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**REPRESENTATION OF INTERESTS, PARTICIPATORY DEMOCRACY AND LAWMAKING IN THE
EUROPEAN UNION: WHICH ROLE AND WHICH RULES FOR THE SOCIAL PARTNERS?**

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TABLE OF CONTENTS

- I. Participatory democracy and representation of interests by the social partners**

The normative and empirical framework of the activity of the social partners in the lawmaking procedure
 - A. The law-making procedure of art.138 and art.139 of the EC Treaty
 - B. Who are the social partners?
 - C. Representativity of the social partners: the perspective of the European Commission and of the European Court of First Instance

- II. The paradigm of participation: old and new models**

- III. Representation of interests through the social partners: representativity, democratic legitimacy and accountability. A critical assessment**
 - A. Representation of interests and democratic legitimacy
 - 1. Sources of legitimacy alternative to the parliamentary representation
 - 2. Representativity of social partners and legitimacy of the lawmaking process: which link?
 - 3. The exclusion of the European Parliament and the democratic legitimacy of the process
 - B. Accountability of the social partners

- IV. Fair representation and democratic legitimacy: a proposal**
 - A. Rules on representation
 - B. The complementarity of functional and territorial representation

Abstract

The paper provides for an analysis of the lawmaking procedure, enshrined in art.138 and art. 139 of the EC Treaty, in the area of EU social policy. The legislative scheme provided therein introduced an institutionalised model of participation of “civil society” groups (EU-level organizations of labour and management) to European governance, and, without a doubt, represents an extremely important field of experimentation for new self-regulatory processes. However, it must be assessed whether the current framework of the procedure allows the attainment of the fundamental aim pursued by participatory models of conferring more democratic legitimacy into the lawmaking process. As a matter of fact, the lack of representativity and accountability of the social partners (acting as lawmakers) and the very limited role of EU institutions in the process may endanger the target of ensuring an adequate representation of a wide range of interests, eventually resulting in the paradox of emphasising, rather than lessening, the democratic deficit in the lawmaking process.

After having examined the implications of the procedure in terms of normative models of representation, legitimacy and accountability, in a constructive perspective two fundamental changes are advocated: (i) the establishment by the EU institutions and by the social partners of more defined rules of representativity, accountability and transparency of the process and (ii) reshaping the balance between private and public actors in the process -by supplementing the functional representation of the social partners with a wider representation of interests by the EU institutions- - in favour of a more inclusive and fair representation of interests.

I. Participatory democracy and the representation of interests by the social partners

In the contentious debate about the lack of democratic legitimacy, accountability and transparency in the European Union, the idea of enhancing better governance through a broader participation of civil society has being strongly advocated among scholars and, more recently, by EU institutions.

The concept of “participation” is, in fact, at the hearth of the White Paper on Governance¹, whereby the Commission identifies the main principles of good governance in “openness, participation, accountability, effectiveness, coherence”. The participation of European civil society, through organizations representative of supranational interests, to the developments of transnational governance, has been framed as “a means to connecting society to structures of governance”². According to the model proposed by the European Commission - which seems also strongly consistent with theories of democratic experimentalism³ - participatory democracy is conceived as a bottom-up, rather than a top-down, model, in which civil society is enabled to give inputs in order to shape and influence the governance of the public community⁴.

The involvement of organizations of interests in policymaking is not a novelty in the European arena. Organized interests have always been present at EC level, providing expertise and support in the implementation of European policies, to the extent that it has been also even questioned whether they have adjusted in time to the evolution of European integration or whether they themselves have been “driving forces” of the integration process⁵.

Despite that, organizations of interests have been generally acting at EU level according to informal schemes and, as recognized in the White Paper, the search for “rules of participation” of civil society to European governance is still in an early stage⁶.

An exception to the mentioned informal setting is currently envisaged in the EU social policy field, where the participation of the social partners⁷ to the lawmaking procedure has been granted even a constitutional framework (art.138 and 139 of the EC Treaty). As a result, the area of social policy may indeed represent today an important field of experimentation in the crucial search for new regulatory models.

However, drawing on a strict analysis of the legal provisions and of the current rules of implementation of this alternative model of drafting legislation, in this paper we argue

that the goal of achieving a more democratic governance through participatory models may be endangered if, at the bottom, a sufficiently wide representation of interests is not guaranteed. When binding legislation is considered, as in the new social policy lawmaking procedure, the encouragement of self-regulatory processes by private organizations must be combined with the fundamental need of representing the interests of those who, not being represented by the organizations involved in the procedure, will be affected by the outcome of the legislative process.

From a historical perspective, trade unions and business associations -today explicitly addressed by the White Paper as organized interest groups part of the “civil society- have been organized at European Community level since the very beginning of the European Community experience. However, whereas they have been initially exerting influence mainly through informal activities (such as lobbying), their participation has gradually evolved toward more formal and, as mentioned above, very recently even into institutionalised schemes⁸.

As a matter of fact, while the social partners have been involved in the past in many consultation procedures and various committees, to date they are formally granted, directly by the EC Treaty (art.138 and art. 139), a right of mandatory consultation and of drafting legislation in the social policy field. Such empowerment does not have any concurrent example in the entire EU institutional architecture and, to a great extent, not even at the national level of Member States.

The mentioned process, whose outcome is the conferment to the social partners of a key role in the shaping of EU social policy, has seen a first stage with the Single European Act of 1986, where the relevance of the “social dialogue” between the social partners (and, in an unclear extent, with the Commission as well) has been recognized in art. 118b. Later on, in 1992, the Agreement on Social Policy (APS) annexed to the Maastricht Treaty designed a system of consultation and participation by the social partners to the lawmaking process. Finally, by means of the incorporation of the mentioned agreement in the EC Treaty by the Treaty of Amsterdam in 1997, the lawmaking procedure providing

for the involvement of social partners became at any effect part of the EC legislation currently in force.

As a matter of fact, a closer look – in and beyond the façade of the written rules - to the crucial issue of how representation of interests is carried out in the social field raises some doubts about the fact that a participation implemented according to the current practice may meet the goal of increasing the democratic legitimacy of the lawmaking process.

In section II of this paper, we focus, using a more empirical basis, on the main features of the new lawmaking procedure and on the “identity” of social partners (with reference to their structures and to the representativity issue as addressed by the institutions and by the Court of First Instance in the *UEAPME* case⁹). Such an assessment is crucial because we believe that the lack of proper consideration of the nature and consistence of the actors participating to the process could lead to an excessive emphasis on the real democratic “potential” of the new procedure. The issues raised are the following. Who are the social partners and for whom they really speak? Can they guarantee an extensive representation of interests or is the representation via the social partners is just an elitist practice? Who has the task of assessing the accountability of social partners and according to which criteria?

In section III we examine some normative models of participation (mainly referring to neo-corporatism theories and to the consociational approach) in order to understand to what extent the model currently enhanced may reproduce or may be assimilated to previous experiences and to what extent it introduces completely new elements requiring the development of a new model.

The issues of democracy and accountability, seen in connection with representation of interests are discussed in section IV. Is the model of functional representation, encompassed by the social partners, able to replace, in a democratic discourse, the territorial representation? Is representativity, in the broad dimension of the Community,

still an appropriate paradigm to assess the accountability of public actors (such as the social partners) or should such concept be reshaped? Should the concept of institutional balance apply also to lawmaking in the social field (with the consequence of recovering the role of the European Parliament in the procedure) or is the absence of the European Parliament irrelevant in terms of democracy? How are interests not represented by the social partners given voice in the lawmaking process?

Finally, in section V we propose to review the current model of participation of the social partners to the drafting of legislation enforcing two main changes. Firstly, a new set of rules concerning the representativity of social partners should be implemented, either by the European institutions or by the social partners themselves. While the norms concerning the criteria and yardsticks to become a “ruler” and to assess accountability must be determined at legislative level, the organizations currently involved in the legislative procedure should indeed give their contributions, by refining their internal structures and representation mechanisms (currently very indefinite) in order to ensure representativity, coordination with the national levels, and transparency in the deliberative process. Secondly, a more balanced participation and coordination between public and private parties in the lawmaking process must be pursued. The current procedure does not envisage any role for the European Parliament and reduces the functions of the Commission and of the Council to mere control (they are not entitled to amend the proposals of the social partners, but only to implement or reject the agreement). Such an unbalance, which could raise serious concerns for the representation deficit in the procedure (also due to the intrinsic limits of functional representation of private parties) and for the lack of political responsibility and accountability of the social partners, could be reduced by coordinating the functional representation with the territorial representation ensured by the European Parliament or by “recovering” a more active participation of the Commission and of the Council.

II. The normative and empirical framework of the activity of the social partners in the lawmaking procedure

A. The lawmaking procedure of art.138 and art. 139 of the EC Treaty

The last amendments in the Treaties and the evolution of the policy making strategies at the European level have framed a major role for the social partners in shaping the social policy of the European Union¹⁰. However the empowerment of the social actors with the right of drafting legislation - one of the core functions of a polity system - constitutes probably the most significant recognition of the relevance assigned to the collective actors¹¹.

The main traits of the lawmaking procedure in which the social partners are involved (which we could therefore define as the “social dialogue” legislative procedure) can be summarised as follows. According to a first pattern, the social partners may participate in the process by means of a consultation procedure. Pursuant to art.138, par.2, of the EC Treaty, the Commission, before submitting a proposal on a social policy issue, must consult the social partners. After this first consultation, the Commission may draft a proposal and submit it to the social partners, who may draft an opinion or a recommendation. After this second consultation, the legislative proposal follows the procedure provided by art.251, with the involvement of the European Parliament, and will be enacted by the Council either by qualified majority or a unanimous vote (depending on the topic, art.137).

The legislative procedure may nonetheless follow a second alternative pattern (enshrined in art.138, par.4), within which the social partners become the main players. Upon the first consultation of art.138, the social partners may inform the Commission of the wish to open negotiations in the view of reaching an agreement on the content of the proposal. In other terms, they retain the power to draft the legislative proposal for a term of nine months (term which may be extended by an agreement with the Commission). If an agreement is reached between the social partners, pursuant to art.139, par.2, it may be implemented either by a decision of the Council or at national level (according to the procedures of the social partners and Member States¹²). If the social partners do not reach an agreement on the legislative proposal, the “standard” lawmaking procedure of art. 137

will apply (the Commission will therefore draft the proposal and the procedure of art.251 will be followed).

So far, the Council has always implemented the agreements reached by the social partners by means of a Directive, following the technique of the “annex”. By reason of such procedure, the agreement, annexed to the Directive in the original text drafted by the parties, is granted binding effect, *erga omnes*, assuming at any effect the force of EC legislation¹³.

Pursuant to the mentioned scheme, the social partners are granted the option, once the Commission has informed them of the intention of taking an action on a certain issue, to take over (or to “hijack”, in the effective words of Lammy Betten¹⁴) the proposal from the Commission. In this case Community institutions, namely the Parliament and the Commission, are excluded, or pre-empted, from interfering, legislating or elaborating parallel proposals.

The mere consideration of the normative framework as described above permits us to point out the following critical issues, which will be discussed, along with the consequent theoretical implications, throughout the paper:

- (i) The subjects of the procedure. Art. 138 does not provide neither for a definition of “social partners” nor for any other criteria of access to the procedure. Who are the rule makers?
- (ii) Exclusion of the European Parliament. According to art. 138 and art. 139 of the EC Treaty, in case of intervention of the social partners the Parliament does not play any role and does not have any right (not even of consultation or information). Is there any consequence in terms of democratic legitimacy for this procedure?
- (iii) Institutional control. The Treaty does not explicitly provide for an eventual power of amendment of the Commission or the Council with respect to the proposal of the social partners. To what extent do the mentioned institutions

retain the powers to exercise control over the proposed legislation? What are the limitations on the action of social partners?

B. Who are the “social partners”?

Whereas there is not a definition in EU legislative sources of “social partners”, in reality there is a consolidated practice which refers the mentioned term, at European level, to “sectorial” associations of trade unions and business organizations (meaning referred to a specific sector, such as commerce sector, metalworkers and so on) and to three main “intersectorial” or cross-sectoral organizations (specifically ETUC, European Trade Unions Confederation, UNICE, Union of Industrial and Employers’ Confederations of Europe and CEEP, European Center of Enterprises with Public Participation).

The above-mentioned organizations have “historically” been present on the European community arena from very early. However, since the phenomenon of “social dialogue” received a formal recognition in the Single European Act (1986), ETUC, UNICE and CEEP have been the principal interlocutors of the European institutions. While the associations at sectorial level are also very important (and indeed the social dialogue at sectorial level is very lively in its current articulation¹⁵, we will focus only on the intersectorial organizations, which are involved in the lawmaking process of more general scope and relevance.

ETUC, UNICE and CEEP affiliate other collective agents, i.e. the representatives of labour and management at national level¹⁶. With the only exception of CEEP, they do not admit individual membership (single workers or employer).

The European Trade Union Confederation (ETUC) was established in 1973 and to date affiliates approximately 76 National Trade Union Confederations from 34 countries (including candidate Central and Eastern European countries). The executive body is composed of representatives of national members according to some quota defined in

proportion to the national affiliated members of each national organization. Decisions are usually taken by qualified majority. With regard to the internal structure of ETUC, it must be remarked that its statute does not provide for any legal mechanism (such as a mandate or delegation of powers) relating to the representation of interests of the affiliated national organizations in the eventual negotiation processes¹⁷. By the same token, the same national members are not bound in any way to implement at national level decisions or policies guidelines established by the European level organization. Finally, the extreme diversity of the representation models adopted by the national affiliated members and their already relevant problems of representativity contribute to make the framework extremely complex and heterogeneous¹⁸.

It is meaningful to note that that the business organizations have been founded immediately after the establishment of the Community. The UNICE was set in 1958, CEEP in 1961¹⁹. They are equally composed of national employers' confederations, with the exception of CEEP that admits also individual membership. Likewise the ETUC, management organizations have neither defined powers nor mandates to negotiate for national members and, on their turn, affiliated national organizations are not bound by European level agreements. Moreover, the aforementioned organizations have internal processes of deliberation (based on the unanimity rule, at least when agreements must be voted on) that reflect, at European level, the general situation of difficult governance and of employers' associations.

The overview briefly outlined above leads us to some basic remarks. Firstly, there are still significant problems of coordination and representativity between the national level of the associations and the European peak-level organizations. The European-level actors are currently involved in shaping their internal organization and rules and however, they lack any internal mandate to act as bargaining agents on behalf of the national associations they claim to represent.

Secondly, there is an even weaker and evanescent link between the European level organizations and the final addressee of their action, meaning the individual worker and

the single employer. The European level associations affiliate national confederations, which, in turn, are usually formed by federations. Consequently, the final addressee of the European agreement or legislative measure (for instance the worker) seems to be very far from the first ring of the chain and, at any rate, he did not usually confer any mandate to negotiate to the European organizations. For that reason it is widely justifiable the conclusion according to which ETUC, UNICE, CEEP could be, at most representative of organizations (and this is already doubtful for the reasons explained above), but not of the majority of European employers and workers²⁰.

Finally, if, in addition to the unclear link between national level and European level organizations, we also consider the representativity deficit of labour and business associations also at national level, by reason of the extremely low membership rates on both sides (on the side of employees the low union affiliation is a widespread phenomenon), it becomes evident that while the agreement signed by the European social partners can become legislation binding for all the European citizens, only a very small fraction of those citizens are in reality represented in the process. And this latter conclusion surely raises the alarming question of the legitimacy of the whole law-making process.

C. Representativity of the social partners: the perspective of the European Commission and of the European Court of First Instance

The issue of the representativeness of social partners and of the selection criteria for the access to the “social dialogue” legislative procedure has understandably been very contentious. Indeed, both the European Commission and the European Court of First Instance expressed their opinion on the issue.

Following the introduction of the right of consultation for the social partners (Agreement on Social Policy, 1992), in December 1993 the Commission established three selection criteria for being considered as a “social partner” in the scope of the Agreement²¹.

Nevertheless, the Commission asserted that the selection criteria were applicable only for the purpose of consultation because, in the event that the social partners were to decide to enter into negotiations in view of reaching an agreement, the principle of mutual recognition would apply. According to the mentioned requirements, the Commission then elaborated a list, annexed to the same Communication, of the organizations, which met the representativeness criteria, taking on the further commitment to update the data in the following years²².

This formulation generated enormous criticism, mainly because the selected criteria related almost exclusively to the formal organizational structures of the social partners, rather than to their “real” representativity²³. As a consequence, the European Parliament also recommended a review of the established representativity criteria, suggesting that the organizations should be able to provide a real mandate from their members to act as representative agents in the social dialogue procedure²⁴. To date, no changes have been effectively brought.

The social partners participating in negotiations of the agreements to date implemented by Directives of the European Council have been only ETUC, UNICE and CEEP, whilst other organizations²⁵ (“representative” according to the list of European Commission valid only for *consultation* activities) have not been admitted to the table of negotiations. On such grounds (exclusion from negotiations) the whole system has been brought before EC judicial Courts.

In fact, following to the execution of the first Directive on Parental Leave, the organization *UEAPME* brought the case before the Court of First Instance of the European Communities, requesting annulment of the Directive by reason of its “illegitimate exclusion” from the lawmaking procedure. The interest of the judgment of the Court stays in its scope as it covers almost any aspect of the lawmaking procedure of articles 138 and 139 of the Treaty (this is why it is often recalled, even in this paper).²⁶

Despite the unquestioned representativeness of UEAPME²⁷, the Court affirming the position of the Commission, held that private organizations cannot invoke before Community's institutions any right to participate in the negotiations carried out to reach an agreement, as this is an "exclusive affair" of the social partners. However, a right of action for an excluded organization is admissible only where there is a lack of "sufficient representativity" of the signatories social partners. The concept of "cumulative sufficient representativity" is shaped by the Court with reference of the representativity of all the signatories parties, "taken together", with respect to the content of the agreement (paragraph 90)²⁸.

However, when the social partners request the legislative implementation of the agreement, the Commission "thereupon resumes control of the procedure" (paragraph 84), therefore implying the duty to "examine the representativity of the signatories to the agreement in question". The same function is assigned, as a second point of the institutional review, to the Council.

The extent of the institutional control on the representativity of the parties is not very clear. Firstly, the clear line drawn between the consultation stage and the eventual negotiation stage is quite artificial as the second stems from and is the clear extension of the first. Secondly, the criteria to assess the "cumulative" representativeness are extremely vague and pave the way to either discretion of the parties in excluding other representative parties or, on the other extreme, to admit parties with no individual sufficient representativity. Therefore in conclusion, the judgment of the Court of First Instance does not seem to have clarified the relevant uncertainties still concerning the "dogma" of representativity.

III. The paradigm of participation: old and new models

In the attempt of qualifying the model implemented at European level of participation of the social partners, several authors have not hesitated to qualify it as openly

“corporatist”²⁹ or “protocorporatist”³⁰. The pragmatic acceptance of functional interest-representation in the policy-making is in fact, a main feature of corporatist systems. While lobbying is intended as a mechanism of interest articulation in a system based on open competition, in the corporatist view the integrated participation in public decision-making is realized through a small number of interest associations³¹.

To a certain extent, the incorporation of interests represented by business and labour organizations is not unfamiliar to the traditions of some European Member States, where corporatist models have been largely implemented in the 1970s. However, the rediscovery of the macro or tripartite concertation at national level in the last decade³² (especially for the purpose of containing salaries growth³³) has determined a revival of corporate theories and the flourishing of a wide literature on the phenomenon³⁴.

Leaving aside the doubts on the theoretical applicability to the European dimension of a model conceived specifically for the national State, it must be said that the EU-level corporatism, if any in the social field, presents very peculiar features. Firstly, whereas the inclusion of private organizations of interests in the lawmaking procedure is in corporatist practices a political contingent choice (not rarely part of a broader “social pact”, attained in a given historical moment under certain political conditions³⁵), at Community level the rights of the social partners to be consulted, and eventually to determine the content of the legislation in the social field, is “institutionalized” or “constitutionalized” in the Treaty. Secondly, when the social partners take over the legislative initiative they strongly limit, in the current practice, the role of the other institutional actors (and actually their intervention replaces and excludes the European Parliament from the procedure). Most probably, this empowerment confirmed in its main traits by the judgment of the European Court of First Instance³⁶, has no parallel in the neo-corporatist models recently implemented in “national” democracies, based more on a power-sharing between private parties and institutions (“concertation” models) rather than on exclusionary attitudes.

The approach adopted by the European Union in shaping social policy, consisting in exercising legislative powers by achievement of a broader consensus through bargaining activities of groups, also recalls some elements of consociational theories. The normative model of “consociational democracy” (as opposed and alternative to majoritarian democracy) has been proposed by Arendt Lijpharts to manage conflicting interests in deeply divided multi-ethnic societies³⁷. Lijpharts’ model for conflict resolution is based on consensus and bargaining rather than on majoritarian mechanisms. “*Consociational democracy means government by elite cartel designed to turn democracy with a fragmented political culture into a stable democracy*”³⁸. Hence, according to Lijphart, from an institutional perspective stability can be achieved through broadly inclusive coalitions, intense bargaining activity, representation of all segments of societies and compromise (rather than majoritarian rules)³⁹.

If we assume that organizations of interests at European level represent “elites”, it could be held that the philosophy embedded in the European social policy model presupposes, consistently with the consociational approach, that elite-cooperation can overcome the imperfections of traditional decision-making. However if such hypothetical parallel could be drawn, we would realize that the European social model could be subject to the same criticism often raised against Lijphart theory - that is to say, the attitude of not being inclusive in the representation of interests of the wide range of interests in society. As a matter of fact, a wide representation of interests is excluded *a priori* in the EU social policy lawmaking procedure where there is not even a “plurality” of subjects. The elites acting in the EU social policy field consist in an extremely limited number of organizations, *per se* representatives of fragments of the society, and moreover with a truly low representativity.

Nevertheless, the partnership scheme enhanced in the EC Treaty for the social partners may hardly be assimilated with models previously elaborated. The procedure herein considered is certainly a self-regulatory process to the extent that legislation is accomplished through a bargaining activity of the parties. It is still not clear how and to what extent the elements of external control (to be exerted by the Commission and the

Council) can graft onto the sphere of activity of private parties, since so far it has been maintained that the Council may only accept or reject the proposal of the social partners⁴⁰. Consequently, the model enhanced appears to limit the role of the institutions to a merely controlling one, whose outcome can be a refusal of implementation only when fundamental provisions of the Treaty are endangered.

Given these premises, in the current framework it seems that there is no room for a concerted or coordinated activity between private and public parties in the procedure of articles 138 and 139 of the EC Treaty. The “take it or leave it” pattern prevents a real interaction between organizations of interests and public institutions and, consequently, a comprehensive assessment of a wide range of interests (beyond the interests of the private parties involved). Therefore, as will be better explained in section V, the model of participation of the social partners should be reshaped in our perspective, to ensure a more inclusive and balanced co-operation with the public institutions.

Finally, it must be also taken into account that theoretically, in a more radically critical approach, the very attitude of the participation of the social partners to increase the legitimacy of European governance has been questioned.

The critique concerns the notion of participation presented by the EU institutions (recently by the Commission in the White Paper on Governance). Magnette holds that the involvement currently fostered is based on an extremely limited conception of participation, dominated by the monopoly of organized groups (and the social partners are among them) and not by the idea of “enlarged” participation to ordinary citizens⁴¹. Moreover, the involvement of citizens and groups currently envisaged is limited to defined procedures, without enhancing the “general level of civic consciousness and participation”. Therefore, the aim of creating conditions for an active exercise of citizenship may be pursued, according to Magnette, not by the inclusion of a few groups, but only by following the pattern of parliamentary democracy and majoritarian systems.

A similar major critic is raised by Steinberg, who also identifies the participation promoted by the Commission as limited to “organized, financially and conceptually powerful lobbying groups”⁴². Steinberg maintains that a real participation of citizens may be realized only with the opening also at European level of a political discourse and the inclusion of political parties as actors of civil society within the idea of participation.

The mentioned critics seem to highlight once again the lack of content of the EU citizenships and the long recognised problem of the gap and distance between EU citizens and the life of the EU institutions. Even so, shaping the discourse in terms of individual participation (of the citizens) *versus* collective participation (of the organized groups) in our perspective is not correct. The desirable fortification of the individual-citizenship dimension in the EU (including the possibility to exercise more directly and actively individual rights) is not antithetic, neither alternative nor supplementary to the participation to the policymaking and institutional life of groups representative of organized interests. Functional representation, when exercised through fair representation and balanced with mechanisms ensuring public control on the process, can reinforce the democratic legitimacy of a system without endangering or jeopardizing the rights of the individual⁴³).

IV. Representation of interests through the social partners: representativity, democratic legitimacy and accountability. A critical assessment

A. Representation of interests and democratic legitimacy

The absence of clear criteria or yardsticks to evaluate the representativity of the social partners, their current scarce representativity and the exclusion of the European Parliament from the procedure are all issues which raise the following question: how should we assess the democratic legitimacy of the “social dialogue” legislative procedure?

We address the aforementioned issues under the following dimensions. Firstly, we inquire as to whether, according to the doctrines of political theory on democracy, there are sources of legitimacy alternative to parliamentary representation. Secondly, the significance of the link between representativity of the social partners and legitimacy of the procedure must be discussed, taking into consideration also the extent of institutional participation and control on the procedure. Thirdly, the relevance of the exclusion of the European Parliament from the process, in terms of legitimacy, is considered.

1. Sources of legitimacy alternative to parliamentary representation

The democratic legitimacy of a system is generally evaluated through the parameters of accountability and representation. Low legitimacy in any lawmaking procedure is commonly traced back to a lack of participation by the citizens in the making of the laws they will abide by.

According to classical theories on democracy, democratic legitimacy is the main feature of parliamentary systems, wherein public government is exercised by “the people” through elected representatives⁴⁴. It has however been largely observed that in recent times two other sources of legitimacy, beyond parliamentary representation, have increasingly become relevant in a democratic discourse: the functional articulation of interests of society into the political system and the ability to effectively deliver stability and welfare (“effectiveness”)⁴⁵. Three such components (parliamentary representation of interests, functional representation and effectiveness) are usually combined and attributed different weights in the various political systems.

The functional representation of interests has mainly been expressed, as partially discussed above, in the two forms of corporatism (and this especially in some small European countries with a reduced fragmentation in sectors and greater cultural homogeneity) and lobbying schemes (see the US model). If, at national level, the emergence of direct functional representation of interests has increasingly taken place in the last decades as a supplement to strong parliamentary systems⁴⁶, at EC level such

representation has always played a strong role. One reason put forward to justify the relevance of functional representation (expressed mainly in the form of lobbying, with a trend to corporatism only in the social dialogue⁴⁷), has also been the lack of a strong party system and the absence of a powerful parliamentary dimension.

The third feature of democracy, related to its “effectiveness dimension” (as discussed by Dahl, 1963), has been addressed as the ability of a democratic system to provide for political solutions, security and welfare. The widespread tendency, in recent decades, to stress the significance of effectiveness has led to an even more significant delegation of decision-making power to informal groups and organizations (with the consequent reduction of the parliamentary role), giving rise to the phenomenon of what has been named the “post-parliamentary or organic democracy”⁴⁸. At European level the effectiveness principle turns out to be crucial, as the Community itself has as its main goal, achieving the objectives that member states alone may not achieve.

Given these premises, we may then ask whether, in the limited context of the social dialogue legislative procedure, the functional representation of the social partners and the effectiveness of the procedure may replace, in terms of a democratic discourse, the lack of an adequate representation of citizens in the lawmaking process. As a matter of fact, representation by the main organizations of labour and management is surely a functional representation of interests and the effectiveness of the procedure may be interpreted as the attitude of the procedure to attain the result of an efficient implementation of legislation in the field of social policy.

As for the relationship between effectiveness and representativity, in normative democratic theory it has been held that “effectiveness can, however, not replace representativity as in independent basis of legitimacy”, because effectiveness is a supplementary but not an autonomous element of democracy⁴⁹.

This argument can be brought to conclude that also in the social dialogue lawmaking procedure the effectiveness of the process, which has been addressed by some scholars as

the only and very reason itself for the empowerment of social partners⁵⁰, may not replace or compensate the evident lack of representativity. While effectiveness can be addressed as a parameter to evaluate the real ability of a system or a process to deliver solutions, an adequate representation is the basic element able to confer legitimacy on the process.

In connection with the issue of functional representation, it is worth remarking that in democratic systems the functional channel of representation, when in existing, is usually not exclusive and more importantly, that Parliament or other representative institutions do retain the power to exercise control, more or less extensive, on the decision making of the organizations of interests⁵¹. These circumstances are not met in the procedure considered here, where (i) there is not a concurrent representation of the social partners and the European Parliament (which is excluded) and (ii) the Commission and the Council seem to be only entitled to accept or reject the legislative proposal (without any power of amendment). Hence, we must conclude that the functional representation of social partners is not *per se* capable of replacing the lack of representation in the lawmaking process.

2. Representativity of social partners and legitimacy of the lawmaking process: which link?

The mere relevance of a connection between the representativity of the social partners on one side, and the democratic legitimacy of the lawmaking process on the other, has been questioned in principle. This is due to the fact that it has been maintained that legitimacy could never arise from representativity of private subjects⁵². The consequence of such position is that, by reason of the “illusion of democratic legitimation” given to the lawmaking process by the participation of the collective actors, the representativeness of the social partners would be, in democratic terms, irrelevant⁵³.

The interpretation described above is, in our perspective, only partially correct. It is true that a more unequivocal representativity of the social partners is not in itself able to

confer full legitimacy on the process, because the principle of sovereignty of people cannot be traced back solely to labour or management organizations. Accordingly, in this paper we strongly advocate different mechanisms of participation of EU institutions in the process or the involvement of the European Parliament.

Nevertheless, if an adequate representativity of the social partners is not sufficient, it certainly is in our view, one of the conditions necessary to attain legitimacy in the social dialogue lawmaking procedure. This is because, as already remarked, the social partners, more than the institutional bodies, are the main actors in the lawmaking procedure considered here, as they may remove the proposal from the control of the Commission and regulate the matter. Such power clearly emerges if we consider that, while Council certainly has the right to refuse the implementation of an agreement, it probably does not retain powers of amendment of the legislative proposal.

The possibility of bringing amendments was originally explicitly stated in the Agreement of 31 October 1991 (signed by ETUC, UNICE, CEEP) from which the Agreement on Social Policy of 1992 originated. However, such provision has not been later transposed into the Social Policy Agreement annexed to the Maastricht Treaty and therefore it is not today included in the EC Treaty (in which, since 1997, the Social Policy Agreement has been, in its turn, transposed). Given the doubts arisen from the silence of the text of the Social Policy Agreement of 1992, the Commission, in a Communication of 1993, expressed the opinion that the Council should not amend the collective agreements because the autonomy of the social partners must be preserved⁵⁴. The same position was later confirmed in the explanatory memorandum on the implementation of the agreement on Parental leave. Similarly, the prevalent opinion among scholars is that amendments by the EU institutions to the agreements drafted by the social partners would not be allowed because they would be inconsistent with the clear intent of the legislature to enhance the autonomy and the initiative of the social partners⁵⁵.

De facto however, thus far the Council and the Commission have never modified the mentioned agreements, always implemented exactly in the original text (using the technique, discussed in sect.2, of the Annex of the agreement to the Directive).

The outcome of this setting is that the agreements are capable of indirectly becoming a source of EC law⁵⁶. The clear consequence is that in our perspective, an assessment of the representativity of the social partners seems to respond to fundamental democratic principle of the accountability of the lawmakers. Indeed, the democratic principles imply that citizens should be involved in lawmaking through some rights and procedures, whose final aim is to ensure that the “addressees of the law can also participate in the making of the law”⁵⁷. Lacking the representativity of the social partners, such link could be, in our perspective, disproved.

3. The exclusion of the European Parliament and the democratic legitimacy of the process

In the controversial debate surrounding the democratic deficit in the European Union⁵⁸, an increase of legitimacy through strengthening the role of the Parliament in decision-making processes has been firmly advocated⁵⁹. As a point of reference, even if the EU system is not a parliamentary democracy, it has been largely recognized that the European Parliament is the institutional body which, by reason of the territorial representation, should guarantee a wider and more inclusive representation of the will of European citizens. Actually, the defense of the prerogatives of the European Parliament is also at the core of the theory of institutional balance⁶⁰, demanding a more fair distribution of powers between EU institutions.

In the institutional framework, consistently with such commonly shared setting, the changes implemented in the more recent revisions of the EC Treaty have indeed strengthened the role of the Parliament (also through a larger application of the co-decision procedure).

Still, it is evident that the social dialogue legislative procedure contained in the Treaty, - according to which the European Parliament is not even formally to be consulted - is in clear counter-trend with respect to the reformations of the EC Treaty and the institutional strategies described above. The marginalization of the European Parliament could then seem even more surprising if we consider that the legislative action in the social policy field affects an area of regulation that is probably the closest to the interests of citizens⁶¹.

In normative terms, we should ask whether the exclusion of the European Parliament has far-reaching consequences in terms of democratic legitimacy of the lawmaking procedure: if the Parliament should represent “the people” of Europe, are the social partners, with their low representativity, able to replace the parliamentary assembly and represent “the people” of Europe? Is there any proportion between the subjects represented by the social partners and the effect that the “negotiated” legislation will have?

These inquiries received a very questionable –and unsatisfactory-- answer by the European Court of First Instance in the UEAPME case⁶². After having openly confirmed the position of the European Court of Justice, according to which the legislative procedures must reflect the fundamental democratic principle of participation through the representative assembly (paragraph. 88), the Court of First Instance surprisingly held that, lacking the European Parliament in the social dialogue procedure, “*the participation of the people is otherwise assured... through the parties representatives of management and labour who concluded the agreement*” (par. 89). Holding that the will of the people may be legitimately and alternatively represented via Parliament or via the social partners, the Court seems to imply that two channels of representation are, in practice, equivalent.

Indeed, such an assertion is surely questionable. From a theoretical point of view, private actors may never achieve the legitimacy of a democratically elected parliamentary assembly, the only direct expression of the sovereignty of people. In addition to that, the

empirical observation of the evident lack of representativity of the social partners leads us to definitely reject such conclusion.

The Court brings the argument that the legitimacy of the process is ensured by the intervention in the procedure of the Commission and the Council, for they have the tasks of evaluating whether the content of the agreement is consistent with the principles of European Law and for determining whether the social partners were sufficiently representative. But, for the reasons mentioned throughout the paper (concerning the uncertainty about the real extent of control exercised by the Commission and the Council and the vagueness of the criteria to assess the representativity of social partners) the position of the Court on this point is certainly not convincing.

In conclusion, the exclusion of the European Parliament from the lawmaking procedure may have, in our view, relevant consequences in democratic terms, furthermore because the absence of the Parliament is not balanced by a participation of the other institutions (the Council and the Commission do not really have any real power to discuss or amend the proposal). The scarce representativity of the social partners does not ensure a wide representation of interests, and the lack of the Parliament increases the deficit of representation in the procedure.

Firstly, from a “quantitative” point of view, there is a clear disproportion between the subjects that the social partners may (even theoretically) represent and the number of people that their action may affect (making reference to the statistic and numbers of the Commission about 70 millions workers). Secondly, the exclusive representation through private parties (without the interaction of an institutional subject representing “the people” and the public interest) leaves open the issue of unrepresented interests in the formation of legislation. Thirdly and similarly, the risk of inequality in the process, between management and labour is not balanced with the presence of an impartial actor representing the more general will of the people. All these questions will be further discussed in section V of the paper.

B. Accountability

The accountability of rulers is a crucial feature of any democratic system. According to Schmitter and Karl, the term “democracy” can be referred to a “regime or system of governance in which rulers are held accountable for their actions in the public realm by citizens, acting indirectly through the competition and cooperation of their representatives”⁶³.

Drawing on this generally shared assumption, we may argue that the need for accountability, intended as the capability of subjects exercising public functions to be held responsible for their actions, implies, in political terms, the problem of control by citizens of the actors deliberating on public issues.

Given that the social partners play the role of “rulers” in drafting legislation, they should in some way be accountable. But so far, it has been very difficult to hypothesize a system of control or review executed by citizens, by members of the same organizations or by institutions according to predetermined rules and procedures.

Obradovic addresses the problem of accountability with reference to the literature on representation of interests in corporatist systems⁶⁴. By also making reference to the theory of democracy by Andersen recalled above, she argues that the justifications for incorporating social actors in the lawmaking procedures may be found in the notion of “representative efficiency” or in the achievement of “public interest”. According to the former, functional accountability as a consequence of functional representation, could be justified by economic efficiency reasons, namely when the participation of some specific groups to the formation of policy leads to tangible efficient results⁶⁵. The “public interest” argument is based on the idea that functional representation via organized interest groups gives voice to interests openly and clearly linked with public purposes and therefore it is justified to the extent it is coincident or compatible with stated purposes of public policy⁶⁶.

The position of Obradovic, according to which the vague concept of “public interest” at European level (and in particular in the social policy field) does not provide for clear standards to measure or to vindicate neither the actions of the social partners nor their accountability, can be definitely shared. The arguments already discussed in the paper with respect to the general issue of democratic legitimacy have also already highlighted the salience of the accountability problem.

A last relevant implication, which will be discussed in the next section, arising from the lack of a set of rules to determine the accountability of the social partners concerns the political responsibility of the legislative actions reached through the social dialogue legislative procedure.

V. Fair representation and democratic legitimacy: a proposal

In this paper, starting from the recognition that the legislative participatory model introduced in EU social policy is an extremely important opportunity in the direction of experimenting and encouraging self-regulatory techniques, we raised the question of whether the scheme currently realized may result in a “democratic paradox”. The envisaged risk consists, as explained in the paper, in the fact that the lack of representativity of the actors, the exclusion of the European Parliament from the procedure and the limits of the action of the Commission and the Council could ultimately end up re-enforcing, rather than reducing, the democratic deficit of the process.

Building on this conclusion, our proposal aims at improving the democratic legitimacy and accountability of the legislative procedure according to two main directives: setting clearer rules for the action of the social partners and attaining a more balanced participation of the EU institutions in the procedure.

A. Rules on representation

As held by Moravcsik, at the European level “full representation” is not feasible but “fair representation” must be a goal⁶⁷. Indeed the representation of millions of citizens (and in our case of millions of workers) imposes the difficult task of organizing interests and of necessarily adapting the normative models of representation to the broad EU dimension. However, the basic principles of authorization and accountability, embedded in the very notion of representation, may not be completely displaced.

According to this approach, in the first instance we would propose that the European level organizations of labour and management (which are presently subjects with weak structures and uncertain rules) adopt clearer internal rules. Such directives should have the purpose of: a) clarifying the scope and limits of the mandate from the national members (national-level organizations) b) establishing internal mechanisms for the assessment of the representativity of the affiliated members; c) creating rules for “internal” accountability; and d) re-enforcing the relationships with the grass-roots of the organizations.

In addition to that, at EU institutional level the rules on representativity should also be specified, at least when the legislative functions of the social partners are at stake. The concept of “sufficient cumulative representativeness”, introduced by the European Court of First instance as a parameter for institutional control over the agreement is, for the reasons discussed above, very vague. Therefore more certain standards, aiming at assessing the real consistency of the lawmakers, should be elaborated.

If it is true that “what distinguish[es] democratic rulers from non-democratic ones are the norms that determine how they become rulers and the practices that hold them accountable for what they do once they have become rulers”⁶⁸, such changes cannot be neglected. They would confer to the collective actors a degree of legitimacy that is more proportionate to the relevant role and the significant responsibilities granted to them by the EC Treaty. At the same time, the implementation of the modifications suggested above could accomplish the additional goals of ensuring better coordination between the European and the national level of the labour and business organizations (also in the view

of a coherent implementation at national level of the legislation enacted at European level) and a better representation and protection of the rights of the individuals⁶⁹.

Most of the changes outlined above are consistent with all the issues concerning the representation of interests already raised and discussed in the paper. Nevertheless, an effort of the social partners in creating also a set of rules to ensure transparency in the deliberation process would also be advisable. The current deliberation procedure followed is very secretive, as social partners do not act referring to a protocol or a procedure known or accessible in any way by the citizens. But, being the agreement reached between the social partners able to be transformed in the content of a binding legislative act and being transparency a major value of democracy, citizens should be given instruments to control or simply being informed about the path and content of a legislative proposal (actors, content of the proposals and counter-proposals of the several players and so on).

Finally, the adjustments addressed (also consistent with the view reflected in the White Paper on Governance, according to which not only the institutions but also civil society actors must act pursuing to the recalled principles of good governance) are even more necessary in view of the coming enlargement. The increase in the number of actors and of interests to be represented by the social partners imposes, more so than ever before, the definition of a more unambiguous framework of rules to ensure fair representation and participation in an enlarged context.

B. The complementarity of functional and territorial representation

The second amendment we advocate is the re-establishment of a more adequate balance in the legislative procedure between private and public parties.

Such argument may appear apparently in conflict with the goal of promoting and encouraging self-regulatory processes. The clear trend toward the experimentation of new regulatory models is grounded on objective reasons, among which are the excessive work

load of Parliaments, the inefficiency of public systems *versus* the efficiency of private schemes, and the value of expertise of specialized subjects. In this perspective, the rationale of the current system may be mainly seen in promoting the autonomy of social partners, “revitalizing” EU social policy and improving the efficiency of legislative intervention.

On the other hand, even if collective bargaining is *per se* a self-regulatory process, within the procedure considered the final outcome of the negotiation process, becomes a *legislation* binding on 70 millions of workers. A “private” phenomenon, including collective bargaining activity and agreements executed between private parties (social partners), ends up in the “public” sphere by the transformation of an agreement into binding law. Yet, the interests at stake in the social policy field are very broad and therefore a broader representation of interests (rather than the representation ensured by the social partners) is necessary. Ultimately, the social partners are not accountable and thus they do not have the political responsibility for lawmaking.

All the above-mentioned remarks lead to the conclusion that functional representation cannot completely replace public political control and that the enhancement of self-regulatory process needs to be counterbalanced with elements of public review and control. This explains why, in substance, we advocate a closer cooperation between institutions and social partners.

On a more pragmatic standpoint, the aspiration to safeguard the rationale of the social dialogue legislative procedure (promoting the autonomy of social partners and the self-regulatory process) and the aim of preserving the public interest must be transposed into a technical solution that will be without a doubt difficult to design. In the present paper we may attempt to outline the general content of several alternatives along with their intrinsic limits. However, these alternatives and their inherent implications will require further exploration.

A first option to consider could be a “recovery” of the role of the European Parliament in the social dialogue legislative procedure. The anomalous absolute exclusion of the mentioned institution has been remarked either by the Commission (which, albeit on a totally informal and voluntary basis, has always kept the Parliament informed on the ongoing negotiations) or by the European Parliament itself, which has repeatedly sought recognition of its right to participate in the procedure⁷⁰.

In theoretical terms, re-balancing the representation gap in the lawmaking process by the involvement of the European Parliament, other than being more consistent with the ordinary lawmaking procedure of the Treaty, would ensure a wider representation of interests that only the territorial channel of representation can better guarantee (despite the known limits of the European Parliament). The participation of the European Parliament in a legislative procedure which remains however mainly delegated to social partners would, among others, (i) minimize the significant problem of the under-represented interest (which may occur in the case of representation by private parties) (ii) lessen the general risk of the representativity deficit and finally (iii) rebalance the risk of inequality in the process between the interests of management and labour (a particular danger vigorously noted by scholars as an additional risk to the democratic foundations of the process⁷¹).

Obviously, the positive effect in terms of legitimacy of the process of the participation of the European Parliament to the legislative process are reduced by the numerous limits which characterize such institution at EU level (in the EU Parliament there is not a notably strong political parties system, but more so lobbying system; at the end, the same EU is not a parliamentary democracy).

The European Parliament could be involved in the process according to different models of intervention. For instance, the Parliament could simply ratify the agreement of the social partners. Such solution excludes *a priori* any real participation, reproducing the “take it or leave it” scheme currently offered to the Council. However, the method

suggested would fully preserve the autonomy of the social actors, giving only a “seal” of democracy to the procedure.

In a second scenario, a number of hearings of the social partners (before the legislative proposal is finally drafted) could be introduced. Accordingly, the social partners would at least have the opportunity to take into consideration the proposal of the Parliament and their autonomy would not be endangered. Finally, the co-decision procedure could be extended also to the social dialogue procedure. This option would however bring the legislative procedure back to the ordinary track, thus forth endangering the parameters of efficiency that are the feature of the current procedure.

A further alternative could consist in introducing mechanisms of “dialogue”, which could be more or less stringent, between the Commission and the social partners. The Commission - representing the “public interest” in the architecture of the Community - could act as an intermediary, at least having the opportunity to express opinions and suggestions on the legislative proposal.

In conclusion, it is submitted that the participation of the social partners in European governance, currently possessing great “potential” in democratic terms, should definitely be fostered. The experimentation currently in force has provided the possibility to reveal the benefits, but also the limits, of such an involvement. Nevertheless, the rules according to which such a potential shall be expressed (especially in the lawmaking procedure), must be consistent with the basic principles of democracy and legitimacy in order to accomplish the goal of representing as many voices as possible.

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¹ European Commission, *European Governance: A White Paper*, COM (2001) 428. For a first critical assessment see J.J.H. Weiler, *The Commission as Euro-sceptic: A Task-Oriented Commission for a Project-Based Union. A Comment on the First Version of the White Paper*, in Jean Monnet Working Paper No. 6/01, *Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance*.

² K. A. Armstrong, *Civil Society and the White Paper-bridging or jumping the gaps?* Jean Monnet Working Paper no.6/01, *supra*, n.1, at 97. For a critical review of the notion of participation in the White Paper on

Governance see also Paul Magonette, *European Governance and Civic Participation: Can the European Union be politicised?*, in Jean Monnet Working Paper 6/01, *supra*, n.1, 23-31, at 23.

³ C. Sabel-M.Dorf, *A Constitution of Democratic Experimentalism*, Columbia Law Review, vol.98, 2, 1998, at 267.

⁴ Meaning, in the words of P.P. Craig, conceiving governance as “starting from groups of people dedicated to the disinterested search for the public interest in society”. P.P.Craig, *The Nature of the Community: Integration, Democracy and Legitimacy*, in P.P.Craig and G.De Burca (eds.), *The Evolution of EU Law* (Oxford, 1999), 40 ff.

⁵ B.Kholer-Koch, *Organized Interests in European Integration: The Evolution of a New Type of Governance?* in *Participation and Policy-Making in the European Union*, H.Wallace and A.R.Young (eds), Clarendon, Oxford, 1997 at 42.

⁶ The activity of other interest groups is in fact, still carried out mainly according to informal or at least non institutionalised procedures (as in the contentious case of “comitology”; see C.Joerges-J.Neyer, *From Intergovernmental Bargaining to Deliberative Political Processes: The Case of Comitology*, 1997 3 *European Law Journal*, 273 and C. Joerges, “Good Governance” Through Comitology in C. Joerges-E. Vos (eds) *EU Committees: Social Regulation, Law and Politics*, 1999, Hart). In this sense a call of the Commission for the setting of a Code of basic rules to regulate at least consultation with organization of interests and groups is embedded in the after mentioned White Paper on Governance. Similar positions have been taken in the past by the EU institutions, for instance, in the following documents: Commission of the European Communities, *An Open and Structured Dialogue Between the Commission and Special Interest Groups* [1993] OJ C63/2; European Parliament, *Second Report on Lobbying in the European Parliament*, [1996], A4-200/96.

⁷ Such expression is referred, in the jargon of EU law, to the main organizations of either Trade unions or Employers association operating at European level. For a definition of “social partners” see *infra* sect.2, B.

⁸ On the evolution of the social dialogue see M.Weiss, *The Future Role of the European Union in Social Policy* in C. Engels/M. Weiss (eds.), *Labour Law and Industrial Relations at the Turn of the Century*, Den Haag 1998, S. 489.

⁹ *UEAPME v. Council*, Court of First Instance, case T135/96, 1998 I.R.L.R. 602. The case will be widely discussed in section II of the paper.

¹⁰ Social partners are involved, in a different degree in consultation and concertation activities with the EU institutions (for instance in the Standing Committee for Employment and the new Employment Committee); in the experimentation and implementation of new governance strategies; (such as the Open method of coordination applied in the European Employment Strategy) and in a wider consultation on economic policies (for instance social partners have been officially consulted, in the context of the so called “macroeconomic dialogue”, with reference to the consequences on employment of the implementation of EMU). Moreover, social partners also play a key role in the implementation of EU legislation and policies at national level, as the Treaty itself (article 138) and the directives issued in the social field open the possibility for an action of social partners at national level as subsidiary or complementing the EU level action. For a very detailed assessment of the functions and the tasks of social partner see C.Barnard, *The Social Partners and the Governance Agenda*, *European Law Journal* 8 (1), 80-101.

¹¹ The social dialogue legislative procedure is also of significant interest from an “industrial relations” standpoint given that it raises the question of whether the mentioned lawmaking scheme has introduced, or at least may pave the way, to a European level of collective bargaining. As such issue falls outside the scope of the present analysis, we refer to the literature on the subject, among which B.Bercusson, *European Labour Law*, London, Butterworths, 1996, 538-552; S.Sciarra, *Collective Agreements in the Hierarchy of European Sources*, in P.Davies-A.Lyon Caen- S.Sciarra- S.Simitis (eds.), *European Labour Law: Principles and Perspective. Liber amicorum Lord Wedderburn of Charlton*, Oxford, 1996; P.Marginson-K.Sisson, *European Collective Bargaining: a Virtual Prospect?* (1998) 36 *Journal of Common Market Law*

Studies, 505-528; L. Wedderburn, *Consultation and Collective Bargaining in Europe: Success or Ideology?* in Studi in Onore di Gino Giugni, Bari, (1999), 1701-1731; A. Lo Faro, *Regulating Social Europe: Reality and Myth of Collective Bargaining in the EC Legal Order*, (2000) London.

¹² The implementation of the agreement by means of the procedures of social partners at national level has never been put into practice, due to the fact that there is no uniform industrial relations system in Europe capable of ensuring a uniform application in every Member State of the Agreements reached at European level. Furthermore, as will be later explained, the lack of coordination between the European level of trade union organizations and business organizations and the national level, also serves to hinder a coherent implementation of European level agreements. Among scholars it is also very contentious whether the agreements of the social partners could have *per se*, aside and before the legislative implementation, any binding value. S.Sciarra, *Collective Agreements in the Hierarchy of European Sources*, *supra* n. 11, asserts that such agreements, without the institutional implementation, could only have the value of gentlemen's agreement. G.Lyon Caen, in *Le Droit Social de la Communauté Européenne après le Traité de Maastricht*, Paris, Recueil Dalloz (1993), 152, maintains that European agreements, without any legal implementation, would be only general «framework» agreements, with no binding effect.

¹³ To date, three intersectoral agreements (meaning applicable to all sectors) have been implemented. They are the agreements on Parental Leave (Council Directive 96/34/EC “concerning the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC”), on Part-time work (Council Directive 97/81/EC “concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC”) and on Fixed-term work (Council Directive 1999/70/EC “concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP”). Moreover, two sectoral agreements (referred to a particular sector) have also been executed and implemented by directives of the Council. They concern the topics of working time of seafarers (Council Directive 99/63/EC) and civil aviation industry (Council Directive 2000/79/EC). Negotiations failed over other subjects, such as European working councils, reversal of burden of proof in equality cases and temporary agency work. The social partners have finally signed an agreement on Telework (July 2002), but it is not clear whether it will be implemented by a Directive or according to the procedure of the social partners.

¹⁴ L. Betten, *The Democratic Deficit of Participatory Democracy in Community Social Policy*, in European Law Review 1998, 23 (1), 20-36.

¹⁵ On this issue see B. Weber, *The European Sectoral Social Dialogue*, in H.Compston and J.Grenwood (eds), *Social Partnership in the UE* (Palgrave, 2000).

¹⁶ Such a possibility is consistent with art.5 of the ILO Convention n.87, 9 July 1948, where it is stated that “labour and management organizations have the right to establish and become members of federations and confederations; every organization, federation or confederation, has the right to become member of international organization of employers or employee”.

¹⁷ The current version of the Statute of the association, amended in 1999 by the 1999 Helsinki Council, can be read on the web page www.etuc.org/executive/constitu.cfm.

¹⁸ Some commentators have observed that even national *confederations* sometimes are lacking direct bargaining representative powers, given, instead, solely to the national *federations*. See M.Roccella-T.Treu, *Diritto del lavoro della Comunità Europea*, Padova, (1995) at 384.

¹⁹ For an historical review of the organization of business at European level see M.Green Cowles, *Organizing Industrial Coalitions: A Challenge for the Future?* in H.Wallace et A.R.Young, *Participation and Policy-Making in the European Union*, Oxford, 1997, 117.

²⁰ L.Betten, *supra*, n.14, 24.

²¹ Communication from the Commission concerning the Application of the Agreement on Social Policy [COM (93) 600 final]. Accordingly, to acquire the right to be consulted the organizations should: “(1) be cross industry or relate to specific sectors or categories and be organized at European level; (2) consist of organizations which are themselves an integral and recognized part of Member States’ social partner

structures and with the capacity to negotiate agreements and which are representative of all Member States, as far as possible; (3) have adequate structures to ensure their effective participation in the consultation process". For a comment see B.Bercusson -J.J.Van Dijk, *The Implementation of the Protocol and the Agreement on Social Policy of the Treaty on European Union*, (1995) 3 Intern.Journ.Comp.Lab.Law Ind.Rel., 3.

²² See *Report on the representativeness of European social partner organizations*, European Commission, Brussels, September 1999.

²³ This opinion is shared by B.Bercusson - J.J.J.Van Dijk, *supra*, n.21 and S.Sciarra, *supra*, n.11.

²⁴ The proposal of the European Parliament is reported in the Communication of the Commission of the European Communities, *The Future of Social Dialogue at European level*, [COM (93) 448 final].

²⁵ Among which EuroCommerce and UEAPME, European Association of Small and Medium Enterprises.

²⁶ For a general comment to the whole judgment see B.Bercusson, *Democratic legitimacy and European Labour Law*, (1999) 28 Industrial Law Journal 153; M.A. Moreau, *Sur la représentativité des partenaires sociaux européens*, (1999) 1 Droit Social, 53; A.Adinolfi, *Admissibility of action for annulment by social partners and sufficient representativity of European agreements*, (2000) 25, 2 European Law Review 165-177.

²⁷ According to the data provided during the proceeding before the Court, about 5 million small and medium sized enterprises should be affiliated to UEAPME (see the judgment, para.103). However, the cross-sectoral organization UNICE argued that many of these enterprises were at the same time UEAPME and UNICE members.

²⁸ In the specific case, the directive on parental leave, being a "framework general agreement", was intended to cover all kind of employees (it is a) and, consequently, the "general representativity" of the cross-industry organizations was considered sufficient by the Court to satisfy the mentioned requirement.

²⁹ D.Obradovic, *Accountability of Interest Groups in the Union lawmaking process*, in Law Making in the European Union, P.Craig-C.Harlow (eds), 1998 at 367.

³⁰ P.C. Schmitter, *How to Democratize the European Union...and Why Bother?*, Rowman, 2000.

³¹ S.S.Andersen and K.A.Eliassen, *EU-Lobbying: Between Representativity and Effectiveness*, in S. A. Andersen and K.A.Eliassen (eds) *The European Union: how Democratic is it?*, 1996, 43.

³² For an example see M.Regini, *Still Engaging in Corporatism? Some Lessons from the Recent Italian Experience of Concertation*, (1997) 3 European Journal of Industrial Relations, 3.

³³ According to M.Rhodes, the adoption of neocorporatist theories meets the goal of ensuring the competitiveness of the national economies, determining a transition from a "social corporatism" to a "competitive corporatism". See M.Rhodes, *Globalisation, labor markets and welfare states. A future for competitive corporatism?* in *The future of european welfare. A new social contract?*, London, 1997, 132.

³⁴ See, among the others L.Wedderburn- S.Sciarra, *Collective Bargaining as Agreement and as Law: Neo-contractualist and Neo-corporative Tendencies of our Age*, in A. Pizzorusso, (ed.), *Law in the Making*, (Berlin-Heidelberg 1988), at 186; F.W.Scharpf, *Crisis and Choice in European Social Democracy*, Ithaca, Cornell University Press (1991); W.Streeck, *Social Institutions and Economic Performance. Studies of Industrial Relations in Advanced Capitalist Economies*, London, Sage (1992); C.Crouch e W.Streeck (eds.) *Political Economy of Modern Capitalism. Mapping Convergence and Diversity*, London, (1997); A.Ferner-R.Hyman (eds.), *Changing Industrial Relations in Europe*, Oxford, (1998); G.Esping-Andersen- M.Regini (eds.), *Why Deregulate Labour Markets*, Oxford, (1999).

³⁵ According to the classical theories on corporatism, such system is based on a trade-off between institutions and organization of interests which presupposes strong powers of the State (currently lacking in the European Community). See P.Schmitter, *Still the century of corporatism?* in (1974) Review of politics,

36 and G.Lehmbruck, *Liberal corporatism and party government*, in (1977) *Comparative political studies*, 10.

³⁶ Case *UEAPME v. Council*, Court of First Instance, *supra*, n.9.

³⁷ The consociational approach is one of the most accredited and controversial theories in the political theory of conflict management in divided societies. The article *Consociational Democracies* by Arendt Lijpharts appeared in *World Politics* 21 (2), 207-25, in 1969. The consociational theory has been then further developed by the same author in *Democracy in Plural Societies*, 1977, 5, where it is held that “consociational democracy is defined in terms of both the segmental cleavages typical of a plural society and the political cooperation of the segmental elites”. See also A.Lijpharts, *Consociational Theory, Problems, Prospects: A Reply*, in *Comparative Politics* 1981 13 (2): 355-360.

³⁸ A. Lijphart, *Consociational Democracies*, *supra*, n.37, at 216. Literature on consociationalism has evolved in 30 years proposing different types of non-majoritarian types, varying from the very first model of consociational democracy, to consensus democracy in the 80's to move towards finally, in the 90's, to the idea of power-sharing. The term *power-sharing* has been introduced by the same author in the 90's as a synonym for consociational democracy, being “more intuitive” and “easier to pronounce” than consociationalism. See A. Lijphart, *Consensus and consensus democracy: Cultural, Structural, Functional, and Rational-Choice Explanations*, in *Scandinavian Political Studies* 21 (2):99-108 (1998).

³⁹ For a broad analysis of consociational democracy as a normative type and an empirical type, reconstructed also with the analytical method of “concept stretching” of Giovanni Sartori, see M. Bogaards, *The uneasy relationship between empirical and normative types in consociational theory*, in *Journal of Theoretical Politics* 12 (4) 2000: 395-423.

⁴⁰ This is the opinion of the European Commission. See sect. IV, A of the present paper and *infra*, n. 54.

⁴¹ See *supra* n.40.

⁴² P. Steinberg, *Agencies, Co-regulation and comitology-and what about politics?* In Jean Monnet Working Paper No. 6/01, *supra*, n.1, at 140, recalling B. Kohler-Koch, *Organized interests in European Integration: The Evolution of a New Type of Governance?* in H.Wallace et A.R.Young, *Participation and Policy-Making in the European Union*, Oxford, 1997, at 42.

⁴³ The problem of the tension between individual rights and rights of the group (meaning the protection of individuals *versus* the rights of the protected group) has been deeply examined in the literature on multiculturalism and multicultural jurisdictions. See W.Kymlicka, *Multicultural Citizenship: a Liberal Theory of Minority Rights*, Oxford, 1995 and A.Sachar, *Multicultural jurisdictions*, Cambridge, 2001.

⁴⁴ The literature on democracy is very wide. For fundamental theories see R.A.Dahl, *Modern Political Analysis*, Englewood Cliffs, 1963, R.A.Dahl, *Polyarchy*, New Haven (1971), R.A.Dahl, *Democracy and Its Critics*, New Haven, 1989; G. Sartori, *The theory of democracy revisited*, Chatam, 1987, D.Held, *Democracy, The Nation-State and the Global System*, in *Ibid.*(ed.), *Political Theory Today*, Cambridge 1991.

⁴⁵ R.A.Dahl, *Modern Political Analysis*, Englewood Cliffs, 1963, R.Katz, *Models of Democracy*, *European Union Politics*, 2 (1) 53-79.

⁴⁶ P.C.Schmitter, *Still the Century of Corporatism?* in F.B.Pike and T.Stricht (eds.), *The New Corporatism: socio-Political Structures in the Iberian World*, NotreDame, 1974; *ibidem*, *Modes of interest Intermediation and Modes of Societal Change in Western Europe*, *Comparative Political Studies*, 10, 1977, 85-131; *ibidem*, *Reflections On Where the Theory of Neo-Corporatism is Going*, in G.Lembruch and P.C.Schmitter (eds), *Patterns of Corporatist Policy Making*, London, Sage, 1982; M.O. Heisler, *Politics in Europe*, New York, 1974; S.S. Andersen and T.R. Burns, *Societal Decision Making: Democratic Challenges to State Technocracy*, Hampshire, 1992.

⁴⁷ C.W.Anderson, *Political Design and Representation of Interests*, *Comparative Political Studies*, 10 (1), 127-151 (1977)

⁴⁸ S.S. Andersen and T.R. Burns, *supra*, n.46.

⁴⁹ C.W.Anderson, *supra*, n.47.

⁵⁰ This is the main theory of A.Lo Faro, *supra*, n. 11. The author maintains that the incorporation of the social partners into the lawmaking procedure responds only to a specific interest of the Commission to introduce a “legislative resource”, with the purpose of revitalizing social policy legislation from the significant impasse of the last decades. On the crisis of labour regulation in the ‘80s see B.Hepple, *The Crisis in EEC Labour Law*, 1987 Ind.Law.Journ.77, at 85, P.Davies, *The Emergence of European Labour Law* in D. Mc.Charty (ed.), *Legal Intervention in Industrial Relations*, London (1992).

⁵¹ C.W.Anderson, *supra*, n.47.

⁵² G.Britz--M.Schmidt, *The Institutionalised Participation of Management and Labour in the Legislative Activity of the European Community: A Challenge to the Principle of Democracy under Community Law*, (2000) 6/1 European Law Journal, 45-71.

⁵³ G.Britz-M.Schmidt, *supra* n.52, at 66.

⁵⁴ *Communication from the Commission concerning the Application of the Agreement on Social Policy* [COM (93) 600 final].

⁵⁵ B.Bercusson, *The dynamic of European Labor Law after Maastricht*, in (1994) *Industrial Law Journal*, 2; F.Guarriello, *Il ruolo delle parti sociali nella produzione e nella attuazione del diritto comunitario*, in *Europa e Dir.Priv.*, 1/1999, 251.

⁵⁶ S.Sciarra, *supra*, n.11.

⁵⁷ E.O.Eriksen -J.E.Fossums, *The EU and Post National Legitimacy*, Arena Working Paper no. 26, December 2000, at 25. The authors point out that democratic legitimacy does not stem from the predetermined wills of individuals, but from the process by which a common will can be formed on the basis of the right that all have to participate in collective deliberation.

⁵⁸ The literature on this issue is very wide. From recent literature see J.H.H. Weiler, *European Democracy and its Critics: Polity and Systems*, in *The Constitution of Europe*, Cambridge, 1999; M.T.Greven-L.W. Pauly (eds.), *Democracy Beyond the State? The European Dilemma and the Emerging Global Order*. Lanham (2000). See also B.Kohler-Koch and R.Eising(eds.), *The transformation of Governance in the European Union*, London, (2000); E.O.Eriksen- J.E.Fossums (eds), *Democracy in the European Union-Integration trough Deliberation?*, London, Routledge (2000). The need for a reconsideration of the very notion of democracy, seen in the current post-national integration as post-national legitimacy, is pointed out by E.O.Eriksen -J.E.Fossums, *The EU and Post National Legitimacy*, *supra*, n.57.

⁵⁹ E.O.Eriksen-J.E.Fossums, *The EU and Post National Legitimacy*, *supra*, n.57, at 20.

⁶⁰ First and foremost, refer to case 139/79 *Maizena*, (1980) ECR 3393, case 138/79 *Roquette Frères*, (1980) ECR 3333, *Chernobyl*, case 70/88, ECR. 1990, 2041. The final goal of the theory of institutional balance is implementing at the EU level the fundamental legal principle according to which people must share the exercise of power through a representative body. In particular see *Roquette Frères*, cit. at 3360 para.33. See also G. De Burca, *The Quest for Legitimacy in the European Union*, (1996) 59 *The Modern Law Review*, 349-376.

⁶¹ M.Weiss, *The significance of Maastricht for European Community Social Policy*, (1992) 3 *Int. Comp. Lab. Law Ind. Rel.* 13; L.Betten, *supra*, n. 14, at 32.

⁶² *Supra*, n.9.

⁶³ P.S.Schmitter and T.Karl, *What Democracy is and...is not*, *Journal of Democracy* 2, n.3 (1991), 75. The same definition, applied to the European Union model, is used by P.S. Schmitter in *How to Democratize the European Union...and Why Bother?*, Rowman, 2000.

⁶⁴ D.Obradovic, *Accountability of Interest Groups in the Union lawmaking process*, *supra*, n.29, at 367.

⁶⁵ See also C.Magagna, *Representing Efficiency: Corporatism and Democratic Theory*, (1988) 50 *The Review of Politics* 420; S.S. Andersen and K.A.Eliassen, *The European Union and the Erosion of Parliamentary Democracy: A Study of Post-parliamentary Governance* in S.S. Andersen and K.A. Eliassen (eds), *The European Union: How Democratic is it?*, Sage, 1996, 231.

⁶⁶ The justification of the contribution to the achievement of public policy objectives is also brought by W. Streeck and P.S. Schmitter, *Community, Market, State- and Associations? The Prospective Contribution of Interest Governance to Social Order*, in W.Streeck and P.S. Schmitter (eds), *Private Interest Government: Beyond Market and State* (Sage, 1985), 21.

⁶⁷ A. Moravcsik-A.Sangiovanni, *On Democracy and the "Public interest" in the European Union*, Center for European Studies Working Paper n.93, Harvard, 2003 (draft).

⁶⁸ P.Schmitter, *supra*, n. 30, at 4.

⁶⁹ See *supra*, n.43.

⁷⁰ European Parliament Resolution on the new social dimension of the Treaty on European Union, [1994], OJ C77/30; European Parliament Resolution on the Application of the Agreement on Social Policy [1994], OJ C205/86; European Parliament Resolution on the Commission proposal for a Council Directive on the framework agreement concluded by UNICE, CEEP and ETUC on parental leave [1996] OJ C96/284; European Parliament Report on Participation of Citizens and Social Players in the Union's Institutional System, A-4338/96, 29 October 1996, at point 16; European Parliament, Report on the Commission Proposal for a Council Directive concerning the framework agreement on Part-time work concluded by UNICE, CEEP and ETUC, A4-352/97, 24 November 1997.

⁷¹ M.Green Cowles, *supra*, n.20; D. Obradovic, *supra*, n.30; S.Fredman, *Social Law in the European Union: The impact of the lawmaking process*, in *Lawmaking in the European Union*, P.Craig-C.Harlow (eds), 1999, 386-411.