

MR WALL

*Bluff a letter Wash
what was in Kohl / Kohl
7.23/11*

Rome Minister

*I think it is worth having a compromise
in your back pocket. You could either talk to*

SOCIAL CHAPTER: OPTIONS FOR MAASTRICHT

Michael Howard or I could write to D/employment

1. Ministers have agreed that we should give no ground on the social chapter before Maastricht, where we might deploy some essentially cosmetic concessions prepared by the Department of Employment in the hope that this might clinch a deal. You asked us to consider privately what might be done if it became clear at Maastricht that we could not reach agreement with other member states on this basis.

2. I attach a paper which compares the position under the existing Treaty with the latest Dutch text and looks for a way through. In brief, it argues that:

a. the Community already has extensive potential competence in the social field;

b. fortunately, much action we would find objectionable is currently subject to unanimity;

c. avoiding extension of QMV is ultimately more important than resisting some elaboration of the Community's objectives and areas for action;

d. so if the United Kingdom has to make any concessions, the best way to do this is probably to have a more substantive social chapter, drawing on parts of the Presidency text, with a decision-taking provision which explicitly preserves unanimity outside those areas where action by QMV is already possible.

*Suggesting that we need to have some amendment to
put forward and suggestively worded in the lines of
para 11 of the Cabinet Office paper.*

Joseph 23/11

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In OPD(E) the Foreign Secretary floated the idea in d. with Mr Howard, who argued against it principally on the grounds that it would lead, in a subsequent IGC, to pressure to move to QMV in areas for which unanimity would be specified this time.


*We could
accept Pres.
text.*

3. From our point of view, the approach set out above would be much less damaging than accepting the Presidency text; but the concessions involved would still be painful. Although, in view of a. above, such concessions would not extend the scope of action that could be taken under the Treaty, there would in effect be an invitation to the Commission to bring forward proposals in the areas concerned - though we would still retain the ability to block them. It would be difficult to convince Mr Howard - and some other colleagues - that such a compromise could be acceptable. But if the alternative was clearly a collapse of the whole IGC, with the blame pinned firmly on Britain, then the price might be worth paying.

4. If the Prime Minister wants to be in a position to negotiate on these lines at Maastricht, it is essential to develop these ideas further (or identify better alternatives): for this the cooperation of the Department of Employment will be essential. The Law Officers will have to be consulted at some point. The Department of Social Security would also need to be involved. The Prime Minister may feel that the Treasury should be involved too.

5. At the same time it would be important to keep the circle of those involved to a minimum, since our negotiating position would be seriously undermined if our partners had any hint that we were contemplating concessions.

6. If the Prime Minister wants to pursue these ideas, the first step would be for him to speak privately to Mr Howard.


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Depending on what eventually emerged from the exercise, the Prime Minister would also need to consider how far it was desirable to seek collective Ministerial authority before Maastricht for any concessions that might be involved.

7. If you would find it helpful to talk over the substance or tactics of all this, I should be happy to do so.

D. Hadley

D A HADLEY

18 November 1991

Encl

3
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SOCIAL CHAPTER: OPTIONS FOR MAASTRICHT

1. The United Kingdom is isolated in resisting any change in the present social provisions of the Treaty. The Dutch Presidency text has the strong support of other Member States. Mr Howard has proposed some essentially cosmetic changes which he would be prepared to offer at Maastricht. Some technical problems with these are still being ironed out by Whitehall lawyers, as a basis for a reply by the Law Officers. But our partners will not regard such a text as any improvement on the status quo: some may indeed regard it as a step backwards.

2. An overall agreement at Maastricht seems unlikely without some material concession on our part. This paper suggests one possible way of bridging the gap.

Existing Provisions

3. The social provisions of the existing Treaty (Annex A) provide the main basis for Community competence in this field. The main features are:

- Article 117 refers to the need to promote improved working conditions and living standards for workers, and indicates a role for harmonisation.
- In Article 118, the Commission is given the task of promoting close cooperation between member states in the social field, particularly in relation to a wide-ranging list of matters (employment, labour law and working conditions, vocational training, social security, health and safety at work, rights of association and collective bargaining). The article confers no powers on the Council,

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and gives the Commission explicit power only to make studies, deliver opinions and arrange consultations: but the ECJ has upheld (in the 1987 Migration case) the Commission's right to take Decisions which are legally binding on member states in order to give practical effect to the Article.

- Article 118A provides for Council directives by QMV on health and safety of workers.
- Article 118B requires the Commission to endeavour to develop the dialogue between management and labour at European level.
- Article 119 establishes the principle of equal pay for men and women, which the ECJ has held has direct effect in member states.
- Outside the social chapter, Article 51 covers social security for migrant workers. Since this now seems unlikely to be amended (ie unanimity will be retained) it is not considered further here.

4. The only explicit legislative power in the social chapter is confined to health and safety (Article 118A). But the references to harmonisation in Article 117 mean that Article 100 can legitimately be used for directives on harmonisation of working conditions and employees' rights. Moreover the fact that Articles 117-119 bring a wide range of social issues explicitly within the scope of the Treaty means that Article 235 could be used as a legal base for action in the areas concerned. It

follows that, even under the existing Treaty, there is extensive potential competence in the social field.¹

5. In practice, the Community's ability to exercise this competence is limited by the unanimity requirements in Articles 100 and 235. This enables us to block objectionable proposals- which is precisely why other Member States are so keen to extend QMV in this area.

Action under the existing Treaty

6. Apart from EC legislation on health and safety at work and social security for migrant workers (which we have always recognised as legitimate Community activities) there have been relatively few legislative measures in the social field. However those that have been agreed are important, covering issues such as equal pay, equal treatment, and workers' rights on the winding-up or transfer of undertakings (including rights to information and consultation). Non-legislative measures (resolutions etc) have also been adopted, which cover a wider range of issues: Annex B gives examples.

7. Because of the difficulty of getting social legislation through under the unanimity requirements in Articles 100 and 235, the Commission is increasingly putting forward proposals under QMV articles which go beyond their natural scope. One example is the use of Article 118A (health and safety) for the pregnant workers directive, despite the fact that it contains provisions, in particular on the level of maternity pay, which can barely be

¹ (Note: Article 100 provides for the approximation of Member States' legal or administrative provisions affecting the functioning of the common market. Article 235 provides for action to achieve a Community objective where no specific power exists elsewhere on the Treaty).

*Why not?
Are we?
P. 102*

connected with health and safety. Unfortunately most Member States are content to go along with stretching existing provisions in this way, since they generally support the policy objectives of the measures. Experience does not suggest that a challenge before the ECJ would be successful.

Presidency Proposals

8. The corresponding provisions of the latest Presidency text (Annex C) are designed to set out in more detail the Community's objectives and the areas in which it may act; to encourage future action; to introduce more QM voting; and to enable European-level collective agreements to be given legal force throughout the Community. More specifically:

- The new Article 117 would introduce a substantial list of social objectives shared by the Community and the Member States. In contrast, the existing Article 117 refers simply to Member States' agreement on the need to promote improved working conditions and standards of living for workers: the Community is not explicitly mentioned, though there are references to harmonisation and the procedures provided for in the Treaty.
- The Presidency's Article 118 provides for Community measures, with a view to achieving these objectives, not only in the areas explicitly mentioned in the existing Treaty (health and safety), but also in areas where action would at present have to be based on Articles 100 or 235 (eg information and consultation of workers, equal treatment, equality of access to the labour market, and integration of persons excluded from it).

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- The Council is to act in these areas by QMV; but unanimity is explicitly required for social security/social protection; certain aspects of trade union law; and employment of third country nationals. In addition, a further paragraph excludes pay, the right of association and the rights to strike or lock out from the scope of the article (though action could still be possible under other articles of the Treaty, notably 235).

 - In addition, Articles 118A and B set out arrangements, on lines recently agreed between UNICE and the ETUC, for consulting the social partners before the Commission puts forward proposals in the social policy field (acceptable); but also enabling the social partners to negotiate collective agreements which at their request could then be given Community-wide effect by Council decision (clearly unacceptable, the more so since the voting rules in Article 118 would apply, ie the Council would often decide by QMV).
9. Our basic difficulty with these provisions is not so much that they enlarge the scope of the Treaty: for the reasons given above there is extensive potential competence already. The biggest problems are that:
- a. the objectives in the new Article 117 are couched in a very open ended way (eg "proper social protection") and are intended to be a strong incentive to action;

 - b. in addition, the obligation to pursue these objectives would rest on both the Community and the Member States, while the present Article refers only to the Member States;

 - c. the specific areas identified for action under the new Article 118 would add to this pressure;

- d. QMV would be much more widely available;
- e. the imposition of collective agreements drawn up by the social partners at European level is unacceptable.

10. Of these problems, extension of QMV is the most damaging, since we know that on social issues (unlike, say, the single market) we will generally be in a minority or completely isolated. QMV on health and safety related matters is well established and cannot realistically be rolled back. But avoiding any further extension of QMV must be a fundamental United Kingdom objective. If we could achieve this, we would still be seriously concerned at the expansive objectives and action areas set out in the Presidency's draft; but the risks would be a good deal less acute.

Possible Compromise

11. Against this background, one could consider taking the Presidency text as a basis and making the following changes:

- Water down the most dangerous objectives in Article 117. Ideally attribute them (as in the existing 117) to the member states only.
- In Article 118, provide for action on health and safety issues by QM (as at present) with everything else by unanimity. Knock out as many of the specific references that would encourage damaging Community action as possible, eg information and consultation of workers, representation and collective defence of workers' or employers' interests, conditions of employment for third country nationals, social protection (bearing in mind that proposals in these areas

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could still be tabled - as at present - under Articles 100 or 235). Otherwise, retain much of the currently proposed text (ie references to eg working conditions, equal treatment, integration of those excluded from the labour market). The list of issues for which the Presidency's text preserves unanimity would become redundant.

- Leave untouched Article 118(3) which allows a member state to give the social partners responsibility for implementing national measures. While this is unnecessary, it is not fundamentally objectionable (unlike the imposition of Community wide collective agreements - see below) as long as there is no requirement on Member States to do so.
- Maintain the provisions in Article 118A for consulting the social partners before the Commission puts forward proposals.
- Delete 118B (giving EC-level collective agreements legal force).

12. These changes would remove the worst features of the Presidency text, while preserving substantial parts of it. In legal terms, there should only be a limited extension of potential Community competence. QMV would not be extended. The main costs for us would be:

- The Treaty text would provide much more encouragement for social legislation than at present, with explicit references to objectionable areas such as information and consultation of workers.

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- Although unanimity would be retained, it would be more difficult for us to argue (as we often do at present) that Community action in these areas was unnecessary.
- To the extent that future proposals were in line with the objectives in Article 117, it would also be harder for us to argue that they were undesirable. On the other hand, most member states do not accept our arguments at present, and it could be argued that provided unanimity can be maintained, our negotiating position may be weakened but will not be decisively undermined.
- Such an outcome would encourage the Commission to stretch existing QMV provisions even further than at present, and the ECJ's Titanium Dioxide ruling (which prevents the Council from combining unanimity and QM/cooperation procedure legal bases, giving priority to the latter) will also push measures towards QMV legal bases. But this will happen anyway, whether or not the Treaty is amended.

Other Alternatives?

13. It would be argued that, instead of having to accept a fairly wide-ranging social chapter as the price of maintaining unanimity where it is currently required, it would be better to consider a limited extension of QM in return for a social chapter which in other respects stuck closely to the present Treaty provisions. We doubt if this offers a negotiable alternative:

- It would involve pulling other member states much further away from the broader text on which they are all basically agreed.

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- It would be difficult to identify limited areas in which we could tolerate QM voting; or to ensure that expansive interpretation did not then lead to much wider use of QMV.

14. On the other hand, if we put forward a proposal along the lines indicated in para.11 above, other member states might well argue that they could only consider accepting it if there was to be at least some extension of QMV as well. We might therefore need to consider whether any marginal concession was possible.

CHAPTER I

SOCIAL PROVISIONS

Article 117

Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained.

They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonization of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action.

Article 118

Without prejudice to the other provisions of this Treaty and in conformity with its general objectives, the Commission shall have the task of promoting close cooperation between Member States in the social field, particularly in matters relating to:

- employment;
- labour law and working conditions;
- basic and advanced vocational training;
- social security;
- prevention of occupational accidents and diseases;
- occupational hygiene;
- the right of association, and collective bargaining between employers and workers.

To this end, the Commission shall act in close contact with Member States by making studies, delivering opinions and arranging consultations both on problems arising at national level and on those of concern to international organizations.

Before delivering the opinions provided for in this Article, the Commission shall consult the Economic and Social Committee.

*Article 118a**

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.

Such 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.

3. The provisions adopted pursuant to this Article shall not prevent any Member State from maintaining or introducing more stringent measures for the protection of working conditions compatible with this Treaty.

* Article added by Article 21 of the SEA.

*Article 118b**

The Commission shall endeavour to develop the dialogue between management and labour at European level which could, if the two sides consider it desirable, lead to relations based on agreement.

Article 119

Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job.

Article 120

Member States shall endeavour to maintain the existing equivalence between paid holiday schemes.

Article 121

The Council may, acting unanimously and after consulting the Economic and Social Committee, assign to the Commission tasks in con-

* Article added by Article 22 of the SEA.

nection with the implementation of common measures, particularly as regards social security for the migrant workers referred to in Articles 48 to 51.

Article 122

The Commission shall include a separate chapter on social developments within the Community in its annual report to the European Parliament.

The European Parliament may invite the Commission to draw up reports on any particular problems concerning social conditions.

COUNCIL RESOLUTIONS AND MIXED RESOLUTIONS ON SOCIAL ISSUES

1. Since 1980 there have been Council Resolutions (implying that the subject matter is within Community competence) on:

- Dignity of women and men at work (1990);
- Action to assist the long-term unemployed (1990);
- Reintegration and late integration of women into working life (1989);
- Safety, hygiene and health at work (1987);
- Action Programme on Employment Growth (1986);
- Guidelines for a Community Policy on Migration (1985);
- Action to combat long-term unemployment (1984);
- Action to combat unemployment among women (1984);
- Promotional employment for young people (1984);
- Promotion of equal opportunities for women (1982 and 1986);
- Community labour market policy (1980);
- Adaptation of working time (1980);
- Linked work and training for young persons (1980).

2. There have also been some "mixed" resolutions of the Council and the Member States (implying that issues within both Community and national competence are covered) on:

- Setting up a European employment survey (1989);
- Combatting social exclusion (1989);
- Social integration of handicapped people (1981).

Annex C

Title VII

Social policy, education,
vocational training and youth

(Presidency text)

Chapter 1: Social provisions

Article 117

The Community and its Member States shall have as their objectives the promotion of employment, improved living and working conditions, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion. To this end the Community and its Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of relations based on agreement, and the need to maintain the competitiveness of the Community economy.

Article 118

1. With a view to achieving the objectives of Article 117, the Community shall support and complement Member States' activities in the following fields:

- improvement in particular of the working environment to protect workers' health and safety;
- working conditions;
- the information and consultation of workers;
- equality between men and women with regard to labour market opportunities and treatment at work;
- the integration of persons excluded from the labour market, without prejudice to the provisions of Article [vocational training].

2. To this end, the Council may 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. Such 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.

The Council shall act in accordance with the procedure referred to in Article 189c after consulting the Economic and Social Committee.

However, the Council shall act unanimously on a proposal from the Commission, after consulting the European Parliament and the Economic and Social Committee, in the following areas:

- social security and social protection of workers;
- protection of workers where their employment contract is terminated;
- representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5;
- conditions of employment for third-country nationals legally present in Community territory;
- financial contributions for promotion of employment and job-creation.

3. A Member State may entrust management and labour, at their joint request, with the implementation of directives adopted pursuant to paragraph 2.

In this case, it shall ensure that, not later than the date of entry into force of a directive, management and labour have introduced the necessary measures by agreement, the Member State concerned being required to take any necessary measure enabling it at any time to be in a position to guarantee the results imposed by the Directive.

4. The provisions adopted pursuant to this Article shall not prevent any Member State from maintaining or introducing more stringent preventive measures compatible with this Treaty.
5. The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.

Article 118a

1. The Commission shall have the task of promoting the consultation of management and labour at Community level and shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties.
2. To this end, before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Community action.
3. If, after such consultation, the Commission considers Community action advisable, it shall consult management and labour on the envisaged proposal. Management and labour shall forward to the Commission an opinion, and, where appropriate, a recommendation.
4. On the occasion of such consultation, management and labour may inform the Commission of their wish to initiate the procedure provided for in Article 118b(1) and (2). The duration of the procedure shall not exceed nine months, unless the management and labour concerned and the Commission decide jointly to extend it.

Article 118b

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

2. Agreements concluded at Community level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 118, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission.

This decision will be taken according to the voting procedures laid down in Article 118.

Article 118c

With a view to achieving the objectives of Article 117 and without prejudice to the other provisions of this Treaty, the Commission shall encourage co-operation between the Member States and facilitate the co-ordination of their action in all social policy fields under this Title.

Article 119

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work is applied.
2. For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

Equal pay without discrimination based on sex means:

- (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
- (b) that pay for work at time rates shall be the same for the same job.

3. This Article shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for women to pursue a vocational activity.

Articles 120 and 121

Deleted

Article 122

The Commission shall draw up a report each year on progress in achieving the objectives of Article 117, including the demographic situation in the Community. It shall forward the report to the European Parliament, the Council and the Economic and Social Committee.

The European Parliament may invite the Commission to draw up reports on particular problems concerning the social situation.