CENTRE OF INTERNATIONAL STUDIES HAMBURG

CIS PAPERS

CIS Conference 2005
"Transnational Norm-Building Networks"

No. 7

Social Dialogue

Brian Bercusson

October 2005

http://www.hwp-hamburg.de/cis/

UNIVERSITY OF HAMBURG

The CIS – Discussion Papers are published on an irregular basis by:

Centre of International Studies
University of Hamburg
Von-Melle-Park 9

D-20146 Hamburg

e-mail: Sarah.Jastram@wiso.uni-hamburg.de

Citation:

CIS Papers, Centre of International Studies Hamburg

Centre of International Studies Hamburg
Hans Böckler Stiftung

Conference

Transnational Norm-Building Networks

SOCIAL DIALOGUE

Brian Bercusson

King's College
University of London

21 October 2005

Contents

Introduction: the EU's perspective on transnational labour regulation

The EU's present perspective on transnational labour regulation may be sought in the Commission's Communication of 9 February 2005 on the Social Agenda.[1] What is striking is there is not one single proposal for *new* legislation in the labour law field. Bursting with slogans, of course, it begins:

> "'A social Europe in the global economy: jobs and opportunities for all', this is the motto of the second phase of the Social Agenda covering the period up to 2010… the vision that binds us together, confirmed in the Constitution, consists of ensuring…".

Well, back to the drawing board…

If labour legislation is not on the cards up to 2010, what is?

> "While respecting the autonomy of the social partners, the Commission will continue to promote the European social dialogue at cross-industry and sectoral levels, especially by strengthening its logistic and technical support and by conducting consultations on the basis of Article 138 of the EC Treaty".

I want to focus on the social dialogue because there is only one specific proposal in the Social Agenda which the Commission explicitly commits to adopting:

> "The Commission plans to adopt a proposal designed to make it possible for the social partners to formalise the nature and results of transnational collective bargaining. The existence of this resources is essential but its use will remain optional and will depend entirely on the will of the social partners".

This commitment has to be seen in the context of the social dialogue as it has developed over 20 years, and particularly in the recent past.[2]

---

[1] Communication from the Commission on the Social Agenda, COM(2005) 33 final, Brussels, 9.2.2005.

[2] On 14 April 2005 the European Economic and Social Committee organised a conference in Brussels on the "20th Anniversary of the European Social Dialogue", bringing together many of those who played and are playing a central role in the social dialogue, beginning with Jacques Delors, and including past and present general secretaries of ETUC, UNICE, UEAPME and CEEP, and the Commissioner V. Spidla and Director-General O. Quintin of D.G-V (Social Affairs). Part of what follows is derived from the Introduction and Conclusions I presented to the opening session of this conference.

An overview of the impact during the last 20 years of the European social dialogue

Chou-en-Lai was said to have responded, when asked about the impact of the French Revolution: "it is too early to say". One should be equally cautious in assessing the impact of the European social dialogue. Calculating the impact of major events is always risky.

To illustrate, many could justifiably claim to be the fathers of the EU social dialogue. But there is a mother, though she would doubtless be horrified to be given the honour. It was Mrs. Thatcher, Prime Minister of the UK from 1979. She halted the programme of EU social legislation which was the result of the Social Action Programme of 1974. The then Treaty requirement of unanimous voting in the Council allowed her to veto the Commission's social policy proposals. It was this inability to launch a social dimension of the Single European Market through the legislative channel which stimulated the effort to find an alternative.

In the EU Member States, there was a well-known alternative: social dialogue. In a remarkable symbiosis of EU and Member State evolution, the initiative of 1985 launched the EU social dialogue. Mrs. Thatcher can thus claim to have been among those, seeking deregulation, who are responsible for creating the EU social dialogue. The irony of history is that the most determined opponent of collective social dialogue at national level in the UK was the inspiration for collective social dialogue at EU level.

So when considering the balance sheet of the social dialogue 20 years later, it is best to be cautious. It may be that failures of the social dialogue will be as important as its successes in producing a social dimension of the EU.

How has the European social dialogue developed?

What are the dynamics of development of the EU social dialogue?

One dynamic of the social dialogue is illustrated by an early experience of failure, which nonetheless produced a success: the European Works Councils (EWC) directive.[3] The EU social partners came close to agreement. But failed at last moment. The reasons for failure are disputed, though some point to the role of the British employers' organisation, the CBI. This reflects the odd position that, while

[3] Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees. OJ L 254/64 of 30.9.94.

the UK as a Member State had opted out of the Social Protocol, the UK social partners continued to participate in the social dialogue.

The failure of social dialogue over European works councils led a then dynamic Commission to propose, and the eleven Member States (excluding the UK) to adopt the EWCs directive in 1994.

The catalyst for the European social dialogue which eventually led to the EWCs directive was the Hoover affair of January 1993, the closure of a factory in Dijon and its transfer to the UK.[4] Similarly, the Renault affair of February 1997 led to a fresh Commission initiative on information and consultation of workers' representatives, though this time there was no social dialogue at all.[5] The eventual framework Directive 2002/14 on information and consultation only emerged in March 2002 after long and painful negotiations among the institutions.[6]

This experience reveals two dynamics at work.

First, in the short term, events can have a catalytic effect. However, this may not be the optimal dynamic of social dialogue, waiting on events. If so, what will be the next catalysing developments: delocalisation, free movement of services and social dumping, Services of General Interest, regressive revision of the Working Time Directive?

Secondly, the impact of catalysing events is subordinate to another, longer-term dynamic: "bargaining in the shadow of the law".

It has become clear that the willingness of the social partners to engage in social dialogue is dependent on the political balance of power in the EU institutions. If the Commission takes initiatives, if the Member States mobilise in Council and if Parliament is supportive, the social partners are confronted with the likelihood of regulation. A logical calculus of self-interest points to incentives to self-regulate via social dialogue.

This explains the 31 October 1991 agreement which led to the Maastricht Protocol and is now in Articles 138-139 EC.[7] Then, employers and unions at EU level, faced with the Dutch Presidency's draft of the Maastricht Treaty proposing expansion of social and labour competences exercised

---

[4] "The Hoover affair and social dumping", *European Industrial Relations Review*, No. 230, March 1993, pp. 14-20.

[5] Marie-Ange Moreau, "*A propos de l'affaire Renault...*", [1997] *Droit Social*, No. 5, pp. 493-509. "The repercussions of the Vilvoorde closure", *European Industrial Relations Review* No. 289, February 1998, pp. 22-25.

[6] Council Directive No. 2002/14 establishing a framework for informing and consulting employees in the European Community. OJ 2002, L80/29.

[7] J.E. Dolvik, *An Emerging Island? ETUC, social dialogue and the Europeanisation of the trade unions in the 1990s*, ETUI, Brussels, 1999.

through qualified majority, agreed on the alternative of labour regulation through social dialogue.[8]

But this dynamic is fragile. It is contingent on the political balance of power in the EU institutions. If the Commission does not push for social policy initiatives, if there are blocking minorities of Member States in the Council of Ministers, if the Parliament is not supportive, then the likelihood of legislative regulation recedes. In these circumstances, employers, in particular, are unlikely voluntarily to look to alternative forms of regulation, unless they can be offered incentives.

This is the major difference between European social dialogue and social dialogue in the Member States. Unlike trade unions in the Member States, the European Trade Union Confederation (ETUC) lacks the power to force employers to come to the bargaining table. This has become ever more evident. Employers will not agree to social dialogue, or, if they do, only on marginal issues, and then only if the results do not take the form of binding obligations. They provide many justifications: the need to maintain competitiveness, flexibility, deregulation… But the outcome is the impoverishment, if not actually the disappearance of European social dialogue.

So the fundamental problem remains: how to engage employers in social dialogue. To address this problem, one should look at the achievements of the social dialogue to date, in order to understand its limitations.

What main agreements were achieved?

These are well-known: at intersectoral level, binding agreements on parental leave,[9] part-time work[10] and fixed term work,[11] "voluntary" agreements on telework (16 July 2002) and work-related stress (2004). But specific features of these achievements may be identified as significant.

First, the binding agreements tend to be linked to the European Employment Strategy: this is explicit in Preambles of part-time and fixed-term agreements. There is divergence in the policies reflected in these agreements: part-time work is

---

[8] B. Bercusson, *European Labour Law*, London, 1996, Chapter 6, "The Strategy of European Social Dialogue", pp. 72-94; Chapter 34: "The constitutional basis for autonomous development of European labour law", Chapter 35, "The role of European social dialogue in formulating European labour law", and Chapter 36, "The application of the Protocol and Agreement on Social Policy of the TEU", pp. 523-570.

[9] Council Directive 96/34/EC of 3 June 1996 on the Framework Agreement on parental leave concluded by UNICE, CEEP and the ETUC. OJ L 145/4 of 19.6.96.

[10] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC. OJ L 14/9 of 20.1.98.

[11] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP. OJ L175/43 of 10.7.1999.

to be facilitated; fixed-term work is to be the exception, requiring justification. It may be asked why this divergence. Does the agreement reflect a genuine trade-off between flexibility and security of employment? Or does it reflect a changing balance of power, evident in the subsequent failure to achieve a similar agreement on temporary agency work? Or was the weight of the gender factor in part-time work determining? In any event, the question is whether the social dialogue agenda should be so limited to the EU's labour market agenda.

Secondly, there is a worrying link of the agreements to a dominant principle: non-discrimination. This characterises the agreements on both part-time and fixed-term workers, which proclaims the principle of non-discrimination as regards these categories of workers.

Discrimination law has vastly expanded, at national level and in EC law. In EC law, the established law on sex discrimination is now accompanied by directives aimed at "combating discrimination on the ground of religion or belief, disability, age or sexual orientation as regards employment and occupation"[12] and "combating discrimination on the grounds of racial or ethnic origin" with a much wider scope beyond employment and occupation.[13]

To this the EU Charter of Fundamental Rights includes in Article 21(1) a general prohibition of "any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation".

In other words, apart from sex discrimination there are at least 13 other grounds on which discrimination is prohibited (Directives (5): racial or ethnic origin, religion or belief, disability, age, sexual orientation; EU Charter (8): colour, social origin, genetic features, language, political or any other opinion, membership of a national minority, property and birth. Adding to this the established prohibition of discrimination on grounds of nationality and now the social dialogue directives prohibition of discrimination against part-time and fixed-term workers, the total number of prohibited grounds comes to 17.

Understanding the development of the law on discrimination requires an understanding of its relationship to the law of employment and industrial relations as a whole. American experience is instructive. In the United States of America, employment discrimination law has become the centre of attention compared to other individual employment law. It overshadows

[12] Council Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000, L303/16.
[13] Council Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000, L180/22.

collective labour law protecting a shrinking unionised workforce with reduced coverage of collective bargaining agreements. In part, discrimination law in the USA has become central due to the lack of general employment protection law. This vacuum in protection places a huge burden on discrimination law. If a worker is not hired, not promoted, is dismissed, or treated badly at work, almost the only form of legal redress available is to claim some kind of discrimination. Conversely, this overloading of the concept of discrimination leads to ever more elaborate justifications for it. The whole system of employment protection revolves around ever more elaborate complaints of discrimination and justifications.

This is manifestly wholly out of proportion compared with other *national* systems of labour law and employment protection in Europe. But, ominously, *not* at the level of *EU law*. I am suggesting that the absence at EU level of a general employment protection law could threaten to allow the imminent wave of EC discrimination law to result in a similarly distorted system of labour law.[14] The risk is of social dialogue being distorted by the *acquis communautaire* on discrimination, with the danger of the cul-de-sac of American labour law: discrimination is all.

Thirdly, there is the critical difference between those outcomes of the social dialogue which have binding legal effects: the three framework agreements embodied in directives, and the other outcomes with questionable legal effects. This raises the general question of implementation of the outcomes of the social dialogue.

How were they implemented?

Article 139(2) EC[15] provides two alternatives for implementation of the results of social dialogue:

---

[14] This over-emphasis on discrimination plays into the pervasive divisions and interest group politics in the USA, and is not unconnected with a more general and recent phenomenon in European politics: the fear of the other. Policies linked to immigration, asylum, etc. allow for discrimination based on nationality grounds, though only as regards free movement, since, once resident and working in the EC, non-EC nationals enjoy same employment rights. Justifications for discrimination in one sphere have a nasty habit of spilling over. Will justifications for denying free movement to non-EC nationals eventually spill over to justifications for different treatment of non-EC nationals working in the EU, and then further contaminate equal treatment of workers in general? Is the "country of origin" principle proclaimed in the Commission's proposal of a directive to liberalise services a reflection of this tendency?

[15] Article III-212(a) of the Treaty establishing a Constitution for Europe adopted by the Member States in the Intergovernmental Conference meeting in Brussels 17-18 June 2004, OJ C 310/1 of 16 December 2004: "…either in accordance with the procedures and practices specific to management and labour and the Member States or,… at the joint request of the signatory parties, by European regulations or decisions adopted by the Council on a proposal from the Commission".

> "…either in accordance with the procedures and practices specific to management and labour and the Member States or,… at the joint request of the signatory parties, by a Council decision on a proposal from the Commission".

The latter have in the past taken the form of legally binding directives. The former alternative of procedures and practices, however, is unclear as to its legally binding effect. This was highlighted in the differing views taken by the parties to the binding effect of the agreement on work-related stress, which not transformed into a directive.

Of vital important to implementation of outcomes of the European social dialogue is the articulation of EU level agreements with national industrial relations systems of collective bargaining. Article 137(3) EC,[16] provides:[17]

> "A Member State may entrust management and labour at their joint request, with the implementation of directives adopted…".

The problem is twofold: not only are there fewer agreements, as most results of social dialogue take other forms: frameworks of action, orientations, joint opinion, guidelines etc., but implementation of the latter, given their non-binding character, is judged ineffective. This is the considered opinion of the European Commission itself. In its Communication of 26 June 2002 on the role of social dialogue in European labour law, entitled "The European social dialogue, a force for innovation and change",[18] the Commission noted, under the heading "Improving monitoring and implementation", that:

> "The European social partners have adopted joint opinions, statements and declarations on numerous occasions. More than 230 such joint sectoral texts have been issued and some 40 cross-industry texts… However, in most cases, these texts did not include any provision for implementation and monitoring: they were responses to short-term concerns. They are not well known and their dissemination at national level has been limited. Their effectiveness can thus be called into question".

---

[16] Article III-210(4) of the Treaty establishing a Constitution for Europe: "A Member State may entrust management and labour at their joint request, with the implementation of European framework laws…or, where appropriate with the implementation of European regulations or decisions…".

[17] Note: the draft Constitution produced by the Convention on the Future of Europe on 18 July 2003 failed to establish this link. Draft Constitution proposed by the Convention on the Future of Europe, Draft Treaty establishing a Constitution for Europe, CONV 850/03, Brussels, 18 July 2003. That draft was amended later to re-establish the link.

[18] COM(2002) 341 final, 26 June 2002.

On the question of the perceived lack of effectiveness, the Commission noted that:[19]

> "Special consideration must be given to the question of how to implement the texts adopted by the European social partners. The recommendations of the High-Level Group on Industrial Relations and Change see the use of machinery based on the open method of coordination as an extremely promising way forward.
>
> The social partners could apply some of their agreements (where not regulatory) by establishing goals or guidelines at European level, through regular national implementation reports and regular, systematic assessment of progress achieved".

To that end, the Commission recommended:

> "The social partners are requested to:
>
> - adapt the open method of coordination to their relations in all appropriate areas;
>
> - prepare monitoring reports on implementation in the Member States of these frameworks for action;
>
> - introduce peer review machinery appropriate to the social dialogue".

The significance of this recommendation was highlighted by the Work Programme of the European Social Partners 2003-2005. For example, of the twelve items in the Social Partners Work Programme under the Employment Heading, only three refer to "agreements", while nine appear to be eligible for the Commission's recommendation on application of the open method of coordination.[20]

Given the nature of the Social Partners' Work Programme, therefore, the Commission questions the ineffectiveness in implementation and monitoring of texts other than agreements. Its solution is, first, to clearly identify those areas where "regulatory agreements" are the chosen instrument. Secondly, where other instruments are proposed (frameworks

---

[19] *Ibid.*, Section 2.4.1, p. 18.

[20] The three appear only in proposals for a "seminar in view to negotiate a voluntary agreement" on stress at work (2003) and a "seminar to explore possibility of negotiating a voluntary agreement" on harassment (2004-2005). An additional item refers to the framework agreement on telework signed on 16 July 2002.

of actions, declarations, orientations, joint opinions) the OMC method may be adapted as appropriate; in particular, "monitoring reports on implementation" and "peer review machinery appropriate to the social dialogue".

The OMC has been often criticised as to its effectiveness when implemented by Member States' administrations in the field of employment policy. Is it appropriate for the Work Programme of the Social Partners on Employment? If joint opinions and other non-regulatory instruments continue to be ineffective, their failure may imply other, more rigorous steps towards effectiveness may be necessary, including regulatory agreements and/or legislation.

The Commission Communication of 12 August 2004

The Commission's latest Communication on the social dialogue is entitled "Partnership for change in an enlarged Europe – Enhancing the contribution of European social dialogue". Despite its title, in fact, there is relatively little in the Communication of 2004 concerned with adapting to enlargement. The brief (3 paragraphs) second section of the "Introduction", entitled *"Enlargement: Challenges and opportunities"* asserts that:

> "…the enlargement of the EU also presents a challenge for the European social dialogue. Social dialogue in the new Member States is characterised by the predominance of tripartism, relatively new social partner organisations, and under-developed bipartite social dialogue at national and sector levels".

One might expect the Communication to develop an active strategy to deal with this challenge. Instead, there are only two other references to enlargement (apart from one word on page 7) towards the end of the Communication. Section 4.2, entitled "Stepping up support to the European social dialogue structures in the context of enlargement", states the Commission's position as follows: (bold italics in the original)

> ***"The Commission will continue to encourage the development of bipartite social dialogue within the new Member States and will increase its support to the European social partners in order to deal with the consequences of enlargement.***
>
> It is important to note that as the social partners are autonomous and social dialogue in the EU is based on the

> freedom of the right to association, capacity-building is essentially a bottom-up process depending on the efforts of the social partners themselves".

Although the first paragraph is in bold italics, the second paragraph is more significant. *Laissez-faire* is the Commission's position on social dialogue. Under the guise of respect for freedom of association, the market in social dialogue must be left to operate without intervention. This is reflected in the only proposal of concrete support for social dialogue in the new Member States. In the next section 4.3, entitled "Improving the impact and follow-up of the European social dialogue", the last indent refers to:

> "Organising national seminars in each Member State – beginning in the new Member States – to raise awareness of the importance of the European social dialogue for national industrial relations".

Consciousness-raising is the Commission's elaborate and sophisticated new tool for promoting social dialogue in the new Member States.

The outcome is acknowledged at present to be, and is likely to continue to be, an under-developed bipartite social dialogue. It is difficult to be less than critical about this abandonment by the Commission of the social dialogue in the new Member States.

The Communication remains focused on the social dialogue as it has evolved in the 15 Member States. But it appears that this is not intended to be discriminatory on grounds of nationality. The Commission's hands-off attitude to social dialogue is not much different when applied to the old Member States.

Contrast the views of High Level Groups

The Social Agenda 2005-2010 includes, at best, only a lukewarm commitment to social dialogue. This may be contrasted with a source which the Commission cited as an inspiration for the Social Agenda 2005-2010: (p. 3)

> "The Agenda also draws on the report of the High Level Group on 'the future of social policy' and the recent contribution of the third Kok report of October 2004, 'Facing the challenge'".

The Kok report endorsed social dialogue as at the heart of European labour market regulation in its section 4 on "Building an inclusive labour market for stronger social cohesion":[21]

> "The call for more reform is too frequently seen as no more than code for more flexibility which in turn is seen as code for weakening worker rights and protections; this is wrong… Nor should reform mean that the social dialogue is taken out of the heart of Europe's labour market. It is essential to its productivity and ability to adopt to change".

The Kok report's conclusion stated: (p. 44)

> "The promotion of growth and employment in Europe is the next great European project. Its execution will require political leadership and commitment of the highest order, along with that of the social partners whose role the high Level Group wishes to sustain".

Another report, this time of the "High Level Group on the future of social policy in an enlarged European Union", was even more emphatic. The report prescribed six policy recommendations specifically on the social dialogue, including:[22]

> "A first priority for the social dialogue is to guarantee its effectiveness. Therefore, every effort should be made to build strong linkages between the European and the national levels and to disseminate knowledge on European social dialogue among members and affiliates of social partners' organizations".

On legislation, the High Level Group urged: (p. 75)

> "Privilege the social dialogue to find solutions to common issues, through binding agreements or other instruments, either through the autonomous work programme of the social partners or through consultations launched by the Commission. The Commission should continue to play a key role with its right of initiative for new legislation, hereby

---

[21] Report from the High Level Group chaired by Wim Kok, *Facing the Challenge. The Lisbon strategy for growth and employment*, Office for Official Publications of the European Communities, November 2004, p. 31.

[22] *Report of the High level Group on the future of social policy in an enlarged European Union*, European Commission, Directorate-General for Employment and Social Affairs, May 2004, p. 74.

> giving an incentive to social partners to opt for a negotiation route to settle the issues at stake between themselves".

At a meeting of the Tripartite Social Summit on 4 November 2004, at which Wim Kok presented his conclusions, the then holder of the Presidency of the Council (Prime Minister Balkenende) together with the then President of the Commission, Romano Prodi, stated that:[23]

> "the social dialogue is crucial as concertation and consensus are at the heart of the European Social model. They confirmed that the contribution of the social partners is essential in unleashing the potential for economic and employment growth…".

In contrast, in a later Communication of 20 July 2005, the Commission retreats from a wholehearted commitment to a role for the social partners.[24] Instead. it appears to marginalise the social partners, and states as its "**top priority… the completion of the internal market and… improving the regulatory environmen**t". The later Communication reflects what many fear is the ideological agenda of this particular Commission. This agenda contrasts with the political priorities of many Member States, not to mention the social partners and, not least, the European trade union movement.

No trace of thee specific policy recommendations of the High Level Group on the Future of Social Policy is to be found in the Commission's Communications of 2005.

Engaging with reality

In its Communication of 2004 on the social dialogue, the Commission did confront the admission of a fatal lack of impact of the results of the social dialogue.[25] This is obviously attributable to failures in the process of their implementation. In section 3.2.1 the Commission appeared reluctant to confront the Member States with their responsibilities under Article 139(2) EC with regard to implementing social dialogue agreements. The gloves are finally taken off with respect to the social partners, though in a strictly gentlemanly fashion (bold italics in the original);

---

[23] Joint Presidency/Commission Press Release, Directorate-General for Employment, Social Affairs and Equal Opportunities, Brussels, 4 November 2004.

[24] Communication from the Commission to the Council and the European Parliament, *Common Actions for Growth and EmploymentL The Community Lisbon Programme*. SEC(2005) 981, Brussels, 20.7.2005, COM(2005) 330 final, p. 2.

[25] Section 4.4, "Autonomous agreements".

> "The Commission fully recognises the negotiating autonomy of the social partners on the topics falling within their competence.
>
> ***However in the specific case of autonomous agreements implemented in accordance with Article 139(2), the Commission has a particular role to play if the agreement was the result of an Article 138 consultation, inter alia because the social partners' decision to negotiate an agreement temporarily suspends the legislative process at Community level initiated by the Commission in this domain…***
>
> Upon the expiry of the implementation and monitoring period, while giving precedence to the monitoring undertaken by the social partners themselves, the Commission will undertake its own monitoring of the agreement, to assess the extent to which the agreement has contributed to the achievement of the Community's objectives.
>
> Should the Commission decide that the agreement does not succeed in meeting the Community's objectives, it will consider the possibility of putting forward, if necessary, a proposal for a legislative act. The Commission may also exercise its rights of initiative at any point, including during the implementation period, should it conclude that either management or labour are delaying the pursuit of Community objectives".

What is needed, of course, is precisely this sort of approach to be applied not to the *aftermath* of a social dialogue, when its results are to be implemented, but *much earlier*: when the social partners are engaging in dialogue. It is then that the Commission's commitment to take action in the event of failure to agree, action in the form of a proposed legislative measure, can provide the crucial stimulus to concluding an agreement. The dynamic of "bargaining in the shadow of the law".

If anything, the Commission's veiled threat as regards implementation may have the opposite effect: of deterring employers from concluding even "autonomous" agreements. The primary motivation for such agreements has been precisely their non-binding character - the fact that implementation is left to the voluntary action of the social partners - with the well-known consequence of lack of impact. If this is threatened by Commission monitoring and possible follow-up implementation, then

employers will see disappear what little incentive they have to make any agreements at all.

The logic of the Commission's position in the case of a refusal by employers to engage in a social dialogue producing a binding agreement would be to adapt its proposed *post*-agreement intervention to the *pre*-agreement stage. To propose legislative action not to stimulate implementation of an agreement, but to stimulate the agreement itself.

This is not rocket science. The formula of "bargaining in the shadow of the law" has been around for over a decade. It is ironic, but an exceedingly sad irony, that the Commission is finally coming around to recognise it after a long period of neglect.

It is not clear whether the Commission understands this dynamic, or deliberately misunderstands it. The last paragraph of section 4.4 states:

> "While recognising the broad scope of the social partners' competences, in line with the previous concerns of the Commission, where fundamental rights or important political options are at stake, or in situations where the rules must be applied in uniform fashion in all Member States and coverage must be complete, preference should be given to implementation by Council decision. Autonomous agreements are also not appropriate for the revision of previously existing directives adopted by the Council and European Parliament through the normal legislative procedure".

At least three important issues are raised by this passage.

First, it represents a further elaboration of the Commission's Social Policy Agenda (2001-2004).[26] Of the ambitions of that Agenda, it was stated that "To achieve these priorities, an adequate combination of all existing means will be required" (p. 14). The second means listed was:

> "Legislation: Standards should be developed or adapted, where appropriate, to ensure the respect of fundamental social rights and to respond to new challenges. Such standards can also result from agreements between the social partners at European level".

[26] Adopted in June 2000, COM(2000) 379, approved by the European Council meeting at Nice in December 2000.

It was not clear that agreements in this policy area between the social partners would necessarily be implemented through a Council decision. The Communication of 2004 now clarifies that this is to be the case, and further extends the range of agreements which must be implemented through a Council decision. As this brings with it the need for Commission, Council and possibly even judicial review by the European Court of Justice of such agreements, it is not clear how this is consistent with the repeated affirmations by the Commission of social partner autonomy.

A second important issue is that the range of agreements to be implemented through Council decision is now extended to "situations where the rules must be applied in uniform fashion in all Member States and coverage must be complete". This formulation reflects very closely the case law of the European Court of Justice regarding implementation of directives through collective agreements.[27] One implication, therefore, is that agreements implemented through a Council decision will take the form of directives.

But another, more disturbing, implication is that the *other* method of implementation envisaged by Article 139(2): "in accordance with the procedures and practices specific to management and labour and the Member States", need *not* necessarily be applied in uniform fashion, *nor* need coverage be complete. Yet this would undermine precisely the Commission's complaint about lack of impact of agreements reached. It would also raise grave questions as to the equal application of Community law in the form of social dialogue agreements.

A third important issue results from the fact that, to date, the Commission has (albeit belatedly and arguably following an incorrect procedure) consulted the social partners in two cases of revision of existing directives: the Working Time Directive and the European Works Councils Directive. One is entitled to presume that this was intended, as provided in Article 138(4) EC, to allow for the possibility of social dialogue. Yet in this last paragraph of section 4.4 of the Communication, the Commission declares that implementation of any resulting social dialogue agreement must be through a Council decision.

Now there is general consensus that neither the Commission, nor anybody else, has the expectation that any social dialogue agreement will be concluded on revision of either directive. But the Commission's statement in this Communication that any such agreement would be made legally

[27] See also Article 137(3) EC: "A Member State may entrust management and labour, at their joint request, with the implementation of directives… In this case, it shall ensure that… management and labour have introduced the necessary measures by agreement, the Member State concerned being required to take any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that directive".

binding through a Council decision is probably the one certain way of removing any incentive by employers to reach agreement. Why does the Commission do the one thing that will destroy any prospect of reaching an agreement?

Transnational collective bargaining

There is an even more daring last fling at an initiative in the final section 4.5 of the Communication of August 2004: "Preparing further developments": (bold italics in the original)

> "In view of the growing number of new generation texts, the Commission considers there to be a need for a framework to help improve the consistency of the social dialogue outcomes and to improve transparency. This Communication makes a first step in this direction by proposing a typology (Annex 2), and a drafting checklist (Annex 3).
>
> ***The Commission will examine the possibility of drawing up a more extensive framework. The Commission's preferred approach would be for the social partners to negotiate their own framework, and it calls on the social partners to consider this possibility.***
>
> Interest in and the importance of transnational collective bargaining has been increasing in recent years, particularly in response to globalisation and economic and monetary union. EWCs are adopting a growing number of agreements within multinational companies which cover employees in several Member States. There is also a growing interest in cross-border agreements between social partners from geographically contiguous Member States, as well as agreements between the social partners in particular sectors covering more than one Member State.
>
> ***In view of this trend, the Commission is conducting a study of transnational collective bargaining and will make its results available to the social partners. At a later stage the Commission will consult the social partners on their outcome regarding the development of a Community framework for transnational collective bargaining".***

What is interesting is how the Communication links the typology of the outcomes of the EU social dialogue with a new formulation: "transnational collective bargaining" and raises the prospect of a Community framework for transnational collective bargaining".[28]

There has long been a demand for a more detailed framework of procedural rules for the European social dialogue.[29] Of course, the autonomy of the social partners requires that, in the first place, they must be responsible for drafting such rules.[30] But where the social dialogue is manifestly falling into desuetude, or producing only ineffective results with little impact, the responsibility of the EU institutions is to propose a procedural solution.

It is mildly encouraging, therefore, that the new Social Agenda of 9 February 2005 appears to take this further:[31]

> "Providing an optional framework for transnational collective bargaining at either enterprise level or sectoral level could support companies and sectors to handle challenges dealing with issues such as work organisation, employment, working conditions, training. It will give the social partners a basis for increasing their capacity to act at transnational level. It will provide an innovative tool to adapt to changing circumstances, and provide cost-effective transnational responses. Such an approach is firmly anchored in the partnership for change priority advocated by the Lisbon strategy.
>
> The Commission plans to adopt a proposal designed to make it possible for the social partners to formalise the nature and results of transnational collective bargaining. The existence of

---

[28] This transmutation of social partner consultation leading to social dialogue and thence into collective bargaining is curiously echoed in a later decision of the European Court of Justice, which determined that the obligation to consult in a number of directives is tantamount to an obligation to negotiate. *Irmtraub Junk c. Wolfgang Kuhnel als Insolvenzverwalter uber das Vermogen der Firma AWO,* Case C-188/03, Opinion of Advocate General Tizzano, 30 September 2004 (in French); ECJ judgment, 27 January 2005.

[29] See the Opinion of the European Economic and Social Committee, Opinion 94/C 397/17, OJ 397/40 of 31 December 1994, and the analysis in B. Bercusson, *European Labour Law*, London, Butterworths, 1996, chapter 36, "The Application of the Protocol and Agreement on Social Policy of the TEU", pp. 553-570.

[30] For an essay describing how such a European level agreement might be drafted on the model of the Danish (and other Nordic) Basic Agreements, B. Bercusson, "Prospects for a European 'September Agreement'", in M. Andreasen, J. Kristiansen and R. Nielsen (eds.) *Septemberforliget 100 Ar*, DJOF Publishing, Copenhagen, 1999 pp. 21-54. For a proposal along similar lines, D. Schiek, "Autonomous Collective Agreements as a Regulatory Device in European Labour Law: How to Read Article 139 EC" (2005) 34 *Industrial Law Journal*, pp. 23-56.

[31] *Communication from the Commission on the Social Agenda*, COM(2005) 33 final, Brussels, 9 February 2005, Section 2: "The Two Priority Areas". Oddly, this proposal appears not in the first section 2.1, under the heading "A New Dynamic for Industrial Relations", but rather under a different heading: "Towards a European Labour Market".

> this resource is essential but its use will remain optional and will depend entirely on the will of the social partners"

Some less obvious elements of a framework for European social dialogue

First, attention must be paid to the internal institutional dynamics of the social partners, UNICE in particular. Experience has demonstrated the importance of the social partners' internal constitutional procedures. These can frustrate progress. For example, the ETUC adopted majority voting to prevent individual national affiliates imposing a veto on entering into social dialogue or adopting agreements reached. UNICE, however, has not.

Secondly, the resources of the social partners are an important constraint. The social partners simply are not equipped to carry out social dialogues on more than one or two issues each year. Yet they are expected to contribute massively to development of the EU's social dimension. In it noteworthy that in its latest Social Agenda, the Commission asserts:[32]

> "While respecting the autonomy of the social partners, the Commission will continue to promote the European social dialogue at cross-industry and sectoral levels, especially by strengthening its logistic and technical support and by conducting consultations on the basis of Article 138 of the EC Treaty".

Thirdly, there are many important strategic and tactical lessons to be learned from the practical experience of previous social dialogues. For example, an analysis of the experience of the social dialogue on fixed-term work identified important issues concerning not only the interactions between the EU social partners, but also the engagement of sectoral federations, and of representatives of the EU social partners' affiliates in the Member States. The relationship of the EU social partners and their national affiliates affects the decisions to undertake the social dialogue on a particular subject to define the negotiating mandate, to decide whether to approve the agreement reached, and to resolve disputes over interpretation of the agreement.

More critical, however, is to acknowledge that the European social dialogue does not exist in a decision-making vacuum. The EU institutions continue to develop their law and policy making processes, and these

---

[32] *Communication from the Commission on the Social Agenda*, COM(2005) 33 final, Brussels, 9 February 2005, page 8.

interact with the law and policy-making role of the social partners in the social dialogue. An illustration of a potentially dangerous development was the Interinstitutional Agreement on Better Law-Making, signed by the Commission, the Council and the European Parliament on 16 December 2003.[33] This "informal" procedure for "better law-making" by the EU institutions appeared to threaten the "formal" constitutional role of the social dialogue in making EU labour law, recognised in Articles 138-139 EC and now in Part III of the Constitutional Treaty. The initial proposals for revision of the Working Time Directive at the end of 2003 seemed to indicate that the Commission was sidelining a formal role for the EU social dialogue, as the Communication was not addressed to the social partners, but to all the world.[34]

In early 2004 the European Trade Union Confederation made strong representations to the Commission about the deficiencies of the social partner consultation procedure. These appeared to have produced some effects, in terms of procedure at least, in that the next Commission proposals on revision of the Working Time Directive were more clearly directed towards the EU social partners.[35] At rhetorical level, at least, the Commission's commitment to the EU social dialogue was reflected in its 2004 Communication on the role of the social dialogue:[36]

> "The evolution of the social dialogue is consistent with the Commission's more general efforts to improve European governance. The social dialogue is indeed a pioneering example of improved consultation and the application of subsidiarity in practice and is widely recognised as making an essential contribution to better governance, as a result of the proximity of the social partners to the realities of the workplace. Indeed, the social partners are different in nature from other organisations, like pressure or interest groups, because of their ability to take part in collective bargaining".

---

[33] The Interinstitutional Agreement was signed and ratified by the Council, Commission and the European Parliament on 16 December 2003. It was published in the Official Journal, OJ No. C 321/2003) of 31 December 2003.

[34] *Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions concerning the re-exam of Directive 93/104/EC concerning certain aspects of the organization of working* time, COM(2003) 843 final, Brussels, 30 December 2003.

[35] Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/88/EC concerning certain aspects of the organisation of working time. *COM(2004) 607 final, Brussels, 22 September 2004.*

[36] *Partnership for change in an enlarged Europe – Enhancing the contribution of European social dialogue*, Communication from the Commission, COM(2004) 557 final, Brussels, 12 August 2004, Section 3.1, page 6.

The fundamental problem remains; how to engage employers in social dialogue.

Options and outlook

What are the options and what is the outlook? Three options may be proposed, and their prospects assessed.

1. Is a revival of the political dynamic feasible? If the EU institutions (Commission, Council, Parliament) combine to promote social initiatives aiming at legislative regulation, the social dialogue could take off again. The longer-term prospects are not predictable, but the political climate in the short and medium term makes this seem unlikely.

2. Can the ETUC achieve some measure of the power to force employers to the table? Again, this seems unlikely, perhaps not even in the longer-term. However, catalytic events may allow for the mobilisation of political and perhaps even industrial power resources.

3. Will employers perceive advantages in engaging in social dialogue? Can they perceive the gains to be made in achieving flexibility through acceptance of new types of employment (fixed-term work, agency work), avoiding costly conflict over re-structuring or even delocalisation, reaching consensus over corporate governance systems, or the financing of pension systems in crisis? It is not clear that European employers' organisations are able or willing to acknowledge these potential advantages, and, even less so, to carry their national affiliates with them?

Longer-term stimuli

Longer-term stimuli to employers to engage in European social dialogue include:

a. Involvement in macro-economic policy could require employers to engage. ETUC attempts at transnational co-ordination of collective bargaining, if successful, could provide valuable support to co-ordination of Member States' economic policy and the monetary policy of the European Central Bank. Member States' and EU institutions' support for the ETUC's co-ordination efforts could persuade employers to engage in social dialogue at EU level, so as not to be left out. The Tripartite Social

Summit for Growth and Employment established in 2002, now in Article I-48 of the Constitutional Treaty, offers a forum, but the task is formidable.

b. Major political failure could have catalytic effects. For example, rejection of the Constitutional Treaty could produce dramatic consequences for EU political integration. This could be accompanied by negative consequences for economic integration, even imperilling the future of the euro. Salvaging the political and economic momentum of European integration could require mobilising major actors in support, bringing pressure on employers to cooperate.

Other dynamic factors

Other dynamic factors could impact on the evolution of the European social dialogue:

i. Sectoral social dialogue is a potential element as yet to prove itself. The Commission's Communication of 2004 on the social dialogue[37] raised the prospect of combining the sectoral social dialogue with European Works Councils in specific sectors. In section 3.2.3: "Synergies between the European social dialogue and the company level", the Commission urges the social partners to explore these: "one example is the link between the sectoral social dialogue and **European works councils (EWCs)**"**.** Now this is an extremely creative idea, though one that has been around for quite some time, and was attempted by the European Metalworkers' Federation in the steel and vehicle manufacturing sectors. But to no avail. How does the Commission propose to put this proposal into action?

> ***"The European social partners could use the opportunity provided by the Commission's consultation on the revision of the EWC Directive to improve the link between EWCs and the social dialogue".***

Given the European employers' position that the EWCs directive requires no revision at present, and the Commission's apparent intention to do nothing (except to combine the consultation process on EWCs revision with the consultation on restructuring – itself an incomprehensible combination) - this is an invitation to futility.

---

[37] Commission Communication, *Partnership for change in an enlarged Europe – Enhancing the contribution of European social dialogue*, COM(2004) 557 final, Brussels, 12 August 2004.

ii. The European Court of Justice may stimulate social dialogue developments. ECJ decisions have stimulated legislative action, such as the amendments in 1998 to the Acquired Rights Directive. Another recent decision defining consultation as including the obligation to negotiate[38] may have a similar effect. The social partners' interest could stimulate their dialogue. The Court's decision in *UEAPME*[39] had important consequences.[40] The EU Charter of Fundamental Rights has the potential to contribute to the legitimacy of an EU industrial relations system, including the European social dialogue. Article 12 (Article II-72 of the Constitutional Treaty) provides for the "right…to freedom of association at all levels, in particular, in… trade union matters…", and Article 28 (Article II-88 of the Constitutional Treaty): "the right to negotiate and conclude collective agreements at appropriate levels".

iii. Developments at sectoral level may combine with potential interventions of the European Court. At its 5th Collective Bargaining Conference on 11-12 October 2005, the European Metalworkers' Federation (EMF) adopted a common demand for its affiliates of an individual right to training guaranteed by collective agreements. This is a development calculated to stimulate the social dialogue on training in the metalworking sector. The adoption by affiliates of the common demand into their national collective bargaining policy will be accompanied by a European campaign designed to spread best practice. To this extent, the EMF's common demand is consistent with the revised Lisbon Strategy's substance and process.

The task is to move from a common demand to an established entitlement to an individual right to training guaranteed by collective agreements. It may be that the Social Agenda's proposed optional framework for transnational collective bargaining at sectoral level will contribute to achieving this objective. The EMF will look to influence the formulation of this framework for transnational collective bargaining at sectoral level.

The dynamic of "bargaining in the shadow of the law", up to now, has looked to the shadow of the legislative institutions, the Commission and Council to stimulate agreement between the social partners. However, the current ideology of the Commission and political composition of the Council are not conducive to such

[38] *Irmtraub Junk c. Wolfgang Kuhnel als Insolvenzverwalter uber das Vermogen der Firma AWO,* Case C-188/03, Opinion of Advocate General Tizzano, 30 September 2004; ECJ decision, 27 January 2005.
[39] *Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises (UEAPME) v. Council of the European Union*, Case T-135/96, [1998] ECR II-2335.
[40] Future judicial interventions might have beeb affected by the Constitutional Treaty's Article III-212(2), whereby social dialogue agreements become "regulations or decisions" ("non-legislative acts" (Article I-33(1)), thereby undermining the justification for judicial (or other) review.

an outcome. It may be that a different kind of legal shadow is needed to stimulate social dialogue: that of the European Court of Justice. The Charter of Fundamental Rights of the European Union, proclaimed at Nice in December 2000, includes Article 14(1):

> *"Everyone has the right to education and to have access to vocational and continuing training".*

A successful EMF campaign to establish in a number of Member States an individual right to training guaranteed by collective agreements may provide the support needed for a claim for this fundamental right. In turn, the prospect of litigation may stimulate social dialogue in those Member States where it is absent. And, ultimately, an individual right to training guaranteed by a framework collective agreement at EU level.

All these are only future prospects. At the moment, there is great dissatisfaction from the side of the trade unions due to the minimal stimulus for social dialogue in the EU's latest Social Agenda of February 2005. Prospective outcomes in the form of "frameworks for action", "joint opinions", "declarations", etc. are insufficient. What is needed is binding undertakings by the social partners. Social partners' affiliates are not interested if whatever is done at EU level can be ignored. EU institutions will pay little attention to a social dialogue which cannot deliver what it promises. Yet there is much which could be put on a social dialogue agenda. The ETUC has identified four areas of critical importance for the social dialogue agenda: (i) low growth, (ii) high unemployment, (iii) demographic change and (iv) restructuring. UNICE has yet to regard this agenda as one where binding undertakings can be entered into.

Social dialogue is one element in an emerging institutional architecture of a European social model.[41] An essential element distinguishing the European social model from that of the USA is the engagement of the social partners in macro-level social dialogue, collective bargaining at sectoral and enterprise level, and participation at the level of the workplace. The initiative to create the EU social dialogue, taken 20 years ago, was of historic importance.[42]

---

[41] B. Bercusson, "The Institutional Architecture of the European Social Model" in T. Tridimas and P. Nebbia (eds), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order*. Vol. 2, Hart, Oxford, 2004, pp. 311-331.

[42] Ten years ago, I was privileged to act as the expert advising on the ECOSOC's first Opinion on the implementation of the Maastricht Treaty's Agreement on Social Policy, which enshrined the social dialogue in the EC Treaty. Opinion 94/C 397/17, OJ 297/0 of 31 December 1994.

The institutional architecture comprises fundamental rights in the EU Charter, the European social dialogue at intersectoral and sectoral levels, European Works Councils, the macro-economic dialogue (Tripartite Social Summit), the European Employment Strategy (the open method of coordination) and workers' participation in the enterprise (processes of information and consultation). Many of these elements are mutually reinforcing. But they emerged at different points in time and in different economic and political conjunctures of European integration. They have yet to be assembled together into a coherent structure.

In historical perspective, the EU social dialogue owes its existence to the UK government's blocking legislation on the social dimension of the EU, leaving the path open to the alternative of the social dialogue. The UK did not succeed in blocking the revolutionary introduction of social dialogue as a mechanism for making EU social policy and law in the Maastricht Treaty.[43] The new social dialogue mechanism produced the first social dialogue agreements. A change of UK government ended the UK's opt-out in 1997. Of course, the current problems of the social dialogue cannot (all) be laid at the door of the British. All the Member States and EU institutions have responsibility. But since the three binding framework agreements were negotiated at intersectoral level between 1996 and 1999, the social dialogue has been in decline.

What is needed now?

Specifically, what is needed now is the following:

i. there is a desperate need for bold initiatives which can stimulate the social partners to engage in social dialogue: to mobilise the dynamic of "bargaining in the shadow of the law";

ii. there is a desperate need for improving the capabilities of the social partners to undertake an effective social dialogue; both logistic and technical support[44] and their internal constitutional structures. Both will increase the potential of reaching agreements;

[43] It was remarked by a delegate to the Convention on the Future of Europe that the creation of a Constitution for Europe in 2004 was a more difficult task than that facing the authors of the Constitution of the United States because the Americans had by then solved their British problem.

[44] To quote from the Commission's new Social Agenda, *Communication from the Commission on the Social Agenda*, COM(2005) 33 final, Brussels, 9 February 2005, page 8.

iii. there is a desperate need for action which will make effective in practice the results of the EU social dialogue, whatever form they take, but in particular, of agreements concluded.

Conclusion

In conclusion, this Commission, the engine of European integration, is revealed as largely failing in its labour law agenda in general, and, more particularly in what the Treaty, in Article 138(1), describes as its:

> "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".

This was the provision inserted by the Single European Act 1986, and under which the then President of the Commission, Jacques Delors, and the then Director-General of D-G.V, Jean Degimbe, and their staff initiated and then promoted the EU social dialogue which culminated in the Maastricht Treaty Protocol on Social Policy and the social dialogue agreements and directives on Parental Leave, Part-Time Work and Fixed-Term Work. Since this last agreement of 1999, however, the decline has been precipitous, and the Commission is not the least responsible. Most of this latest Communication, but for the final paragraphs, is evidence of the poverty of its ambition. With the greatest optimism, perhaps the phrase which describes it best is "benign neglect".

Would the Constitution[45] make any difference? The language of Article I-48 is stronger:

> **Article I-48: The social partners and autonomous social dialogue**
>
> "The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy.
>
> The Tripartite Social Summit for Growth and Employment shall contribute to social dialogue".

[45] Treaty establishing a Constitution for Europe adopted by the Member States in the Intergovernmental Conference meeting in Brussels 17-18 June 2004, OJ C 310/1 of 16 December 2004.

But it is the Commission which is responsible for ensuring respect for Treaty provisions. What the history and development of the social dialogue shows us is that a dynamic, intelligent and subtle Commission, and social partners, led by historically sensitive leaders, can achieve great things. Future generations will judge harshly those who allowed the historic achievement of an EU social dialogue to wither and die. One can only hope that, if the Constitution ever comes into effect, the Commission will take its responsibilities more seriously.

The new Treaty establishing a Constitution for Europe retained the legal framework for EU social dialogue, and, arguably, even strengthened it by providing for fundamental rights of association at all levels and collective bargaining at appropriate levels. It remains to be seen whether this Constitution ever becomes an active instrument for future developments in the social dialogue, or only a passive memorial to the achievements of the past.