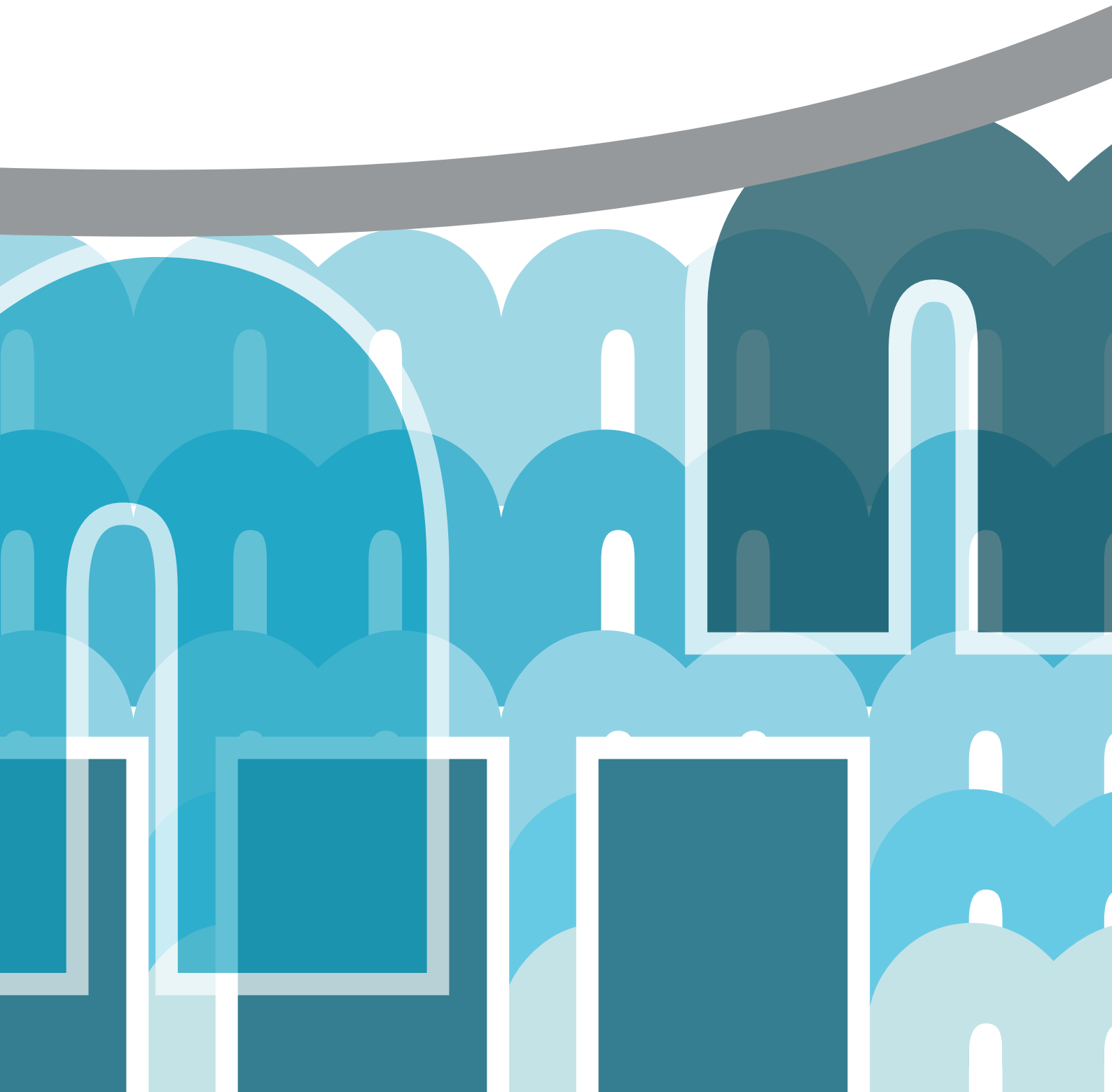
National and European social dialogue



National and European Social Dialogue

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About the project

Project WIM (Workers in management for sustainable management in Slovenia, Macedonia, Montenegro and Serbia) is aimed at promoting EU legislation on including employees at the national and transnational level and improving the knowledge of the situation in this area in partner countries. It paves the way for introducing the necessary measures and strengthening the knowledge of social partners as well as those responsible for taking action at the level of the company. This knowledge will help company representatives to include employees in the decision making process, resulting in a positive attitude toward change management in the region. The expected outcome of the project is an improved bipartite social dialogue at the sectoral and corporate level, which are in the partner countries still insufficiently developed.

The partners of the one-year project, co-financed by the European Union, were employer associations, trade unions, trade associations and their members. Project outcomes and awareness raising activities that have been carried out (research, preparing the publication, sharing experience at workshops, meetings, study visits and the final international conference as well as other activities at the national level) will enable social partners to participate in national debates about the modernisation of legislation on the involvement of workers. The project will contribute to better adjustment of legislation in the area of the involvement of workers and will have a multiplier effect on the government and social partners.

Aim of the project theme

Including workers in the decision making process represents not only an important communication tool but also a tool for ensuring legitimacy and transparency in adopting business decisions in the segment directly or indirectly impacting them. Trusting the management and their business decisions is of crucial importance since with appropriate inclusion of employees in the decision making process even unpleasant measures, such as the implementation of decisions, can positively impact the mood of the employees and their sense of belonging to the company. It is not the question of *what* but rather of *how*.

The social dialogue means the involvement of the employees in the decisions concerning them or addressed to them, whereby it needs to be emphasized that the role of the employees should not encroach upon the role or responsibility of the management, which is in turn responsible to the owners of the capital entrusted to them as well as to the employees, not forgetting also the damage and criminal liability of the management. The extent of the responsibility of the management requires a relatively free hand in adopting business decisions, ensuring, however, directly or indirectly the proper role of the employees. The law provides minimum frameworks for the role of workers' representatives, which may be upgraded depending on the needs of the society and concrete circumstances.

Needless to say, the law provides formal frameworks and the contents of the dialogue, but the pursuit of the contents or their implementation does not in itself constitute a quality dialogue. The quality of dialogue requires trust, trust requires time, therefore, a quality social dialogue needs time to be developed and cannot be simply prescribed. This should also be taken into account when transposing the EU acquis, which is rather loose, into national legislation. This looseness allows

member countries to create national legislation, which takes into account as much as possible the societal and cultural characteristics and the level of already established dialogue. As a rule, uncritical copying of other country systems leads to social dialogue on paper only, without the necessary contents and quality.

About the social dialogue

As far back as 1919, the International Labour Organisation (ILO) recognised the social dialogue as the tool for coordinating the demands for social justice,[1] and at the same time a tool for better competitiveness of companies and higher economic growth. In line with the definition of social dialogue as provided by ILO, social dialogue includes any kind of information exchange, joint consultations, collective bargaining and other mechanisms for joint decision making based on any kind of procedure taking place between the government, representatives of employees and employers, relating to topics of economic and social policies of mutual interest. The social dialogue is therefore not limited solely to the formal forms of mutual action, but includes also the non-formal forms of information exchange. From the very definition of the plurality of social dialogue stakeholders follows: it may take place as a dialogue between those representing the interest of the capital and those representing the interest of labour (bipartite dialogue) or with the inclusion of the state representing the public interest in the tripartite dialogue.

Social dialogue is not limited only to the levels of coordination of interests, but takes place at all levels: from the micro level, i.e. the level of individual employer, to the international level, where the widest possible consensus is sought with regard to the fundamental values and starting points for further regulations. There are of course several stages to this: the level of individual activity or set of activities, the national level, the level of the community of countries (for example the European social dialogue). And it is the European social dialogue, which has lately been attracting attention: primarily because of the harmonisation of minimum dialogue standards for the stakeholders, with the aim of achieving better corporate management of higher quality, and secondly, because of the single market where companies gain transnational dimension.

Labour relations are contractual relations, generally regulated in the most important parts by law setting down minimum standards. These must be observed by all employers and employees. In the process of mutual discussions, as one of the levers of social dialogue, the parties may agree to upgrade their respective rights or regulate the area not covered by law. The law defines separately those cases, where the rights of employees can be regulated so as to become less favourable, but these are exceptions and are to be applied restrictively. It should be mentioned that the proposer of a law allows the social partners a degree of participation in drafting laws from the area of labour and social law. The practice in EU member countries, however, varies. Some have not developed the mechanisms for representatives of employers and employees to participate in drafting the laws

[1] The concept of social justice is in itself empty of meaning but it can be filled with values, tradition, and history of individual concrete social environment. Regardless of its contextual emptiness, the content of social justice is a question of the distribution of social burdens between the individual social owners.

within the framework of a formal procedure. When social partners would like to influence legislation, the only means for them is to lobby,[2] which makes the process of lawmaking less transparent.

Social dialogue is in its basis the consequence of various interests of the stakeholders: employers and their interest groups and workers, who are joined in different ways. At the activity level, the interests of the employees are as a rule represented by the trade unions, which are formed on the basis of activities in the company where employees work, possibly also on the basis of other criteria, for example their occupation.

The social dialogue should therefore be defined as a process, in which different interest groups share information, negotiate, coordinate or adopt different views. It means equipping three seemingly opposite interest groups with methods of mutual tolerance and mutual trust with the purpose of achieving long-term prosperity. The intensity of social dialogue is also different with regard to its form, whereby mutual exchange of information and viewpoints represents the lowest form of such dialogue. The highest form is the formation of common positions or an agreement on a specific and relevant socio-economic circumstance, which may be the subject of social dialogue.

The three »contradictory« interest groups of the social dialogue are actually social partners. These are:

- state (representing »public interest«, and acting simultaneously as employer in the public sector)
- representatives of employers (interests of the capital)
- workers' representatives (interests of labour).

Despite the seemingly conflicting interests, all social partners are joined in the common goal of attaining social peace. With a view to achieving a balance between the different interests of the social dialogue parties, compromises are necessary, which imply re-weighting, assessing and classifying interests of each of the groups.

Effectiveness of social dialogue

As already stated, social dialogue is a process, in which different interest groups share information, negotiate, coordinate or adopt views. It means equipping three seemingly opposing interest groups with methods of mutual tolerance and mutual trust with the aim of achieving long-term prosperity. The intensity of social dialogue is also different with regard to its form, whereby mutual information exchange and viewpoints represent the lowest form of such dialogue. The highest form is the formation of common positions or an agreement about a specific and relevant socio-economic circumstance, which may be the subject of social dialogue.

Informing the opposite side in social dialogue does not generally lead to a common understanding and represents as such the lowest dialogue stage.[3] Finding common solutions, however, represents for both sides a reasonable compromise and as such an optimal solution. Formalised social dialogue

[2] According to the rules of individual countries

[3] Actually this is a »monologue«

does not only mean seeking acceptable compromises but also involving employees' representatives in the decision making processes. It is thus the involvement of the representatives of the interests of labour in the process of management – participation of workers in management. The basic premise is to ensure transparency in decision making and in the creation of sustainable decisions. Participation of workers in management that has developed in practice is therefore divided into two approaches: involvement of employees in supervisory and decision making bodies and participation of employees through their representative or elected body – the works council, which can participate in several ways: in line with the Directive[4] through the notification system or provision of information and through joint consultations on important decisions. Some national regulations[5] have upgraded these two forms of worker participation with co-decision making on the most important business matters, which have distinct and long-term consequences also for the employees.[6] The fundamental idea of workers' participation in management is the internalisation of business decisions: our decision is also your decision. Such integration of the will of the employees in decision making ensures sustainability, transparency and coordination of interests in adopted business decisions. All of this results in a significantly higher degree of social peace at the micro level and generally also in greater employee satisfaction.

Two-tier formal bipartite social dialogue

The established formal social dialogue forms are thus two-tier: collective bargaining and implementation of the agreed rights of employees, as a rule regulated by collective agreements and similar bilateral agreements (i.e. traditional bipartite social dialogue), and the involvement of employees in the management of the company, which can be further divided into two types: participation through workers' representative or workers' body and through the inclusion of the representatives of employees in the supervisory bodies and management of the company. The two possibilities are legally demarcated:[7] the works council has to abstain from all activities in the area of trade union activities, which for example also means that the works council is not allowed to organise industrial action[8]. This is the right of the workers, and they can organise a strike themselves or through the trade union but not via the works council. Such regulation is in a way logical: the works council is, according to the law, participating in management, while an industrial action could

[4] Directive 2002/14/ES of the European Parliament and Council from 11.3.2012 on defining the general framework for informing and consultation with workers in the European Community

[5] Such regulation is known in Slovenia, Austria and some other EU countries

[6] For example in the case of extensive reduction of the number of employees, defining the rules of remuneration, determining the conditions for promotion …

[7] The example of the Slovene Law on the participation of workers in management

[8] Article 7 of the Workers' Participation in Management Act stipulates that the right to participation of workers in management should not encroach upon the rights and obligations of trade unions and employer associations. To protect the interests of their members, the works council must abstain from any kind of union struggle.

be understood as an activity against the joint decision of the employer and employees' representatives participating in management.

The inclusion of employees in the decision making process may take place at several levels, similar to the »traditional bipartite dialogue«: at the level of individual employer or the level of the group, if it has its »parts« in at least two EU member countries.

Five typical social dialogue models[9]

In Europe social dialogue has not gone through the same development and the same tradition, since it developed by taking into account the peculiarities of labour and social relations specific to an individual social substratum. The distinction between the individual models is based on the treatment of following hypotheses:

- Nature of connection between the legal arrangement and collective agreements
- Which level of collective bargaining is the predominating or the essential one (corporate, activity based …)
- Characteristics of trade unions and trade union organisation: baseline (ideological, religious, corporate…), trade union pluralism at individual level (share of membership / only one trade union or several), trade union culture or approach (conflict based approach, trade union as a service provider, partnership approach …)
- Schemes of employee representation (through unionisation or through elected representatives) and their role in the relation to the employer (information, consultation, co-decision making, co-management …).

Scandinavian model

In the Scandinavian model the labour market is regulated by the system of collective agreements, whereby the social partners enjoy a high level of autonomy. Negotiations or collective bargaining are relatively centralised in Finland and Denmark, while the trend in Sweden goes in the opposite direction: here bargaining is strongest at the local level.

The percentage of coverage of employees with collective agreements is high, but differs from country to country: 80% coverage in Denmark, 91% coverage in Finland, and 88% in Sweden. The degree of unionisation is also high: 80% of private sector workers are members of trade unions in Denmark, 74% in Finland, and 70% in Sweden. Trade unions in these countries play a somewhat different role because they are not active solely at the level of social dialogue but provide also other services or conduct certain functions, for example unemployment insurance.

[9] From the presentation of Marie-Noëlle Lopez – "Industrial relations systems in Europe"

The main representative of the employees is the shop steward in the company and not the representative of the works council, whereby it must be taken into account that this representative has substantial authority given otherwise to works councils: the right to be informed, the right of consultation, the right of co-decision making in certain matters (only in Sweden)[10] and the obligation (!) to negotiate with the employer about certain issues.

Mediterranean model

The Mediterranean model of social dialogue can hardly be considered a uniform model because some of the basic characteristics of individual countries differ substantially. What is common to all, however, is a relatively strong or important role of the state in the dialogue. In the majority of countries, the employer associations and trade unions at the central level still play a regulatory role, whereby the negotiations in individual sectors remain the framework also in cases where the policies are agreed upon at the cross-sectoral level (Spain, Belgium, Italy).

The rate of union membership differs but is still relatively low, around 20% (except Belgium with 55% membership), in France only 8%. In most of the cases there is not a single large trade union and the members are distributed among several trade unions (five large trade unions in France, three in Belgium and Italy, two in Spain and Portugal …), which in many cases still base their ideology on »class struggle«.

In the majority of cases, countries with the Mediterranean model use a two-tier system of employee representation: through trade unions and through the works council, where the rights or participation patterns of the latter are mainly limited to information and consultation. Co-management exists only in state-owned enterprises.

Continental model

In accordance with the model of social state and market economy, industrial relations are mostly regulated with collective agreements. The activities and agreements of social partners have as a rule priority over a government measure and are also characterised by a high degree of consensus. This mainly plays a subsidiary role. Agreements between social partners serve only as a guarantee of »fair social regulation«, applying mainly the framework of minimum standards and fundamental rights. While in Germany the primary level of collective bargaining is at the province level, in Austria and the Netherlands it is mainly at the state level. In spite of the decentralisation trends in social dialogue (the agreements reached with the works councils of the company, especially in Germany and in the Netherlands) the sectoral level of collective bargaining still retains the most important position.

Trade union membership is relatively high, in Germany 59% of the workers are members of a trade union, in Austria and in the Netherlands the share is even higher (98 and 80 per cent). In Germany and in Austria there is only one predominating trade union (confederation), while in the Netherlands there are three relatively equally strong trade unions. At the company level the trade union has no power, but the works councils are extremely powerful and the employees can co-decide in certain issues via their representatives.

[10] Even the right to joint management in private enterprises

Anglo-Saxon model

The model pursues a liberal approach also at the level of industrial relations by consistently following the principle of voluntariness in terms of negotiations as well as membership in the organisations, which have the character of a social partner. The employer or employer association can enter negotiations with the representative of trade unions, acknowledging them in this way. They can also not acknowledge their representation and reject negotiations. Instead of collective agreements, the law plays an important role and protects the most vulnerable workers, since only one third of them are covered by collective agreements. The latter figure is particularly true for the public sector, while coverage rate in the private sector is significantly lower.

The level of membership in trade unions is also low, which is particularly true for the private sector. The membership is mainly concentrated in one trade union or confederation of trade unions. The majority of collective agreements are concluded at the company level but the number of such arrangements is relatively low. Nor are the traditional models of works councils in the societies of the Anglo-Saxon model very common. The negotiations proceed via trade union representative.

Central – Eastern European model

The Central – Eastern European model of social dialogue cannot be considered as a uniform model but rather as a series of very different approaches. The common point might be the relatively low level of unionisation and a low level of collective bargaining limited usually to the level of individual company. Despite the existence of normative frameworks for establishing works councils, the leading role in representing the interests of the employees in a company is given to the trade union. As a rule, membership in trade unions is divided among several large unions or head offices.

Special features of the Eastern model in the »WIM« project partner countries[11]

The social dialogue in project partner countries still meets the essential outline of the Eastern European model of social dialogue, but reveals certain special characteristics, possibly the result of the absence of implementation of the EU acquis. The EU acquis regulates namely the work of employees' representatives. A possible example of such a situation is Serbia, where the competences of the works councils and trade unions of a company have not been clearly demarcated. All have in common the fact that the social dialogue takes place at all levels, but with very different contents: the most frequent common points of bargaining are the issues of payment for work and working hours.

According to the results of a survey the role of the employees' representative can be understood very differently: while in Macedonia and Montenegro the employers see the employees' representatives as playing a relatively positive role, the Serbian employers see them as an obstacle and consequently attribute them not only a neutral but a rather negative role.

[11] Serbia, Macedonia and Montenegro

Collective bargaining (Slovene model)

Formalised bargaining about the rights and obligations of employees and employers or collective agreements represent only one of the forms of social dialogue, which can take place at the level of individual company, at the activity and also at the national level.

In the system of collective bargaining, the principle »better for the worker« implies that every act at a lower or narrower level can only provide only a larger scope of employee rights or improve the existing set of rights for the benefit of the worker. This means that the collective agreement can regulate the rights of the employee not covered by labour legislation, or make the rights already defined by law more favourable for the employee. The principle in question is not implemented only within the collective bargaining for the rights in relation to the law, but also between the collective agreements at different levels. This means that a collective agreement of a lower level can regulate the rights not covered by a collective agreement of a lower level, or can improve the rights already covered by the agreement and make them more favourable for the employee. There are some exceptions to this rule. In the Slovene legislation, the basic law defining labour relations allows for the possibility of derogation from the mentioned principle and for the possibility of »different regulation« in collective agreements. The exception from the rule does not refer to all the rights but only to those rights and standards, for which the law explicitly allows »different regulation«. In this way[12] certain periods of special working time regimes can be regulated less favourably for the employee, with additional examples where a fixed-term contract can be concluded and similar. Such possibility of derogation from the general principle is delegated to member countries when drafting labour legislation or is within the European acquis at least allowed.[13] The possibility of derogation from the general rule can be part of the collective agreements at a higher level in relation to the lower level, which is in accordance with the Slovene legislation, but it must be clearly defined which rights may be regulated differently[14] and under which circumstances.

What is standard material of collective agreements? They usually consist of two parts: the obligational part, which regulates the rights of signatories or contracting parties[15] of the collective agreement, and the normative part regulating the rights and obligations of employees and employers. The content of the normative part usually consists of provisions: regulating the rights and obligations of employees and employers in concluding an employment contract, during working time

[12] Example

[13] An example is the Directive on certain aspects of working time organisation (2003/88/ES), stipulating the possibility of specifying longer reference periods. It sets the longest reference period for legal regulation and the longest period for the case of further regulation on collective agreements.

[14] However, not less favourable than stipulated by law, even though it does not allow for the possibility of different regulation of the concrete right.

[15] The Slovene law regulating collective bargaining differentiates between the signatories of the collective agreement, of whom there can be several on every page (for example, several trade unions sign the collective agreement on behalf of the employees), and the parties, which are always only two – the employer and the employee side.

and in connection with the termination of the employment contract, remuneration, as well as other personal compensations connected with work, safety and health at work, or other rights and obligations originating from the relationship between the employer and employees, which ensure the conditions for the dialogue between trade unions and the employer

The contents of the collective agreement are always negotiated and the bargaining process starts upon the request of either party. The collective agreement is concluded for fixed or indefinite period, whereby the fixed-term contracts cannot be terminated before the expiration of the period for which they were concluded.

The contents of collective agreements are not limited only to the points prescribed by law. In several European countries they represent also the possibility or the way of implementing autonomous framework agreements concluded between social partners at the community level. Examples of such contents, which can be transposed into national legislation, are »stress management at the workplace«, »regulation of telework«, »parental leave« and »prevention of harassment or violence at workplace«. Some of the countries implement through collective agreements even the directive or specific contents of directives from the area of labour and social relations.

Social dialogue at the EU level

Rationality and course of the European social dialogue

In the area of social policies and industrial relations, the institutions of the European Union exercise relatively limited legislative power. Such legislative limitation is also the consequence of large differences in normative arrangements of the contents and extremely diverse traditions, different approaches and, in some countries, strong emphasis on the role of the social partners in regulating them. These are just some of the reasons for the different organisation at the European level. In order to promote forms of management in this area, intra-sectoral European social dialogue is being emphasised. Not only can the social partners at the European level present and defend their interests during regular legislative procedures consultations, but can, under certain conditions, independently negotiate and make their agreements similar to the *EU acquis*. This can be achieved in two ways: the agreement of European social partners is incorporated into a directive, later adopted by the European Council,[16] or it can become an autonomous *de facto* framework agreement with the status of a directive. In the latter case, the national social partners are obliged to transpose the agreement into the legal system in accordance with the method usually applied in the individual member country. If no agreement is reached within the deadline set by the Treaty establishing the European Community, the European Commission takes back the whole procedure. Despite the fact that the social partners might not have reached an agreement, the partially coordinated part and the viewpoints exposed during the negotiations may represent a substantive basis and signal the Commission, in which direction and form the issues could be regulated.

[16]Council Directive 1999/70/ES from 28.6.1999 on the framework agreement on fixed-term contracts, concluded between ETUC, UNICE in CEEP

The basic premise of the social dialogue at the Community level is: allow us to agree on our own on the issues concerning us since we know best what we need and what is (still) acceptable for us.

Due to the exposed platform, which has its roots in the Treaty establishing the European Community, the Commission is required to consult with the social partners before submitting any proposal from the area of social policy[17] as regards the needs and possible policies concerning Community action.

In the initial phase the social partners have the opportunity to say that they wish to coordinate themselves the contents,[18] or defer the harmonization to the Commission. In case they want to work on their own, they start to negotiate about the contents with the aim of concluding a binding agreement. In this case a task force is set up, chaired by a neutral person, usually a former member of the Commission staff.

The creation of the negotiation team is followed by the coordination process within individual interest groups. Before continuing the negotiations, BUSINESSEUROPE, for example, has to align its interests with UEAPME and CEEP, and prior to that it has to receive the mandate for it from its members, i.e. the national employer associations, and form its viewpoints, coordinating them with the representatives within the employer group.

The condition for the validity of a decision or agreement is the support of at least 2/3 of member organisations directly affected by it. The condition for the consent on the employer side is consensus. The employer side thus decides to sign the agreement on the basis of consensus and not qualified or simple majority.

Negotiations take place in plenary sessions, whereby they have to be concluded[19] within nine months, unless agreed with the Commission that the nine-month deadline for adopting the decision has been extended.

Negotiation results may have different forms: the form of framework agreement,[20] framework action plan,[21] or some other legally non-binding text.[22] In these negotiations, the European social partners agree upon the form of the document they will adopt. The forms might differ depending on how they will be transposed to the national level and whether they will be legally or just »morally« binding. The »moral« strength of the agreement is the result of the concurrence of wills of social partners.

[17]Social partners at the level of EU: ETUC (trade unions), BUSNIESSEUROPE (representatives of employers), CEEP (employers in the public sector) and conditionally Eurocadres, CEC and UEAPME (representing small and medium size enterprises)

[18]According to Article 155 of the EU Founding Treaty

[19]Which means reaching an agreement

[20]Framework agreement

[21]Framework of actions

[22]Joint analyses, declarations, recommendations, reports, case studies

a. Framework agreement

Framework agreements are the result of negotiations between European social partners, which have far-reaching and legally binding effects. The framework nature is the consequence of the subsidiarity of the European acquis, which only defines the direction, the starting points and the results to be reached with the implementation of the agreement contents at the national level.

The agreements reached at the European level come in two legal forms: the first possibility is that the social partners request the Council to implement their agreement in the form of a directive. In this case the Council does not have the option or the right to change the contents of the agreement but can only provide an appropriate form for it, i.e. a directive. An example of such transposition of an agreement into a directive is the Directive of the Council 1999/70/ES from 28.6.1999 on the framework agreement on fixed-term work, concluded between ETUC, UNICE and CEEP. In this way, the agreement becomes part of the European acquis and as such legally binding for member countries. In case member countries would not implement such an agreement in form of a directive, the Commission might initiate an enforcement action against the state.

The second possibility or form, in which the agreement between social partners may manifest itself, is the conclusion of an »autonomous« agreement, according to which the social partners take on the responsibility for transposing the agreed contents to the national level, the level of individual activities, and the level of individual companies. In principle this implies that the agreement refers solely to the companies and those employed in these companies, covered by the material and personal validity of the collective agreement. The monitoring of the transposition process differs from the case where the agreement is included in the European acquis in form of a directive. The Commission cannot undertake any formal sanctions against a violating country. The same limitation concerning legal sanctions applies also to the European Court of Justice[23] and institutions at the national level.

Notwithstanding the foregoing, the national social partners implement such agreements and periodically, in accordance with the time frame stipulated in the agreement, report about the implementation of the contents in the autonomous agreement. The passivity of national social partners concerning the transposition[24] would in the long run as well as mid-term represent a serious blow to the credibility of European and national social partners, which would in turn change the dynamics of autonomous agreement adoption.

b. Indicative range of measures[25]

Within the framework of negotiations the European social partners themselves agree on the format in which the agreed contents will be adopted. The framework set of measures is not a legally binding document, its strength, however, derives from the concurrence of views of social partners about the agreed contents. Such framework set of measures usually includes the common goals and guidelines

[23] European court of justice (ECJ)

[24] If, for example, the contents of the agreement were not transposed in the legal system via collective agreements, actual measures or through legislation

[25] Framework of actions

that are qualitatively and quantitatively defined with specific criteria. The guidelines and goals need to be promoted and transposed to the national level[26] by the members of the European social partners,[27] who are the signatories of such documents. European social partners monitor the activities connected with the implementation of measures in the individual member country on an annual basis and assess with regard to the differentiated priorities whether the measures are achieving the goals and are going in the right direction. They are not legally binding in themselves but they certainly contribute to the change of policies in member countries. Irrespective of the legal impact, they highlight the importance of specific topics and in this way encourage discussions between the social partners and regulatory bodies on how to achieve those measures set out from the framework.

c. Other texts

Instead of framework agreements or framework sets of measures, social partners may also adopt other documents, such as joint analyses, declarations, recommendations, reports, case studies and similar. These are all non-binding documents which may, however, include important common viewpoints and advice for social partners or for those adopting relevant decisions from the area of industrial relations and social policies. Since the beginnings of European social dialogue, the European social partners have already adopted an extremely wide range of such texts.

History and development of the European social dialogue[28]

As part of the Treaty establishing the European Union (TEU), the European social dialogue represents a fundamental element.

The European social dialogue has resulted in a large number of documents, whereby the adoption of approximately 60 joint texts by social partners needs to be especially emphasised: the process is complementary to the national social dialogues existing in the majority of member countries. The European dialogue, now structured within the management of the Union, enables social partners to contribute extensively to the definition of European social standards.

Consultations among social partners started in mid sixties within the framework of consultative committees, Standing Committee on Employment and tripartite conference on economic and social issues. However, it was in 1985, with the launch of bipartite social dialogues encouraged by Jacques Delors, the then chairman of the committee that the social dialogue at the level of Community developed into a real European negotiating forum.

The development of the social dialogue process has gone through three phases:

[26] With regard to the contents of the agreement and if needed also the sectoral level and the level of individual company

[27] ETUC, BUSINESSEUROPE and CEEP

[28] Chapter taken from an ETUC text

I - (1985-1991) in the first period, the activities of the bipartite social dialogue ended with the adoption of resolutions, declarations and joint opinions, which were not binding.

II - (1992-1999) the second phase began on October 31, 1991, with the signing of the agreement between social partners, which was later included in the Protocol on social policy and annexed to the Maastricht Treaty in 1991. Thanks to the Maastricht Treaty, agreements negotiated between social partners may have a binding legal impact through a Council decision.

In 1997, the Agreement from 1991 was included in the Amsterdam Treaty (Articles 138 and 139 TEC). In this context the European social dialogue led to the implementation of three framework agreements: on parental leave in 1996 (revised in 2009), on part-time work in 1997, and for fixed-term work in 1999, all three as Council directives.

III - (1999-2005) the third phase started in December 2001 with the joint contribution of European social partners to the European Council in Laeken. In accordance with the Agreement from 1991 (Article 139 par II TEC), the characteristic of this final phase was greater independence and autonomy for exercising social dialogue.

At the meeting in Genval on November 22, 2002, the social partners adopted their first joint multi-annual programme for the period 2003 – 2005.

In this context, the European social partners concluded the first agreements in the new generation of »autonomous« initiatives, where the implementation at the national level was entrusted to the social partners themselves. This new approach resulted in the conclusion of three important framework agreements: on telework (2002), stress at the workplace (2004), and on harassment and violence at the workplace (2007), as well as the framework of measures for lifelong learning and qualifications (2002), and the framework of actions for gender equality (2005).

In March 2006, social partners adopted their second multi-annual work programme for the period 2006 – 2008, which commits the participants to act in a number of areas, including:

- negotiating a voluntary framework agreement on harassment and violence at the workplace adopted in April 2007;

- joint measures for change management;

- strengthening the social dialogue in new EU member countries;

- monitoring existing agreements.

Some time ago Juliane Bier from the European Trade Union Confederation (ETUC) prepared a very interesting Power Point presentation, in which she described in detail two work periods of integrated guidelines of European social partners – 2003-2005 and 2006-2008.

On the basis of Article 139 TEC, the process of European social dialogue provides for consultation with social partners at the Community level for the whole range of subjects relating to employment and social issues listed in Article 137 TEC. The procedure has two mandatory phases. First, the Commission will consult the social partners on the possible direction of Community action, and then it will consult with them about the contents of these measures. If, following each of these phases,

partners do not reach an agreement on the opening of bipartite negotiations, while the Commission still believes the measure to be desired, the proposal is set out.

Since 1997, the Presidency of the Council has been inviting social partners to meet the »troika« before the EU Council. After the summit meeting in Nice (2000), it was decided that the meetings should be held annually before the spring summit meeting of the European Council. The Council Decision from March 6, 2003 provides that the tripartite social summit is made up of representatives from the current Council presidency, the next two presidencies, the Commission and social partners.

Establishing a tripartite social summit represents an extremely important political step since it recognises the role of tripartite consultation at the highest decision making level, at the European level. The areas covered by tripartite consultations are: macroeconomic dialogue, employment, social care, education and training.

On September 29, 2005 the Social Dialogue Summit celebrated the 20th anniversary of the European social dialogue. The social partners marked this event in a joint press release, which stated that **»**they intend to continue contributing constructively to the EU integration process**«**.

Participation of workers in management (European legal framework)

Participation of workers in management at the national level is regulated by two directives:

- Directive 2002/14/ES of the European Parliament and Council from March 11, 2002, establishing a general framework for informing and consulting employees in the European Community (Official Gazette RS, no. 80 from March 23, 2002, p. 29)
- EU Council Directive 2001/23/ES from March 12, 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (Official Gazette RS, no. 82 from March 22, 2001, p. 16).

The fundamental directive regulating the participation of employees in management is the Directive 2002/14/ES of the European Parliament and Council from March 11, 2002, establishing a general framework for informing and consulting the workers in the European Community, which has to be taken into account as the minimum framework by all EU member countries when creating national legislation. It provides two basic forms of participation in management and sets out the circumstances, which are the subject to mandatory informing and consulting. According to the Directive, informing and consulting are necessary with regard to the recent and probable development of the company's or establishment's activities and economic situation; with regard to the situation, structure and probable development of employment in the company or establishment, regarding any anticipatory measures envisaged, in particular, where there is a threat to employment; with regard to decisions likely to lead to substantial changes in work organisation or in contractual relations.

The Directive also sets out the manner of informing,[29] with the aim of achieving its purpose and developing into quality consultations. Information shall be given at such time, in such fashion and with such content as is appropriate to allow, in particular, employees' representatives to conduct an adequate study and, where necessary, prepare for consultation. National legislation must organise consultations so as to ensure that the timing, method and content thereof are appropriate, at the relevant level of management and representation depending on the subject under discussion; on the basis of information supplied by the employer and of the opinion which the employees' representatives are entitled to formulate in such a way as to allow them to meet the employer and obtain a response, and the reasons for that response, to any opinion they might formulate; with a view to reaching an agreement on decisions within the scope of the employer's powers referred to in the paragraph.

We need to mention especially the provision of the Directive, requiring member countries to adopt provisions enabling the employer to safeguard confidential information, revealing it only to the employees' representatives and experts assisting them. The Directive requires member countries to adopt provisions limiting the passing on of information to employees' representatives when the nature of that information is such that, according to objective criteria, it would seriously harm the functioning of the company or establishment or would be prejudicial to it.

Participation of employees in management (the Slovene arrangement)

On the one hand the Slovene legislation deviates from the minimum standards in the Directive, and on the other hand it has not transposed the whole Directive as stipulated by the Directive itself. The Slovene law regulating the participation of workers in management does not include the possibility of withholding the passing on of confidential information. On the other hand, the Slovene legislation, regulating participation in management, has upgraded the minimum standards from the Directive: in connection with the circumstances requiring the participation of employees' representatives and with regard to the forms of participation. It has introduced co-decision making, which is a higher form of participation than informing and consulting, defined in the Directive. The Slovene legislation has introduced another special feature: participation of employees in company bodies.

Participation of workers in management should not compete with the regulation of employee rights within the framework of collective negotiations of different levels. In spite of this it should be noted[30] that certain rights of employees or even sets of rights are being dealt with within the framework of two separate forms of formalised social dialogue. Parts of the contents of collective agreements at any level partly overlap with the contents, the regulation of which belongs to the employees' representative or body representing employees in management. Such example of duplication of the competence of both groups of employees' representatives is the decisions about the criteria for the calculation of yearly leave, promotion and remuneration, and about the participation in the laying off procedure of a large number of employees and similar.

[29] And consultations

[30] The case of the Slovene model

The provision on participation of employees in management itself is divided into two parts: acting via a special body[31] or employees' representative[32] and by acting within the supervisory and management bodies.

Participation of employees in company bodies

The employees have the right to nominate their representatives into supervisory bodies of the company under the general condition, meaning that the company, where they want to participate in decision making through supervisory bodies, has to employ at least 50 workers. The number of workers' representatives in supervisory bodies is defined in the company statute; however, it should not be less than one third of the members and not more than half of all the members in the company supervisory body.

Employees' representatives are appointed or elected into supervisory bodies by the works council, which is true also in case of recall. In order to prevent the abuse of the institute and takeover of workers' functions by the representatives of capital or management, the law stipulates an additional limitation: as employees' representative in supervisory or governing board cannot be elected a person employed in the company who does not have the right according to this law to elect or be elected into the works council. According to the law regulating co-management of employees, managers and procurators (governing staff) do not have active and passive election rights. In spite of the right to nominate members into supervisory bodies, employees' representatives cannot become chairmen of these bodies.

Members of the supervisory or management board and its committees, who are employees' representatives, represent the interests of all the employees within the mandate of this body in line with the law regulating business associations or the Co-operative Associations Act, and the company statute. Upon the demand of the employees' representatives, the supervisory body or the management body of the company is obliged to discuss on an annual basis the report of the works council on the situation in the area of implementation of this act in the company, the proposal of measures, and has to take a stand.

Employees of a company, employing more than 500 workers have a workers' director, nominated into the management board by the works council. If the company employs 500 or fewer workers, the workers' director can be nominated into the management bodies if so agreed by the works council and employer. Within the framework of general rights and obligations belonging to all company board members or CEO's in line with a special act and company statute, the workers' director or employees' representative represents interests of the employees with regard to personnel and social issues.

Despite enjoying special protection in company bodies, employees' representatives' responsibility for abandoning obligatory practices is not ruled out. This is a provision stipulated by the Companies Act.

Participation of employees in management of the company

[31] Works council

[32] Shop steward

Employees in the company with at least 20 workers have, in accordance with the law, the right to participate in managing the company through the works council. If the company employs fewer workers, then they participate through the workers' representative.

Employees' participation in management of the company is exercised individually or collectively in such a way that employees are directly informed and can directly give proposals and opinions, or are informed by employees' representative or the works council, and through him offer suggestions and opinions. They can demand joint consultation with the employer, co-decide on individual, by law stipulated issues, and require the retention of individual decisions of the employer until the adoption of the final decision by the competent authority. The employer and the works council or its committee meet at the request of the employer or works council. They meet as a rule once a month in order to implement the rights and obligations originating from the law governing workers' participation in management.

It has to be mentioned that employees themselves have the right to participate in the management in ways defined by law. The employee thus has the right to: present an initiative and get an answer if this relates to his workplace or organisational unit; be informed in time about any changes in the work area; express his opinion about all the issues that relate to the organisation of his workplace and work process; demand that the employer or an employee authorised by the former explain the issue of wages and other areas of labour relations, and from the contents hereof. The employer is obliged to respond within 30 days.

Collective worker participation in management of the company may be implemented through three forms of cooperation which depend on the contents of decisions that are or will be taken. The three forms are: informing, as the lowest level of workers' participation in management; consulting; and co-decision making. In case the employer fails to allow the employees' representatives to participate in management in one of the mentioned forms appropriate to the contents being decided on, the works council or the workers' representative could demand that the decision of the management be postponed.

Communication is the lowest form of employee participation, whereby the employer must inform the works council or the workers' representative in particular on: economic situation of the company, its development goals, the state of production and sales, general situation of the industry, changes in the activity and the decline thereof, changes in the organisation of production, changes in technology, on the annual accounts and annual report. It is also important that the works council has the right of access to the documentation on these matters, which is necessary as information.

Consultation is the next level of workers' participation in management, whereby consultation does not necessarily mean harmonisation of opinions. It means above all confronting the arguments, motivating or directing the employer to adopt such solutions that are better for all involved.

Before taking a decision, the employer must inform the works council and demand joint consultations regarding status and personnel issues of the company, as well as all the questions relating to the safety and health of workers at work. The necessary information must be provided to the works council at least 30 days before the decision is taken. The deadline for the proposed joint consultations must be at least 15 days before the decision. Joint consultations between the works council and employer represent the obligation of the employer to inform the works council about the

planned decisions about the status[33] and personnel[34] issues, as well as about the issues regarding safety and health of workers at work. He consults with them and seeks to reach a consensus.

The employer is required to submit for approval to the works council the proposals for the decision in connection with the use of annual leave and other absences from work; criteria for the evaluation of workers' performance; criteria for remuneration of innovative activities in the company; use of the housing fund, holiday capacities and other facilities of the employees' standards; promotion criteria. The works council has to discuss the proposals from the preceding paragraph and take a position about them within eight days from submission. Silence or passivity on the part of the works council is to be understood as agreement. The employer is not allowed to make a decision if within eight days the works council refuses consent. Consensus, adopted at the works council and in written form submitted to the employer as answer to his proposal is considered as an agreement between the works council and employer.

Participation in the strict sense of the word means an upgrade of »participatory minima« from the Directive,[35] which defines only information and consultation. Co-decision making is defined also by the legislation of other EU member countries, for example Austria, and not only Slovenia.

European works councils

The fundamental principles of the European Union are the free movement of capital, goods and labour. The free movement of these elements has in practice gradually led to more intense capital merging of companies within the EU. This mainly implies the purchase of companies in a member country by a company from another member country, as well as the establishment of new subsidiaries and affiliates in member countries. The phenomenon of going beyond the national framework of operations of companies thus gradually grew, and the need arose to set up mechanisms that would allow the employees to obtain information which directly or indirectly impacted or could have an influence on their labour status, and consultations about these circumstances.

At the level of the European Community, the role of employees in issues concerning information and consultation at transnational level was already included in the Council Directive 94/45/ES.36. The

[33] Status changes are: changes of the status; sale of the company or its major part; closing of the company or its major part; substantial changes in ownership; reshaping of the company status, defined by law regulating economic undertakings; change of the system of company management

[34] Personnel matters are: needs for new workers (number and profile); job classification; posting a large number of workers outside the company; moving a large number of workers (more than 10% employed in the company) from place to place; adopting acts from the area of additional pension, disability and health insurance; reducing the number of workers; adopting general rules on disciplinary responsibility.

[35] Directive 2002/14/ES

[36] Directive of the Council 97/74/ES from December 15, 1997 extending to the United Kingdom of Great Britain and Northern Ireland, Directive 94/45/ES on the establishment of a European Works Council or a procedure in

Directive on European Works Councils in 1994 laid the foundations for workers' participations in companies and groups of companies operating in the area of the European Union.

The legal framework for EWC was established in 1994 and had to be adapted to the evolution of the legal, economic and social context, and also clarified. With time, the need arose to change certain solutions of the existing Directive and eliminate certain ambiguities. A different role was given to the trade unions and external experts. The basic idea or the subject of regulation remained the same: participation in matters directly or even indirectly impacting the workers. In May 2009, the European Parliament and Council reached an agreement on a recast of the Directive, which replaced the existing Directive in the spring of 2011.

From the preliminary findings of the recast Directive 2009/38/ES of the European Parliament and of the Council from May 6, 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing[37] and consulting[38] employees, it follows that the functioning of the internal market involves the process of concentration of companies, cross-border mergers, acquisitions, joint ventures and consequently a more pronounced transnational nature of companies and associated companies. In the opinion of the legislator, economic activities may develop harmoniously only if companies and associated companies, operating in two or more member countries, inform employees' representatives about the decisions affecting the workers and consult with them. In legislation or in the practice of member countries, information and consultation procedures with workers mainly do not take into account the transnational structure of the entity, nor are decisions taken on behalf of these workers. This situation within one and the same company or associated company can lead to unequal treatment of workers affected by the decisions. Appropriate provisions need to be adopted to ensure in companies operating in the area of the Community, proper information and consultations with the workers when the decisions impacting them are made outside the country where they are employed.[39]

Establishing European works councils, unlike any other forms of workers' organisation, has a unique feature: employees' representatives are not the only actively legitimised persons for establishing

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Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees

[37]Informing means the transfer of data to workers' representatives provided by the employer so as to enable the workers to become acquainted with an issue and to study the same; informing is done in time, manner and contents, which enable workers' representatives to examine thoroughly possible impact and when appropriate, prepare consultations with the competent body of the undertaking or associated undertaking operating at the level of the Community;

[38]Consultations are establishing dialogue and exchange of opinions between the workers' representatives and the board of directors or other appropriate level in time, manner and contents, which enable the workers' representatives to express within reasonable time, and without intruding upon the competences of the board, their opinion about the proposed measures referred to in the consultations that could be taken into account in the undertaking operating at the level of the Community, or associated undertaking operating at the level of the Community.

[39]In the preamble of the Directive 209/38/ES

»their representative body«. In certain cases and under certain conditions, the employer has, in accordance with the Directive, the right of requesting the workers to become organised in the European works council. This does not mean that later on he has the possibility of influencing the work or the decisions of the European works council. It is only an acknowledgement of the employer's interest to standardise communication with the employees in several member countries on matters that affect decisions at the transnational level. Decisions of a company that do not have the transnational element or consequences cannot be the subject of consultations or informing within the framework of the European works council.

Establishment of a European Works Council

The European works council (hereinafter referred to as EWC) represents European workers in a company. Through them the company management carries out one-way or two-way communication on matters concerning the development of business and other important decisions that might affect the employees. It has to be noted that only the issues with a transnational dimension fall under the competence of EWC. In assessing whether the elements are of transnational nature, the number of participating members, the level of management in the matters, or their relevance for the European work force has to be taken into account with regard to the extent of possible effects of decisions taken.[40]

EWC can be set up in the »Community-scale undertaking«,[41] at the employer's initiative or when proposed by a sufficient number of workers in at least two companies in at least two different member countries. The establishment of EWC happens in two phases: the first phase is to set up a special negotiating body, and the second is the actual establishment of EWC. The process of setting up a EWC starts at the request of 100 workers[42] or upon the initiative of the employer. The structure is then adjusted to the specific structure of the undertaking.[43]

Upon the initiative or request of the employer, a special negotiating body is established, whereby the framework of the Directive needs to be followed; nomination of the representatives into the special negotiating body takes place in each member country consistent with the national legislation for the election of workers' representatives into the works council. The number of representatives from individual country must be in proportion with the number of employees in the company of a member country and all those employed in the company at the level of the Community.

[40] In line with the Directive, transnational issues are those issues, which concern a Community-scale undertaking or at least two undertakings or branches or affiliated undertakings in two different member countries

[41] Community-scale undertaking is every undertaking, employing in member countries at least 1 000 workers and from them at least 150 workers in at least two member countries

[42] Additional condition: the request comes from the workers from at least two companies and at least two member countries

[43] The Directive determines that the negotiating body has to represent in a balanced way workers of different countries.

The central management[44] and the management board in the individual member country must be informed about the elected or appointed representatives, whereby the central management covers all the expenses of the special negotiating body necessary for the establishment of EWC. The role of the special negotiating body is to reach an agreement with the employer, agreeing about the number of representatives who will be members of EWC, the manner of work and topics that will be subject to information and consultation, and of course, the necessary expenses that the central management would cover.

The Directive also sets out the framework of the minimum standards of the agreement between the special negotiating body and central management:[45] it determines for which branches of a Community-scale undertaking or undertaking from Community-scale associated undertakings the agreement will apply; structure of the European works council, number of members, allocation of seats, taking into account where possible, the need for balanced representation of employees with regard to their activities, category and gender, the term of office; the functions and the procedure for information and consultation of the European works council and the arrangements for linking information and consultation of the European works council and national employee representation bodies in accordance with the principles of transnationality; venue, time and frequency of the meetings, (where necessary) the composition, the appointment procedure, the functions and the procedural rules of the select committee set up within the European works council; the financial and material resources to be allocated to the European works council; the date of entry into force of the agreement and its duration, the arrangements for amending or terminating the agreement and the cases in which the agreement shall be renegotiated and the procedure for its renegotiation, including, where necessary, where the structure of the Community-scale undertaking or Community-scale group of undertakings has changed.

On the basis of an agreement between a special negotiating body and central management EWC is established, which then represents the interests of employees.

Conclusion

No directive gives workers or their representatives the right to co-manage or co-decide, but only the right to one-way or two-way exchange of information relevant to the employees and directly or indirectly concerning them.

Involving employees in decision making processes represents not only an important communication tool but an aid or tool for ensuring the legitimacy and transparency of decision making in the segment directly or indirectly impacting them. It is important to trust the management and their business decisions since appropriate involvement of the employees in decision making processes, even unpleasant measures such as the implementation of decisions, may have a positive impact on

[44]The central management is the central management of the undertaking at the Community level or, in case of Community-scale associated undertaking, the central management of the governing undertaking

[45]Article 6 of the Directive

the mood of the employees and their sense of belonging to the company. It is not a question of *what* but rather of *how.*

It should again be emphasised that legislation provides only a formal framework and focuses on the contents that should be the subject of dialogue, however, their implementation cannot by itself constitute a high- quality dialogue. The quality of dialogue requires trust, trust in turn requires time. High-quality social dialogue thus needs to be developed and cannot be simply prescribed. This should be considered when transposing the EU acquis into national legislation, which is relatively loose. The looseness allows member countries to create national legislation, which should in the greatest possible extent take into account social and cultural specificities as well as the level of already established dialogue. Uncritically copying the systems of other countries will, as a rule, lead to social dialogue on paper only, without the necessary contents and quality.

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