

## 3.2 The role of the EU institutions in the European social dialogue

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### 1. The European Commission.

One of the functions of the EU Commission is to promote the consultation of management and labour at Community level (Art. 3 (1) Agreement on Social Policy - ASP). The Commission does so by simply following the procedures of the Agreement on Social Policy. It has to consult the social partners before submitting any proposal in the social field (Art. 3 (2) ASP). Over the last four years the Commission effectively used this procedure on a number of occasions: European Works Councils, burden of proof in sex discrimination matters, parental leave, part-time work, sexual harassment, employee involvement in company matters, etc. We may assume that the Commission will continue to play according to these rules in future. So the real question is: can/should the Commission do more to stimulate the social partners?

The ASP (Art. 3 (1) provides that the Commission "shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties." What does that mean?

In my view we have to interpret that phrase as an obligation on the Commission to assist the social partners as much as possible; for example, by performing secretarial tasks, providing interpreters, covering the costs of meetings, organising research, informing the public, training negotiators, etc. The Commission may do so by its own services (DG V for instance), by supporting institutes like the European Trade Union Institute, etc. What more?

It is clear that the more frequently the Commission initiates the social dialogue procedures, the more the social dialogue is promoted. However, up to now the number of occasions that the Commission has initiated

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the social dialogue has not been impressive (2 or 3 times a year). This could be extended up to, say, 10 times a year. Would that entail the risk that the social partners (and employers, in particular) will feel glutted with initiatives and reduce their cooperation?

Obviously, the Commission must be cautious not to overburden the social dialogue. However, experience shows that in about half of the issues proposed by the Commission for the social dialogue, the social partners did not start negotiations. Are there ways to improve this ratio?

The most important means of pressure is in the ASP-procedure itself: the Commission may press forward with its proposals despite the negative opinions of the social partners. Such persistence may persuade the social partners to make better use of the possibilities of the social dialogue. But - again - the Commission must act with care. If it presses on with its ideas, but is defeated in the European Parliament or in the Council, it risks losing much of its prestige.

Finally, the Commission may seek a change in the level or forum of bargaining: if all-industry agreements at a European level are not possible, the Commission may try to bring the issue into the sectoral social dialogue and stimulate sectoral agreements. This too may put some pressure on the all-industry social partners to enter into negotiations and agreements.

But heavy Commission intervention in manipulating the rules of the game raises a constitutional issue: if the social partners are put under very heavy pressure to negotiate, would that not be a violation of the principle of free collective bargaining, which is a fundamental trade union right?

## **2. The European Parliament (EP)**

The role of the EP in the social dialogue is somewhat depressing. If the social dialogue is effectively producing agreements, the EP is to a large extent outflanked. It is questionable whether the EP even has the right to be consulted on proposals of the Commission to the Council to implement agreements concluded in the social dialogue. Until now the Commission was wise to consult the EP on a voluntary basis. But what can the EP do? It cannot amend the agreement. It can only bless the agreement or helplessly raise objections. It has no power to stop a Euro-agreement becoming a Euro-Directive. And yet, it will have such a

power vis-à-vis classic Directives adopted by the Council after the Treaty of Amsterdam comes into force.

This is not to say that the EP has no role at all in the Social Dialogue.

The EP can stimulate the EU Commission to increase the number of its proposals in the social field. It can propose items and ideas for such proposals, etc. It can "punish" the social partners, if they are unwilling to conclude an agreement, by cooperating in the adoption of classic Directives.

So there is some influence, but it is marginal. One must indeed conclude that at the very moment when the EP sees its role in social policy making growing (through the co-decision procedure) it is immediately sidelined by the procedures of the social dialogue.

The EP might succeed in a legal action before the European Court in which it claims the same degree of involvement with the adoption of Directives under Art. 4 (2) ASP as it has with the adoption of classic Directives (Art. 189c, later Art. 189b procedure). If this fails the only thing the EP can do is to press for an amendment of the Art. 4 ASP-procedure in a future Intergovernmental Conference.

### **3. The Court of Justice of the European Communities**

A first role of the Court of Justice in the social dialogue is already apparent: resolving questions of interpretation of the provisions of the ASP.

But a more comprehensive involvement of the Court with the social dialogue is likely.

First of all: the selection of organisations entitled to participate in the social dialogue. A case on this point has already been submitted by UEAPME. This case may not be admissible in its present form, but it is likely that comparable cases, presented in a different form, may oblige the Court to speak out on the very sensitive question of representativeness.

Secondly, there is the question of interpretation of Euro-Agreements annexed to Council Directives. Sooner or later, by way of preliminary references or infraction procedures, the Court will be forced to give interpretations of these Agreements. In those situations the Court may well give interpretations contrary to the intentions of (one of) the social partners which concluded the Euro-Agreement. And, as Otto Kahn-

Freund once remarked: "the power to interpret is the power to destroy." The social partners may try to avoid this by being as clear and concrete as possible in the texts they are framing; but it is well known that this is not exactly their field of expertise. Social partners are accustomed to express themselves in agreements in very ambiguous terms in order to conceal certain disagreements.

Thirdly, the Court will be confronted with the problem of the binding force of mere agreements; that is, of the implementation and interpretation of Euro-Agreements which are not incorporated into Directives, but are implemented in accordance with the procedures and practices specific to management and labour and the Member States.

Finally, the Court may be involved in a wide variety of problems resulting from disputes in the process of collective bargaining. If the negotiations are not leading to an agreement the Court might be asked to mediate or arbitrate. The Court may be involved in adjudicating on the legal consequences of industrial conflicts related to negotiations in the European social dialogue.

With the rise of a genuine European system of industrial relations, all these possibilities may occur sooner or later and force the Court to take a position.

So the question arises: is it wise to have all these highly explosive questions determined by the Court? Or should another body be preferred - the English Advisory, Conciliation and Arbitration Service, the American National Labor Relations Board, the German Bundesarbeitsgericht, etc. can serve as different models.

#### **4. The Economic and Social Committee**

The role of the ESC in the social dialogue is perhaps even more depressing than that of the European Parliament. If the social dialogue is effectively producing agreements, the ESC is to a large extent outflanked. The ESC does not even have the right to be consulted on proposals of the Commission to the Council to give binding effect to agreements concluded in the social dialogue. Until now the Commission was wise to consult the ESC on a voluntary basis. But what can the ESC do? It cannot propose amendments. Like the EP, it can only bless the agreement or helplessly raise some objections. It too has no power to stop a Euro-agreement becoming an Euro-Directive.

This is not to say that the ESC has no role at all in the Social Dialogue.

Like the EP, the ESC can stimulate the EU Commission to increase the number of proposals in the social field. It can propose items and ideas for such proposals, etc.

Again, some influence, but marginal.

The prospects are even more grim for the ESC than for the EP. It will increasingly become apparent that the ESC is a form of duplicate social dialogue. People will say: why maintain an ESC when its main participants - employers and trade unions - are already involved in the social dialogue?

Of course, there is a formal answer to that question: the ESC embraces more organisations than those represented in the social dialogue; also, its members are different in their natures. But all this will not prevent many people regarding the ESC and the social dialogue as duplicate institutions.

The ESC will have to redefine its role and to restrict itself to the issues which are not suitable for the social dialogue.

## **5. Concluding remarks**

This point brings me to a final observation.

The social dialogue of UNICE/CEEP and ETUC is one element. It may prosper, but it will presumably never be able to replace a formal institution like ESC. A plurality of institutions is here to stay.

Prototypes of this phenomenon can be found in the Benelux Countries and at EU level.

In the Netherlands, the "private" forum of the Foundation of Labour has coexisted for half a century alongside the "public law" forum of the Economic and Social Council. The borderline is vague, but apparently there is a rationale for the coexistence of both institutions.

Similarly in Belgium, two forums coexist - the Central Council of the Economy alongside the National Labour Council.

At EEC level we have seen the Standing Committee on Employment emerging alongside the ESC, and there were interprofessional summit conferences on unemployment held in the 1970s.

As in God's house, where - as the saying goes - there are many dwellings, apparently also in the house of the Consensus State the social partners may meet in a plurality of dwellings!

### 3.3 Discussion

#### **The European Commission**

The Commission's role can be to stimulate the dialogue, by making more social policy proposals engaging the social partners.

The Commission is not confined to stimulating the intersectoral dialogue. If it does not work, the Commission should turn to another level of dialogue: sectoral or regional. This is consistent with the principle of subsidiarity.

It is argued that the Commission should be paying more attention to sectoral dialogue, which requires resources to be channelled to sectoral social partners. In particular, sectors with a transnational dimension (transport, communications) or the subject of EC policy (steel, energy producers (gas/electricity), automobiles ...).

The role of other Directorates General is often overlooked. DG V is responsible for social policy. But the "Monti" proposal emerged from DG XV of the Commission. DG XV did not consult any social partners.

Either DG XV did not think there were social policy implications or social policy was ignored.

The role of other DGs becomes important as their proposals overlap both on social policy, and on potential subjects for social dialogue.

The case of lack of consultation on the "Monti" proposal illustrates a DGs very narrow definition of what constitutes a proposal in the social policy field. Only DG V has any clear idea. To other DGs, the trade unions are just another lobby. For example, public procurement is not seen as having a social policy dimension. Rather, it is perceived as a technical matter.

The Amsterdam Treaty's integration of the Maastricht Agreement on Social Policy into the Treaty of Rome may not change anything. UNICE will continue to argue for exclusion of social policy from "merely technical" issues, such as free movement.

It is important to suggest some mechanism to ensure that social policy dimensions are considered. For example, the requirement that all proposals include a statement regarding their impact on employment. This could be added to, or interpreted as meaning also:

- social policy implications;
- consequences for fundamental social rights (as expressed in the 1989 Charter).

### **The European Parliament**

The European Parliament could have a number of roles in social dialogue:

- to set the social policy agenda (through consultation with trade unions);
- prior to agenda setting, to initiate research, debates and hearings on new areas of social policy to be developed.

### **The European Court of Justice**

Social dialogue may need an expert body, perhaps a specialised European Court, for such tasks as dispute settlement and uniform interpretation of transnational agreements. The questions for such a body include: what kinds of disputes should it deal with; and what alternative forms of dispute settlement machinery exist?

One existing illustration of the possibilities is the provision requiring the ECJ to consult the social partners on interpretation of the Agreements on Parental Leave and Part-Time Work:<sup>23</sup>

"Without prejudice to the respective role of the Commission, national courts and the Court of Justice, any matter relating to the interpretation of this agreement at European level should, in the first instance, be referred by the Commission to the signatory parties who will give an opinion".

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<sup>23</sup> Council Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, Annex, Clause 4(6). OJL 145 of 19.6.1996, p 4.

## **The Council of Ministers**

The potential of social dialogue is evident in the case of employment policy. The Council has come very far in incorporating social dialogue and the social partners into the policy on employment guidelines. But there is the question of the capacity of social partners and of the processes of the social dialogue to respond to these demands. Again, it is a question of procedures, resources, and so on.

## **New structures**

The Luxembourg Jobs Summit provided for regular tripartite meetings between the social partners, the Council and the Commission, before the European Council meetings; also regular contacts to pave the way. The question is: how does this relate to the social dialogue process in the Agreement in Social Policy?

Another example is the High Level Group on Restructuring, agreed in the Luxembourg Summit conclusions of November 1997. This was a compromise result of a two year offensive by the ETUC exerting pressure, especially after the Renault affair, as Ministers were not willing to revise the major directives on restructuring. But questions remain: who is to sit on such panels; what is its procedure and approach? Commissioner Bangemann had created a high level panel for the car industry. But its approach was criticised as management oriented: its themes were globalisation and benchmarking. It was not labour-oriented, in the sense of focussing on employment consequences.

There is a need to respect the tripartite principle: to include not exclusively the institutions which formulate social policy, but also the social partners.

## **Member State governments**

National governments have responsibility for helping the social partners at national level to contribute to the EU social dialogue. Assuming the national social partners are willing to engage in EU social dialogue, this could include:

- assisting in the formation of the social partners and the status of their representatives;
- allowing for activities linked to social dialogue processes;
- assisting coordination of national-level agreements with EU social dialogue outcomes.

If national social partners were unwilling to engage in EU social dialogue, Member States could still:

- encourage cooperation and coordination with EU-level dialogue;
- discourage behaviour (or legal rules) which worked against EU-level social dialogue.