Article 118A challenge in the Court of Justice
Update

Since our article on the challenge to article 118a in the Court of Justice (see TUTB Newsletter No. 9), we have had a stream of inquiries about where things stand and what can be done to stop occupational health gains being rolled back.

The short answer is - there has been very little movement on this front. The full Court (i.e. fifteen judges) is due to hand down its judgement on 17 December. It suggests that the Court is alive to the fundamental issues at stake in what is the most important case referred to it on article 118A since the provision was written into the Treaty by the Single European Act of 1986. This recognition that it is a landmark case is certainly positive, but still no guarantee that the verdict will be in line with the overarching goal of harmonization while maintaining the improvements made. Other cases have unfortunately shown that the Court's social sympathies are limited. Whatever line the judgment takes, having it delivered by a full court would make the precedent harder to reverse in a later case. If article 118A is thrown into question, the most effective way of restoring Member States' unrestricted rights to keep or introduce provisions more favourable to workers would be through a protocol annexed to the Treaty (as has often been done in the past). The hurdles are more political than legal: it would require unanimity from the Member States. On the other hand, ratification of the Amsterdam Treaty would be an opportunity to clear the matter up. It would only take one Member State to make ratification of the Treaty dependent on the adoption of such a protocol to create more favourable conditions. But final ratification of the Treaty is still some months away, because it requires a revision of the constitution in France.

Information from Italy as to political responsibilities within the previous government is very confused. The only certain thing in the mass of contradictory information going the rounds is that no official defence was put forward by the Italian authorities which would have enabled the Court of Justice to assess the Italian legislation, and that the responsibility for this lies with different Italian institutions.

A letter putting the case for the Italian carcinogens legislation was sent by the Ministry of Labour on 16 April 1997 to the Ministry of the Foreign Affairs, which should have forwarded it to the Court of Justice. For reasons which remain unclear, it did not do so. On 13 August 1998, the Italian Ministry of Labour appealed to the Avvocatura generale dello Stato to apply for a reopening of the hearing under article 61 of the CJEC's Rules of Procedure. Our information suggests that this application was never made. Was it a policy decision not to defend the Italian legislation and, if so, whose? Did officials err by omission? Why did the Ministry of Labour not follow-up on the case?

On 4 November, the three Italian trade union confederations wrote to the new Minister of Labour, Antonio Bassolino, urging the Italian government to assume its responsibilities in a case which will have serious repercussions for all the Member States. At the time of writing, there is no telling whether the new government will act or follow its predecessor's line of resolute inaction. Either way, it is very late in the day to reopen the hearing, and the Court's Diary (for the week of 16 November) seems to suggest that the Italian government has filed no application.

In May 1998, the European Trade Union Confederation called on its affiliated trade union confederations to lobby their own governments. The Advocate General's submissions and the

report of the hearing show that the Court was given piecemeal and questionable information on some points of fact, Italian law, and the content of the Community Carcinogens Directive itself. More disturbing still is the fact that in a case touching on the very principle of article 118A, no Member State saw fit to put its views and the Commission's submissions seem not to have given a proper statement of all the issues.

Because of this, the ETUC pressed for the hearing to be reopened under article 61 of the CJEC's Rules of Procedure. Unfortunately, only the Court can do that, of its own motion or on application by a party, a Community institution or a Member State. As far as we know, no Member State - not even Italy - has filed such an application. This is a surprising display of passivity from Italy and prompts the question whether the Ministry of Labour really wants to uphold the legislation it is meant to enforce.

Some trade union confederations - apparently ETUC member organizations in Finland, Belgium, Denmark, Sweden and Italy, plus the CGT in France - have lobbied their governments.

Unfortunately, their efforts have not really paid off. As far as we know, the only initiative so far taken has been purely informal. This was at the June 1998 Social Affairs Council convened under the British Presidency, when compliance with article 118A as regards Member States' rights to maintain or introduce measures more favourable to workers was discussed at an informal meeting (i.e., not on its official agenda). The discussion was held behind closed doors (as are all Council proceedings apart from those considered good photo-opportunities), so it is impossible to know exactly what went on. The European Parliament, by contrast (which should have been able to challenge the Commission on its role in this case) has stood completely apart from the debates. The Austrian Presidency (second half of 1998) seems to have taken an interest, so the matter could end up on the agenda of this year's final Social Affairs Council in December. What Germany's line will be when it takes over the Council Presidency for the first half of 1999 is anyone's guess.

Whatever the outcome, this case has made two things clear. One is the issue of access to justice. The fact that national or European trade union organizations cannot intervene as parties in this type of dispute does nothing to help the Court build up a body of social/employment case law which takes full account of opposing workplace interests. The other is the very major obstacles to transparency of action by the Community and national public authorities alike. The ETUC has tried to get a copy of the conclusions that the Commission submitted to the Court of Justice, which were discussed at a public hearing. The Commission has never replied. Things have been even less open and above-board in Italy. The previous administration's Labour Minister, Mr Treu, has offered no explanations as to why the defence statement written by his department was not sent to the Court of Justice. This sort of thing adds to the danger of public decisions being swayed by private business lobbies.

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This article was written on 20 November 1998. Once judgement has been delivered (probably by 17 December), it will be announced on the TUTB's web site at www.etuc.org/tutb.