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Decision-making under the EU's social chapter: Discretion and amendments

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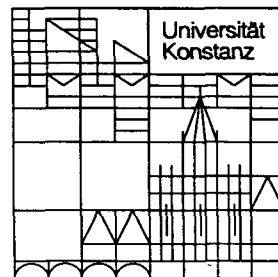
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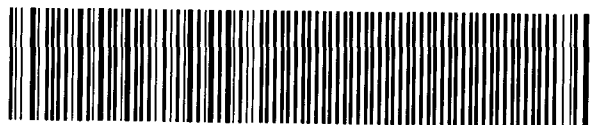
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Decision-Making under the EU's Social Chapter*

- Discretion and Amendments -

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Abstract:

In 1993 the EU created a new procedure for social policy legislation. As the UK objected to its inclusion into the 'Maastricht Treaty' the Social Chapter was established as separate agreement. A central feature is that trade unions and employer organisations, the social partners, can propose legislation. Two legally contentious issues are analysed using simple game-theoretic principles: a) whether Commission and Council are endowed with discretion, b) whether either of them can amend proposals. While discretion restricts the social partners' influence, the right to amend might render the mechanisms laid down in the Social Chapter ineffective.

Keywords: Decision-Making, European Union, Legal Interpretation, Social Chapter,

JEL-Classification: D72, D78, F02, K33

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1. Introduction

The most important legal and political change the European Community (EC) experienced in the last decade is the Treaty establishing the European Union (Maastricht Treaty). It represents a move towards a closer union of member states with a common foreign and security policy, including co-operation in judicial and home affairs. Moreover, it lays down the possibility of a common currency. One proposed area of modifications to the EC Treaty, however, has not been included into the Maastricht Treaty, as the UK government objected to any extension of the EC's legal base in the area of social policy. Hence, amendments to articles 117 to 123 EC Treaty were not included into the Maastricht Treaty, as had originally been envisaged. Instead, the provisions designed to replace these articles - the Social Chapter - were established separately and signed only by the remaining 11 countries,¹ as Agreement on Social Policy.

The rules laid down in the Social Chapter emphasise the "social dialogue", i.e., negotiations between representatives of employers and employees, voluntary agreements and possibly the development of legal norms in a consensual manner. The Social Chapter introduces a completely new decision-making procedure into the legal process of the EU. It not only involves the European Commission and the Council of Ministers, excluding the representative of the UK, but also the social partners, most importantly the European Trade Union Confederation (ETUC) and the European employer associations (UNICE, CEEP).² The novel character of the Agreement on Social Policy and the haste with which it was concluded have given rise to numerous debates about legal issues: does the Social Chapter, for example, constitute European Community Law, and what might be the nature of the involvement of the European Court of Justice (Bercusson 1996, pp.525f, Curtin 1993)? Moreover, the extent to which Commission and Council can influence the development of legal rules is not codified unambiguously in the Social Chapter.

In this paper we investigate what consequences the alternative possibilities of involvement for the Council and Commission under the EU's Social Chapter will have, assuming the self-interest of the participants to determine their actions. Such an analysis can supplement legal arguments as it helps to predict which outcomes will prevail under alternative legal arrangements. Even if the UK joined the Social Chapter the analysis would retain its validity, as the Social Chapter's procedures are unlikely to be affected by such a step. In section 2 we will

¹ Austria, Finland and Sweden acceded to this Agreement on Social Policy when they joined the EU in 1995.

² In the *Communication concerning the application of the Agreement on Social Policy* (COM (93) 600 final) the Commission lists 28 organisations of social partners it deems eligible for participation in the process of the Social Chapter. UNICE (Union de Confédération de l'Industrie et des Employeurs de l'Europe), CEEP (Centre Européen des Entreprises à Participation Publique) and ETUC are, however, the only ones mentioned in the catalogue of the Commission for a horizontal social dialogue as opposed to the sectoral version. Horizontal social dialogue refers to agreements encompassing all sectors of the economy while the sectoral social dialogue would only be relevant for a specific sector. As firstly, all legislative projects enacted under the auspices of the Social Chapter so far have only been aimed at the horizontal level and as secondly, our analysis can basically be extended to the sectoral social dialogue, we will only consider the former here.

outline the decision-making process in the EU for social policy. Moreover, we will describe the rules laid down in articles 3 and 4 of the Social Chapter for the adoption of new regulations. Disputed procedures will be indicated. So far, two directives on European works councils³ and parental leave,⁴ have been passed in accordance with the procedures of the Social Chapter, another one on atypical work is currently being discussed, while the Commission has now proposed draft legislation in the case of the reversal of the burden of proof in sex discrimination cases.⁵ In section 3 the two contentious issues will be analysed:

- 1) What will be the consequences if the European Commission and the Council are endowed with *discretion*, such that the Commission may not propose an agreement by the social partners to the Council and/or such that the Council may reject it in a vote?
- 2) What will be the impact if the Commission or the Council are entitled to *amend* proposals by the social partners?

We will first look solely at the issue of discretion and subsequently combine both questions. For our analyses, we suppose all actors to be non-altruistic, in the sense that they always pursue an outcome most beneficial to them. We do not explicitly propose objective functions for the social partners, the European Commission and the Council in order to keep the results as generally applicable as possible. It should be pointed out that our analysis focuses on the consequences of alternative legal interpretations of the Commission's and Council's powers, and not primarily, for example, on the desirability of the Social Chapter as such, its impact on productivity growth, the question why the Social Chapter has been agreed upon despite adverse interests in some cases, or on the incentives to bargain enshrined in the Social Chapter.⁶

The economic analysis yields no decisive arguments against discretion. Granting the Council - and possibly the Commission - this right can prevent the social partners from "hijacking" the legislative process. The right for Commission or Council to amend agreements, however, would severely reduce incentives for trade unions and employer associations to participate in the social dialogue. If the Council were granted the right to amend, it could dominate social policy legislation, despite the contrary intention in the Social Chapter, because it were equipped with a last-mover advantage.

³ Council Directive 94/45/EC of 22 September 1994 (Council 1994a) on the *Establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purpose of informing and consulting employees*, OJ L 245/64 of 30.9.94.

⁴ Council Directive 96/34/EC of 3 June 1996 (Council 1996) on *parental leave*, OJ L 145/4 of 19.6.96.

⁵ Cf. N.N. (1996).

⁶ See, for example, Addison/Siebert (1994), Kersley/Martin (1995), Lange (1993), Boockmann (1995) or Vaubel (1993) on these issues.

2. The Social Chapter's Decision Procedure

2.1 Overview

The Social Chapter was originally drafted as replacement for the existing social policy provisions in articles 117 to 123 of the EC Treaty. The refusal of the UK Government to countenance any extension of the EC competence in the area of social policy led to a compromise, namely, that all member states concluded the Protocol (No. 14) on Social Policy to the Maastricht Treaty. The Protocol notes that 11 member states "wish to continue along the path laid down in the 1989 Social Charter" and have adopted an agreement to this end. The Protocol, signed by all 12 member states, "authorises" those eleven states to "have recourse to the institutions, procedures and mechanisms of the Treaty for the purpose of taking among themselves and applying so far as they are concerned the acts and decisions required for giving effect" to their agreement. The compromise between the UK on the one hand and the other member states on the other hand effectively meant that the social provision in the EC Treaty have not been amended⁷ and are still valid for all 15 EU member states. For 14 of them, but not the UK, the Social Chapter offers an additional explicit legal base for social policy measures.

A decisive difference between the EC Treaty and the Social Chapter with respect to social policy is that the former includes no explicit community competence for social policy legislation, with the exception of Art. 118a which refers to "improvements, especially in the working environment". All other issues have to be covered by Art. 100 (approximation of laws) and/or Art. 235 (general authorisation), both requiring unanimity in the Council for new legislation to be passed. In Art. 2 sec. 1 of the Social Chapter the Commission's legal power is established in particular for the improvement of the working environment to protect workers' health and safety, working conditions, the information and consultations of workers, equality between men and women with regard to labour market opportunities and treatment at work and the integration of persons excluded from the labour market. Directives based on Art. 2 sec. 1 only need a qualified majority (Art. 189c EC Treaty) in the Council to become law, while directives based on Art. 2 sec. 3 require unanimity. This section refers to social security and social protection of workers, protection of workers where their employment contract is terminated, representation and collective defence of the interest of workers and employers, including co-determination, conditions of employment for third-country nationals legally residing in Community territory and financial contributions for promotion of employment and job-creation, without prejudices to the provisions relating to the Social Fund. The stronger emphasis on majority decisions can help to explain why proposals by the Commission which have been rejected in the Council of 15 might stand a greater chance of acceptance under the rules of the

⁷ A minor change in Art. 118a EC Treaty represents an exception.

Social Chapter of currently 14 states. Note, that the provisions of Art. 2 shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs (Art. 2 sec. 6).

Another major difference between the EC Treaty and the Social Chapter is the emphasis the latter places upon the "social dialogue". Art. 118b EC Treaty only requires the Commission to "endeavour to develop the dialogue between management and labour at European Level..."⁸ Art. 3 sec. 1 of the Social Chapter, however, lays down: The Commission shall have the task of promoting the consultation of management and labour at Community level and shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties. To this end, before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Community action (Art. 3 sec. 2). If, after such consultation, the Commission considers Community action advisable, it shall consult management and labour on the content of the envisaged proposal. Management and labour shall forward to the Commission an opinion or, where appropriate, a recommendation (Art. 3 sec. 3). On the occasion of such consultation, management and labour may inform the Commission of their wish to initiate the process provided in Art. 4. The duration of the process shall not exceed nine months, unless the management and labour concerned and the Commission decide jointly to extend it (Art. 3 sec. 4). Should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements (Art. 4 sec. 1). Agreements concluded at Community level shall be implemented either in accordance with the procedure and practices specific to management and labour and the member states or, in matter covered by Art. 2, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission, thus becoming Community Law. The Council shall act by qualified majority, except where the agreements in question contain one or more provisions relating to one of the areas referred to in Art. 2 sec. 3, in which case it shall act unanimously (Art. 4 sec. 2). Agreements by the social partners, although initially like collective bargaining agreements, can thus become mandatory for all firms and employees.

The likelihood that agreements concluded at Community level will be implemented in accordance with the first possibility mentioned in Art. 4 sec. 2 of the Social Chapter appears to be negligible. Firstly, the incentives to pursue this option are small as *all* collective contracts would have to contain the relevant clauses to guarantee universal coverage. Secondly, the law of only few states (such as Belgium and the Netherlands) has provisions to extend agreements *erga-omnes*, which could be used to apply bilateral agreements of the social partners to all employers and employees. And thirdly, in an adjoined declaration to the Social Chapter the member states denied any responsibility to provide possibilities for extending agreements *erga-*

⁸ As the term "social partners" is used in most translation into other official European Union languages and because "social partners" is employed in many English texts as well, we will use this expression too when not quoting the legal text.

omnes.⁹ Hence, this implementation method might be theoretically feasible but seems to be of little practical significance; it will therefore be neglected subsequently.

The legal provisions outlined above translate into a decision-making procedure which may be summarised as follows: Starting point for legal changes in the area of social policy is an initiative by the Commission.¹⁰ It presents this proposal of a directive or regulation to the Council which may vote after hearing the European Parliament and the Economic and Social Committee.¹¹ Should the Commission's proposal not obtain the required number of (weighted) votes the Commission may adhere to the procedure of the Social Chapter. Regardless of the fact that the legal debate about the relation between the competence in the Social Chapter and the EC Treaty is not yet concluded (Bercusson 1996, pp.530ff, Buchner 1993, Schuster 1992, Weiß 1992a), the Commission will find it politically advisable to use the EC Treaty as preferred legal base - if possible -, to ensure common legislation in all 15 EU countries. Only when it becomes obvious that potential legislation will be blocked in the Council the Commission might choose the second-best option and turn to the legal base of the Social Chapter (Addison/Siebert 1994, Hall 1994).¹² Under its regulations the Commission will send a letter to the social partners, inquiring about the possible direction of Community action, giving them six weeks to make a statement. With a second letter containing the planned proposal and the possible legal base the Commission questions the social partners on the possible content.¹³ At this stage, the social partners can inform the Commission that they intend to draft their own agreement on the matter in question. All four examples of legislation enacted under the Social Chapter mentioned above have seen both hearings, but only in the case of parental leave and - to some extent - of atypical work the social partners have decided to develop their own agreement. In the other two cases, the social partners let the Commission proceed.¹⁴ If the

⁹ Notwithstanding the fact, that the legal nature and binding effect of such a declaration is rather questionable.

¹⁰ There is, however, no agreement on whether the Commission alone has the right to initiate social policy measures (cf. Bercusson/v. Dijk 1995, CES 1994, Cullen/Campbell 1996).

¹¹ Note that the relevant articles 100, 118a and 235 EC Treaty, which have all been used by the Commission as legal base for social policy legislation, contain different procedures of decision-making and vary on the question if and to what extent the European Parliament and the Economic and Social Committee have to be heard.

¹² The Commission in its *Communication concerning the application of the Agreement on Social Policy* (COM (93) 600 paragraph 8), names criteria in order to decide what legal basis to use first. Effectively, it states that as long as a solution for all fifteen member states seems feasible, the Commission will choose the EC Treaty as legal competence. See, however, Vaubel (1995) for a different interpretation of the Commission's actual behaviour. On the one hand, the Commission's attitude is supported by the Council. In its Resolution of 6 December 1994, OJ C 368/7 of 23.12.1994, (Council 1994b) it demands that the Social Chapter will only be chosen as competence, when all other ways and possibilities to achieve unanimity among member states have been exhausted. On the other hand, the European Parliament (1994b) regrets this demand, as it would lead to a lack of coherence and a low level of protection for workers.

¹³ See Bercusson (1996, pp.541f) for alterations which can result in the incentives for the social partners to bargain, if the Commission would not inform them of the content of the proposal for new regulations - a scenario which cannot be ruled out, as Art. 3 sec. 3 of the Social Chapter does not explicitly require the Commission to provide this information.

¹⁴ On the discussion between the social partners that took place with regard to the European works councils project, see Falkner (1996a,b).

legal process remains within the Commission's realm it will follow the path described in Art. 2 Social Chapter. The same will be true if the social partners fail to come up with a proposal of their own in the stipulated period - a case which has not occurred yet - and the Commission wants to proceed. If the social partners develop a proposal this document will be presented to the Commission. The Commission will then propose the social partners' document to the Council. The text of the Social Chapter does not rule out explicitly that the Commission might proceed with its own legislative proposal, despite the social partners' agreement. Clearly, such an action would violate the spirit of the Social Chapter as laid down in Art. 4 Sec. 1. Because this option has not been a legally contentious issue, it will not be discussed in detail here - and has not been included in figure 1. The final step is a decision by the Council.¹⁵

Figure 1: A stylised decision-making process in EU Social Policy

The questions debated in the legal profession relate to the last two steps in this decision-making process. Given the use of the Social Chapter as legal base and given a proposal by the social partners the first question is whether the Commission is endowed with discretion to propose the agreement by the social partners to the Council and whether the Council is given discretion to decide about it. The second question concerns the Commission's and Council's right to amend the social partner's proposals. In terms of figure 1 this translates into choices at points B and C.

2.2 Discretion

The Commission claims that it is its own decision whether to propose an agreement by the social partners to the Council or not.¹⁶ As guardian of the Treaty it would be its obligation to evaluate the representativeness of the social partners, their mandate and the legitimacy of the agreement (Höland 1995). Moreover, Art. 4 sec. 2 of the Social Chapter states that an agreement by the social partners "shall be implemented ... by a Council decision *on a proposal from the Commission*" (emphasis added). If the Commission is mentioned explicitly it will have to play an active role in the decision-making process, such that it must be granted discretion (Buchner 1993).

¹⁵ If the social partners have not presented an agreement to the Commission, the latter's proposal may be amended by the Council, given unanimity. As the Commission is aware of this possibility it will have an incentive to propose only regulations which will not be amended, such that the outcome in figure 1 is supposed to reflect the Commission's preferences.

¹⁶ COM (93) 600 paragraph 39.

In the dominating legal view, however, the Commission is not granted discretion (Bercusson 1994, Weiß 1992b). This is also the opinion of the Economic and Social Council (CES 1994), as the procedure set out in Art. 4 is not designed to seek the Commission's approval for a collective agreement, but rather to use the Community's legislative machinery in order to endow agreements with the legal standing, which they otherwise would not have (Watson 1993). Furthermore, there is no textual evidence contained in the Social Chapter which indicates that the Commission can assess the agreement in terms of the criteria listed in its communication (Bercusson 1996, p.567). In addition, the first draft for a new Art. 118b contained the following clause: "In matters falling within Art. 118, where management and labour so desire, the Commission *may* submit proposals to transpose the agreement referred to in paragraph 1 into Community legislation."¹⁷ Due to the fact that this optional clause (*may*) was substituted by a more restrictive clause (*shall*) in Art. 4 sec 2 (see quote above), one could gather that a limitation of the Commission's discretion was intended.¹⁸

A similar textual argument may be employed concerning discretion by the Council. The joint proposal of ETUC/UNICE/CEEP for new provisions of the EC Treaty, which has become the Social Chapter almost unchanged, contained the clause that "Agreements... *may* be implemented...". In contrast to the text that finally constituted Art. 4 sec. 2, containing the wording "*shall*", the usage of "*may*" seems to imply discretion. The general legal opinion, however, does not doubt the Council's discretion (Watson 1993, Buchner 1993, Kempen 1994, Höland 1995). Due to the general division of power between Commission and Council, the Council is not supposed to be bound to the Commission's proposal and is therefore not constrained by the social partners' agreement (Buchner 1993).

The notion that neither Commission nor Council are endowed with discretion may finally find support in the fact that the Social Chapter stipulates no rules for the case that an agreement by the social partners has not been proposed by the Commission to the Council or that it has been rejected by the latter. But as has become clear above, legal opinion on the issue of discretion is divided and tends to view the rights of Council and Commission differently.

2.3 Amendments

As mentioned above, the Commission claims the right to check the social partners' agreement concerning mandate, representativeness and legitimacy. Once the agreement has passed that test, however, the Commission plans to hand to the Council the original version only. It therefore denies itself the right of amendments. One opinion in the legal debate thinks it would not be congruent with the Commission's responsibility, if the Commission were bound by the text

¹⁷ Europe Documents No. 1733/1734, 3 October 1991, emphasis added.

¹⁸ This textual argument does not, however, apply to the German translation, for example.

of the social partners' agreement (Däubler 1992). Again, a comparison between the original proposal for Art. 118b put forward by ETUC/UNICE/CEEP and the final text of the Social Chapter can facilitate the legal interpretation. The agreement between the social partners suggested as new Art. 118b, stated that "Agreements may be implemented ... by a Council decision on a proposal from the Commission, *as they have been concluded*." As the last 5 words have been omitted from the final text of Art. 4 sec. 2, amendments to the social partners' agreement seem feasible. The main legal opinion, however, denies at least the Commission the right to amend, as legislation would not represent the social partners' agreement any more.¹⁹

Concerning possible amendments by the Council, it is argued on the one hand that agreements by the social partners might be politically and morally binding, but not legally so. The obligation to retain the original text would contradict the Council's political responsibility for all EU-legislation (Däubler 1992, Buchner 1993). Moreover, it is stated in the Protocol on Social Policy, signed by all European Union member states, that the Council may amend proposals by the Commission only unanimously. This would indicate the right of amendments. On the other hand, it is claimed, for example by the Commission,²⁰ that the Council is bound to the text of the social partners' agreement. As national legislations do not allow to amend agreements between employers and trade unions which are extended using *erga-omnes* procedures, this should also apply to understandings on a European level (Wank 1995). Moreover, if the Council is not obliged to implement the social partners' agreement, it is not necessary to endow it with the right of amendments. Instead, the right of discretion ensures that the Council can never be overruled (Höland 1995, Séché 1993, Wank 1995, Watson 1993, Whiteford 1993). In addition, if amendments were allowed this could be interpreted as violation of the principle of subsidiarity, as viewed by the Commission and the Economic and Social Committee.²¹ Finally, the European Parliament emphasises that as soon as the Council amends the proposal by the social partners, this proposal is null and void. Hence, the legislative process according to Art. 2 of the Social Chapter would have to start anew (European Parliament 1994a).

The "historical" experience, based on the only directive directly resulting from an agreement by the social partners (parental leave) does not yield insights, as the Commission only made a minor change²² to the agreement before proposing it to the Council which passed it without further amendments. The legal opinions on discretion and amendments have thus not really been put to the test, yet.

¹⁹ Cf. Buchner 1993, Watson 1993, CES 1994, Weiß 1992b, Schulz 1996, p.109, Fn.30, Höland 1995.

²⁰ COM (93) 600 paragraph 38.

²¹ COM (93) 600 paragraph 6, CES 1994. See also Bercusson (1996, pp.556f, 606), Buda (1995) and Schulz (1996, p.146)

²² The Commission included a non-discrimination clause in Art. 2 sec. 3 of the parental leave directive.

3. Alternative Rules

3.1 Analytical Framework

Suppose all parties involved in the decision-making process under the Social Chapter can be depicted as rational, pursuing well defined objectives - which can, in principle, be specified precisely - subject to constraints.²³ Social partners, members of the European Commission and national governments represented in the Council are not assumed to be benevolent in the sense that they maximise the welfare of the workers, firms, people or other constituents on whose behalf they act. Instead, they maximise their own payoffs, and the interests of the constituents will be included as constraints. The objective and constraints of any of the parties involved will not be specified in detail, however. They differ at least insofar, as that a party which can propose a regulation will always prefer it to the proposal of any other party, because the payoff resulting from one's own legislative ideas is higher than that resulting from a regulation reflecting another party's preferences. These assumptions imply a general applicability of the results derived below: they hold irrespective of the specific objectives of the parties involved.

In general, we model all parties as entities or unitary actors. The consequences of this entity assumption are most pronounced for the social partners, as it implies that the social partners have managed to agree on a proposal which constitutes a (net) improvement for some of them and a deterioration for none. Social policy legislation therefore appears to be a positive-sum game for the social partners, assuming complete information. Incentives to bargain also exist if the social partners can impose rules which make them better off at the expense of third parties.²⁴ Alternatively, social policy issues might be characterised by prisoners' dilemma situations on a European level. It will be shown below, however, that there may be incentives to bargain for the social partners even in the case of a zero-sum game. Moreover, we will allow for diverse interests in the Council and among the social partners (section 4.3).

Complete and perfect information are presumed, once the Commission has turned to the competence of the Social Chapter. This assumption is feasible because of the players' common knowledge about the procedural rules and because of the information revelation mechanism implied by Art. 2 of the Social Chapter. Before the social partners seek an agreement the Commission will have stated its ideas. In addition, the desire by the Commission to proceed primarily under the competence of the EU Treaty and to resort to the Social Chapter only as a second-best choice, ensures that the social partners will also be informed about the Council's opinion on the issue under debate. This is the case because the issue will be debated at length in the Council - trying to achieve a unanimous vote required by Art. 100, 235 EU

²³ For a survey of the research on potential objectives of Commission and Council, see Vaubel (1994).

²⁴ Cf. Boockmann (1995). Boockmann points out that the opportunity to obtain gains from bargaining at the expense of others is especially pronounced in the context of the European Social Chapter because the Commission limits the number of social partners.

Treaty - before the Commission turns to the legal base of the Social Chapter. The alterations that might occur to the analysis if incomplete information is assumed, for example, because the Council of 15 has not fully revealed its preferences by rejecting a proposal, are discussed in section 4.2.

Payoffs to the social partners, the European Commission and the Council are indicated by the superscripts s , e and c respectively. If a law is passed which has been proposed by the social partners, for example, payoffs will amount to S^s for the social partners, S^e for the European Commission and S^c for the Council. The payoffs due to a proposal by the European Commission (Council) are labelled E^i (C^i) accordingly, where $i = s, e, c$. The payoff resulting from the current legal situation is equal to Ω^i . A proposal will be made or accepted if the payoff resulting from it is at least as large as the payoff from the alternative course of action.

3.2 Discretion

In order to investigate the consequences of discretion we focus on the payoffs to the three parties involved under the alternative interpretations of the Social Chapter, as depicted in figure 2. It represents an amended part of figure 1, where the second statement by the social partners has been called for by the Commission, and where payoffs have been included. Because social policy legislation has usually taken very long to gestate it seems reasonable to assume that the alternative to new legislation is the continuation of the current legal situation.

Figure 2: Decision-Making for Alternative Legal Options: Discretion

If the social partners do not attempt to present a proposal of their own, the Commission's will be submitted to the Council. The latter will accept this proposal if it is made better off by letting these rules become law, i.e., if $E^c \geq \Omega^c$, which has been assumed in figure 2. Moreover, the Commission will only present the proposal if its payoff also improves, such that $E^e \geq \Omega^e$. Clearly, the social partners' payoffs can deteriorate ($E^s \leq \Omega^s$), once they have failed to take over the process. If the social partners have presented their own agreement to the Commission and if their proposal is accepted by both Commission and Council $S^e \geq \Omega^e$ and $S^c \geq \Omega^c$ will hold. From figure 2 we can conclude that the social partners will also take over the law making process at point A if their payoff from the new law S^s is not less than the Commission's proposal, i.e., if $S^s \geq E^s$.

Giving the Commission and the Council discretion therefore ensures that neither of the two will be made worse off by proposals by the social partners. Moreover, including the social partners into the decision-making process under the Social Chapter guarantees them a payoff

which will not lie below that resulting from the current situation. Should Commission and Council be granted discretion, a new piece of social policy legislation will only come into being if this process is a positive-sum game, i.e., if the new law represents a Pareto-improvement, from the point of view of the 3 parties involved. If, however, discretion were granted neither to the Council nor to the Commission, social policy regulations might become Community Law which would reduce the payoffs of the Commission and the Council in comparison to the original situation. Given the right of the Commission to initiate the law making process, it could be argued that allowing the Commission to reject a proposal by social partners' involves an element of superfluous control as the Commission can refuse to initiate a project if it fears that the social partners will propose rules which make the Commission worse off. This line of argument could be disputed though if the social partners' attitudes and preferences were unknown to the Commission at the time of making its proposal.

As a by-product of the previous analysis it is possible to explain why the social partners might wish to present new social policy legislation, even if they do not directly benefit from it, or how they are able to effectively block new legislation. By presenting a set of rules - even if they do not wish them to become law - which will not be proposed by the Commission or will be rejected by the Council and which cannot be amended, the social partners can at least ensure the status quo payoff Ω^s . Note, however, that if the Commission could ignore the social partners' wish to present an agreement, the above reasoning will not necessarily hold.

If we assume that the Council represents national governments and that their actions in the Council influence their chances of re-election, the Council's discretion can be interpreted as a safety net which helps to prevent proposals by the social partners from becoming law which harm the wider electorate but benefit the agents represented by the social partners. The economic analysis in this section therefore provides compelling evidence in favour of discretion for the Council, if amendments are not allowed, supporting the dominating legal view.

The importance of the Commission's discretion depends to a large extent on its objective function. The Commission is not subjected to the possibility of electoral backlashes and it is only controlled by the European Parliament in very few areas. Hence, the probability that the Commission pursues objectives with fewer constraints than national governments makes the case for its double involvement less compelling than for discretion by the Council. If new social policy legislation has to be initiated by the Commission, granting the Commission discretion might be viewed as an incentive not to neglect this area of policy. Proponents of a more active Commission might therefore favour an interpretation of the Social Chapter which also gives the Commission discretion. But the economic analysis of the Social Chapter does not provide arguments that will point out disastrous consequences if the Commission is denied discretion - given the absence of amendments.

3.3 Amendments

The analysis of the previous section will now be enriched by allowing both the Commission and the Council to amend proposals they are presented with. Figure 3 depicts the choices the three actors face under such circumstances and the respective payoffs.

Figure 3: Decision-Making for Alternative Legal Options: Discretion and Amendments

Note, that by refusing to draft an agreement on their own in accordance with Art 4 sec. 1, the social partners can guarantee themselves a payoff E^s , where E refers to the payoff resulting from a Commission's proposal if the co-operation procedure under Art 189c EC Treaty is followed. If E^s exceeds the alternative to be expected under the relevant decision-making rules, this option will yield a kind of minimum payoff for the social partners. The payoffs for either party resulting from a law emanating from the co-operation procedure might be different from the payoffs that would occur if especially the European Parliament had not been involved and the Commission had been able to get its proposal accepted, labelled \hat{E}^i , $i = e, c, s$. This outcome seems to have been anticipated by some actors, as the European Parliament (1994a) denies the Commission the right to amend proposals by the social partners.

If different objective functions are assumed for the Council and the other two actors and if, in addition, alternative constraints apply, neither the Commission nor the social partners will propose a law that maximises the payoff of the Council - subject to its constraints. Allowing the Council to make amendments therefore implies that it will always be able to improve on the payoffs resulting from the Commission's or the social partners' proposal, as $C^c > E^e$ and $C^c > S^s$. Giving the Council the opportunity to improve on the payoffs resulting from proposals by the other parties therefore ensures that neither the Commission's nor the social partners' proposal will become Community law. Moreover, if the right to amend proposals is unrestricted the Council will always be able to alter proposals in such a way as to guarantee $C^c \geq \Omega^c$. Any legislation in the area of social policy will therefore reflect the objective function of the Council and the constraints it is confronted with, if it is endowed with the last-mover advantage of being able to amend proposals. This result will basically be unaffected if discretion to reject a proposal by the Commission is denied to the Council. Effectively, there would be no influence of the social partners on social policy law-making.

Turning to the Commission, it can be noted that the right to amend agreements by the social partners would be without impact, if the Council had the right to amend. But the Commission is not without influence in such a situation as it could either refuse to present the social partners' proposal to the Council or - at an earlier stage - it could have refrained from initiating the whole process. It is noteworthy that the Commission has reserved itself the right of discre-

tion which is of importance, given the Council's ability to amend, while it does not require the right to amend which is ineffective.

If it is now assumed that the Council is solely endowed with the discretion to decide on a proposal by the Commission but not to amend it, while the Commission may amend or refuse to pass on a proposal by the social partners, the Commission can effectively determine the outcome of the legislative process. By submitting a proposal such that $\hat{E}^c \geq \Omega^c$, the Commission can ensure that its ideas will be turned into law. In contrast to the case in which the Council is able to amend, however, the necessary approval by the Council guarantees that a second objective function and a second set of constraints will be taken into account; at least as some kind of threshold. But, as in the case of the Council being able to amend the social partners' agreements, a text proposed by ETUC and its employer counterparts will not survive the Commission's right to amend, as the Commission would otherwise refrain from improving its payoff. Also denying the Commission the right to amend brings us back to the analysis of section 3.2.

The main results can be summarised as follows: the right for the Council to amend a proposal renders the equivalent right of the Commission ineffective. This outcome might be reflected in the Commission's interpretation of the Social Chapter. The right to amend for either the Council or the Commission will prevent proposals by the social partners from becoming Community law. Hence, allowing amendments either by the Council or Commission will be in conflict with the objective laid down in the Social Chapter of "promoting ... the social dialogue between management and labour", because the results would be without impact on social policy regulation. In addition, giving Commission or Council the right to amend invalidates the social partners' ability to preserve the current legal situation, which they possess, if only Commission and Council are granted discretion. Finally, should the Commission but not the Council be allowed to amend proposals, the former's power in determining the direction and scope of European policy would be enhanced further.

4. Extensions

The above analysis builds on assumptions which might be criticised on empirical grounds. They include 1) the possibility for Council or Commission to amend or reject proposals by the social partners without cost, 2) complete information, and 3) unitary actors. We will discuss these assumptions in turn and show that a relaxation will not alter results fundamentally.

4.1 Cost of Exercising Rights

In the single case in which the social partners have actually presented an agreement to the Commission so far, this agreement on parental leave has been accepted almost without alterations by the Commission and not been amended by the Council. This outcome seems to be in stark contrast to the results of our theoretical analysis. Why have the Council and the Com-

mission not amended the social partners' text, given some legal support for an according interpretation of the Social Chapter? This conflict between theory and evidence might be due to the omission of an important determinant of the Council's and Commission's decisions: the cost of amending or rejecting a proposal. Such cost could arise if interactions between social partners, Commission and Council resemble more a repeated game than the one-shot game, assumed so far. If that were the case, an amendment of a proposal today, in order to improve one's payoff, might be detrimental to the gain from co-operation tomorrow, such that Commission and Council do not attempt to exercise the potential right to amend. Alternatively, cost of amendments or rejection might arise because either of the two actions is viewed negatively by the electorate or the European Parliament, for example, such that the set of constraints is more restrictive in case of exercising the right of discretion or of amending a proposal than in the case of approval. Finally, one could think of transaction cost incurred if amending a proposal, because defining new rules requires co-ordination between bureaucracies, politicians and interests groups. If the cost of amendment or of exercising discretion are sufficiently high Commission and Council might be prevented from amending an agreement by the social partners or from exercising their potential discretion, as in the case of parental leave. Such an interpretation would be compatible with the notion that neither Commission nor Council wanted to discredit the new legal framework at the outset. The existence of such cost of exercising rights might thus reduce the dominance of Council or Commission, if amendments were feasible, but would not remove it.

The economic interpretation therefore does not support the legal claim that the Commission or the Council should have the right to amend agreements the social partners have proposed as new legislation, even if cost of amendments are included. This view will be strengthened, if the assumption of given cost is modified. If possible, the social partners will try to raise these cost, to deter an amendment or a rejection by Commission or Council. The more opportunities Commission and Council have to influence the final result the stronger will therefore be the incentives for the social partners to lobby their national governments and the Commission. If the right to amend in addition to discretion raises the incentives for rent-seeking, it could be argued that allowing either Commission or Council to alter the agreement by the social partners will increase the unproductive use of resources for lobbying purposes.

4.2 Incomplete Information

Assume in contrast to previous deliberations that although the rules of the game are known to all players, there exists incomplete information with respect to the preferences of each party and to the constraints they face. Hence, it is impossible to ascertain a priori what the payoff to party i will be, resulting from a proposal by party j , for $i \neq j$ and $i, j = s, e, c$. Investigating the impact of discretion, it can be noted from figure 2 that a proposal by the social partners will

still only become law if all three parties involved improve their payoff by accepting (or proposing) it, as one's own payoff from the current legal situation should be known to each party. Denying Commission or Council discretion would allow the social partners to dominate the law-making process. The only change in the analysis of discretion occurs when evaluating the incentives for the social partners to draft their own proposal. If the exact content of the Commission's proposal and the stance the Council will take are unknown, the social partners will not be certain what their payoff will be if they let the Commission proceed at point A in figure 2. But by submitting their own proposal the social partners can invariably guarantee themselves the status quo payoff Ω^s . Turning to the combined issue of amendments and discretion, note from figure 3 that the incentives for the Council to amend proposals persist, such that it would continue to dominate social policy legislation devised under the Social Chapter. Clearly, a right for the Commission to amend would not have an effect on this outcome, which entails as a consequence that the social partners' preferences still have no influence on the final outcome.

Allowing for incomplete information can explain the empirical fact why certain proposals, using Art. 100, 118a or 235 of the EC Treaty as competence, have been submitted by the Commission to the Council, but have been rejected by the later. In addition, this modification allows for the existence of cheap talk or signalling behaviour in the context of legislation under the rules of the Social Chapter by any of the parties involved. Nevertheless, the fundamental results of the analysis with complete information continue to apply: discretion for Commission and Council is necessary to prevent the social partners from dominating the legislative outcome and to ensure Pareto-improvements. Granting Commission or Council the right to amend will confer on either of them a last-mover advantage which will allow the respective party to impose its preferred outcome. The main results of this section also apply if the social partners are given the right to initiate the legislative process, and if this right is not restricted to the Commission, as, for example, argued by the Economic and Social Committee.²⁵ This is because, if the social partners initiate the process, there will be no complete knowledge with respect to the Commission's or the Council's objectives and constraints.

4.3 Diverse Interests

The members of the Council of the 14 countries which have signed the Agreement on Social Policy and the social partners are often characterised by diverse if not conflicting preferences and constraints. What will be the impact for the above reasoning with respect to discretion and amendments if the assumptions of unitary actors are relaxed?

If the social partners are viewed as having diverse interests they will only present an agreement if the individual payoffs from an agreement for both of them exceed those resulting

²⁵ Cf. Bercusson (1996, pp.555f) and footnote 10.

from the Commission's proposal, given complete information and discretion by Commission and Council, but no right to amend. Let S_t^s be the payoff to ETUC, resulting from a proposal by the social partners. S_f^s is the payoff for the same proposal for the firms' representatives, i.e., UNICE and CEEP, which are assumed to have the same objectives and constraints. Payoffs resulting from proposals by the other parties are defined accordingly. Allowing for diverse interests among the social partners ensures that any joint proposal will guarantee $S_k^s > E_k^s$, for $k = t, f$, but not necessarily $S_k^s > \Omega_k^s$. Hence, the threat of the Commission's proposal might induce either of the social partners to agree to a deterioration of its payoff in comparison to the current legal situation, but the social partners retain an influence on the outcome. They will be "bargaining under the shadow of the law" (Bercusson 1996, pp.538ff). Granting solely discretion to Commission and Council thus does not warrant that new social policy legislation represents a strict Pareto-improvement. But new legislation will certainly be an improvement in comparison to the (hypothetical) alternative - the Commission's proposal. Although the likelihood that the social partners will dominate the legislative process is weaker if diverse interests are allowed for, discretion for Council and Commission ensures that the social partners cannot exploit their potential power. In order not to lose their influence completely, the social partners could present proposals regarding specific aspects of the social policy regulation under debate, even if they cannot agree to take over the whole legislative project.

The conclusions with respect to the analysis of discretion and amendments in combination are not affected fundamentally in comparison to that of section 3.3 if diverse interests of the social partners are taken into account. They will only present a proposal if both either prefer the current legal status to the Commission's proposal or if the Council's amendments guarantee a higher payoff than the Commission's ideas. As it is less likely that the social partners can agree on this evaluation of the different payoffs if they have diverse interests than if they can be depicted as unitary actors, the likelihood that the Commission can proceed at point A in figure 1 increases. Hence, diverse interests of the social partners weakens their impact on the decision-making process and strengthens that of the Commission.

For the Council to take a decision, be it an acceptance or an amendment, requires either a qualified majority or unanimity. In case of discretion, a proposal by the social partners might thus become law although some countries have objected to it, because they incur a reduction in payoffs. On the one hand, discretion therefore does not ensure Pareto-improvements any more if the proposal to be voted on requires only a qualified majority (Art. 2 I, II). On the other hand, already a small number of countries - or even one in case of unanimity (Art. 2 III) - can block a proposal by the social partners, even though the large majority of member states might benefit. Nevertheless, a case for discretion - in the absence of the right to amend - persists, in order to prevent the social partners from imposing their preferred outcomes. If the possibility of amendments is taken into account in addition to discretion, diverse interests of member states will prevent amendments from being made every time, even though the Council is

allowed to do so. Hence, the Council's domination of the decision-making process due to its ability to amend proposals by the social partners will be less pronounced if diverse objective functions and constraints of the signatory countries are taken into account, than if the unitary actor assumption is imposed. Giving up the assumption of the Council being a unitary actor reduces its influence should it be allowed to amend proposals but does not erase it. But the less likely are amendments by the Council, because the required majority does not exist, the more likely it might be that amendments by the Commission pass the Council. As the Commission is the party which most likely can be viewed as unitary actor its influence increases the more diverse the objectives and constraints of the other parties involved.

4.4 Conclusions

Given complete information, unitary actors, and the absence of costs of amendments or rejection it has been shown using simple game-theoretic concepts that discretion for the Commission and Council ensures that new social policy legislation represents a Pareto-improvement, from the perspective of the three parties involved. The right to amend proposals by the social partners would severely reduce their influence in the legislative process and their incentives to present proposals to the Commission, while either Council or Commission - depending on which party had the last-mover advantage - could dominate the decision-making process. Relaxing either of the above assumptions does not fundamentally affect the consequences of alternative decision-making procedures inherent in the ambiguities of the Social Chapter. The incentives for the social partners to bargain, for the Commission to initiate the legislative process, for Commission and Council to exercise the right of discretion or to amend proposals might change, however. Nevertheless, the economic analysis does not provide arguments for an interpretation of the Social Chapter which supports the claim that Commission and/or Council should be able to amend proposals by the social partners - unless one desires to nullify the social partners' influence in the decision-making process.

Figure 1:

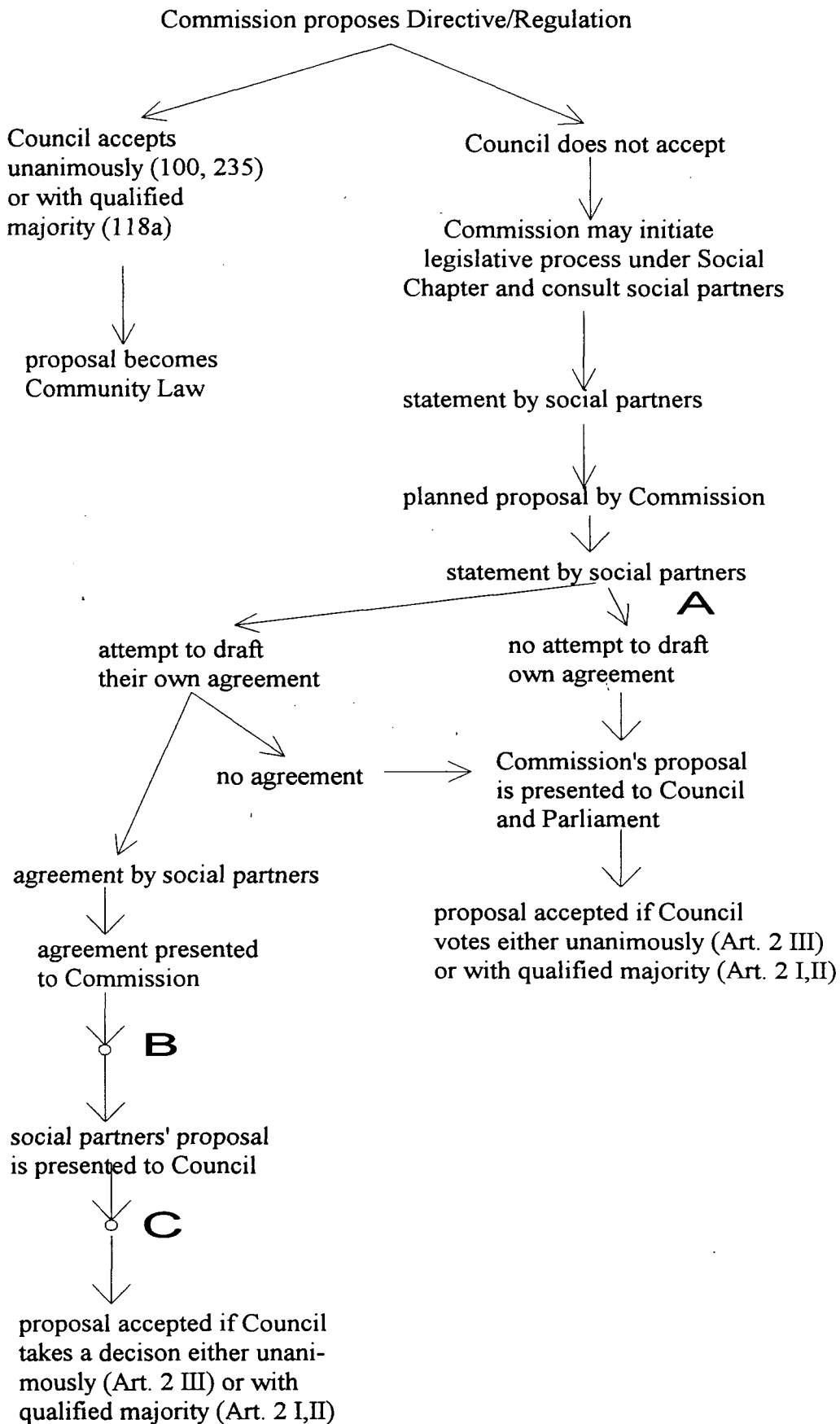


Figure 2:

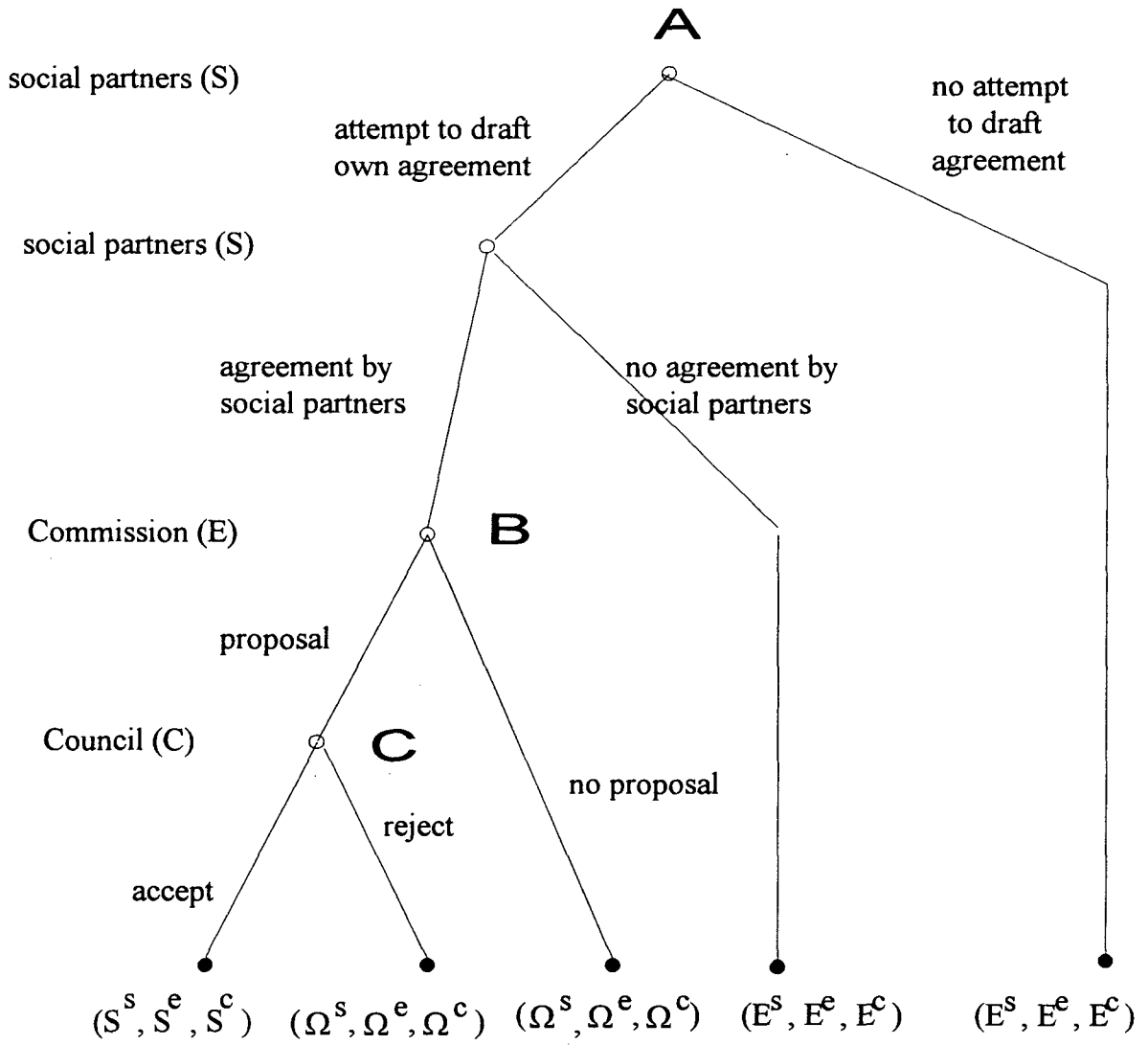
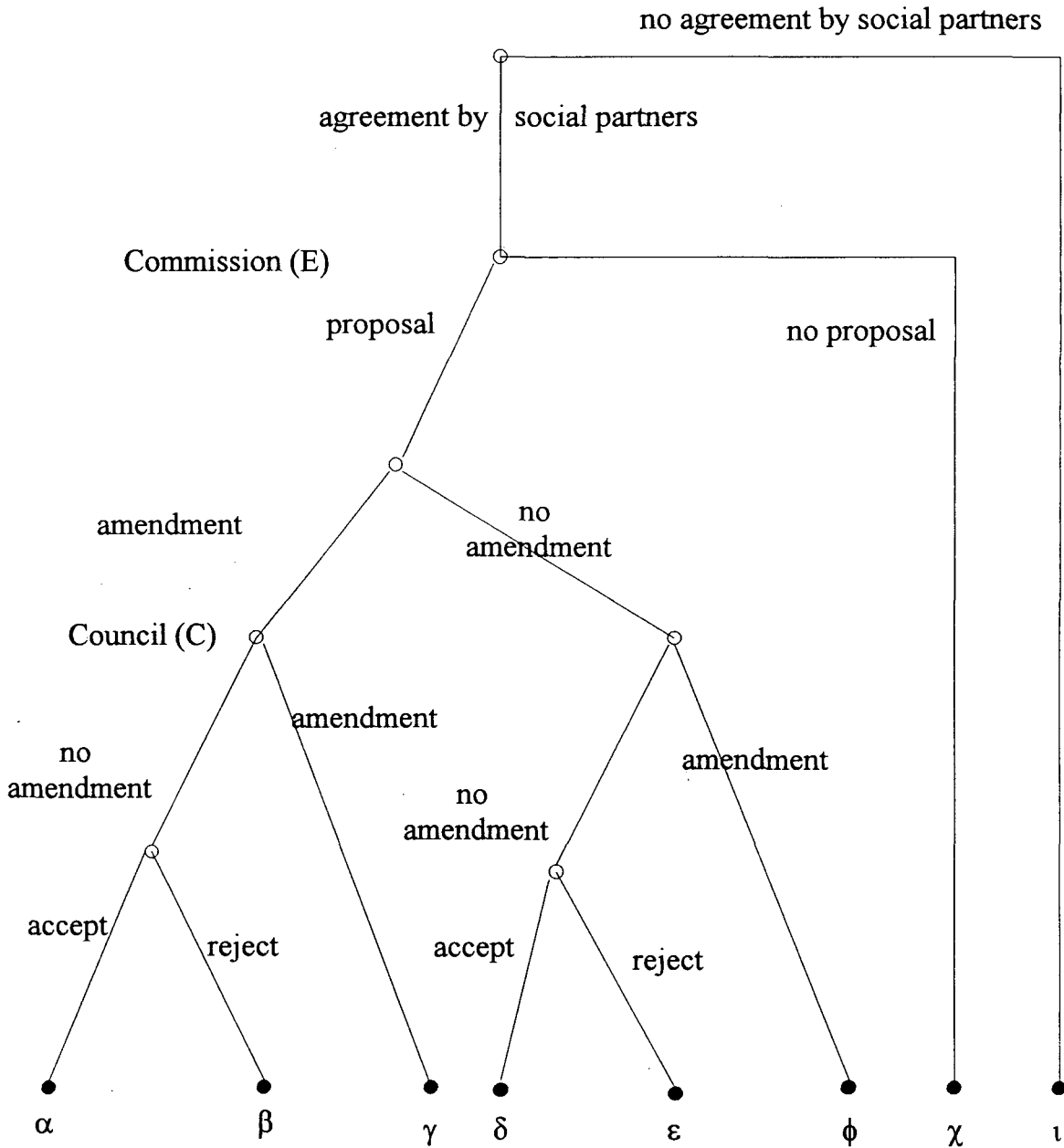


Figure 3:



$$\alpha = \{\hat{E}^s, \hat{E}^e, \hat{E}^c\}$$

$$\beta = \{\Omega^s, \Omega^e, \Omega^c\}$$

$$\gamma = \{C^s, C^e, C^c\}$$

$$\delta = \{S^s, S^e, S^c\}$$

$$\varepsilon = \{\Omega^s, \Omega^e, \Omega^c\}$$

$$\phi = \{C^s, C^e, C^c\}$$

$$\chi = \{\Omega^s, \Omega^e, \Omega^c\}$$

$$\iota = \{E^s, E^e, E^c\}$$

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