The Social Agenda: is ‘hard law’ making a come-back?

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Introduction

Social affairs in Europe were characterised, in 2008, by debate about the revision of the European Works Councils directive (see article by Jagodziński in this volume), the revision of the working time directive, and the adoption of the directive on temporary work almost ten years after the process was launched. At sectoral level, furthermore, preparatory work lasted throughout the second half of the year on transforming into a directive a collective agreement based on an International Labour Organisation (ILO) Convention for seafarers\(^1\). Following several years when European initiatives in the field of social legislation were weak, or even non-existent, are we now witnessing a come-back of ‘hard law’ to the detriment of those ‘new forms of governance’ – or ‘soft law’ – generated in particular by the open method of coordination (OMC)? If this trend were to be confirmed, would it be connected with the mixed results of the Lisbon strategy (Pochet and Boulin, 2009; ETUI and ETUC, 2009) and with the come-back of an agenda of re-regulation dictated by the credit crunch? Or is the timing purely coincidental?

Closer analysis reveals that what is happening is without doubt more complex and cannot be ascribed to a straightforward alternative: hard law vs. soft law. On the one hand, and contrary to received opinion, the number of directives adopted in the social policy field never did plummet – except between 2005 and 2007. This will form the subject of

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our first section, consisting of a quantitative analysis of legislative output since 1975.

On the other hand, this persistence (resistance) of hard law has to be seen in parallel with the European Commission’s new Social Agenda, which is hardly any more inspirational than its predecessors, but attempts above all to move from a social to a societal agenda. It is noticeable, by way of example, that the term ‘worker’ has all but disappeared (except concerning the issues of mobility and health & safety at work), replaced by ‘individuals’, ‘persons’, ‘people’, ‘Europeans’, ‘citizens’, ‘young people’, and so on. Instead of ‘labour’ we have ‘human resources’, and where the Treaty of Rome made it a task of the European Community ‘to promote improved working conditions and an improved standard of living for workers’ (Art. 117), the Commission now refers to ‘empowering and enabling individuals to realise their potential while at the same time helping those who are unable to do so’ (CEC, 2008a: 3). These few semantic observations do not of course constitute an analysis, still less proof, but in our opinion they do reflect the resolve of certain players to cast aside the traditional definition of social policy and move into other fields where, moreover, Community competence is marginal. This is the subject of our second section.

Our third and final section will comprise a detailed presentation of the proposal for a (revised) directive on working time and the directive on temporary work. For, above and beyond the debate about whether hard law is undergoing a revival or a decline, it is worth assessing the content of the acts adopted.

1. **The evolution of European social legislation since 1975**

It is generally accepted by most members of the academic community that there are fewer and fewer social directives, and that when such directives are adopted their content is (very) minimalist. Consequently, the OMC may have been considered by many – even by people not supportive of such an approach – as a possible response to the lack of political support for the development of EU social legislation. The conventional wisdom in this sphere can be verified empirically by examining the data on the number of directives and regulations adopted. Figures 1 (per five-year period) and 2 (per year) show, in black, the total number of...
social directives/regulations (including health and safety directives) and, in white, the number of health and safety directives as a share of the total.

Figure 1  **Number of social directives per 5 year period (1975-2008)**

Quite clearly, and contrary to received opinion, the number of directives adopted did not fall during the second half of the 1990s and the first years of the new millennium. On the contrary, a rather comparable picture emerges for the periods 1988-1995 and 1996-2004. It is hardly possible, in the light of these numbers, to claim that the Community method is in crisis, at least up until enlargement in 2004.

Dividing the data into ‘social’ and ‘health & safety’ directives allows us to examine whether the overall numerical stability is attributable to the growing number of health and safety directives\(^2\). In fact, we see that most of the new directives relating to health and safety were adopted in

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\(^2\) A small number of directives have been adopted under Article 118 (health and safety) in order to benefit from the qualified majority associated with this legal basis, but they are broader in scope than health and safety (Directives 93/104 on working time, 92/85 on pregnant workers and 94/33 on young workers). These have been classified as general social directives.
the first half of the 1990s in the wake of the 1989 health and safety framework directive. Moreover, the four directives adopted between 2002 and 2006 derived from the same parent directive, dating from 1993, which was split into four different proposals in the late 1990s. The relative stability in the number of directives adopted cannot consequently be explained by a surge in health and safety legislation.

Figure 2 *Number of social directives per year (1975–2008)*

Another possible way of explaining this stability is to look at the texts adopted by the social partners and subsequently transposed into directives. As from 1995, seven framework agreements have been turned into directives, three of them deriving from the cross-industry level (parental leave in 1995, part-time work in 1997 and fixed-term work in 1999). The other four arose at sectoral level: two are adaptations of the working time directive to transport sectors (seafarers in 1998 and civil aviation in 2000); the other two are agreements concluded in the railways sector in 2004 (one fully transposed into a directive in 2005 and the other partially so in 2007). These data fit with
the conclusions of research we carried out on sectoral social dialogue (Dufresne et al., 2005), which showed that the social partners in these sectors had a clear preference for negotiating binding agreements. On average, one text emanating from the social partners is extended erga omnes by a directive every two years. Thus the issuing of sectoral directives clearly does contribute to explaining the overall legislative stability.

In terms of subject matter, the directives adopted since 1997 relate to traditional social fields, such as the statute for a European company (2001), information and consultation at national level (2002), the statute for a European cooperative society (2003), non-discrimination (2000), gender equality (2004), free movement (2004), and so on. Thus stability can likewise be detected in the thematic continuity and the extension of the traditional social agenda.

Admittedly, there was a marked reduction of the use of hard law measures in the years 2005, 2006 and 2007. One might however wonder, in the light of recent social partner consultations, whether this will be a lasting trend. In 2007 the social partners were consulted on six topics: active inclusion; employment in maritime occupations in the EU; cross-border transfers of undertakings; reconciliation of working and family life; musculoskeletal disorders; needlestick injuries. These consultations are intended to lead to the presentation of formal draft directives by the Commission or to a decision by the social partners to negotiate together.

In 2008, the Commission put forward a draft directive on the revision of the European Works Council directive. Meanwhile, the Social Affairs Council of June 2008 reached a common position on the working time and temporary agency directives, the latter being adopted on 19 November 2008 (see below). A new proposal was put forward in July 2008 on non-discrimination outside the field of employment (CEC, 2008b). Also in July, the Commission proposed transforming into a directive the framework agreement concluded in 2006 by the European Community Shipowners’ Associations (ECSA) and the European Transport Workers’ Federation (ETF) on the Maritime Labour Convention. The directive was officially adopted on 16 February 2009.3

3. The above table, and our analysis, takes no account of directives adopted during the year whose purpose is to introduce purely technical (not substantive) amendments to existing
This flurry of activity would seem to indicate the likelihood of a continuing flow of hard-law measures in the coming years.

Of course, the above quantitative data tell us nothing about the potential impact of EU social legislation. The key question is whether these texts will have a significant and structural influence (at least for some Member States) or whether they are minimalist directives establishing a very low threshold of protection at EU level and making little change to national rules. By structural influence, we mean measures which call into question some fundamental aspects of the national approach to social legislation.

2. The Renewed Social Agenda

The new Social Agenda came about in a rather odd manner, beginning life as a ‘non-paper’ on Europe’s social reality (March 2007) which was put out for consultation. The document was drawn up by Roger Liddle and Frédéric Lerais of the BEPA (Bureau of European Policy Advisers) (Liddle and Lerais, 2007), linked to the President of the Commission, Mr Barroso. It begins by describing various trends and changes in European society and then, in a second section, addresses itself to well-being in post-industrial societies. Over and above the usual themes – inequality, demography, education, poverty, etc. – the issues covered include quality of life, rising crime and insecurity, and family life.

Thereafter the Commission took over responsibility for the consultation and, in November 2007, adopted a communication on ‘opportunities, access and solidarity’ (CEC, 2007) based on its initial conclusions drawn from that consultation. The aim was to modify the traditional agenda
texts (e.g. an amended annex, a change of deadline for transposition, codification on the basis of established law, etc.). Such amendments were made, in 2008, to the following: Regulation No.592/2008 of the European Parliament and of the Council of 17 June 2008 amending Council Regulation (EEC) No.1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community; Directive 2008/46/EC amending Directive 2004/40/EC on minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (electromagnetic fields); Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer (codified version); and Directive 2008/106/EC on the minimum level of training of seafarers (recast).
and deal henceforth with quality of life, rather than with social issues in the narrow sense as before.

The Renewed Social Agenda adopted in July 2008 (CEC, 2008a) forms part of this new dynamic. Another imperative had to be borne in mind: namely, not to tie the hand of the next Commission which will take up office in November 2009. This is therefore a provisional exercise pending the adoption (or not) of a fully fledged social programme by the next Commission.

A resolutely optimistic note is struck by the Renewed Social Agenda, as is evident from the very first paragraph of the communication: ‘Technological advances, globalisation and an ageing population are changing European societies. In recent years the pace of change has accelerated. Europeans are living longer, healthier lives in new family configurations and working patterns. Values and relationships between generations are changing. Europeans face unprecedented opportunities, more choice and improved living conditions. The European Union, notably through the Lisbon Strategy for growth and jobs, greater market integration and macro-economic stability, has been instrumental in creating those opportunities, by stimulating employment and mobility.’

The priorities of the Social Agenda hinge on three terms already highlighted in the previous communication: opportunities, access and solidarity. Seven major themes are outlined.

1) Children and youth – tomorrow’s Europe. Included here are efforts to improve the quality of education systems and achieve targets regarding early school leavers, as well as child poverty. Since Europe does not have legislative powers in this area, it is a matter of offering incentives, exchanging ideas and implementing the open method of coordination.

2) Investing in people, more and better jobs, new skills. This includes the proposal for amending the Works Councils directive, a working document on anticipating and managing structural change and another on company-based transnational agreements (the previous Agenda had mentioned developing an optional legal framework but the employers objected).
3) Mobility. It is well known that the *Laval*, *Viking*, *Rüffert* and *Luxembourg* cases (see article by Dalila Ghailani; see also the collection of articles at www.etui.org) highlighted the tensions between social rights, collective bargaining and equal treatment on the one hand, and free movement for workers on the other. The ETUC and national organisations voiced strong objections to judgments they regarded as imbalanced and dangerous for workers. Mobility is a crucial issue, in that it shapes the vision and direction of European integration, yet the Commission confined itself to proposing a Forum ‘to promote debate and exchange of good practice’. In addition, it plans to develop a ‘fifth freedom’, i.e. free movement of knowledge, by promoting the mobility of researchers, young entrepreneurs, young people and volunteers.

4) Longer and healthier lives. The main proposal concerns patient mobility (see article by Rita Baeten), with fresh attention being paid to the impact on public finances. There will be a communication on health inequalities, building on work under the Social Inclusion and Social Protection OMC. Patient safety and the quality of health services will be addressed, as will the EU health workforce. It is striking to note the extent to which this area, which only a few years ago was marginal and received only sporadic consideration at European level, has now become important and covers different facets of healthcare.

5) Combating poverty and social exclusion. Very superficial treatment is given to this theme. The digital divide and extending the food aid programme will be on the Agenda, as will active inclusion and social services of general interest.

6) Fighting discrimination. This theme has been fleshed out in more detail, with a proposal for a directive to combat discrimination outside the field of employment. There will be several proposals related to reconciling private and professional life (parental leave – revision, new forms of leave, and protection for pregnant women – revision). Various other actions are envisaged, ranging from childcare to poverty among women, to the gender pay gap.

7) Opportunities, access and solidarity on the global scene. Included here is corporate social responsibility, now something of a cliché, but also the more serious issue of decent work.
The second part of the communication deals with instruments. As is evident from our presentation of its themes, the Social Agenda contains few proposals for directives, and many of those are revisions of existing texts. Even that, however, is still an improvement on the previous social programme. But the question now is how much improvement – or regression – can be expected from revisions of existing directives. As Janine Goetschy has quite rightly pointed out, the main characteristic of the European level was to afford protection which was initially relatively low but has remained unchanged, while deregulation has taken place at national level. It remains to be seen, then, whether this will still be the case once the existing directives have been revised.

The two proposals for directives under discussion in 2008 will be examined in our next section, focusing on their content as well as the underlying political dynamic. We are referring to the revision of the working time directive, and to the newly adopted directive on temporary agency work.

3. The proposal for a directive on working time and the agreement on temporary agency work

3.1. The working time directive

3.1.1. Background
In the wake of the 1989 action programme accompanying the Community Charter of the Fundamental Social Rights of Workers, a directive restricting weekly working time to 48 hours throughout Europe was adopted in 1993. This directive is based on the Treaty article concerning workers’ health and safety (thus requiring a qualified majority to be adopted). The United Kingdom immediately objected to the directive and called for it to be repealed on the grounds that the wrong legal basis had been used by the Council (health & safety). The UK also based its case on the principle of subsidiarity, claiming that the Community legislator had not established that the goals of the directive would be better served at EU level than nationally. The European Court
of Justice nevertheless dismissed London’s arguments in its judgment of 12 November 1996.4

The then Conservative government obtained an ‘opt-out’ for the UK, i.e. a (theoretically) temporary provision authorising it not to apply the 48 hour per week rule under certain circumstances, namely subject to an individual worker’s prior agreement in writing. Abusive practices on the part of British companies very soon came to light, whereby employers were making recruits sign the contract of employment at the same time as the agreement waiving the restriction of working time. Since both documents were presented simultaneously, it was in the interest of the job applicant to sign both – or risk signing neither. The upshot is that around 3.7 million British employees are working more than 48 hours per week, which represents a proportion three and a half times higher than the European average.

Pressure began to mount for this ‘temporary’ provision to be terminated once the 1993 directive came up for revision. But London proved intractable. Attempts to reach a compromise failed on no fewer than seven occasions between 2004 and 2008. The UK’s position did however begin to weaken under pressure from the trade unions, the European Parliament and the group of Member States in favour of a more socially-oriented Europe. London therefore decided to embark on a large-scale diplomatic offensive, aimed at making this social dossier part of a wider package where other countries might be interested in negotiating compromises. It then became clear that the working time and temporary work directives would have to be linked together, and that their fate would depend on a series of trade-offs among Member States.

The UK and Germany began to work together on certain sensitive dossiers in 2003. A sort of agreement was reached: London would back Berlin in its efforts to amend a draft directive on take-over bids (Germany was seeking at the time to protect car producer VW from hostile take-over bids); in exchange, the UK sought Germany’s support on temporary workers’ rights, a dossier related to that of working time.

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Another agreement followed, this one between London and Paris. France had until then belonged to the group of countries demanding that the UK abandon its opt-out. To mollify Paris, the UK government agreed to be flexible on the full liberalisation of electricity and gas. France agreed in return to abandon its own demands on the opt-out, thereby turning its back on the coalition of socially-oriented countries. The final piece of the jigsaw was fitted when the UK government persuaded the employers (the Confederation of British Industry, CBI) to give ground on the rights of temporary workers, in exchange for which the CBI could rest assured that the opt-out from the working time directive would be maintained. The Trades Union Congress (TUC) and the CBI then signed an agreement on temporary work, breaking the deadlock on this dossier. And so it was that the UK government could return to Brussels in early June 2008 with a green light on the temporary work directive, and a red light – but accepted by (almost) all – on abandoning its opt-out from the working time directive.

3.1.2. Content of the Council’s common position

The Council agreement concluded in June 2008 contains three main strands:

— the opt-out clause, allowing employers to arrange individually with workers not to apply the maximum working hours, would be maintained;

— what are known as the ‘inactive’ parts of on-call time would not count as working time, even when the worker must be available at the workplace;

— the reference period for calculating average maximum weekly working time (48 hours) would be extended from four to twelve months, without a safeguard clause.

5. By means of unbundling, i.e. separating electricity and gas generation from their transmission, so as to open up the European energy market, which in practice meant dismantling the large French and German energy groups.
The agreement stipulates that the maximum limit on weekly working time remains at 48 hours, unless a worker requests an individual opt-out. In that case, he/she may work at most 60 hours per week provided that the social partners have not decided otherwise. Other conditions are laid down: no opt-out agreements to be signed during the first month of work, and no penalties for workers not signing one.

Furthermore, the Council agreement defines what is to be understood by ‘on-call’ time (for hospital doctors, firefighters, police, etc.). It is divided into two aspects: ‘active’ on-call time, regarded as real working time, and ‘inactive’ on-call time, which can only be counted as working time if authorised under national legislation or by agreement with the social partners. A worker requesting an opt-out in respect of on-call time would be able to work at most 65 hours per week.

3.1.3. Reactions
Criticism poured in from countries supportive of an ambitious compromise (Belgium, Cyprus, Greece, Spain, Portugal, Hungary and Malta), in justification of their abstention at the vote. They abstained, apparently, because a bad compromise is better than no compromise at all.

The reaction from the trade unions was hostile: on-call time is no longer systematically considered as working time, even when the worker is available to his/her employer; the opt-out is maintained whereas it should have been abolished; negotiation between the social partners has been circumvented in that the opt-out is to be requested individually. In short, it is still possible in principle for one Member State to compete with others via a form of social dumping. It is interesting that the British TUC nonetheless identifies some positive aspects in this compromise: in particular, the 60 hour limit for workers subject to an opt-out (65 hours in the case of on-call time), the fact that the worker’s opt-out agreement must be renewed annually, and the fact that the opt-out can no longer be requested at the time of signing the contract. The TUC would have liked to see the UK opt-out abolished, of course, but its application is now governed by more stringent rules. Last of all, the TUC notes that London failed to obtain a definitive opt-out: the draft directive in fact specifies that the clause will be revised once again at a future date.
The European Trade Union Confederation (ETUC), for its part, had sought to keep separate two dossiers which have nevertheless been linked together. It organised a demonstration in Strasbourg in December 2008 to coincide with the sitting of the European Parliament, with a view to influencing the vote there. The ETUC put forward five demands, which attracted support from a large majority of MEPs. The demands had to garner an absolute majority of at least 393 votes in order to be accepted.

They were as follows:

- on-call work including inactive time is working time: 576 votes (and compensatory rest must follow after on-call duties: 514 votes)
- putting an end to the opt-out: 421 votes (and deletion of the conditions for the opt-out including the maximum 60 and 65 hours: 544 votes)
- proper conditions for annualisation: 536 votes
- strengthening reconciliation of work and family life: 539 votes
- limiting the exclusion of higher and managerial staff: 422 votes.

The MEPs therefore overwhelmingly rejected the Council’s common position. The points of discord are substantial and relate above all to the opt-out clause, which Parliament wishes to abolish, and on-call time, all of which must in its opinion be regarded as working time (although the inactive parts thereof may be calculated in a specific way). Following on from that vote, a conciliation procedure between Parliament and Council was to be initiated in 2009. No doubt it will not be plain sailing.

3.2. Temporary work

3.2.1. Background
The directive on temporary work has a long history. The European Parliament and the Council of the EU already adopted resolutions in favour of action to protect temporary workers more than twenty years ago, while the European Commission put forward a draft directive in
1982 but it was not adopted. In 1990, as part of the action programme accompanying the Community Charter of the Fundamental Social Rights of Workers\(^6\), the Commission proposed legislating in three areas: part-time work, fixed-term contracts and temporary work. This second attempt failed too, but that did not prevent the adoption of a directive to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship (Council of the European Communities, 1991). The directive did not, however, cover other important aspects of temporary work, such as the duration and renewal of contracts, the circumstances under which user undertakings may have recourse to temporary work, parity between temporary staff and equivalent permanent employees in user undertakings as concerns pay and working conditions, and lastly trade union rights and collective representation for temporary staff.

It should be pointed out immediately that temporary work is a far more complex issue than either part-time work or fixed-term contracts. A whole host of divergent practices and rules exist in the Member States concerning the status of temporary workers (some countries do not even have a definition of temporary work or any specific regulations governing it). Moreover, it was a highly sensitive matter politically at the time, given the upsurge in this type of work in all Member States from the mid 1990s onwards.

In 1995 the Commission launched a round of consultations with the European social partners which led to the start of negotiations between them one year later. The social partners reached agreements on part-time work and fixed-term contracts, both of which were transformed into directives, in 1997 and 1999 respectively. As for the third element, temporary work, the two sides began talks in May 2000. It became perfectly plain after a year of negotiations that UNICE (now BusinessEurope) was not prepared to accept agency workers being put on the same footing as direct employees of the user undertaking. Opinions also differed on the trade union side (Degryse, 2002). The two

\(^6\) The Charter sets out the need for an ‘improvement in the living and working conditions of workers’, including temporary workers. There must be an alignment of these conditions, and ‘the improvement must cover, where necessary, the development of certain aspects of employment regulations’ (Article 7).
main reasons why the negotiations became deadlocked had to do with equal treatment for agency workers and the conditions under which companies may have recourse to temporary staff.

Concerning equal treatment, the ETUC believed that the user undertaking should be recognised as the first point of reference when comparing basic working conditions (wages, working time, health and safety). It pointed out in support of its argument that this principle had already been accepted in the other social partner negotiations on atypical work (part-time work and fixed-term contracts), adding that the principle was already being applied in most countries. The ETUC’s insistence that comparable workers in the user undertaking should be the first point of reference was regarded by UNICE as unjustified, in that agency workers in some countries are permanently under contract to the agency and are paid by their employer even when not on assignment at a user undertaking. This point of view was shared by the European Association of Craft, Small and Medium-sized Enterprises (UEAPME).

In the ETUC’s opinion, furthermore, it was also necessary to regulate the conditions for using agency staff, and in particular to establish measures for preventing abuses of this form of labour. (The employers refused to do so.) The trade unions were concerned that agency staff would be treated as second-rate workers by companies trying to make them do the same work as their own ‘real’ workers but at lower cost and with less stringent statutory and regulatory constraints. According to the unions, agency workers have less control than other employees over the type of work they do and the way in which they do it, receive less training, have a higher rate of accidents at work and are less well-informed about health and safety, are more likely to perform shift work and have less time to complete a job.

The ETUC Executive Committee decided on 22 March 2001 to break off negotiations with the employers. It then called upon the Commission to put forward a directive aimed at regulating temporary agency work, which the Commission duly did on 20 March 2002. This return to the legislative method took the whole affair back to the state of affairs prevailing some ten years earlier, albeit in a different political context (most notably with the Labour Party having come to power in the UK).
3.2.2. Content

Thus the European Commission put forward a proposal for a directive on working conditions for temporary workers in 2002 (European Parliament and Council of the EU, 2002). But it soon became bogged down in the Council, giving the impression that if the social partners themselves had failed to reach an agreement it would be difficult to obtain the Council’s endorsement. That did indeed prove to be the case, at least for a period of six years.

After a good deal of horse-trading (described above in section 3.1), the Member States, meeting in the Council, reached a qualified majority agreement on the proposal on 10 June 2008. Following its approval by the European Parliament on 22 October 2008, the directive was officially adopted by the Council on 19 November 2008 and will enter into force in three years’ time (European Parliament and Council of the EU, 2008). The Commission and the social partners – both cross-industry and sectoral – gave their backing to this agreement.

The directive rests on the principle that the three million or so temporary agency workers in Europe will enjoy equal treatment. It addresses the following questions: the reasons for prohibitions or restrictions on the use of temporary agency work (Art. 4), the principle of equal treatment (Art. 5), access to employment, collective facilities and vocational training (Art. 6), representation of temporary agency workers (Art. 7) and information of workers’ representatives (Art. 8).

Any existing restrictions or prohibitions on the use of temporary agency work must be justified by Member States by December 2011. Only where they can be explained on grounds of general interest – subject to verification by the Commission – may such measures be maintained.

The directive guarantees equal treatment for temporary agency workers as from the first day of their assignment in respect of basic working conditions and employment (including pay, leave, working time, rest periods and maternity leave). It is possible to deviate from this rule provided that a collective agreement or specific agreement has been signed by the national social partners. What is more, agency workers must be kept informed of opportunities arising for employees of the company, and must benefit from the same collective facilities (canteen, childcare facilities, transport services etc.) as workers directly employed
by the company. Finally, the directive aims to improve temporary agency workers’ access to training, even in the periods between their assignments.

3.2.3. Reactions

Eurociett, the European Confederation of Private Employment Agencies (which represents the profession as a whole in Europe) reacted positively. According to its Managing Director, Denis Pennel, the agreement ‘will, by aligning the protection granted to temporary agency workers, improve the image of a sector that is still all too often discredited’.

The response from the trade unions was equally favourable. The ETUC welcomed the way in which the Council had solved the most contentious issue in the directive, namely equal treatment between agency workers and employees of the user undertaking. The directive will not any more introduce a general qualifying period before the equal treatment principle would apply, as was proposed previously, but instead only allows for derogation by collective agreement or – under specific conditions – by agreement between the national social partners. John Monks, General Secretary of the ETUC, stated that ‘the directive also gives an important role to social partners to deal with the implementation and application of this principle in practice, which allows for flexibility while ensuring the protection of workers’ (ETUC, 2008).

Conclusion

We have shown in this article that, contrary to received opinion, the European Commission is still feeding into the legislative process in the field of European social legislation. With the exception of the period 2005-2007, ‘hard law’ does not really seem to have given ground to ‘soft law’. The Commission’s Renewed Social Agenda of 2008 contains a few legislative proposals but, more significantly, it attempts to broaden the notion of social policy to take in new or related fields. In this wider
conceptual framework, ‘workers’ are often replaced by ‘individuals’, ‘people’, ‘persons’ and ‘Europeans’ in policy areas where Community competence is often only marginal.

As for the development of European social law in the strict sense of the term, it often consists of revisions of existing directives (working time, European Works Councils, etc.), as well as some new legislative initiatives (temporary agency work). It is also reflected in the implementation, via directives, of agreements concluded between the European social partners at either cross-industry or sectoral level.

It is nevertheless apparent that the adoption of social directives in the Council and the European Parliament has become more complex than in the past. The cases of the working time and temporary agency work directives demonstrate that, when adoption is not dependent on the social partners (or when their negotiations have failed), the political decision-making is influenced by a series of factors which may have little to do with the actual content of the directive, such as political momentum, bilateral diplomacy, the creation of negotiating ‘packages’, etc. In principle, none of these factors play a part when the social partners negotiate among themselves. Do these external factors have a negative impact on the quality of the texts adopted? The answer to that question in 2008 seems to have been ‘yes’ in the case of working time, and ‘no’ in the case of temporary agency work.

References


