Main developments in European cross-industry social dialogue in 2009: ‘bargaining in many shadows’

Stefan Clauwaert

2009 promised in many respects to be an interesting, challenging as well as very difficult year for the European cross-industry social dialogue. The European social partners ETUC/BusinessEurope/UEAPME/CEEP not only had to submit their third autonomous work programme, but also agreed to engage in several important negotiations/talks more or less outside the margins set out in that work programme, such as the negotiations on a revised parental leave framework agreement/directive and the so-called ‘joint talks’ on the implications of the European Court of Justice (ECJ) judgments Viking, Laval, Rüffert and Commission vs. Luxembourg. Furthermore, there was the backdrop of the economic crisis which would certainly not facilitate these different exercises, in particular the negotiations on an autonomous framework agreement on inclusive labour markets. And finally, there were the scheduled institutional changes such as the European Parliament elections, the establishment of a new European Commission and the full ratification by all the EU-27 of the Lisbon Treaty, which would/will all have implications for the future (role) of

1. Cases C-438/05, C-341/05, C-346/06 and C-319/06 respectively. All case law is available on the ECJ website at: http://curia.europa.eu/jcms/jcms/j1_6308/. For more information on all these cases, including fact sheets, trade union and academic commentaries, etc., see the specific ETUI website section on the ECJ cases at http://www.etui.org/en/Headline-issues/Viking-Laval-Rüffert-Luxembourg.

2. The Lisbon Treaty finally entered into force on 1 December 2009 following its ratification by the Czech Republic and entails several changes to the articles related to the European social dialogue (former Articles 138-139 of the Nice Treaty). Firstly, a new article (Article 152) has been added at the beginning of the chapter devoted to social policy. It states: The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of the 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’. This article thus extends recognition and promotion of the European social dialogue from the Commission (as stipulated in ex-Article 138 TEC) to the
European social dialogue at both cross-industry and sectoral level. In this chapter, it is aimed to provide a comprehensive albeit concise overview of the most important features, processes and outcomes over the past year in the European cross-industry social dialogue.

1. Third autonomous work programme 2009-2010

With 2008 – and thus the term of their second work programme 2006-2008 – nearing its end, the European social partners started their negotiations on the orientation and content of their third autonomous work programme in October 2008. Whereas the ‘Lisbon Strategy’ formed the overarching context for the actions planned under the first two autonomous work programmes 2003-2005 and 2006-2008, this work programme has thus been configured with as a background an economic and financial crisis which was clearly also going to have a hugely detrimental social impact on citizens and workers throughout Europe. The introduction to the third work programme leaves no doubt about this when stating that ‘the European social partners are aware of the new context created by the current financial and economic crisis and are ready to consider the short, medium and long term implications this will have on workers and employers. To foster sustainable development, the European social partners consider that Europe needs to restore economic growth, to improve competitiveness, productivity and job quality, to achieve full employment and social progress and to enhance environmental protection. In this context, they will seek to

3. For an overview of the context, content and implementation of this work programme, see: Schömann (2009) and the ETUC/ETUI Benchmarking Working Europe reports for 2007, 2008 and 2009.

3. For an overview of the context, content and implementation of this work programme, see: Schömann (2009) and the ETUC/ETUI Benchmarking Working Europe reports for 2007, 2008 and 2009.
evaluate the appropriate mix of macro, micro and labour market policies conducive to stabilising the economy and to reaching sustainable growth and high levels of employment’ (ETUC et al., 2009a). Furthermore, the European social partners also opted for the first time for a two-year programme (instead of three), as its completion would thus coincide with the end of the Lisbon Strategy in 2010 and enable them to take account in any future work programme of whatever will be the major orientations and actions identified for and contained in the new ‘post-Lisbon’ strategy. Just as for their second work programme 2006-2008, they again opted for a ‘qualitative’ rather than ‘quantitative’ approach, thereby focussing on only a few but important issues and actions, not least because there were still several actions from that second work programme which still had to be finalised and/or embarked on. These included amongst others:

— the negotiation and implementation of an autonomous framework agreement on inclusive labour markets;

— finalisation of the national studies on economic and social change in the EU-27 in order to effectively manage change and restructuring;

— the negotiation of a framework of actions on employment;

— continuation of the work on capacity building for social partners in an enlarged EU, in the EEA and in candidate countries, including further developing the activities of the social partners’ respective resource centres4;

— monitoring, assessing and evaluating the implementation of EU social dialogue framework agreements and frameworks of actions; and

— further development of their common understanding of the various instruments resulting from their negotiations, determining

4. As concerns the ETUC, this resource centre can be found at: http://resourcecentre.etuc.org/. The employers’ resource centre can be found at: http://www.erc-online.eu/Content/Default.asp.
their impact on the various levels of social dialogue, and further co-ordinating the various levels of social dialogue and negotiations, including the development of better synergies between European cross-industry and sectoral social dialogue.

As for entirely new actions, they identified the following ones:

— a joint recommendation aimed at contributing to the definition of the post-2010 Lisbon Agenda, including in the context of the current economic and financial crisis;

— the development of a joint approach to the social and employment aspects and consequences of climate change policies with a view to maximising opportunities and minimising negative effects and to identify possible joint actions;

— jointly monitoring the implementation of the common principles of flexicurity, notably in order to evaluate the role and involvement of the social partners in the process and to draw joint lessons; and

— jointly addressing mobility and economic migration issues and promoting the integration of migrant workers in the labour market and at the workplace in order to identify possible joint actions.

Although the intention had been to present this work programme officially to the Tripartite Social Summit in March, its finalisation was slightly delayed and it was thus officially presented on 7 May 2009 in the framework of, and as clear signal to, the special European Jobs Summit held in Prague on that same day. Due to this small delay, but mainly because in 2009 the European social partners devoted most of their time to finalising actions/negotiations under the second work programme as well as to social dialogue exercises falling somewhat outside the scope of their work programme (see different subchapters below), no real joint activities (e.g. in the form of joint seminars/conferences, joint studies and/or joint discussions/negotiations) were undertaken on any of the new issues/themes. They have however set 3 February 2010 as the date for a meeting to kick off the discussions on the joint recommendation aimed at contributing to the definition of the post-2010 Lisbon Agenda.
2. Towards an autonomous framework agreement on inclusive labour markets

In the 2008 issue of Social Developments in the European Union, Isabelle Schömann already reported on the history and context of these negotiations (Schömann, 2009). Indeed, although the second work programme 2006-2008 foresaw negotiations on an autonomous framework agreement on either lifelong learning or the integration of disadvantaged groups into labour markets, it was decided as both issues were so interlinked to refocus the topic for negotiations and try to agree on a framework agreement regarding so-called inclusive labour markets. The actual negotiations started on 17 October 2008 and from the beginning, the negotiations proved to be very difficult for several reasons. First of all there was the fact that the negotiations started off at a moment where the crisis (and the impact it would have on the social side as well) was omnipresent. Although both sides of the negotiating table agreed that, in the current times of crisis, the issue at stake was all the more pertinent and that dealing with it was even more important and urgent, the argument over the crisis overshadowed the negotiations on several occasions and on several points. In particular, on how far each of the actors concerned (social partners, public authorities, individual workers and jobseekers, etc.) bore (shared) responsibility, but more importantly on who should pay for the action to be taken.

Furthermore, the European social partners started from sometimes very divergent points of view. Firstly, there were the initial diverging views on who should be covered by the agreement. Whereas the employers wanted to target primarily those currently outside the labour market and needing to be (re-)included (the so-called ‘outsiders’), the trade unionists not only wanted to cover those outside the labour market but also those who were currently in the labour market but at risk, e.g. because of restructuring, as well as to ensure that all workers could also make progress in the labour market (i.e. the so-called ‘insiders’). Secondly, there was also an initial diverging view on who should bear the main responsibility for ensuring labour market inclusion, whereby the employers considered the responsibility of the individual worker/jobseeker a very important factor, whereas the trade union side preferred to focus rather on the ‘collective’ responsibility of enterprises, trade union and public authorities. Thirdly, there was also
the very thin borderline between what concrete actions the social partners could actually undertake jointly and what is rather the shared and/or exclusive responsibility/competence of others (i.e. public authorities, NGOs, social economy, education systems, etc.).

Despite all this, and after more than ten months of negotiations and 15 meetings of either the full negotiating delegations and/or the so-called drafting group, the European social partners were able to reach a draft autonomous framework agreement on 9 December 2009. In a sense, this is a truly innovative agreement as never before have the European social partners tried to cover such a vast and complex matter in a framework agreement. Having to cover such an overarching issue, entailing competence for taking action in often very divergent fields (labour law, labour market policy, social security, taxation, education, etc.), certainly did not always facilitate the negotiations.

The text of the draft agreement reached consists of three parts: the agreement as such, comprising six clauses, an annex containing several recommendations of the European social partners to public authorities and others (e.g. social economy, NGOs, education systems) and an annex listing several existing European legislative and non-legislative instruments whose implementation and application is particularly relevant in order to achieve the aims and principles set out in this draft framework agreement. As for the six clauses forming the actual body of the agreement, they concern more particularly:

5. For the record, concerning the full negotiating delegation, on the ETUC side each country concerned (EU/EEA/candidate country) can nominate one representative (irrespective of whether trade union pluralism exists in the country or not; in case of such pluralism the different affiliated trade unions decide amongst themselves which organisation will be representing ‘the country’) as well as a pre-determined number of members representing the European Industry Federations affiliated to the ETUC and the ETUC Women’s Committee. Furthermore, the so-called liaison committee Eurocadres-CEC also has the right to nominate a representative. On the employers’ side, the three organisations BUSINESSEUROPE, CEEP and UEAPME decide amongst themselves about the concrete composition of their delegation. On each side, and depending on the issue as well as taking into account the geographical context, the negotiating delegation appoints from its members the colleagues to be at the so-called drafting group, which tries to arrive at actual drafting proposals based on the orientations and regular feedback given by the respective negotiating delegations.

6. Certainly when one compares this to earlier more ‘easier’ or at least ‘more targeted’ issues like for example parental leave, fixed-term work, telework or harassment and violence at work.
An introduction describing the ‘history’ of the exercise (i.e. the work programmes of the social partners) as well as the context in which the negotiations took place (the economic crisis as well as the fact that they recognise that achieving inclusive labour markets does not only depend on their actions but also on those of others such as public authorities, etc.).

A clause highlighting the aims of the agreement, in which it is clearly spelled out that the agreement concerns not only access but also the return to, retention in and development within the labour market of each individual (cf. above on the diverging views of the target groups). In that sense the agreement aims at increasing the awareness, understanding and knowledge of employers, workers and their representatives of the benefits of inclusive labour markets as well as to provide workers, employers and their representatives at all levels with an action-oriented framework to identify obstacles to inclusive labour markets and solutions to overcome them.

Clause 3 on ‘description and scope’ again spells out that the framework agreement covers those persons who encounter difficulties in entering, returning to or integrating into the labour market and those who, although in employment, are at risk of losing their job, all of this being due to different factors which may be of a contextual, work-related or individual nature. For each of these categories of factors, some clear examples are provided.

Clause 4 on the other hand provides a non-exhaustive list of obstacles which can occur for people willing to enter, stay in or progress on the labour market. Again a non-exhaustive list of obstacles are enumerated, which may relate amongst others to 1) availability of information, 2) recruitment, 3) training, skills and capabilities and/or 4) working life in general (e.g. working conditions and environment).

The actual solutions to achieving more inclusive labour markets, for the achievement of which the European social partners consider themselves (and their affiliates) the main actors, are set out in Clause 5 in a non-exhaustive way.

Clause 6 forms the traditional implementation and follow-up clause and is quite similar in its wording to corresponding clauses in the previous
autonomous framework agreements on work-related stress and harassment and violence at work.\(^7\)

As mentioned, the agreement is complemented by two annexes. Annex 1 lists a whole range of actions which the European social partners think lie within the competence and responsibility of other actors in first instance. The second annex refers to relevant existing European legislative and non-legislative texts, such as directives (e.g. on fixed-term work, part-time work, and non-discrimination), as well as former framework agreements or other joint texts agreed upon by the European social partners.

At the time of writing of this article, the draft agreement had been submitted to the respective member organisations of the European social partners for their internal consultation with a view to its eventual formal adoption by the respective decision-making bodies of the European social partners. Following that, it will certainly be interesting to see and monitor how the various stakeholders (public authorities, NGOs, etc.) to whom the agreement is addressed and who need to be involved will respond to it and actually act upon this framework agreement.

3. **The joint declaration on the economic crisis**

At the beginning of 2009 and looking ahead to the Tripartite Social Summit of March 2009, the European social partners also engaged in joint talks with a view to delivering at the Summit a *Joint Declaration*

---

7. As for the autonomous framework agreement on harassment and violence, it should be highlighted that the Social Dialogue Committee adopted on 16 June 2009 the second annual table on the implementation of this framework agreement; the text is available along with others at: [http://resourcecentre.etuc.org/linked_files/documents/Final_joint_table_2009%20harassment_violence_EN.pdf](http://resourcecentre.etuc.org/linked_files/documents/Final_joint_table_2009%20harassment_violence_EN.pdf). As for the autonomous framework agreement on work-related stress, reference could be made to the fact that on 2 July 2009 the European Commission organised a major conference entitled 'Tackling work-related stress in the EU – Lessons learned from the European social partners’ agreement'. All documents (including a DVD presenting the agreement via interview of representatives of the European social partners and other stakeholders are available at: [http://ec.europa.eu/social/main.jsp?catId=329&langId=en&enkeventId=187&furtherEvents=yes](http://ec.europa.eu/social/main.jsp?catId=329&langId=en&enkeventId=187&furtherEvents=yes). The conference was also intended as a launching pad for the work on the Commission’s own implementation report which it envisages to publish in summer 2010.
The objectives of the declaration were 1) to recall the specific contributions which the European social dialogue was expected to deliver in relation to the crisis via its third work programme (see above), 2) to specify the urgent measures European social partners considered necessary in the short run to stabilise the economy and limit the most severe social consequences of the crisis, 3) to describe the medium-term actions they considered necessary to turn the economy round and restore job creation, and 4) to recall the need to intensify consultations with them by the EU institutions. However, after several intense debates, the European social partners could not reach a consensus on the content of such a joint declaration. Although there were several reasons for this, one was for instance that ETUC wanted a declaration with would clearly and emphatically specify what were the real reasons for the crisis and thus not hide this behind soft language or analyses. ETUC wanted the declaration to clearly spell out that it was the lack of a Social Europe and a social dimension as well as the unregulated and uncontrolled financial markets which had caused all this and also had further exacerbated social inequalities, including income inequality. The employers’ side could not however accept such strong language. Another major reason was that the employers’ side wanted to integrate into the text a call for a general (and at least temporary) reduction of labour costs via the reduction of employers’ contributions, this being for all incomes irrespective of size. The trade union side could not accept this, as it considered this might (further) undermine social security systems throughout Europe, the (financial) sustainability of which – in particular in times of economic but also social crisis – had to be upheld and ensured. Despite the failure to reach a consensus on the declaration, the European social partners did however achieve a compromise on 7 May 2009 on ‘Joint recommendations on support to economic recovery by the European Social Fund’.

In this document the European social partners recognise that the ESF represents the EU’s main financial instrument for investing in people by supporting the implementation of active inclusion measures, activation measures, re-training and skills upgrading. However, and in order to ensure maximum impact, part of the ESF’s resources should be redirected to priority areas with immediate relevance to the crisis. They list a number of measures to improve access to ESF resources as well as to maximise the impact of the ESF on labour markets, especially as to how ESF support could maintain employment, encourage entrepreneurship and new jobs and help to increase employment of young people in particular. The European social partners furthermore ask to be involved in decision-making and implementation processes regarding the ESF at all levels.

4. **The ‘ECJ talks’**

In the course of 2007 and 2008, the European Court of Justice (ECJ) interpreted existing European rules on posting of workers in the context of the freedom to provide services (Laval, Rüffert and Commission vs. Luxembourg cases) and on the freedom of establishment (Viking case). In these judgments, the ECJ gave in particular its interpretation of the relationship between fundamental social rights and economic freedoms in the internal market.

In October 2008, the European Commission and the French Presidency of the Council called on the European social partners to jointly develop an ‘analysis of the consequences of the ECJ cases and of the challenges related to the increased mobility in Europe’, and thus contribute to the re-establishment of confidence in the further development of the internal market. This invitation was accepted by all of them, although with some hesitation and reservation on both sides and also very low expectations on a positive outcome, given the very divergent views on the issue from the outset. It was deliberately decided not to call this

---

9. Respectively C-341/05, C-346/06 and C-319/06. All case law is available on the ECJ website at: [http://curia.europa.eu/jcms/jcms/301_6308/](http://curia.europa.eu/jcms/jcms/301_6308/).
exercise negotiations, but ‘talks’, in order not to give the impression that the European social partners might come up with an Agreement on this topic. It was also intended to make this a very quick exercise, but due to the often widely diverging opinions the discussions became delayed, have been extended several times and were even on the verge of breaking down on several occasions. In the meantime, during 2009 they have held three plenary meetings (30 March, 5 June and 26 October) and three meetings of a smaller-sized group (18 May, 26 September and 14 December).

The social partners are now hoping to find a consensus soon on what is called a ‘progress report’ on the state of play of the various discussions. This progress report is intended to highlight some of the points where they are in agreement on the possible consequences of the judgments; however most of the text as it stood at the time of writing this article highlights instead the divergent points of view on many other implications of the judgements. The European social partners have so far focussed their discussions around two central themes a) the context of the single market and the impact of the ECJ rulings, and b) the relationship between economic freedoms and fundamental (social) rights. Other issues which they intended to work on included: 1) the obstacles to be removed and the conditions to be put in place to improve free movement, and 2) the challenge of respecting the diversity of national industrial relations systems and the eventual responses to these challenges.

A further plenary meeting is scheduled for 18 and 19 January 2010, at which hopefully a final text of the progress report will be reached, so that it can be submitted and presented at the next meeting of the Social Dialogue Committee on 25 February 2010.

It should also be noted that, following the ECJ’s interpretation of the Posting of Workers Directive in several of these cases (e.g. that the Directive sets out ‘maximum’ rather than ‘minimum’ requirements), a huge debate is taking place amongst and between European social partners and European institutions on the possible need for a revision of this Directive. Whereas the employers’ side sees no real need for a revision of the Directive’s provisions but wishes, rather, to ensure a more effective implementation and application of it – in particular through enhanced cooperation between Member States and their
authorities (and seems to have backing here from for example the Commission and Council) – the ETUC calls for a revision of the Directive in several respects\textsuperscript{11}. In the meantime, the Commission has launched several activities in the form of research studies and a High-level Expert Group to examine and discuss the possible actions to undertake in relation to the revision of the Directive and/or strengthening of its implementation and application. Furthermore, Commission President Barroso, in his submissions to the European Parliament aimed at obtaining its support for his re-election, promised to look at the need for a regulation on the Posting of Workers Directive. The parallel existence of all these different processes (social partners’ talks, High-level Expert Group discussions, etc.), and in particular the clear interplay between them, has turned this issue into an extremely difficult and politically sensitive game of chess whereby any move in any of the processes might have a considerable impact in the other processes.

5. Towards a revised Parental Leave framework agreement/directive

On 18 June 2009, a new milestone in the European social dialogue was reached. Having started in September 2008, and after six months and seven rounds of negotiations, the European social partners signed a framework agreement revising their 1995 Framework Agreement on Parental Leave\textsuperscript{12}. It is in fact the first time in the history of the European social dialogue that such a revision exercise of a pre-existing framework agreement has been undertaken.

It is worth remembering that the Commission had already consulted the European social partners in October 2006 and May 2007 in a first and second stage consultation on the reconciliation of professional, private and family life, and, among other things, had addressed the issue of updating the regulatory framework at Community level. The Commission had thus encouraged the European social partners to

\textsuperscript{11.} The respective positions of the European social partners can be found on their respective websites.

\textsuperscript{12.} This framework agreement was incorporated into Directive 96/34/EC of 3 June 1996.
assess the provisions of their framework agreement on parental leave with a view to its review. On 11 July 2007, the European social partners jointly informed the Commission of their intention to evaluate the existing parental leave arrangements throughout Europe in connection with other work/life balance arrangements and to assess whether joint action on this issue was needed. They submitted the results of this evaluation in the form of a progress report on 13 March 2008 to the Tripartite Social Summit and expressed therein their wish ‘to undertake joint work on the Parental Leave Directive’.

Although they recognised that the initial framework agreement/directive had been a catalyst for positive change and played a significant role in helping working parents in Europe to achieve better reconciliation, the European social partners considered that certain elements of the agreement needed to be adapted or revised in order to better achieve its aims. This included inter alia ensuring higher take up of parental leave by fathers and taking into account the growing diversity of the labour force and societal developments, including the increasing diversity of family structures. Formal negotiations started on 17 September 2008 and, although it was envisaged to be ‘a short exercise’, ended six months later on 23 March 2009. That the negotiations took longer than expected was certainly due to several factors, such as the fact that – in this author’s experience – the negotiation of agreements destined to become ‘hard-core law’ always proves harder and more awkward than any other negotiations. But the ‘crisis’ was in addition a decisive element, in particular as some on the employers’ side questioned whether negotiating more and better paid parental leave arrangements was the most important issue to tackle in times of (economic) crisis.


15. It should be noted that only a few days before the start of the negotiations, on 3 September 2008, the European Parliament adopted a Resolution calling for the improvement of Directive 96/34/EC, including by providing more incentives for fathers, improving the employment rights of workers who take parental leave, making the leave arrangements more flexible, and increasing the duration of parental leave and pay during such leave (European Parliament Resolutions P6_TA(2008)0399).
Despite all this, the European social partners were able to make further progress in a constructive spirit towards ensuring enhanced possibilities for the reconciliation of private, family and professional life. The most concrete positive results are the following:

- the introduction of one additional month of leave (4 months instead of 3 for each parent, of which at least one month is non-transferable) (Clause 2§2);

- the strengthening of the ‘individual’ nature of the entitlement (Clause 2§1);

- strengthening of the rights of ‘atypical’ workers (fixed-term, part-time, temporary agency work) to parental leave (Clause 1§3 and 3§1(b));

- increased protection against unfavourable treatment as a result of exercising the right to parental leave (and thus not only in relation to dismissal, as in the 1995 agreement) (Clause 5§4);

- the introduction of a new provision relating to a right to request flexible working arrangements upon return to work after parental leave, as well as the provision to ensure arrangements whereby the worker on leave is ‘kept in touch’ with what is going on in the enterprise during the leave period (Clause 6);

- ensuring respect for diversity of family structures (lone parents, same sex couples, etc.) when establishing parental leave rights (Clause 1§1);

- the need for recognition of the rights of, and need for special measures for, parents of children with disabilities or long-term illnesses (Clause 3§3).

---

16. The text of the revised framework agreement can be found at: http://www.etuc.org/IMG/pdf_Framework_agreement_parental_leave_revised__18062009.pdf
On the other hand, only limited progress has been made in regard of the following aspects:

— the principle of non-transferability for the whole period of leave: whereas already in the 1995 Agreement the whole period of parental leave was considered to be ‘in principle’ non-transferable, this principle was not always correctly applied in the Member States. This basic principle is still inscribed in the new version of the agreement, but — in particular to ensure a higher take up by fathers — it is now stipulated that the additional fourth month of leave may not under any circumstances be transferred between the parents (Clause 2§2 and Preamble 16);

— although on the trade union side there was a determination to ensure a clear reference and right to paid parental leave, the final text of the agreement provides only some references to the role and level of income in relation to the take up of parental leave, in particular by fathers (Clause 5§5 and Preamble 18-20).

Finally, it has to be admitted that it is a pity that the European social partners were not able to ensure changes to the following aspects:

— no increase in the age of the child (still 8 years – Clause 2§1);

— the new agreement only deals with parental leave and not with other forms of leave such as paternity leave, filial leave (i.e. leave for taking care of dependent family members), adoption leave, etc.;

— no new rules on the leave for reasons of ‘force majeure’ (Clause 7).

As for what one could call these missed opportunities, it is also noteworthy that the European Parliament’s Committee on Women’s Rights and Gender Equality discussed at its meeting of 29 September 2009 a motion for a resolution tabled by MEP Eva Britt-Svensson, in which the agreement is considered to be a ‘first step towards flexible methods for achieving a work-life balance’ and thus ‘supports the agreement between the social partners on parental leave and regards it as an important aspect of equal opportunities policy in support of the reconciliation of professional, private and family life’. It also welcomes the increased attention given to the rights of part-time, fixed-term and
temporary agency workers. However, the motion for a resolution also regrets that certain issues are not covered or are not adequately taken into account in the current framework agreement. These include amongst others: 1) no new rules on other forms of leave (like paternity and filial leave; the resolution therefore calls on the Commission to come up with concrete new legislative proposals); 2) the fact that the non-transferability was limited to only the additional month of leave and not the whole four-month period; 3) the way consideration was given to remuneration issues; 4) no increase in the age of the child providing the right to parental leave, etc.\(^\text{17}\)

On 30 November 2009, the European Council of Ministers of Employment/Social Affairs reached a political agreement on the text of the proposal for a directive incorporating this revised framework agreement\(^\text{18}\).

6. Other activities

Next, as set out in their own work programmes, the European social partners also undertake to continue to take action both at bipartite and tripartite levels in reaction to European Commission proposals and initiatives. This includes the joint/separate replies to European Commission consultations under Article 154-155 of the EC Treaty of Lisbon (former Articles 138-139 under the EC Treaty of Nice). In 2009 the following thematic consultations were launched amongst others:

- 1\(^{st}\) Consultation on notifications by Member States under Article 17(5) of Directive 2003/88/EC (working time of doctors in training);


\(^{18}\) At the time of writing of this article, the directive was not yet published in the Official Journal and thus the final implementation date is not yet known.
Main developments in European cross-industry social dialogue in 2009

— 1st Consultation of the social partners on the protection of workers from the risks related to exposure to electromagnetic fields at work, and

— 2nd consultation of the European social partners on the revision of exclusions concerning seafaring workers.¹⁹

On 14 October 2008, the Commission launched another consultation with particular relevance for the European sectoral social dialogue but also for the cross-industry one. The consultation had as its objective ‘taking stock of the implementation of the Commission Decision of 20 May 1998, which set up the sectoral social dialogue committees with a view to better strengthen and promote the sectoral European social dialogue and its functioning in accordance with Articles 138 and 139 of the Treaty’.

As the Communication indicates, the European sectoral social dialogue has developed rapidly over the years, with – at that time – 36 committees established and several sectors preparing for the creation of new ones. Sectoral social dialogue produces outcomes of practical importance. Over 70 million workers and nearly six million undertakings can be covered by the social partners’ decisions, declarations and agreements at sectoral level. It thus proves the growing importance of sectoral social dialogue and the European commitment to support and enhance its role.

This is why the Commission invited the European social partners at both sectoral and cross-industry level to reply to a set of questions relating to the creation and functioning of the sectoral social dialogue committees (including questions relating to their autonomy, representativeness, perimeters of the sectors, their capacity to negotiate, their ‘administrative’ functioning, etc.), on the synergies between different actors (between Commission and sectors, amongst the sectors themselves, etc.) and on the implementation of their outcomes and their impact.

¹⁹. All the formal consultation documents can be found at: http://ec.europa.eu/social/main.jsp?catId=524&langId=en. As some issues relate to more sectoral matters, it might be possible that the European cross-industry social partners did not react to them but left it rather to the social partners of the appropriate sectoral social dialogue committees. In any event, the responses of ETUC, BUSINESSEUROPE, UEAPME and CEEP are in principle made available on their respective websites.
Some of the questions were particularly relevant for the relationship between European sectoral level social dialogue and dialogue at cross-industry level. For example, in section 3 on ‘Synergies and cooperation’, two questions pertained to the cooperation between sectors and the cross-industry level and asked in particular (1) how should sectors integrate cross-industry autonomous agreements in their work and reflection?, and (2) to what extent do social partners cooperate with the cross-industry social dialogue as well as with the European Works Councils?

Although many of the European Industry Federations (EIFs) affiliated to the ETUC submitted their sector specific replies, they also subscribed to a general reply which the ETUC had fleshed out in consultation with them (ETUC, 2009a). As for the questions above, the reply highlighted the following. Concerning the integration of cross-industry autonomous agreements in the work and reflection of the Sectoral Social Dialogue Committees (SSDCs), the ETUC is certainly in favour of such an approach and ready to contribute to doing so in any way possible. The ETUC considers that the Liaison Forum could serve as a forum where an initial introduction to the cross-industry agreements could be presented, but that there is in addition a clear need for concrete joint meetings between the cross-industry and sectoral social partners to discuss in depth the agreements reached and how the SSDCs could best use them in their own work. Another way of improving this integration is for the Commission to ensure that wherever desirable and envisaged, joint project applications by the sectoral social partners to adopt and implement these agreements are fully supported, including financially. Furthermore, the ETUC also considers that it would be very useful and mutually beneficial if representatives of the SSDCs could be invited to meetings of the cross-industry Social Dialogue Committee to present concrete results achieved via their sectoral social dialogue. As for multi-sectoral initiatives, the ETUC certainly welcomed the few examples so far made known. In particular, the ongoing multi-sectoral initiative to look at the possibilities for more targeted implementation of the cross-industry agreements as with the European Works Councils?

---

20. For the moment 12 in total; for an overview see: http://www.etuc.org/a/17.
21. This Liaison Committee could best be described as a meeting platform to which representatives not only of the different sectoral social dialogue committees but also of the European cross-industry social partners are invited and where they can present and discuss activities and outcomes reached in their respective dialogues in a cross-sectoral and cross-level way and thus learn from each others’ experiences and raise awareness of the results achieved.
Main developments in European cross-industry social dialogue in 2009

A framework agreement on harassment and violence is to be welcomed and supported. BusinessEurope highlighted in its reply of 27 November 2008 (BusinessEurope, 2008) first of all the fact that sectoral social dialogue is the appropriate place to tackle subjects specific to the sectors concerned. For horizontal themes, concertation or negotiations between the social partners should take place in the cross-industry social dialogue, where sectors play a role through national employers’ associations and feed into national coordination procedures. It further stressed that sectoral organisations are also invited to participate in negotiations that take place in the cross-industry social dialogue if sector-specific aspects make it necessary. Past experience includes the negotiations on part-time work, fixed-term work and temporary agency work. On the other hand, in the framework of the European sectoral social dialogue, BusinessEurope considers that sectoral social partners must be free to choose their discussion themes and how they organise their social dialogue. They may decide to develop initiatives which build upon or are in line with cross-industry social dialogue activities or agreements.

CEEP for its part considers the cooperation between both levels of EU social dialogue as essential and believes that it should be further improved. On the sectoral social partners’ side there is the evident need to better evaluate whether and when cross-industry agreements can be a starting point for their discussions, in order to check whether the necessarily broad cross-sectoral instruments need any integration or specification at sectoral level. They also refer to the ongoing multi-sectoral work on third party violence. However, CEEP’s evaluation of sectoral initiatives is less positive: they simply replicate what has already been signed at cross-sectoral level. CEEP feels in fact that those initiatives do not bring mutual strength but on the contrary they weaken social dialogue effectiveness. CEEP also considers that the information given during Social Dialogue Committee (SDC) meetings about current activities at sectoral level is sporadic and always left to EC representatives. Therefore, CEEP attaches particular importance to the implementation of the 2009-2010 work programme of the European social partners stating that they will ‘further coordinate the various levels of social dialogue and negotiations, including the development of better synergies between European inter-professional and sectoral social dialogue’. This should lead, in practice and amongst other things, to systematically inviting to SDC meetings any sectoral social partners who
have just reached new agreements, in order to present their initiatives and have an exchange of views on possible repercussions for the cross-industry work (CEEP, 2009)\textsuperscript{22}.

Finally, UEAPME stresses first of all that both dialogues should have well defined tasks and responsibilities, with a clear demarcation between cross-industry and sectoral level. It is important to better differentiate between subjects that should be dealt with at cross-industry level and subjects that should be dealt with by sectors. Cross-industry social dialogue should deal with horizontal economic, social and employment issues, whereas sectoral social dialogue should deal with specific matters affecting the branches of industry, including when necessary the adaptation to their sectors of the framework conditions and agreements decided at cross-industry level. In terms of content, the adaptation at sectoral level of EU framework agreements such as the ones on telework and stress has proved the practical complementarity between the cross-industry and sectoral levels. However, for UEAPME, optimal functioning of the two levels of social dialogue requires good coordination and well organised reciprocal flows of information on their respective activities. Furthermore, it also considers that the Liaison Forum offers a good platform for exchanges of information at various levels between the stakeholders. This is primarily a place for the European Commission to inform the European social partners, but sometimes in the past it has even been used for consultations with all the European social partners. It is also a structure where the two levels of European social dialogue, cross-industry and sectoral, meet and present their results and exchange views (UEAPME, 2008)\textsuperscript{23}.

All the respective replies to this review exercise were presented and discussed with all stakeholders at a seminar held in Brussels on 24 April 2009. Based on the replies received and the discussion at the seminar, the Commission is currently preparing a Communication, in which it is expected to express its views on the future direction of the European sectoral social dialogue. This Communication is likely to be published in the spring of 2010.

\textsuperscript{22} The reply is available at: http://www.ceep.eu/images/stories/pdf/Opinions/ responses/CEEP%20Answer%20Consultation%20SSD.pdf
Conclusions

It was the late Professor Brian Bercusson who described the European social dialogue as ‘bargaining in the shadow of the law’\textsuperscript{24}, referring to the fact that the European social partners had been able to obtain a co-regulatory role in the European legislative process by having the capacity of negotiating framework agreements subsequently incorporated into directives, but also referring to the fact that – at least in the early years – they only ever negotiated when there was a serious threat that the Commission would launch legislative proposals if the European social partners did not start negotiations or could not successfully complete them.

The European social dialogue in 2009 could be described as ‘bargaining in many shadows’. Firstly, there has been the shadow of European institutional reform. 2009 saw the advent of a new European Parliament where a further rightward shift in the political majority might not prove favourable, at least for the trade union side, and might thus influence the already fragile power relationship between them and the employers’ side in respect of entering into negotiations or reaching agreements. There was also the inauguration of a new European Commission, and at least judging by the political priorities set out by Mr. Barroso himself in his ‘Europe 2020’ agenda, it is clear that the social dimension – apart from tackling unemployment in the wake of the economic crisis – seems once again not to be high up on the priority list. Furthermore, there was also at long last the coming into force of the Lisbon Treaty in December 2009, which at least provides for some new and promising avenues to make progress in the social arena as well as in the European social dialogue as such\textsuperscript{25}. And, finally, it remains to be

\textsuperscript{24}. See Bercusson (1990); as Professor Bercusson sadly passed away in 2008 and was a true friend of the (European) trade union movement, the ETUI honoured him by publishing a selection of his writings including this landmark article. For full details of the book of selected writings, see the references.

\textsuperscript{25}. See footnote 3. Furthermore, and at least for the ETUC, it would be worth exploring how one could build on some positive social features, such as:
- the reinforcement of social values and principles (such as solidarity, equality and gender equality, non-discrimination, etc.);
- the social and employment objectives (‘full employment’, ‘social market economy’);
- the incorporation of the Charter of Fundamental Rights;
- the right of initiative for citizens;
seen how the outcomes of the Commission’s review of the European sectoral social dialogue will not only influence and/or reorient that dialogue, but also whether or not it has implications for the interplay between the European social dialogue on the cross-industry and sectoral level.

Secondly, there was the shadow of the social partners’ own work programmes, in two senses. On the one hand, 2009 saw the adoption of the third autonomous work programme, which not only contains a lot of ‘left-overs’ from the second work programme but was also developed in the wake of what will become the post-Lisbon Strategy but of which the content is – at least at the time of writing this article – still very unclear. On the other hand, and as described above, the European social partners agreed to enter into a number of exercises falling outside the margins of, or rather lying in the shadow of, their work programmes, such as the talks on the ECJ cases and the negotiations on the revised parental leave agreement; the European social partners expended a good deal of time and energy in trying to finalise them in a successful manner.

Thirdly, there was the shadow of the economic crisis. In fact one could state that the ‘spectre of the crisis was omnipresent in 2009 and clearly ‘overshadowed’ many if not all of the discussions. Although several discussions, including the one on the joint declaration as well as the ones on the framework agreement on inclusive labour markets, were certainly pertinent and now was the right time to tackle them, the argument of the crisis by no means facilitated the negotiations on them or on the European social dialogue in general.

Despite all the above, the European social dialogue at cross-industry level still proved its added value for the development of Social Europe. Of course, not everything was rosy but at least some tangible steps forward were made via the Revised Parental Leave agreement and the draft autonomous framework agreement on inclusive labour markets

- the legal base for services of general interest, and
- the social clause.

See for more information on this the ETUC Resolution on ‘ETUC and the Lisbon Treaty’ available at: http://www.etuc.org/a/6741.
Main developments in European cross-industry social dialogue in 2009

(although at the time of writing it was still unclear whether this would be accepted by all the European social partners’ respective decision-making bodies).

References


ETUC, BusinessEurope, UEAPME and CEEP (2009b), ‘Second annual table on the implementation of the ETUC/ BusinessEurope -UEAPME/


ETUI and ETUC (2009), Benchmarking Working Europe 2009, ETUI, Brussels.


