safety issues might lead to an increased awareness and understanding of the issues in the undertakings.

On the other hand, it could be argued, that it is as though the Commission, by emphasising what it choses to call the dynamic link between the two policy areas, in fact ignored the potential conflict between the two. Although it promised to take the social implications into account, in proposals on the removal of technical barriers, it might be too optimistic to believe that the conflict will be avoided. One example where the dynamic link might not exist is in the field of preventive measures. It is a fundamental principal in Danish health and safety legislation that the safety and health of workers must be considered at the earliest possible moment in order to prevent accidents, cf. below part 3. The Commission supports this principle but suggests that this be done with the legal bases in industrial policy, by establishing principle safety requirements. In this case Member States which require stronger preventive measures to be taken than the directive might prescribe, will have to either lower the requirements or go through the article 100 A (4) procedure. Consequently, the Commission's statement that a dynamic link exists between the social and industrial policy seems too one-sided. The fact that article 100 A will be used for preventive measures in the early stages may give rise to worries that the scope of article 118 A will be limited to preventive measures at the latest stages just before reaching the workers.

The communication mentions a proposed directive on the harmonization of classification and labelling of dangerous preparations; this proposal was later adopted as the directive 88/379/EEC¹⁸ and will be dealt with more specifically in Part 3 of the thesis. This directive is an article 100 A directive. The Commission announces that in parallel it will examine what additional measures are required for the protection of the health of workers within the framework of article

¹⁷ *Ibid* note 16.

¹⁸ OJ L 187, 16.7.88

118 A. Again, by the use of the term "in parallel", the Commission seems to expect a situation where article 100 A and article 118 A work together and support each other, but as will be shown later in Part 2.1.4, the actual result of these parallel measures within article 118 A may also be a conflict with the article 100 A directive. The case with the directive 88/379/EEC may be seen as an example of the above-mentioned tendency to limit the scope of article 118 A to preventive measures at the later stages before reaching the workers.

1.1.1.1. Conclusions

It is important to note from the action programme that both the Council of Ministers and the Commission agreed that article 118 A must encompass measures relating to ergonomics and the working environment. Although a Council resolution does not possess any binding force, the Council's statement that equal emphasis should be placed on achieving the economic and social objectives of the internal market was both clear and, in some ways innovative, since the Treaty of Rome including the SEA does not put social objectives on the same footing as economic objectives. This clear statement from the Council might inspire the Commission to come up with new proposals based on article 118 A, and might also influence the European Court of Justice in its interpretation of the social provisions in the Treaty. Further, on the positive side it must be mentioned that the Commission acknowledged the duration of working time as a factor that may cause accidents at work, but did not however take full steps towards proposing a directive on working time.

On the negative side, it must be underlined that few of the proposals for directives in the action programme may be described as new ideas; too many were amendments to already-adopted directives or in fact proposals that earlier had failed to be adopted because of the requirement of unanimity. Further, the Commission's attitude towards the potential conflict between the social and industrial policy expressed the hope or the idea that there were not going to be any such conflicts. The Commission therefore left the problem unfortunately unsolved. Finally, a tendency might be discerned in the Commission's choice of legal bases for proposals for directives in the sense that preventive measures for health and safety at work at the early stage require the use of article 100 A, whereas the scope of article 118 A is narrowed down to those measures which are closely related to the workers.

1.1.2. The Social Charter and the Commission Action Programme relating to the Social Charter

In December 1989, the heads of state or government of the European Community, with the sole exception of the United Kingdom¹⁹, adopted a Charter on the Fundamental Social Rights for Workers²⁰, at the meeting in the European Council at Strasbourg. The idea of a Social Charter had been launched during the Belgian Presidency at the Labour and Social Affairs Council of May 1987, and followed up by an opinion of the Economic and Social Committee in November, 1987²¹, with a series of seminars being organised under the auspices of the Commission in 1987 and 1988²². At the European Council's meeting on Rhodes 2-3 December 1988 the conclusion noted:

"Completion of the single market should not be an end in itself. It should have as its goal something far greater, the guarantee of well-being for all, a policy which follows in the best tradition of European social history".

Thereafter, the development was very rapid: in February 1989, the Economic and Social Committee presented a paper entitled "Opinion on a Social Charter²³" and in March 1989 a Resolution on a Social Charter followed from the European Parliament²⁴. The Commission published the first draft of the Social Charter in May 1989²⁵. This was accepted by ten Member States; Denmark abstained from voting whereas the United Kingdom voted against it. The

¹⁹The United Kingdom government was not prepared to support the Charter even as a purely political instrument which has no binding legal effect. The Secretary of State for Employment, then Norman Fowler M.P., gave three reasons for this government's rejection of the Charter in the House of Commons on 29 November, 1989:

"First, the Charter is intended as a basis for actions. It is accompanied by an action programme... Secondly, the issues in the action programme are what the Commission proposes action on immediately... Thirdly, the effect of accepting the Charter as it stands would be to concede that the Community has competence to deal with these subjects and that it should take action in any event. That runs entirely contrary to the principle of subsidiarity... Subjects such as holidays and hours should not be regulated from Brussels." House of Commons Official Report vol. 162 col. 724 (29 November, 1989).

²⁰See *Social Europe*, 1/90, pp. 46-50 and the discussion on the importance of the Charter which followed the adoption cf. Brian Bercusson, The European Community's Charter of Fundamental Social Rights of Workers, *The Modern Law Review* 53:5 September 1990, pp. 632; Bob Hepple, "The implementation of the Community Charter of Fundamental Social Rights", *The Modern Law Review* 53: 5 September 1990, pp. 643-654; Philippa Watson, The Community Social Charter, *Common Market Law Review* 28:37-68, 1991, pp. 37-68; and Eliane Vogel-Polsky, What Future Is There For A Social Europe Following The Strasbourg Summit? *The Industrial Law Journal*, Vol. 19, 1990, pp. 65.

²¹Opinion of the Economic and Social Committee on the Social Aspects of the Internal Market (European Social Area), Brussels, 19 November, 1987, CES 1069/87.

²²See "The Social Dimension of the Internal Market", Interim report of the interdepartmental working party of the Commission, *Social Europe*, Special Edition, Brussels, 1988.

²³CES 270/89 F/OUP/CH/ht, Brussels, 22 February, 1989.

²⁴Resolution of 15 March, 1989, OJ C 96, 17 April, 1989, p. 61.

²⁵COM(89) 248 final, Brussels, 30 May, 1989. See also *Social Europe*, 1/90, pp. 92-96.

second draft was presented in October 1989²⁶. During the period running from the presentation of the second draft, and the final adoption of the Social Charter at the European summit at Strasbourg in December 1989, the Commission produced, pursuant to its right of initiative under article 155, a communication concerning its Action Programme, including 47 proposals relating to the implementation of the Social Charter²⁷. The initiatives were divided into thirteen sections, twelve of which correspond to each of the twelve fundamental rights set out in the Social Charter. The communication on the Action Programme was presented on 20 November 1989 and published on 29 November 1989; therefore changes negotiated at the summit in December were not taken into consideration as the Commission drew it up. In the following sections a detailed examination will be presented on the possible effects of the Social Charter and the communication on the Action Programme on health and safety policy, with special regard to the relationship between and the interpretation of articles 100, 100 A, and 118 A.

1.1.2.1. The Preamble

The status of the Social Charter is that of a non-binding Declaration made by eleven of the EC Member States. Nevertheless, this solemn declaration of intent is intended to form the cornerstone upon which the social infrastructure of the internal market will be built. In this respect the Social Charter may be called "soft law" - to be translated into "hard law" or concrete obligations by the adoption of measures within the context of the accompanying Action Programme²⁸. The effect of soft law is such that it offers only a temporary respite insofar as parties who have reluctantly consented to mere statements of intent are likely to subsequently insist on the translation of lofty principles into binding agreements. This may explain why the UK government was so strongly opposed to the adoption of the Social Charter. Through it, the eleven Member States expressed a political will to support actions in the field of fundamental social rights of workers, and restated a series of social and labour rights. In contrast to the first two drafts, the adopted Social Charter clearly states in the Preamble, paragraph 11:

"whereas the implementation of the Charter must not entail an extension of the Community's powers as defined by the Treaties".

Thus, the Social Charter must not extend the competence laid down in articles 100, 100 A and

²⁶ COM(89) 471 final, Brussels, 2 October, 1989. See also *Social Europe*, 1/90, pp. 97-101.

²⁷ COM(89) 568 final, Brussels, 29 November, 1989.

²⁸ O. Brouwer, F. Carlin, M. van Empel, C. Lahaye, S. de Peuter, R.J. Prins, *Industrial Relations 1992: An assessment of the Social Dimensions of the Internal Market and its impact on industry*, Stibbe, Blaisse & De Jong, 1990, p. 21.

118 A. The Social Charter may, however, be used to interpret the scope of the powers in these articles.

Although the Social Charter is of a non-binding nature, it might affect both the Commission and the European Court of Justice. In the case of the Commission, it is to be considered as a political directive from the majority of the Council of Ministers to draw up proposals in line with the Charter. Thus it is unlikely that the Commission will present any new proposals falling outside the scope of the Social Charter on social issues. In this way the text of the Social Charter may be seen as defining the scope of the initiatives that will be taken by the Commission. It outlines very effectively the social policy of the future; in other words the Social Charter provides a framework of principles for the future development of a European "social dimension". For this reason, the interpretation of the Social Charter itself is important, because if it is given a wide interpretation it follows that the Commission's proposals will be wider.

The Court, on the other hand, will have to decide upon the importance of the Social Charter. It should be remembered that it has in earlier cases referred to and ordered domestic courts to take into consideration non-binding Declarations or Commission Recommendations²⁹, because of this it may be expected that the wording of the Social Charter will influence the Court in the case of ambiguities.

In the Preamble of the Social Charter, paragraph 2, the relationship between the social and economic aspects is dealt with:

"in the context of the establishment of the single European market, the same importance must be attached to the social aspects as to the economic aspects and whereas, therefore, they must be developed in balanced manner."

Although this can be taken as a positive statement for a social policy in general, it would also

²⁹ See in relation to non-binding declarations, which the Court has referred to Case 222/84, Marguerite Johnston vs. The Chief Constable of the Royal Ulster Constabulary, (1986) ECR 1651. In the case Grimaldi v. Fonds des Maladies Professionnelles, Case 322/88 of 13 December 1989 the European Court of Justice referred to the Commission Recommendation of 23.7.1962 on a list of industrial diseases and the Commission Recommendation 66/462/EEC of 20.7.1966:

"...domestic courts are bound to take those Recommendations into consideration in order to decide disputes submitted to them, in particular where they are capable of clarifying the interpretation of other provisions of national or Community law".

See also O. Brouwer, F. Carlin, M. van Empel, C. Lahaye, S. de Peuter, R.J. Prins, *Industrial Relations 1992: An assessment of the Social Dimensions of the Internal Market and its impact on industry*, Stibbe, Blaisse & De Jong, 1990, p. 110 and Philippa Watson, *The Community Social Charter*, *Common Market Law Review* 28:37-68, 1991.

seem to imply that a social policy would be in some way linked to the establishment of the single European market. The question that therefore remains to be answered is to what degree, if any, a social policy proposal which is unrelated to the internal market is acceptable.

The above statement may also be seen as a simple restatement of the Council resolution on the third Action Programme concerning Safety, Hygiene and Health at Work, where the Council stressed the need to place an equal emphasis on achieving the economic and social objectives on completion of the internal market. Paragraph 2 of the first draft leaves the social policy in a more independent position with regard to the single European market:

"Having regard to the implementation of a social policy at Community level, particularly in view of the impending completion of the internal market"

The final draft does, however, in paragraph 13 use the expression **"the social dimension of the Community"** and not "the social dimension of the internal market". Thus it is this lack of clarity with regard to the Community and the internal market which leads to difficulty in interpretation and therefore to uncertainties over the position of social policy with regard to the internal market.

The Action Programme reveals to what extent the Commission is willing to use the social policy provisions which the Preamble of the Social Charter opens up, for social policy not related to the internal market. Although the Action Programme was drafted before the final text of the Social Charter, no changes were made in paragraphs 2 and 13 from the second draft to the final text. In the Action Programme the Commission did not, despite the opportunities given in the Social Charter, express a will to extend the measures to more than the social dimension of the internal market:

*"These measures are grouped under thirteen short chapters, each covering an area relating to the development of the social dimension of the **internal market**."*³⁰

In connection to this it should be mentioned that in the Action Programme the Commission stated that:

*"The social dimension has already become a fact".*³¹

³⁰ *Supra* note 27, p. 3.

³¹ *Supra* note 27, p. 4.

It did this with a reference to what the Commission considered to be the substantial advances that had been made in the areas such as improvement of the working environment in order to protect the health and safety of workers. This positive statement may in fact be open to debate since Vogel-Polsky describes the period from the coming into force of the Single Act to the adoption of the Social Charter as a period where "the social deficit" of economic integration had emerged in a striking manner³². The Federation of Danish Unions (LO) argued in July 1989 as Vogel-Polsky, that in cases of conflicting considerations between social aspects and economic aspects (free trade), the economic aspects had consistently been emphasised³³.

Further, the eleven Member States stated in the Preamble, paragraph 7, of the final Charter:

"the completion of the internal market must offer improvements in the social field for workers of the European Community, especially in terms of...., living and working conditions, health and safety at work,"

"Health and safety at work" was not mentioned in the first two drafts, but it was added before the adoption of the final Charter. The reason for its omission in the first two drafts remains unclear, particularly since this is the only employment-related social issue with respect to which the Treaty unambiguously authorises decisions by a qualified majority. An examination of the articles of the Social Charter and the communication on the Action Programme might reveal whether the Commission took it for granted that health and safety was included, or if the Commission simply forgot to deal with it in the first drafts. Further, it may be asked whether the use of the term "health and safety at work" instead of "working environment" reduces the application of article 118 A. As mentioned above in part 2.1., this article originated from a proposal by Denmark covering protection at the workplace. The Danish notion of the workplace is broad and dynamic and not limited to the health and safety of workers in the strict sense. If the Commission accepts this broad and dynamic approach to the term health and safety at work, the Social Charter does not imply a reduced application of article 118 A. A statement made by Papandreou, Member of the Commission, indicated in September 1989 that the use of the term health and safety should not be interpreted as narrowing the scope of article 118 A, and on the other hand that the Commission was willing to use the provision in a dynamic way:

³² Eliane Vogel-Polsky, "What Future Is There For A Social Europe Following The Strasbourg Summit?", *The Industrial Law Journal*, Vol. 19, 1990, pp. 65.

³³ LO, "EF, det indre marked og den sociale dimension - Dansk fagbevægelses position, målsætning og strategi", LO, Copenhagen, 1989.

*"There has been frequent reference to article 118A and I think Parliament agrees with the interpretation given by President Delors regarding that subject, namely that it refers to health and safety. We cannot include everything under that article, but the Commission will strive to interpret it more broadly so that technical and social developments within the Community can be taken into account"*³⁴

At this stage it should be noted that neither the Social Charter nor the Commission's communication concerning its Action Programme indicate the legal bases on which proposals should be based. The Social Charter, however, contains especially two headings that might indicate the European Council's interpretation of articles 100, 100 A, and 118 A, *"improvement of living and working conditions"* and *"health protection and safety at the workplace"*. Other headings may also include initiatives of interest to the interpretation of articles 100, 100 A, and 118 A, but the following analysis of the Social Charter and the Action Programme will concentrate on the above-mentioned headings. The Action Programme expressed in relation to other headings, e.g. "Employment and Remuneration" the intention of proposing one directive on *atypical workers*, and in relation to "Equal Treatment for Men and Women" the Action Programme contained a proposal for directive on the *protection of pregnant women at work*. These initiatives will be further described in part 2.1.3. of the thesis.

1.1.2.2. Improvements of Living and Working Conditions

The first heading of interest, "Improvement of living and working conditions", is comprised of the articles 7-9. The heading may be seen as a reference to article 117 of the Treaty, which concerns "the need to promote improved working conditions and an improved standard of living for workers". Article 7 requires that the improvements being made should be maintained, in particular as regards the duration and organisation of working time and forms of employment other than open-ended contracts.

The first and second drafts stated the need for establishing a maximum duration of working time, but this was omitted in the final version. This might be interpreted as a shift away from an emphasis on the protection of the workers, but on the other hand it could be argued that the word maximum is implied where the final version talks about improvements in the duration of working time. In the latter case the question arises, however, of why maximum was left out in the final version, if it did not constitute a change in the meaning of the text?

³⁴See OJ No. 2-380/91, p. 104 on the Debates of the European Parliament on 13.9.89.

Further, the term "forms other than open-ended contracts" was narrowed down, so that weekend work, night work and shift work were all left out in contrast to the first draft. In the second draft these forms of work were particularly categorised as "other forms of work". The use in the adopted text only of improvements *"in particular the duration and organization of working time and forms of employment other than open-ended contracts"* seems to indicate that its scope goes beyond the factors explicitly mentioned. Thus these improvements may in fact also include what the second draft described as other forms of work.

The changes from the first and second drafts to the final text of article 7 are few and have an uncertain effect on the understanding of the article. An evaluation which can be made about the importance of article 7 with regard to the health and safety policy is that it is of a non-dynamic character, because it only establishes a right to maintain the improvements being made, but does not require that new improvements should be made at Community level in the form of directives. Despite this, it might possess an internal dynamic, since Member States with the highest level of protection are guaranteed that they can maintain their level in cases of harmonisation, whereas the others will have to improve their protection, because harmonisation is made at the high level. Article 7 does state that improvements in working conditions must be the consequence of the completion of the internal market, which must include an approximation of these conditions. Given this reference to the completion of the internal market, article 7 could be interpreted as linked to the measures based on article 100 A of the Treaty. Since improvements in working conditions must be the consequence of the completion of the internal market, the article might be understood as confirming the fact that improvements in the working conditions are still perceived as a by-product of economic integration, cf. 1.1 above on article 2 EEC. On the other hand, it could be argued that since the improvement of working conditions is not limited to the completion of the internal market (the Preamble talked about "the social dimension of the Community"), working conditions are not simply a by-product of economic integration. Article 7 only deals, however, with the completion of the internal market and establishes a right to maintain the improvements being made when measures are taken to complete the internal market. Other provisions might deal with working conditions as part of the social dimension of the Community.

In the field of articles 7 and 8, the Commission's Action Programme contained a directive for the adaptation of working time. This was innovative in comparison to the third health and safety

Action Programme, which also acknowledged that the duration of working time could have an adverse effect on the wellbeing and health of workers, but did not express the will to propose a directive.

Although the proposal is described under the headline "new initiatives", the Commission did nothing to hide the fact that it was based on a draft recommendation from 1983³⁶, which the Council had failed to adopt. The Commission also made it clear that it intended to propose minimum reference rules as regards the maximum duration of work, rest periods, holidays, night work, week-end work, and systematic overtime. The word "maximum" is an example of the fact that the Commission could not take the last changes in the Social Charter into consideration, since the Action Programme was produced earlier than the Social Charter.

In a similar way the Commission's intention to come up with proposals on night work, week-end work and systematic overtime was dropped or not explicitly mentioned in the adopted Social Charter, after having been mentioned in article 10 of the second draft. The Commission stated in the Action Programme the content of the proposal for directive; it was, however, not possible on the basis of the Programme to conclude which legal basis would be used. The Commission stressed the importance for the adaptation of working time with regard to both the firm's dynamism and its competitiveness, so as to avoid excessive differences (the "social dumping" argument), and also the importance of working conditions and workers' health.

The Action Programme does not therefore solve the problem of choice between article 118 A, article 100 A, and article 100. The reference to the wellbeing and health of workers, and the fact that the proposal will include minimum reference rules made it very likely that article 118 A would be used as the legal basis; on the other hand, the argument for preventing social dumping may better indicate article 100, since the directive would affect the establishment of the common market. Finally, article 100 A could also be used, since labour is a factor of production which affects the functioning of the internal market. Although it might have been clear to some that article 118 A would be used as legal basis for the proposed directive, it is important to recognise the fact that both article 100 and 100 A might have been used instead, if the Commission wished to test their scope and to promote the use of these provisions. In this way it is clear that

³⁶ Draft Council Recommendation on the reduction and reorganisation of working time OJ 1983 C 290/4.

the choice of legal basis depends to a large extent upon the vision of the Commission³⁶. It is thus important to realise to what a great extent the Commission's view affects the actual use of the Treaty provisions in article 100, 100 A, and 118 A. It should be noted that the Commission's proposal on a Directive concerning working time³⁷ ended up being based on article 118 A as later shown cf. Part 2.1.3.2.2.

In relation to the planned directive on working time, it is worthwhile noting that the Commission focused on collective agreements in the Action Programme, since it recognised that these set the standards to be harmonised in many cases. This recognition led to the statement:

"the basic conditions which these (collective)³⁸ agreements should comply with ought therefore to be clearly defined."³⁹

Article 8 of the Social Charter, which, together with article 7, encouraged the Commission to propose the directive on working time, was subject to changes only with regard to the two draft proposals (article 13 of the first draft and article 11 of the second draft) suggested, in the reference to the weekly rest period and annual paid leave, standards "which must be progressively harmonized in accordance with national practices". The interpretation of the term "practices" is described by Brian Bercusson⁴⁰ in detail, but since it is of no importance in the choice of the legal basis for Community actions, it will not be dealt with in the following.

1.1.2.3. Health and Safety Protection at the Workplace

The second Title of the Social Charter which is of particular interest to the use and understanding of the Treaty provisions in article 100, 100 A, and 118 A is *Health protection and safety at the workplace*. The Title only includes one article, namely article 19:

"Every worker must enjoy satisfactory health and safety conditions in his working environment. Appropriate measures must be taken in order to achieve further harmonization of conditions in this area while maintaining the improvements made.

³⁶ See also Brian Bercusson, *Fundamental Social and Economic Rights in the European Community* Report presented to a conference in Strasbourg on "Human Rights and the European Community" 20-21 November 1989 (Florence, E.U.I. 1989 mimeo), p. 206.

³⁷ COM(90) 317 final - SYN 295 of 20 September 1990, published in OJ C 254/4 of 9 October 1990.

³⁸ My insert.

³⁹ See more about this in Brian Bercusson, *The European Community's Charter of Fundamental Social Rights of Workers*, *The Modern Law Review* 53:5 September 1990, pp. 632.

⁴⁰ *Ibid* note 39.

These measures shall take account, in particular, of the need for the training, information, consultation and balanced participation of workers as regards the risks incurred and the steps taken to eliminate or reduce them.

The provisions regarding implementation of the internal market shall help to ensure such protection."

The first paragraph clearly appears to be inspired by article 118 A of the Treaty, given the similarities in the wording, although there are, however, some striking differences between the two provisions. The Social Charter introduces the general standard of *satisfactory conditions*, which is a term of an unclear and vague nature. It might be understood as referring to either satisfactory to the Member States, or satisfactory to the workers. The first may be used as a political interpretation of the term, meaning conditions that are considered to be satisfactory by a qualified majority in the Council, although they may be unsatisfactory to a minority, for example, Germany and Denmark. The correct legal interpretation will, on the other hand, be **satisfactory to the workers**, since the Social Charter deals with the rights of workers only, and because article 19 clearly states that "every worker" must enjoy satisfactory conditions. The consequence is that an adopted Council directive based on article 118 A might not meet the requirement of satisfactory to the workers, simply because a qualified majority in the Council has considered the directive to be satisfactory. In this way the provision may also be seen as an instruction to the Commission to come up with proposals that are not "minimalist" or the "lowest common denominator" of existing laws found in the Member States, because article 28 of the Social Charter includes an invitation to the Commission to submit initiatives for the effective implementation of the Social Charter, and because the lowest common denominator may not be satisfactory to the workers. Because it is up to the Council to control and adopt the Commission proposals, the Commission will have to take such an instruction into consideration when drafting proposals. The term, satisfactory conditions, was also used in the first two drafts of the Social Charter, but in neither was it defined what was to be considered satisfactory. Article 118 A, (2) of the Treaty did not include anything about the level of the minimum requirements which were to be implemented, but the effect of the Social Charter may in this case be, that "minimum requirements" in article 118, (2) will have to be interpreted as **minimum requirements satisfactory to the health and safety of workers**.

The Social Charter's aim might also be seen as a way to provide stronger encouragement for Member States with a low level of protection to make improvements, given that according to

article 27 it is the responsibility of the Member States to guarantee the rights in the Social Charter. In other words, it is also up to the Member States to guarantee that the workers enjoy satisfactory health and safety conditions.

Further, where article 118 A prescribes "improvements, *especially* in the working environment, as regards the health and safety of workers" the Social Charter differs in that it has purposely left out the word. This was also innovative, given that the early drafts of the Social Charter used the words "more especially". The effect of leaving out "especially" in article 19 of the Social Charter may not constitute any important change, but it does, in fact, seem to narrow the scope of article 118 A, since the Social Charter in contrast to article 118 A excludes the health and safety of workers which is not related to the working environment from the scope of the provision.

The second sentence of article 19 uses the expression "*appropriate measures*" to achieve further harmonization. This might lead to the conclusion that measures such as regulations can be used; but since the Social Charter, according to the Preamble paragraph 11, does not entail an extension of the Community's powers as defined by the Treaties, the appropriate measures in article 118 A can only be by means of directives. In other words, the appropriate measures can only be those measures allowed for in the Treaty provisions. In this connection may be mentioned the importance of article 235, which allows the Council to act unanimously on appropriate measures, as long as action should prove necessary, and if the Treaty has not provided the necessary powers. Therefore the Council could by using article 235 adopt regulations, if it should prove necessary⁴¹. The provision has also been used in the adoption of the *European Year of Safety, Hygiene and Health at the Workplace* (1992)⁴².

In the second paragraph of article 19, there is a complete reference to those rights of workers that are laid down in the "framework" directive which is based on article 118 A, and concerns the introduction of measures to encourage improvements in the safety and health of workers at

⁴¹ Although the use of article 235 normally requires 4 conditions to be met - according to Claus Gulmann and Karsten Hagel-Sørensen, *EF-ret, Jurist- og Økonomforbundets Forlag*, Copenhagen, 1989, p. 46f: (1) The action should be needed, (2) It should help attain one of the Community's objectives, (3) The objective should be within the limits of the common market, and (4) The Treaty does not provide the necessary powers in other provisions, - then there has been discussions in Denmark on the use of article 235, because article 20 of the Danish Constitution only allows concession of sovereignty to international organisations "to a more specific extent", and it may be argued that article 235 of the Treaty does not meet this requirement.

⁴² See Com(90) 450 final, Brussels, 7.11.1990.

work⁴³. The workers' rights appear in article 10 - 12 of the directive. This second paragraph in article 19 of the Social Charter was not included in the first two drafts. The reason why it was not part of the first draft may well be explained by the fact that the first draft of the Social Charter was published before the adoption of the "framework" directive. In the second draft however, which was published on 2 October, 1989, more than three months after the adoption of the directive, it is more difficult to find a reason for the lack of reference to the rights in the directive. Since the directive is of major importance in the field of health and safety at work, it seems hard to believe that the Commission could have forgotten about it when drawing up the article. Especially when the Commission in its Action Programme of 20 November, 1989 stated that the framework Directive is of particular importance for the safety and health of workers at work. No other explanation, however, has been found.

The term "*balanced participation*" may be rather new in the Community terminology, but it might be interpreted according to article 11, paragraph 1 of the framework directive, which presupposes:

"Balanced participation in accordance with national laws and/or practices."

One of the questions which arises as a result is what are the consequences, if national laws and practices do not prescribe workers' participation in relation to safety and health at work? What exactly is meant by the term "balanced participation" is very difficult to say, and it might be argued⁴⁴ that the discussion is destined to end up on the table of the ECJ for inevitable clarification. Thus, Biagi concludes⁴⁵ that the term implies "something more than simple consultation certainly a different *quid* from traditional collective bargaining", and that "*the range of possible interpretations of 'balanced participation' really is very wide*". Others seem to argue⁴⁶ that the term is interpreted as "balanced co-operation", and quotes the Commission for looking favourably upon this, provided it proceeds in harmony with national legal provisions or practices. **Co-operation** may be defined as consultation, negotiation, or co-determination, if one considers the participation of employees' representatives to be divided into five levels:

⁴³ Directive 89/391/EEC of 12.6.1989 and published in OJ L 183 of 29.6.1989.

⁴⁴ M Biagi, "From Conflict to Participation in Safety: Industrial Relations and the Working Environment in Europe 1992", (1990), Vol 6, *International Journal of Comparative Labour Law and Industrial Relations*, pp. 67

⁴⁵ *Ibid* note 44.

⁴⁶ Hubert Krieger, "Participation of Employees' Representatives in the Protection of the Health and Safety of Workers in Europe", *The International Journal of Comparative Labour Law and Industrial Relations*, Vol 6, (1990), pp. 217-227.

- *no employee participation*: management plans and implements new health and safety measures without any form of employee participation.
- *information*: management informs the employees' representative body in writing or in meeting together.
- *consultation*: joint committees are set up in which employees' participation are not merely informed by management, but can also comment and expect justification from management in the event of differing opinions.
- *negotiation*: a contractually binding outcome is worked out in joint negotiating committees at company or inter-company level.
- *co-determination*: the employee has a right of veto and decisions require the agreement of both parties.

In relation to the word "**balance**" it may be asked what is being balanced? And the answer to this might be, that it is the participation of the employees in relation to the importance of health and safety aspects in the matters concerned. Thus, if the matter directly affects the working process, the employees should be entitled to participate in the decision making process, whereas matters which more indirectly affect the working environment e.g. planning of new technologies may entitle the employees to a lower intensity of participation.

Finally, article 19, paragraph 3 of the Social Charter is one of the most concrete provisions in the Social Charter. It deals with the provisions regarding the implementation of the internal market. Thus it affects the directives that are based on article 100 A. According to the paragraph, all provisions regarding the implementation of the internal market shall help to ensure the protection of health and safety. It is important to note that contrary to the first two drafts, which provided a negative injunction "such protection may not be jeopardized", the final Social Charter provides for a positive injunction, e.g. that the directives that are adopted on the basis of article 100 A shall help to ensure the health and safety protection. The paragraph may therefore be an important factor when interpreting article 100A, paragraph 3. The result is that health and safety conditions are linked to the internal market programme in a special way which differs from all other areas.

The Action Programme provides for an extensive list of new initiatives to be taken in the field of article 19 of the Social Charter. Of a total of twelve initiatives ten are proposals for directives.

The ten proposals can be divided into two categories, initiatives in sectors where safety causes significant problems - the so-called high-risk sectors - and proposals for directives covering specific risks, which are not related to certain sectors. The emphasis is clearly on safety initiatives in the high-risk sectors, and this is also in line with the Commission's intentions:

"The Commission considers that priority should be given to new initiatives in areas where safety causes significant problems"

The first category includes proposals for Council Directives on sectors that are all uncovered by the first individual Directive on the minimum requirements for the workplace⁴⁶, pursuant to article 16 (1) of the framework directive:

- On the minimum health and safety requirements to encourage improved medical assistance on board vessels.
- On the minimum health and safety requirements for work at temporary or mobile work sites.
- On the minimum requirements to be applied in improving the safety and health of workers in the drilling industries.
- On the minimum requirements to be applied in improving the safety and health of workers in the quarrying and open-cast mining industries.
- On the minimum safety and health requirements for fishing vessels.
- On the minimum safety and health requirements for activities in the transport sector.

Whereas the second category, proposals for directives on specific risks not related to certain sectors, includes proposals for Council Directives on:

- The minimum requirements for safety and health signs at the workplace.
- Defining a system of specific information for workers exposed to certain dangerous industrial agents.
- The minimum safety and health requirements regarding the exposure of workers to the risks caused by physical agents.
- Amending Directive 83/447/EEC on the protection of workers from the risks related to

⁴⁷ *supra* note 27, p. 43.

⁴⁶ Directive 89/654/EEC adopted on 30 November, 1989, published in OJ L 30 December, 1989.

exposure to asbestos at work.

It should be noted that the above-mentioned proposals will not necessarily all be presented with article 118 A as the legal basis. In the introduction of the Title in the Action Programme, when describing the progress made after the Single Act came into force, the Commission mentions not only the proposed and adopted directives based on article 118 A, but it also describes the progress made in the field of directives based on article 100 A. When describing the effects of the article 100 A directives, the Commission confirms its approach to the use of article 100 A and 118 A, which was introduced in the 3rd Action Programme concerning Safety, Hygiene and Health at Work, cf. 1.1.1. In this approach, the Commission envisages the two provisions as working together in parallel rather than creating conflicts. The result could be, as the 3rd Action Programme indicated, the narrowing down of the scope of article 118 A to the measures which are closely related to the workers, that is, the regulation of working processes, whereas article 100 A could be used for setting requirements to products, technical regulations regarding products and equipments used by workers. The Commission confirms in the Action Programme on the Social Charter that this may be the way article 118 A and article 100 A should be used, since when it describes the article 100 A directives, it points to the technical regulation of products:

"In parallel, the Community has developed the implementation of a new approach regarding technical regulation which entails, for example for industrial machines or for individual protective clothing, compulsory safety requirements for the protection of workers."

Taking firstly the content of the proposals for directives on the high-risk sectors, the Commission intends in all six proposals to set the minimum health and safety requirements. This may be interpreted as a strong indication for the use of article 118 A as the legal basis for the proposals. The proposal on fishing vessels provides yet a stronger indication for the use of article 118 A, bearing in mind that the Commission intends to use this Article for the regulation of work processes. The Action Programme states⁴⁹:

"The purpose of the proposed directive is to lay down minimum safety and health requirements in relation, in particular, to working procedures on board such vessels."

This should be a key area for the Commission in its use of article 118 A, although the words "in

⁴⁹ *Supra* note 27, P. 46.

particular" appear in the text. The proposal on work at temporary or mobile work sites may also be seen as referring to healthy work processes, but in this case the work process clearly covers more than specific work situations within a workplace, given that it covers the complete design of the site:

"The Directive aims to incorporate health requirements from the initial stages of site design;"⁵⁰

On the basis of this initiative it may be asked how far the Commission can stretch the use of article 118 A, because in this case it appears to take space from article 100 A, since the initiative will affect requirements set to products used at the site. Examples of products which might be affected by a widening of the use of article 118 A could be Danish companies which export turnkey dairies and concrete plants. This conflict between, on the one side, article 118 A directives, and, on the other, article 100 and 100 A directives will be further analysed in 1.4. At this point it should be mentioned that a common position on a Commission proposal based on article 118 A⁵¹ was adopted by the Council on 19 December 1991.

The proposal concerning medical assistance on board vessels may be seen as going in the same direction, so that it covers the total set up of the workplace. The workplace is in this case the vessel. The focus of the directive in the creation of a safe and healthy workplace is in this case the medical assistance on board. Medical assistance might not be a part of the working process in a strict sense, but, widely interpreted, the guarantee of getting medical assistance in the case of an accident is part of a safe working process. The aim of the Directive is *"to promote better worker safety and health on board vessels by improving medical assistance on board."*

Further, the proposal for a directive concerning the transport sector *"aims to set the minimum requirements for the prevention of dangerous situations and the protection of all the workers concerned"*. If the proposal covered preventive measures that set requirements to products and still based on article 118 A, then it would be an important step in the direction of widening the scope of the provision. But the prevention of dangerous situations must be interpreted in context, and the situations described in the Action Programme are related to working processes namely *"transport-related maintenance, handling and loading work."*

⁵⁰ *Supra* note 27, p. 45.

⁵¹ COM (90) 275 final, OJ C 213, 28.8.90; amended proposal: COM(91) 117 final, OJ C 112, 27.4.91.

Taking secondly the content of the proposals for directives on specific risks not related to certain sectors, the proposals for signs at the workplace, and the risks related to asbestos, these may simply be considered as amendments or revisions and extensions of existing directives. In relation to *safety and health signs at the workplace*, Council Directive 77/575/EEC and Commission Directive 79/640/EEC were already in existence, as was Council Directive 83/447/EEC for *asbestos*. These existing directives were all based on article 100, but another legal basis may be used for the proposals, since article 100 A and 118 A have been introduced in the meantime by the Single Act. The proposal on safety and health signs at the workplace aimed at setting the minimum requirements, therefore, it was no surprise that article 118 A was chosen as legal basis for the Commission's proposal⁶², and the later adopted directive⁶³.

Further, there is the proposal on defining a system of specific information for workers exposed to certain dangerous industrial agents. The proposal is for a minimum directive, and it is important to note that the information is in relation to the workers and not to the employers. Another directive sets the requirements for the information sheets in relation to the placing on the market of chemical substances, and the proposal will have to take this into consideration. The fact that the proposal is for a minimum directive and that it will provide information for the workers are indications that Article 118 A will be used as the legal basis. An interesting point in relation to Part 3 of the thesis is the statement in the Action Programme⁶⁴, which acknowledges the work done by the ILO on chemical substances:

"This proposal defines the minimum requirements for the protection of workers and takes account of the work carried out by the ILO on chemical substances"

Finally, the proposal on physical agents will also be proposed as a minimum directive. In the comments to this proposal the Action Programme moves towards a recognition of the damaging long-term effects of certain working processes, and at the same time it stresses the importance of preventive measures in a minimum directive also:

"It often takes some time before effects which are damaging to health become apparent. A proposal will be made to introduce the preventive and corrective measures necessary to reduce the possibility of overexposure, accident and illness."

⁶² COM(90) 664 final, OJ C 53, 28.2.91.

⁶³ *European Report*, No. 1727, December 1991 reports that a joint position was adopted in the Council.

⁶⁴ *Supra* note 27, p. 47.

1.1.2.4. Conclusions:

The Charter and the Action Programme provide a framework of principles on which the future development of a European social dimension will be developed. The Charter in the Preamble used the expression "the social dimension of the Community" and thereby expressed an accept of having the Commission come up with proposals which might not be linked to the internal market. Despite this indication the Commission limited its Action Programme to the internal market. It is therefore very unlikely that the Commission will propose initiatives in the field of health and safety at work which do not affect the establishing of the internal market. The Commission's view influences in this way the use of the Treaty provisions to a large extent.

Article 7 of the Charter, that concerns improvements in the living and working conditions, does not provide a right to improvements, it simply includes a right to maintain the improvements being made. The reference to the completion of the internal market as the cause to improvements may imply that proposals within the scope of this article will be based on article 100 A. The Action Programme contained only one partly new initiative in this field, namely the intention of a proposal for a directive on working time. Different arguments presented in the Action Programme may indicate different legal bases for this proposal, but because of the intention to propose minimum reference rules, and because of the recognised possible adverse effects from working time on the wellbeing and health of workers, there were strong indications for the use of article 118 A, which also was used in the later Commission proposal. Thus, it may constitute a first step in the direction of widening the scope of article 118 A to something more than health and safety in the strict sense; the wellbeing of the workers is taken into consideration as well.

Secondly, the title on "Health protection and safety at the workplace", which only includes article 19, contains new elements especially of importance to the interpretation of article 100A and 118A. The first paragraph clearly appears to be inspired by Article 118A, although the Social Charter introduces a general standard of satisfactory (health and safety) conditions and drops the word especially in comparison to article 118 A. Satisfactory conditions may indicate that the level of proposals based on article 118A are not to be the lowest common denominator, but should be at a level which would be considered satisfactory to the workers. Article 19, (2) of the Social Charter is a complete reference to the rights of workers laid down in the framework

directive 89/391/EEC, which is based on article 118A, and as such the Social Charter does not seem to include anything new. Finally, the last paragraph links in a special way internal market provisions, such as article 100A, to health and safety conditions. All internal market provisions shall help to ensure health and safety protection. This is more concrete than article 100A, (3) and might result in a higher level of protection in the Commission proposals.

The Action Programme emphasises in the field of article 19 initiatives for new directives in high-risk sectors. In these proposals the Commission confirms the approach indicated in the third Action Programme concerning Safety, Hygiene and Health at Work, see above 1.1.1., to use article 118A for regulation of working processes, whereas article 100A is used in relation to products. The new initiatives indicate also that the working process should be widely interpreted, so that it includes the total design of the site in the case of temporary or mobile work sites. The initiatives for directives on specific risks not related to certain sectors do not seem to provide new information about the scope of articles 100, 100A, and 118A, but they contain, however, an acknowledgement both of the work done by the ILO on chemical substances and of damaging long-term effects of certain working processes. These acknowledgements may be useful in part 3 of the thesis.

1.2. Theory - Opinions on the Interpretation of the Treaty-articles

The theoretical discussions have to a large extent concentrated on the interpretation of the exclusionary clause in article 100A, and the concept of the working environment in article 118A. The arguments may be loosely divided into three schools of thought: (1) those emphasising the economic aspects through deregulation of the European Community, (2) those which consider a social dimension highly important and therefore advocate a positive and active role of the Community in the working environment by the wide use of majority voting, and (3) those who aim to reach a compromise between the first two. It is important to bear in mind that all three schools of thought agree on the fact that some health and safety matters must be regulated, but they disagree to the extent of the regulation.

1.2.1. The deregulation-school

The deregulation-school has found its major support in Unice (the employers organisation at

European level) and the UK government⁵⁶, but other Member States have also been opposed to a wide use of majority voting in the social field⁵⁶. Unice expressed that it would support harmonization measures in relation to the Social Charter⁵⁷ in five areas: health and safety, mobility, education and training, equal opportunities, and economic and social cohesion, as defined in the SEA. No other areas should be regulated or harmonized by the Community. This approach by Unice seems to be in line with that of the UK government, which supports harmonization in industrial health and safety⁵⁸ to a limited extent. Unice further stated in relation to the Social Charter:

*"The text clearly underlines the Commission's intention of proposing legislation in areas which Unice considers unsuitable for Community action. These are the areas normally left to free collective bargaining (e.g. working hours, work contracts, leave, information, consultation and participation), or to national legislation meeting the specific requirements of the country concerned."*⁵⁹

With this statement Unice clearly emphasised that article 118A should only be used in cases where there is no tradition for collective bargaining or national legislation. Thus this is an argument for a wide definition of the principle of subsidiarity. At the same time it may be understood as a call to the Commission to remain neutral, on the basis of article 118A with regard to existing relations between management and labour at national level. Unice expressed preoccupation in relation to the general introduction paragraph 5 of the Commission's Action Programme on the Social Charter, i.e., that the Commission was going to narrow the use of the subsidiarity principle:

"This approach worries Unice, since it appears to favour centralization and regulation through Community directives of matters which should properly be left for decision at other levels, either through national laws, through collective bargaining or according to the traditions and practices which have evolved locally over many decades"

This goes to prove the skeptic attitude in Unice towards Community regulation, namely that this

⁵⁶ See the comments of the former Employment Secretary under Thatcher, Mr. Norman Fowler, reported in (1989) *Employment Gazette*, to the effect that "The real social dimension of 1992 is the opportunity to create new jobs and reduce unemployment". It is the UK's view that "further unnecessary regulation will impede economic growth and job creation"(ibid). Such comments have also been expressed by Employment Minister, Mr. Tim Eggar, in terms that "Our experience is that business creates jobs; detailed regulation does not" (cited in (1989) *Employment Gazette* 575).

⁵⁶ *European Report*, December 4(?), 1991, Section IV, op. cit. 9

⁵⁷ *Social Europe* 1/90, p. 22-24.

⁵⁸ See Bob Hepple, *Comparative Labour Law and Industrial relations in Industrialised Market Economies*, in Roger Blanpain (ed), Vol. 1, Chapter 12, fourth and revised edition, Kluwer, p. 304.

⁵⁹ *Supra* note 57, p. 23.

is only justified if the set objectives cannot be sufficiently obtained by the Member States, and if the effects of the measure will be better reached at community level. At what point the objectives can be reached more effectively at Community level depends upon the vision of the Community as held by its author, and, in this respect, it may be expected that Unice and the UK would argue that Community competence should interfere as little as possible. The discussion on the interpretation and the use of the subsidiarity principle will probably intensify in the years to come, since, if the Maastricht agreement is adopted, the new article 3B of the Treaty will include subsidiarity as a general principle in Community legislation. Unice has made it clear that it believes Community regulation should be very limited in the social field:

"European firms must not be bound up in more Community-level social regulations than those strictly necessary to:

- 1. ensure the proper functioning of the internal market;*
- 2. avoid disloyal competition."*⁹⁰

The idea of limiting the scope of article 118A has some support by legal experts. Roger Blainpain argues⁹¹ that the general rule is that of unanimity, since the correct interpretation begins with article 100A, (2)'s rule, that the rights and interests of employed persons should be decided on a unanimous basis. He further argues:

"Article 118A, which allows a qualified majority only for health and safety matters in the workplace, constitutes an exception to the general rule. Therefore, article 118A should be interpreted in a restrictive manner."

This interpretation can be used to limit the application of article 118A to industrial health and safety, which is arguably essential for economic efficiency, and which at the same time removes the stigma from some of the more unacceptable features of the market. The consequence of such an interpretation will be that only specific health and safety issues, which the UK and Unice also believe should be regulated, may be adopted on a basis of qualified majority, whereas proposals touching upon more than the health and safety of workers in the strict sense, will have to be adopted on a unanimous basis. This will leave the opponents of a strong social dimension

⁹⁰ *Ibid* note 59.

⁹¹ Roger Blainpain, 1992 and Beyond: The Impact of the European Community on the Labour Law Systems of the Member Countries, *Comparative Labour Law Journal*, 1990, p. 404.

See also R.F. Eberlie, The New Health and Safety Legislation of the European Community, *The Industrial Law Journal*, 1990, Vol. 19, p. 88 that argues for a narrow definition of "the working environment", "at present simply health and safety".

with powerful control of the development in this field, since the UK government in the Council will be able to block all initiatives which are contrary to the deregulatory approach.

Thus, whereas the discussions before the SEA concentrated on the substance of proposals, given that all Member States had to agree, the debate after the SEA has centred on the legal basis chosen by the Commission⁶², since majority voting is allowed for in only certain areas. The position of one government on its own is therefore much weaker in these areas now than it was under the old regime of unanimity. It should be noted that the above-mentioned approach proposed by Roger Blainpain does not necessarily lead to this favourable situation for the deregulatory movement (although he favours a restrictive interpretation of the parameters of health and safety) because the result depends to a large extent on which health and safety issues are accepted as such. In this matter he seems to be willing to include more than the UK and Unice: *"Safety and health concerns include the prevention of stress, work accidents and professional diseases"*. Stress in particular is a factor which both the UK and Unice are opposed to including under health and safety, since they both reject Community legislation concerning working hours.

1.2.2. The pro Social Dimension-school

In contrast, those that opt for active participation on the part of the Community in the area of health and safety legislation for workers have had important support from the European Parliament (EP), and especially the Committee on Social Affairs and Employment within the EP. As early as October, 1986, the Chanterie Report⁶³ took up the debate on the scope of article 118A in relation to article 100A:

"Draws attention to the dangers of a restrictive interpretation (of article 118A)⁶⁴ aimed solely at establishing minimum provisions for technical standards, when social standards and living conditions must also be harmonized;"

"Believes that the qualified majority, as defined in article 100A, (1) with regard to "the approximation of the provision laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market", should also be applied to decisions involving the social area, without which the functioning of the internal market would be profoundly impaired"

⁶² Philippa Watson, "The Community Social Charter", *Common Market Law Review* 28:37-68, 1991 and for example, *European Report*, November 28, 1990, No. 1633, Section IV, op. cit. p. 10.

⁶³ Document A 2-141/86 of 30 October, 1986.

⁶⁴ My insert.

This early acceptance of article 100A initiatives based on qualified majority as having a social element, and the rejection of a restrictive interpretation of article 118A, has since then been developed further in several reports⁶⁶ and resolutions⁶⁶. The Salisch Report in October, 1988 "*On the working environment and the scope of Article 118A of the EEC Treaty*"⁶⁷ presented the interpretations of articles 100, 100A, and 118A to which the EP decided to subscribe, and which in the following years it has tried hard to promote. The report may, on the other hand, also be seen as laying down strategies for the EP in order to gain as much influence as possible with regard to the legislation on the working environment. By giving article 118A the widest possible scope, the EP is guaranteed the best chance of influencing the decision-making in this field, since article 118A prescribes the cooperation procedure laid down in article 149 between the Council and the EP, whereas articles 100, and 100A, (2) do not. The conclusions in the report appear to be based to a large extent on the results of a hearing with four lawyers, Mr. Daübler, Mr. De Catherine, Mr. Blainpain, and Mr. Dupeyroux on 22 June, 1988. The majority of lawyers affirmed that:

- *the concept of the working environment" referred to in article 118A is wider than that of the "workplace"; the safety and health of workers covers the individual as a whole, i.e. his or her physical and mental state and the prevention of injury (industrial accidents, occupational diseases, etc.);*
- *the terms "working conditions" and "working environment" would appear to allow a fairly flexible and far-reaching interpretation;*
- *such an interpretation would permit article 118A to be used for everything directly or indirectly related to the physical or psychological make-up of the worker;*
- *article 118A concerns not only machinery, plant and the introduction of new technologies but also the conditions at the work station and the organization of work within the firm (team work, night work, work lacking protection or job security, the work rate, part-time work, etc.);*
- *the word "especially" which appears in the first paragraph of article 118A means that the measures provided for in the article must relate particularly, but not solely, to the working environment;"*

⁶⁶ Document A 2-42/87/Annex of 8 May, 1987 Opinions on the communication from the Commission "Making a success of the Single Act - A new frontier for Europe" (COM(87)100 final - Doc. C 2-224/86), where the EP criticise the lack of reference to Article 118A in the Commission's communication.

⁶⁶ Resolution on the Community Charter of Fundamental Social Rights, Social Europe 1/90, p. 109-111, and resolution of 15 March, 1989 on the social dimension of the internal market, Social Europe 1/90, p. 111-113.

⁶⁷ Document A 2-0226/88 of 21 October, 1988.

This far-reaching interpretation of article 118A not only provides the EP with maximum influence on the decision-making, but at the same time it severely weakens the position of Member States opposed to regulation in this field, given the loss of the veto. Such an interpretation would provide the Community with strong powers for regulating the working environment at European level. Where the conclusions in the report can be said to be imprecise by referring to a "flexible and far-reaching interpretation", it does, however, state, both in the motion for the resolution, and in the adopted resolution by the EP⁸⁸, that:

"Article 118A should therefore cover the individual sectors referred to in Article 118"

"Article 118A.....should include provisions on ergonomics and the working environment and all direct and indirect material and psychological interests of workers"

"Working Environment covers the duration, organization and content of work since these factors have a bearing on the health and safety of workers, as in the case of night work or certain forms of activity, which are particularly arduous (shift work) or dangerous for workers"

The report's approach would, in contrast to Roger Blainpain's suggestions, make article 118A the general rule, and the unanimous requirement in article 100A, (2) the exception, which should be interpreted in a strict sense. Further, given the above-mentioned quotation by Roger Blainpain in 1990, i.e., that article 118A includes only health and safety, and that health and safety should be interpreted in a restrictive manner, it seems unlikely that he would affirm "a fairly flexible and far-reaching interpretation" of the term "working environment". It is unlikely, therefore, that he was one of the majority of the four lawyers who affirmed the conclusions in the Salisch Report.

In its later resolution on the social dimension of the internal market⁸⁹, the EP not only stressed the importance of a wide scope of article 118A, but also emphasised a close cooperation with the social partners, on the part of the Commission, when drawing up directives and regulations setting out the fundamental social rights.

The relationship between article 118A on the one hand, and articles 100A and 100 on the other was analysed both in the Salisch Report, and in a second report by the same author on the

⁸⁸ OJ C 12/181 of 16 January, 1989.

⁸⁹ See resolution of 15 March, 1989 on the social dimension of the internal market, Social Europe 1/90, p. 111-113.

proposals from the Commission to the Council for three directives on atypical work⁷⁰ :

"Looking at the interpretation of article 118A in the light of the interpretation of other provisions of the Treaty, and in particular article 100A, most of the lawyers stated that the validity of article 100A is limited in time since the wording makes it clear that the article constitutes a derogation from article 100; it provides for the adoption of measures for the approximation of the provisions laid down by law, regulation or administrative action which have as their object the establishment and functioning of the internal market.

Article 118A on the other hand establishes an enduring and fundamental principle which is a permanent feature of the Treaty and which should be taken as a basis for all provisions concerning the workers." (The Salisch Report)⁷¹

"Under paragraph 2 (of article 100A)⁷² , provisions relating to the rights and interests of employed persons are excluded from the scope of decision-making by a qualified majority, yet this derogation must not be applied indiscriminately to every provision affecting the rights and interest of employed persons. Careful analysis of article 100A inevitably leads to the conclusion that social back-up measures connected with the internal market help to achieve the objectives set out in article 8A and hence must not be subject to the restriction under article 100A, (2)" (The report on atypical work)⁷³

It should rightly be emphasised that article 118A, in contrast to article 100A, is not simply related to the internal market, but that it in fact, relates to the social dimension of the European Community. Further, it should be noted that the statement about article 118A concerning its status as a fundamental principle, which should be taken into consideration in all provisions on workers, was accepted by eleven of the Member States, when they adopted the Social Charter, because article 19, (3) of the Charter expresses the same principle. Finally, the strategy of letting article 100A, (1) include some provisions affecting the rights and interests of employed persons implies both of these, i.e. that the area for majority decisions is extended, so that Community regulation becomes easier, and that the EP must be heard in these cases through the cooperation procedure in article 149. This is characteristic of EP interpretation in the field of working environment, namely that it not only provides the Community with a better basis for regulation, but that it also gives more power to the EP itself. It is not, therefore, simply for idealistic reasons that the EP has chosen an interpretation that favours the workers, but also that some of its own interests may well be involved.

⁷⁰ See Document A 3-0241/90 of 2 October, 1990, p, 33

⁷¹ *Supra* note 67.

⁷² My insert.

⁷³ *Supra* note 70.

The Economic and Social Committee has also expressed support⁷⁴ for the use of article 118A in its broadest sense as proposed by the EP, and it seemed to believe that this extension of majority voting should not cause problems for the Member States, since article 189 in relation to the implementation of directives leaves "the choice of form and methods" to the latter. The final statement regarding the Member States' opinion towards the extension of majority voting has proved to be badly mistaken, since not only has the UK been very much opposed to this extension, but other Member States have also hesitated to give it their support⁷⁵.

Since the Salisch Report the EP has, when it has been asked about the use of article 118A referred to and repeated the argumentation from the Salisch Report on several occasions⁷⁶, and in 1990 it was even more aggressive towards the Commission and the Council, when it threatened the Commission with the use of article 144 for a vote of no-confidence and expressed its intentions of filing a complaint on the basis of article 175 with the European Court of Justice on the interpretation of article 118A⁷⁷. The EP was, in other words, of the opinion that neither the Council, nor the Commission had showed any intention of using the broad interpretation which the EP favoured; it believed that the Council used the most restrictive interpretation. Talks in March 1992 with the former member of the EP's Committee on Social Affairs, Employment and the Working Environment, Mrs. H. Salisch, seem, however, to confirm that the Commission has moved towards the interpretations suggested by the EP, and that the final obstacle for a wide use of article 118 A is now the adoption of the Commission proposals in the Council.

The EP may well have been inspired by Vogel-Polsky⁷⁸ in this more aggressive attitude towards the Council and the Commission, since she also suggested that the EP use articles 144, and 175 of the Treaty in a complaint with the European Court of Justice. She argued, like the EP, for the use of article 100A, (1) in some cases where the rights and interests of workers are involved. Her argument was that, by referring to article 8B and article 100A, (1), since the principle rule

⁷⁴ See the Beretta Report on the Social Aspects of the Internal Market, Brussels, 19 November, 1987, p. 2, Document CES 1069/87.

⁷⁵ See *European Report*, 4 December, 1991, No. 1726, section IV, p. 9 in relation to the proposal on working time.

⁷⁶ See the EP Report on atypical work Document A 3-0241/90, p. 33.

⁷⁷ See *Social Europe* 2/90, p. 28.

⁷⁸ See Eliane Vogel-Polsky, What Future Is There For A Social Europe Following The Strasbourg Summit? *The Industrial Law Journal*, Vol. 19, 1990, pp. 65, where she suggests the use of article 175, and Eliane Vogel-Polsky, *L'Europe Sociale 1993: Illusion, Alibi ou Realite?*, L'institut d'Etudes europeennes, Bruxelles, 1991, p. 126, in which she suggests the use of either article 175, or 144.

relating to the realisation of the internal market is legislation by a qualified majority vote, unless the Treaty provides otherwise, paragraph 2 of article 100A has therefore to be treated as the exception to this rule. She listed three possible interpretations of the unanimity requirement in article 100A, (2)⁷⁹:

- "1. only for drafts concerned exclusively with the rights and interests of workers alone,*
- 2. for drafts which mainly (but not exclusively) affect the rights and interests of employed persons,*
- 3. for any proposal, as soon as it concerns, even indirectly or partially, the rights and interests of employed persons."*

In her argumentation, versions 2 and 3 were rejected, the former because it would lead to endless discussions on the predominance of proposals, and would therefore not be practicable; on the other hand, version 3 would make the derogation in article 100A, (2) into the principal rule in practice, since most proposals touch upon the rights and interests of workers, and this would be unacceptable when the measures help to achieve the objectives set out in article 8A⁸⁰. Vogel-Polsky argued that the latter rejection was reinforced by paragraph 3 of article 100A, since it relates to health and safety measures passed by qualified majority, which is prescribed in paragraph 1. Therefore, she considered it to be clear that these measures come under paragraph 1, and not under paragraph 2.

The other important concept to define in this area is the concept of "the working environment" in article 118A. Again, Vogel-Polsky and Brian Bercusson have mentioned three possible interpretations:

- "1. It would be limited to the protection of work in strictest sense.*
- 2. It would be to include all working conditions which have or which could have an effect on the health and safety of workers, including the duration of working time, its organisation and its content (in such a way as to cover for example, night work, shift work and different forms of "a typical" employment".*

⁷⁹ It should be noted that Brian Bercusson earlier suggested the same three ways of interpreting article 100A, (2), but without indicating which of these would be the most likely interpretation, see *Fundamental Social and Economic Rights in the European Community* Report presented to a conference in Strasbourg on "Human Rights and the European Community" 20-21 November 1989 (Florence, E.U.I. 1989 mimeo), p. 206.

⁸⁰ This is also supported by Bob Hepple who argues that virtually every proposal aimed at the establishment and functioning of the internal market has some effect, however limited, on employed persons, and therefore rejects version 3. Version 2 is rejected because "a test of predominance leans too heavily on the perspectives of those affected by the measures" cf. Bob Hepple, "The implementation of the Community Charter of Fundamental Social Rights", *The Modern Law Review* 53: 5 September 1990, pp. 643-654.

3. *It could mean "working conditions" in the widest sense as well as accidents at work, industrial diseases and the protection of health at the workplace."*

None of the two authors fully defines, where the borders lie between each of the interpretations, even though Vogel-Polsky must have had an idea of what she saw as the borders, because she stated *"the prevailing interpretation has been the most limited and restrictive"*. Thus, it is necessary to define these borders before trying to use the interpretations. The following definitions of the three interpretations will be used, if nothing else is indicated: the most limited the protection of work in the strictest sense simply covers regulation of measures directly concerned with the work process e.g safety measures in relation to a machine used by workers; the second is the only interpretation where the authors in some ways have tried to define the border, this interpretation includes the duration of working time, its organisation and its content in relation to all working conditions which have or which could have an effect on the health and safety of workers; finally the third interpretation "working conditions" in the widest sense includes what is considered in a Nordic concept to be part of the term "working environment" (arbejdsmiljø)⁸¹ such as unfair dismissal and payment systems.

Both Bercusson and Vogel-Polsky rightly point to the fact that the choice between these options will demonstrate the political will of the Commission, and the Member States in the Council to use their powers in the social domain, and whatever interpretation is used will have to respect the restrictions prescribed in article 118A, (2) regarding minimum provisions, gradual implementation, and the protection of small and medium sized enterprises. As regards the minimum provisions, the Social Charter extended the restriction to minimum requirements satisfactory for the health and safety of workers, cf. conclusions above in 1.1.2.4.

Version 3 of the suggested interpretations seems to be very much in line with that suggested by the EP, but according to Vogel-Polsky, version 1, which is the most restrictive, has prevailed. This may, however, not be quite as obvious as she has described, since talks with Mrs. H. Salisch in March 1992 have confirmed the Commission's willingness to implement a wider interpretation,

⁸¹ Cf. the description of the Nordic concept of the working environment in Ruth Nielsen and Erika Szyszczak, *The Social Dimension of the European Community*, Handelshøjskolens Forlag, Copenhagen, 1991, p. 183.

and others⁸² were also of the opposite opinion as early as April 1990:

"those who are in favour of Community intervention in the social field - including the European Commission - have tried to give article 118A the widest possible meaning in order to provide the Community institutions with as broad a base as possible for intervention".

In the light of this background it is therefore relevant to analyse the proposed and adopted directives in this field in order to determine which interpretation both the Commission and the Council have favoured, see more about these analyses under the heading in 1.3.

Vogel-Polsky also expressed criticism on the Action Programme related to the Social Charter, because it did not "constitute an innovation or an extension of the social dimension". She argued that it was within the express powers of the Community that proposals for most of the binding Community measures be put forward. Therefore, in order to promote these measures, it was unnecessary either to refer to a Community Charter, or to adopt a specific Action Programme. The criticism referring to the lack of innovation may be relevant, but it would be a mistake to expect the Action Programme to include any extensions of the social dimension, when the Preamble of the Social Charter explicitly stated that the Charter did not entail an extension of the Community's powers. Further, her conclusion on the interpretation of article 100A, (2) is also questionable, since it is not as clear cut as she presented, that the interpretation related to predominance was of no use. Predominance may well be used in the same way as the EP suggested when interpreting the word "especially" in article 118A, namely, for measures particularly, but not solely, related to the working environment. In the case of endless discussions which Vogel-Polsky predicted, the European Court of Justice would have to solve the conflict, and define what factors should be taken into consideration.

A very interesting analysis of the relationship between articles 100, 100A and 118A has been found in a document in the Bundesministerium für Arbeit und Sozialordnung⁸³. The

⁸² See O. Brouwer, F. Carlin, M. van Empel, C. Lahaye, S. de Peuter, R.J. Prins, *Industrial Relations 1992: An assessment of the Social Dimensions of the Internal Market and its impact on industry*, Stibbe, Blaisse & De Jong, 1990, p. 17.

See also Health and Safety Information Bulletin 180 of 7 December, 1990, p. 8 which stated in relation to the proposals on working time and pregnant women that: " the Commission has broadened the scope of its health and safety programme to include "hybrid" directives which, although bringing together safety requirements with welfare and social security provisions, can take advantage of the qualified majority voting in Council which applies to health and safety directives based on article 118A".

⁸³ The document is in the possession of the author.

conclusions in this document seem to be inspired by a point of view expressed by the Dutch delegation, during its Presidency in the second half of 1991. The German delegation had raised the question whether the Member States, when dealing with the protection of workers, were allowed to classify substances in stricter categories than those already and finally categorised according to marketing directives based on article 100A⁶⁴ :

"Article 118A is according to the German ministry, a (functional) speciality in relation to articles 100 and 100A. This means that substances and preparations can be subject to a stricter classification than laid down in marketing directives, either by the use of Community directives based on article 118A, (2), or by the Member States' own legislation based on article 118A, (3), if the objective is the protection of workers.

When article 118A was inserted into the Treaty it substituted the general rule in article 100 which had been used up to that time for the protection of workers in the field of health and safety. In the relationship between articles 100 and 118A, article 118A may therefore be considered to be **lex specialis**⁶⁵ . There is a functional difference in the scope between the two internal market provisions in articles 100A and 118A, and they relate to each other through article 8A. According to article 8A: The community shall adopt measures with the aim of progressively establishing the internal market in accordance with article 100A **"and without prejudice to the other provisions of this Treaty."** The other provisions of this Treaty include article 118A, which is an important part of the social dimension of the internal market.

The directives that protect the workers and are based on article 118A may, according to this interpretation, have other objectives than the product related internal market directives that are based on article 100A. The first would come up against the latter's functional limit. The introductions to the directives in the field of working environment seem to confirm this. Thus, e.g., the introduction to the Council directive (based on article 118A) of 12 June, 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (89/391/EEC) states:

"whereas the improvement of worker's safety, hygiene and health at work is an objective

⁶⁴ The following are quotations based on my translation.

⁶⁵ My emphasist.

See Magnus Aarbakke, "Harmonisering af Rettskilder", *Tidsskrift for Rettsvitenskap*, Vol. 79, 1966, p. 499-518 on the norms of priority: *lex superior*, *lex posterior*, and *lex specialis*.

which should not be subordinated to purely economic considerations;"

The provisions of this directive shall thus cover all risks, but *"without prejudice to more stringent present or future Community provisions"*.

Article 118A may therefore be used in parallel to article 100A. This means, that Member States are allowed to introduce measures according to article 118A, (3).

Because of the objective in the article 118A directives protecting the workers, it may not be concluded that the Member States are bound to use the classification in the marketing directives, 67/548/EEC and 88/379/EEC, when implementing the Council directive of 28 June, 1990 on the protection of workers against the risk of exposure to carcinogens at work (the 6th daughter directive, 90/394/EEC, according to article 16, (1) in directive 89/391/EEC), which both in the introduction and in article 2, a) and article 19, (1) refers to the two marketing directives.

This interpretation can be further substantiated by referring to the introduction of directive 91/173/EEC, (based on article 100A), in which it is stated:

"the present Community provisions regarding the Member States right to introduce wider limitations in the use of the concerned substances and preparations at the workplace are not affected by this directive"

This analysis seems to imply that if the objective is the protection of the workers, then article 118A may be used even though marketing directives have been adopted for the regulation of the same products. In this way article 118A may take considerable space away from articles 100 and 100A, since article 118A should not be subordinated to the economic considerations expressed in the directives based on articles 100 or 100A. The argument on article 118A being the *lex specialis* in relation to both articles 100 and 100A may indicate that the only limit on article 118A is in fact that the measures must aim at the protection of workers; if that is the case then the directives based on article 118A should be used when conflicts occur in relation to article 100A directives, because article 8A prescribes article 100A to be used without prejudice to the other provisions of this Treaty, meaning also in respect of article 118A directives. The analysis does not, however, indicate the limits to the use of article 118A any further than in the protection of

workers, but since article 118A should not be interpreted as a derogation, it may not be limited to the protection of workers in the strictest sense.

1.2.3. The possible compromise

The third school of thought, the attempt to reach a compromise between deregulation and a social dimension, includes the work by Jörn Pipkorn⁸⁸. He argues that article 100A should be considered as *lex specialis* in relation to both article 118A and 100. Article 118A, (2) states it is a **“help”** to achieve the harmonization of conditions in the area of health and safety of workers. The word “help” is in this case considered to imply that there is another provision with which article 118A helps to achieve the objectives, namely, article 100A, which has a wider scope, and which is not limited to a gradual implementation. The unanimity requirement in article 100A, (2) for provisions relating to the rights and interests of employed persons should, according to Pipkorn, be understood as including something less than any proposal, as soon as it concerns, even indirectly or partially, the rights and interests of employed persons. He accepts, in other words, that paragraph 1, which allows for qualified majority voting, may be used for these proposals. His argument is that a wide use of paragraph 2 would be inconsistent with the systematisation in article 100A. In relation to article 100, article 100A does explicitly state that it is a “derogation from Article 100”, and Pipkorn interprets this as meaning that Article 100A is *lex specialis*. Understanding article 100A as *lex specialis* has as a consequence that whenever both article 100A and one of the other articles may be used as the legal basis for measures, it has to be article 100A that is used. This obviously reduces the scope of the social policy rule in article 118A, and emphasises the economic aspects of the proposals; however, on the other hand, it still permits a wide use of majority voting. Therefore, Pipkorn’s interpretation may be seen as a compromise between the first two schools of thought presented.

1.2.4. Conclusions

The interpretation of article 100A starts with the general rule in paragraph 1 providing for qualified majority voting. The unanimity requirement in paragraph 2 concerning the rights and interests of employed persons is, in other words, a derogation to the general rule. Vogel-Polsky’s rejection of her third interpretation of paragraph 2, that unanimity is required for any proposal, as soon as it concerns indirectly or partially the rights and interests of employed persons, seems, therefore, appropriate, since this interpretation would in practice make

⁸⁸ Hans von der Groeben, *Kommentar zum EWG-Vertrag*, Vol. 2 Artikel 85-109, edition 4, 1991, p. 2851f.

paragraph 2 the general rule. A strong argument for reducing the scope of the unanimity requirement in paragraph 2 to that of the strictest among the alternative interpretations suggested by Vogel-Polsky and Bercusson, is found in the case-law from the European Court of Justice. In the case *Maizena GmbH v. Council of the European Communities*⁸⁷ the Court stated in relation to the involvement of the EP in the legislative process that:

*"it reflects at Community level the fundamental principle that **the peoples should take part in the exercise of power through the intermediary of a representative assembly.**"*⁸⁸

In a later case, *Commission v. Council*⁸⁹, the Commission attacked the Council's use of article 130S as the legal basis for a directive. The alternative legal bases were articles 130S and 100A, (1), where article 130S in contrast to article 100A did not prescribe that the EP should be involved through the cooperation procedure in article 149. The Court ruled that article 100A was the proper legal basis, and the directive was, therefore, cancelled, because if there are two alternatives for a legal basis the one that leaves the most power to the Parliament should be used. If these court decisions are used to resolve the choice between the three alternative interpretations suggested by Vogel-Polsky and Bercusson, the result will have to be that article 100A, (2) only covers drafts exclusively concerned with the rights and interests of workers alone, because paragraph 2 in contrast to paragraph 1 does not provide the cooperation procedure with the EP. Thus, the conclusion is that article 100A, (1) takes as much space as possible from paragraph 2 in order to respect the fundamental principle that the peoples should take part in the exercise of power. Thus, the European Court of Justice seems to reject Blainpain's approach that article 100A, (2) should be seen as the general rule.

The relationship between articles 100 and 100A is laid down in article 100A, (1), which states that it is a derogation from article 100. According to this, article 100A should be used on all measures which have as the objective their establishing of the internal market.

The concept of *lex specialis* might for some people be a useful tool, when interpreting the

⁸⁷ Case 139/79, Judgment of 29 October, 1980. ECR (1980) 3393-3426.

⁸⁸ In the earlier case 138/79, *Roquette Frères*, judgment, para. 33, (1980) E.C.R. 3333 the ECJ had ruled that "due consultation of the Parliament in the cases provided for by the Treaty constitutes an essential formality disregard of which means that the measure concerned is void". See about the ECJ's opinion on the Council's duty to consult the Parliament in Kieran St. C. Bradley, "Maintaining the balance: The role of the Court of Justice in defending the institutional position of the European Parliament", *Common Market Law Review*, 24: 1987, pp. 41-64.

⁸⁹ Case 300/89, Judgment of 11 June, 1991.

Treaty-articles of interest to the regulation of the working environment. Both the German Bundesministerium für Arbeit und Sozialordnung and Jörn Pipkorn have used the concept, although it has lead to different results. Jörn Pipkorn's reason for considering article 100A as being *lex specialis* in relation to article 118A is based mainly on his interpretation of the word "help" in article 118A, (2). In contrast, the German Ministry argues that article 118A should be seen as *lex specialis*, since article 8A states that article 100A should be "without prejudice to the other provisions of this Treaty". Pipkorn's focusing on the word "help" implies an excessive interpretation of an unclear term, since the word may rather refer to the fact that article 118A, (1) places a duty on the Member States to set certain objectives, and paragraph 2 then provides the Community with competence in order to help the Member States achieve these objectives. The latter interpretation suggested by the German Ministry seems more convincing, since article 8A, which is placed under the part of the Treaty's principles, expressly states that article 100A is not intended to take space from other provisions. Thus, the conclusion would be to see article 118A as *lex specialis*.

The problem with this interpretation lies, however, in the fact that: 1) article 118A is not an internal market provision, and 2) articles 100A and 118A appear under two different titles of the Treaty; article 100A under "Common rules", whereas article 118A is under the "Social policy" title. It is likely that the correct interpretation of article 8A would be to understand "without prejudice to other provisions of this Treaty" as meaning other provisions of the Treaty related to the establishment of the internal market. This is supported by the fact that articles 8A and 100A in the SEA appeared under the same subsection, "Subsection I - Internal market", whereas article 118A was part of the subsection on social policy. Secondly, the fact that articles 100A and 118A appear under two different titles of the Treaty may exclude the use of the concept *lex specialis*, since this requires that the two articles dealt with should be part of the same policy, and within this - one of the articles should be the more specific. Articles 100A and 118A do not meet these requirements for the use of *lex specialis*. Therefore, the interpretation suggested by the German Ministry appears to be based upon a concept of *lex specialis* which is too wide. Thus, the relationship between article 118A on the one hand, and articles 100 and 100A on the other can not be described in the terms of *lex specialis*. The two sides will have to be interpreted separately.

Since the above-mentioned interpretations by Pipkorn and the German Ministry do not seem to

have led to correct interpretations of article 118A, the following question can still be raised should the concept of "the working environment" be interpreted as widely as possible, embracing "working conditions" in the widest sense as well as accidents at work, industrial diseases and the protection of health in the workplace, or should it be limited in any way. The question of which interpretation to use rests upon a political decision taken by the Community institutions. Some factors may, however, indicate which interpretations would be the most likely. Thus, it could be argued that the preliminary work prior to the adoption of article 118A is important, since it may describe the intended understanding of the concept. Article 118A originated in a proposal by the Danish Government at a government conference on the protection of the working environment, and the term "working environment" is a translation of the Danish term "arbejdsmiljø"⁹⁰. This concept was incorporated into Danish legislation in 1975 by a law "on the working environment". In a Nordic context the working environment is a broad concept⁹¹ relating in particular to:

- the arrangement of the work-place,
- the physical and socio-psychological conditions under which work is performed,
- the use of work equipment by workers at work, and
- the exposure of workers to toxic and other dangerous substances at work.

The Nordic concept of the working environment covers both physical aspects of the working conditions and psychological and social aspects thereof, such as monotony, lack of social contacts at work or a rapid work pace. By the incorporation into the EEC Treaty of the concept of working environment the Community is, however, not bound by the Danish notion, since it has now become a Community matter. The Commission has showed, however, according to talks in March 1992 with Mrs. H. Salisch, a willingness to adopt a wider interpretation of the working environment. Further, since it is the only employment-related social issue with respect to which the Treaty unambiguously authorises decisions by a qualified majority, the Community has a strong obligation to use its competence in this area in order to develop the single European market in a balanced manner as prescribed in the Preamble of the Social Charter. These factors all indicate that the narrowest interpretation suggested by Vogel-Polsky and Bercusson in their version 1, meaning "working environment" limited to the protection of work in the strictest sense, is the most unlikely to be adopted. At this stage which of the other two interpretations could be used it cannot be concluded, but a further examination, under heading 1.3., of the

⁹⁰ Document A 2-0226/88 of 21 October, 1988, pp11-12 refers to this preparatory work.

⁹¹ See Ruth Nielsen and Erika Szyszczak, *The Social Dimension of the European Community*, Handelshøjskolens Forlag, Copenhagen, 1991, p. 183.

proposed and adopted directives based on article 118A may provide an answer to this question.

1.3. Practice - examination of the legal basis of adopted and proposed directives concerning the protection of workers

Keeping in mind the discussions mentioned in 1.2. on the interpretations of especially articles 118A, and 100A, (2) the Community competence in this part of the social field is not only a highly political, but from a legal point of view, also a very technical question. The proposed and/or adopted directives may help clarify what interpretations are being used by the Commission and the Council, and whether the Commission in its proposals to the Council as argued above has moved towards a wider interpretation of article 118A, whereas the Council should be reluctant on the wide interpretation. The directives concerning the protection of workers may be divided into three groups according to the legal basis: Articles 118A, 100A, and 100.

1.3.1. Directives based upon article 118 A

Examining first the proposed and/or adopted directives based on article 118A, these directives may again be divided into smaller groups depending on which of the two framework directives they relate to, Council Directive *on the protection of workers from the risks related to exposure to chemical, physical and biological agents at work* 80/1107/EEC⁹², or Council Directive *on the introduction of measures to encourage improvements in the safety and health of workers at work* 89/391/EEC⁹³. This division into two groups implies that the examination to a large extent follows a chronological order, whereby the thesis about the Commission's tendency to use a wider interpretation of article 118A may be verified or rejected.

The first two directives to be adopted using the new legal basis, article 118A, introduced by the Single European Act, were both related to the first framework directive 80/1107/EEC on hazardous agents. The Directive on the protection of workers by the banning of certain specified agents and/or work activities 88/364/EEC⁹⁴ was the 4th individual Directive within 80/1107/EEC, while the other, 88/642/EEC⁹⁵, was a simple amendment of 80/1107/EEC.

⁹² See OJ L 327/8 of 3 December, 1980, Council Directive 80/1107/EEC of 27 November, 1980.

⁹³ See OJ L 183/1 of 29 June, 1989, Council Directive 89/391/EEC of 12 June, 1989.

⁹⁴ See OJ L 179/44 of 9 July, 1988, Council Directive 88/364/EEC of 9 June, 1988.

⁹⁵ See OJ L 356/74 of 24 December, 1988, Council Directive 88/642/EEC of 16 December, 1988.

Finally, Directive 91/382/EEC⁹⁶ on asbestos was adopted amending the second individual directive within 80/1107/EEC.

The second framework directive was in contrast to the first adopted after the Single European Act and article 118A came into force. Whereas directive 80/1107/EEC was based on article 100, the second framework directive, 89/391/EEC, is, therefore, based on article 118A. Directive 89/391/EEC stated in the Preamble, that the provisions of the directive apply to all risks including those covered by the first framework directive. The list of directives related to 89/391/EEC within the meaning of article 16, (1) is extensive, some areas were expressly mentioned in the annex of 89/391/EEC, whereas others have been included later. Thus, article 16, (1) states "The Council shall adopt individual Directives, *inter alia*, in the areas listed in the annex". The proposals or adopted directives related to this framework directive may be divided into two smaller groups, depending on whether the initiatives were part of the Commission's Action Programme on the Social Charter, or if they were announced earlier⁹⁷. The reason for this division is, it would prove, if the Social Charter has had an impact on the interpretation of the scope of article 118A in the way of widening it. The list of initiatives related to directive 89/391/EEC and originating from the time before the Social Charter includes 7 directives which have already been adopted by the Council:

- directive 89/654/EEC on the minimum safety and health requirements for the workplace⁹⁸,
- directive 89/655/EEC on the minimum safety and health requirements for the use of work equipment⁹⁹,
- directive 89/656/EEC on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace¹⁰⁰,
- directive 90/269/EEC on the minimum health and safety requirements for the manual handling of loads where there is a risk particularly of back injury to workers¹⁰¹,
- directive 90/270/EEC on the minimum safety and health requirements for work with

⁹⁶ See OJ L 206/16 of 29 July, 1991, Council Directive 91/382/EEC of 25 June, 1991.

⁹⁷ The only exceptions are two directives related to the unification of Germany, directive 90/476/EEC of 17 September, 1990, published in OJ L 266/1 of 26 July, 1990, and directive 90/659/EEC of 4 December, 1990, published in OJ L 17 December, 1990.

⁹⁸ See OJ L 393/1 of 30 December, 1989, Council Directive 89/654/EEC of 30 November, 1989.

⁹⁹ See OJ L 393/13 of 30 December, 1989, Council Directive 89/655/EEC of 30 November, 1989.

¹⁰⁰ See OJ L 393/18 of 30 December, 1989, Council Directive 89/656/EEC of 30 November, 1989.

A Commission communication, 89/C 328/02, on the assessment of the safety aspects of personal protective equipment with a view to the choice and use thereof was adopted in relation to the directive see OJ C 328/3 of 30 December, 1989.

¹⁰¹ See OJ L 156/9 of 21 June, 1990, Council Directive 90/269/EEC of 29 May, 1990.

display screen equipment¹⁰²,

- directive 90/394/EEC on the protection of workers from the risks related to exposure to carcinogens at work¹⁰³,

- directive 90/679/EEC on the protection of workers from risks related to exposure to biological agents at work¹⁰⁴.

The group of proposals or adopted directives based on article 118A and originating in the Action Programme of the Social Charter appeared under various headlines. Of these initiatives only one directive has been adopted by the Council, while the others have been proposed by the Commission and are being considered in the Economic and Social Committee, the European Parliament, or the Council. The "First Annual Report on the Application of the European Community's Social Charter"¹⁰⁵, which the Commission, according to article 29 of the Social Charter, has to establish each year, contains a diagram explaining the progress of each of the following initiatives:

- directive 91/383/EEC supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship (atypical work)¹⁰⁶,

- proposal on the protection of pregnant women, women workers who have recently given birth and women who are breastfeeding¹⁰⁷,

- proposal on certain aspects of the organisation of working time¹⁰⁸,

- proposal on the minimum health and safety requirements to encourage improved medical assistance on board vessels¹⁰⁹,

- proposal on the implementation of the minimum safety and health requirements at temporary or mobile work sites¹¹⁰,

- proposal on the minimum requirements to be applied in improving the safety and health of workers in the drilling industries¹¹¹,

- proposal on the minimum requirements for improving the safety and health protection of

¹⁰² See OJ L 156/14 of 21 June, 1990, Council Directive 90/270/EEC of 29 May, 1990.

¹⁰³ See OJ L 196/1 of 26 July, 1990, Council Directive 90/394/EEC of 28 June, 1990.

¹⁰⁴ See OJ L 374/1 of 31 December, 1990, Council Directive 90/679/EEC of 26 November, 1990.

¹⁰⁵ See COM(91) 511 Final.

¹⁰⁶ See OJ L 206/19 of 29 July, 1991, Council Directive 91/383/EEC of 25 June, 1991.

¹⁰⁷ COM(90) 692 final, OJ C 25 of 1 February, 1991. Common position adopted by the Council on 19 December, 1991.

¹⁰⁸ COM(90) 317 final of 5.12.90, OJ C 254 of 9.10.90; and COM(91) 130 final of 23 April, 1991.

¹⁰⁹ COM(91) 65 final, OJ C 74 of 20 March, 1991. Common position adopted by the Council on 1 October, 1991.

¹¹⁰ See amended proposal COM(91) 117 final and OJ C 112, 27 April, 1991. A common position was adopted by the Council on 19 December, 1991.

¹¹¹ COM(91) 493 of 19 December, 1991, OJ C 46/50 of 20.2.92. Common position adopted at the EEC Social Affairs Ministers meeting in Luxembourg April 30, 1992, *European Report*, May 6, 1992, No. 1766.

workers in the extractive industries for the exploration and exploitation of minerals in mines and quarries¹¹²,

- proposal on the minimum safety and health requirements for fishing vessels¹¹³

- proposal on the minimum safety and health requirements for activities in the transport sector¹¹⁴,

- proposal on the minimum requirements for safety and health signs at the workplace¹¹⁵,

- proposal on the minimum safety and health requirements regarding the exposure of workers to the risks caused by physical agents¹¹⁶,

- proposal on the approximation of the laws of the Member States on the protection of young people at work¹¹⁷,

1.3.1.1 The First Framework Directive 80/1107/EEC¹¹⁸

Looking at the first framework directive 80/1107/EEC, the directive is important for the understanding of the related directives, since it defines the scope or frames which the related directives have to respect. The title of 80/1107/EEC, which was on the protection of workers from the risks related to exposure to chemical, physical and biological agents at work, might provide an indication of its scope. The directive had two principal objectives: 1) the elimination or limitation of exposure to chemical, physical and biological agents at work, and 2) the protection of workers who are likely to be exposed to such agents. In other words, it simply provided protection at work against well known risks to the health and safety. Thus, article 2, (a) defined "agent" in the directive as "*any chemical, physical or biological agent present at work and likely to be harmful to health*". It may, therefore be concluded that the scope of directive 80/1107/EEC is limited to the protection of work in the strictest sense. Although the concept of the working environment was not introduced into Community Law before the adoption of the SEA, the scope of directive 80/1107/EEC may be described as falling within the strictest interpretation of the term "working environment" which Vogel-Polsky, and Bercusson suggested after the adoption of the SEA, cf. 1.3.

It should be noted that the Council in the Preamble stressed the involvement of the social

¹¹² COM(92) 14 final of 17 February, 1992 - SYN 392, OJ C 58/3 of 5.3.92.

¹¹³ COM(91) 466 final - SYN 369 of 27 November, 1991.

¹¹⁴ *Ibid* note 113.

¹¹⁵ COM(90) 664 final, OJ C 53 of 28 February, 1991. Common position adopted by the Council on 3 December, 1991.

¹¹⁶ COM to be adopted in December 1991.

¹¹⁷ COM(91) 543 final SYN 383 adopted by the Commission on 15 January, 1992, published in OJ C 84/7 of 4 April, 1992.

¹¹⁸ *Supra* note 92.

partners by stating "employers and workers have a role to play in the protection of workers". This should not be understood as a reference to their participation in the Economic and Social Committee and the Advisory Committee on Safety, Hygiene and Health Protection at work, since the role of these institutions were dealt with earlier in the Preamble. It is, however, unclear whether the Council see the role the social partners have to play, as a role at European level, at national level, and/or at the level of the undertakings. The latter seems the most likely, because article 3, (3) regulates the information workers and/or their representatives at the place of work should be ensured.

The amendments to 80/1107/EEC in directive 88/642/EEC¹¹⁹, which was based on article 118A, did not result in any changes in the aim and scope, but it allowed the Member States to lay down more stringent standards, since it, because of article 118A, had become a minimum directive. The frame remained, however, the same for the individual directives. The question could be raised on the legitimacy of using a different article of the Treaty for amendments of earlier directives. There seems, however, not to have been any discussion or debate on this matter, so this will not be dealt with in any further details in the following.

Since the scope of directive 80/1107/EEC falls within the strictest interpretation of the later adopted term "working environment", meaning limited to the protection of work in the strictest sense, the fourth individual directive within this, 88/364/EEC¹²⁰, seems also to limit the scope to that interpretation. It should, however, be noted that the interpretation had not been published by Vogel-Polsky and Bercusson at the time of the adoption of the two Directives, but article 118A had come into force by the adoption of the latter. Article 1, (1) of directive 88/364/EEC describes the purpose of the directive as being "to protect workers against risks to their health by means of a ban on certain specific agents and or certain work activities", and further that the ban is based on the following factors:

- there are serious health and safety risks for workers,
- precautions are not sufficient to ensure a satisfactory level of health and safety protection for workers,
- the ban does not lead to the use of substitute products which may involve equal or greater health and safety risks for workers."

The first factor implies that the protective measures in this directive are limited to the areas where

¹¹⁹ *Supra* note 95.

¹²⁰ *Supra* note 94.

certain agents are acknowledged as causing serious risks. Therefore, the second interpretation of the term "working environment", suggested above by Vogel-Polsky, and Bercusson, that it would include all working conditions which have or which could have an effect on the health and safety of workers would be too wide. Like the first framework directive 80/1107/EEC with amendments, the scope of this directive 88/364/EEC falls within the strict interpretation of the adopted concept of the working environment.

Directive 83/477/EEC¹²¹ on *asbestos*, the second individual directive within the framework of 80/1107/EEC, was amended in Directive 91/382/EEC¹²² also using article 118A as legal basis. Although it was adopted after the second framework directive 89/391/EEC, it did not contain a reference to this, because it was a simple amendment of the earlier directive on asbestos. The Preamble to the amendments states in relation to the risks caused by asbestos: "Whereas asbestos is a particularly hazardous agent which can cause serious illness and which is found in various forms in a large number of circumstances at work". Further, the amendments do not change or widen the objective of the former directive on asbestos 83/477/EEC. In this directive the aim of the directive was described as "the protection of workers against risks to their health, including the prevention of such risks, arising or likely to arise from exposure to asbestos at work. It lays down limit values and other specific requirements." These two quotations indicate that Directive 91/382/EEC, like the other directives within the first framework directive, only used the narrow interpretation of the term "working environment", since it concerns solely limit values and other specific requirements against this particularly hazardous agent.

1.3.1.2. The Second Framework Directive 89/391/EEC¹²³

Turning towards the second framework directive 89/391/EEC *on the introduction of measures*

¹²¹ OJ L 263/83, 24.9.83.

¹²² *Supra* note 96.

¹²³ *Supra* note 93.

to encourage improvements in the safety and health of workers at work¹²⁴, it may be described as the most important piece of regulation in the field of working environment, because the majority of later adopted directives using article 118A as legal basis has been related to directive 89/391/EEC. The Directive, which is addressed to Member States, requires compliance by 31 December, 1992. The "framework" status derives from the provision of article 16, (1) and (3), which provides that the Council shall adopt individual directives *inter alia*, in the areas listed in the annex, and that the provisions of directive 89/391/EEC, without prejudice to more stringent and/or specific provisions, shall apply in full to all the areas covered by the individual Directives. It applies according to the Preamble and article 2 to all sectors and all risks including the risks related to hazardous agents covered by the first framework directive 80/1107/EEC. This general approach combined with individual directives constituted a change in method on the part of the Community, since the former approach to a large extent was to adopt directives concerning specific risks.

The general objective of directive 89/391/EEC is, according to article 1, (1) to encourage improvements in the safety and health of workers at work. That general objective is placed, by recitations in the Preamble, in the context of the fact that "Article 118A of the Treaty provides that the Council shall adopt, by means of directives, minimum requirements for encouraging improvements, especially in the working environment, to guarantee a better level of protection of the safety and health of workers". The means to achieve this object is further specified in paragraph 2 of article 1, which goes on to state:

"To that end it (the directive)¹²⁵ contains general principles concerning the prevention

¹²⁴ For considerations of the impact of the 1989 framework directive, see M Biagi, "From Conflict to Participation in Safety: Industrial Relations and the Working Environment in Europe 1992", (1990), Vol 6, *International Journal of Comparative Labour Law and Industrial Relations*, pp. 67; Alan C.Neal, "The European Framework Directive on the Health and Safety of Workers: Challenges for the United Kingdom?", *The International Journal of Comparative Labour Law and Industrial Relations*, Vol. 6, (1990), Issue 2, pp. 80; Manfred Weiss, "The Industrial Relations of Occupational Health: The Impact of the Framework Directive on the Federal Republic of Germany", *The International Journal of Comparative Labour Law and Industrial Relations*, Vol. 6, (1990), pp. 119-128; Marie-France Mialon, "Safety at Work in French Firms and the Effect of the European Directives of 1989", *The International Journal of Comparative Labour Law and Industrial Relations*, Vol. 6, (1990), pp. 129-145; Luigi Montuschi, "Health and Safety Provision in Italy: The Impact of the EEC Framework Directive", *The International Journal of Comparative Labour Law and Industrial Relations*, Vol. 6, (1990), pp. 146-158; Hubert Krieger, "Participation of Employees' Representatives in the Protection of the Health and Safety of Workers in Europe", *The International Journal of Comparative Labour Law and Industrial Relations*, Vol 6, (1990), pp. 217-227; Frank B. Wright, "The Development of Occupational Health and Safety Regulation in the European Communities", *The International Journal of Comparative Labour Law and Industrial Relations*, Vol 8, (1992), pp. 32-57; Ruth Nielsen and Erika Szyszczak, *The Social Dimension of the European Community*, Handelshøjskolens Forlag, Copenhagen, 1991.

¹²⁵ My insert.

of occupational risks, the protection of safety and health, the elimination of risk and accident factors, the informing, consultation, balanced participation in accordance with national laws and/or practices and training of workers and their representatives, as well as general guidelines for the implementation of the said principles".

The general principles may be divided into two categories:¹²⁶ those directly concerned with the promotion of health and safety at work, and those concerned with the institutional structures and procedures which are considered a necessary part of that promotion. Whereas measures from the first category may be included in a narrow interpretation of the term "working environment", meaning the protection of work in the strictest sense; the second category, however, of which the aim might be seen as the setting up of a policy for *the industrial relations of the working environment*¹²⁷, falls outside this interpretation. In fact, health and safety at work represents the area where the most important Community law provisions on information, consultation and worker participation are found. The organization of measures in this field is not part of the protection of work in the strictest sense, but may have some positive effects in the longterm: "Proper organization of safety and health in undertakings should lead to a substantial reduction in the incidence of accidents and occupational diseases, with consequent economic benefits for society as a whole"¹²⁸. Thus, directive 89/391/EEC seems in contrast to the first framework directive 80/1107/EEC to leave open the wider interpretations of article 118A.

Further, the Preamble states: "Whereas the incidence of accidents at work and occupational diseases is still too high; whereas preventive measures must be introduced or improved without delay in order to safeguard the safety and health of workers and ensure a higher degree of protection". The fact that the Preamble also included occupational diseases may be considered as indicating that directive 89/391/EEC establishes the widest possible frames for individual directives, meaning "working conditions" in the widest sense as well as accidents at work, industrial diseases and the protection of health in the workplace. **Industrial diseases**, which

¹²⁶ See Alan C. Neal, "The European Framework Directive on the Health and Safety of Workers: Challenges for the United Kingdom?", *The International Journal of Comparative Labour Law and Industrial Relations*, Vol. 6, (1990), Issue 2, p. 81. Krieger regards the basic principles of the Directive as "preventive, integrated, and directed towards organisation and participation" cf. Hubert Krieger, "Participation of Employees' Representatives in the Protection of the Health and Safety of Workers in Europe", *The International Journal of Comparative Labour Law and Industrial Relations*, Vol 6, (1990), pp. 217-227.

¹²⁷ M Biagi, "From Conflict to Participation in Safety: Industrial Relations and the Working Environment in Europe 1992", (1990), Vol 6, *International Journal of Comparative Labour Law and Industrial Relations*, p. 80.

¹²⁸ See COM(88) 73 final, p. 30 of 7 March, 1988, the explanatory memorandum to Directive 89/391/EEC.

have been defined in the Action Programme on the Charter as meaning, "where there is good reason to believe that they (the diseases)¹²⁹ are closely connected with certain activities, but which the Member States have not yet recognized as giving any right to compensation"¹³⁰. The final argument for stating that the directive uses the wide interpretation is found in article 3, d)'s definition of "prevention": all steps or measures taken or planned at all stages of work in the undertaking to prevent or reduce occupational risks. The inclusion of the wide term "occupational risks" may be seen as an argument that the directive is using the widest interpretation of the "working environment". It may therefore be concluded that the second framework directive 89/391/EEC sets the widest frames for the individual directives that relate to it.

The directive is divided into four sections: General provisions (articles 1-4), employer's obligations (articles 5-12), worker's obligations (article 13), and miscellaneous provisions (articles 13-19). The set up of the directive indicates that, while it is using the widest interpretation of the term "working environment", it is, on the other hand, limited to setting requirements in the relationship between employers and workers. This is in line with the indications of the scope of article 118A in the Social Charter. Therefore, preventive measures setting requirements to parties outside these two categories can not be related to the framework directive. This fact is important when judging the impact of such general principles of prevention as in article 6, (2) e.g. the employers general obligation in article 6, (2), (c) to combat the risks at source. Thus, individual directives may for example specify the information on dangerous preparations which the employers should provide for the workers, but if the employer needs to get the information from the producer of the preparations, it is not within the scope of directive 89/391/EEC to place obligations on the producers to provide information.

The obligations that may be placed on the employers appear to be very far reaching; under the terms of article 5, (1), employers have a duty to ensure the safety and health of workers "in every aspect related to the work". Even the employer's delegation to external services of powers and duties relating to safety at work, or, the workers neglect of own obligations does not, according to article 5, (2) and (3), affect the responsibility of the employer. The only provision that might limit the responsibility of the employers is article 5, (4), which allows the Member States to

¹²⁹ My insert.

¹³⁰ This runs contrary to the Danish definition of industrial diseases (erhvervssygdomme) which implies that the diseases have been recognised as giving a right to compensation cf. Law no. 450 of 25 June 1987 on compensation for occupational injuries § 10.

exclude responsibility in cases of force majeure. Further, all these obligations are, according to article 6, (5), to be fulfilled at the expense of the employer, the workers may in no circumstances be involved in the financial cost.

The employers obligation deriving from the general rule of Article 5, (1) may be enunciated as follows¹³¹ :

- *1. *Duties of Awareness:* These are threefold, consisting, first, in a broad duty - which follows from the preamble to the Directive - for the employer to keep himself informed of the latest advances in technology and scientific findings concerning workplace design; second, in a duty to identify and to evaluate risks to the safety and health of workers in the undertaking or establishment; and, third, a duty - closely linked to duties of instruction and training below - to be aware of the capabilities of workers at the undertaking or establishment as regards health and safety.
2. *Duties to take Direct Action to Ensure Safety and Health:* These twin duties constitute the "heart" of the Directive. They comprise (a) a duty to eliminate avoidable risks¹³² ; and (b) a duty to reduce the dangers posed by unavoidable risks¹³³ .
3. *Duties of Strategic Planning to avoid risks to Safety and Health:* This pair of duties reflect the need for both a general overview of safety and health needs and the implementation of a specific programme at the undertaking or establishment. The former is covered by the duty, in article 6, (2), (g), to develop a "coherent overall prevention policy" . The latter is detailed in the article 7 duties to develop and implement a system for the protection and prevention of occupational risks.
4. *Duties to Train and Direct the Workforce:* The general duties of training for the workforce in matters of safety and health are set out in article 12. In addition, there is a broad requirement in article 6, (2), (i) that employers, as part of their normal activity in managing and directing the work, should provide appropriate instructions to their workers, while article 6, (3), (d) makes it clear that employers must take appropriate steps to ensure that only "workers who have received adequate instructions" are to have access to areas where there is "serious and specific danger".
5. *Duties to Inform, Consult, and Involve the Workforce:* These duties are extremely widely cast by the Directive. The details of what information is to be given by

¹³¹ See Neal, *supra* note 126.

¹³² Article 6, (2), (a).

¹³³ Article 2, (2), (b) and (f).

employers to workers and/or their representatives are set out in article 10, while broad duties to provide for consultation and participation of workers are set out in article 6, (3), (c) and, most importantly, in article 11.

6. *Recording and Notification Duties:* A variety of obligations on the parts of employers and undertakings are set out in article 9, (1), (c) - listing of certain accidents and occupational illnesses at the undertaking or establishment - and article 9, (1), (d) - reports, for the benefit of relevant national authorities, on occupational accidents and occupational illnesses suffered by the workforce."

The worker's obligation in article 13 seems, in comparison, to place very little burden on the individual worker:

"It shall be the responsibility of each worker to take care as far as possible of his own safety and health and that of other persons affected by his acts or omissions at work in accordance with his training and the instructions given by his employer".

The obligations imposed on employers may well result in additional costs. The Directive does not, however, leave many possibilities of escape from the employer's responsibilities which it lays down. The only exception which the Directive has to respect, is the special status which article 118A provides for small and medium-sized enterprises (SME)¹³⁴ :

"directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings".

It may be important to define the scope of this exception for SMEs. What is meant by "hold back" and "creation and development" ? A directive which implies negative short term effects or temporary obstructions for the SMEs, but proves cost-effective in the long-term, would that be considered a violation of article 118A of the Treaty ? When answering the question it must be remembered that "hold back" refers to "the creation and development" of SMEs. If the safety measures laid down in a directive, in the long-term prove cost-effective and as such might help the development of enterprises, but on the other hand represents an obstacle for the creation of SMEs, then the directive should be considered a violation of the Treaty. The reason for this is,

¹³⁴ It should be noted that the concept of SMEs is broadly defined. In relation to economic support for SMEs the Commission decided on 20 May 1992 that the enterprises must meet the following criteria: 1) It must be an independent enterprise (no larger enterprise may hold 25% or more of the shares); 2) The number of employees may not exceed 250; and 3) The turnover must be lower than 20 millions ECU. Thus, an escape clause for the SMEs may exempt a large number of enterprises from the constraints of Community working environment regulation. See on the definition of SMEs, Commission of the European Communities, *Perspektiv 92*, No. 6, June 1992, p. 4.

that even though "creation and development" is understood as referring to specific phases in the life of SMEs, article 118 (2) exempt in general all constraints on the creation of SMEs. Thus, a directive does not meet this requirement even if it helps the development of existing SMEs, if it at the same time prevents the creation of new SMEs.

The Directive, on the other hand, prescribes that "the size of the undertaking and/or establishment" may be taken into account when defining the duties of the employer in article 7, (5) and (7), article 8, (1) - (2), article 9, (2), and finally article 10, (1). Despite these escape clauses for SME's it may be asked¹³⁵ whether the Directive in fact respects the limitation contained in article 118A. In the Preamble it states that "the improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations", and article 6, (5) expresses that the workers should not be involved in the financial cost for health and safety measures. In other words, the employers have to pay. This is further emphasised in article 11, (4), and 12, (4) relating to the consultation and participation of workers, and the training of workers. These three provisions do not include escape clauses for SME's. A Declaration on article 118A, (2) was adopted in relation to the Single European Act. This Declaration confirms the basis that employees in SME's should not experience lower protection of the safety and health, but discrimination because of the size of undertaking may, however, be justified:

"The Conference notes that in the discussions on Article 118A (2) of the EEC Treaty it was agreed that the Community does not intend, in laying down requirements for the protection of the safety and health of employees, to discriminate in a manner unjustified by the circumstances against employees in small and medium-sized undertakings."

Because of article 118A (2)'s status as a Treaty provision there are no doubt cases where the provisions in Directive 89/391/EEC or the Declaration may not be seen as interpretive factors in relation to article 118A, but are in conflict with it, in that situation article 118A (2) is *lex superior*. There should, however, be a presumption that no conflict between Directive and Treaty provisions exists. Still, if the Directive imposes administrative, financial and legal constraints in a way which would hold back the creation and development of SMEs, it is justified to discriminate against the workers in SME's by providing them a lower level of protection, and in this case,

¹³⁵ See both Alan C. Neal, "The European Framework Directive on the Health and Safety of Workers: Challenges for the United Kingdom?", *The International Journal of Comparative Labour Law and Industrial Relations*, Vol. 6, (1990), Issue 2, pp. 80 and M Biagi, "From Conflict to Participation in Safety: Industrial Relations and the Working Environment in Europe 1992", (1990), Vol 6, *International Journal of Comparative Labour Law and Industrial Relations*, pp. 67 who raise the question.

despite the Preamble of Directive 89/391/EEC, the improvements of workers' safety and health at work is subordinated to avoiding financial constraints on the SMEs. The lack of escape clauses for SMEs in relation to employers' obligations concerning consultation and participation of workers in article 11, and training of workers in article 12 may indicate that Directive 89/391/EEC does not respect the limitation contained in article 118A.

As a way of trying to avoid the prospective conflict between Treaty and Directive provision, it might be argued that the Directive prescribes the same health and safety standards for all enterprises, and leaves it to Member States to find ways of easing the pressures on SMEs. Such an interpretation would, however, run contrary to what is explicitly laid down in the Treaty, since it reads "Such directives shall avoid...", which must imply that it is up to the Community directives to lay down ways for the protection of the SMEs and not up to the individual Member States.

Further, in relation to worker information in article 10 the escape clause prescribes that the workers and/or their representatives in the undertaking shall receive all the necessary information "in accordance with national laws and/or practices which *may*¹³⁶ take account, *inter alia*, of the size of the undertaking and/or establishment". Article 118A (3) allows Member States to maintain or introduce more stringent measures for the protection of working conditions. It could be argued, since paragraph 3 is a derogation to the second paragraph, that paragraph 3 permits Member States to use more stringent measures, without having to respect the restrictions set up for directives in paragraph 2 concerning SMEs¹³⁷. If this interpretation is accepted, then the "may" in article 10 of Directive 89/391/EEC is within the limits of article 118A. It must, however, be noted that paragraph 3 because of its status as a derogation must be interpreted narrowly.

Another interpretation would take as its basis that Member States have transferred competence to the Community within the field of health and safety. If the Community does not use its competence pursuant to the principle of subsidiarity, or, if the Community legislation as here is in the form of a minimum directive, it does not change the fact that the Member States' regulation within such a field is seen as part of the Community law system, and as such falls within the

¹³⁶ My emphasis.

¹³⁷ Ruth Nielsen seems to favour this interpretation, since she in: *Arbejdsmarked og Sociale Forhold, Juristen*, Vol 5, 18 May, 1992, pp. 221-224, in relation to Community regulation of the working environment states "Danmark er frit stillet til at bygge ovenpå" (Denmark is free to set further requirements (my translation)).

jurisdiction of the European Court of Justice, article 164¹³⁶. In this relation it should be noted that the European Court of Justice several times has emphasised the supremacy of Community law in conflicts with national regulation.

Turning to the more specific within this second interpretation; according to article 118A (2), competence in the field of health and safety has been transferred to the Community, under the condition that Community Directives have to respect the principle of avoiding imposing certain constraints which would hold back the creation and development of SME's. Thus, the protection of health and safety of workers in Community directives is subordinated to the protection of SME's. When paragraph 3 allows Member States to use more stringent measures *"compatible with this Treaty"*, it could, therefore, be argued that the Member States would have to respect the principle of protection of SMEs, because of the supremacy of Community law, and because the Member States by the insert of the restriction into the Treaty have agreed, that whenever directives are adopted, the protection of SMEs comes first. Further, the provisions adopted by the Community pursuant to article 118A are all in the form of directives according to Paragraph 2, and according to Paragraph 3 it only regulates the Member States competence in relation to these directives (*"The provisions adopted pursuant to this Article"*) in the way of maintaining or introducing more stringent measures *"compatible with this Treaty"*. Thus, it could be argued, because of the compatibility requirement with the Treaty, and the supremacy of Community law, the Member States which derive their competence from Community law to adopt more stringent measures than the Directives, may not disregard the fact that protection of SMEs comes first, whenever health and safety Directives are adopted. It would seem inconsistent, if the Member States' regulation, which is a more stringent measure than a Community Directive regulating the same, does not respect the restriction that protection of health and safety is subordinated protection of SME's.

This latter interpretation seems the most convincing, since it implies both that Member States regulation is coherent with principles emphasised in Community law, and that it would be an acknowledgement of the fact that Community law is superior to national legislation. The consequence of this is, that the *"...may take account..."* in article 10 of the Directive should have been a *"shall avoid imposing ... constraints"* both in order to respect the limitations in relation to the SMEs, and to be compatible with article 118A (2). It would not be sufficient if article 10 read

¹³⁶ The question whether article 177 may be used for preliminary rulings depends, if the Court considers the provision to be direct applicable.

"shall take account...", since the "taking account of" does not necessarily imply a protection of SMEs.

This interpretation might have some rather wide implications on national legislation, since, when adopting Directives, many Member States might simply have analysed the content of the Directive and concluded, that their level of health and safety protection was higher than the Directive required, therefore they would see no reason to oppose the Directive. This interpretation implies, however, that these Member States should not simply analyse the level of the Directive in comparison to the national level, they should also consider whether the existing national regulation respect the protection of SMEs, if not, they will have to adopt measures that leave escape clauses for the SMEs. In the case that the Member States disregard this obligation to protect the SMEs, the affected enterprises may, through questions raised before a court or tribunal of a Member State, oppose the national regulation which is an implementation of the Community directive, and, according to article 177 (b) ask for a preliminary ruling from the European Court of Justice (ECJ) on "*the validity and interpretation of acts of the institutions of the Community*".

The question may be raised whether article 118A, (2) of the Treaty has direct application in the Member States. The ECJ listed in the van Gend en Loos Case¹³⁹ a number of conditions which had to be fulfilled, in case of direct application; the Treaty provision had to contain a clear, unconditional negative obligation, which is not qualified by any reservation on the part of states, and should not require any legislative intervention on the part of the states. These conditions have, however, been eased so that the case-law of the ECJ today only seem to require, that the Treaty provision is clear and unconditional.¹⁴⁰ Against this background, it seems most likely that the ECJ would consider article 118A (2) indent 2 direct applicable in the Member States, as it did in relation to article 119 on equal pay¹⁴¹.

¹³⁹ Case 26/62, Judgment of 5.2.1963, (1963) ECR 2, NV. Algemene Transport - en Expeditie Onderneming van Gend en Loos vs. Niederländische Finanzverwaltung.

¹⁴⁰ Nielsen, Ruth, *Lærebog i Arbejdsret*, third edition, Jurist- og Økonomforbundets Forlag, Copenhagen, 1990, p. 59 in which is stated, that there is a presumption for the direct application of Treaty provisions and refers to Pierre Pescatore: The Doctrine of "Direct Effect": An infant Disease of Community Law, *European Law Review*, 1983, pp. 155.

¹⁴¹ Case 43/75, (1976) ECR 455, the Defrenne-II-case. In the case the directive seemed, in requiring equal pay for work of equal value, as well as equal pay for equal work, to go beyond article 119, but the ECJ held that the directive simply provided an elaboration of the meaning of the Treaty. It would be unlikely that the ECJ responded the same in relation to a directive neglecting the protection of SMEs in order to improve the health and safety at work, since the Defrenne-II-case in contrast did not contain a conflict between two considerations within the legal basis. It was therefore easier to elaborate on the principle of equality.

The question of whether the Directive respects the restriction of article 118A, on regulation concerning SMEs in general, may thus be very doubtful, but the application of the Directive may give a more exact answer to this.

1.3.1.2.1. Individual Directives Within Directive 89/391/EEC From the Period Before the Charter

The first seven Directives which were adopted within the scope of Directive 89/391/EEC were all announced, and some even adopted, before the Social Charter. Non of these initiatives were part of the Commission's related Action Programme. In the Preamble they all emphasised the links to article 118A, and Directive 89/391/EEC, and stressed at the same time that each:

"constitutes a practical aspect of the realization of the social dimension of the internal market".

Analysing further which of the three interpretations of the term "working environment", that were mentioned in part 1.2., has been used for the adoption of the seven directives, one will first have to examine the subjects or the objectives of each Directive. By doing this, six of the seven directives might seem to fall within the narrow interpretation of the term, meaning protection of work in the strictest sense. The six Directives are: 89/655/EEC *on the safety and health requirements for the use of work equipment*¹⁴² *by workers at work*¹⁴³; directive 89/656/EEC *on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace*¹⁴⁴, 90/269/EEC *on the safety requirements for the manual handling of loads*¹⁴⁵ *where there is a risk particularly of back injury to workers*¹⁴⁶; 90/270/EEC *on the safety and health requirements for work with display screen equipment*¹⁴⁷; 90/394/EEC *aiming at the protection of workers against risks to their health and safety, including the prevention of such risks, arising or likely to arise from exposure to carcinogens at work*¹⁴⁸; and finally, 90/679/EEC *aiming at the protection of workers against risks to their health and safety, including the prevention of such risks, arising or likely to arise from exposure to biological*

¹⁴² Defined in article 2 (a), of the Directive as having the following meaning: "any machine, apparatus, tool or installation used at work".

¹⁴³ *Supra* note 99.

¹⁴⁴ *Supra* note 100.

¹⁴⁵ Defined in article 2 of the Directive as having the following meaning: "transporting or supporting of a load, by one or more workers, including lifting, putting down, pushing, pulling, carrying or moving of a load, which, by reason of its characteristics or of unfavourable ergonomic conditions, involves a risk particularly of back injury to workers".

¹⁴⁶ *Supra* note 101.

¹⁴⁷ *Supra* note 102.

¹⁴⁸ *Supra* note 103.

*agents at work*¹⁴⁹.

A closer examination of the content in the six Directives shows, however, that Directive 90/270/EEC on Display screen equipment contains a provision that may not be included under the narrowest interpretation of the term "working environment". Article 7 has as its heading "Daily work routine" and prescribes:

"The employer must plan the worker's activities in such a way that daily work on a display screen is periodically interrupted by breaks or changes of activity reducing the workload at the display screen."

Thus, the Directive goes further than the simple protection of work, such as the protection mentioned in the annex related to article 4 and 5, which requires protection against noise, heat, radiation, and humidity. In article 7 it also regulates the content of working time; matters which clearly fall within the scope of the second interpretation, all working conditions which have or which could have an effect on the health and safety of workers, including the duration of working time, its organisation and its content. The other five directives that have been dealt with above do, however, not contain similar provisions which widen the scope. Directive 90/269/EEC on the manual handling of loads where there is a risk particularly of back injury comes closest to widen the scope, since it in Annex 1 on reference factors under point 4 in the requirements of the activity states:

"The activity may present a risk particularly of back injury if it entails one or more of the following requirements:

- over-frequent or over-prolonged physical effort involving in particular the spine,*
- an insufficient bodily rest or recovery period,*
- excessive lifting, lowering or carrying distances,*
- a rate of work imposed by a process which cannot be altered by the worker."*

Thus, the Directive mentions "insufficient bodily rest or recovery period" as factors which may indicate a health and safety risk, and both these factors may be seen as part of the organization of working time. The reason for still considering the Directive to be within the narrow interpretation of "working environment" is that it does not expressly aim at regulating or preventing insufficient bodily rest or recovery period, but considers only the periods as indicators of risks.

¹⁴⁹ *Supra* note 101.

Another of the Directives 89/656/EEC *on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace* might not be of much interest when determining the scope of the adopted Directives, but instead it reveals how Directives based on articles 100A and 118A may work together. The Directive 89/686/EEC ¹⁵⁰ based on article 100A of the Treaty refers in article 3 to a list of basic health and safety requirements, which the manufacturers of protective equipment are obliged to fulfil. When the equipment meets these demands set in the Directive, then it also meets the minimum requirements laid down in article 4 of the corollary Directive 89/656/EEC based on article 118A EEC on the use of personal protective equipment. Article 4 (1) lays down: "Personal protective equipment must comply with the relevant Community provisions (article 100A Directive) on design and manufacture with respect to safety and health"¹⁵¹, after which it lists a number of obligations for the employers. It should, however, be emphasised that the employer is not left with a free choice between the equipment which have an EC mark affixed; in the same article 4 it is further laid down:

"All protective equipment must:

(a) be appropriate for the risks involved, without itself leading to any increased risk;

(b) correspond to existing conditions at the workplace;

(c) take account of ergonomic requirements and the worker's state of health;

(d) fit the wearer correctly after any necessary adjustment.

Thus, the Directive on the use of the equipment limits the choice to equipment affixed with the EC mark of conformity. The principles in the 1989 Framework Directive in section II on employers' obligations may even limit this choice further, since it is fully applicable to the whole scope of the Directive on the use of this equipment. The situation is very similar when the subject is machinery, and not personal protective equipment. Thus, the article 118A Directive has incorporated the article 100A standards as the minimum protection level which the equipment has to meet.

A more critical fact from a social dimension point of view is contained in article 6 (1) on rules for use of the equipment:

¹⁵⁰ My insert referring to Directive 89/686/EEC, OJ L 399/89.

¹⁵¹ Directive 89/655/EEC on work equipment contains a similar reference in article 4, (1) (a), by which is to be understood the Machinery Directive 89/392/EEC, OJ L 183/89.

"Without prejudice to articles 3, 4 and 5, Member States shall ensure that general rules are established for the use of personal protective equipment and/or rules covering cases and situations where the employer must provide the personal protective equipment, taking account of Community legislation on the free movement of such equipment".

The effect of this is at least a procedural requirement; when Member States would like to use their legislative competence to define in what situations they want protective equipment to be used, then they should first analyse the effects on the free movement of such equipment. Both article 36¹⁵² and article 100A, (4) allows the Member States to introduce restrictions on imports justified on grounds of the protection of health of humans, it, therefore, seems surprising that the Community in a Directive specifically aimed at the protection of the health and safety of humans, might require the Member States to take special account of the free movement of goods.

Turning towards the last directive, that was not part of the Social Charter, Directive 89/654/EEC *on the minimum safety and health requirements for the workplace*¹⁵³, this directive seems to set requirements to something more than protection of work in the strictest sense, meaning protection of the workers against accidents directly related to the working process. The subject of Directive 89/654/EEC is to lay down minimum requirements for safety and health at the workplace (article 1 (1)), and goes on to define the **workplace** as "the place intended to house workstations on the premises of the undertaking and/or establishment and any other place within the area of the undertaking and/or establishment to which the worker has access in the course of his employment". This definition includes areas on the premises of the undertaking, where working processes are not performed e.g. the annex 1 point 7.2 of the Directive regulates the room temperature for such areas as rest areas, sanitary facilities, canteens and first aid rooms. These parts of the workplace are not directly related to the working process, and the inclusion of them in a directive concerning the health and safety at work, implies that the Council has accepted the extension of the scope of article 118A to all working conditions which have or

¹⁵² See Ruth Nielsen and Erika Szyszczak, *The Social Dimension of the European Community*, Handelshøjskolens Forlag, Copenhagen, 1991, p. 194 who state in general terms "that working environment provisions either fall outside of the scope of article 30, because they do not affect cross-country trade or will be lawful as a "mandatory requirement" within the meaning of *Cassis de Dijon* (Case 120/78 (1979) ECR 649) or as part of "public health" in article 36." According to this the Member States seem free to balance considerations of safety with those of free movement of goods. In contrast does Anneke Biesheuvel Borgli not seem to question the lawfulness of article 118A Directives prescribing that account should be taken of the free movement of goods see "Sikkerhet og arbeidsmiljø i EF", IUSEF, Senter for EF-rett Universitetet i Oslo, nr. 1, 1990, p. 51.

¹⁵³ *Supra* note 98.

which could have an effect on the health and safety of workers; the second interpretation suggested by Vogel-Polsky and Bercusson.

1.3.1.2.2. Individual Directives Within Directive 89/391/EEC From the Period After the Charter

The "First Annual Report on the application of the European Community's Social Charter"¹⁵⁴ contained, as mentioned above, a list of 12 Directives which have been proposed or adopted using article 118A as legal bases. Of these initiatives only those, which might imply a widening of the scope of article 118A, or those which have proved controversial¹⁵⁵ either in the European Parliament or in the Council, will be further analysed in the following.

The Directive 91/383/EEC on *the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship*¹⁵⁶ has its origins in a Commission plan to develop a single directive on **"atypical work"**, defined as any employment other than under an open-ended full-time contract. The aim of this should, according to the Commission's Action Programme on the Social Charter, under the title "Employment and Remuneration", be the establishment of "a Community framework ensuring a minimum of consistency between these various forms of contract in order to avoid the danger of distortions of competition and increase the transparency of the labour market at Community level". Instead, when presenting the Commission's proposal for a Community framework for these atypical work contracts¹⁵⁷, the proposal had been divided into three proposals for Directives, each one based on a different article of the Treaty, one proposal on working conditions using article 100, a second with regard to distortions of competition using article 100A, and finally the proposal for the Directive 91/383/EEC *on the safety and health of temporary workers* using article 118A. The first two initiatives will be examined in later sections of the thesis.

The aim of Directive 91/383/EEC is to ensure, in relation to information about specific occupational risks, medical surveillance, and the responsibilities incumbent upon undertakings

¹⁵⁴ *supra*, note 105.

¹⁵⁵ Thus, Wright describes the three initiatives which will be dealt with in the following as a "creative" use by the Commission of article 118A and as an "abuse" of the Treaty powers cf. Frank B. Wright, "The Development of Occupational Health and Safety Regulation in the European Communities", *The International Journal of Comparative Labour Law and Industrial Relations*, Vol 8, (1992), pp. 32-57.

¹⁵⁶ *supra* note 106.

¹⁵⁷ COM (90) 228 final - SYN 280 and SYN 281, Brussels, 13 August 1990, published in OJ C 224, 8 September 1990.

using the services of temporary workers, that temporary workers have the same health and safety protection as other workers in the user undertaking working on an open-ended contracts. It must, however, be noted that the scope of the Directive is limited solely to the protection of temporary workers; all other persons employed in an atypical employment relationship are thus excluded. Article 2, (2) prescribes:

"The existence of an employment relationship as referred to in article 1 shall not justify different treatment with respect to working conditions inasmuch as the protection of safety and health at work are involved, especially as regards access to personal protective equipment".

The Commission's plan to create a Community framework for atypical work contracts has been subject to severe criticism from both the supporters of deregulation, the UK Government¹⁵⁸, and from the European Parliament¹⁵⁹, which favours an active role of the Community in the field of social regulation, but the criticism has not so much been related to Directive 91/383/EEC, as it has to the other two proposals. The EP suggested, however, in its report, that the scope of the directive should be extended to cover all contracts, which are not permanent and full-time, and that the object in article 2 should be broadened:

"The existence of an atypical employment contract or terms of employment shall not justify different treatment with respect to working conditions as regards the content or difficulty of the work, the safety of the work and health protection, access to personal safety equipment, the working environment and pattern, including the arrangements for fixing working hours and paid maternity leave"¹⁶⁰.

Eventhough the first suggestion, in particular, on the widening of the scope seems to be in line with the Commission's overall aim of establishing a Community framework ensuring a minimum of consistency between the various forms of contract, neither of the two suggestions have been included in the final text of the adopted Directive. The consequence of the Directive will be that there is a consistency between the protection of health and safety for permanent, full-time workers, and temporary workers, but the Directive fragments further the atypical workers, resulting in groups of more and less protected atypical workers. This fragmentation seems to be contrary to the overall aim of consistency.

¹⁵⁸ Financial Times, 27 November 1990, p. 2

¹⁵⁹ Document A 3-0241/90 of 2 October 1990, PE 141.028/fin, Report of the Committee on Social Affairs, Employment and the Working Environment on the three proposals, Rapporteur: Mrs. Heinke Salisch.

¹⁶⁰ my emphasis.

The second suggestion on the broadening of the Directive's object to include "paid maternity leave" implies a use of the term "working environment" in article 118A in its widest sense, including payment systems. The EP's approach of testing the Commission and the Council's willingness to a wider use of article 118A is not surprising, considering the EP favours a very liberal use of article 118A. The testing proved, however, to be a failure, since the amendment was not accepted in the above-mentioned article 2, (2), and the final content of the Directive may indicate that the Commission at least at that time was unwilling to embark on the widest use of article 118A.

The Directive is restricted to cover only areas such as information to workers of required occupational qualifications or skills or special medical surveillance (article 3), workers' training (article 4), medical surveillance of workers exposed to work particularly dangerous to the safety and health (article 5), and protection and prevention services (article 6). Thus, the Directive does not include anything more than what might be included in Bercusson's and Vogel-Polsky's second way of interpreting article 118A, that is to cover all conditions of work which have or could have effects on the safety and health of workers.

The proposal on the *protection of pregnant women, women workers who have recently given birth and women who are breastfeeding*¹⁶¹, referring to the Social Charter article 16 on equal opportunities for men and women, and article 19 on the harmonization of health and safety conditions, originated in the AP related to the Charter. Further, the framework Directive 89/391/EEC prescribed in article 15 that "Particularly sensitive risk groups must be protected against the dangers which specifically affect them" the group of women which the proposal aims at protecting is regarded as a specific risk group. The proposal represents another of the Commission initiatives that have shown to be controversial. Not only has the UK government¹⁶² criticised the proposal, but also in Denmark it has met with strong opposition from various organisations, such as the Danish Employers' Association (DA), Salaried Employees' and Civil Servants' Confederation (FTF), and most notably the Council on Equal Treatment for Men and

¹⁶¹ *supra*, note 107. Although the research for this thesis was concluded by 30 August 1992, it should, however, be noted that a Directive was adopted by the Council on 19. October 1992. Thus, this might indicate a willingness in the Council to use Article 118 A in a broader sense. The adoption of the Directive will, however, not be dealt with any further in the following, and the conclusions in this part were drawn before the adoption of the directive.

¹⁶² *European Report*, No 1726, December 4, 1991, Section IV, p. 9, and *European Report*, No 1727, December 7, 1991, Section IV, p. 12. The latter shows that also the Spanish delegation has had troubles accepting parts of the proposal.

Women (Ligestillingsrådet)¹⁶³.

The proposal is a clear example of the different approach used in the Nordic countries, and most of the EC Member States. The explanatory memorandum to the proposal¹⁶⁴ shows, that all other Member States have some restrictions on night-shift working by women, whereas Denmark does not regulate this area. The reason for this being that the Nordic countries¹⁶⁵ have always been marked by almost a lack of special protection for women at work, because such protection is seen as sex discriminatory and as being contrary to the Nordic tradition of not prohibiting or putting restrictions on any work for any woman. The proposal clearly confronts the Nordic approach:

*"Consequently, this proposal for a Directive, based on article 118A of the EEC Treaty, sets out to improve the protection for pregnant workers or women who have just given birth, in their working environment, but without having a negative effect on their working conditions in general, and particularly on their situation on the job market. To this end, the proposal attempts to protect the health and safety of women workers while also guaranteeing respect of the principle of equality laid down by Council Directive 76/207/EEC, on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions protecting female workers on the one hand and upholding the principle of equal opportunities for men and women on the other".*¹⁶⁶

From the part of the Nordic countries it would be argued, despite the Commission's good intentions, that putting restrictions on women's right to work under the same conditions as men will have a negative effect on women's working conditions in general, and will uphold the principle of equal opportunities as regards access to employment. In other words, the regulation would create additional obstacles to jobs for women. The Danish employers emphasised the latter, claiming the proposal would prevent women of normal childbearing age from being employed. The ECJ's ruling on a French case in July, 1991, concerning the prohibition against night work for women in the French Code du Travail¹⁶⁷, might indicate that the ECJ favours the Nordic approach. The ECJ ruled that national laws could not forbid night-time work for women.

¹⁶³ *Børsen*, Friday 21 June, 1991, p. 12 and Ruth Nielsen and Erika Szyszczak, *The Social Dimension of the European Community*, Handelshøjskolens Forlag, Copenhagen, 1991, 209.

¹⁶⁴ COM(90) 406 final - SYN 303, Brussels, 17 October 1990

¹⁶⁵ Ruth Nielsen and Erika Szyszczak, *The Social Dimension of the European Community*, Handelshøjskolens Forlag, Copenhagen, 1991, p. 209.

¹⁶⁶ *supra*, note 164, p. 4.

¹⁶⁷ Case C-345/89 *Criminal Proceedings against Alfred Stoeckel*. Court decision on 25 July 1991. The case has not been published at the time being.

This might be important for the proposal, since in the explanatory memorandum it is stressed that the proposal should respect both the principles of equal treatment in the Community law and the Case law of the ECJ.

The overall content of the proposal may be described as linking the protection of health and safety of these women, with the maintenance of employment and income rights¹⁶⁸. Thus, in relation to the legal basis for the proposal the Economic and Social Committee (ESC) stated:

"the legal basis for the proposal (article 118A) is endorsed as the appropriate article for a Directive dealing essentially with the health and safety of workers".

This may imply that the ESC accepts that article 118A is being used as legal basis not only in cases where the proposal exclusively regulates health and safety issues, but the ESC might, however, limit the use to cases where health and safety is the predominant aim. Thus, the ESC approved that the proposed measures - concerning maternity leave, work-related rights and dismissal, night-time working and protection against certain agents and work processes - "form a coherent health and safety package".

Further, it should be noted as the ESC does, that the Conventions of the International Labour Organization (ILO), have been used and referred to by the Commission as a consensual basis for drawing up the proposal.

Looking at the more specific content of the proposal the Preamble reveals in relation to the objective:

"the objective of this Directive is to protect the health of the pregnant worker within her working environment and that it is necessary to take account of the working relations between the potential beneficiary and her employer; whereas, furthermore, it is advisable to leave to the Member States the faculty of subjecting the eligibility regarding the maintenance of the remuneration or the payment of the allowance to the existence of a working relationship since the beginning of the pregnancy or, by extension, to the pregnant workers who, at the beginning of their pregnancy, were registered as unemployed".

From this it might be concluded that it indirectly confirms that the Directive also aims at regulating the payment system in relation to this group of women. This is even more directly stated in other

¹⁶⁸ Economic and Social Committee's opinion on the proposal OJ C 41/29 of 18 February 1991.

Recitals of the Preamble:

"Whereas the purpose of the period of leave from work - namely, the protection of the health of pregnant women or women who have recently given birth and those who are breastfeeding - would not be achieved without which, for example, some of these women would be forced to give up most of their period of leave in order not to lose their remuneration; consequently maintenance of employment and income rights should be guaranteed during the period,"¹⁶⁹

"Whereas the provisions of this Directive regarding the compulsory rest period before the presumed date of birth (and after the birth) would have no effect if this rest period were not to be accompanied by the maintenance of pay or the payment of an equivalent allowance; whereas, in consequence, the eligibility period referred to above does not apply to the compulsory rest period and that it is necessary that the Member States take all the appropriate measures to that effect".¹⁷⁰

This approach of extending the use of article 118A to regulation of payment systems, in order, to protect the health and safety of workers, marks a clear step towards broadening the interpretation of the provision. The Commission seems by the proposal of the Directive to accept, that the term "working environment" in article 118A should be understood as "working conditions" in the widest sense, and therefore it falls within the third interpretation suggested by Vogel-Polsky and Bercusson.

Section II of the proposal is titled "working conditions". Article 3, paragraphs 3 and 4 in particular contains strong indications that working conditions should be understood in the widest sense of the term including all work-related rights, in other words an extremely broad interpretation of article 118A:

*"3. If the adjustment referred to in paragraph 2, indent 2, is not technically possible, the employer shall take the necessary measures to move any worker concerned to another job. In such cases measures shall be taken to maintain the worker's level of pay and/or to pay an equivalent allowance and to **ensure that her work-related rights are unaffected**"¹⁷¹ for the period concerned.*

4. In cases where transfer to another activity is not technically or objectively feasible, the workers in question shall be granted leave for the whole of the period considered necessary to protect their safety and health. Their pay and/or an equivalent allowance,

¹⁶⁹ Amended proposal OJ C 25/9 of 1 February 1991.

¹⁷⁰ COM(90) 406 final -SYN 303, Brussels, 17 October 1990, p. 28.

¹⁷¹ My emphasis.

*and their work-related rights, shall be maintained throughout this period."*¹⁷²

Thus, the proposal regulates not only the pay of the pregnant women and others covered by the proposal, but it also protects the women's work-related rights in general. The latter might include various rights, which one might consider more naturally fall within other Treaty provisions of the Community's social policy. The Commission's approach will, therefore, result in a widening of the scope of article 118A, and as a consequence the use of qualified majority voting in relation to more proposals. By this proposal the Commission seems to give up its earlier reluctance towards the interpretation of the term "working environment" suggested by the European Parliament. This would be in line with remarks from the former member of the EP's Committee on Social Affairs, Employment and the Working Environment, Mrs. Heinke Salisch, who, in March 1992, considered that the Commission had moved towards the EP's position, and that the remaining obstacle to a wide use of article 118A was its adoption in the Council. The statement by Jacques Delors, President of the European Commission¹⁷³, that in spite of the crisis in real socialism, a welfare-state backed market economy with highly pronounced co-operative structures in society and business enterprise represented the best way of ensuring the long term competitiveness and social stability in Europe, may also indicate that Delors sees the role of the Community as an active entrepreneur of a European welfare-state. Therefore the Community's competence within the social field must be used to its maximum.

Section III of the proposal concerns "Leave Arrangements, Duration of Work and Employment Rights". It is especially this part of the proposal with which the Danish Employers' Association has met with criticism¹⁷⁴, because of the obligation placed on employers to provide 14 weeks leave from work on full pay and/or a corresponding allowance. The present Danish system provides for 28 weeks (4 before birth) of maternity leave, and a pay of maximum 90% of the average weekly wage and Dkr 2339 per week (estimated 300 ECU), but the system is mainly financed through public social security funding. In contrast, the proposed Directive implies according to the Danish employers that they will have to finance the full pay for the first 14 weeks. The result of this would be an extra cost for Danish employers at estimated Dkr 500 millions (estimated 62 millions ECU). The main provision in the proposal setting up this system is article 5, paragraph 1, indent 1; and article 6 extends the 14 weeks of protected maternity leave

¹⁷² See amended proposal OJ C 25/9 of 1 February 1991.

¹⁷³ Hubert Krieger, "Participation of Employees' Representatives in the Protection of the Health and Safety of Workers in Europe", *The International Journal of Comparative Labour Law and Industrial Relations*, Vol 6, (1990), pp. 217-227.

¹⁷⁴ *Børsen*, Friday 21 June 1991.

not only to the pay, but employment rights in general:

"Article 5

1. Member States shall take the necessary measures to ensure that the women referred to in Article 2 are granted an uninterrupted period of at least 14 weeks leave from work on full pay and/or a corresponding allowance, commencing before and ending after delivery. The time at which this period of leave commences shall be decided by the beneficiary, in accordance with national practice and legislation.

Article 6

The maintenance of work-related rights shall be ensured throughout the period of leave from work referred to in Article 5.

The proposal provides, the female workers with a protection of rights in case of pregnancy, but the criticism expressed by the Danish employers, that it would lead to an increased financial burden on the employers might not have to be the consequence. The proposal provides "full pay and/or a corresponding allowance", but does not define that the employers have to pay the cost. It could be argued that "a corresponding allowance" means that the Member States may be allowed to assume the financial burden. The word "pay" seems to imply that the employer assumes the financial burden, thus, "a corresponding allowance" might imply that somebody other than the employer pays, e.g. the Member State. Despite a list in annex 1 of the explanatory memorandum¹⁷⁵ on the existing financing of maternity leave in all 12 Member States, no provisions are found which expressly require the employers to pay the cost. Therefore, Denmark may be free to let the social security system pay the full cost; such an approach will imply that there would be no direct extra cost for the employers when employing women workers.

Finally, the Preamble quotes article 118A (2) in relation to the protection of small and medium-sized undertakings. The proposal does not, however, contain any escape clauses for these types of undertakings, or any provisions ensuring that the SMEs do not have to bear the full financial constraint resulting from the rights provided for the women. Thus, it may be asked whether the proposal imposes such administrative and financial burdens which would hold back the creation and development of SMEs. Undoubtedly, the proposal implies significant burdens for small undertakings both in relation to the possible risk of having to pay a minimum of 14 weeks of leave, but also having to do without the employee, and instead having to find a temporary replacement who does not possess the same knowledge about the undertaking.

¹⁷⁵ COM(90) 406 final -SYN 303. Brussels, 17 October 1990.

The proposal *concerning certain aspects of the organisation of working time*¹⁷⁶ follows up the Social Charter's articles 7, and 8 on improvements of living and working conditions, and article 19 on the health protection and safety at the workplace. Further, it is in accordance with the related Action Programme, which announced an initiative concerning the adaptation, flexibility and organization of working time. The basis for the Commission proposal is to be found in research¹⁷⁷ which has concluded:

*"longer working hours increased substantially the probability of accidents at work.In addition , there is **the greater psychological burden**, not merely the purely physical workload; this causes a feeling of harassment and stress which obviously **has an adverse effect on the quality of work and on health in general***

*Several studies have been carried out on weekly rest periods. Although they are relatively old (Vernon, United States , 1918 - Industrial Health Research Board Emergency, London, 1942 - Kossoris & Köhler, United States, 1947) they all show that a weekly working time of more than 50 hours could, in the long run, be harmful to the health and safety of workers. Other more recent studies in France in 1975 and 1988 ¹⁷⁸ have confirmed these results, showing that there is a **positive correlation between working weeks of more than 6 days and some indicators of health** ¹⁷⁹ (fatigue, disturbed sleep, problems revealed during medicals)."*

The emphasised quotations indicate, that the Commission has found part of the basis for the proposal in what may be described as prevention of **Industrial diseases**, which has been defined in the Action Programme on the Charter as meaning, "where there is good reason to believe that they (the diseases)¹⁸⁰ are closely connected with certain activities, but which the Member States have not yet recognized as giving any right to compensation". In order both to ensure that the Member States' practices on the organization of working time do not have an adverse effect on the wellbeing and health of workers, and to avoid excessive differences in approach from one sector or country to another, the Commission would thus through the proposal define the basic conditions, which should be complied with. It argues that "the rules

¹⁷⁶ COM(90) 317 final - SYN 295 of 20 September 1990, published in OJ C 254/4 of 9 October 1990. Amended proposal COM(91) 130 final - SYN of 23 April 1991.

¹⁷⁷ COM(90) 317 final - SYN 295, p. 6.

¹⁷⁸ Alain Wisner & James Carpentier, *l'Aménagement des conditions de travail par équipes successives (travail posté)*, Agence Nationale pour l'Amélioration des Conditions de Travail (ANACT), Ministère du Travail, Paris, 1976, and Dr. Estryn-Behar, *Pathologie du personnel hospitalier féminin et conditions de travail*, Institut National pour la Santé et les Etudes Médicales (INSERM), Paris, 1988.

¹⁷⁹ My emphasises.

¹⁸⁰ My insert.

governing the entire issue of maximum working hours per day and per week and corresponding rest periods, which in some Member States are under review at present, are mainly justified and motivated on the ground of the health of the employees concerned".¹⁸¹ At this point it should be noted that the Commission in the explanatory memorandum defines what it understands by **health**:

"In this respect and as underlined by the constitution of the World Health Organization (preamble, first principle), it should be recalled that "health is a state of complete psychic, mental and social wellbeing and does not merely consist of an absence of disease or infirmity""

This definition of health, which the Commission uses, is indeed very broad, and if applied article 118A of the Treaty, the consequence would be a wide scope of the qualified majority voting within the social field. With the definition the Commission firmly confirms its intention of using article 118A to its full extent.

The UK Government has, however, been strongly opposed to Community intervention in the field of working time. The Employment Secretary, Michael Howard, argued bitterly with Commissioner Vasso Papandreou for Social Affairs at the December 3, 1991 Council meeting for EEC Social Affairs Ministers. He expressed the UK arguments about *"the Community having no business concerning itself with social rights and to the effect there is no link at all between workers' safety and health and working time"*.¹⁸² Thus, by the latter argument the UK Government rejects the research results on which the Commission has based its proposal, and the UK has openly said that article 118A does not constitute an ideal legal basis for the initiative¹⁸³. When discussing the proposal in the Permanent Representatives Committee (Coreper) on 17-18 September, 1991 it was, however, not only the UK which seemed reluctant to accept the use of article 118A as legal basis; Portugal also expressed reservations in order to further examine the proposal¹⁸⁴. The latest development in relation to the proposal shows also that the UK was not isolated in strongly opposing most of the provisions; at the EEC Social Affairs Ministers meeting in Luxembourg April 30, 1992 Germany would not isolate the UK, and the Council was, therefore, not able to conclude the debate on the proposal¹⁸⁵. Another attempt

¹⁸¹ *Supra*, note 177, p. 9

¹⁸² *European Report*, No. 1727, December 7, 1991, Section IV internal market, p. 12.

¹⁸³ *European Report*, No. 1726, December 4, 1991, Section IV, p. 9.

¹⁸⁴ See the minutes of the meeting on 17-18 September, 1991, Brussels 26 September, 1991, Document 8166/91.

¹⁸⁵ *European Report*, No. 1765, May 1, 1992.

to reach a conclusion is planned in June under the Portuguese Presidency.

When examining further the content of the proposal, the basis will be text of the proposal after the September 17-18-meeting in Coreper, since this is the most recent available text.

The objective and scope of the proposed directive was after the negotiations in Coreper according to article 1 (1) and (2)¹⁸⁶ :

"1. This Directive contains minimum provisions for the safety, and health concerning the organisation of working time

2. This Directive applies to

a) the minimum daily, weekly and yearly rest periods, time spent at pauses, and the maximum weekly working hours per week

b) certain aspects of night work, shift work, and patterns of work."

The proposal seems, therefore, hard for the UK to accept, if it does not believe that there is convincing evidence that night and shift work create serious health hazards. Part III of the proposal deals exclusively with night work, shift work, and patterns of work. In article 8 the normal hours of work for night workers is limited to an average of eight hours in any 24-hour period calculated over a reference period not longer than 14 days; and paragraph 2 regulates night work including high risks, which requires considerable physical or mental performance. In that case the worker is not allowed to work for more than 8 hours in any 24-hour period. Further, in relation to patterns of work article 13 might, as suggested by the Dutch Presidency, introduce a general principle that the work should be adjusted to man, especially in prevention of the effects of monotony of work and work at fixed pace. This gained full support from seven delegations and the Commission, whereas the others would like to examine the proposal further. It might, therefore, seem that the Council is taking its first steps towards a use of the concept of the working environment meaning the same as in a Nordic context covering both physical aspects of the working conditions and psychological and social aspects thereof, such as monotony, lack of social contacts at work or a rapid work pace.

In relation to rest periods the proposal provides the workers with a daily minimum rest of 11

¹⁸⁶ My translations from the Danish text in Document 8166/91, *supra* note 184.

consecutive hours in each period of 24 hours (article 3), and a right to a pause during work, if the daily working time exceeds 6 hours (article 4). On a week basis the workers should have as a minimum 35 hours of consecutive rest (article 5 (1)), and maximum an average of 48 hours a week during a seven day period (article 6). Finally, the proposal states, that all workers shall have an annual four weeks paid holiday (article 7).

The proposal obviously implies burdens on the employers, and does this without leaving exceptions for small and medium-sized enterprises (SMEs). The Preamble refers to the provision in article 118A (2) protecting the SME's, but at the same time it states that:

"improvements of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations;"

The latter statement is further supported in the explanatory memorandum¹⁸⁷ :

"This directive sets out minimum provisions for which derogations will not be granted for economic reasons. These provisions, it should be noted are not intended to place workers of small or medium-sized enterprises at a disadvantage in any way which cannot be justified objectively - in accordance with the terms of the declaration of the intergovernmental conference on article 118A, (2) of the Treaty ."

Whether the exclusion of derogations for economic reasons is in respect of article 118A, (2) protecting the SMEs might be debatable. The protective provision for the SMEs explicitly states that article 118A directives shall avoid imposing financial constraints on the SMEs, therefore, according to the Treaty, the working environment is subordinated to considerations protecting SMEs. The declaration of the intergovernmental conference may not allow the Commission to disregard the financial burdens placed on the SMEs by the proposal, and this may imply that the Commission can be forced to grant derogations for SMEs for economic reasons. By stressing the intention of not placing workers of SMEs at a disadvantage, the Commission might seem to emphasise the Declaration on behalf of the actual Treaty text.

Further, it is worth noting in relation to the use of article 118A, that the Council's legal service clearly accepts the broadening of the scope of article 118A to include **hybrid directives**, meaning directives which bring together health and safety requirements with other provisions secondary or of a subordinated nature to the main aim of the Directive, and still let the initiative

¹⁸⁷ *Supra* note 177, p. 17.

take advantage of the qualified majority voting in the Council¹⁸⁸. The proposal on the organisation of working time includes in article 5 (2) the provision that the minimum weekly rest period in principle includes Sunday. Spain, Ireland and the UK were all opposed to this, and the Council's legal service was, therefore, asked for an opinion in which it stated¹⁸⁹:

"The Council's legal service adds, that article 118A of the Treaty, on which the proposal is based, is the correct basis for the provision in article 5 (2) indent 1. It is obvious that the indent contains a provision, which is subordinated to the aim of the Directive, the protection of the health and safety of workers; the fact that the weekly rest period includes the Sunday is not decisive for the realisation of this aim, but it may contribute to the realisation, if the Member States judge that the Sunday rest, because of the Member States' socio-cultural traditions, have a larger psychological effect than rest periods at other days during the week.

Since the referred provision in article 5 (2) is secondary, it does not change the legal basis of the proposal; according to the case-law of the European Court of Justice must the legal basis of a legal act be laid down with regard to its main aim or main contents.

The conclusion is, therefore, that article 118A is a correct legal basis for article 5 (2) indent 1 of the proposal¹⁹⁰."

This implies that article 118A should not solely be limited to regulation of health and safety of workers; other topics may be included, as long as the predominant aim concerns the health and safety of workers. Thus, topics which would require unanimity, if regulated on their own in specific directives, might take advantage of the qualified majority voting in article 118A, if

¹⁸⁸ *supra* note 179.

¹⁸⁹ The Danish text from which I have translated reads the following:

"Rådets Juridiske Tjeneste tilføjer, at Traktatens artikel 118A, som forslaget bygger på, er et korrekt grundlag for bestemmelsen i artikel 5, stk. 2, første afsnit. Det er således indlysende, at afsnittet indeholder en bestemmelse, der er sekundær i forhold til direktivets formål, nemlig beskyttelsen af arbejdstagernes sikkerhed og sundhed; at den ugentlige hviletid omfatter søndagen er ikke afgørende for virkeliggørelsen af dette formål, men det kan være medvirkende hertil, hvis medlemsstaterne skønner, at søndagshvilen på baggrund af medlemsstaternes social-kulturelle traditioner har en større psykologisk værdi en hviletid, der falder på en anden ugedag.

Da der er tale om en sekundær bestemmelse, ændrer den således ikke ved forslagets retsgrundlag; ifølge Domstolens retspraksis skal en retsakts retsgrundlag fastsættes under hensyntagen til dens hovedformål eller hovedindhold.

Konklusionen er derfor, at artikel 118A er et korrekt retsgrundlag for artikel 5, stk. 2, første afsnit, i direktivforslaget"

¹⁹⁰ It then refers to the following cases:

45/86, Commission vs. Council, (1987) ECR, p. 1517;

68/86, The UK vs. Council, (1988) ECR, p. 855;

131/86, The UK vs. Council, (1988) ECR, p. 905;

275/87, Commission vs. Council, (1989), p. 259;

131/87, Commission vs. Council, (1989) ECR, p. 3743;

11/88, Commission vs. Council, (1989) ECR, p. 3799.

included as secondary provisions in a health and safety directive.

Finally, in the Preamble the proposal refers to the ILO Conventions as the minimum of what the Community should respect with regard to weekly rest periods:

"Whereas it is appropriate that in the areas of its competence the Community should respect at least the Conventions of the International Labour Organisation with regard to weekly rest periods, in particular Convention No. 14 on weekly rest periods for industry and Convention No. 106 on weekly rest periods for commerce and offices, and whereas it is appropriate to implement Recommendation No. 103 which calls for a weekly rest period of 36 hours;"

Already in the AP on the Social Charter the Commission expressed a will to take account of the work carried out by the ILO on chemical substances. In relation to the proposal on pregnant women the Commission, as noted above, continued and stated that it would use the ILO Conventions as a consensual basis for drawing up the proposal. Therefore, it seems as if the Commission in its proposals based on article 118A respects the work of the ILO, and considers the ILO level as the absolute minimum level for this kind of Community Directives.

1.3.2. Proposed and/or Adopted Directives Based on Article 100A with Respect to Safety and Health

In 1983 the Council adopted the Directive 83/189/EEC¹⁹¹ which laid down a procedure for the provision of information in the field of technical standards and regulations. This directive was amended in 1988¹⁹² providing a standstill procedure for the adoption of new technical standards. The Member States were hereby obliged to notify the Commission of new proposals for national standards. The Commission would then oppose the new national standards in case they did not fulfil "essential requirements and have an objective in the public interest of which they constitute the main guarantee". In a 1988 Commission Decision *providing for the improvement of information on safety, hygiene and health at work*¹⁹³ a procedure was established to monitor the working of national provisions and provisions adopted to implement the articles 100A and 118A Directives in the field of health and safety at work.

¹⁹¹ Directive 83/189/EEC of 28 March 1983, OJ L 109 of 26 April 1983.

¹⁹² Directive 88/182/EEC, OJ L 81/88.

¹⁹³ Decision 88/383/EEC, OJ L 183/34 of 14 July 1988.

With the Council Resolution from 7.5.1985¹⁹⁴, respectively the White Paper, on the completion of the internal market (§ 65 and §68)¹⁹⁵, a New Approach to Technical Harmonisation was formally approved. The "new approach" means that binding Community regulation is limited to "essential requirements" only. These essential and general requirements are then specified through reference to voluntary technical specifications / standards drawn up by the private-law standardization bodies Comité Européen de Normalisation (CEN) and Comité Européen de Normalisation Electrotechnique (CENELEC)¹⁹⁶. By this approach, technical regulation is de facto delegated to private organisations.

It should be noted that one of the advantages of delegation to the private-law standardization bodies or non-EC bodies is the fact that European States outside the EC may take part in the standardization; the organisations of today are composed of 18 EC and EFTA countries. Thus, the new standards might affect all European states in their standard setting, especially the EFTA countries which in 1984 signed a contract of cooperation with the EC and CEN/CENELEC¹⁹⁷.

The disadvantages may, however, be that according to CEN/CENELEC rules, at least six months, sometimes longer, is allowed for the transposition by national standardization bodies of harmonized standards into national standards, further, the transposition can lead to lack of clarity on which standards are harmonized at the European level and which are not¹⁹⁸. The New Approach is generally practised, also in relation to article 100A Directives, with respect to safety and health at work.

The standards concerned, the so-called "harmonized standards", remain voluntary. The standards which are established in relation to each Directive will, however, most probably lead to

¹⁹⁴ OJ C 136/1 of 4 June 1985.

¹⁹⁵ COM(85) 310 final. Brussels, 14 June 1985.

¹⁹⁶ See more about the standardization bodies in the paper presented by Volker Eichener, *European Harmonization of Health and Safety at Work Standards -Problems and Prospects*, at the Europe after 1992 seminar, European University Institute, Florence, Thursday 19 March 1992, Anneke Biesheuvel Borgli, Sikkerhet og arbeidsmiljø i EF, *IUSEF*, Senter for EF-rett Universitetet i Oslo, nr. 1, 1990, pp 1-77; Commission of the European Communities, *Det indre marked standardisering og mærkning*, Europa '92, 2nd edition, March 1991; Aage Huulgaard and Jes Knudsen, *Arbejds miljøloven I Gennemgang - Kommentarer*, Forlaget Fremad A/S, Copenhagen, 1991, pp. 73; and Ruth Nielsen and Erika Szyszcak, *The Social Dimension of the European Community*, Handelshøjskolens Forlag, Copenhagen, 1991, p. 197.

¹⁹⁷ See Anneke Biesheuvel Borgli *ibid*, note 196. The Commission signed the general guidelines on 13 November 1984.

¹⁹⁸ Ruth Nielsen and Erika Szyszcak, *The Social Dimension of the European Community*, Handelshøjskolens Forlag, Copenhagen, 1991, p. 199.

the large majority of manufacturers following these standards, because:

1. The standards create a presumption of conformity to the relevant essential requirements; the burden of proof is on the Member State which argues that the standard does not meet the essential requirements in the Directive;

2. The Member States which carry through the standard will not run the risk of being convicted of not implementing the Directive in the proper way, and will not have to go through a control procedure before the Commission.

But the manufacturers are in principle free to introduce products on the market which do not meet the CEN/CENELEC standards. They will in that case have to fulfil the procedures for assessment of conformity to the relevant Directive, which is laid down in this Directive. When, for example, the machinery directive, 89/392/EEC, lays down that machinery or each component thereof must be capable of being handled safely, the manufacturers that do not meet the CEN/CENELEC standards of safety handling, may, however, still be capable of proving that their products may be handled safely.

The requirements in Community Directives are the only legal requirements which can be applied to the marketing of the kind of product covered within the Community. No additional legal requirements can be applied to the marketing of a product in a Member State, except for those which may be covered by the safeguard-clause in article 100A (4) . The safeguard-clause may both be invoked to set further requirements than the Directives on grounds of major needs relating to the working environment, and to reject the standards set by CEN/CENELEC in case the Member State considers that the standard does not meet the requirements in the Directive¹⁹⁹ .

With respect to health and safety at work, two of the most important article 100A Directives²⁰⁰ which have been adopted according to the New Approach are *on the approximation of the laws of the Member States relating to machinery*²⁰¹ and *on the approximation of the laws of the*

¹⁹⁹ *Ibid*, note 198.

²⁰⁰ See Social Europe 2/90 pp. 48 - 49.

²⁰¹ Council Directive 89/392/EEC of 14 June 1989, OJ L 183/9 of 29 June 1989. The corollary to this Directive is Directive 89/656/EEC on the safety and health requirements for the use of work equipment by workers at work, OJ L 393/13 of 30 December 1989, which is based on article 118 A.

*Member States relating to personal protective equipment*²⁰².

The first directive, the *Machinery Directive*, sets requirements which the Member States in its implementation have to place on the manufacturers of machines (article 2), whereas the Directives based on article 118A solely concern the relationship between workers and employer. The Directive aims at covering all machines except for those explicitly excluded in article 1 (3).

In the Preamble is stressed what may be seen as the main aim of the Directive:

*"Whereas existing national health and safety provisions providing protection against the risks caused by machinery must be approximated to ensure free movement of machinery"*²⁰³ without lowering existing justified levels of protection in the Member States"

It should, however, not be neglected that the safety aspect is highly important in the Directive, since it incorporates safety into machine design and construction. Both the Preamble and article 1 (1) defining the scope confirm this:

"Whereas the maintenance or improvement of the level of safety attained by the Member States constitutes one of the essential aims of this Directive and of the principle of safety as defined by the essential requirements;"

"Article 1

1. This Directive applies to machinery and lays down the essential health and safety requirements therefor, as defined in annex 1."

In relation to this it should be emphasised that the Directive, despite the statement that essential health and safety requirements constitutes an essential aim, was adopted without the use of article 100A (2) that requires unanimity for provisions "relating to the rights and interests of employed persons". The reason for this seems likely to be that the health and safety aspect is not limited solely to employed persons, but covers all people in general, although the safety of workers is emphasised in article 2 (2) of the Directive which stresses "that persons and in particular workers are protected when using the machines in question".

The fact that the Directive also emphasises the health and safety aspect in a Directive whose main concern is the free movement of goods is in line with the later adopted Social Charter,

²⁰² Council Directive 89/686/EEC of 21 December 1989, OJ L 399/18

²⁰³ My emphasis.

which in article 19 indent 3 laid down that "the provisions regarding implementation of the internal market shall help to ensure such protection (health protection and safety at the workplace)²⁰⁴ .", and article 100A (3) of the Treaty which requires the Commission to take as a base a high level of protection in proposals concerning health and safety.

The Directive might be considered a frame complemented by CEN/CENELEC standards, and individual directives for certain machines which may be needed e.g. because of special risks. Thus, the Directive, which consists of four chapters, regulates in chapter II only the certification procedure for the conformity with the provisions of the Directive, and in chapter III the marking with an EC symbol. It is only in chapter I "Scope, placing on the market and freedom of movement" that material requirements are laid down, and in that case the Directive is limited to lay down those essential to health and safety (article 1 (1) and Annex 1), whereas further details on the health and safety requirements are left to the standardization bodies.

In Annex 1 to the Directive is a list of essential health and safety requirements including under 1.1.2. "Principles of safety integration" which lays down:

- "(b) In selecting the most appropriate methods, the manufacturer must apply the following principles, in the order given:*
 - eliminate or reduce risks as far as possible (inherently safe machinery design and construction),*
 - take the necessary protection measures in relation to risks that cannot be eliminated,*
 - inform users of the residual risks due to any shortcomings of the protection measures adopted, indicate whether any particular training is required and specify any need to provide personal protection equipment.*
- (d) Under the intended conditions of use, the discomfort, fatigue and psychological stress faced by the operator must be reduced to the minimum possible taking ergonomic principles into account."*

The concept of **safety** in the Directive might be seen as rather wide, since it includes such factors as discomfort, fatigue and psychological stress. It is, however, clear when analysing the requirements under (b) that they are very vague and open to different interpretations. The fact that risks must be eliminated or reduced as far as possible could lead to different results in the Member States, if standards were not laid down by CEN/CENELEC specifying what is to be

²⁰⁴ My insert.

considered "as far as possible". Some Member States which have reduced the risks further than the harmonized standards prescribe might, however, find the harmonised standards inadequate to satisfy the essential requirements referred to in the Directive. In that case the Directive prescribes a special procedure before the Committee set up under Directive 83/189/EEC²⁰⁵.

In relation to this it may be noted that the Directive in article 4 states the general rule, that Member States shall not prohibit, restrict or impede the placing on the market and putting into service of machinery which complies with the provisions of the Directive. According to this, the Member States are, therefore, not allowed to introduce or maintain more stringent measures within the scope of the Directive. It does, however, also in article 7 contain a safeguard clause based on article 100A (5) by which the Member State **"shall"**²⁰⁶ take all appropriate measures to withdraw machinery from the market, to prohibit the placing on the market, putting into service or use thereof, or to restrict free movement thereof", if it ascertains that machinery bearing the EC mark and used in accordance with its intended purpose is liable to endanger the safety of persons, and, where appropriate, domestic animals or property.

It is relevant to define the scope of the provisions concerning health and safety, since it determines to what extent the Member States according to the general rule in article 4 have a restricted competence. The scope might be defined as regulation on the design and construction of machinery:

*"whereas the provisions of this Directive concerning the design and construction of machinery, essential for a safer working environment shall be accompanied by specific provisions concerning the prevention of certain risks to which workers can be exposed at work, as well as by provisions based on the organization of safety of workers in the working environment;"*²⁰⁷

Thus, since the Directive seems limited to regulation of the construction of machinery, it can not prevent the Member States from laying down, in due observance of the Treaty, high levels of protection for workers when **using** the machines in question. As mentioned above a corollary to the Machinery Directive has also been adopted, an article 118A Directive²⁰⁸ within the 1989

²⁰⁵ *supra*, note 191.

²⁰⁶ My emphasis.

²⁰⁷ The Preamble.

²⁰⁸ Council Directive of 30 November 1989 concerning safety and health requirements for the use of work equipment by workers at work (89/655/EEC) published in OJ L 393/13 of 30 December 1989.

Framework Directive, which concerns the use of machines. It might be seen as a general approach cf. 1.1.2.4. that article 100A Directives concern the construction of goods and health and safety in general, including the working environment, while the article 118A Directives concern the use of goods. As a consequence article 2 (2) states that the Directive only restricts the Member States competence to introduce new regulation concerning the construction of machinery:

*"The provisions of this Directive shall not affect Member States' entitlement to lay down, in due observance of the Treaty, such requirements as they may deem necessary to ensure that persons and in particular workers are protected when **using**²⁰⁹ the machines in question, provided that this does not mean that the machinery is modified in a way not specified in the Directive"*

Turning to the Directive 89/686/EEC on the approximation of the laws of the Member States relating to personal protective equipment ²¹⁰ the outline of the Directive is to a large extent the same as for the Machinery Directive. The most notable differences lie in the EC Type-Examination in article 10, and a quality control set up in article 11. The Directive was adopted on 21 December 1989 more than six months after the Machinery Directive, and after the adoption of the Social Charter on 9 December 1989. According to the Charter's article 19 indent 3 the Directive shall help to ensure health protection. Thus, it is a positive injunction, meaning that it is not sufficient that the Directive does not jeopardise protection, it shall in an active way help ensure health protection. The Directive seems to fulfil this obligation:

"Whereas it is necessary to harmonize these different national provisions (relating to personal protective equipment)²¹¹ in order to ensure the free movement of these products, without in any way reducing the valid levels of protection already required in the Member States, and to provide for any necessary increase therein²¹² ;"²¹³

The last phrase may indicate that the Directive respects article 19 of the Charter, but according to other parts of the Preamble the health protection is limited to that concerning the design and manufacture of personal protective equipment:

"Whereas the provisions governing the design and manufacture of personal protective equipment laid down in this Directive which are fundamental, in particular, to attempts to

²⁰⁹ My emphasis.

²¹⁰ *supra*, note 202.

²¹¹ My insert.

²¹² My emphasis.

²¹³ The Preamble.

ensure a safer working environment are without prejudice to provisions relating to the use of such equipment and the organization of the health and safety of workers at the workplace;”

This directive may, like the machinery directive, be seen as relating to the rights and interests of employed persons, but since its predominant aim is the free movement of protective equipment, the legal basis has been determined according to the latter, meaning article 100A (1). The scope of article 100A (2) is thereby narrowed.

1.3.2.1. Internal market regulation on dangerous preparations with respect to safety and health at work

Directive 88/379/EEC relating to the classification, packaging and labelling of dangerous preparations²¹⁴ constitutes the frame for the internal market regulation of **preparations**, defined as mixtures or solutions composed of two or more substances. The Directive was adopted in 1988 by eleven Member States against the vote of Denmark. The regulation on preparations refers to a large extent to the previously adopted Directive 67/548/EEC²¹⁵ also relating to the classification, packaging and labelling, but in this case relating to dangerous substances. **Substances** means chemical elements and their compounds as they occur in the natural state or as produced by industry.

The preparation Directive contains in article 3 a reference to the criteria for the classification and labelling which are laid down in Annex VI to Directive 67/548/EEC, save where the alternative criteria referred to in the preparation Directive are applied.

The basic principle of Directive 67/548/EEC is that substances shall be classified, packaged and labelled in the country of origin (the country where they are produced or for the first time imported into the Community) according to a common set of rules. It establishes classification criteria, and identical danger symbols. Further, it defines in Annex III of the Directive a number of Risk phrases (R phrases) on the nature of the special risks attaching to dangerous substances, and in Annex IV Safety phrases (S phrases) indicating the safety advice relating to their use. The consequence being that R and S phrases mean the same in all twelve Member States.

²¹⁴ Council Directive 88/379/EEC of 7 June 1988, published in OJ L 187 of 16 July 1988, p. 14. Adapted twice to technical progress by Commission Directives 89/178/EEC OJ L 64 of 8 March 1989, and 90/492/EEC OJ L 275 of 5 October 1990.

²¹⁵ Council Directive 67/548/EEC of 27 June 1967, published in OJ 196, of 16 August 1967, p. 1. Last amended by Directive 79/381/EEC OJ L 259, 15 October 1979. 10th adaptation to technical progress by Commission Directive 88/490/EEC OJ L 259 of 19 September 1988.

The preparation Directive refers in article 7 (1) (d) - (f) to the danger symbols, R phrases and S phrases laid down in Directive 67/548/EEC, and states that this information shall clearly and indelibly be marked on any package. Thus, when dangerous preparations satisfy the conditions set up in the Directive, including Annexes, Member States are then precluded from prohibiting, restricting or impeding the marketing of such preparations on the grounds of classification, packaging or labelling (article 13).

The Directive contains, however, a safeguard clause in article 14 of the kind allowed for in article 100A (5) EEC; in the case a Member State presents evidence that a preparation, despite the Directive, constitutes a hazard by reason of its classification, labelling or packaging it may prohibit the sale. Further, the Directive does not, according to article 11, affect the Member States' competence to ensure that workers are protected when using the dangerous preparations:

"This Directive shall not affect the right of Member States to specify, in due compliance with the Treaty, the requirements they deem necessary to ensure that workers are protected when using the dangerous preparations in question, provided this does not mean that the classification, packaging and labelling of dangerous preparations are modified in a way not provided for in this Directive."

The importance of this provision might, however, be debatable, since it is clear that Directives do not affect the competence of the Member States in fields not harmonized by them, and article 1 (1) of this Directive clearly limits the scope to the classification, packaging and labelling of dangerous preparation when they are placed on the market. In other words, regulation of the use of these preparations falls outside the scope of the Directive. Therefore, there may not be any need to expressly lay down the provisions contained in article 11; without it the legal position would have been the same. Despite this fact, it seems like part of the traditional Danish demands to request this clause which the Danish National Labour Inspection describes as the "Danish clause" in an internal document²¹⁶.

In article 10 the Council has delegated legislative power to the Commission in relation to the establishing of a common set of rules governing safety data-sheets for dangerous preparations:

"Member States shall take the measures necessary to implement a system of specific

²¹⁶ Direktoratet for Arbejdstilsynet, Internationalt Sekretariat, 6. November 1990: "Samtidig blev der indført den sædvanlige "danske klausul" i artikel 11".

information (in safety data-sheet form) relating to dangerous preparations.

The detailed arrangements for this system shall be laid down in accordance with the procedure provided for in article 21 of Directive 67/548/EEC within a period of three years after the adoption of the Directive, taking account the systems in force in the Member States.

This information is principally intended for use by industrial users and must enable them to take the necessary measures as regards the protection of health and safety at the place of work."

The Commission used this delegation of competence when adopting Directive 91/155/EEC defining and laying down the detailed arrangements for the system of specific information relating to dangerous preparations in implementation of article 10 of Directive 88/379/EEC²¹⁷.

Because of the close links between the Directives on substances, and preparations this Directive concerns not only preparations, but also substances:

"whereas it is therefore desirable to establish a system of safety data sheets which is applicable to both dangerous substances and dangerous preparations; whereas the implementing provisions for dangerous substances will be laid down in due course;"

The approach used by the Council and the Commission to adopt regulation on safety data-sheets may from a democratic point of view be considered critical. The Council took advantage of the qualified majority voting in article 100A when adopting Directive 88/379/EEC. Thereby, it was possible to adopt the Directive despite Danish resistance, which feared that the Danish level for protection of workers would be affected in a negative way. It was especially the Danish protection against organic compounds and preparations causing cancer that would be considerably lowered by the new classification, see more on that in Part 3 of the thesis. By the insert of article 10 the qualified majority of the Council delegated the, in Denmark, highly controversial issue of safety data-sheets to the Commission. As a consequence a new conflict in the Council was avoided when Directive 91/155/EEC was adopted. Denmark was prevented from defending its interest in the Council, and because of the Directive being a Commission Directive there was no obligation to cooperate with either the European Parliament according to article 149 EEC or the Economic and Social Committee. It could be argued that the European Parliament will have to blame itself for its lack of influence on the Directive, because it did not object to Directive 88/379/EEC's delegation of power to the Commission. It might, however, not

²¹⁷ Commission Directive of 5 March 1991, published in OJ L 76 of 22 March 1991.

have been able to predict the consequences of the delegation. This approach of avoiding public debate on controversial issues by not involving the peoples representatives in the final decisions may not only be considered rather critical from a democratic point of view, it also runs contrary to a fundamental principle laid down by the ECJ in an earlier mentioned case²¹⁸ : "it reflects at Community level the fundamental principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly."

Both Directive 88/379/EEC and 91/155/EEC were planned to take effect from 8 June 1991, but Denmark has with the tacit accept of the Commission not implemented the two Directives as of July 1992.

The person responsible for placing a dangerous substance or preparation on the market, whether the manufacturer, importer or distributor, shall supply industrial users with a safety data sheet containing the following obligatory headings:

- 1. identification of the substance/preparation and of the company/undertaking;*
- 2. Composition/information on ingredients;*
- 3. hazards identification;*
- 4. first-aid measures;*
- 5. fire-fighting measures;*
- 6. accidental release measures;*
- 7. handling and storage;*
- 8. exposure controls/personal protection;*
- 9. physical and chemical properties;*
- 10. stability and reactivity;*
- 11. toxicological information;*
- 12. ecological information;*
- 13. disposal considerations;*
- 14. transport information;*
- 15. regulatory information;*
- 16. other information.*

The information shall be provided free of charge at the latest when the preparation is first supplied and thereafter following any revision due to any significant new information regarding safety and protection of health and the environment. The revision must be provided to all former recipients who received the preparation within the preceding 12 months.

²¹⁸ *Maizena GmbH v. Council of the European Communities* Case 139/79, Judgment of 29 October 1980. ECR (1989) 3393 - 3426.

Further, the Directive includes in the Annex a guide to the compilation of safety data sheets in order to ensure that the content of each of the mandatory headings listed in the Directive will enable industrial users to take the necessary measures relating to protection of health and safety at the workplace. The guide is, however, neither exhaustive nor binding for the supplier.

The concept of dangerous preparations refers in both Directive 88/379/EEC and Directive 91/155/EEC to the classification criteria laid down in Directive 88/379/EEC. Thus, the classification criteria that were used in 88/379/EEC and which Denmark opposed, because of the damaging effects on the Danish protection level, were also used as the basis for Directive 91/155/EEC. The first of the Directives was adopted before the Social Charter, whereas the safety data sheet Directive was adopted after. The classification level in the latter Directive appears to be in disharmony with article 19 indent 3 of the Charter, which prescribes that the internal market provisions shall help to ensure the health protection. The question may be raised: help to ensure the protection for whom? In this case it does not cover Danish workers as will be proved in Part 3.

1.3.2.2. Atypical work

The last proposed Directive on the basis of article 100A, which will be analysed in this part, is the proposal on *certain employment relationships with regard to distortions of competition*²¹⁹. The proposal was part of the Commission's earlier mentioned plan to create a Community framework for atypical work contracts. Despite many attempts the Directive has not been adopted in the Council. In the explanatory memorandum²²⁰ the Commission breaks down into three categories the main rules governing the employment relationships concerned, which may cause distortions of competition vis-à-vis other Member States:

- *direct costs of remuneration;*
- *costs resulting from social protection;*
- *indirect wage costs connected with the features of the employment relationship.*

Thereafter, it concludes that wage determination is essentially a matter for collective negotiation

²¹⁹ COM(90) 228 final - SYN 280. Brussels, 13 August 1990. The proposal was amended in COM(90) 533 final - SYN 280. Brussels, 31 October 1990 following the opinion of the Parliament in first reading on 24 October 1990, OJ C 295 of 26 November 1990. See also the Report of the Committee on Social Affairs, Employment and the Working Environment, Rapporteur: Mrs. Heinke Salisch, on the issue: Document A 3-0241/90 of 2 October 1990. See the opinion of the Economic and Social Committee in OJ C 332 of 31 December 1990.

²²⁰ COM(90) 228 final - SYN 280. Brussels, 13 August 1990, p. 13.

and national legislation where the Community because of the principle of subsidiarity should not intervene. Thus, the proposal aims only at approximating the relevant national social protection schemes (article 2), and indirect wage cost connected with the employment relationship (article 3), in order to eliminate the disparities which give rise to distortions of competition. The measures may be summarized as mainly dealing with social protection, entitlement to annual holidays, the conditions of dismissal applying to temporary workers, and restriction on the renewal of temporary contracts of less than twelve months. The national differences create dangers of distortion of competition particularly in frontier areas, and the freedom of movement for workers is affected thereby. It should, however, be noted that the proposal does not apply to employees whose average weekly working time is less than eight hours (article 1 (3)).

The European Parliament used the proposal as an opportunity to try and promote the widest possible use of qualified majority voting, whereby the Parliament would be ensured involvement to the largest extent. The proposal by the Parliament might also be interpreted as an attempt to bind both the Commission and the Council to a wide use of article 100A (1) in contrast to article 100A (2). The European Parliament proposed in its first reading²²¹ that a new recital was inserted:

"Whereas article 100A allows such measures to be taken if they are connected with an economic need and do not relate exclusively to the rights and interests of employed persons;"

The Parliament's proposal may be interpreted as a wish to restrict article 100A (2) to measures exclusively relating to the rights and interest of employed persons, whereas measures including other concerns as well, according to the Parliament, may be adopted on the basis of a qualified majority in the Council. This interpretation is in line with that proposed by Bercusson and Vogel-Polsky as the first of three interpretations. In the explanatory statement to the Report of the Committee on Social Affairs, Employment and the Working Environment it states that:

"Careful analysis of article 100A inevitably leads to the conclusion that social back-up measures connected with the internal market help to achieve the objectives set out in article 8A and hence must not be subject to the restrictions under article 100A (2)."

The Commission²²² did, however, not wish to insert the recital when it amended the proposal

²²¹ OJ C 295 of 26 November 1990, p. 96.

²²² COM(90) 533 final - SYN 280. Brussels, 31 October 1990.

after the Parliament's first reading. This reaction by the Commission may be interpreted in two ways: 1) That the Commission rejected the interpretation of the Parliament, and wished to extend article 100A (2) to more than exclusively rights and interests of employed persons²²³; or, 2) that the Commission favoured the same interpretation as the Parliament, but did not want to provoke Members of the Council, who were already skeptical²²⁴ towards the Commission's use of Community competence. No clear conclusion may be drawn against this background. It has been proved in relation to article 118A that the Commission has been willing to widen the scope of qualified majority voting in order to ease the way for Community regulation. This might indicate the Commission would accept the Parliament's interpretation. On the other hand, the Commission's division of the proposals between issues regulated on the basis of article 100 and others on the basis of article 100A, might be interpreted as an indication that the Commission favours a wider scope of article 100A (2); see the European Parliament's critic on the article 100 proposal immediately below.

1.3.3. Proposed and/or Adopted Directives Based on Article 100 with Respect to Safety and Health

Within the scope of article 100 of the Treaty only one proposal has caused considerable conflicts and debate, namely, the Commission's proposal for a directive on *the approximation of the laws of the Member States relating to certain employment relationships with regard to working conditions*. The proposal was part of the Commission's earlier mentioned plan to create a Community framework for atypical work contracts. The aim of the proposed Directive is to ensure that the workers with employment relationships other than full-time open-ended relationships enjoy equal treatment to that of other employees with respect to working conditions. In relation to working conditions the Commission lists²²⁵ in its proposal eight main issues which need particular attention:

- access to training;

²²³ If that is the correct interpretation, then it runs contrary to Vogel-Polsky's statement that the interpretation leaving most room for the qualified majority voting has been the prevailing within article 100A. See Eliane Vogel-Polsky, *What Future Is There For A Social Europe Following The Strasbourg Summit?* *The Industrial Law Journal*, Vol. 19, 1990, pp. 65.

²²⁴ See Financial Times 27 November 1990, p. 2: "The UK strongly opposes the content of the directive on part-time work, which insists that such workers should be entitled to the same benefits and conditions as full-time workers. The UK argues this would only increase the costs of employing part-time workers. Germany is also concerned that the proposals would be incompatible with its existing social security system."

²²⁵ COM(90) 228 final - SYN 280 and SYN 281, Brussels, 13 August 1990, p. 27.

- *taking into account such employees in calculating numbers of persons employed with a view to the setting-up of representative bodies for workers;*
- *information for workers' representative bodies in the event of recourse to the workers covered by this Directive;*
- *grounds for recourse to temporary employment;*
- *information for the temporary workers employed where the employer intends to recruit full-time employees for an indefinite period;*
- *rules concerning access to social assistance;*
- *access to the social services of undertakings;*
- *the specific situation of workers employed through temporary employment businesses.*

The response from the European Parliament was very clear; it found the use of article 100 unacceptable, and as a consequence it rejected the proposal²²⁶. The reason²²⁷ for the rejection was the fact that with regard to special forms of employment, the directive based on article 100 deals with working conditions, whereas the one based on article 100A is concerned with distortions of competition. The inference is, according to the Parliament, that the Commission is making a clear distinction between the economic and the social aspect and in that way, by removing the social aspects from article 100A, it is interpreting the scope of the latter article in extremely restrictive terms.

The criticism from the European Parliament may seem justified to a certain extent. The proposal refers in the Preamble to Title 1, point 7 of the Social Charter which lays down that "the completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community". That quotation could be used as an argument for the EP's interpretation, since it implies that the improvement in the working conditions results from the completion of the internal market. Thus, the improvement of the working conditions should be an integrated part of internal market regulations, which are based on article 100A. The Commission may, therefore, not be acting in accordance with the Social Charter when it divides the improvement of the working conditions and the internal market provisions into two separate proposals.

1.4. The conflict between legal bases at a lower level

Conflicts may occur not only in relation to what Treaty basis to use for Community secondary

²²⁶ OJ C 295 of 26 November 1990, p. 96.

²²⁷ See the Report by the European Parliament's Committee on Social Affairs, Employment and the Working Environment, *supra* note 219.

legislation dealing with health and safety, as described above under 1.3. e.g. the atypical work directives, but they might also occur between secondary Community legislation, directives, adopted with different legal bases. The Commission seems either to neglect the problem, or simply emphasises the positive working together of directives based on articles 118A and 100A EEC.

Ernesto Previdi²²⁸ recognises in an article²²⁹ that articles 118A and 100A reveal completely different principles, the first defining minimum worker protection levels, whereas the second sets maximum protection values, and that it might seem impossible *"to reconcile these two apparently contradictory approaches when it comes to adopting legislation on a particular subject"*. Despite this the Commission concludes²³⁰ on the relationship between legislation based on article 100A and 118A that:

"The free movement of goods and safety at work are not mutually exclusive. The completion of the internal market is not incompatible with the continual quest to improve safety conditions at work, which is a priority concern of the Community."

Ernesto Previdi appears also to conclude that it is possible to reconcile the two approaches; the heading of the article reads: *"Free movement of goods and social policy - The complementary nature of Community legislation on the basis of articles 100A and 118A"*. In order to support his conclusion he finishes with a specific example, which he considers proves the complementary nature:

"A Directive based on article 100A sets the maximum sound level which can be produced by a certain type of machine (and no Member State will be able to require a lower level). A directive based on article 118A establishes that a worker must not be exposed to a noise level produced by this same type of machine for more than a certain length of time, the Member States remaining at liberty to set even shorter time-limits in their legislation."

The example, however, may not be as convincing as Ernesto Previdi considered. If one adds to the example that one Member State before the harmonisation measures had emphasised the protection of workers against noise, therefore, the national manufacturers of machines in this member State had had to produce machines with a much lower sound level than the Community

²²⁸ Acting Director, Directorate for the Internal Market and Industrial Affairs 1, Commission of the European Communities.

²²⁹ Social Europe 2/90, p. 47.

²³⁰ See Social Europe 2/90, pp. 47 - 49.

Directive based on article 100A requires. Because of the harmonisation the Member State was no longer allowed to set these strict requirements on manufacturing of machines, but instead article 118A permits it to limit both the time of exposure and the level of exposure. Would Ernest Previdi still consider the legislation to be of a complementary nature, if the Member State used article 118A and the Directive based thereon to set very short time-limits for machines that only fulfil the requirements in the Directive, and considering this time-limit would make the use of those machines virtually impossible? Whereas machines that fulfil the former national requirements to the manufacturing of machines are allowed exposure time-limits, which are much longer and therefore makes these machines more useful in comparison to the machines manufactured at the EC level.

The Member State would argue, that it has simply used its competence according to article 118A and the Directive based thereon, in order to ensure the protection of workers against noise; which it also before the harmonisation measures had considered important. Further, the Member State neither restricts nor impedes the placing on the market and putting into service of the machines manufactured at the EC level, but by setting different time-limits according to the noise produced by the machines, it might hope that the manufacturers at the EC level, of their own free will, will change to a lower noise level, because of the limited sale of their machines. Other Member States and foreign manufacturers may argue, that the time-limits are simply used in order to place national manufacturers in a favourable position, because they might be virtually the only manufacturers whose machines are of some use.

Thus, the Member State's measure may either be considered a social measure aimed at protecting the workers, or a protectionist measure aimed at protecting national manufacturers on the domestic market. If the European Court of Justice sees it as a social measure then it is justified, whereas the contrary is the case, if it is seen as a protectionist measure. Nielsen and Szyszczak state²³¹ :

"Where harmonisation measures to ensure the protection of the working environment have been adopted at Community level and establish Community procedures to ensure the working environment recourse to article 36 or the "mandatory requirements" is no longer justified"

²³¹ Ruth Nielsen and Erika Szyszczak, *The Social Dimension of the European Community*, Handelshøjskolens Forlag, Copenhagen, 1991, p. 194.

It could, however, still be argued that all national measures within the scope of article 118A EEC should be considered justified. The implications of this point of view might be rather far reaching, since it in some cases might spoil the effects of harmonisation aimed at ensuring the free movement of goods within article 100A EEC.

The solution could be to argue that article 100A (3) prescribes that the Commission in its proposals concerning health and safety shall take as a base a high level of protection, and further in the Social Charter article 19 indent 3 it is laid down that Directives based on article 100A shall help to ensure the protection of health and safety at the workplace. Thus, if the Directives based on article 100A EEC meet these requirements the harmonised protection level should be as high, so that the Member States with the highest level of worker protection should not need to introduce measures based on article 118A that seriously affect cross-country trade. If the Member States with the highest level of protection need to take such measures, then the attack from other Member States should not be launched against the measures based on article 118A and Directives thereof, but instead against the protection level which the Directive based on article 100A provides for. Minor effects on cross-country trade resulting from measures based on article 118A may, however, not be avoided, but should be considered lawful.

This interpretation implies that it allows the highest level of worker protection by taking as the point of departure the thesis that all national working environment provisions within the scope of article 118A are considered lawful; and at the same time focussing on ensuring a high level of protection in the Directives based on article 100A also in relation to the best protected workers in the Community, by giving article 100A (3) EEC and the Social Charter article 19 indent 3 some concrete content. Thus, to some extent one may conclude, as did Ernesto Previdi, that a complementary relationship exists between Community legislation on the basis of articles 100A and 118A, but the areas of conflict should be recognised as well.

Two practical examples of this complementarity or potential conflict are the above-mentioned:

- 1) The Council Directive 89/392/EEC concerning machinery based on article 100A, and the Council Directive 89/655/EEC concerning the use of work equipment by workers based on article 118A.

2) The Council Directive 89/686/EEC concerning personal protective equipment based on article 100A and the Council Directive 89/656/EEC on the use by workers of the equipment based on article 118A.

All directives have been analysed separately above, but together they illustrate the relationship between secondary Community legislation based respectively on articles 100A and 118A.

Denmark has not according to one of the leading legal experts within the Danish National Labour Inspection²³² experienced problems in relation to these Directives on technical devices; the only area which has been harmonised on the basis of article 100A at a non-satisfactory protection level is the chemical covering dangerous preparations and substances. The Directives which have caused problems are the ones on the classification, packaging and labelling of dangerous preparations (Directive 88/379/EEC²³³) and the data sheet Directive (91/155/EEC²³⁴). The debate in Denmark has been centred around how it would be possible to keep the higher Danish protection level. In the debate some have argued that the solution lies in the use of article 100A (4) which is to be used:

"If, after the adoption of a harmonization measure by the Council acting by a qualified majority, a Member State deems it necessary to apply national provisions on grounds of major needs referred to in article 36, or relating to protection of the environment or the working environment, it shall notify the Commission of these provisions."

On the other hand, legal advisers for the Danish National Labour Inspection in the Danish Ministry of Justice have argued²³⁵ that article 100A (4) may not be invoked in a case where the aim, the protection of workers, may be reached by adopting national provisions based on article 118A²³⁶. If a Member State by the use of these national measures may reach the same worker protection, then it is not "necessary" to invoke article 100A (4) to uphold the traditional Danish views on what is dangerous. There is a great difference in relation to the free movement of goods whether article 100A (4) is invoked, or national measures based on article 118A are

²³² Knud Overgaard Hansen, head of the international office.

²³³ OJ L 187 of 16 July 1988.

²³⁴ OJ L 76 of 22 March 1991.

²³⁵ According to talks with a person in the Danish National Labour Inspection who took part in the consultations with the Ministry of Justice. The Ministry of Justice did only provide the advice in the oral form!

²³⁶ Thus, the use of article 100A (4) is not quit a simple as presented by Ruth Nielsen and Erika Szyszczak, *The Social Dimension of the European Community*, Handelshøjskolens Forlag, Copenhagen, 1991, p. 204-205.

adopted, since within the scope of article 118A measures may only be adopted which place obligations on the employer and the workers, whereas within the scope of article 100A obligations are placed on the manufacturers. Therefore, it could be argued that article 100A (4) may only be invoked in cases where other measures with a less damaging effect on the free movement of goods can not be used to obtain the same objectives, the principle of proportionality. The Danish problem, however, is that the Danish National Labour Inspection fears that the use of article 118A measures will be less effective in relation to the protection of workers; see more on this in Part 3 where the question whether Denmark may invoke article 100A (4) will be further discussed.

2. Conclusion: The used interpretation at an EC legislative level

After having examined some of the Directives which have been adopted or proposed on the basis of article 118A it should be possible to conclude both how the Commission, and the Council, interpret the Community competence within this field. The initiatives have been held up against the three possible interpretations suggested by Bercusson and Vogel-Polsky.

It seems as if the first Directives adopted on the basis of article 118A, both the daughter Directives to the first framework Directive 80/1107/EEC and five of the first seven Directives which were adopted within the second framework Directive 89/391/EEC, were limited to cover the protection of work in the strictest sense. Thus, they indicated that the Commission and the Council at the time were using the most restrictive interpretation of the concept "working environment" in article 118A. This attitude was, however, slowly given up; the first signs appeared in relation to two²³⁷ of the Directives which were announced after the framework Directive 89/391/EEC, but before the Social Charter, where both the Commission and the Council agreed to use a wider interpretation. After the adoption of the Social Charter the Commission has responded by giving clear indications that it is willing to extend the scope of article 118A to include working conditions in the widest sense of the term. In relation to the only Directive which has been adopted with reference to the Social Charter, Directive 91/383/EEC on the safety and health at work of temporary workers, the Commission refused, however, to accept an amendment from the European Parliament, which would imply the widest use of article 118A. But since then the Commission has been trying to convince the Council to use the widest interpretation of the term "working environment" in relation to article 118A. This has happened both in relation to the proposal on working time and the proposal on pregnant women, but the Council has been responding very reluctantly, so the proposals have not yet been adopted, because of the Council's attitude.

The general picture has been the European Parliament as the driving force constantly seeking to promote the widest use of article 118A, the Commission which has slowly moved towards the Parliament's point of view, and the Council which has been trying hard, though unsuccessfully, to agree upon taking the last decisive step to the widest interpretation of article 118A. It seems as if the adoption of the Social Charter has had a greater effect on the Commission than on the

²³⁷ Directive 90/270/EEC on visual display units and 89/654/EEC on the safety and health requirements for the workplace.

Council. The Commission responded quickly to the adoption by presenting proposals that used the social provisions in article 118A to their full extent. The explanation for the Council's more reluctant attitude may be found in the fact that the UK did not support the Charter, and some of the other members of the Council have not been willing to isolate the UK. The Maastricht agreement may mean the turning point in this attitude, since the UK was isolated in relation to the social policy, where the heads of states of the other eleven Member States agreed upon a protocol for the Community's social policy.

Further, the Commission has, with the proposals on pregnant women, and especially on working time, showed a willingness to broaden the scope of article 118A Directives to include hybrid directives, meaning directives which bring together health and safety requirements with other provisions secondary to or of a subordinated nature to the main aim of the Directive, and still take advantage of the qualified majority voting in the Council. The Council's legal service seems to fully approve this approach.

The Directives based on article 118A may place far reaching obligations on the employers; the only restriction to these obligations is found in article 118A (2) on the protection of small and medium sized enterprises. The restriction in relation to the SMEs may, as has been argued above cf. 1.3.1.2., be interpreted as affecting both the Community directives and the Member States' own regulation according to article 118A (3). The framework Directive 89/391/EEC does not seem, however, to respect the restriction, and some of the following proposals for daughter directives appear to use the same approach. In the Commission's proposals for directives on pregnant women and working time the Preamble quoted in both cases article 118A (2), but in the provisions they did not provide any escape clauses for the SMEs. The proposal on working time even went as far as stating in the explanatory memorandum that no derogations will be granted for economic reasons. Thus, the Commission appears to emphasise the Declaration of the intergovernmental conference on article 118A (2) on behalf of the actual Treaty text. This might be in respect of the approach in the framework Directive 89/391/EEC, where the Council might have indicated a lack of interest in the protection of SMEs.

Finally, in relation to directives based on article 118A the Commission has stated several times that it would take account of the work carried out by the ILO, and has referred to it in Preambles of proposals. In the proposal on pregnant women the Commission noted that ILO Conventions

were used as a consensual basis for drawing up the proposal. Thus, ILO work might serve as the minimum level for Directives based on article 118A. Another international organisation whose work is taken into consideration is that of the WHO. In the explanatory memorandum the proposal on pregnant women quotes and uses WHO's definition on health. As early as 1984, the Council, by the adoption of the second action programme on health and safety²³⁸, stressed the importance of cooperation with the WHO and the ILO, therefore, the Commission's approach is in line with the opinion expressed by the Council.

The directives adopted on the basis of article 100A with respect to health and safety have been adopted according to the New Approach to Technical Harmonisation, if they concerned technical regulation. Thus, they have only harmonised essential health and safety requirements in order to ensure the free movement of goods, which has been the main aim of the directives. Despite the inclusion of health and safety requirements, which may be considered as relating to the rights and interests of employed persons, the directives have been adopted on the basis of a qualified majority voting in the Council according to article 100A (1). Therefore, the Council has clearly rejected the widest interpretation of article 100A (2) suggested by Bercusson and Vogel-Polsky, requiring unanimity in the Council in relation to any proposal, however partially and indirectly concerned with employees' rights and interests.

The European Parliament has also in the field of article 100A proved to be the driving force in promoting the widest use of qualified majority voting in the Council; maybe because it also ensures the Parliament has maximum influence through the cooperation procedure. In relation to the Commission proposal on atypical work with regard to distortions of competition, the EP tried, by proposing a new recital to the Preamble, to bind the Commission and the Council to generally limit article 100A (2) as far as possible, meaning measures exclusively concerned with the rights and interests of employed persons. The Commission did not amend its proposal in the suggested way, so the Council did not have the possibility of approving or refusing the proposal. The Commission's response may, however, indicate that it does not agree with the most restrictive interpretation of article 100A (2); it may consider the scope to be those proposals which are predominantly concerned with employees' rights and interests.

In relation to the technical regulation the requirements in the directives have been limited to the design and construction and health and safety in general, including the working environment,

²³⁸ OJ C 67, 8.3.1984, p. 2.

similarly the requirements have been limited to the classification, packaging and labelling of dangerous preparations. Despite this clear limit in the harmonisation measures, the Danish government seems to find it necessary to insert what it calls "the Danish clause" stating that the directives do not affect the Member States' right to set requirements on the use of the products in order to protect the workers. "The Danish clause" is, however, of no importance, since the result would have been the same without the provision. Further, the Preamble to Directive 88/379/EEC on dangerous preparations show that the distinction between requirements to the classification, packaging and labelling on the one side and the use on the other might not be without problems, since the label constitutes a basic tool for users.

Article 100A (3) regulates the level of health and safety protection, and the Social Charter also deals with the subject in article 19 indent 3. The Directive on personal protective equipment seems to respect these requirements, whereas the Commission Directive on safety data sheets for dangerous preparations 91/155/EEC, which was also adopted after the Social Charter, is more critical. What is meant when the Charter lays down that the internal market provisions shall help to ensure health protection? The most natural interpretation would be to require the provisions to help to ensure the protection for employees in all Member States, no limits are indicated in the text of the Social Charter. Despite this, the Commission adopted the safety data sheet Directive, although the Danish government argued strongly that the consequence of the Directive would be a lowering of the Danish level of worker protection. Thus, the Commission may not have taken the Social Charter sufficiently into consideration when adopting the Directive. Further, the whole procedure of delegating a controversial issue from the Council to the Commission, and, as a consequence, avoiding public debate through the involvement of the European Parliament, may be critical, since the European Court of Justice has stated that it is "a fundamental principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly."

It should be noted in relation to the directives based on article 100A, that in contrast to the ones based on article 118A, the Commission has not indicated that it will take the work of international organisations such as ILO and WHO into consideration. This is important in cases where the Directives based on article 100A set lower requirements than the work within the other international organisations²³⁹.

²³⁹ Anneke Biesheuvel Borgli, Sikkerhet og arbeidsmiljø i EF, *IUSEF*, Senter for EF-rett Universitetet i Oslo, nr. 1, 1990, p. 73 considers it to be rather unlikely.

In relation to Directives based on article 100, which requires unanimity in the Council to adopt a Directive, the European Parliament rejected the only proposal which may be important within the context of this thesis. The proposal on certain employment relationships with regard to working conditions was rejected by the EP because it considered the proposal to be an attempt by the Commission to remove the social aspects from article 100A by making a clear distinction between the economic and the social aspects. The EP's criticism may be supported by the Social Charter Title 1, point 7, which implies that improvements in working conditions should be an integrated part of internal market regulations. Neither the Commission nor the Council has responded to the rejection by the EP, although the rejection had already been published in November 1990, so the proposal has not moved any further. This might indicate that the Commission and the Council intend to respect the rejection and the reasons behind it, since the proposal could have been adopted despite resistance from the EP.

Finally, the Commission likes to present the relationship between directives based on articles 100A and 118A as if they are of a complementary nature and not incompatible. In order to ensure this, one might, however, have to set certain conditions on the internal market Directives based on article 100A to ensure a high level of worker protection. The level should be high enough so that the Member States with the highest level of worker protection should not need to introduce measures based on article 118A that seriously affect cross-country trade. Article 100A (3) and article 19 indent 3 of the Social Charter may be interpreted as already requiring this high protection level. Further, all national measures within the scope of article 118A should be considered justified. This would allow for "the continual quest to improve safety conditions at work, which is a priority concern of the Community."

PART 3: THE EFFECTS OF THE USED INTERPRETATION ON DANISH WORKERS EXPOSED TO DANGEROUS PREPARATIONS

The only area which has been harmonised on the basis of article 100A EEC with reference to the working environment at a protection level which is not satisfactory from a Danish point of view, is the chemical covering dangerous preparations. The Directives which seem to provide a lower worker protection are Directive 88/379/EEC *on the classification, packaging and labelling of dangerous preparations*¹, and Directive 91/155/EEC *on a system of specific information relating to dangerous preparations*². In order to examine the consequences of the Community harmonisation for Denmark, the present Danish worker protection in this area must be analysed.

At this point it should be noted that these Directives do not represent the first conflict between Danish and EC Law within the field of chemicals. Already in 1987 the European Court of Justice had to come up with a judgment on a case between the Commission and Denmark³ concerning classification, packaging and labelling of dangerous substances according to Directive 67/548/EEC. Part of the case concerned the fact that Denmark, when implementing the Directive, which was based on article 100, chose to impose wider obligations to notify substances. The widespread view in Denmark was that Danish criteria for classifying substances as dangerous were stricter than the Community provisions, thus, full implementation would lower the Danish standard of consumer and worker protection. Denmark argued that the Danish provisions were meant to widen the protection of man, and thus should be accepted by the Court, since the general objective of the Directive was to protect man and the environment. The Court, however, ruled that another objective of the Directive was to eliminate obstacles to trade in the substances in question within the Community. Consequently, the rules of the Directive relating to notification were intended to be exhaustive. Thus, the Court found the Danish provisions adopted to implement the Directive did not adequately transpose the Directive into national law. After the judgment Denmark gave up its resistance on this point and amended its legislation.

¹ OJ L 187, 16.7.1988, as amended by Commission Directive 89/178/EEC OJ L 64, 8.3.1989, and 90/492/EEC, OJ L 275, 5.10.1990.

² OJ L 76, 22.3.1991.

³ Case 278/85 of 14 October 1987, ECR (1987) pp. 4069 - 4095 concerning Directive 79/831/EEC amending for the sixth time Directive 67/548/EEC, (OJ L 259, 1979, p. 10).

1.1. The effects of Council Directive 88/379/EEC on Danish working environment

The Danish Working Environment Act of 1975⁴ has to some extent a similar status to the Framework Directive 89/391/EEC, since it lays down a frame of main principles and standards for the regulation of the working environment, such as the employers duty in § 15 to ensure safe and healthy working conditions. This is in fact characteristic for the Act in that it describes the aims rather than setting requirements to specific situations.

In contrast to the Framework Directive, the Act, rather than laying down the frames for specific Acts, delegates the regulatory competence e.g. to the Ministry of Labour or to the Danish National Labour Inspection, by allowing them to lay down further rules through the adoption of Orders in the specified fields⁵. The Act sets the minimum standards, consequently the social partners may not through collective agreements deviate from the requirements by providing a lower worker protection level. The social partners are, however, considered to play an important role in the establishing of safe and healthy working conditions. This is seen at the central level both through the setting up of a Working Environment Council, the object of which, according to § 66, is "to enable the social partners to influence the efforts to provide a safe and healthy working environment", and through trade safety councils which will participate in the solution of safety and health problems (§ 14). The role of the social partners is also stressed at the level of the enterprises through the obligation to set up safety committees; see part 2 of the Act about the decentralised measures.

The important difference between the Danish Working Environment Act and the Community regulation on working conditions concerns the scope of the regulation. The Community regulation within the context of article 118A is limited to placing obligations on employers and employees, whereas the Danish Act goes on in §§ 30 - 36 to placing requirements on "suppliers, etc." The reason for extending the scope is the normal Danish approach of preventing adverse working conditions at the earliest possible stage⁶. This difference in

⁴ See now the Act 1985 - 12 - 18 no. 646 on the working environment, as amended by Act 1987 - 04 - 22 no. 220 and Act 1989 - 03 - 29 no. 196.

⁵ Hans Henrik Mortensen, *Arbejdsmiljøloven*, sixth edition, Dansk Arbejdsgiverforening, Copenhagen, 1990, p. 8, see also Ruth Nielsen, *Arbejdsmiljøret*, Jurist- og Økonomforbundets Forlag, Copenhagen, 1986.

⁶ See the preparatory work to the Act, Folketingstidende (Parliamentary Report), 1975 - 76, Tillæg A, p. 96.

approach will cause problems whenever the Danish existing or planned requirements to the suppliers are higher, than those laid down in Community regulation based on article 100A.

The field of chemical preparations represents such a problematic field. Part VIII of the Act concerns exclusively substances and materials. Material is synonym to **preparation**⁷. In § 49 we find laid down:

"(1) The Minister of Labour may lay down further rules concerning the manufacture, importation, storage, transportation, and use of substances and materials with properties which may constitute a danger to or in any other way adversely affect safety and health, including rules packaging , repackaging and labelling.

2. The Minister of Labour may lay down rules prohibiting the manufacture, importation and use of particularly dangerous substances and materials."

This delegation of competence in subsection 1 to the Minister of Labour was used when adopting Order number 540 of 2 September 1982 on Substances and Materials. In the Order the Minister defines in § 2 (2) and (3) what is meant by a **dangerous substance or preparation**:

"(2) In this Order substances and materials which may constitute a danger to or in any other way adversely affect safety or health shall mean:

a) substances and materials which are to be classified in accordance with the rules on classification laid down by the Ministry of the Environment

b) substances and materials included in the list of threshold limit values for substances and materials and annexes to this issued by the National Labour Inspection

c) substances and materials which the Director of the National Labour Inspection defines as dangerous to or having an adverse effect on safety and health, cf. subsection (3)

d) materials which pursuant to separate Order, cf. section 23 (3) shall be considered as dangerous to or in any other way having an adverse effect on safety or health.

(3) The Director of the National Labour Inspection may direct that substances and materials about which information is available to the effect that a special risk exists in

⁷ Directive 67/548/EEC OJ L 196 of 16.8.1967 defines in article 2 (1) b) preparations as mixtures and solutions composed of two or more substances, and the Danish Order no. 540 of 2 September 1982 defines materials as "mixtures of two or more substances, including biological materials."

connection with their use shall be considered as dangerous to or having an adverse effect on safety or health. The decision shall be published."

The reference in § 2 (2) a) to the the rules on classification laid down by the Ministry of the Environment implies a reference to the Order no. 662 on the classification, packaging, labelling, sale and storage of dangerous substances and products⁸, which apart from implementing Directive 67/548/EEC on the classification, packaging and labelling of dangerous substances, also sets requirements to the classification of preparations. This Directive is of major importance, since the Directive 88/379/EEC in article 2 adopts its definitions of what preparations are considered to be dangerous:

"The definitions appearing in Article 2 of Directive 67/548/EEC with the exception of the definition in paragraph 1 (d) thereof, shall apply to this Directive."

And at the same time Directive 88/379/EEC seems in article 3 (1) to a wide extent to adopt the same classification:

"The general principles of the classification and labelling of preparations shall be applied according to the criteria in Annex VI to Directive 67/548/EEC, save where the alternative criteria referred to below are applied."

Thus, when Order no. 540 defines what is to be considered a dangerous preparation it covers a much wider range than Directive 88/379/EEC lays down. In Danish Working Environment regulation dangerous preparations are not only those which are defined in Directive 88/379/EEC, but also those which according to further requirements in Order no. 662, and other Orders by the Ministry of the Environment define dangerous preparations⁹, as well as preparations which are covered under one of the other categories listed in § 2 (2) b) - d) of the Act.

The problem for Denmark arises, therefore, in relation to those preparations which in Denmark are considered to be dangerous, but which are not included in Directive 88/379/EEC's definition and classification of dangerous. The legal basis of the Directive is article 100A, because it is a Directive creating a total harmonised level in relation to dangerous preparations. Denmark is not, according to the general rule, allowed to set further requirements resulting in a larger number of preparations being classified as dangerous. The only solution, if Denmark

⁸ See Order of 14 October 1987 Lovtidende A 1987 p. 2415.

⁹ See Order no. 724 of 18 November 1987 on the classification, packaging and labelling of dangerous chemical products, which are to be used as organic solvents, and Order no. 725 of 18 November 1987 on the classification, packaging, and labelling of dangerous paint products.

wants to retain its broader definition, might be to invoke article 100A (4).

One of the effects is: organic solvents are, according to Order no. 52 of 13 January 1988¹⁰ § 1 (1), considered dangerous in Denmark when the preparation contains a concentration of 0.5 % or more of one solvent; in contrast, the Community definition of dangerous preparations requires, according to the Directive, in general a concentration between 12.5 and 50% of the same solvent in order to classify it as dangerous¹¹. The Directive lays down exhaustively what may be considered dangerous; other adverse effects such as the effect of organic solvents on the central nervous system are therefore not taken into consideration. The result is that the Danish concept of health within the working environment regulation is narrowed down.

Further, in relation to **carcinogens** the National Labour Inspection has laid down its own criteria as to when a substance is considered to be carcinogenic in a list, which is revised regularly. The criteria for the Danish list of carcinogens is based on recommendations and documentation on substances from the WHO's international cancer research centre, IARC. The Danish list includes substances which the IARC has classified as a group 1 or 2 substance. The consequence is, that Denmark recognises about 300 substances as causing cancer, whereas the Community on the 6 June 1991 had recognised only 108¹², see Annex 1 of the amended 67/548/EEC Directive. Yet, the year before the Community only recognised 81 substances as carcinogenic, so despite the relatively low figure in 1991, there has been a strong move towards the acknowledgement of carcinogenic effects. The Community uses its own criteria for the classification of carcinogenic substances, which explains the difference in numbers between the Danish and the Community list.

In relation to carcinogens the National Labour Inspection's list includes in general those preparations which contain a concentration of 0.1 % or more of a carcinogenic substance, whereas the Directive does not lay down a general concentration limit, but differentiates between the various substances. For example, preparations including R-40 substances (possibly permanent damage of health) must contain 1 % of the substance before being classified as dangerous. The difference in concentration limit 0.1 % and 1 % would, according to

¹⁰ Order by the Director of the National Labour Inspection on the basis of § 2 (2) c) in Order no 540.

¹¹ Cf. the internal documents in the Labour Inspection of 5 September 1990, p. 6; and 6 November 1990, p. 4.

¹² Cf. internal document in the Labour Inspection of 6 June 1991.

the Danish National Labour Inspection¹³, mean that about 10 % of all preparations containing R-40 substances would not be considered dangerous, if the Directive is implemented as it stands. Thus, the problems in relation to carcinogens lie: 1) in the relatively low number of substances classified as dangerous; and 2) the higher concentration limits which are allowed before the preparations are considered dangerous at Community level.

Despite these differences in relation to carcinogens, the National Labour Inspection¹⁴ does not consider them the most controversial issues in the Directive, because it believes, with reference to the development from 1990 to 1991, that the Community within the next years will classify a number of additional substances, and the remaining unclassified, according to the Community regulation, might be used very little.

It considers the most controversial issue to be the Directives approach to organic solvents. From a legal point of view one can, however, not neglect the fundamental difference between the Community system and the Danish system on carcinogens. If the Directive is implemented, Denmark is no longer allowed to follow the recommendations from the WHO, and to revise the Danish list on carcinogens whenever new dangerous substances are registered. Denmark will have to wait until the Community as a whole decides to adopt the WHO recommendation. Thus, the result might be a less dynamic development in the worker protection. Further, the fact that the National Labour Inspection expects a number of carcinogens, which are on the present Danish list, to remain unclassified within the Community system may on grounds of principles be unacceptable to Danish workers.

In relation to preparations containing more than one dangerous substance the Directive and Order no. 662 use two different methods, when calculating whether the preparations should be classified as dangerous. They both use what might be called the **principle of addition**, but with different meaning¹⁵. The Danish method implies that preparations containing substances from the same group of hazards ex irritant (Xi) are classified according to an addition of the concentrations of the different substances within the group of hazard, see points 12-17 of Annex 1 to Order no. 662. Whereas, according to the Community, the addition is limited to concentration of substances that are classified with the same risk phrases, meaning that within

¹³ Cf. intern document in the Labour Inspection of 5 September 1990.

¹⁴ See note 11.

¹⁵ Cf. internal document in the Labour Inspection of 14 February 1991.

the group of irritants only those concentrations which e.g. are regarded as irritants for the respiratory system (R 37) are added (article 3 (5) (g) - (i)). But the concentrations of other irritants using other risk phrases (skin irritants R 38, and eye irritants R 36) are not added to the concentration of R 37 substances. Further, the concentration limit is higher in the Directive, allowing up to 20 % of each type of irritants¹⁶ (point 4 of Annex 1 (Table IV)) . Thus, a preparation might contain a sum of the three irritants of almost 60 % without being classified as dangerous. In contrast the Danish rules only allow the sum of the three irritants to be up to 10 %.

Finally, the National Labour Inspection fears¹⁷ that the Community's method of addition will affect the classification of **organic solvents** as R 48 preparations, meaning preparations which have severe effects after repeated or prolonged exposure. One of the purposes of the R 48 phrase is to warn against the effects of exposure to organic solvents on the central nervous system. Not only is the method of addition at Community level different, but the concentration limits are as well. The Directive allows concentrations of up to 10 % before classifying the substance, whereas Order no. 662 only permits 0.1 %. Thus, the Community provisions require concentrations of 100 times the Danish limits before classifying the organic solvents. The National Labour Inspection expects¹⁸ this problem on method of addition in relation to R 48 phrases to be of increasing importance, because Denmark hopes it will be able to convince the other Member States to classify a larger number of organic solvents with the R 48 phrase.

1.2. The effects of Commission Directive 91/155/EEC¹⁹ on Danish working environment

The Directive on *the system of specific information relating to dangerous preparations* was adopted on the basis of article 10 of Directive 88/379/EEC which laid down:

"Member States shall take the measures necessary to implement a system of specific information (in safety data-sheet form) relating to dangerous preparations.

The detailed arrangements for this system shall be laid down in accordance with the procedure provided for in article 21 of Directive 67/548/EEC within a period of three years after the adoption of the Directive, taking into account the systems in force in the

¹⁶ It may be noted that the second amendment, Directive 90/492/EEC OJ L 275 of 5.10.90, to the Directive reduced the concentration limit for gaseous preparations to 5 %, see point 4, Table IV A.

¹⁷ *Supra*, note 15.

¹⁸ *Supra*, note 15.

¹⁹ *Supra* note 2.

Member States

This information is principally intended for use by industrial users and must enable them to take the necessary measures as regards the protection of health and safety at the place of work"

During the negotiations the Danish delegation stressed the importance of the information system "taking into account the systems in force in the Member States". By the insertion of this clause the Danes thought the Directive on safety data sheets would not limit the use of Danish Working Environment legislation. The clause was, according to the National Labour Inspection's documents²⁰, a condition for the Danish Ministry of Labour to accept a provision on safety data sheets in a total harmonisation Directive which is aimed at marketing, but at the same time is highly relevant for the working environment. The question may, however, be raised: What is meant by "accept" ? Denmark, despite the clause, was the only Member State to vote against the adoption of Directive 88/379/EEC. The most likely interpretation may be, that the clause was only a condition, and that there were other conditions that led to the negative vote. According to this interpretation these other conditions could still justify a challenge before the European Court of Justice or use of Article 100 A (4).

The Directive uses the same definitions for dangerous preparations as the main Directive 88/379/EEC. Above the differences have been described between the Danish and the Community definition of the concept "dangerous preparation". The use of Directive 88/379/EEC's definition consequently leads to preparations that are considered dangerous according to Danish regulation, but do not require safety data sheets according to Directive 91/155/EEC. This has considerable effect on the present Danish system, since the Danish regulation on safety data sheets from suppliers uses the broader concept of dangerous preparations laid down in § 2 (2) of Order no. 540. This follows on from § 16 of the same Order:

*"(1) Any person who supplies or makes available a substance or material which **may constitute a danger to or in any other way adversely affect safety or health**"²¹ shall ensure that it is provided with easily intelligible safety data sheets when delivered.*

(2) Safety data sheets shall contain the following information:

- 1) trade name and product registration number (PR-No.), if any, assigned by the National Labour Inspection*

²⁰ Cf. internal documents of 5 September 1990 and 6 November 1990.

²¹ My emphasis. It is the same wording as the definition in § 2(2).

- 2) *fields of application*
- 3) *restriction on application*
- 4) *requirements concerning special training*
- 5) *harmful properties including symptoms in connection with ingestion or absorption into the organism*
- 6) *precautions to be taken in connection with the use of the substance or material including special working clothes and personal protective equipment*
- 7) *first aid*
- 8) *properties on heating and in case of fire*
- 9) *precautions in connection with fire*
- 10) *precautions in connection with spill and waste removal*
- 11) *safety regulations in connection with storage*
- 12) *labelling, cf. section 5.*

(3) The safety data sheets shall be drawn up in Danish unless other rules are applicable or unless the Director of the National Labour Inspection permits or requires that another language be used."

This obligation to provide information is the responsibility of all suppliers at all levels.

The reason the Danish Ministry of Labour has argued strongly against setting restrictions on the Member States' right to lay down requirements to the suppliers is because it is one of the main principles in Danish Working environment regulation that preventive measures should be used at the earliest possible moment, as close to the source of risk as possible, and preferably before the preparation reaches the work sites²². Order no. 540 does not only require safety data sheets from the suppliers, it also requires in § 20, safety data sheets from the employers to the employees. These data sheets shall contain the same information as listed in the twelve points in § 16, except that some of the information must take into consideration the kind of use of the preparation within the undertaking. The two obligations, both for the suppliers and the employers, to provide safety data sheets, are in theory independent of each other, but in reality the employer will need to get the information for his data sheet from the supplier. The National Labour Inspection has also said that the data sheets from the suppliers are considered to be the basis for compilation of the data sheet produced by the employers²³. Especially, the employer in small and medium sized undertakings may find it difficult to fulfil his obligation on the data sheet, if the information is not provided from the supplier. Thus, the natural source when drawing up the employers' safety data sheet is the safety data sheet produced by the supplier.

²² Cf. *supra*, note 13.

²³ Cf. Aage Huulgaard and Jes Knudsen, *Arbejdsmiljøloven I Gennemgang - Kommentarer*, Forlaget Fremad A/S, Copenhagen, 1991, p. 320.

Formally, the Directive does not affect the requirements to the employer safety data sheet; Denmark will still be allowed to set its own standards. If, however, the Community reduces the requirements to the suppliers' safety data sheet, then the consequence will most likely be that the quality of the employers safety data sheet is lowered, because of the lack of information. In many cases the supplier might not possess the information, because the manufacturer knows that the supplier is not obliged to provide the information. Even with the present system calculations in the Danish Register on substances and preparations show²⁴ that the suppliers do not know the detailed content of almost 40 % of the substances and preparations. Thus, it might indicate that the manufacturers will provide no more information than they need to sell the product. Therefore, the employers might not be able to obtain the information required for their data sheets from either the suppliers or the manufacturers. More resources will be spent when trying to obtain information at the decentralised level.

In contrast to the Danish system which lays down a set of information which both the supplier and the employer has to provide, the Commission Directive in article 3 only makes it obligatory for the supplier to provide a safety data sheet with certain headings:

"The safety data sheet referred to in article 1 shall contain the following obligatory headings:

- 1. identification of the substance/preparation and of the company/undertaking;*
- 2. composition/information on ingredients;*
- 3. hazards identifications;*
- 4. first-aid measures;*
- 5. fire-fighting measures;*
- 6. accidental release measures;*
- 7. handling and storage;*
- 8. exposure controls/personal protection;*
- 9. physical and chemical properties;*
- 10. stability and reactivity;*
- 11. toxicological information;*
- 12. ecological information;*
- 13. disposal considerations;*
- 14. transport information;*
- 15. regulatory information;*
- 16. other information.*

²⁴ Cf. internal document from the National Labour Inspection of 6 November 1990.

It shall be incumbent on the person responsible for placing the substance or preparation on the market to supply the information specified under these headings. This information shall be compiled in accordance with the Explanatory Notes in the Annex. The safety data sheet shall be dated."

The Directive simply requires certain headings, and then leaves it to the Annex to specify what information might be demanded under each heading. The Annex is a "Guide²⁵ to the Compilation of Safety Data Sheets". Thus the guide is not exhaustive, and it is up to the supplier to decide what information, according to the guide, he wants to pass on to the employers. The purpose of the guide "*is to ensure that the content of each of the mandatory heading listed in article 3 will enable industrial users to take the necessary measures relating to protection of health and safety at the workplace.*" Therefore, it seems that the Commission in the Directive acknowledges that information to the employers through data sheets, has an effect on the health and safety protection of workers. This may be even more so in point 8 of the Annex concerning "exposure controls/personal protection"; the provision clearly shows the relationship between the suppliers' and the employers' duties, since the provision aims at measures which the employers shall bring about on the basis of the information from the suppliers.

To some extent the Directive and the Danish working environment regulation set similar requirements, but in addition to these, Order no. 540 requires further information to be given on²⁶ :

- *fields of application*
- *restriction on application*
- *requirements concerning special training*
- *special marking*
- *the suppliers registration number in the Danish Register on substances and preparations*

Thus, the supplier is obliged to inform the employers on restrictions on application, if the preparation for example according to § 8 of Order no. 103 of 15 February 1989²⁷ is not to be used by young people below the age of 18. The Order on young people's dangerous work prohibits them, for example, from working with or being exposed to preparations containing

²⁵ My emphasis.

²⁶ Cf. also the National Labour Inspections Instruction (At-anvisning) no. 3.1.0.1. of June 1988 on suppliers safety data sheets, which contains recommendations to the compilation of the data sheet.

²⁷ Amended by Order no. 883 of 21 December 1989.

more than 0.1 % of substances on the National Labour Inspection's list on carcinogens, or more than 0.5 % of organic solvents on the list of these²⁸ . One of the reasons why the Danish government introduced this prohibition in 1989 was the fact that during the eighties, as a result of working with organic solvents, a minimum of 100 youth had been recognised as brain damaged²⁹ . Consequently, when the Directive was published part of the discussion was focused on those effects related to the protection of youth. Arguments such as "*a new Community Directive will destroy Danish rules protecting youth at work against brain damages and cancer.*" were seen in a major Danish newspaper³⁰. Thus, the reaction to the Directive in the Danish media was extremely negative.

In relation to special training some Orders require that the users of certain preparations must have followed special courses on the use of these preparations, e.g. § 37 (3) of Order no. 660 of 24 September 1986 on asbestos, and § 8 of Order no. 199 of 26 March 1985 on epoxyresin and isocyanates lay down such a requirement, and the safety data sheet must inform about this legal obligation. The Directive, in contrast, only mentions this in the guide's point 16 to the compilation, that under the obligatory heading "other information" could be indicated "*any other information which might be of importance for safety and health, for example: training advice.*" This might be characteristic of the difference between the Community method and the Danish method. The National Labour Inspection states³¹ that, while Denmark during the negotiations wished to introduce more binding obligations for the suppliers, the result was that most of the suggestions were accepted, but only in the form of recommendations contained in the guide of compilation.

The special marking implies that the safety data sheet must inform of more than R- and S-phrases based on Directive 88/379/EEC, thus, e.g. information must be given on the water-soluble content of chromate in cement according to Order no. 661 of 28 November 1983.

Apart from these general requirements to the suppliers safety data sheets laid down in Order no. 540, Orders concerning specific preparations lay down special requirements. According to Order no. 52 of 13 January 1988 on preparations with a content of volatile substances including

²⁸ Cf 1992 - 02 - 24 - AEB.134

²⁹ *Politiken*, Sunday 7 April 1991, Section 1, p. 1; and *Jyllands-Posten*, Wednesday 10 April 1991, Section 1, p. 8.

³⁰ *Politiken*, Sunday 7 April 1991, Section 1, p. 1.

³¹ Cf. *supra*, note 21.

organic solvents § 2 (2) the data sheet must inform about the content of volatile substances, including the names of the substances in the preparation. § 2 (2) sets the same requirements for epoxyresin and isocyanates.

1.3. Conclusions

The two Directives have shown an area of the Community's internal market initiatives which has caused considerable debate in Denmark³², because this area of chemicals is presently the only field which has been harmonised at a non-satisfactory level seen from a Danish working environmental perspective. In the public debate there seems to be a wide acceptance of the Community competence within this field; the discussions and the criticism have been centred around the issue of whether the Danes must accept a retrograde step in worker protection in order to ensure progress in other Member States³³.

Both before and after the adoption of the Single European Act in 1986 there has continuously been what some³⁴ call a surprising skepticism with regard to the Community both in the Danish Parliament and in the Danish population. The skepticism in the Parliament seemed to be somewhat diminished until the Danish "No" to the Maastricht agreement in the referendum of 2 June 1992. Thus, a large majority in the Parliament recommended the adoption of the Maastricht agreement. As was the case in relation to the Single European Act, so it seemed to be for the Maastricht agreement, that all plans for amending the Community treaties meet with considerable political and critical interest in Denmark³⁵. Before the adoption of the Single European Act Denmark had emphasised that the working environment was considered an important area, and it was almost universally agreed that the establishment of the internal was not to take place at the expense of the protection of the working environment: free trade is important, but proper protection of human health is more important³⁶.

Article 100A (4) was, before the Danish referendum of 27 February 1986 on the Single

³² *FællesRådet*, April 1991, volume 35, issue 4, p. 3; *Politiken*, Sunday 7 April 1991, Section 1, p. 1 and 4; *Politiken*, Monday 8 April 1991, Section 1, p. 5; *Politiken*, Tuesday 9 April 1991, section 2, p. 4; *Politiken*, Wednesday 10 April 1991, Section 4, p. 5; *Jyllands-Posten*, Tuesday 9 April 1991, Erhverv og Økonomi p. 2; *Jyllands-Posten*, Wednesday 10 April 1991, Section 1, p. 8.

³³ *Politiken*, Tuesday 9 April 1991, section 2, p. 4.

³⁴ Claus Gulmann, The Single European Act - some remarks from a Danish perspective, *Common Market Law Review*, 1987, pp. 31-40.

³⁵ *Ibid* note 34.

³⁶ *Supra* note 34.

European Act, presented as a major achievement, since it would protect the Danes against a situation where they could be forced to lower their environmental and working environmental protection level. Thus, a memorandum from the Danish Ministry of Foreign Affairs³⁷, which was part of the basis for discussions in Folketinget (the Parliament), stated, that the aim before the negotiations about article 100A (4) - (6) EEC was to develop a firm and legally safe method in relation to the protection of the working environment and the environment. The government was satisfied with the result, and found that Denmark, according to the provisions, as it had emphasised, was allowed to pursue aims in relation to the working environment and the environment³⁸. Some even consider that the protective clause in article 100A (4) was a highly contributory factor in ensuring the Danish "yes" in the 1986 referendum³⁹.

Despite a strong demand for the use of article 100A (4) in order to solve the problems which Denmark has experienced in relation to dangerous preparations, the provision has not been adopted, and a lasting solution has not been reached. The situation is still that Directive 88/379/EEC defines the concept of dangerous preparations in a narrow sense, which may be unacceptable seen from a Danish point of view, since the Directive does not permit the Member States to widen the concept. The consequence is, as described above, that Directive 88/379/EEC reduces the Danish concept of dangerous preparations laid down in § 2 (2) of Order no. 540. Thus, a lower number of carcinogens are considered dangerous, and the concentration limits for carcinogenic substances and organic solvents in the preparations will both be higher and be calculated through a method of addition allowing a larger sum of risks before being classified as dangerous.

The Commission Directive 91/155/EEC concerning suppliers' safety data sheets on dangerous preparations uses the Community definition of dangerous preparations from Directive 88/379/EEC to lay down the meaning of "dangerous". In contrast Denmark requires safety data sheets from the suppliers for all preparations which are defined as dangerous according to the

³⁷ "Notat vedrørende afsnittet om miljøpolitik i formandskabets konklusioner fra Det europæiske Råds møde den 2.-3. december 1985 i Luxembourg", Ministry of foreign Affairs 18 December 1985. See Tillæg B til Folketingstidne Folketingsåret 1985-86: "Bilag vedr. Den Europæiske Akt", J.H. Schultz A/S Copenhagen, p. 2480.

³⁸ The Danish text reads: "På denne baggrund finder regeringen, at disse bestemmelser er i overensstemmelse med de danske synspunkter, som regeringen har givet udtryk for i folketingets markedsudvalg forud for Det europæiske Råds møde, nemlig at der måtte udarbejdes en håndfast af juridisk sikker metode vedrørende arbejdsmiljø og miljøbeskyttelse.

Regeringen er tilfreds med denne løsning og finder, at Danmark herefter kan forfølge de formål vedrørende arbejdsmiljø og det ydre miljø, som vi tillægger stor betydning.

³⁹ *Jyllands-Posten*, Wednesday 10 April 1991, Section 1, p. 8.

broader Danish concept (§ 16 of Order no. 540). Further, the Danish provisions on the content of safety data sheets lay down, in comparison to Directive 91/155/EEC, additional demands to the information which must be provided. These demands cover fields of application, restriction on application, requirements concerning special training, special marking, and the suppliers' registration number in the Danish Register on substances and preparations. These additional demands should not be underestimated as they are from a Danish perspective considered very important; public debate over the demand concerning fields of application in relation to the protection of the youth proved this.

2. What are the possible solutions for Denmark in the conflict between Danish and Community law ?

The two Directives 88/379/EEC and 91/155/EEC should both have been implemented by 8 June 1991. Denmark has for the time being chosen not to implement the directives. It has refrained from implementing Directive 91/155/EEC on the basis of a creative use of article 5 (2) in the Directive. Article 5 (2) reads:

"These provisions shall take effect from 8 June 1991. However, existing information systems of the safety data sheet type in use in some Member States may continue to be used until 30 June 1993."

The normal way of interpreting this provision would be as an obligation to implement the Directive by the latest on 7 June 1991, and then the Member States have a choice in relation to preparations which were considered dangerous according to the national provisions, whether or not the Member States permit the existing systems to stay in force in parallel with the Community system until 30 June 1993. Denmark has, however, interpreted the provision as meaning there is no obligation to implement the Directive before 30 June 1993, therefore, the only existing system on data sheets in the period up to 30 June 1993 is the old Danish system. There is no doubt that this interpretation is incorrect, since article 5 (2) reads "These provisions shall take effect from 8 June 1991." According to the Danish interpretation the Directive's provisions do not take effect from the fixed date. The purpose of this interpretation might be to postpone a political sensitive decision in the hope, that the Community by 30 June 1993 has made progress and reached a level, which is more acceptable seen from a Danish perspective. Even the Commission seems to understand the Danish position, since DG III has confirmed⁴⁰ that

⁴⁰ According to a document received from the National Labour Inspection. The document is in the possession of the author.

Commission Services would not take the initiative to challenge Denmark's continuation of their own systems. Still the risk remains that an individual supplier or other organisation might make a complaint to the Commission in which case the services according to Article 169 could feel forced to institute the necessary proceedings. This is the situation as it stands in August 1992. But because the Danish interpretation, which postpones a more permanent solution, comes to an end on 30 June 1993, it may be of interest to analyse what possible solutions may be reached.

Denmark has, according to sources in the Ministry of Labour⁴¹ three possible solutions, when it has to decide upon the implementation of Directive 91/155/EEC:

"1) Denmark may choose to implement the Directive in its full extent and accept the retrograde steps in relation to the working environment. This solution will cause problems for the workers.

2) Denmark may choose to remove the most critical parts of the Directive, those relating to carcinogenic substances and organic solvents, and then implement the remaining parts. This will mean there is not much left of the original Directive, and legal proceedings will undoubtedly be taken against Denmark before the European Court of Justice.

3) The Directive may be implemented to its full extent combined with more stringent provisions on the employers obligation to produce safety data sheets."

The consequences of solution number one have been described in detail above. Therefore, there is no reason to analyse this any further.

Solution number two is the most controversial seen from a Community perspective. If Denmark chooses to implement those parts of the Directive which do not reduce the Danish requirements, and rejects the implementation of the rest of the Directive on the basis of article 100A (4), then we will probably see a conflict between the traditional Danish interpretation of article 100A (4)⁴² and the Commission's interpretation before the European Court of Justice.

Because of a fear that article 100A will lower Danish protection levels not only on the working environment, but also and more especially on the environment, the derogation clause in article 100A (4) played an all-important role in the Danish public debate before the referendum in 1986 and the signing of the SEA. Article 100A (4) reads:

⁴¹ *FællesRådet*, April 1991, volume 35, issue 4, p. 3.

⁴² *Supra* note 38.

"If, after the adoption of a harmonization measure by the Council acting by a qualified majority, a Member State deems it necessary to apply national provisions on grounds of major needs referred to in article 36, or relating to protection of the environment or the working environment, it shall notify the Commission of these provisions.

The Commission shall confirm the provisions involved after having verified that they are not a means of arbitrary discrimination or a disguised restriction on trade between Member States.

By way of derogation from the procedure laid down in articles 169 and 170, the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in this article."

In order to stress the Danish interpretation and possibly also for domestic political reasons, Denmark annexed to the Final Act a Declaration on article 100A:

"DECLARATION BY THE GOVERNMENT OF THE KINGDOM OF DENMARK

on article 100A of the EEC Treaty

The Danish Government notes that in cases where a Member State is of the opinion that measures adopted under article 100A do not safeguard higher requirements concerning the working environment, the protection of the environment or the needs referred to in article 36, the provisions of article 100A (4) guarantee that the Member State in question can apply national provisions. Such national provisions are to be taken to fulfil the above-mentioned aim and may not entail hidden protectionism"

Thus, Denmark considers article 100A (4) as a unique opportunity to obtain more stringent protection - an opportunity to make use of technological developments in the individual Member State, even though the level of protection desired is not feasible in the Community as a whole. Clearly, these visions imply that the paragraph does not have a limited scope, instead it may have a rather broad one⁴³. Denmark invoked for the first time its interpretation of article 100A (4)⁴⁴ in a dispute between Denmark and the Commission on car exhaust-gas. The dispute has, however, not been solved by the European Court of Justice⁴⁵.

⁴³ Cf. paper by Christina Toftegaard Nielsen, "Article 100A (4) in the EEC Treaty - an analysis from an environmental point of view - illustrated by the car exhaust dispute between the Commission and Denmark", Vrije Universiteit Brussel, Programme on international legal cooperation, 1991, p. 10.

⁴⁴ Beslutningsforslag nr. B 28, Folketinget (the Parliament) 1988-89.

⁴⁵ The dispute has not come before the European Court of Justice, and is unlikely to do so, because the Community in 1993 will reach a level similar to the Danish, see more on this *supra* note 43, p. 10.

If Denmark chooses to invoke article 100A (4) in relation to suppliers safety data sheets, it should be noted 1) that Denmark voted against the Directive 88/379/EEC, which forms the basis for Commission Directive 91/155/EEC; 2) that article 100A (4) will be used to maintain national provisions in existence at the time when Directive 91/155/EEC was adopted; and 3) the fact that Denmark has not invoked article 100A (4) within the implementation date will not be used against Denmark as an argument of having failed to meet the target date⁴⁶. Against this background it seems, as if it is taken for granted in the Danish debate that Denmark has the right to invoke article 100A (4), and that it is simply a matter of a political decision whether Denmark wants to use the provision or not⁴⁷.

The question might, however, not be so easily solved. The Danish special committee on EC social and labour market affairs, which includes⁴⁸ representatives from the Ministries of Labour, Social Affairs, Foreign Affairs, Justice, and Housing, has concluded that the more stringent national provisions can not be maintained⁴⁹. The reason for this conclusion was, the fact, that the committee interprets article 100A (4) as only allowing national derogations in case they relate to the protection of the working environment and involves the employers and workers; and directly Directive 91/155/EEC only affects the requirements on suppliers' safety data sheets. Thus, the Special Committee has adopted an interpretation which limits the traditional Danish interpretation. The argument within the Special Committee was that Denmark is free to introduce more stringent measures on the employers' safety data sheets and thereby ensure the existing worker protection. Further, DG III has proposed⁵⁰ that Denmark could replace its more stringent provisions on suppliers' safety data sheets, by a procedure recommending that suppliers provide the specific information which they today are obliged to provide.

⁴⁶ DG III has in documents to the Danish Ministry of Labour confirmed this. These documents are in the possession of the author.

⁴⁷ Ruth Nielsen and Erika Szyszczak, *The Social Dimension of the European Community*, Handelshøjskolens Forlag, Copenhagen, 1991, p. 205 is a good example on this attitude. When dealing with Directive 88/379/EEC they state "It is therefore a matter of debate whether Denmark should invoke article 100A (4) EEC to uphold the traditional Danish views on what is dangerous. It will probably be decided mainly on the basis of political considerations." and "It seems likely that a Member State who voted against the Directive and who is upholding provisions in existence at the date of the adoption of the Directive would stand a good chance of being successful in a case before the European Court of Justice". But also the Minister of Labour has said "If we can not change the Directive, I will not deny, that it might be necessary to invoke the environmental guarantee (article 100A (4))" see *Jyllands-Posten*, Tuesday 9 April 1991, Erhverv og Økonomi p. 2.

⁴⁸ Claus Gulmann and Karsten Hagel-Sørensen, *EF-ret, Jurist- og Økonomiforbundets Forlag*, Copenhagen, 1989, p. 108.

⁴⁹ *Supra* note 15.

⁵⁰ *Supra* note 40.

Against this background, it might be argued that Denmark would be wrong if it deemed it necessary to apply national provisions on grounds relating to the working environment, because the same result may be reached by introducing more stringent measures on the employers, and that would have less damaging effects on the free movement of goods (the principle of proportionality). It may, however, be questioned whether the existing worker protection can be ensured through more stringent measures on the employers. Formally, it may be possible, but in practice it seems more doubtful. This solution suggested by the Special Committee is identical to that described above as solution 3 of implementing the directive to its full extent while placing further requirements on the employers.

In order for solution 3 to provide the same worker protection as the existing Danish system, the employers must be able to obtain the information from the suppliers and the manufacturers, which they shall provide in their data sheets about the preparations according to § 20 of Order no. 540. The Danish Employers' Association (DA) believes⁵¹ that the manufacturers and suppliers will provide the employers with the information they need to fulfil their obligations. In contrast the National Labour Inspection has stated⁵² that *"if the Directive is implemented, it is going to be almost impossible for the employers on their own to produce satisfactory safety data sheets, but the National Labour Inspection may still hold the employers legally responsible, if the data sheets are incorrect."* The general duty of the employer is expressed in § 15 of the Danish Working Environment Act:

*"It shall be the duty of the employer to ensure safe and healthy working conditions.
Special reference is made to -*

- (a) Part V on the performance of the work;*
- (b) Part VI on the condition of the place of work;*
- (c) Part VII on technical equipment etc.;*
- (d) Part VIII on substances and materials.*

The duty is expressed in general terms, but is further specified in the respective parts of the Act, thus, in relation to preparations Part VIII. Where the employer contravenes this duty, he is liable to a fine on the basis of the strictest liability (see § 83 of the Act). In relation to injuries, occupational diseases and other diseases on the workers, the responsibility for the employer is based on culpa, which the national Courts through case-law has interpreted as a strict culpa

⁵¹ *Politiken*, Sunday 7 April 1991, Section 1, p. 4.

⁵² *Supra* note 15.

responsibility, and in some cases the Courts have even ruled on the basis of the strictest liability⁵³.

Thus, the employers are not only liable to fines if they disregard their duties, but might also have to pay damages to the workers. Therefore, the employers may be motivated to obtain the information they need to fulfil their obligation.

The existing Danish system is, however, based on a presumption that the employers would not get the information from the suppliers which was listed in § 20 of Order no. 540, if the suppliers did not have a legal obligation to provide this information (§ 16 of the Order). The National Labour Inspection, and the Danish Ministry of Labour has at several occasions confirmed, in meetings with the Commission, in intern documents and in public debate, that it disagrees with the Danish Employers' Association (DA). It believes that lowering the requirements on the suppliers' safety data sheets will lead to a lower standard of the employers' safety data sheets. The National Labour Inspection argues⁵⁴, that even today calculations in the Danish Register on substances and preparations show that the suppliers do not know the detailed content of almost 40 % of the preparations. The manufacturers do not want to provide them with the information, therefore, the information is given to the Register as confidential information. The argument is, therefore, if the manufacturers today want to provide the least information possible, then the employers may under the Community system be expected to run into difficulties when they try to obtain the information needed for their safety data sheets. Even if the employer asks the supplier for information, the supplier might not be in possession of the information, and the manufacturer might not have sufficient interest in the matter to be willing to provide the information. The National Labour Inspection has especially emphasised the weak bargaining position of small and medium sized enterprises.

Against this background Denmark may have sufficient evidence to indicate, that the Danish level of worker protection can not be maintained, if Directive 91/155/EEC is implemented, and more stringent measures on the employers are introduced. Thus, the conclusion reached within the Danish Special Committee on EC Social and Labour Market Affairs may not be correct. The reason for the conclusion might be that the legal expertise within the Committee is embodied in

⁵³ Cf. judgment from the Supreme Court of Justice published in Ugeskrift for Retsvæsen, p. 1108, 1989.

⁵⁴ Cf. intern document from the National Labour Inspection of 6 November 1990.

the representative of the Ministry of Justice. This person might not have sufficient knowledge of the existing system on suppliers' and employers' safety data sheets, and how the suppliers' data sheets may be a precondition for the production of employers' data sheets. In other words, the above mentioned solution 3 does not seem to be a reliable way to maintain the present level of worker protection. Therefore, Denmark may be allowed to invoke article 100A (4) and follow the solution described in number 2.

The problem with this conclusion is, however, that Denmark might be reluctant to invoke the derogation clause, as long as the legal basis to do so is most unclear⁵⁵. The Danish Employers' Association (DA) has expressed such considerations. It would like to invoke article 100A (4) in a more important and safer test-case before the European Court of Justice⁵⁶.

A last alternative to the 3 solutions dealt with above may be for Denmark to choose a policy of "wait-and-see". Article 100A (3) lays down that in its proposals concerning health and safety the Commission will take as a base a high level of protection. The Article only requires the Commission to take a high level of protection as a base in its *proposals*. There are no obligations concerning the Council which can amend the Commission's proposal unanimously (article 149 EEC). Thus, one might argue⁵⁷ that article 100A (3) can hardly provide the Member States with any legal instruments.

In this case the situation may, however, be different, since Directive 91/155/EEC is a Commission Directive, and more importantly the Social Charter's article 19 indent 3 lays down: "The provisions regarding implementation of the internal market shall help to ensure such protection (health and safety protection)⁵⁸". The Charter is, as mentioned in Part 2.1.1.2., a non-binding declaration, but may, nonetheless, influence the European Court of Justice in case of uncertainties. According to article 27 of the Charter it is the responsibility of the Member States to guarantee the fundamental social rights in the Charter. Therefore, the Member States acting in the Council shall, according to the Charter, ensure that the internal market provisions help to ensure the health and safety protection. This, combined with the fact that the Commission's proposals should take as a base a high level of protection may be used by the Danes to attack

⁵⁵ *Supra* note 43, p. 10.

⁵⁶ *Supra* note 51.

⁵⁷ Cf. *supra* note 40, p. 53 and Peter Pagh, "EF miljø ret", Christian Ejlers' Forlag, Copenhagen, 1990, p. 80.

⁵⁸ My insert.

the Directive, if the Commission decides to bring Denmark before the ECJ considering that Denmark has failed to fulfil its obligation to implement the Directive.

The Directive has been adopted in accordance with the procedure provided for in article 21 of Directive 67/548/EEC⁵⁹ by a Committee composed of representatives from the Member States, and a president who is a Commission representative. When a proposal for a measure is presented to the Committee, it is asked for a statement. The proposals are always presented by the Commission representative. Statements are adopted in accordance with the rules for the Council's vote, according to article 148 (2) EEC. Therefore, the Commission representative does not take part in the voting. If the Committee responds positively to the Commission proposal, the Commission may adopt the measures (see article 21 (3) a) of Directive 79/831/EEC⁶⁰). Thus, the Commission is obliged to present proposals based on a high level of protection, and the Member States representatives in accordance with the non-binding Charter, shall ensure that the internal market measures help to maintain the protection of health and safety. The result, Directive 91/155/EEC, seems, however, to disregard these conditions, since the Directive from a Danish perspective does not help to ensure the protection of health and safety. The reason for this must be that, since the Committee does not have the competence to amend the proposals, the Commission proposal took as a basis a lower level of protection than the Danish. Therefore, the Commission infringed the rule in article 100A (3), when it presented the proposal, and the Member States representatives should have rejected the proposal according to the Charter's article 19.

In order to oblige the Court to review the legality of the Directive, Denmark could, according to article 173 of the Treaty, have chosen to institute proceedings before the European Court of Justice within a time limit of two months of the publication. Denmark has, however, overrun the time limit, since the Directive was published in OJ L of 22.3.91, and may therefore only question the legality of the Directive if the Commission in accordance with article 169 decides to bring the matter of Denmark's refusal to implement the Directive before the European Court of Justice.

The possible solutions for Denmark in the conflict with Community law may be summarised as:

- 1) In the case that it wants to maintain the present protection level it may invoke article 100A (4), and if the Commission chooses to bring the matter before the European Court of Justice, it

⁵⁹ See the sixth amendment Directive 79/381/EEC OJ L 259 of 15.10.79.

⁶⁰ *Ibid* note 56.

should primarily argue that the Directive be declared void, because of infringement of article 100A (3) and the Charter's article 19. Secondly it should argue that Denmark is allowed to invoke article 100A (4), because it is the only reliable way to maintain the present level of worker protection.

- 2) Denmark may choose to implement the Directive in its full extent and accept the retrograde steps in relation to the working environment.
- 3) The Directive may be implemented to its full extent, combined with more stringent provisions on the employers' obligation to produce safety data sheets, and recommendations for the suppliers equivalent to the present Danish obligations. The consequence of this being that the present worker protection is unlikely to be maintained.
- 4) Denmark may not want to use this case as a test-case on the use of article 100A (4) of the Treaty. Therefore, it might choose a policy of "wait-and-see", where Denmark refrains from implementing the Directive, and leaves the initiative to the Commission. If the Commission decides to bring the matter before the ECJ, then Denmark should, as in solution no. 1, argue that the Directive be declared void, because of infringement of article 100A (3) and the Charter's article 19.

Which solution Denmark will finally adopt remain unclear at the moment, but there is no doubt that a conflict before the ECJ on the matter will attract tremendous interest in the Danish public debate on the future relations to the EC. For political reasons both Denmark and the Commission may, therefore, have strong interests in avoiding a conflict, which could further increase Danish skepticism with regard to the Community, and thereby strengthen the resistance towards the adoption of the Maastricht-agreement. Another result of such a conflict would most likely be that the Community's efforts to be seen as the driving force in relation to working environment matters would finally be lost.

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