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Social dialogue and the legislative process: breathlessness and hesitation

Introduction

The emphasis which has recently been placed on the quality of employment in Europe takes on fresh importance when we read the results of surveys carried out by the European Foundation for the Improvement of Living and Working Conditions (especially Paoli and Merllié, 2001). These clearly highlight the way in which the demands of competitiveness and integration with the global economy have led, in recent years, to a deterioration in the welfare of workers and of their physical and mental well-being.

Little more is needed to emphasise the important role of the social partners in shaping the conditions for new forms of work, in particular temporary work and teleworking. Both these subjects have long been neglected at European level, although they are in fact major issues which go to the heart of the Lisbon objectives (to become the most competitive economy in the world while at the same time strengthening social cohesion). We have therefore chosen to begin this article with these two subjects. We shall then go on to examine the social dialogue at sectoral level, where a strong momentum seems to have built up around these two issues, resulting in the signing of agreements and codes of conduct. Finally we shall review the major social Directives which were the subject of agreements in 2001, and which define a more detailed framework for information and consultation.

1. Cross-sectoral social dialogue

1.1 Cross-sectoral social dialogue and atypical working

In the following paragraphs we shall look at the way in which the actual negotiations (on temporary work and teleworking) are developing, and at the contribution made by the social partners to the Laeken Declaration. These two subjects are closely linked.

1.1.1 The breakdown of negotiations on temporary work

Negotiations between the social partners on temporary work were the third phase in the attempt to regulate atypical forms of work, following the conclusion of negotiations on part-time work in 1997, and fixed-term contract work in 1999. The symbolic significance of this was that it completed a "package" which would avoid the worst excesses of flexible working (as demanded by the trade unions) and at the same time allow for the development of these forms of employment in Europe, once safeguards had been put in place (as demanded by the employers).

A very brief backward glance will remind us that temporary work has been on the European agenda for almost twenty years. It was in fact in 1982 that the European Commission published its first draft Directive on temporary working. This Directive, which was amended in 1984, covered both temporary and fixed-term contract work. This attempt failed to get through the Council, as did a second attempt in the early 1990s, which was an extension of the Community Charter of the Fundamental Social Rights of Workers ([1]). The failure of this second attempt did not, however, prevent the adoption of a Directive on improving the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship (Council of the European Communities, 1991). But this Directive does not cover other important issues relating to temporary work, such as trade union rights, rates of pay etc.

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1 The Charter defines the need for an approximation of conditions in forms of working such as temporary work, "while the improvement is being maintained", and makes the point that "the improvement must cover, where necessary, the development of certain aspects of employment regulations" (Article 7).

Let us be clear at the outset that the question of temporary work appears to be much more complex than that of part-time working or fixed-term contracts. In fact there is a vast range of divergent rules and practices in the Member States concerning the status of temporary workers. It is also a more politically sensitive issue, given the rapid growth in this form of working in all the Member States since the mid 1990s, and the lack of a clear definition (cf. box).

Temporary work: a tricky issue

Apart from the fact that it is a triangular relationship involving a worker, a firm acting as an intermediary agency and a user firm, where the agency employs the worker and puts him/her at the disposal of the user firm, legal definitions, regulations and practice in respect of industrial relations show considerable variation. A study carried out by the European Industrial Relations Observatory (*) broadly identifies three main patterns of development:

– a general lack of clear, specific definition and regulation of temporary work as a separate type of employment relationship, as is the case in Denmark, Finland, Ireland and the United Kingdom;

– specific legal definition and regulation of temporary work, referring principally to the relationship between the temporary work agency, the user firm and the worker, as is the case in Austria, Germany, Luxembourg, the Netherlands, Norway, Spain and Sweden;

– specific legal definition and regulation of temporary work, covering the relationship between the temporary work agency, the user firm and the worker, but also defining a specific status for the temporary worker. This is the case in Belgium, France, Italy and Portugal.

According to the study, temporary work also exists in Greece, but is not regulated (although it is not prohibited by law either). This explains why we have virtually no specific information on this form of employment.

(*) For more information, see the study carried out by the EIRO on temporary work in Europe (http://www.eiro.eurofound.ie/1999/01/Study/TN9901233S.html).

- **Negotiations between the European social partners**

The main issues in negotiations between the social partners in the case of temporary work relate to the duration and renewal of temporary contracts, the circumstances in which user firms may make use of temporary work, the need for parity between temporary workers and equivalent full-time workers in user firms with regard to rates of pay and/or conditions of employment, and finally trade union rights and the way in which temporary workers are represented.

The positions adopted by the social partners vary from one Member State to another. This is probably due to differences in their regulatory and legislative situations. According to the EIRO study on temporary work in Europe (2), "*generally speaking, employers see temporary work as a necessary element of flexibility in the workforce and a good means of favouring employment, although in some cases they are more neutral (…). Whereas in some countries (Germany, Norway and Portugal) employers are calling for more deregulation, in others, such as France, they have played an important part in regulating this sector*".

Opinions and assessments are not unanimous on the trade union side either. "*Generally, in the past, trade unions saw temporary work as representing a danger for minimum employment standards and as open to abuse (…). They criticised the insufficient level of pay and conditions and the fragility of temporary work, or the fact that workers were excluded from occupational benefits, training and promotion prospects. Although many trade unions continue to criticise certain aspects of temporary work, they now often tend (though not in all cases) to accept it as a fait accompli, and concentrate their efforts on obtaining better regulation and/or better coverage through collective agreements*".

It was against this complicated background, with widespread differences of opinion, including within the social partners' own organisations, that negotiations began in June 2000 between the European Trade Union Confederation (ETUC), the Union of Industrial and Employers' Confederations of Europe (UNICE) and the European Centre of Enterprises with Public Participation (CEEP).

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2 http://www.eiro.eurofound.ie/1999/01/Study/TN9901233S.html..

For some years, the ETUC had been urging UNICE to come to the negotiating table. In a letter sent in August 1999 to the former Secretary-General of UNICE, Dirk Hudig, the ETUC wrote: "*It is not possible for the social partners to be incapable of establishing their own agenda for discussion beyond the negotiation which should logically take place on the question of temporary work (…)*". To this appeal, the employers' side responded in prudent terms: "*Regarding any negotiations on temporary work (…), UNICE is committed to examining this possibility. Of course I cannot pre-judge the outcome of our internal discussions, but I can confirm that they have begun*". Not until 3 May 2000 did the employers' side announce its agreement to begin talks on the subject.

Such an agreement to negotiate appears from the outset to be subject to serious restrictions and set in a context rather different from what the trade unions had been expecting. Georges Jacobs, the President of UNICE, in fact stated that "*in many Member States, temporary work is still subject to outmoded restrictions. The employers are prepared to discuss ways and means of avoiding unfair discrimination with regard to temporary workers. However, if the trade unions are serious about setting Europe on the path to full employment, they must recognise that temporary work is part and parcel of having properly functioning labour markets and of finding solutions to Europe's problems. Promoting free use of temporary work throughout Europe would be an essential contribution by the social partners to efforts aimed at increasing employment rates (…)*". This is the same kind of give and take as was displayed on the issue of part-time working and fixed-term contracts, which the employers' side wanted to see developed, while the trade unions demanded regulation of these atypical forms of work.

- **Deadlock and failure**

These negotiations, which began in June 2000, were supposed to last nine months, but major difficulties quickly emerged. The main one, without any doubt, was the issue of employment conditions for temporary workers, since the ETUC – unlike UNICE – considers it essential to ensure equal treatment for the employees concerned on the part of the user company. In March 2001, *i.e.* almost at the end of the planned negotiating period, this question produced a warning shot from

the ETUC's General Secretary, Emilio Gabaglio: "*Negotiations between the social partners on the issue of temporary work, with a view to producing a European framework agreement, have reached a critical point, on the verge of breakdown, because of deadlock on the part of the employers. As in any agreement, compromises are necessary, but the European employers cannot expect the ETUC to give up on the establishment of rules which can form a framework for the use of temporary work while avoiding discrimination and abuse*". And he went on to warn that if the deadlock was maintained, the ETUC would break off the negotiations. A few days later, on 15 March, the ETUC negotiating delegation concluded that it was no longer possible to continue negotiating, and on 21 and 22 March the ETUC Executive Committee decided to break off negotiations.

This is the second failure of the European social dialogue since the entry into force of the Maastricht Treaty and its Social Chapter, following the breakdown in 1998, when UNICE refused to negotiate on the question of information and consultation of workers in national undertakings (an issue which has since been dealt with in a Directive adopted at the end of 2001; cf. section 3.2).

The two main reasons for the deadlock relate to equal treatment for temporary workers and the conditions for the use of temporary work by employers. On the question of equal treatment, the ETUC, as we have seen above, considers that the user undertaking has to be recognised as the first point of reference for the purposes of comparability on fundamental conditions of employment (wages, working time, health and safety). It backs up this point of view by stressing that this principle has already been accepted in other negotiations involving the social partners on atypical forms of work (part-time work and fixed-term contracts), and adds that it is already in force in the majority of countries. The ETUC therefore considers that the lack of any margin for manoeuvre on the part of UNICE means that the European employers' side is responsible for this deadlock.

UNICE, for its part, has condemned the ETUC's "inflexibility". In the words of its President, "*the ETUC's insistence that a comparable worker in the user undertaking should be the first point of reference is not justified. In some countries, temporary workers have an open-ended contract of employment with the agency, and are*

paid by their employer even if they are not sent to a user firm. To impose on them a comparison with an employee of the user firm would be totally unjustified". This view was shared by the European Union of Crafts, Trades and Small and Medium-sized Enterprises (UEAPME), which was unable to accept the definition of a temporary worker proposed by the ETUC.

The trade union organisation, however, suggests a second reason for the failure of negotiations: this relates to the conditions for the use of temporary work, and in particular the employers' refusal to recognise the need for preventive measures against abuse in the way this form of work is handled. Yet a similar principle had been accepted in the previous agreement on fixed-term contracts. Faced with this double deadlock, the trade unions feared that temporary workers would be used as second-rank employees by firms, which would try to make them do similar work to the "real" workers, but at less cost and with less stringent legal and regulatory restrictions.

Following the breakdown of negotiations, the ETUC Executive Committee called on the European Commission to propose a Directive aimed at regulating temporary work, and the Commissioner, Anna Diamantopoulou, undertook to do this (European Commission, 2002). The whole issue can now be expected to follow the conventional European legislative procedure, which means that the situation is now back where it was some ten years ago. All will now depend on whether the political balance of forces within Member States will be such as to permit a favourable outcome.

It is worth noting that one of the consequences of this breakdown in negotiations has been the initiation of sectoral negotiations on this subject (cf. section 1.1.2).

1.1.2 Start of negotiations on a non-binding agreement on teleworking

Teleworking was the second subject of negotiation to be tackled by the social partners in 2001. A teleworker can be defined as an employee whose work is done at a distance, outside the firm's premises or the place where the work is due, by means of information and data transmission technologies, most notably the internet. There is no need

to spell out here the extent to which this form of work is likely to develop, hand in hand with the vigorous development of the internet and the information society. We are almost certainly only at the very beginning of a period of large-scale expansion in this new, atypical form of working.

According to a survey of working conditions produced by the European Foundation for the Improvement of Living and Working Conditions, teleworking from home is already far from being an isolated phenomenon in the European Union. "*One self-employed person in ten and 4% of all employees telework for at least one-quarter of their time. Teleworking on a full-time basis is carried out by just over 1% of the working population (1.5 million). Occasional teleworking is more widespread (5% of workers), particularly among northern European countries. As for the categories of teleworkers, the proportion of managers (15%) and professionals (12%) who telework for at least one-quarter of their time is noticeably higher than the average (5%)*" ([3]).

It should be noted that the development of teleworking contains within it a substantial challenge to the trade union organisations, who may fear the unravelling of industrial relations systems and a loosening of the bonds of solidarity among teleworkers, which in principle is what underlies labour relations. (There are of course better prospects for teleworking in the tertiary than in the secondary sector.) ([4]).

These few points show just how much is at stake in the European social dialogue on this subject. At a sectoral level, two major agreements have been signed in the fields of telecommunications and commerce (cf. section 2.1). At a cross-sectoral level, the social partners got to grips with the subject in 2001.

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3 "La recherche en chiffres: le télétravail en Europe", Newsletter, No.12, December 2001.

4 For analyses of this subject, see *inter alia* the following websites: http://www.telework-mirti.org/ see also http://www.ftu-namur.org/publications/index.html.

- **Background**

On the European Commission side, research was carried out as early as 1996, in collaboration with the European Foundation for the Improvement of Living and Working Conditions (see especially European Commission, 1997). This highlighted the fact that there was no legal definition of a teleworker in any of the Member States, nor was there any specific legislation designed to protect the teleworker. As the Commission noted, "*Some forms of telework are subject to general laws, others to specific regulations governing homework or the self-employed. In a few cases collective agreements have been concluded and in others, individual agreements, both written and informal, deal with a number of telework issues*" (European Commission, 1997: 14). It was in this context, vague as it was, that the Commission undertook to begin consultations with the social partners on new forms of work organisation, including teleworking.

In February 1998, at a symposium on "Industrial relations in the information society", the European Trade Union Confederation had launched an appeal for the Commission to present a draft Directive on teleworking, for a European Observatory to be set up to monitor teleworking agreements, and for a transnational instrument to be developed for the information and consultation of trade unions and employees working by means of this technique ([5]).

On 9 June 1999 a seminar was held to enable the social partners to develop an initial joint approach to the challenges of teleworking. Then on 26 June 2000 the Commission initiated the first phase of consultation with the social partners on the question of modernising the organisation of work, including in particular teleworking. The second phase was initiated on 16 March 2001. In the case of teleworking, which is at the very heart of this modernisation process, the aim in the Commission's view was to "provide a framework within which it can be practised without limiting its development". To this end, it submitted to the social partners a series of general principles which, in its view,

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[5] *Agence Europe*, No.7153, 5 February1998.

would provide a suitable framework for teleworking to take place. The list covered the following points:

- right to return voluntarily to work at the company's premises,
- guaranteeing the maintenance of employee status,
- guaranteeing equal treatment,
- information to be supplied to the teleworker,
- costs to be assumed by the employer,
- guaranteeing appropriate training,
- health and safety protection,
- working time,
- protection of privacy and of personal data,
- maintaining contact with firms,
- collective rights of teleworkers,
- access to telework.

On the basis of this, the Commission invited the social partners to let it have an opinion or a recommendation on the content of the proposal envisaged, or to inform it of their willingness to become directly involved themselves in a process of negotiation focusing on this content.

- **UNICE's appeal**

Meanwhile UNICE had already jumped the gun by issuing an appeal to the European Trade Union Confederation on 8 March 2001, *i.e.* a week before the Commission's proposal, with the aim of negotiating an agreement on teleworking without further delay. "*There is no reason to wait for the Commission's second consultation*", in the view of the employers' organisation, who were clearly in a hurry. In marshalling their arguments, they based themselves on the situation prevailing in the United States: "*Almost 7 million European employees regularly work at a distance from their employers' premises, using information technology. They represent approximately 4.5% of the workforce, compared with nearly 13% in the USA*".

However, in an implicit reference to the Lisbon summit (March 2000), which sought to put Europe on the path to becoming "the most competitive knowledge-based economy in the world", UNICE immediately declared that, in its view, "telework is a way of working, not a legal status". In other words, it did not intend to seek a framework agreement among the social partners which could then be translated into a Directive (Articles 138-139, EC Treaty). According to the UNICE President, Georges Jacobs, distance working "*is not a subject for regulation at European level, but we think that voluntary negotiations at European level may favour the development of teleworking in Europe*".

The employers' position immediately appears difficult to reconcile with the points made by the Commission. How can one, on the one hand, not regulate (as UNICE wants), but on the other hand guarantee (as the Commission would wish) equal treatment for teleworkers, their collective rights, assumption of their costs, training, information etc.? UNICE's haste to negotiate an agreement which would not be legally binding, and the strange coincidence of timing, probably gives some indication of the state of mind in which the employers' side envisages the social dialogue taking place on this issue.

The ETUC, in a press release, recalled that for its part it wanted a European regulatory framework (based on legislation or negotiation). In Gabaglio's view, "*the timing [of the UNICE letter], the nature of the proposed negotiation, the status of the agreement and its implementation at national level raise a number of questions and call for clarification*". Before becoming involved in any negotiations, the ETUC therefore asked for guarantees that any voluntary framework agreement would actually be implemented at national level. Admittedly, in UNICE's view, any agreement would incorporate a commitment on the part of the members of the signatory organisations to ensure that the European agreement was carried out in the Member States, in accordance with national traditions. But the ETUC feared that "national traditions" might be seen to include the attitude of members of UNICE who would refuse to implement a European framework agreement on a basis of parity. For this reason it requested a preliminary agreement on procedure between UNICE, CEEP and the ETUC in order to "*define this voluntary negotiation, the nature*

of the European framework agreement which may result from it, and the responsibilities of our member organisations to ensure its implementation".

Despite these fundamental differences, negotiations between the social partners got under way on 12 October 2001. It is worth recalling that Article 139 of the EC Treaty provides the possibility, in paragraph 2, for the social partners to decide to implement agreements concluded at Community level, and that this can be done either in accordance with the procedures and practices specific to the social partners and the Member States, or by a decision of the Council acting on a proposal from the Commission (cf. box below).

Negotiating a voluntary framework agreement appears to be something of a test case, because up until now the social partners have always limited themselves to framework agreements which were then translated into Directives by the Council (parental leave, part-time working, fixed-term contracts). This change of tack proposed by the employers is in keeping with the spirit of the times: "soft law" and open methods of co-ordination are currently enjoying a favourable wind, especially in the area of social policy. Whether this "soft law" will progressively replace the legislative approach (and not merely supplement it, as some optimistic observers have suggested) is therefore more than ever a topical issue.

Article 139

1. Should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements.
2. Agreements concluded at Community level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 137, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission.

The Council shall act by qualified majority, except where the agreement in question contains one or more provisions relating to one of the areas referred to in Article 137(3), in which case it shall act unanimously.

1.2 The social partners and the future of Europe

Nearly ten years after the entry into force of the Maastricht Treaty and the implementation of the European social dialogue, with the possibility of framework agreements resulting from it, the time has come to take stock. Although one might have hoped, until the end of the 1990s, that this dialogue would be able to breathe fresh life into the idea of a Social Europe, we find that the rush of agreements concluded (or about to be concluded) on parental leave, fixed-term contract work and part-time working, instead of breathing in fresh life, has left us breathless. Admittedly the new subjects for negotiation – especially temporary work and teleworking – are technically and politically more complex; but it remains the case that recent developments in negotiations between the social partners highlight a constant factor: the employers' extreme reluctance to accept binding legislative or negotiated instruments, and their persistent desire to replace them with voluntary agreements or codes of conduct, whose implementation cannot be monitored by the courts.

This evolution of events is clearly lagging behind the political guidelines which were written into the Maastricht Treaty. The authors of the Treaty sought to give the social partners a means of participating directly in drafting the core of social legislation in the European Union. To some extent, politics was taking a step backwards in relation to the social players, who were expected to play a more significant role. What we find, nearly ten years later, is that the employers themselves are taking a step backwards, and the European Trade Union Confederation finds itself out on its own. Admittedly UNICE showed itself to be a skilful operator by taking the initiative in negotiations on teleworking. But as we have seen above, the "astonishing" coincidences of timing, and the limited scope of any agreement, seem to confirm the new direction which UNICE is seeking to impose on the cross-sectoral social dialogue.

Against this difficult background, the social partners nonetheless tried to provide a joint contribution to the European summit at Laeken in December 2001. This text was in the forefront of the discussions at the Social Affairs summit held on 13 December. The social partners also

announced that they would, under the Danish Presidency, examine in more detail the lines of thinking identified in their first contribution, with a view to making concrete proposals for the Intergovernmental Conference in 2004, which has been charged with revising the Treaties (6). We shall now look in more detail at the content of this initial contribution.

1.2.1 Contribution from the social partners

The joint declaration by the social partners for the Laeken Summit comprises four broad chapters which cover the following areas (ETUC *et al.*, 2001):

- the specific role of the social partners;
- the distinction between bipartite social dialogue and tripartite concertation;
- the need for tripartite concertation to be better articulated around the different aspects of the Lisbon strategy;
- their wish to develop a work programme for a more autonomous social dialogue.

We shall rapidly review the first two points, which are mainly concerned with clarifying roles and processes (for more detailed information on these points, see the article by Anne Dufresne). In re-defining their roles, the social partners refer to the Commission's White Paper on European Governance; they ask for full account to be taken "*of the specificities of the social dialogue*", and in particular for the social partners to be involved as observers in the Convention set up to reflect on the future of Europe (cf. article by C. Barbier). Secondly, they seek to distinguish bipartite social dialogue between the social partners themselves from tripartite concertation (exchanges between the social partners and the European authorities), especially with a view to the enlargement of Europe to include Eastern European countries, "*where*

6 For the record, it was the contribution of the social partners to the Treaty of Maastricht in 1991 which made it possible for the Social Chapter to be included in that Treaty and for "social negotiations" to develop.

confusion between tripartite concertation and bipartite social dialogue is undermining development of autonomous social dialogue".

Points 3 and 4 seek to be both more innovative and more forward-looking. On point 3: taking account of the development of new Community methods for policy action (the European employment strategy, structural reforms, the Cologne process, and in particular, the establishment of "spring European Councils"), the social partners express regret that the Standing Committee on Employment (SCE) can no longer, in its present form, meet the need for coherence and synergy which the various processes require. For this reason they propose replacing the SCE with a "tripartite concertation committee for growth and employment", which would be a forum for concertation between the social partners and the public authorities on the overall European strategy defined in Lisbon. This committee, once set up, would be the place where all the major axes of economic policy, the employment guidelines, structural reforms, and the whole of the Community's economic and social strategy could be discussed together. It would meet ahead of the spring European Council, and thus give fresh impetus to the macro-economic dialogue (see A. Dufresne).

As for point 4, which is more forward-looking, it envisages the development of a work programme for a more autonomous social dialogue. The ETUC, UNICE and CEEP state that they wish to reflect jointly on the best way of developing an autonomous social dialogue and of organising their work more effectively within a work programme defined by a social dialogue summit. Once again, this desire on their part is set in the context of making a better contribution to the European employment strategy, and of preparing for enlargement of the European Union. (The social partners also call for technical assistance to be given to the social partners in the applicant countries, so as to encourage the development of strong, autonomous trade union and employers' organisations which can play a full part in the European social dialogue).

The multi-annual work programme should encompass not only the "conventional" European framework agreements, but also a spectrum

of instruments following the Open Method of Co-ordination: opinions, recommendations, declarations, exchanges of experience, awareness-raising campaigns, open debates etc. As the signatories to the contribution emphasise, the implementation of such a programme would pre-suppose regular social dialogue meetings and/or summits taking place.

1.2.2 Article 139 and "soft law"

What we find, therefore, is that the joint contribution essentially reveals a shared willingness to improve the structure of dialogue and concertation (in the broad sense), and to adapt them to recent developments in European methods of working. The desired replacement of the Standing Committee on Employment would take place within a more ambitious prospect of extended concertation across all economic and social policies. The new committee would have to synchronise its meetings with the spring European Councils, so as to give its work more political impact. This line of thinking fits in with the desire to achieve better economic governance, appropriate for the completion of economic and monetary union.

Defining a multi-annual work programme for social dialogue could also make a very useful contribution to developing a more forward-looking attitude. Today, framework agreements sometimes appear to have been negotiated without any overall plan (apart from the "atypical work" trio), lacking any guidelines, dependent on the margin of manoeuvre open to one or other of the social partners (often the employers, as it happens). Programming, in this respect, would undeniably represent a step forward.

From both these points of view, the joint contribution sets out ways in which the functioning of concertation and social dialogue can be improved by changes in the forums for concertation and by adopting consistent programme frames into which the content of social dialogue can fit. But as a counterpart to this, we must also emphasise the increasing tendency to widen the range of instruments, especially non-binding instruments, of social dialogue. Should we not see in this tendency, which clearly reflects UNICE's position, a progressive intrusion

of "soft law", which is so much in vogue in the current working methods of the European institutions? Opinions, recommendations, declarations, exchanges of experience, awareness-raising campaigns and open debates may certainly lead to progress in European labour relations, but given that these are non-binding instruments, not subject to scrutiny by the courts, there is the risk that this panoply of "good practice" may progressively replace the establishment of a legislative core. Assessments of the efficacy of "soft law" are by no means unanimous. Some see it as offering opportunities for progress in areas which would otherwise remain off-limits. Others see in it a drift towards a Europe of "exchanges of experience", from which constraints of a political (no legislation), democratic (no parliamentary scrutiny) and judicial nature (no possibility of sanctions by the European Court of Justice if commitments are not respected) have been removed, forcing Europe to rely only on the goodwill of public or private operators.

Two factors among others lend support to this hypothesis. The Commission, in January 2002, initiated a consultation of the social partners based on Article 138 §2 on the subject of managing the social consequences of corporate restructuring, but insisted that "it is important to note that this Decision is not aimed at harmonising rules governing the social aspects of restructuring but at promoting the development and dissemination of good practice" [7]. The other indication is found in the conclusions of the high-level group on the future of labour relations, issued in March 2002. The group proposes that the social partners set up their own process, drawing on the Open Method of Co-ordination and adapting it to the specific features of labour relations. They also recommend that appropriate indicators should be defined to measure progress achieved in respect of the quality of labour relations. "Open Method of Co-ordination", "indicators"… Will the year 2002 see Article 139 of the Treaty being contaminated by "soft law"?

7 IP/02/61 of 15 January 2002.

2. Principal developments in the sectoral social dialogue

In this second part, we shall examine the (fairly dynamic) development of the social dialogue at sectoral level. Four texts in particular have been the subject of agreement between employers and trade unions, and these will form the subject of our analysis:

- two agreements on the content of a Directive on teleworking in the telecommunications sector (28 February) and in the commercial sector (28 May);
- a joint position within the temporary work agencies sector on the objectives for a future Directive (8 October);
- a code of conduct in the personal services sector (28 June).

2.1 Agreements on teleworking in the telecommunications and commercial sectors

2.1.1 Telecommunications sector

Agreement was reached on 7 February 2001 within the "Telecommunications" sectoral committee of the European social dialogue, on defining guidelines for teleworking in Europe. Like the agreement concluded in April in the commercial sector, this one is based on a recognition of the rapid changes taking place in the economic environment and the development of new technologies, and of the modernisation of working practices which, in the view of the social partners in this sector, ought to result from this. They emphasise that: "*Telework constitutes a form of work organisation whose increasing use is a clear sign of a trend towards a more flexible and more mobile workplace. Telework is particularly important for the telecommunications companies, for whose products and services it provides an important field of application*".

Within this context, guiding principles were defined to enable this form of working to be developed in European telecommunications undertakings. These principles have been submitted for voluntary approval to the undertakings concerned. They relate to employees who, using information and communications technology, carry out all of their work at home, or regularly perform some work at home whilst the remaining part is performed on the company's premises.

This agreement is both very complete and very precise. The telecommunications sector, which of course is the one most directly affected by the development of teleworking, seems keen to set an example by defining guidelines which, for the most part, are devoid of all ambiguity. This move can be seen as an extension of the Lisbon summit (March 2000). The fields covered are immense: equal treatment, trade union rights, health and safety, industrial relations, financing of equipment, the psychological welfare of the teleworker (avoiding exclusion and isolation) etc. These are ambitious guidelines, and the sectoral committee of the social dialogue will monitor their adoption in 2002. There can be no doubt that the objective of the signatories is also to serve as a textbook example to other sectors in the development of the social dialogue.

2.1.2 Commercial sector

On 26 April 2001, the European social partners in the commercial sector likewise signed a sectoral agreement on guidelines for teleworking. This is an important agreement; commerce employs some 23 million workers in the EU, or 16% of the total workforce. It is also the largest sector of employment in the EU, and is represented on the employers' side by EuroCommerce, and on the workers' side by Uni-Europa. Teleworking here is defined as covering all tasks comparable to those which could be carried out by an employee at the workplace but which may also be done at a distance, using computer technology, in most cases connected to the information network of the company. The agreement concluded in this sector does not cover self-employed workers.

The guidelines in this agreement are designed to regulate teleworking by means of collective agreements at both national and company level. They contain six major points: the introduction of teleworking, employment conditions, holidays and absence, tasks and confidentiality, workplace and equipment, and finally participation in a trade union organisation. The most sensitive issues in teleworking are addressed: trade union rights, health and safety, confidentiality of data, returning to work at the company's premises, financing of equipment etc. This agreement shows that the social partners in the commercial sector share

a fairly similar vision of the way in which this form of employment should develop, even though some imprecise or ambiguous forms of wording may still persist ("efforts should be made" to make it possible for a worker to return to work at the company's premises when the teleworker expresses a wish to do so…). At any rate it shows that the social partners are capable of agreeing on a number of provisions designed to respect the way in which teleworking is to develop.

2.2 Joint position in the temporary work agencies sector on objectives for a future Directive

The breakdown in cross-sectoral negotiations on temporary work in May 2001 (see above) gave fresh impetus to the social dialogue between employers and trade unions in the temporary work sector. Euro-CIETT (European committee of the International Confederation of Temporary Work Businesses) and Uni-Europa (the European regional organisation of Union Network International, which brings together trade unions in the service sector) negotiated within the framework of the "Temporary work" sectoral committee of the European social dialogue, with the aim of providing a joint contribution to the work being done by the European Commission – which had committed itself to producing a draft Directive on temporary work.

Euro-CIETT and Uni-Europa signed an initial joint declaration on 3 July 2001, following the breakdown of cross-sectoral negotiations. In it, they expressed regret for this breakdown and gave a positive welcome to the Commission's decision to present a draft Directive on the subject. At the same time, the social players in the sector asked the Commission to take account of their opinions and recommendations. The second declaration, signed on 8 October, took up precisely those objectives on which the two organisations had reached agreement. This declaration included a list of thirteen points which, in the opinion of the signatories, should form the basis for future draft legislation. These objectives sought in broad terms to achieve a balance between protecting temporary workers and strengthening the role of temporary work agencies in Europe.

It is particularly worth noting the points relating to trade union rights for temporary workers, a restriction on the use of temporary workers in the case of a strike in the user firm, and the question of equal treatment, which does not seem to be very clearly dealt with. On these important points, as on access to training, for example, the social partners in the sector managed to find common ground which their cross-sectoral colleagues had failed to find. We must however emphasise the lack of clear markers on the duration and renewal of temporary contracts, and the circumstances in which user firms may resort to temporary work.

According to the Regional Secretary of UNI-Europa, Bernadette Tesch-Ségol, this joint declaration represents a great success because it "*greatly strengthens [the rights of temporary workers] and should offer a greater number of unemployed people the opportunity to re-enter the labour market. The agreement recognises the fact that the use of temporary work is one way of improving the possibilities of finding employment and of becoming integrated into the labour market, especially for specific and/or disadvantaged groups, most notably through training and development*". It remains to be seen, of course, how much of this useful contribution the Commission will retain, and what the Council and the European Parliament will then do with it.

2.3 Code of conduct in the personal services sector

Seven general principles and ten guidelines: these are the core elements in a code of conduct adopted on 26 June 2001 by the social partners in the personal services sector (CIC-Europe for the employers, and UNI-Europa Hair and Beauty for the trade unions). The code is directed at jobs in hairdressing, an activity which employs a million people in around 400,000 salons. It covers a wide range of subjects (working conditions, fair rates of pay, profits, lifelong learning and training etc.) and sets out principles relating to the information and consultation of employees as well as the means of combating clandestine and undeclared employment. As a code of conduct, these principles and guidelines do not have the force of law. Nevertheless, the European social partners have undertaken to recommend to their national members that they be applied in day-to-day practice.

The code of conduct is based on seven general principles and ten guidelines. The principles relate to the success of the firm, the working environment, profits, "fair" wages, working conditions, and lifelong training. The guidelines, for their part, relate to the following:

1) Co-operation and mutual understanding
2) Equal treatment
3) A ban on employing under-age workers
4) Wages and benefits
5) Health and safety
6) Family life
7) Employability
8) Combating unfair dismissal
9) Freedom of association and collective bargaining
10) Information and consultation.

3. Legislation

Under the Swedish and Belgian presidencies, a number of legislative dossiers appeared ripe for political approval. These dossiers – especially those on involving workers in a European limited company and on information/consultation in national undertakings – represent progress in defining a "European social model", in that they aim to ensure greater involvement of workers, and the organisations who represent them, in the social management of firms.

3.1 Involvement of workers in the European company

On 8 October 2001 – after 31 long years of negotiations, deadlock and finally breakthrough – the Council of Ministers of Employment and Social Affairs formally adopted the Regulation concerning the Statute for a European company, and the Directive relating to the involvement of workers. It will be recalled that a political compromise had been reached at the European Summit in Nice in December 2000, and the "Employment and Social Affairs" Council which followed (20 December) had come out in favour of adopting both texts. The fact

that it took so long to reach agreement on this issue was essentially due to the social component of the European limited company: the question of worker involvement in fact held up the adoption of the Regulation for many years. Following the breakthrough in December 2000, the European Parliament had to be consulted once again (4 September 2001) before the texts could finally be adopted, because of the changes made since it was last consulted.

A few dates…

The first proposal for a Regulation concerning a Statute for a European company was submitted to the Council by the Commission in 1970. It was amended in 1975.

Ten years later, in June 1985, the Commission's White Paper on completing the internal market was approved by the European Council in Milan; this document committed the Council to adopt the Statute of the SE (Societas Europaea – European company) by 1992. The Brussels European Council in 1987 once again expressed the hope that such a Statute would be put in place quickly.

On 25 August 1989 a new proposed Regulation was drafted by the Commission, and amended on 6 May 1991. The deadlock persisted for a long time, but it was on the basis of this amended text that agreement was finally reached.

3.1.1 The SE Regulation (Regulation EC No.2157/2001)

The Statute of a *Societas Europaea* (SE) allows undertakings which so desire to constitute themselves, throughout the territory of the European Union, in the form of a limited-liability company, thus enabling them to operate at EU level subject to Community legislation which is directly applicable in all Member States. This new company structure, with several establishments, is intended to facilitate the transmission and implementation of strategic decisions (Council of the European Union, 2001a).

The Regulation of 8 October 2001 enables firms in the Member States to constitute themselves as an SE by means of cross-border mergers. They may also transfer their company headquarters to another Member State without having to be dissolved in their State of origin before being re-constituted in the host State. In fiscal terms, SEs will be treated like any other transnational company. Lastly, the SE may also be a holding company, a joint subsidiary or the result of a transformation in a national limited-liability company which has proved its European credentials by having a subsidiary in another Member State for two years.

3.1.2 Directive on "Involvement of employees" (Directive 2001/86/EC)

The involvement of workers in a European company is defined by a set of rules that take the form of a Directive (Council of the European Union, 2001b). The difficulty has been to take account of the diversity of national rules and practices concerning the way in which employee representatives are involved in the decision-making process within the firm. The idea of harmonising the principles of worker participation was not pursued. On the other hand, guarantees were given that the creation of a European company would not mean the disappearance or weakening of the system of worker involvement which pre-dated the European company. We shall now look in more detail at the content of this Directive.

The Directive stipulates first of all that when the managers of companies draw up a plan for the establishment of an SE (according to the conditions laid down in the Regulation, see above), they shall take the necessary steps to start negotiations with the representatives of the companies' employees on arrangements for the involvement of employees in the future SE.

To this end a "special negotiating body" is to be set up, representing the employees of the companies and/or subsidiaries concerned, in accordance with fixed rules. This body is called upon to determine, through negotiation with the competent organs of the participating companies (management representatives), the arrangements for

involvement of employees within the SE. It may however decide not to negotiate, and to rely simply on the rules on information and consultation of employees in force in the Member States.

If negotiations are started, the "special body" and the competent organ of the SE are called upon to determine the composition of the representative body which will negotiate with the SE in connection with the arrangements for information and consultation (in a sense the Works Council of the SE). They must also determine other issues such as the frequency of meetings of this body, the financial resources to be allocated to it, information and consultation procedures (which might supersede the setting-up of the body) etc.

The Directive also contains provisions on protection of employees' representatives, and calls on Member States to provide for administrative or legal measures in the event of failure to comply with the Directive. An important point is that the Directive cannot adversely affect the existing rights of employees with regard to involvement, as provided for by national legislation and/or practice.

The standard rules on information and consultation (*i.e.* the minimum set of provisions which must be made in cases where no agreement has been concluded) are defined in an annex to the Directive. They provide, among other things, that at least one meeting per year shall be held between the representative body and management representatives, and that regular reports shall be drawn up on the progress of the business of the SE and its prospects. Meetings should allow for discussion on the structure of the SE, its economic and financial situation, the probable development of the business, production and sales, the situation and probable trend of employment, investments, substantial changes concerning the organisation of the company, the introduction of new working methods or production processes, transfers of production, mergers, cutbacks or closures of undertakings or establishments, and collective redundancies.

In cases of relocation, transfer, closure of undertakings or collective redundancies, the representative body "*shall have the right to be informed*" and may ask for a meeting with the competent body within the SE or

any other level of management, "*so as to be informed and consulted on measures significantly affecting employees' interests*".

With regard to the more specific question of employee participation in the administrative bodies of the SE, the most sensitive issue and the one which caused the most political deadlock, it is to be organised according to rules which vary according to how the SE was set up:

- If the SE is the result of a merger, there must be provision for employee participation if 25% of the total number of employees in all the participating companies enjoyed the right of participation (before the merger). However, the Nice agreement allows Member States not to transpose this provision into national law, while retaining the right to register the SE concerned.
- If the SE has been established by transformation, employee participation in the company's administrative bodies continues to apply in the same way as before the transformation.
- If the SE has been established by creating a holding company or setting up a subsidiary, employee participation has to be organised if a majority of the companies' employees enjoyed the right of participation in the administrative bodies of their company.

Member States have a period of three years (until 8 October 2004) to comply with the Directive, and the Commission is to carry out a general review of its application by October 2007 at the latest.

3.2 Information and consultation of employees in national undertakings

Each EU country has its own legislation governing the setting-up of works councils. These councils, broadly speaking, are designed to provide information to employees and to trade union organisations about the financial state of the company, the prospects for employment, investments etc. However, news reports on social developments around Europe remind us, at regular intervals, that national legislation does not always prevent decisions affecting workers from being made and publicised without adequate procedures having been put in place. This was one of the main reasons why the European Commission proposed

to the Council and the European Parliament that these gaps should be plugged at Community level.

The legislative process on information and consultation of workers in national undertakings got underway on 11 November 1998, with a proposal for a Directive from the Commission (European Commission, 1998 and 2001). This is an extension of the 1994 Directive on works councils for companies with a European dimension. The aim is to establish a general framework for informing and consulting employees, including in national firms, smaller firms and those which do not necessarily have subsidiaries in any other European countries.

For the record, let us recall that the legislative process was initiated following the employers' refusal to negotiate a framework agreement on this subject in the context of the European social dialogue. In June 1997 the Commission did in fact consult the social partners for the first time on the usefulness of a European initiative in this field. On 5 November 1997 it suggested to the social partners that they draw up an agreement among themselves on this issue. As early as February 1998, the ETUC indicated its support for such an initiative, followed in March by the CEEP. UNICE, however, gave a categorical refusal on 16 October 1998, thus blocking the way to any negotiated agreement.

As it was empowered to do under the Treaty, the Commission then decided to take the initiative and begin the legislative procedure. On 11 November 1998 it adopted a proposal for a Directive establishing a general framework for improving information and consultation rights of employees in the European Community. For more than two years this proposal was "kept on file" in the drawers of the Council of Ministers. Not until the end of the year 2000, under the French Presidency, and following the agreement on the Statute for a European company at the European Council in Nice (see previous article) did this file re-emerge, this time with the serious prospect of being adopted.

3.2.1 Content of the Directive

This Directive resulted from a conciliation agreement between the Council and the European Parliament in mid-December 2001. It has

been formally adopted in 2002, and must be in force in the Member States within three years at the latest (2005).

Depending on the choice made by Member States, the Directive is to apply to undertakings with at least 50 employees in one Member State, or establishments with at least 20 employees. It is for the Member States to define the terms under which the right to information and consultation is exercised, but as a minimum, this right must cover:

- information on the recent as well as the probable development of the undertaking's activities and its economic and financial situation;
- information and consultation on the situation, structure and probable development of employment within the undertaking and on any anticipatory measures envisaged, especially in the event of a threat to employment;
- information and consultation on decisions likely to lead to significant changes in work organisation or in contractual relations.

The text makes it clear that the information must be provided "*at the appropriate time and in the appropriate manner, so as to allow the employees' representatives to examine the matter properly and, where appropriate, to prepare for consultation*". As for consultation, it too must observe certain conditions: it must take place at an appropriate time and using appropriate means, at the relevant management and representation level, and on the basis of relevant information provided by the employer and the opinion which the employees' representatives are entitled to formulate. It must also enable the employees' representatives to meet the employer and obtain a reasoned response to any opinion they have formulated; finally it must seek to reach an agreement on the relevant decisions which come under the employer's prerogative (work organisation, contracts of employment).

The Directive allows Member States to give the social partners the choice of defining freely, by agreement, the procedures for informing and consulting employees (while of course observing the minimum conditions set out above). Finally, it calls upon Member States to provide "effective, proportionate and dissuasive" penalties for serious infringements of its provisions (absence of information or withholding

of important information). If an employer is in serious breach of his information and consultation obligations, and takes decisions which have substantial consequences in terms of termination of contracts or employment relations, the Member States must provide for these decisions to have no legal effect on the employment contracts or employment relationships of the employees affected. This non-production of legal effects "*will continue until such time as the employer has fulfilled his obligations or, if this is no longer possible, adequate redress has been established*", under arrangements and procedures to be determined.

So the three key points in this Directive are the threshold for the undertakings concerned (markedly less than the figure of 100 workers originally envisaged), the fact that the social partners are given an important place in the implementation of the legislation, and finally the dissuasive measures in terms of sanctions in cases where employers fail to meet their obligations (to the extent of depriving the decisions concerned of any legal effect).

3.3 Political agreement on protection of employees in the event of insolvency of their employer

A Directive adopted in 1980 seeks to ensure protection for European workers in the event of their employer's insolvency (Council of the European Communities, 1980). It provides that Member States will set up an institution responsible for guaranteeing that employees whose employers have become insolvent will receive settlement of their unpaid wage and salary claims. Subject to certain principles, Member States are free to decide how this institution will be organised, financed and operated.

For several years there has been talk of revising this Directive and altering some of its provisions. In 2000 the Commission consulted the social partners with a view to obtaining their opinions and respective positions. On 15 January 2001 the Commission gave the green light to this revision process by adopting a proposal for a Directive amending the 1980 Directive (European Commission, 2000). This initiative sought mainly to clarify the concept of insolvency, to alter the categories of paid employees covered, as well as simplifying provisions relating to the

period of validity of the guarantee, and strengthening the protection afforded to employees in transnational situations.

The aim therefore is to bring Community legislation into line with recent economic developments, in particular the completion of the internal market. It is also to take account of the settled case law of the Court of Justice and the way in which the law on insolvency has evolved. As the Commission notes, the amendments proposed are the only way to ensure that the provisions of the Directive can apply effectively in transnational insolvency situations – which is important at a time when firms are being restructured as they are at present.

Placed on the agenda of the Employment and Social Affairs Council, political agreement was reached on the proposal on 3 December 2001. The Fifteen were able to define the principles of a common position, which was to be adopted early in 2002 and then sent to the European Parliament under the co-decision procedure. It will be noted in particular that in the case of transnational insolvency situations, new provisions have been introduced which seek to determine explicitly which institution is responsible for paying wage and salary claims (*i.e.* that of the Member State on whose territory the employees concerned were actually working). Amongst other changes made, we must mention the way in which the scope of the Directive is further specified by limiting the possibility of exclusions, and the simplification of Articles 3 and 4 concerning the guarantee institutions.

3.4 Agreement between Parliament and Council on road transport drivers' hours

One last major dossier was the subject of a conciliation agreement between the Council and the European Parliament: that of drivers' hours in the road transport sector. On 17 December the two arms of the legislative authority reached agreement on the last remaining points in dispute between them. These related to the inclusion of self-employed drivers in the scope of the proposed Directive on the organisation of working time for persons professionally involved in mobile activities in the road transport sector.

Under the terms of this agreement, and in a particularly convoluted form of words, the Directive will apply to self-employed drivers four years after the date of implementation "*provided that the Report to be drawn up by the Commission two years before the expiry of this period of temporary exclusion does not reach the conclusion that the Directive shall not apply to self-employed drivers*" (8). This provision thus makes the achievement of social progress in this field dependent on the Commission's analyses and conclusions on conditions of competition, road safety, organisation of the transport sector etc.

While awaiting the conclusions of this report, it is worth pointing out that the Council and Parliament managed to specify and clarify the concepts of "working hours" and "self-employed driver", which is something of an achievement in itself (indeed, the more the definitions used are agreed and precise, the less leeway Member States will have for interpretation, which is often detrimental in this field).

Conclusions

The implementation of the social component of the Lisbon objectives is being carried out according to a working method (open co-ordination) and processes which are now infiltrating the whole field of social policy. However, in 2001, legislation still retained its place alongside the range of instruments available under the OMC. Several important Regulations and Directives were in fact adopted, or were the subject of political agreement: employee involvement in European companies, insolvency of employers, information and consultation, drivers' hours, and also, more unobtrusively, Directives on "scaffolding", "vibrations", "noise" etc. So it cannot be said that social Europe is turning into a "soft" Europe, depending exclusively on a sense of "social accountability" within firms.

On the other hand, it has to be recognised that the Community's social dialogue is stalled. The employers' refusal to negotiate in 1998 on information and consultation of workers cannot be seen as just an isolated accident. The positions of the cross-sectoral social partners on

8 Press release, No.15425/01 (Press 480), 17 December 2001.

temporary work appear to be irreconcilable. As for teleworking, although negotiations began in 2001, this was on a "voluntary" agreement, since UNICE refused to contemplate a framework agreement. Are we to conclude that the fresh impulse which the social dialogue received in 1991 has run its course? Or that the social dialogue is about to go off on a different tack, with the intrusion of "soft law"?

As noted in a previous edition of Social Developments in the EU (Degryse, 2000), one of the dangers for the European social dialogue is that its protagonists will be left to their own devices, in what will always be an unequal power relationship. While UNICE can achieve its objectives (less social regulation) simply by refusing to negotiate, or by proposing voluntary agreements, the ETUC can only achieving its objectives through constant political lobbying and the search for allies, so long as it is deprived of the one means of exerting pressure open to trade unions at national level: the strike notice. On this subject, progress in political, economic and social integration in Europe – especially following the completion of monetary union – is making it less and less easy to understand why there is no recognition of the right to carry out Europe-wide trade union action. The question deserves at least to be a subject for political debate in the context of institutional reform.

In their joint contribution to the Laeken summit, the social partners re-affirmed the importance they attach to the social dialogue. But we shall have to wait for their second contribution, planned for the Danish Presidency, before we can judge the specific proposals they will produce for the Intergovernmental Conference in 2004.

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