The legitimacy of social partners’ participation in European occupational health and safety policy.

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ABSTRACT

On the one hand the literature on the ‘European democratic deficit’ has focused largely on territorial representation and rights-based issues. On the other hand, literature on EU interest group participation has remained largely descriptive. As a consequence there is a particular need to address questions of legitimacy and democratic procedure linked to functional participation (section 1). Instead of looking to the system of interest intermediation as a whole, I focus on what could be argued to be the underlying assumptions of certain institutionalised forms of functional participation. The way in which such forms of functional participation are combined is analysed within one policy sector, namely occupational health and safety policy (section 2). Section 3 and Section 4 give an insight in the normative assumptions underlying two of the institutionalised forms of functional participation in OH&S policy, while Section 5 analyses the tensions between these two different models of functional participation.
1. The European democratic deficit and functional participation.

This paper presents some elements of my broader PhD research on ‘Functional Participation in European Occupational Health and Safety Policy: Democratic Nightmare or Additional Source of Legitimacy?’ The starting point of both my PhD research and this paper is the debate on the European democratic deficit. For long, both the academic and the political debate have focused on issues of territorial representation, predominantly using the parliamentary model1 as a framework for defending a steady increase of the European Parliament’s competencies and control on the Commission, but equally stressing the importance of the Member States as ‘Masters of the Treaty’ and their representation in the Council. The Maastricht Treaty introduced subsidiarity in territorial terms, created a Committee of the Regions and paid some lip service to the importance of strengthening the role of national parliaments in European decision-making.2 In addition to these ‘territorially based’ elements the Maastricht Treaty equally introduced some rights-based elements of legitimacy, such as citizenship and transparency. While the merits and limits of all these elements (regional representation, role of national parliaments, subsidiarity, citizenship and transparency) for the legitimacy of the European polity have been intensively discussed during the 1990s - especially, in the period of the 1996 intergovernmental conference preparing the Amsterdam Treaty -3 the issue of ‘functional participation’4 has been surprisingly absent in the debate (together with that other missing item; direct democracy or direct citizen participation).5 There is, though, a very broad literature on interest group participation in the European polity.6 A part of the literature on European interest group participation concerns case studies of lobbying activities, focusing on a particular (type of) interest group or on a certain policy sector.7 Most contributions, however, address the overall pattern of interest articulation at the European level, inducing a debate on whether the European polity could be described in terms of pluralism or neo-corporatism (generally concluding in favour of the former).8 This literature on European interest group participation has one thing in common; its descriptive nature. It describes the overall system in terms of pluralism or corporatism, or tries to find out why interests organise or not at the European level; where do they find access-points to policymakers; which influence they have etc. Concerns about the legitimacy of interest

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2 On the limits of this approach, see Laprat (1991); Westlake (1995); and Smismans (1998).
3 On the diverging opinions of the EU Institutions on how to operationalize such elements as citizenship, subsidiarity and transparency, see De Burca (1996).
4 I use the concept of ‘functional participation’ instead of ‘interest group participation’ since the common use of the latter concept tends to treat ‘interests’ as a given (see March and Olsen, 1989, p.154). Since my analysis makes also use of deliberative models of democracy the concept of ‘interest group participation’ seems less apt.
5 At the 1996 IGC only Italy and Austria made some attempt to place the issue of direct democracy on the agenda, launching the idea of public petitions. Nentwich and Falkner (1997), p.17. The interest of the academic literature on direct citizen participation in EU policy-making emerged in the second half of the 1990s; see, e.g. Nentwich (1996).
6 See Andersen and Eliassen (1991); Claeys et al (1998); Greenwood (1997); Greenwood et al (1992); Kohler-Koch (1994); Mazey and Richardson (Eds.) (1993); van Schendelen (Ed.) (1993); Wallace and Young (Eds.) (1997).
7 e.g. Cawson (1997); Green Cowles (1995); Schneider et al (1994).
group participation occasionally arise but only as loose remarks on the sideline, such as the observation that ‘the overrepresentation of business-interests is problematic’. However, the issue of interest group representation is rarely placed within the broader debate on the legitimacy of the European polity. Consequently, there remains a gap between on the one hand, the academic and political debate on the legitimacy of the EU - neglecting the issue of functional participation; and on the other hand, the literature on interest group participation which avoids normative considerations.

Nevertheless, some authors analysing the features of the European polity have recently placed the issue of interest group participation within the broader debate on EU legitimacy. Andersen and Burns argue that in addition to territorial or parliamentary representation, also interest group representation and expert representation can be considered being legitimacy criteria for the European polity (though they might in a certain sense be contradictory). According to Wolfgang Wessels ‘several different functional, legal and political sources of legitimacy are fused’ in the EU. ‘The fusion implies a new exercise in indirect democracy and is, in this sense, a ‘saut qualitatif’ in democracy: a new kind of democracy in a larger area - not perfect but a major step forward.’ Features known from (neo-)corporatist approaches merge with those of technocratic policy making mixed with parliamentary elements and that of the rule of law. The EU as polity would then be based on a new mix of several and different concepts of legitimacy’. In a comparable sense, Adrienne Héritier argues that alongside the given formal structures of intermediate democratic legitimisation of the Council, and the direct legitimisation of the European Parliament, substitute elements of democratic legitimisation can be identified in the European polity. One of them is the establishment of ‘supportive networks’ which seek to secure input-legitimacy by allowing the concerned actors to take part in policy-shaping. But Héritier also stresses that ‘the situation calls for institutional measures which provide an arena to counterbalance the tendency towards segmentation and the pursuit of particularistic interests’.

The way seems thus opened to the recognition of functional participation as an ‘additional source of legitimacy’ of the European polity, supplementary to territorial representation. However, there remains a lot to be done before it would be justified to make such an affirmation. First, there is a particular need for normative narratives on functional participation; need which is not only a problem of the European polity but results from the predominant interest of democratic theory for territorial representative democracy and direct democracy. Second, much more empirical research is needed to see whether particular institutions live up to the expectations of the proposed models. A plea for the institutionalisation of deliberative fora, for instance, should be backed up by empirical research on how deliberation takes place in these fora.

Recently, a normative wave has reached the European integration literature, shifting the older debate on ‘the nature of the beast’ to a debate on how the legitimacy of this sui generis polity could be thought of. Thus, MacCormick described the EU as a

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12. Other elements are transparency; mutual horizontal control and distrust among actors in a diverse negotiated democracy; and competition among multiple authorities. Heritier (1999).
‘European commonwealth’ in which democratic institution-building should be guided by four aspects of subsidiarity. Bellamy and Castiglione seek to apply a ‘republican model’ to the European Union in which power is dispersed within civil society and dialogue encouraged. Such a model would fit the non-statist character of the European integration, and encouraging signs of the development towards such a republican model are identified. Craig, on the other hand, has given a republican reading of the European institutional balance. Perfectly within the framework of the multi-level polity concept, Joerges and Neyer developed the idea of ‘deliberative supranationalism’ and pointed to its legal consequences to structure comitology processes.

All these proposals agree that there can be no all-including narrative for the complex processes of European governance. Weiler, Haltern and Mayer have distinguished three modes of European governance (international, supranational and infranational) to which correspond different models of democracy (respectively consociationalism, pluralism-competitive elitism, neo-corporatism). The way in which they linked the models of democracy to the modes of governance might be criticised, but there seems to be a large agreement that only a differentiated democratic discourse can be applied to the multiple-form governance of the Union.

On a more micro-level than the three large modes of governance distinguished by Weiler et al, one may argue that ‘different arrangements may require different normative foundations linked to different conceptions of democracy’. The analysis of Joerges and Neyer, for instance, has focused on the specific institutional arrangements of comitology, and the application of the model of ‘deliberative supranationalism’ to this arrangements does not exclude the application of other models to other elements of European governance.

One should note that despite the new interest for the normative aspects of European governance, no systematic attention has been paid to the institutional arrangements for functional participation. My PhD research and this paper have precisely the intention to look to different institutional forms through which functional participation is organised in the European polity and will argue that there is not one normative

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15 The concept of commonwealth is based on the idea that ‘a group of people to whom can reasonably be imputed some consciousness that they have a ‘common weal’, something which really is a common good, and who are able to envisage themselves or their political representatives and governing authorities realizing this or striving after it through some form of organized political structure, embodied in some common constitutional arrangements’ MacCormick (1997), p339.

16 Market subsidiarity; communal subsidiarity (underlining freedom of association and local public self-government), rational legislative subsidiarity (endorsing effective representative democracy) and comprehensive subsidiarity (strengthening fora for deliberation that are as open and accessible as possible); ibid, p.354.

17 Bellamy and Castiglione (forthcoming).

18 Craig (1999). For a normative reading of the institutional balance in terms of interest representation, see Smismans (2001, fortcoming).


22 Bellamy and Castiglione (forthcoming).

23 The ‘deliberative supranationalism’ of Joerges and Neyer, for instance, focuses on comitology committees - i.e. committees ensuring a representation of the Member States in the implementation process, rather than on committees with representatives from interest groups. Since I got the occasion to have a look at Frank Wendler’s paper for the workshop before sending in mine, I could add that the German literature on this issue (to which I have not really access) appears to be more advanced than the English, French, Italian or Dutch one. See Benz, Eichener, and Heinelt.
narrative underlying such institutions, but that each institution of functional participation is built on different normative assumptions. The legitimacy of the policy-making process depends on how such forms of functional participation are combined - with each other, and with forms of territorial representation. The combination of different forms of participation may reveal contradictions between the underlying normative assumptions of these institutions. The way in which different institutions for functional participation are combined cannot be analysed in general terms since such combinations differ according to the policy sector. The next section explains why the sector of occupational health and safety policy has been chosen to analyse functional participation.

2. Functional participation in European occupational health and safety policy.

European occupational health and safety policy (OH&S) is a particularly interesting field to analyse the legitimacy of functional participation, for two reasons. First, OH&S forms a substantial part of European social policy, which in its turn has - much more than other policy sectors - given rise to debate on the legitimacy of European intervention. Second, OH&S is rich of different forms of functional participation. The question of the type of social policy appropriate to the European level has been largely debated both at the academic and the political level. Thus it has been argued that the European Union lacks the democratic prerequisites to take redistributive decisions. Such decisions require not only a democratic institutional design but also a public sphere and a demos, which ensure solidarity and make redistributive decisions based on majority voting acceptable. Yet a substantial European social policy did emerge. Not surprisingly it is mainly of a regulatory (and not of a redistributive) nature. Most of this regulatory social policy deals precisely with OH&S, i.e. the regulation of the organisation of the occupational environment and of the way in which work equipment and machinery are to be used in order to protect the health and safety of workers. OH&S regulation often entails technical assessments, but it is also by excellence a ‘social policy sector’, namely, by regulating the employment relation. As a consequence, the organisations of management and labour have obtained a particular position within the policy-making process.

Leaving apart the possible influence which management and labour might have via lobbying, my research focuses on how their participation is institutionalised. Four particular forms of functional participation in European OH&S could be distinguished;
-the European Economic and Social Committee (ESC);

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24 Hervey (1998; 80) argues that ‘formation of a coherent, principled European social policy would have to arise from a reformed EU in which the current democratic deficit had been effectively addressed.’
25 Majone (1992; 31) talks about ‘homogeneous communities’.
27 About two thirds of the social Directives have been taken in the field of OH&S.
28 In parallel with how the European Commission mostly uses the concept, I use a restrictive definition of OH&S, i.e. excluding the setting of health and safety standards for machinery and work equipment; which is in Community context mostly defined as ‘technical product regulation’ related to the free movement of goods.
-the European Agency for Safety and Health at Work;
-the tripartite Advisory Committee for Safety, Hygiene and Health Protection at Work (AC)
-the European social dialogue.

They are involved in OH&S policy to a different extent, changing according to changes in policy-type (e.g. from regulatory to persuasive policy-making), and partially in combination with each other.

Within the scope of this paper, I will limit myself to identifying their role in what has been the core of OH&S policy, namely the issuing of legislative Directives.29 For long the process could be described as follows:

Commission initiative → consultation of the AC → Commission proposal →
consultation of the ESC → European Parliament → Council

The initiative is taken by the Commission which may find inspiration for a proposal in various sources of information, such as private OH&S experts or (semi)-public OH&S bodies.30 However, at the initial phase of the policy-making process, the only institutionalised form of functional participation that is by definition consulted on each legislative OH&S proposal is the AC. The AC will set up a working group in which the Commission representative can hear the first remarks of the social partners (and the Member State representatives) on the initial pieces of the proposal. By the time the AC can adopt a formal opinion the Commission draft will have obtained a more solid form, given that the AC plenary only meets twice a year.

Having heard the opinion of the AC the Commission will then make its formal proposal, which is sent on the same moment to the ESC, the EP and the Council. It is the ESC which will first take an opinion on it. After the intervention of the ESC, no other institutionalised forms of functional participation intervene in the policy-making process.31 Until the Single European Act the EP was only consulted and the Council had to adopt the Directive with unanimity. The SEA introduced qualified majority voting and the co-operation procedure. The Amsterdam Treaty introduced the co-decision procedure.

Contrary to territorial representation, with the steady increase of power of the EP, the institutionalised forms of functional participation have remained nearly untouched until the mid 1990s; with this double consultation; the AC prior to the formal Commission proposal, and the ESC after it.

By the mid 1990s the Agency and the Social Dialogue came on the scene. The first is mainly involved in persuasive policy-making, but may have an influence on the Commission in the initial drafting phase of regulation. The second, consists in a consultation procedure of management and labour which intervenes before the Commission sends its formal proposal to the ESC. On the occasion of that consultation management and labour may also ask to deal with the issue by collective

29 My PhD research analyses also their role in regulatory implementation and in persuasive policy-making.
30 Interview with Commission officials.
31 Obviously, informal lobbying (also from the social partners) can take place over the entire policy-making process (though interest groups and the social partners argue that ‘the game is plaid’ when a proposal arrives on the table of the Council).
agreement. The procedure then by-passes the ESC and the EP and may lead to the implementation of the collective agreement by a Council Directive. Each of these four institutions (AC, ESC, Agency, social dialogue) is based on particular assumptions about EU legitimacy and the role of functional participation therein. My aim is not to analyse what were the particular intentions of the policy actors and the drafters of the Treaty on the moment of creating these four institutions. Rather will I take the formal structures as a starting point and ask what are the underlying assumptions of such institutions if they are supposed to be legitimate. The four institutions appear to be based on different ideas of the role of representation and deliberation.

The ESC is identified as a ‘functional assembly’ which introduces increasingly and for some policy issues elements of deliberative democracy but which is in a technical area as OH&S not able to provide this added value of broader deliberative forum. The Agency is defined as ‘a network agency with social partners’ guidance’, i.e. it uses the idea of policy networks as organisational devise and legitimating discourse with the social partners co-defining the features of the network.

In this paper I will focus only on what has always been the main institution for functional participation in OH&S, namely the tripartite AC; and what has recently become a competitor, namely the European social dialogue.

3. The tripartite Advisory Committee for Safety, Hygiene and Health Protection at Work (AC).  

The AC can be considered to be an example of a particular ‘model’ of Community committees, namely tripartite advisory committees (3.1.). An analysis of the functioning of the AC (3.2.) allows to identify the normative assumptions at the basis of such a structure (3.3.). Subsequently, the legitimacy problems caused by such a structure and assumptions are analysed (3.4.).

3.1. Tripartite advisory committees as a species of Community committees.

Tripartite advisory committees are a rare species among the large number of committees active in European decision-making. In addition to the two Treaty provided ‘grand committees’ (the ESC and the Committee of the Regions), and the committees active within the EP, Council and COREPER, one could mainly distinguish between three type of European committees. ‘Scientific committees’ are composed of scientific experts and formulate recommendations (based on scientific

32 Smismans (2000).
33 Contrary to the broad literature on policy networks, the concept is used here in a normative and not in an analytical way (in which case, also the ESC, AC and social dialogue would obviously have fit the network concept). For one of the few more normative uses of ‘policy networks’, see Ladeur (1997).
34 In addition to the analyses of legal texts, official publications and working documents, (several of) the main policy actors concerned with the AC have been interviewed; 4 Commission officials in the division responsible for OH&S; 6 members of the AC (2 on employers side, 2 on workers side; 2 on government side); the ‘coordinator-observer’ from UNICE and ETUC within the AC; 2 members of the EP and 2 ESC members having been responsible for an OH&S legislative proposal within their institution.
expertise) in the preparatory and/or implementation phase. ‘Interest committees’ are composed of representatives of socio-economic interests groups in order to inform the Commission on the views of the concerned interests and to profit from their ‘field experience’. ‘Comitology committees’ are composed of Member States representatives and are set-up to ensure an element of ‘national representation’ where the Council has conferred implementing powers to the Commission.

The tripartite advisory committees could be classified under the ‘interest committees’, in the sense that they are attached to the Commission to bring to its attention the expertise and views of the concerned interest groups. They differ, though, from most ‘interest committees’ on several points: they are not completely composed of representatives of interest groups, but contain also representatives from the Member States; they aim at a balanced representation of management and labour; and, the social partners’ representatives in the AC are chosen from national organisations and not from European interest groups as is the case in most ‘interest committees’.

Tripartite advisory committees exist only within the social policy field and their common characteristics can be defined as follows:
- attached to the Commission to assist in legislation and/or implementation
- composed on a tripartite basis: representatives from national administrations, employers representatives and trade union representatives
- formally constituted by a legal act (contrary to many ad hoc ‘interest committees’), and having Rules of procedure
- they take ‘formal’ opinions on proposals made by the Commission. With ‘formal’ I do not mean that they are formally published, but that they draft common opinions representing the view of the committee, or at least of a part of the committee.
- their consultation is mostly optional
- the advisory committees consequently depend mainly on the initiatives of the Commission, but they are master of their own agenda
- their secretariat is assured by the Commission (normally a part-time activity of one Commission official)
- their members are appointed by the Council at the proposal of the Member States (in collaboration with the social partners)
- they have a ‘general’ competence for an issue of social policy across different sectors of the economy (e.g. health and safety in all sectors of the economy).

37 Much of the European debate on committees has focused on these Comitology committees, to that extent that the distinction ‘comitology committees’ vs ‘non-comitology committees’ has become quite common. See, e.g. Van der Knaap (1996) and Falke (1996).
38 They are thus not comitology committees. They do not fall under the 1987 and the 1999 Comitology Decisions, and thus neither under the ‘advisory committee procedure’ provided by these decisions.
39 On this point they differ, for instance, from the Comitology committees to which the ‘advisory committee procedure’ applies. The latter committees have to be consulted.
40 Contrary to most ‘interest committees’, where the Commission appoints the committee members.
41 Other tripartite advisory committees exist to deal with the European Social Fund; vocational training; freedom of movement of workers; social security of migrant workers; and, equal opportunities for women and men.
3.2. Competence, composition and functioning of the AC.

The AC has been created in 1974 by a Council Decision and its task has been defined as ‘assisting the Commission in the preparation and implementation of activities in the fields of safety, hygiene and health protection at work’. Though the Commission is not formally obliged to consult the AC, it generally does so for most of its OH&S activities. The AC is consulted on the (pluri-annual) working programmes in OH&S, on legislative proposals (Council Directives), and on most of the Commission’s implementation measures (such as Commission Directives, Decisions and Communications).

The AC consists of 90 full members, i.e. two government representatives, two trade union representatives and two representatives of employers per Member State. An alternate member is appointed for each full member. Both full members and alternate members are appointed by the Council for a period of three years which is renewable. Government representatives originate from the national ministries responsible for OH&S, or in some cases from semi-public authorities or agencies having responsibility for national OH&S policy. The representatives for management and labour mostly come from the national social partners confederations, though in a small number of cases (and especially for management) they originate from sectoral national organisations, and even from private firms.

According to its statutes the AC is chaired ‘by a member of the Commission or, where such member is prevented from so doing and as an exception, by a Commission official to be nominated by him.’ Despite this stipulation, the exception has become the rule. The Commissioner for social affairs does not chair the AC, but normally sends the Director General of DG V. In addition, the representatives of the Commission’s department concerned with the issues at stake participate at the meetings.

The Statutes of the AC stipulate also that each Committee member may be accompanied by an expert, and the Chairman may invite two additional experts. In practice, each of the three groups within the AC, and especially the trade union and the employers group, has a small circle of experts whose assistance is frequently asked for. Experts have no voting right but often play a very important role in the decision-making of the Committee.

The AC normally holds a plenary session twice a year. A large part of the AC’s work, however, is done in ad hoc working groups. Since profound debate is difficult to take place in a body composed of 90 members, the AC Statutes enable the creation of such ‘working groups’ under the chairmanship of a Committee member. During 1997, for instance, twenty meetings were organised to accommodate the activities of

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43 This is, for instance, the case for the UK, Ireland, and Sweden.
44 Article 6, 1 Statutes AC.
45 At the AC meeting of April 1997, Commissioner Padraig Flynn addressed the Committee, a ‘unique act in the history of the Committee’ (Daemen and Van Schendelen, 1998, p.136) but even then the AC was chaired by the Director-General, see AC Annual Report 1997.
46 Article 6, 5 Statutes AC.
47 Article 6, 3 Statutes AC.
eleven working groups. In the period of the boom of regulatory OH&S output (around the 1989 Framework Directive) the number of meetings even attained more than 40 a year.

The functioning of the AC is largely determined by the role of the three ‘interest groups’, namely the ‘trade union group’, the ‘employers group’ and the ‘government group’. Though the AC Statutes state that each Member State shall send two representatives from employers, from trade unions and from national administration, they do not provide that three groups should be formed within the Committee. Even the Rules of Procedure of the AC, adopted in 1976, remain silent on the role of the three ‘interest groups’, and physically the plenary is divided into groups of representatives per Member State and not into three interest groups. Yet, the dynamics of decision-making in the AC centres around the ‘interest groups’, and especially since their role has been strengthened in the last years, one can argue that the AC’s Rules of Procedure are completely by-passed by the reality.

Each of the interest groups holds separate meetings and they appoint a spokesperson, who acts as their main voice within the plenary sessions. The spokesperson of the governmental interest group is a member of the Committee representing the Government whose country holds the Council Presidency. The spokesperson for the trade union group is generally a high-level representative (such as the Confederal Secretary) from the ETUC (European Trade Union Confederation), and for the employers group from UNICE (Union of Industrial and Employers’ Confederations of Europe). Contrary to the spokesman of the government group they are thus not AC members but act as ‘external expert’.

The normal procedure starts with the creation by the plenary session, normally at the proposal of the planning group, of a working group to study a particular draft or action proposed by the Commission. A working group normally consists of more or less 15 persons - four or five persons for each of the three ‘interest groups’. Three members act as chairman, vice-chairman and rapporteur respectively. An official from the Commission Directorate responsible for OH&S and mostly one or more external experts are active in the working group. According to the Rules of Procedure (Article 16,3) the members of a working group need to have the necessary technical competence. ‘If necessary they can be appointed among persons that are not full members or alternate members’. On the employers-side in the working group mostly an expert is present who is affiliated with one of the member-organisations of

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49 Social Europe 8/90, p.17.
50 The AC can draft its own Rules of Procedure but they ‘enter into force after the Council, having received an opinion from the Commission, has given its approval’ (Article 8 AC Statutes). The current Rules of Procedure are still those adopted by the Council on 30 April 1976.
51 The concept of ‘interest groups’ is used in the Annual reports of the AC, and is common vocabulary among the participants within the Committee.
52 They always meet the day before a plenary session of the AC; and mostly have some additional meetings during the year, e.g. in 1997 they had two additional meetings, see AC Annual Report 1997.
53 Article 15 Rules of Procedures states that each working group has a president and two vice-presidents. The president should act as rapporteur. In practice (confirmed in the Annual Reports) a president, a vice-president and a rapporteur are appointed.
54 Note that, contrary to the committee as a whole, in the working groups the chair is not hold by a Commission official but by a Committee member.
UNICE. Around ten experts from different sectors of industry are frequently asked by UNICE to act as expert on the employers side in a working group. On the trade union side in the working group, the participation of an expert from the European Trade Union Technical Bureau (TUTB) is the rule. The TUTB has been created by the European Trade Union Confederation in 1989 in order to provide expertise on trade union side in the very technical area of OH&S, and is funded by the European Commission.

A working group mostly meets once or twice a year but occasionally meets more, depending on the activities of the Commission. Its 15 members debate on mainly technical issues and try to find a consensus. The draft AC opinion is then sent to the plenary session. Plenary Sessions normally take two days. At the first day, the three ‘interest groups’ meet separately. They determine their final position for the plenary session, whether they agree with a common AC opinion, or whether they will present a group opinion. The real plenary meeting takes place on the second day. The spokesmen from the three interest groups use most of the time, and explain the position of their group. There is mostly very few interaction with the other AC members, who mainly listen to the declarations of the spokesmen. Real votes are seldom taken. The Chairman (Commission official) usually concludes, on the basis of the statements made by the spokesmen, that there is enough support for a common opinion, or that one or several interest groups take a different stand. The common opinion and/or the interest group opinions are then sent to the Commission.

3.3. Functional participation in risk regulation and normative assumptions.

National experience has shown that risk regulation, such as protecting the workforce against health and safety risks, can hardly be established via extensive and detailed legislation drawn up and/or debated by territorial representatives. Risk regulation is a cognitive demanding process in which scientific arguments are combined with normative considerations. Scientific expertise is needed to make a risk assessment (what are the risks associated with specific substances or with certain working conditions) and to provide instruments for risk management (what can be technically realised to avoid these risks). Risk regulation, however, also entails normative considerations, namely what risk can we as society accept? The answer might differ according to national or regional traditions and culture. The answer also depends on the costs of regulation. OH&S regulation entails costs for producers, for consumers (products might become more expensive), for national administrations (implementation and control measures) and sometimes even for workers (OH&S standards might influence competitiveness and therefore employment). Assessment of economic costs is thus inherent to the process of risk regulation.

Also at the European level the parliament, or more general, territorial representatives (including the Council) are not well equipped to provide all the expertise and considerations associated with risk regulation. Assessing the risk of a certain chemical agent or of certain working conditions, or providing technical solutions to avoid such risks, requires technical expertise which most parliamentarians and

55 For more information, see http://www.etuc.org/tutb/uk/index.html
56 See also Deamen and Van Schendelen (1998).
Council representatives cannot provide. Neither have they a precise view on the economic costs of OH&S measures. The Commission on the other hand, has not enough staff to develop such expertise in the variety of fields it is dealing with. The institutionalisation of functional participation appears then as a way to increase output-legitimacy; namely, better policy outputs will be obtained by involving those with a particular expertise in the field. Better policy outputs are assumed to increase social acceptance or legitimacy of the policy-making process. There are multiple ways through which expertise of non-elected actors can be introduced in the policy-making process. Thus, one could opt to create ‘independent agencies’, well staffed to develop scientific expertise and to make assessments of economic costs. The legitimacy of such agencies - which, after being mandated by parliament, could act autonomously - may be based on the idea that technical deliberation, free from ‘parochial political considerations’ ensures the best policy output.

Despite the technical nature of OH&S this model has not been chosen for European policy in this field. The EC has chosen to develop OH&S regulation largely via the legislative road. A European independent agency would not be able to take into account the normative considerations of OH&S problems, which differ according to national culture and practices. OH&S regulation via the normal legislative road would ensure that territorial representatives in the EP and the Council are able to address questions as which risk is acceptable and to take account of national differences. However, in this normal legislative road, the AC (and the ESC) is created to reply to the need for expertise.

The procedure for OH&S regulation which makes recourse to the AC seems thus to be built on the following assumptions:

* risk regulation needs to pass the normal territorial representation via the EP and the Council to judge the social acceptance of risks and to balance the socio-economic costs of regulation. Moreover, such territorial representation ensures the representation of national differences. The need to take account of national traditions and practices is also exemplified by the choice of the Directive as legislative instrument, which leaves considerable discretion to the Member States on how the objectives of the legislation should be reached.

* functional participation via the AC is then assumed to aim at two things: first, it is assumed to increase output-legitimacy by introducing actors which have particular expertise in the field, namely representatives of the social partners and from national public administrations who are normally dealing with OH&S issue; second, it is assumed to increase input-legitimacy by involving those directly concerned by OH&S regulation, which does not only lead to better implementation but can also be seen as an element of democratic participation.

The consultation of these functional actors is organised via the creation of an advisory committee, and not simply via lobbying. Functional participation via an advisory committee is assumed to have three particular advantages:

- it provides a balanced representation of management and labour; i.e. without such a committee the weakest party, labour, would not be able to have the same influence. Yet, it also assumes that there is no further need to represent other interest groups than the social partners.
by appointing national representatives of the social partners, and by including a group of government representatives, the AC is supposed to express the diversity of national traditions and practices.

-contrary to lobbying, the AC brings the concerned interest groups together to make them deliberate on OH&S proposals. As Sidjanski notes ‘the advantage of committees over lobbying is that within these committees different views are confronted with each other so that a common general interest can be looked for and sectoral interests refrained.’\textsuperscript{58} In a pure interest based model, interest groups would formulate their demands vis-à-vis the Commission and would not readjust their view taking account of the opinion of other interest groups. By creating an advisory committee, the concerned interest groups will deliberate on an issue to present a common opinion to the Commission. This will also reduce the discretion of the Commission to pick and chose between different interest groups positions, while the deliberative process in the European Parliament and the Council is reinforced by an additional forum of deliberation.

3.4. Legitimacy problems.

3.4.1. Does the AC live up to the expectations?
The AC assumes to increase legitimacy by an additional level of representation and by increasing deliberation. But how representative and deliberative is the AC? Moreover, has it any influence on the policy-making process?

* representation:
Does the AC ensure a ‘balanced representation’ of those most directly concerned by OH&S? The AC brings together an equal number of representatives from management and labour. Management, however, can rely on a greater number of OH&S experts than labour. Consequently, while the AC strengthened the position of labour compared to mere lobbying, labour missed, especially in the beginning years of the AC, still the necessary expertise to ‘counterbalance’ management. Yet this situation has steadily improved, and especially since the creation of the Technical Bureau of the European Trade Union Confederation (TUTB) the situation appears much more in balance.

Another question is whether the social partners’ representatives in the AC are representative of all the economic sectors concerned by OH&S. In the current composition of the AC, full members on the trade union side, all come from the national trade union confederations, with the exception of one German member from the German Metal Trade Union. Members from the national trade union confederations can be supposed to represent trade unions in the various economic sectors.

Yet, not all workers are part of a trade union\textsuperscript{59} and trade unions are not equally present in all sectors of economic activity. In SMEs, for instance, they are generally absent. Yet, a large part of the workforce is employed in SMEs and health and safety risks are as real for them as for workers in unionised industry. Or who represents the

\textsuperscript{58} Sidjanski (1992), p.73. In a comparable sense Sartori (1987; pp.227-238) considers committees to be an optimal unit of decision-making due to their face-to-face character, which enables to combine low ‘decisional costs’ (difficulties to arrive at decision) with low ‘external risks’ (risks that addressees will not accept the decision).

\textsuperscript{59} Exception made of the Austrian case.
interim workers, who often change job, and are therefore more vulnerable for occupational accidents?

Also on the employers’ side most members originate from the national employers confederations. However, even more than on trade union side, the national confederations of employers’ organisations only represent part of the economic sectors. Partially, some AC members fill up the gap: there are two representatives for commerce and services, one for crafts and one for agriculture. Yet, the number of representatives does not correspond to the importance of these sectors. It could hardly be assumed that the five AC members from private firms fill up the gap. The two representatives from private associations for the prevention of accidents or diseases (one for the Spanish and another for the French employers) could be supposed to have a more ‘general scope’. But also on employers’ side one can ask; who represents the employers of SMEs, for whom OH&S regulation might impose an important financial burden? These questions of representativity with regard to the different sectors of economic activity are increasingly important since the economy shifts to non-unionised and ‘atypical’ workers, SMEs, service sector and ‘new economy’. One of the new priorities of the Commission, for instance, is the ‘new organisation of work’, namely working from home, remote work, subcontracting etc. As former Commissioner Padraig Flynn put it ‘our task is to ensure that those workers involved also benefit from the same guarantees of health and safety’.60

One may also question whether social partners organisations (together with representatives from national administrations) really represent all those concerned by OH&S regulation. Put different: can one assume that the legitimacy of OH&S policy-making is ensured by involving only the traditional social partners? Several non-occupational groups might have an interest in participating in the AC; the disabled, for instance. Is the border of OH&S policy by definition identified with the line between pre- and post-occupational accident? Or could the representation of the disabled in the development of OH&S regulation lead to stronger responsibility for the consequences of occupational accidents and diseases? Moreover, disabled (by occupational reasons or not) should not be condemned to stay out of the employment market. To integrate them (back) into the workplace, specific protective measures might be necessary. Consumers, on the other hand, might be concerned that higher OH&S norms are not entirely at their costs.

However, the shortcomings in the representativity of the AC should not be exaggerated. First, one should take into account that other interests, such as consumers or the disabled, may also have a say on OH&S regulation via their representation in other fora, such as the ESC. Second, the AC is but an advisory committee; its aim is to introduce into the policy-making process technical expertise and practical experience which territorial representatives lack; but in the end, these territorial representatives take the decision. ‘Shortcomings’ in its representativity are therefore less problematic than for institutions which have real decision-making power.

Yet, there is one element of the AC’s representative character which incites to more concern. The AC is also supposed to be representative for the different Member States. In addition to the representatives from national administrations, the social partners representatives are chosen from the national and not from the European level. The AC members are appointed by the Council, at the proposals of the Member States. This element of subsidiarity is important because there are different national regulatory traditions and different attitudes towards the acceptability of risk, and before all because European risk regulation such as OH&S has different economic implications throughout the Union.

The AC Statutes ensure that each Member State has an equal number of AC members. However, there are no effective procedural guarantees to ensure such a balance within the working groups. Article 16, 4 of the Rules of Procedure describes how the members of a working group should be appointed. The AC members of the same Member State have to propose in common agreement one or several of them to act as working group member. The AC has then to decide on basis of the proposals done. Yet, in practice, the balance between the interest groups, together with the personal expertise, are far more decisive in the composition of the working groups. This leads actually to big differences among the Member States. In the eight working groups active at the end of 1997, for instance, only once a Greek AC member was member of a working group (in this case a representative from the national administration). The same applies for Portugal (but in that case a representative on the employers’ side). At the other extreme, 17 times a UK member was active at the working group level. In two working groups the UK was even represented on employers, workers and government side.

The functioning of the working groups is illustrative for a more general problem of the AC, namely the dominance of those Member States which have the best expertise in OH&S issues (mainly the Northern countries), and the passivity of those which have not this expertise (mainly the Southern countries). It has been argued, and it also appeared in the interviews hold, that the imbalance in expertise between the Member States has plaid an important role in the realisation of the (unexpected) high level of European OH&S norms, namely on the level of the most advanced countries. Though one might favour a ‘race to the top’ rather than a ‘race to the bottom’ in social norms, the legitimacy of the AC as representing national differences can be questioned if the Committee is generally used by the Northern Member States to impose their regulatory approaches and standards to the Southern countries, especially since this generalisation of the higher standards gives competitive advantages for those Member States which have already such norms.

* deliberation

61 The Statutes mention only explicitly that the Council appoints the members (Article 4.3).
63 Namely the UK, France (mainly for machinery) and Denmark (Germany only on chemical products) (interviews).
64 Greece, Portugal and Spain (interviews).
66 The imbalance in Member States representation at the working-group level of committees reminds the BSE crisis. It appeared that during the BSE crisis, the BSE sub-group of the Animal Health section of the Scientific Veterinary Committee was at all material times chaired by a United Kingdom member, and its meetings were numerically dominated by United Kingdom nationals. See Bradley (1999), p.87.
67 For a comparable phenomenon in environmental policy, see Adrienne Heritier at al. (1994).
The debate on deliberative democracy has brought forward different definitions of
deliberation, going from Habermas’ ‘rational discourse’\textsuperscript{68} to broader definitions, such
as Gambetta’s ‘conversation whereby individuals speak and listen sequentially before
making a collective decision’\textsuperscript{69} or Stokes’ ‘the endogenous change of preferences
resulting from communication’.\textsuperscript{70} Under these broader definitions,\textsuperscript{71} deliberation is
not limited to decision-making by means of arguments offered by and to participants
who are committed to the values of rationality and impartiality, but could also include
bargaining, i.e. changes of positions due to the bargaining power of the parties - that
is, the resources that enable them to make credible threats and promises.\textsuperscript{72}
To clarify the deliberative process in the AC it is actually useful to distinguish
between different types of deliberation at three different levels of the AC: the level of
the working group, of the interest group and of the plenary session.
The first level is that of the working group. According to Article 17 of the AC’s Rules
of Procedure, working groups cannot take decisions by voting. In order to arrive at a
proposal for a common decision to be adopted by the plenary the AC members thus
have to look for consensus. The working group always presents a proposal for a
common opinion, though sometimes explains also the differences in view. As results
from the interviews hold, deliberation within the working groups is mainly concerned
with technical arguments. Obviously employees are on the demand side for higher
standards, whereas employers tend to refrain the setting of higher OH&S standards
(though national differences might sometimes upset this basic starting point).\textsuperscript{73} Debate
in the working groups is, however, not a taking of dogmatic positions but occurs
around technical arguments. This applies also for the representatives from national
administrations. They do not defend ‘the national position’,\textsuperscript{74} though they mostly
present their national law as the solution to adopt. For national administrators each
European intervention necessitates national implementation measures. The more
close European OH&S regulation is to the national system, the easier for the national
administrators. Arguments put forward by the representatives of national
administrations are therefore not put in terms of national economic interests but rather
in terms of technical solutions that could be developed at the European level. The
technical nature of the deliberation in the working groups result largely from their
composition. Rather than ensuring an equal representation of all the Member States,
working groups ‘should be as small as possible to ensure maximum efficiency’
(Article 16, 1 Rules of Procedures).\textsuperscript{75} Moreover the Rules of Procedure require that

\textsuperscript{68} Habermas (1996).
\textsuperscript{70} Stokes (1998), p.124.
\textsuperscript{71} Young (1996) prefers to use the concept of ‘communicative democracy’ to recognise the role of other
forms of communication than deliberation.
\textsuperscript{72} Elster (1998), p.6.
\textsuperscript{73} Southern trade unions might see higher OH&S standards as a further threat to employment, whereas
Northern employers organisations might see European higher OH&S standards as a competitive
advantage since they had already to comply to such standards at the national level anyway. According
to the interviews hold, however, these national differences are minor to the opposition labour versus
management. Trade unions principally are in favour of higher European OH&S norms; employers
principally are in favour of harmonisation of OH&S norms (in order to avoid competition on this
aspect) but will always argue that the economic costs of the trade union demands are too high.
\textsuperscript{74} Normally such a ‘national position’ has still to be developed.
\textsuperscript{75} Yet, working groups respect the balance between the three interest groups.
‘the members of the working group must have the necessary technical capacities’, and if necessary members of a working group might even be appointed among persons that are neither full nor alternate AC members (Article 16, 3). As already described, experts from the TUTB on trade union side, and some external experts on the employers’ side play an important role in the working groups. Technical argumentation is also supported by the presence of the responsible Commission official, who does not hold the chair of the working group, but provides an important technical input given his/her position as drafter of the (initial) proposal. The second level of deliberation is that of the interest groups. The day before the plenary the three interest groups meet separately to decide on their final position for the following day. This deliberation within the interest groups is less based on technical arguments but is mainly concerned with bridging the national differences within the interest group. The trade union group normally has no problem in finding a common position, due to the co-ordinating role of the representative from ETUC who will act as spokesman. Also on the employers’ side a common position is mostly found, though with some more difficulty. On employers’ side there is more diversity in sectoral organisations and the co-ordinating task of the spokesman - normally a representative from UNICE - is therefore more complicated.

To define a common position on the side of the representatives from national administrations is more difficult. Contrary to employers or employees national administrators have no common interest pro or contra higher OH&S standards. In addition to the defence of ‘the national solution’ to the particular technical problem, arguments on economic interests might turn up. Simplified; Southern countries see the European OH&S regulation as a threat whereas Northern countries may consider it a competitive advantage. National regulatory traditions might, however, counterbalance the economic North-South divide, namely some Southern countries combine strict regulation with wide flexibility and non-control in implementation whereas more Northern countries might prefer guidance combined with stricter implementation. The opposite consequences of economic interest and regulatory traditions along the North-South distinction might actually lead to a common position. Most importantly, however, seems to be the fact that national administrators, after having pointed to their preference in regulatory technique, are not attempted to play it hard. Contrary to employers and employees, the national interests can be defended strongly further on in the decision-making process, namely at the level of the Council.

The third level of deliberation is at the plenary session. According to Article 7 of the AC Statutes, the opinions of the AC should be delivered by an absolute majority vote of the votes validly cast. In terms of deliberation, majority vote is obviously half a glass of water. In order to obtain a majority of votes, half of the AC members can readjust their preferences to each other but discard the view of the other half. However, votes are nearly ever taken within the AC. Consensus is looked for.

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76 In the words of a Commission official, the fact of not having the chair of the working group does not profoundly diminish the Commission’s influence since ‘we have the knowledge’.
77 Danish employers, for instance, tend to be more in favour of higher OH&S standards, whereas British employers are clearly hostile.
78 Frequently, the same persons active in the AC as representatives of the national administrations are also the national representatives within the working groups of COREPER and the Council. Whereas they act ‘in personal capacity’ as expert in the AC they are mandated to represent the national position in COREPER.
Consensus can only be reached if AC members listen to each others views and are ready to adapt their own opinion. Yet, often deliberation in the plenary is fairly limited. Mostly a solid agreement can be reached at the level of the working group, which is then confirmed by the interest groups meetings. In that case the spokesmen of the three interest groups will just make a statement in the plenary whereupon the Chair will ascertain that agreement has been reached. When it is difficult to reach a solid agreement within the working group because economic and national arguments frequently turn up in the technical debate, such arguments might either be overcome or be strengthened through the deliberation in the interest groups. Occasionally an interest group might also put into question the agreement as reached at the level of the working group. As a Commission official puts it, ‘the presentation of coherent and constructive AC opinions largely depends on the skill of the co-ordinators acting within the framework of their respective interest groups’. The spokesmen of the interest groups are also in informal contact on the day of the interest group meetings, so that the position for the plenary can be adapted. The ‘positions’ of the interest groups and the possibility to add to an AC opinion the opinion of an interest group will then condition the debate in the plenary. The deliberation at this level is nearly ever purely technical and ‘interest-based positions’, national and political arguments enter clearly into the debate. This is strengthened by the tendency to send ‘into the arena’ the spokesmen and AC members with a more generalist or political approach rather than the ‘pure experts’ who focus their action on the working groups. Even if other than technical arguments appear the process remains mainly one of deliberation rather than of bargaining. The bargaining powers of the concerned parties are limited and tend to neutralize each other, namely each party can threaten to issue a separate interest group opinion, but all the AC members are aware that a common AC opinion has proven to have more influence on the Commission.

Deliberation in the AC is thus a multi-level process in which technical deliberation precedes deliberation on more normative and interest-based arguments. In these sense the AC resembles to a certain extent what happens in certain comitology procedures with scientific committees. Namely it has been said that ‘arguing’ among scientific experts or other professionals (within scientific committees) reduces the potential for conflict on specific issues before they enter policy arenas (comitology committees) which are dominated by strategic bargaining. Though normative arguments and strategic bargaining remain the exception in the AC one can distinguish between the very technical working group level preparing a ‘technical common agreement’ which facilitates the more interest-based deliberation at the level of the interest groups and plenary.

The AC thus effectively ensures a process of deliberation which would not take place if interest representation occurs only via lobbying. However, the deliberative process in the AC is less intensive than the institution may pretend, namely often only a small number of AC members are involved in the deliberation on a particular OH&S

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79 Social Europe 2/90, p.20.
80 AC members are all supposed to have a certain technical expertise in OH&S issues. Yet, the appointment of two representatives per category for each country (+ alternates) enables the appointment of members who are technical experts on the one hand, and members who are more generalists on the other hand.
proposal. Often the debate is limited to the small circle of AC members dealing with
the issue in the working group. This problem is obviously linked with the
underrepresentation of certain Member States as mentioned above.

* output-legitimacy

The AC introduces elements of expertise and might does improve the policy output; at
least if the AC has influence on the decision-making process.

Though the AC played a considerable role in the development of the first OH&S
Action Programme in 1978 its role remained modest until 1987. The modest
development of OH&S policy until 1987 implied that the AC met only on few
occasions and this did not favour the development of a coherent working practice
within the committee. It proved very difficult to bring management and labour (and
representatives from national administrations) to a common agreement after profound
debate. The fact that OH&S directives had to be adopted with unanimity (namely
under Article 100 EC) did not favour a deliberative attitude of those AC members
(management and some MS representatives) who were against European OH&S
regulation, since this could easily be blocked further on in the policy-making process.
The Single European Act had therefore a serious impact on the working of the AC.
The Qualified Majority Voting opportunity enshrined in Article 118a EC did not only
led to a boom in OH&S legislation, it also enabled a stronger
involvement of the AC
in this regulatory process. Since QMV made it more likely that legislation was
enacted, the ‘deliberative attitude’ within the AC increased. Labour and management
found an agreement on OH&S regulation as part of the Single Market project. A
‘smooth’ co-operation between management and labour within the AC seems to be a
decisive factor for the Committee’s influence. It results from all the interviews that
consensus within the AC is a dominant factor to have influence. According to a
Commission official, not respecting a clearly expressed consensus in the AC would
only lead to insurmountable problems in implementation.

In comparison with the main Community Institutions, the AC is only a side player. It
is not a decision-taking body but remains an advisory committee. It leads mainly to
technical adjustments of the Commission’s drafts. Normally it leads not to
fundamental changes of the Commission’s initiatives. Yet, if the AC expresses a
large consensus against a Commission proposal, the Commission is likely to hear
comparable voices also on other places, which may lead to a serious readjustment or
even a withdrawal from the proposed initiative. Occasionally an expressed consensus
by management and labour within the AC, against the ‘government group’ has even
led to the Commission withdrawing from its initiative.

3.4.2. Accountability

82 Baldwin and Daintith (1992), p.5.
83 Daemen and Van Schendelen (1998; 135) point to the fact that in the early 1980s, management in
northern countries was subjected to stricter national OH&S regulation and therefore began to see the
AC as an instrument to push OH&S standards for the South.
AC members are not directly elected; the ‘government representatives’ are simply part of the national administration, whereas only a small part of the social partners’ representatives is elected within their organisation. In any case is the control on their action in the AC minimal. Is this lack of accountability problematic?

The AC does not replace territorial representation, i.e. it has only advisory competence in a decision-making process where, in the end, territorially elected representatives take the decision. Legal competence is obviously no guarantee since in technical issues territorial representatives might simply rubber-stamp what has been decided by technical experts, but has just explained, the AC practice is one of having influence without dictating the solution. Functional representation does thus not bypass territorial representation.

Since the AC has no decision-making power, the question of accountability is less stringent then for institutions which do have this power. However, there is one element of accountability which remains equally important for mere advisory structures, namely transparency as a way of accountability to the general public and to the decision-making institutions.\(^{84}\) Transparency is ‘a way of informing the public’ so that the citizen can know which decisions are taken, why and on basis of which arguments. Transparency can also enable scrutiny by other institutions.

However, EU committee procedures have been largely criticised for their opaque nature.\(^ {85} \) Their opinions are not published, their composition remains often unknown, everybody ignores their real influence and there remains even doubt on the exact number of committees active in European policy-making. Access to committee documents has rarely been granted to researchers, and much less to the public or media.\(^ {86} \) ‘The opaque and confusing nature of the committee system results in its non-accessibility to the scrutiny of other institutions.’\(^ {87} \) Neither the EP nor the media is in a position to review, evaluate or monitor what is happening in the committee rooms.\(^ {88} \)

Among the various types of committees, the consultative committees to the Commission, such as the AC, appear to be a bit more transparent than, for instance, comitology committees where there is great reluctance to uncover the positions taken by the Member States.\(^ {89} \) According to Article 3 of the AC Statutes ‘the Committee produces an annual report on its activities, which the Commission forwards to the European Parliament, the Council, the Economic and Social Committee and the Consultative Committee of the European Coal and Steel Community’. Such publicity should enable some scrutiny by and accountability to the other institutions. While this provision for publicity has been called an exceptional one\(^ {90} \) compared with the opaqueness of other committees, its merits should be shaded. The annual report contains the list of all AC members, but without mentioning the organisations they originate from. The succinct summaries of the AC opinions reproduced in the annual report are neither of a nature to enable a profound scrutiny of the AC activities.

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\(^{84}\) For different aspects of the relationship transparency-democracy, see Gronbech-Jensen (1998).

\(^{85}\) Schaefer (1996); Vos (1997); De Burca (1999); Dehousse (1999).

\(^{86}\) Schaefer (1996).

\(^{87}\) De Burca (1999), p.76.


\(^{89}\) Ibid., p.22.

\(^{90}\) Falke (1996), p.162.
The opinions of the AC are not published as such, and it is very difficult to get access to them. Moreover, the Committee sessions (both plenary and working groups) are not public.

Requesting increased transparency of the AC seems thus entirely justified, and the publication of the AC’s composition and of its opinions on the internet are measures which would not require excessive efforts. Yet one should also acknowledge that even under the current conditions the AC may appear more transparent than what would happen if there was no advisory committee. Only a very limited number of MEPs have shown an interest in the technical details of OH&S regulation. Consequently, the risk that in a framework of pure lobbying, OH&S regulation would be drafted by a single and non-identified particular interest seems much higher than in a procedure involving the AC.

4. The European social dialogue.

Like for the AC, I will first briefly describe the European social dialogue (4.1) to analyse consequently the normative assumptions underlying such a structure (4.2.) and the legitimacy problems created by it (4.3.). Contrary to the AC the social dialogue is not exclusively and even not primarily created for OH&S issue; section 4.4. describes its (potential) role in OH&S policy.

4.1. The mean features of the European social dialogue.

The concept of European social dialogue has been used to refer to different institutions which establish the participation of management and labour in European policy-making, distinguishing between a cross-sectoral, sectoral, and Euro-company social dialogue and between processes of consultation, joint action, negotiation and concertation. I will focus here on what has been considered the core of the social dialogue, namely the procedures for the participation of management and labour in European social policy-making as created by the Social Agreement added to the Maastricht Treaty and subsequently enshrined in the EC Treaty by the Amsterdam Treaty (Articles 138 and 139 EC Treaty). It is beyond the scope of this paper to go...
into the details of the extensive (legal) debate on this procedure,\textsuperscript{94} so I will limit myself to a simplified description.

The procedure starts with a double obligation for the Commission to consult the social partners on all ‘proposals in the social policy field’, first on the possible direction of Community action, and second, on the content of the envisaged proposal. To be consulted the organisations of management and labour should ‘a) be cross industry or relate to specific sectors or categories and be organised at European level; b) consist of organisations which are themselves an integral and recognised part of Member States’ social partners structures and with the capacity to negotiate agreements, and which are representative of all Member States as far as possible; c) have adequate structures to ensure their effective participation in the consultation process’.\textsuperscript{95} The Commission has established a list of 44 organisations which currently comply with these criteria.

On the occasion of this consultation,\textsuperscript{96} management and labour may inform the Commission of their wish to deal with the issue by bipartite collective agreement. Within a (renewable) time-limit of nine months, such a request will generally lead to the suspension of the normal legislative procedure (though the Commission has in principle the discretion to go onwards). In case the social partners find an agreement no other legislative action will be taken. If the negotiation fails, the normal legislative procedure via (the ESC, the COR) the European Parliament and the Council goes ahead.

If a European collective agreement is reached it can be implemented in two ways; either ‘in accordance with the procedures and practices specific to management and labour and the Member States, or in Community social policy matters, ‘at the joint request of the signatory parties, by a Council decision on a proposal from the Commission’. For all the four European cross-sectoral collective agreements signed until now, the second route of implementation has been chosen. Whereas the legal consequences of the first route remain unclear, diverging according to national traditions, and often simply depended on whether the affiliated organisations will press their members to respect the agreement; the second route makes the collective agreements provisions generally binding due to implementation via a Council Directive,\textsuperscript{97} i.e. all Member States are obliged to reach the objectives of the collective agreement, though they have some freedom to choose the instruments to obtain these results.

4.2. Neo-corporatist inspiration and normative assumptions.

\textsuperscript{94}E.g. Ojeda-Avilés (1993); Bercusson and Van Dijk (1995); Mancini (1995); Weiss (1995); Betten (1998).

\textsuperscript{95}Commission Communication concerning the application of the Agreement on social policy, COM (93) 600 final.

\textsuperscript{96}Following a 1993 Commission Communication, social partners can only initiate negotiation at the occasion of the second consultation.

\textsuperscript{97}The Treaty talks about implementation by ‘Council decision’. The Commission has argued that such ‘Council decision’ could be as well a ‘Council Decision’ as a ‘Directive’, ‘Regulation’ or ‘Recommendation like defined in Article 249 EC.
Interest intermediation in the European polity has mostly been defined as pluralist.\textsuperscript{98} A variety of players - associations, private firms, professional lobbyists, regional actors etc. - have a multiple choice of access-routes to the policy-making process. Interest intermediation in the EU is not monopolised by the peak associations of management and labour and it is surely not a copy of national neo-corporatist settings in which the ‘encompassing’ organisations of management and labour monopolise tripartite concertation with the government on macro-economic policy, ensure wage bargaining and play a decisive role in the implementation of welfare policies.

However, this more ‘pluralist picture’ of the European polity as a whole does not exclude two things:
- First, within certain ‘sub-systems’ of the European polity corporatist patterns may prevail. Within specific areas a limited number of groups might well have been granted a privileged access to the policy-makers to the exclusion of others. Such European ‘meso-corporatism’ has been recognised by several authors.\textsuperscript{99}
- Second, certain institutions may be built on neo-corporatist intentions, or the normative considerations that can be assumed at the basis of such a structure may be of a neo-corporatist nature.

I will argue that the European social dialogue is of neo-corporatist inspiration.\textsuperscript{100} The point of reference is not a descriptive account of neo-corporatist practice at the national level, but the considerations placing neo-corporatism against (neo) pluralism. Three elements exemplify the neo-corporatist inspiration of the European social dialogue, instead of a (neo) pluralist one.
- First, the European social dialogue creates within the area of social policy a privileged access to policy-making for certain interest groups to the exclusion of others. Consequently it does not correspond to the pluralist idea that interest group competition leads automatically to equilibrium in society and that the general interest can be resumed in the outcome of such competition.\textsuperscript{101} Public authority will - taking into account ‘the general interest’ - select those groups which merit a privileged access. In line with neo-corporatist thought, the privileged groups to participate in social policy are the associations of the main functional groups, namely management and labour.

Though the Commission can consult NGOs, third sector organisations, cooperatives or private interest groups informally or via a Green paper, these groups do not profit from the privileged consultation under Article 138 EC Treaty. Even less can these groups participate in the negotiation procedure under Article 139.
- The creation of a separate regulatory space in which management and labour have the autonomy to deal with social and work-related issues by bipartite negotiation and agreement is a second neo-corporatist feature. Though the ‘autonomy’ of such space for bipartite negotiation has been conditioned differently within the national industrial relations systems, all neo-corporatist systems recognise that public authority should to

\textsuperscript{98} Streeck and Schmitter (1991).
\textsuperscript{99} Gorges (1996); Falkner (1997); Greenwood (1998); and Traxler and Schmitter (1994).
\textsuperscript{100} Even authors, like Obradovic, who - mainly referring to national corporatist practice - are very sceptical on the possibilities of developing a corporatist policy-making mode at the European level, agree that the Social Agreement’s intention is ‘to promote European-level collective bargaining in the full corporatist manner’. See Obradovic (1995), p.265.
\textsuperscript{101} Neither does it correspond with the neo-pluralist idea that transparency, ‘due process’ and judicial review can guarantee the equal access to policy-making for all interest groups.
a certain extent refrain from intervention in certain work-related issues which can better be dealt with by bipartite negotiation between management and labour. Article 139 (1) states explicitly that ‘should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements’. Moreover, the obligatory two-stage consultation procedure of Article 138 (2) and (3) is linked to the possibility to negotiate on an issue introduced by the Commission. This means a form of ‘horizontal subsidiarity’ in favour of management and labour, namely within certain conditions regulation via bipartite negotiation is privileged to the normal legislative road of policy-making. The reached collective agreements may even be extended erga omnes via Council Directive. Though this requires the intervention of the Commission and the Council the outcome is a legislative act which has entirely been drafted by management and labour. In addition, in a Communication of 1998, the Commission has stated that even European collective agreements which have been drafted entirely at the autonomous initiative of the social partners, and thus not as a result of the consultation procedure by the Commission, may be implemented by Council Directive. Alternatively, European collective agreements may be implemented ‘in accordance with the procedures and practices specific to management and labour and the Member States’, which confirms the ‘autonomous space of regulation’ for management and labour as recognised in the Member States. Finally, Article 137 (4), confirming established case law, recognises management and labour as privileged partners in the implementation of social policy directives; national bipartite agreements can substitute national legislation to transpose directives (though the Member State remains ultimately responsible).

102 Autonomy of social partners relations from State intervention has most strongly been stressed in the UK, and this ‘collective laissez-faire’ has been distinguished by labour lawyers from continental neo-corporatist systems. Yet, a space for ‘bipartite relations’ is equally central to continental industrial relations systems, though not as autonomous as in the UK.

103 It does not follow that negotiation can only take place after consultation.

104 Commission Communication ‘Adapting and Promoting the Social Dialogue at Community Level’ (20/5/98).

105 Soon after the signing of the Maastricht Treaty an ETUC/UNICE/CEEP statement proposed several criteria to the Commission to identify the social partners under the consultation and negotiation procedure of the SA. The criteria aimed clearly at guaranteeing their own representational monopoly, stipulating among others that the organisations should ‘be represented in all member-states of the European Community and, possibly of the European Economic Area, or have participated in the “Val Duchesse” social dialogue’. See Dolvik (1997), p.315. However, in its subsequent 1993 Communication on the application of the SA, the Commission did not draft the criteria so bluntly in favour of the three organisations.

106 Whereas it is sufficient to be ‘representative of several Member States’ for organisations in Sectoral Dialogue Committees, ‘representative of all Member States as far as possible’ is required for the two-
Even if under Article 138 EC currently 44 organisations are consulted, the Commission has stated to be ‘conscious of the practical problems posed by a multiplicity of potential actors.’ The Commission will endeavour to promote the development of new linking structures between all the social partners so as to help rationalise and improve the process, i.e. reduce the number of players by making the bigger organisations more comprehensive. The Commission has since longer date - and especially since the mid-1980s - plaid an incentive role in the development of European peak associations. In particular, the strengthening of ETUC (vis-à-vis its own constituents and vis-à-vis the employers) was considered by the Commission to be a primary condition to get the social dialogue taking of. Therefore, it provided substantial funding to facilitate union training, research and meetings at the European level ( ). Meanwhile, it opened up privileged networks of communication between itself and ETUC.

Incentives to strengthen the position of ETUC and UNICE (CEEP) as encompassing organisations have also resulted from the dynamics under the Article 139 negotiation procedure. The recognition by Commission, Council and Court of First Instance of ETUC, UNICE and CEEP as representative of management and labour cross-industry, together with the confirmation of the principle of mutual recognition, has incited other European organisations to collaborate with these three organisations in order to have their position represented in the ETUC-UNICE-CEEP negotiations. The Commission has explicitly welcomed this evolution to inter-organisational co-ordination and centralisation.

The creation of a social dialogue which ensures a privileged access to policy-making for a limited number of ‘encompassing organisations’, which, moreover, have the opportunity to sign agreements with effect *erga omnes* bypassing the normal legislative route, is built on two particular assumptions:
- First, it assumes that management and labour have a balanced bargaining position; only under these conditions their self-regulation can be considered legitimate.
- Second, it assumes that the ‘encompassing organisations’ are representative. Under the most strict interpretation of ‘representativity’ the organisations have to be ‘representative’ within the sector of self-regulation but in a broader sense ‘representativity’ implies equally that the organisations internalise as much as possible the costs of their self-regulation for other interests and that the organisations themselves are democratically structured (including that the representatives of the organisations are mandated by their members).

### 4.3. Legitimacy problems

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\(^{109}\) The Commission refers to ‘the positive example’ of the association as experts of, EUROCOMMERCE, FENI, COPA and HOTREC in the negotiation on the agreement on fixed-term contracts. See Commission Communication, Adapting and promoting the Social Dialogue at Community level, 20/5/98, point 5.3. After its negative experience with using the judiciary route to get access to the negotiation table, UEAPME is equally searching to get its views represented via UNICE.

\(^{110}\) I will be brief on this issue, since there is already an important bunch of literature on this issue, of which a good account is given in Frank Wendler’s paper for the workshop.
4.3.1. Does the social dialogue live up to the expectations?

Whereas the assumptions of ‘representativity’ and of ‘balanced bargaining position’ are already problematic for neo-corporatist practices at the national level, they are even more so at the European level. The statement of the Commission and the Court of First Instance that the three umbrella organisations UNICE, CEEP and ETUC represent all categories of employers and employees can hardly been supported. Many of the national trade unions and employers’ associations are not included in these organisations; and their internal decision-making structures raise both questions on the mandate of the representatives, and on the internal democratic nature of the organisations. And if it still needs to be restated, trade union membership is in decline, while non-unionised atypical workers are, as far as their number is concerned, no longer that atypical.

The self-regulatory autonomy of the social partners is based on the idea that the social-economic power relations between management and labour will bring both to the negotiation table and result in a justified outcome. At the European level, however, any such social-economic pressure, particularly in the form of industrial action or threats thereof, is lacking; labour is not strong enough to make a European strike a real threat, while management can profit from ‘negative integration’ having no need for further ‘positive intervention’.

There is an alternative threat to get the social partners at the negotiation table; the threat of legislation. The European Commission can give the stimulus for such ‘bargaining in shadow of the law’ by making proposals for social legislation, but the outcome will remain limited as long as the Member States are not likely to adopt such legislation in the Council (despite the fact that several social policy issues can now be decided by qualified majority vote). How this outcome would be assessed in terms of ‘output-legitimacy’ depends on the frame of reference. If one expect the European social dialogue to resemble the kind of collective bargaining established at the national level, linked to the acquisition of rights of the welfare state, the European social dialogue has not too much to offer. However, if one compares the outcome of the European social dialogue with what would have been reached if the procedure did not exist, the assessment is more shaded. On the one hand, the social dialogue has been able to regulate certain issues via collective agreement which for years were blocked under the normal legislative procedure. Moreover, as the case of the European Works Councils Directive has shown, even where the social partners are not able to reach a European collective agreement, they may, nevertheless, have a decisive influence on the normal legislation which follows the failed negotiation.

On the other hand, it appears that the substantial content of the collective agreements is lower than the initial Commission proposals.

4.3.2. Accountability

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111 E.g. Schmidt (1999).
112 It is difficult to see, though, what would have been the final Directive, if there would not have been a collective agreement. Moreover, the Commission may also make proposals which are more faregoing precisely to get management at the negotiation table.
For the AC the lack of accountability and transparency was softened by the fact that the EP and the Council remain the final decision-takers, of whom the accountability is (to a certain extent) ensured via territorially based elections. The problem of accountability is more serious for the social dialogue since it creates a self-regulatory space and it even allows that collective agreements be made generally binding by Directive. Even if in the latter case, the Council has to intervene, it only approves the entire text of the agreement without making changes to it. Moreover, the EP does not intervene into the process. The problem of accountability is not only one of by-passing the EP but raises questions on the internal democratic nature of the social partners’ organisations and the mandate of their representatives. Moreover, one may question whether criteria of transparency generally applied to public authorities should not be applied to the social partners organisations in cases where their agreements will have a generally binding nature.

4.4. European social dialogue and OH&S policy.

The European social dialogue is much broader than the field of OH&S regulation. Moreover, it aims rather at social regulation and collective bargaining on broader issues of the employment relation than on technical issues of risk regulation. OH&S is traditionally not a sector in which bipartite negotiation is well developed. Especially due to its technical nature, but equally due to the particular role of public authorities (e.g. control on implementation) OH&S norms are generally established via legislative intervention. ETUC and UNICE agree that also at European level negotiation will be the exception to the rule and can at best occur regarding procedural matters, information, consultation, participation and training. Vocational training is a traditional issue of social dialogue and it was one of the privileged issues for which it was hoped that a European social dialogue would develop. For the European social partners vocational training in OH&S seems currently the most probable issue on which negotiation in that sector might occur. Agreements dealing with vocational training in OH&S might even more easy occur than agreements on vocational training on other issues, given the relatively low opposite interests between management and labour in the OH&S sector compared to other industrial relations issues.

However, whereas the number of European collective agreements in OH&S issues will remain in reality very limited, the Amsterdam Treaty made the social dialogue provisions obligatory for all OH&S legislative initiatives. This legal change has (probably unforeseen) consequences in the combination of different forms of

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113 Obviously the critique on territorial representation as put forward in the debate on the EU democratic deficit applies here.
114 ETUC internal document.
115 Position de la CES sur l’application du traité d’Amsterdam dans le domaine de la santé et de la sécurité sur le lieu de travail; document adopté par le comité exécutif les 16-17 septembre 1999. Commentaires de l’UNICE du 27 avril 1998 sur “la consultation des partenaires sociaux dans le cadre de la politique communautaire de protection de la santé et de la sécurité des salariés sur le lieu de travail”.
116 Internal document ETUC.
118 Interviews with the European social partners.
functional participation, and revails the tension between two different models of functional participation.

5. Legal and factual overlap and normative contradictions.

I have argued above that the legitimacy of functional participation in OH&S policy should be assessed by taking account of how different forms of functional participation are combined (section 2). I have limited consequently my analysis to two of such forms of participation, the AC and the social dialogue, and set out their different normative inspiration (section 3 and 4). I will now focus on how the emergence of the social dialogue on the scene of OH&S policy has created tensions between two different models of functional participation. The reaction of several policy actors to the creation of the social dialogue in OH&S illustrates this tension.

5.1. Legal and factual overlap between the two procedures.

With the adoption of the Social Agreement (SA) added to the Maastricht Treaty two legal bases were available for OH&S regulation: the usual Article 118a EC Treaty, applicable to all the 12 Member States, and Article 2 SA, applicable to all but the UK. The social dialogue procedure provided by the SA would juridically only apply if OH&S action is based on Article 2 of that Agreement. However, using the SA as legal basis for OH&S regulation would have been more a disadvantage than an advantage. It had sense to use the SA in those fields where both the Agreement and the Treaty required unanimity, since unanimity with 11 is more easy to reach than with 12 (especially if the UK is the additional party). It had equally sense for those fields for which the SA provided qualified majority vote whereas the Treaty provided unanimity. For OH&S measures, on the contrary, Article 118a EC Treaty provided already qualified majority vote. The Commission has consequently preferred to base OH&S proposals on the Treaty and not on the SA in order to make the provisions also applicable to the UK.

Although the Commission committed itself to applying the consultation procedure of the SA also to measures based on the EC Treaty ‘in order to standardise its approach’ (whereas it was legally not required to do so), it has not held this promise in the field of OH&S. The Commission had a good experience with the consultation of the social partners via the tripartite Advisory Committee and it did not want to upset this satisfactory practice by introducing another consultation procedure that would intervene in the same phase of the policy-making process.

However, the Amsterdam Treaty integrated the social dialogue provisions in the EC Treaty. There remains only one legal basis for OH&S legislation (namely Article 137 al.1 EC) to which the social dialogue procedures (Articles 138 and 139) unavoidably apply. As a consequence, consultation of the AC and consultation via the social dialogue procedure will overlap. Both consultations take place in parallel, at the initial stage of the decision-making process, namely before the Commission presents its formal legislative proposal.

This parallel consultation leads to duplication. The European social partners’ organisations consulted under Article 138 contact their national member organisations before taking a position, and in particular the OH&S experts of these organisations. Often these national OH&S experts are precisely appointed by their national organisation as AC member. The same persons are thus consulted twice (in the same phase of the policy-making process). This duplication makes especially the role of the AC superfluous; since the AC plenary only meets twice a year, the social partners will already expressed by then their opinion via the double consultation of the social dialogue.

5.2. The tripartite advisory committee and the social dialogue: two different models of functional participation.

The parallel consultation of the AC and the social dialogue procedure does not only illustrate legal and factual overlap but also exemplifies the tension between two different models of functional participation, based on different normative assumptions.

One could argue that the AC is of neo-corporatist inspiration as well as the social dialogue; yet, this is true only to a limited extent. The AC establishes a privileged fixed access for management and labour to the exclusion of other interest groups. This ‘balanced access’ does surely not correspond to the pluralist idea that unregulated interest group competition ensures the realisation of the general interest or to the neo-pluralist idea that transparency, ‘due process’ and judicial review could guarantee the equal access to policy-making for ‘all’ interest groups. Yet, the AC is far less an ‘interest based model’ of functional participation than the social dialogue, and it is not intended to open the way to self-regulation by ‘encompassing organisations’.

The AC is supposed to introduce technical expertise into the decision-making process. It brings together representatives of the social partners and the national administrations since they are supposed to have that expertise (technical expertise, and practical experience), but the AC members are not supposed to represent their organisation directly. For that reason, it is also possible that AC members are actually experts from private firms or private prevention organisations (as long as they are ‘dropped’ in the AC by either management or labour). The AC aims mainly at a technical deliberation between experts which are chosen from the different Member States to take account of the national experiences and expertise which management and labour and the national administrations have acquired.

In the social dialogue procedure, on the contrary, the consultation procedure is established to hear directly the opinions of the concerned interest groups; the 44 organisations of management and labour consulted during the double consultation procedure of Article 138 EC are consulted directly by the Commission and their reply is considered to be representative of the interests these organisations claim to represent.

120 It is not by accident that the European social dialogue has never developed within tripartite committees like the AC.
Moreover, the double consultation procedure is strongly linked to the option to deal with the issue via negotiation and collective agreement. Thus Article 138 paragraph 4 links explicitly the consultation procedure of that article to the negotiation procedure of Article 139 EC. The consultation is limited to a certain number of European organisations, since only European ‘encompassing’ organisations would be able to sign European collective agreements.

5.3. The tension between two models of functional participation as exemplified by several policy actors.\textsuperscript{121}

The duplication of the consultation via the AC and the social dialogue has led to a debate on a future reform of the AC and ‘streamlining’ of the procedures. However, to date no solution has been found that satisfies the concerned policy actors. The debate exemplifies the tension between the preferences of the different policy actors for the two opposed models of functional participation.

For the Commission division responsible for OH&S policy (with seat in Luxembourg) functional participation is mainly an instrument to improve its own legislative proposals; it provides expertise and facilitates implementation. Therefore, the Luxembourg division prefers the technical deliberation provided by the AC to the ‘interest based consultation’ of the social dialogue which even risks to take the regulatory initiative out of the hands of the Commission to give it to the self-regulation by the social partners.

Since the Amsterdam Treaty made the social dialogue procedure obligatory for all OH&S issues, the Luxembourg division actually hoped that the traditional consultation of the AC would have been considered as complying with the requirements of the double consultation procedure of Article 138 EC.\textsuperscript{122} Put different, the simple consultation of the AC would be assumed to correspond to the obligatory consultation of Article 138. Theoretically that Article does not exclude that the consultation of ‘management and labour’ takes place within the context of a tripartite committee. Neither does that Article say that ‘management and labour’ should be European social partners’ organisations. However, assuming that the consultation requirements of Article 138 are complied with by the sole consultation of the AC - being tripartite and with national social partners representatives - would go against the terms of the Commission’s 1993 Communication and against the established social dialogue practice. Moreover, it is difficult to see how such consultation of national (social partners’) representatives in the AC would then possibly lead to negotiation resulting in European collective agreements (as provided by Article 138 (4) and 139 EC).

The Commission division responsible for the social dialogue (Directorate D of the Directorate General for Employment and Social Affairs) has other priorities than the Luxembourg division. Its aim is to develop and support a multi-level system of European collective bargaining. The procedures of Articles 138-139 and the Commission Communications (of 1993; 1996 and 1998) interpreting these articles are the main legal tools to support such collective bargaining between European

\textsuperscript{121} The analysis is based on interviews with Commission officials in the division responsible for OH&S, and with those representatives of ETUC and UNICE preparing the reform of the AC.

\textsuperscript{122} Interview sources.
encompassing organisations. The Commission’s social dialogue Directorate is not likely to place the established social dialogue practice on shaky grounds by recognising that ‘management and labour’ under Article 138 could also mean ‘national social partners representatives within a tripartite committee’. Consequently, it prefers that also in OH&S issues, the current criteria of the social dialogue would be applied.

The tension between a Commission division which prefers functional participation in terms of technical deliberation in the normal legislative procedure, and a Commission division aiming at functional participation as an ‘interest based consultation’ which may lead to collective bargaining among encompassing organisations, blocks a reform of the current procedures. Though the social partners, who are not satisfied with the current duplication, have requested the Commission to come up with a reform proposal, the Commission has not been able to do so.

It is worth noting that the Luxembourg Commission division for OH&S policy has recently become a formal subdivision of the Commission Directorate responsible for the social dialogue. This is illustrative of the conviction of the Directorate-General for Social Policy that OH&S policy should be linked to the social dialogue. However, for the moment this integration has not yet contributed to a streamlining of the preference of the OH&S division (still in Luxembourg) to consult the AC, with the social dialogue criteria developed by the Social Dialogue Directorate of which it is now part.

Frustrated by the current duplication ETUC and UNICE have made their own proposals for reform. On the one hand, they are convinced that the AC has proven its utility (also because of the presence of representatives of national administrations) and that it should be maintained; on the other hand, they are attached to the privileged position they have acquired in the social dialogue. Therefore, their proposals aim mainly at reforming the AC in such a way that the role of ETUC and UNICE within it would be strengthened and consequently the link to the negotiation of collective agreements would be facilitated. Such a reform would profoundly change the nature of the AC.

ETUC has worked out the most elaborated proposal for reform. According to the ETUC proposal the social dialogue consultation (Article 138 EC) would be situated within the AC. Put different, there would be no consultation of the social partners outside and apart from the AC. As argued above, it is difficult to assume that the current consultation of the AC complies with the consultation requirements of Article 138 as interpreted by the 1993 Commission Communication. Yet, one could think about reforming the AC in such a way that it could comply with the social dialogue requirements. The AC has in any case to be reformed because of future EU enlargement.

The two-stage consultation could take place within the AC by strengthening the role of the ‘interest groups’ in the AC, and in particular the role of the workers group and the employers group. The Commission could consult management and labour on the direction of Community action by sending the respective documents to ETUC and

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123 The following analysis is mainly based on an internal document of ETUC and on the ‘Position de la CES sur l’application du traité d’Amsterdam dans le domaine de la santé et de la sécurité sur le lieu de travail. Document adopté par le comité exécutif les 16-17 septembre 1999’. 
UNICE which would convocate meetings of the workers and of the employers ‘interest group’ of the AC. Both groups would give their opinion separately and independently. ETUC and UNICE would communicate these opinions to the Commission. The second stage of the consultation - i.e. on the content of the proposal - would take place in the same way.

The decision to negotiate on an item would not be taken by the ‘interest groups’ of the AC, but by the Executive Committees of ETUC and UNICE (and CEEP) (since they would have to negotiate). If there are negotiations, the topic would leave the AC. If there are no negotiations, the AC would set up a working group with all three ‘interest groups’ and the plenary would adopt a joint position of all three ‘interest groups’.

This ETUC proposal has several advantages. First, it avoids duplication. Second, the AC is involved from the start of the procedure which enables to use its expertise already in the two-stage consultation and facilitates the adoption of a joint opinion as soon as the social partners have decided they do not want to negotiate on the issue. Third, the involvement of the European social partners confederations ensures the link between consultation and possible negotiation.

The AC should be reformed to realise this option. The position of the AC ‘interest groups’ should be formalised and strengthened. Moreover, the role of ETUC and UNICE within the ‘interest groups’ should be recognised. Finally, the AC Statutes should provide explicitly the possibility to adopt ‘interest group opinions’. Though opinions of the ‘interest groups’ already circulate informally within the current AC practice, the AC Statutes only recognise AC opinions adopted by the plenary (and thus by the three ‘interest groups’ together) which may ‘be accompanied by a written statement of the views expressed by the minority, when the latter so request.’

However, there remain serious problems with the ETUC proposal. First, what will be the role of the government group within the AC during the first and second stage of consultation of the social partners? Could the government group also be asked to give its opinion on direction and content of Community action? Since such a requirement is not enshrined in the Treaty (contrary to the two-stage consultation requirement of the social partners), should it then be enshrined in the AC Statutes? But will the government group be able to adopt such ‘interest group’ opinions, given its difficulties of internal coordination?

Second, the proposed solution complies with the established practice to consult under the social dialogue procedure the European social partners organisations only to the extent that ETUC and UNICE will play a central role and will have the possibility to decide to deal on the issue by negotiation. However, the established social dialogue practice, based on the 1993 Commission Communication, provides the consultation of a broader list of (now 44) European social partners’ organisations. If the two-stage consultation is reduced to consultation of the workers and employers group of the AC, coordinated respectively by ETUC and UNICE, most of the 44 European organisations will no longer be consulted. Moreover, in the normal social dialogue procedure ETUC and UNICE contact all their national member organisations. Many of them are also directly represented in the AC (which is precisely the main origin of the duplication), but not all of them. Consequently, if the normal social dialogue procedure is replaced by a two-stage consultation of the AC’s workers and employers group coordinated by ETUC and UNICE, some of the national social partners

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organisations will no longer (indirectly) be consulted. The ETUC has proposed that in addition to coordinating the AC workers group, it could continue consulting the other national member organisations. It suggested also that it would consult the European Industry Committees, i.e. sectoral European trade union confederations, which are part of the list of 44 organisations which the Commission normally consults in the social dialogue. These organisations could, where issues of a particular sector are at stake, also be involved in the working groups of the AC. The consultation of the AC workers group coordinated by ETUC would thus be able to cover nearly all trade union organisations that are normally consulted via the social dialogue.

Nevertheless, though the European Industry Committees are already affiliated with ETUC, it is not sure that they like to abandon the direct consultation they profit from under the social dialogue. In addition, two European trade union organisations, namely Eurocadres and Confédération européenne des cadres, are part of the list of the social dialogue but are not affiliated to ETUC. Moreover, on employers side the situation is much more problematic. On the one hand, there are about 25 European employers’ organisations, not affiliated to UNICE, which are consulted under the normal social dialogue procedure. Often their national member organisations are not represented in the AC. With the proposed procedure they would no longer be consulted and it is difficult to imagine how UNICE could coordinate or represent them. On the other hand, even within the employers group of the AC there are a considerable number of national employers organisations which are not member organisations of UNICE. Already today this situation makes the coordinating task of UNICE in the employers group difficult. Members of the AC employers group who are not affiliated to UNICE are likely to make the coordination task of UNICE even more difficult when their European confederation is no longer consulted via the normal social dialogue.

Finally, the problem is not only limited to the two-stage consultation. The consultation of the 44 European confederations may lead to negotiations and agreements among those organisations that recognise each other to that extent. Though in practice such negotiation has mainly taken place between ETUC, UNICE and CEEP, negotiation and agreements (which under certain conditions might even be implemented by Council decision) among other European organisations are not excluded, as is shown by recent developments in the sectoral social dialogue. If the social dialogue is integrated in the AC, the possibility that the two-stage consultation leads to negotiation is limited to ETUC and UNICE.

Therefore, the integration of the social dialogue procedure within the AC (even a reformed AC) seems not feasible without touching to the criteria formulated within the 1993 Commission communication on the social dialogue. The Commission, though, seems not attempted to start tinkering at the fragile framework of the broader social dialogue in order to facilitate the consultation process in the sole sector of OH&S where the number of new legislative initiatives appears, anyway, to be quite modest in the (near) future.

The proposed reforms would seriously change the normative inspiration of the AC, giving it a more ‘neo-corporatist character’. The focus would be less on ‘technical deliberation’ while its ‘interest-based character’ would be strengthened. The

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125 This problem may aggravate with future enlargement, given that the number of AC seats per Member States is likely to be reduced.
encompassing organisations of management and labour would ensure internal coordination to express via the AC the opinion of their interest group; while the strengthened role of ETUC and UNICE in the AC would strengthen the possibility to take the regulatory initiative out of the AC into self-regulation via collective bargaining between the encompassing organisations.

It is doubtful whether the Commission will accept the proposals made by the social partners, given that it touches upon the established AC practice (and therefore not loved by the Commission’s OH&S division), and, more importantly, on the established social dialogue practice (and therefore not loved by the Commission’s social dialogue directorate).

As a representative from ETUC put it; ‘we have to deal here with a unique confrontation between a tripartite and a bipartite model of consultation. We do not expect that the problem will be resolved within the coming months…’.

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