

Perspective of the Social Partnership in the 21th Century in the European Union

by

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I. Introductory remarks

One of the key elements of a modern society and economy is the Social Partnership. This statement is also valid for the European Union itself and not only for the single member states and their national societies. Therefore the treaty of Rome (in the version of Nizza) and the secondary community law reflect this position in legal texts as well as in political documents of the European Union and its commission. But in general both do not use the term “social partnership”, they describe it mostly by employing “social dialogue”. The several member states of the EU however prefer instead of “social dialogue” other designations as “Sozialpartnerschaft”, management labour, social partners or collective autonomy. It is therefore to understand when a British author – and I refer here to Alan Neal – formulates the ironical question “We love you social

dialogue – but who exactly are you?”¹

The treaty – after Amsterdam - contains now the term “social dialogue” but no explicit definition; it gives us an open formular² or an “open concept” as a vague and ambiguous characterization of many procedure with different contents as (1) the mere consultation of the representative organisations of both sides of the industry – of the trade unions and the employers’ associations on the European level and in the framework of the community institutions or (2) as a dynamic process of concertation in which the social partners are primarily involved and in which they discuss together questions of their common interest and attempt not only to transpose but also to define the social policy of the community by their collective autonomy as well as to bring it in legislative process in the European Union.

It becomes hereby clear that the main aspect of the social partnership will be mainly characterized by a broad, comprehensive social dialogue. The EU-Commissions describes with the following sentences: “The social dialogue at the European level covers discussion between the European social partners, joint action and possible negotiation between them, as well as discussions between the social partners and the institutions of the European Union. It has played an important role in policy development and policy

¹ In: Fondazione Giulio Pastore (ed.), *La contrattazione collettiva europea*, 2001, p. 113 ff.

² See especially Nunin, *Il dialogo sociale europeo*, 2001, p. 1 ff.

implementation ever since the establishment of the European Coal and Steel Community. It has allowed the social partners to communicate their views to the EU institutions and reciprocally to informing their members of initiatives of direct interest to them. This has improved the quality of political decisions and facilitated the implementation of policies in the economic and social field³.

The social dialogue should not be identified with the process of the collective bargaining and with the conclusion of collective agreements. Social partnership, social dialogue and negotiation of agreement between the social partners are however connected but they are different aspects of the whole complex.

In the European Community do not actually exist collective bargaining and collective agreements in the classical, traditional or orthodox sense as a process to conclude collective bargaining agreements regulating typical working conditions as working time and/or wages. Art. 137 par. 6 of the Rome Treaty excludes explicitly wages from the EU's competence which has an immediate effect to the social dialogue and its allowable subjects

This gives us the opportunity to ask for subjects and procedures of the social dialogue as the most remarkable phenomenon of the social partnership. And given the answer to these questions we can

³ Commission Communication concerning the Development of the Social Dialogue at the Community level No. 3 (Com. (96) 448 final – 18.09.1996).

then further look to the future and the possible development of the social partnership in our century.

The social partnership was and is not a complete and clearout but an evolving, dynamic concept in which can be found at least three components: the first involves the process of dialogue between the social partners (nor Art. 139 (1) of the Treaty) probably leading “to contractual relations, including agreements”; the second relates to the dialogue between the social partners at the European level and the Commission of the EU; the third concerns the interface of the European Union and the member states where the social partners are involved in some kind of contracted legislation on the level of the EU as well as in the implementation of European Legislation – here in the form of directives – by national agreements between the national social partners.

The development of a European Social Partnership depends also to a certain degree upon creating a legal framework for the bargaining process and its results as a part of the European social dialogue.

II. The European social dialogue

The central element of the social partnership on the level of the

European Union consists in the social dialogue. Due to the open formula and to the special institutional and legal framework on the Community level it can not be sufficient and satisfying to transfer the national structures and answers apart from all the national diversities and differences in the field of the social dialogue, especially in relation to the collective bargaining and institutional participation.

The main goal of the social dialogue as a mean to realize the social partnership will remain and continue also in the future. But before discussing the possible development of the social dialogue we need a reliable starting point and therefore a short description of the actual situation.

1. The actual stance of the European social dialogue

In contrast to many member states of the Community the European social dialogue shows many differences concerning all relevant aspects as actors or partners, instruments, subjects or procedures. The result hereof: it would be very dangerous to draw too much a line parallel to the European and national situation. In addition the similarities in the terminology conceal the fact that the several national systems are also very different among themselves. One has to be very careful to draw any immediate conclusions from the first complex to the second one and vice versa.

In the following remarks I would concentrate my remarks to the partners of the European social dialogue, the instruments they use, the subjects of their possible agreements and their implementation. The relevant procedural aspects will be of course included.

a) The procedural framework of the social dialogue

Neither European law nor practice prescribe a certain procedure for the social dialogue. Because of its broad understanding only one definitive form is lacking. The only procedure which has found a certain formal regulation is the participation of the social partners in the legislative process of the enactment of a directive by the council. For mostly all other activities in the social dialogue the social partners are not bound by any explicit procedural rules. It is therefore a matter of practice to develop procedural rules for the different forms of the social dialogue. The advantage of such rules lies after all in a higher certainty of law.

b) The partners of the social dialogue

The kind, number, and structure of the participants in the social dialogue depend upon the relevant form of activity. Here is not to discuss the opportunity of the social partners to contact the other

side outside the framework of the Treaty of Rome. We will concentrate our endeavours on the real social dialogue within the Treaty. Because no body will deny that the Treaty does not regulate all the contracts and relations between the social partners. It is insofar of no interest if the social partners can refer to their collective autonomy based on the freedom of association and/or the right to collective bargaining. But the social dialogue within the Treaty can be on the one hand a negotiation process according to Art. 137 or on the other hand be related to other topics outside of this rule. In the latter case it seems however to be doubtful if this kind of social dialogue between the social partners is covered by the Treaty; this is a question if and how far the Treaty can be applied also to literally not mentioned subjects.

In the Treaty we can find two different kinds of the social dialogue: the first relates to a three partite dialogue between the trade unions; the employers and the commission, e.g. the consultation of the social partners by the commission on social policy questions and problems; the second form of the social dialogue refers to the process of consultation and/or negotiation between trade unions and employers with the possible result of agreements. If these agreements can be characterized as European collective agreements concluded in a European collective bargaining procedure is a question how one defines the collective bargaining agreement. Against the qualification of such an agreement as a collective agreement – e.g. the agreement between the European

social partners functioning as basis and framework for the decision of the Council creating a directive – may be said that the European social partners do not have the mandate to conclude collective agreements for the workers and that they are not allowed to negotiate on working conditions as wages (Art. 137 par. 5 of the Treaty). But even one does not deny the characterization of the concluded agreements as European collective agreements this fruit of the bargaining has many deficiencies in comparison to the traditional concept of the bargaining agreement⁴.

The Treaty does not specify or differentiate the term social dialogue. And though the presumption should be that only an overall, inter-professional dialogue comprising the whole labour market would be regular the Commission and the social partners have in practice developed widely the sectoral dialogue⁵.

All social partners – inter-professional or sectoral – are only recognized in this function if they are “representative” on the European level⁶. This requirement of representativeness is found on the national level in most member states but the Treaty does not

⁴ Cf. Birk, Vereinbarungen der Sozialpartner im Rahmen des Sozialen Dialogs und ihre Durchführung, in: Europäische Zeitschrift für Wirtschaftsrecht 8 (1997), pp. 453.

⁵ Commission Communication concerning the Development of the Social Dialogue at Community level (Com (96) 448 final no. 28 ss.; Commission Decision 98/500/EC of 20 May 1998 on the establishment of Sectoral Dialogue Committees promoting the Dialogue between the social partners at European level.

⁶ Com (93) 600 final no. 23,24.

know such a condition of recognition neither in the case of the conclusion agreement which should be used as basis of a directive nor for the implementation of a directive by collective agreement. The relevant criteria to verify the representativeness in the view of the Commission are as follows: “The organisations should be cross-industry or relate to specific sectors or categories and be organized at European level; consist of organisations which are themselves an integral and recognized part of Member State social partner structures and with the capacity to negotiate agreements, and which are representative of all Member States as far as possible; have adequate structures to ensure their effective participation in the consultation process⁷.”

In the UEAPME case before the Court of First Instance held however that representativeness is generally a requirement to conclude a collective agreement at the national level in most European countries and seems to be transferred to EU level.

c) The instruments of the European social dialogue

The main and essential instrument of the social dialogue apart of some informal statements or gentlemen’s agreements constitutes the agreement between the social partners. It is as a framework

⁷ Com (93) 600 final no. 24

agreement the basis for a Council directive. And one of the most discussed questions in the literature concerns the legal characterization of such a European agreement: Is it a collective bargaining agreement in the traditional, classic sense? The answer does not seem to be clear because there are some pros and many contras. But the further discussion of this issue can only be fruitful if we can draw some legal consequences hereof. Here it does only satisfy to refer to the problematic situation.

d) The substance of the European agreements concluded in the European social dialogue

Here we are only talking on such agreements between the social partners which are justified only by the Treaty and not by the general fundamental social right of collective bargaining. It is a different question if the Community recognizes and respects the freedom of association and the right of collective bargaining both as the two essential pillars of the collective autonomy of the social partners.

The Treaty itself indicates in Art. 137 the different fields where the social partners are legitimized to bargain collectively and to produce rules resp. to regulate on a certain prescribed – and not freely selected – field of labour and working conditions. Art. 137 par. 5 of the Treaty has clearly excluded very important aspects from

the bargaining of European agreements as questions of wages or concerning.

As subjects of a European agreement of the social partners which can be transferred into a directive by a decision of the Council, Art. 137 provides a relatively wide range of labour law or related topics: as working environment, working conditions, protection against dismissal, information and consultation of workers, collective representation of interests of workers and employers, equal opportunities of men and women on the labour market as well as equal treatment at the working place, modernisation of the social protection systems.

If one follows the opinion of the Commission⁸ then the European agreement can not only concern topics as enumerated in Art. 137 par. 1 of the Treaty but also other issues of community relevance, especially in the case of the joint social action. The commission mentions four more general aspects: (1) promoting the modernization of work organisation and working patterns through negotiation at the appropriate level, agreements on work organization including working time and flexible working arrangements achieving the required balance between flexibility and security; (2) developing the social dimension of the process of industrial restructuring, especially in context of worker information

⁸ Cf. Communication of the Commission adapting and promoting the social dialogue at Community level (COM (98) 322 final from 20.05.1998), under “5. Employment joint active and negotiation.”

and consultation; (3) opening workplaces across Europe for training, work practice, traineeship and other forms of employability measures; and (4) promoting equal opportunities between women and men, both in a wide context and on specific initiatives aimed at reconciling work and family, for example, the further development of policies on a career breaks, parental leave and part time work. The social partners have to take up the new challenges and monitor the employment process in order to review all possible initiatives to modernize the legal, contractual and institutional framework at all levels of the dialogue.

e) The implementation of the European agreements concluded in the social dialogue

As far as the implementation of the European agreements according Art. 137 par. 1 of the Treaty is concerned two ways are possible. The first consists in a council decision which transposes the agreement into a directive acting more like a notary public than a legislature; this can then be adopted by the member states either by legislation or by a national collective agreement or by a combination of both if there are no other procedures specific to management and labour in a member state.

The implementation of European agreements outside Art. 137 par. 1 of the Treaty has to follow the mere national way by applying “the

national procedures and practices specific to management and labour and the member states”.

2. Developments and perspectives of the social dialogue in the 21th century

The European social dialogue was, is and will be open for further improvements and developments. These opportunities depend of course upon a lot of other factors and criteria. Any prediction must be uncertain and imprecise. The intensification and extension of the European social dialogue is in principle not doubtful.

But the central problem is if there must be a more or less comprehensive or are only necessary some amendments or corrections.

Nobody can have doubts about the legal deficiencies and shortcomings of the actual legal regulation of the whole complex of the European agreements and their legal aspects in detail. Neither the Agreement on Social Policy (ASP) was, nor the actual text of the Treaty is legally satisfying. The most issues and problems have not found any solution, and only few of them are treated by the text of the Treaty. Therefore it would be very desirable that the Community should introduce a stable and clear legal framework for the European agreement because it is under such circumstances

as the existence of 25 member states not to recommend to fall back only on one national solution bearing in mind that it does not exist all over the same or nearly the same answer.

But even of more importance than the aspect of a stable legal framework is the substantive question what other aspects and subjects should be regulated by the social dialogue. Do we have a real social partnership, or is this not more than an institutionalized matter of some social contacts. And must the social dialogue not be extended to a broad collective bargaining procedure concerning all essential aspects of the individual and collective labour relations beyond all actual legal restraints in the Treaty and realizing the true collective autonomy of the social partners. A certain step in this direction contains the Community's philosophy demonstrated by the above quoted Communications. What about the integration of the process of globalization into the European social dialogue or at least the increasing number of cross border relations?

Legal, substantive and geographic issues require an answer which involves the construction of the European social dialogue's building and its extension.

Furthermore the Community also needs to react to the post industrial, knowledge based society and its influence on the structure of the industrial relations. Very helpful in achieving this goal can be the proposals in the "Communication from the

Commission to the Council, the European Parliament, The Economic and Social Committee and the Committee of the Regions – Social Policy Agenda”⁹. The aim of this Agenda is to provide a comprehensive and coherent approach for the European Union to confront the new challenges to social policy resulting from the radical transformation of Europe’s society and economy. This is particularly the case for the changes engendered by the new knowledge-driven economy, which affects the working and personal life of all people living in Europe.”¹⁰.

A very interesting point for the labour law may be the question how far one would derive also from this new situation the transformation of the actual system of European agreements according to Art. 137-139 of the Treaty into a real and comprehensive system of European collective bargaining and European collective agreements and therefore for a framework of relevant rules. The topic was until now more an issue discussed in many member States by the European labour law doctrine¹¹ than a practical one.

⁹ COM (2000) 379 final.

¹⁰ COM (2000) 379 final (under I 2).

¹¹ Cf. Birk, Vereinbarungen der Sozialpartner im Rahmen des Sozialen Dialogs und ihre Durchführung, in: Europäische Zeitschrift für Wirtschaftsrecht 8 (1997), p. 453 ss.; Deinert, Der europäische Kollektivvertrag, 1999; Franssen, Legal Aspects of the European Social Dialogue, 2002, p. 101 ss.; Grandi, La contrattazione collettiva europea: aspetti giuridici, in: Fondazione Giulio Pastore (ed.), La contrattazione collettiva europea, 2001, p. 11 ss.; Kowanz, Europäische Kollektivvertragsordnung, 1999, p. 101 ss.; Ojeda Avilés, applicability of European collective agreements, in: Comisión Consultativa Nacional de Convenios colectivos (ed.), Collective Bargaining in Europe, 2005, p. 427 ss.

A last aspect of the intensification of the social dialogue at the interface of the collective bargaining on the Community and on the national level concerns the problem of the coordination of the national collective bargaining at the European level¹² either by the trade unions or and/ or by the employers. Some trade unions of member States (Belgium, Germany, Luxembourg, The Netherlands) have just adopted a joint statement which provides for the coordination of collective bargaining policies and an exchange of information. The trade unions of these four members of the monetary union undertook to conclude collective agreements in which wage levels correspond to price trends and increases in labour productivity. A further recent development in cross border union cooperation was the conclusion in June 2000 by the constructions workers trade unions from Belgium, The Netherlands, and Germany of a joint declaration on measures to seek harmonisation of working conditions in the industry and a cooperation agreement¹³.

These endeavours on different areas demonstrate the importance to carry on the efforts in the deepening and improving the Community.

¹² See Clauwaert/ Hoffmann/ Kirton-Darling/ Mermet, Social dialogue and coordination of collective bargaining ant European level, in: Comisión Consultativa Nacional de Convenios colectivos (ed.), Collective Bargaining in Europe, 2005, p. 301 ss.

¹³ Franssen, op. Cit., p. 6.

III. The national social dialogue at the beginning of the 21st century

In contrast to the Treaty the social dialogue in the member States is based on the collective autonomy of the social partners. They represent the social partnership. But the national social dialogue does not only consist of the collective bargaining procedure or the integration in different political structures but it covers also the participation and/or codetermination of the workers by their trade unions or other specific bodies as works councils. What aspects of the social dialogue in a certain member State play the dominant role depends from many factors which differ considerably of course from one country to the other. It does not surprise that every member State has developed as a consequence of his own history, society, and economy an own more or less unique social system. This may also be the reason that even under the framework of the European Union the further development of the social partnership and therefore of the social dialogue cannot produce the same results in all member States.

Under such circumstances only in some member States and for a few aspects the issue of the development of the social dialogue can be discussed.

All member States have however to deal with the problem of the Europeanization of their social dialogue. This means first that the whole complex of the social dialogue must be divided in three different sectors: (1) the European social dialogue as described above; (2) the European-national social dialogue, i. e. the national social dialogue depending from Community law conditions; (3) the national social dialogue, mainly based on the collective autonomy of the social partners (trade unions, employers).

Because that in 25 member States we find more than one model of the social dialogue we must concentrate only on some representative groups as the Germanic-Nordic group, the Romanesque group (France, Italy, Spain) and the British-Irish group. The eastern member States mainly belong to the second group. Anyway, the enlargement of the community entails a large number of other problems which must be solved; their view is therefore more directed to these than to the further development of the social dialogue.

While the collective bargaining procedure as an essential part of the social dialogue in the member states can and must be developed by the social partners the reform and/or improvement of the participation-codetermination regime is essentially based on legislation and not on collective bargaining agreements.

Agreements on the one side and legislative interventions must not be seen in general as exclusive measures to improve the social

dialogue but very often complete each other.

Which substantive developments should and will involve the national social dialogue? In general, the social and economic changes affect the European as well as the national level of the social dialogue. For the reaction of the system of the national social dialogue it can be referred to the remarks above concerning the European level. Only where national peculiarities are involved we have to look either to a group of orientated answer or merely to the individual country involved.

Nobody actually knows what exactly should be modified in the national social dialogue, because nobody knows the future developments. But it is not doubtful that our national social dialogue systems are not sufficiently able to adopt the international/transnational changes. They have to be open to these movements of internationalization and Europeanization and to intensify the links between the systems. The priority of the competence of the member states in social matters becomes to a certain aspect more and more questionable. This statement seems inevitable but it is as such not satisfying. However more precision would be only fortune-telling.

IV. Outlook

The social partnership primarily finds its expression in the social dialogue. The European social dialogue is a relative young phenomenon and therefore not very deeply elaborated. The social dialogue on the level of the singular member States goes back in some countries until the end of the 19th century. But especially its legal aspects are very often controversial and not elaborated by positive legal rules. In contrast to the national systems of the social dialogue which are principally based on the collective autonomy of the social partners the European social dialogue finds its legitimation more by the Treaty than by the social partners.

The further development of the social partnership and the social dialogue are involved by many changes in law, society, and economy. What kind of consequences these changes will have on the European and national social dialogue is an open question. But anyway the statement should be allowed that the social dialogue in all forms should be enhanced.

壹、導言

社會夥伴性 (Social Partnership) 是現在社會與經濟關鍵因素之一。歐盟自身其各會員國以及各民族社會，對此論點均有共識。所以，羅馬條約 (Treaty of Rome) 及其從屬之共同體法律，歐盟及其委員會之正式法條及政治性文件均表達此一立場。但是，這些文件通常不使用社會夥伴一詞，而以社會對話 (Social dialogue) 代之。然而，歐盟的許多會員國卻捨「社會對話」，而以社會夥伴性 (Socialpartnerschaft)，經營性勞工 (management Labour) 社會夥伴 (Social partners) 或集體自主權 (collective autonomy) 來陳述其意義。因此，一位英國作者尼爾 (Alan Neal) 順理成章地提出一個諷刺性的問題：「社會對話！我們愛您，但您究竟是誰？」¹⁴

阿姆斯特丹 (Amsterdam) 條約之後的歐盟條約，提出社會對話一詞，但卻無明確定義。它留給我們的是一個開放程式¹⁵或概念，看來語義含糊，但卻具有以下內容 (1) 它是歐盟層級之工會以及雇主聯盟之代議組織以及共同體機構之諮商；(2) 它是一種自發性的過程，在此過程中，社會夥伴們參與其中，討論共同利益的問題，不但嘗試取得共同體內社會政策之共識，同時，以其集體自主權將此共識引進歐盟的立法程序中。

基於以上描述，我們可以清楚理解到，社會夥伴之最主要特徵乃是一種廣泛的相互理解的社會對話。歐盟之委員會用以下文字描述它：「歐盟層級的社會對話，包括歐盟之社會夥伴及機構之間的對話、討論、互動及協調。自從歐洲煤鋼共同體 (European Coal and Steel Community) 成立之後，社會對話，在政策的形

¹⁴ IN: Fondazione Giulio Pastore(ed), La contrattazione cletiva europea,2001, p.113ff.

¹⁵ See especially Nunin, Il dialogo sociale europeo, 2001, p.1ff.

成與發展，曾扮演重要角色，它使社會夥伴及歐盟機構更能形成互惠互利之決策，提高政治決策的品質，簡化經濟與社會之形成。」¹⁶

社會對話並不同於集體協商或取得協議結論之過程。社會夥伴性。社會對話以及社會夥伴之間的協議，互相之間確有其關連性，但均屬一複合整體之不同面向。

在歐洲共同體中，並不存在古典、傳統，或教條式的集體協商機制，以協議諸如工時、工資等勞動條件。羅馬條約第 137 條 6 款，清楚的將工資的討論，排除在歐盟的集體協商之外。這當然直接影響社會對話的範圍及議題。

這正好給予我們機會，去探索社會對話的議題與程序的問題，既然它們是社會夥伴性的標竿現象。同時我可以在將來回答這些問題，觀察社會夥伴性在我們這一代的可能發展。

社會夥伴性過去不是，現在也不是一個封閉的定了調的概念；而是一個發展中，活動性的概念，在這個概念中，我們至少可以發現以下三個組成要素：第一、社會夥伴之間的對話過程，(條約之 139 條(1)款)以導致建設性的關係與協議。第二、歐盟層級的機構與社會夥伴之間的對話論述。第三、歐盟與其會員國之間的介面，藉此形成歐盟之政策共識以及立法，它可表現在成員國之間的協定中。

準此，歐洲社會夥伴性之發展，一定程度的有賴於立法架構中的協商程序之創造性，此為歐洲社會對話的部分成果。

貳、歐洲社會對話

歐盟的社會夥伴之關鍵因素在於社會對話。歐盟已有公開的程式，特別的組織以及法律結構，但是社會對話，並不以藉著這些組織傳遞國與國之間的社會對

¹⁶ Commission Communication concerning the Development of the Social Dialogue at the Community level No.(Com(96) 448 final-18.09.1996

話訊息為滿足，尤其是在集體協商與組織參與方面，更需關注到國家與民族之間的差異性。

社會對話的目的，在於作為實現社會夥伴性的媒介。此一目的應該維持並加以發展。但是，在討論社會對話的可能發展之前，我們需要一個可靠的起點，所以，我們要簡短的敘述一下實際狀況。

1. 歐洲社會對話之定位

比起共同體的諸會員國，歐盟的社會對話所關切的相關面向，自有不同，其面向為；社會對話進行行事、夥伴、工具、議題或程序是為主要關切面向。如果，我們太相信歐洲與各會員之共同性，那是相當危險的。光是一些專門術語的共似性就足以掩蓋以下事實；那即是同樣名稱的制度，但在各國的制度內容卻很不一樣。我們不可以一國之情況，直接援引以論證他國之結論，反之亦然。

在以下的論文中，我將專注於歐盟社會對話所使用之工具，可能協定的主題及其運作；當然，與其相關的過程亦包括在內。

a) 社會對話的程序架構

不論是歐盟的法律或是實踐中，並未對社會對話規定特定程序。特定單一形式，無法滿足多方相互理解之需要。唯一具有特定形式的規則，是當社會夥伴在參與立法時，應遵守會議規程。在其他社會對話活動中，社會夥伴不受任何特定形式規則之約制。所以，實際上是各種不同形式的社會對話，在實踐中，去發展適合自己的程序規則。這種情況遠比成文法規之形式更為有利。