

THE EUROPEANISATION OF LABOUR LAW AND ITS IMPACT ON THE NEW MEMBER STATES

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1. Introduction

On 1st May 2004 eight countries of Central and Eastern Europe (CEE) together with Malta and Cyprus joined the European Union (EU): Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia. The enlargement of 2004 is without any doubt the biggest challenge the EU has ever faced, not only in terms of quantity but also in terms of quality. The surface area of the EU increased by one third and the population grew from about 390 000 to about 450 000. At the same time the GDP only increased by 5 per cent, which means that within the EU the GDP per head declined by about 18 per cent¹. The number of languages spoken in the EU almost doubled and the problem of finding a fair balance between smaller and bigger countries has become more urgent than ever.

In the context of this enlargement situation the CEE States are of specific interest. They still have to complete the process of switching from a State-controlled economy to a market-based economy and thereby have to develop systems of industrial relations that not only function efficiently but are adapted to the particular socio-cultural environment of the country concerned. There are significant differences between the various CEE States, and it would be a mistake to lump all of them together in this respect.² It should be kept in mind that already in the communist period the situation of these countries was quite different. There were no signs of reform whatsoever in the Baltic States, which were integrated in the Empire of the Soviet Union, whereas countries like Poland or Hungary had already undertaken economic reforms before the downfall of the iron curtain. And of course all of the CEE countries do have

¹ See M. Ladó, EU Enlargement: Reshaping European and National Industrial Relations, *The International Journal of Comparative Labour Law and Industrial Relations (IJCLLIR)*, vol. 18, 2002, 101

² For these very significant differences see the enlightening report by M. Ladó on „Industrial relations in the candidate countries”, European industrial relations observatory on-line, <http://www.eiro.eurofound.eu.int/2002/07/feature/TN0207102F.htm>

very different traditions dating back long before the communist period. However, in spite of all these differences it is possible to identify characteristics that these countries all have in common.

The focus of my reflection, therefore, will be on the question how the common features of labour law and industrial relations in the CEE countries (neglecting Malta and Cyprus) will affect the Europeanization of labour law and industrial relations and what impact the latter will have on the transformation process in the CEE States.

After sketching very briefly the basic features of the development of industrial relations in the CEE States (2) an attempt will be made to describe the features of the Europeanization of industrial relations (3). Then the question is to be discussed whether and how the two can be linked together in this integration process³(4).

2. Labour Law and Industrial Relations in the CEE States

The CEE States were confronted with the dilemma of transforming simultaneously an authoritarian regime into a democracy, a planned economy into a market economy and a party-dictated system of labour law and industrial relations into one, which is compatible with political freedoms and market economy. The present structure of labour law industrial relations in the CEE States to a great extent is still to be explained as a reaction to and a legacy of the communist system of the past. It is – as will be shown – the expression of a highly individualistic neo-liberal approach.⁴ In the communist period employment relationships were embedded in large production units or large administrations, distinctions between private law employees and state employees were almost non-existent and the employees enjoyed – at least on paper – far-reaching protective standards. Even if the party-dominated trade unions played an important role in this overall bureaucratic and highly regulated system, collective labour law in a Western sense was practically unknown. In spite of the fact that the terminology of collective bargaining was used, the respective mechanism had nothing to do with the counterparts in the West. And on individual level it has to be kept in mind that the individual employment contract had almost nothing to do with contractual freedom: the

³ For a brief discussion of this challenge see also M. Weiss, The social dimension, in R. Langewiesche / A. Toth, *The Unity of Europe*, European Trade Union Institute, Brussels, 2001, 123, and M. Weiss, *Industrial Relations and EU-Enlargement*, in R. Blanpain / M. Weiss (eds.), *Changing Industrial Relations and Modernisation of Labour Law*, Kluwer Law International, The Hague / London / New York, 2003, 439

⁴ M. Stanojevic / G. Grades, *Workers' representation at company level in CEE countries*, *TRANSFER*, vol. 9, 2003, 31 (44)

terminology was also here misleading. The mentioning of these few characteristic signs of labour law and industrial relations in the communist period show the dramatic challenge the CEE countries were confronted with after the downfall of the former system.

2.1. Trade Unions

In the period before the political change in the CEE States the rule was a monistic system of trade unions, which – as already indicated – were more or less mere instruments of the ruling party. There was an important exception: the movement of Solidarnosz in Poland was created as an autonomous alternative to the existing trade union structure. The monistic pattern of the communist period in the meantime has been replaced by an excessive pluralism. Quite often it looks as if trade unions are more concerned to compete with each other, than understanding their role as being the counterpart to the employers' side, thereby weakening the strength of the labour movement as a whole⁵. But the situation is even worse. The creation of a private sector in the economy has gone hand in hand with an extensive erosion of the system of trade union representation. The backbone of the new private sector in these countries are the small and medium-sized companies (SMEs), trade unions practically do not exist there and do not play any role⁶. Since in these SMEs there are no other bodies representing employees' interests, the result in most cases is total individualization of the relationship between employers and employees. Trade unions – as already in the old system – only play a role in the bigger – still or formerly State owned – enterprises. On the whole, the organisation rate of trade unions has declined significantly⁷.

2.2. Employers' Associations

The situation of employers' associations is even worse. They only exist to a very rudimentary extent and mainly represent the interests of the big enterprises, many of them are still not yet privatized. In principle, the employers in the SMEs do not see yet the need to organize. If employers' associations are founded, this is done not in a perspective of acting as a counterpart to trade unions, but with the intention of lobbying for common business interests⁸. Therefore, on the whole, employers' associations may be considered to be a rather marginal player up to now⁹.

⁵ H. Kohl / H.-W. Platzer, Labour Relations in Central and Eastern Europe and the European social model, TRANSFER, vol. 9, 2003, 11 (15)

⁶ For details see M. Ladó / D. Vaughan-Whitehead, Social Dialogue in candidate countries: what for ?, TRANSFER, vol. 9., 2003, 64 (69)

⁷ M. Ladó / D. Vaughan-Whitehead (FN 6) 66

⁸ See M. Ladó (FN 2) under the subtitle „Diversity in industrial relations – heritage of the past“

⁹ See M. Ladó / D. Vaughan-Whitehead (FN 6) 70

2.3. Tripartite Arrangements

A characteristic feature of most of the CEE States are tripartite arrangements on national level. These are bodies to discuss issues of restructuring the economy and of ways of promoting social justice. There is no doubt: this tripartite social dialogue has its merits and has played an important role in the process of restructuring industrial relations in the CEE States. However, the problem consists in the fact that this social dialogue is asymmetrical. The State still dominates weak trade unions and even weaker employers' associations. These discussion forums are largely serving to legitimize the respective Government's policy¹⁰. In spite of the structural deficiency many decisions are taken in the tripartite social dialogue, thereby preventing to a certain extent the evolution of autonomous bilateral collective bargaining structures. However, there is at present no alternative to the tripartite social dialogue as it exists: it is absolutely necessary to create acceptance for all the transformation work that has to be carried out. It has to be stressed that these arrangements on national level do not have a supporting structure on lower levels.

2.4. Collective Bargaining

In view of the weakness of the employers' associations and of the non-existence of collective actors, in big parts of the economy it is no surprise that collective bargaining is rather the exception than the rule, and that – at least in principle – it only takes place on company or plant level. Multi-employer bargaining mainly happens in the companies, which formerly were parts of a State owned big enterprise and now are fragmented in different parts¹¹. However, there is practically no bargaining on higher levels: be it the sectoral or the national one¹². The coverage by collective agreements is very low. They only play a role in bigger companies, the big amount of companies in the private sector is not at all affected by them.

2.5. Employees' Involvement in Management's Decision-Making

Due to the experience made before the downfall of the iron curtain there is still much reluctance to accept workers' participation as a feasible pattern in the new market economy¹³. Nevertheless, there is quite a lot of legislation providing for

¹⁰ M. Ladó (FN 1) 111

¹¹ See M. Ladó (FN 2) under the subtitle „Sectoral collective bargaining – current state of affairs”

¹² M. Ladó / D. Vaughan-Whitehead (FN 6) 73

¹³ See M. Sewerynski, Employee Involvement and EU Enlargement – Polish Perspective, in M. Biagi (ed.), *Quality of Work and Employee Involvement in Europe*, Kluwer Law International, The Hague / London / New York, 2002, 263 (270)

institutionalized workers' participation¹⁴, in most cases without the support of the social partners. There is scepticism and opposition in particular in the trade union camps. There are mainly three problems. First, this pattern only plays a role in big companies¹⁵. Secondly, the institutional arrangements in some cases are too much of a copy of systems of Western Europe, and therefore do not really fit into the overall structure of the respective country. Finally, there is no appropriate division of labour between trade unions and such bodies of workers' participation. This lack of a consistent and coherent concept of the system of industrial relations as a whole creates rivalry and suspicion, and in the very end weakens and de-legitimises the position of elected workers' representatives as well as of the trade unions. It, however, again has to be stressed that in the big majority of companies in the private sector neither trade unions nor other bodies of workers' representatives exist. Where they are formally present, they in actual practice quite often are under management control, mere „extensions of managerial structures"¹⁶.

2.6. Law in the Books and Law in Action

The production of legislation after the political change in all CEE States has been quite impressive and is still continuing to an enormous extent¹⁷. This ties in with the legalistic approach that is still commonly found in the CEE States, whereby a problem is regarded as having been solved if a law or regulation has been passed to deal with it. The gap between the normative level and day-to-day practice remains considerable¹⁸. There are many reasons for the fact that the implementation side is so unsatisfactory, ranging from resentment of intervention on the basis of labour legislation to a lack of controls and inefficiency of the existing judicial system or other conflict resolving bodies. In view of their weakness neither trade unions nor other bodies of workers' representation are in a position to really monitor the factual implementation of statutory law.

In addition it has to be stressed that within the large number of companies in the private sector of the CEE countries in actual practice labour law plays no role whatsoever. It is made too easy for companies to sign contracts on the basis of general civil law and thus to avoid the statutory labour and social

¹⁴ For an overview see H. Kohl / H.-W. Platzer (FN 5) 15 and M. Ladó (FN 2) under the subtitle „Information and Consultation of workers"

¹⁵ M. Stanojevic / G. Gradev (FN 4) 45

¹⁶ *ibidem*

¹⁷ See the discussion paper by A. Bronstein, Labour Law Reform in EU Candidate Countries: achievements and challenges, on-line

<http://www.ilo.org/public/English/dialogue/ifpdial/download/papers/candidate.pdf>

¹⁸ See M. Ladó / D. Vaughan-Whitehead (FN 6) 80

provisions aimed at providing employees with a degree of protection¹⁹. This leads, of course, to a constant process of de-legitimization of labour and social security legislation. And as a result to an increasing extent a mentality can be observed, which praises the free game of market forces in the absence of labour law and social security law as well as the absence of collective structures as an ideal precondition for prosperity.

3. The Europeanization of Industrial Relations

3.1. Fundamental Social Rights

After a long-lasting and very controversial debate in 2000 the Charter of Fundamental Rights of the EU was passed as a legally-non binding declaration, expressing the consensus of all present Member States. In the meantime the draft for a Constitutional Treaty, replacing and amending the old Treaties on the EU and on the EC, has integrated this Charter in its text to make it legally binding. In spite of the still existing controversies on the issue of qualified majority there is no doubt that the Constitutional Treaty will be accepted in the near future.

Within the Charter there is a specific chapter for fundamental social rights under the title „solidarity”. But even outside this chapter there is a whole set of such rights of utmost importance in the social context, including the freedom of association, which implies the right of everyone to form and to join trade unions for the protection of his or her interests (Art. 12). The chapter on „solidarity” as such contains twelve core rights, including the workers’ right „to working conditions which respect his or her health and dignity” (Art. 31 par. 1), the right of collective bargaining and collective action, which is guaranteed as a subjective right either for workers and employers or for their respective organizations (Art. 28), and the right for either workers or their representatives to information and consultation in good time in reference to management’s decision making (Art. 27). The two latter fundamental rights, of course, are of utmost importance in the context discussed in this paper.

In evaluating the content of the chapter on „solidarity” it has to be stressed that it includes collective rights, it insists on the Community’s and the Member States responsibility for providing job security, for providing working conditions which respect the worker’s health, safety and dignity and for protecting young people at work. It furthermore insists on measures to make family and professional life compatible and to provide social security as well as

¹⁹ Cs. Kollonay-Lehoczky, European Enlargement – A Comparative View of Hungarian Labour Law (forthcoming)

social assistance. All this taken together it becomes pretty evident that this is a concept which would be incompatible with mere de-regulation, de-collectivization and de-institutionalization. Or to put it in broader terms: it would be incompatible with a strict neo-liberal approach²⁰.

3.2. Minimum Standards

Up to now the Community's legislative activity has not been characterized by a systematic approach. This is mainly due to the fact that social policy only gradually became a relevant factor in the context of the Community. Now there is a far-reaching power to legislate in the field of labour law and social security. However, the EC still has no power to legislate in reference to "pay, the right of association, the right to strike or the right to impose lock-outs". And there is no hope that this will be changed by the Constitutional Treaty.

In the meantime many topics are covered by Directives, thereby influencing the law of the Member States. However, my focus is not on these topics. It rather has to be stressed that to an increasing extent the Directives are shaped in a way, which gives the social partners and workers' representatives a significant role in implementing them. A very good example in this respect is the Directive on Working Time²¹.

3.3. Social Dialogue

The umbrella organisations of the trade unions and of the employers' associations on EU level are not involved in collective bargaining, but are primarily considered to be a lobby for the respective interest groups they represent. They were for a long time informally cooperating with the Commission. This so-called „social dialogue” was for the first time formalized by the Treaty in 1986. In the meantime it has achieved a very elaborated structure by Art. 138 and 139 of the EC Treaty.

Nowadays the above mentioned actors are integrated into the legislative machinery. Before submitting a proposal of legislation the Commission has to consult them „on the possible direction of Community action”. If the Commission then still wants to continue to elaborate a proposal, there has to be a second consultation of the parties of the social dialogue „on the content of this proposal”. On this occasion the social partners can take over the Commission's initiative and try to regulate the matter by reaching an

²⁰ For a detailed analysis of the impact of the fundamental social rights in the Charter see M. Weiss, *The politics of the EU Charter of Fundamental Rights*, in B. Hepple (ed.), *Social and Labour Rights in a Global Context*, Cambridge University Press, 2002, 73

²¹ See in this context C. Barnard, *The EU Agenda for Regulating Labour Markets – Working Time Revisited* (forthcoming)

agreement. They have nine months to elaborate an agreement, which then – without the involvement of the European Parliament – can be transformed into a legally binding Directive by the Council. The Directives on parental leave, on fixed-term contracts and on part-time work are results of such a procedure. If the social partners cannot reach an agreement within the period of nine months, the task to draft a proposal falls back to the Commission.

The social partners however, according to the Treaty do have an alternative possibility. They are free to conclude agreements – even in matters where the EC has no legislative power – to be implemented „in accordance with the procedures and practices specific to management and labour and the Member States”. Such agreements are not legally binding. It is up to the social partners on EU level to convince the respective actors in the Member States to transform the ideas contained in such agreements into their respective structure within the Member States. A recent example for such a strategy is the agreement on tele-work of 2002, whose possible impact now is vividly discussed in the different Member States.

In addition to the inter-professional social dialogue there is an increasing number of sectoral social dialogues²². They are not integrated into the legislative machinery. However, their institutional structure has recently been improved in a significant way. Their task is the representation of the specific interests of their sector within the EU and the conclusion of agreements, which now may be binding among them, but which remain to be voluntary for the actors on lower levels. Such agreements so far only play a marginal role²³.

3.4. Collective Bargaining

Up to now and certainly for a long time in the future collective bargaining remains to be a matter of policy within the Member States. The legal pattern of collective bargaining and collective agreements is different from country to country. There is, however, at least one feature common to the collective bargaining structure of all current Member States (with the exception of the UK): they all have an interrelated multi-level system²⁴. But again, the rules on the relationship between agreements on different levels, or between old and new agreements, are different from country to country.

²² For a detailed analysis see B. Keller, Social Dialogue at Sectoral Level: The Neglected Ingredient of European Industrial Relations, in B. Keller / H.-W. Platzer (eds.), *Industrial Relations and European Integration*, Ashgate, Aldershot / Burlington, 2003, 30

²³ *Ibidem* 37

²⁴ See F. Traxler, European Monetary Union and Collective Bargaining, in B. Keller / H.-W. Platzer (eds.), *Industrial Relations and European Integration*, Ashgate, Aldershot / Burlington, 2003, 85 (90)

In view of this diversity it would be totally unrealistic to think in terms of a European Collective Agreement as an instrument to promote uniformity. Nevertheless, the need for more cooperation and coordination in collective bargaining throughout the Community has definitely increased due to the introduction of the European Monetary Union. The new currency leads to an increase of transparency: prices, wages and other working conditions can easily be compared. The discrepancies of working conditions between different Member States are becoming more evident. This to a bigger and bigger extent might lead to pressures to develop strategies directed to the goal of gradual convergence – at least in a long-term perspective.

The monetary union has a second impact on collective bargaining, which perhaps is even more important. So far it somehow was possible to cope with labour market problems by national monetary policy. There was a sort of interaction between the actors of collective bargaining and the National Reserve Banks. Now monetary policy is centralized and conducted by the European Central Bank. The question therefore has to be put, whether a collective bargaining structure can be established which would correspond to the European monetary policy as it did before to the national monetary policy²⁵.

The task consists in improving horizontal transnational coordination. In this respect at least some progress has been achieved in the last fifteen years. The first important step was the so-called Doorn-declaration of 1988, named after the Dutch town Doorn, where the declaration was signed. In this declaration the trade unions of Belgium, Netherlands, Luxembourg and Germany agreed on three core principles to be observed in collective bargaining throughout the European Community: (a) Wage settlements in collective agreements should correspond to the sum total of the evaluation of prices and the increase in labour productivity. (b) Collective agreements should make an attempt to strengthen mass purchasing power and focus on employment creating measures (shorter working time etc.) and (c) There should be regular information and consultation between the participating trade unions on developments in bargaining policy. In short: the idea was to influence the content of collective bargaining by the first two principles and to strengthen the horizontal communication by the third principle. The principles on content in the meantime have been redefined and shifted from wage issues to non-wage issues as for example life long learning. And the attempt of more intensive communication has been extended to continuous evaluation.

²⁵ For the interrelationship of monetary policy and collective bargaining see F. Traxler (FN 24)

In the meantime quite a few initiatives were started on sectoral level. In 1997 the German metalworkers' trade union launched a cross-border collective bargaining network. The idea was that each individual district of this trade union was supposed to develop a solid network of collective bargaining cooperation with the metalworkers' trade unions of neighbouring countries. In addition a common day to day information system on collective bargaining has been established. And finally, common working groups on specific bargaining issues have come into existence. The example of the German metalworkers' trade union in the meantime has been followed in Scandinavia by the Nordic metalworkers' trade unions and by trade unions from other sectors as for example the construction and the chemical industries.

The most promising and most far-reaching initiative was taken by the European Metalworkers Federation (EMF) in the late nineties of last century. It covers the EMF member countries as a whole. The EMF developed guidelines for national collective bargaining in order to prevent downward competition. In addition it developed Charters on specific issues: on wage bargaining, on working time bargaining and on bargaining for training conditions. Other issues are to be added. To just illustrate the approach for the case of wage bargaining it reads „the point of reference to wage policy in all countries must be to offset the rate of inflation and to ensure that workers' incomes retain a balanced participation in productivity gains”. This of course is nothing more than a recommendation: the responsibility remains to be with the individual negotiating trade union. The EMF initiative has been accompanied by a remarkable process of institution-building. There is now an EMF Collective Bargaining Committee for assessing and further developing the structure of this initiative. And there are Working Parties for the specific issues. All this has led to continuous evaluation, to an intensified continuous communication and to a strengthening of personal links between representatives of EMF affiliates. Since 1999 the EMF has established a European Collective Bargaining Information Network (EUCOB), an excellent data base on recent developments in collective bargaining in the metal industries. In the meantime the EMF has been followed-up by other European trade union federations as are chemistry, construction, food, public service and textile.

In view of all these initiatives the ETUC passed a resolution in 1999 on a „European system of industrial relations”, urging in particular for a „European solidaristic pay policy”, which should be able to (a) guarantee workers a fair share of income, (b) counter the danger of social dumping, (c) counter the growing income inequality, (d) contribute to a reduction of disparities in living conditions and (e) contribute to an effective implementation of the principle of equal treatment of the sexes. In addition the resolution is stressing the European Federations' responsibility to coordinate collective bargaining.

In 2000 the ETUC passed a „European guideline for wage increases”, which is very much shaped according to the model of the already mentioned EMF guideline on wage bargaining. The European Trade Union Institute (ETUI), the research institute of the ETUC, now annually evaluates the wage bargaining policy in the light of the guideline.

The listing up of all these initiatives is merely meant to illustrate that the need for transnational cooperation and coordination has been understood by the trade unions. Even if the structures are still in a rudimentary stage, they are an important element to develop a transnational perspective and thereby shape collective bargaining in the national context. Of course there is an evident deficiency: this development takes place exclusively on the trade union side²⁶. There are no similar attempts on the employers' side. However, the more the strategy of coordination and cooperation will be a successful tool in the hands of the trade unions, the less it will be possible for the employers' associations to simply ignore this new reality.

The process of transnational coordination and cooperation could be significantly stimulated by the social dialogue, the inter-professional one as well as the sectoral one. The inter-professional social dialogue should not put all its energy in the preparatory steps of legislation, but should focus more on agreements to be implemented according to national law and practice. Thereby it could help to find out what topics might be of primary interest for regulation in a more coordinated way. Model agreements could present frameworks to enrich the imagination of the national actors²⁷. In case the actors on European level cannot reach an agreement, each side at least could communicate to its constituency its respective view. Of course all such framework-agreements and communications would not be legally binding. But they could help to stimulate discussions on the domestic bargaining scene of how to cope with such proposals. It goes without saying that such a communication strategy can only function if there is a vertical dialogue between the European umbrella organizations and the different national constituencies.

It may be stressed that the recent developments in promoting the transnational coordination of collective bargaining in the EU context are definitely very promising. However, all available instruments are to be used to intensify and to

²⁶ For a comprehensive overview on all these coordination activities see T. Schulten, *Europeanisation of Collective Bargaining: Trade Union Initiatives for the Transnational Coordination of Collective Bargaining*, in B. Keller / H.-W. Platzer (eds.), *Industrial Relations and European Integration*, Ashgate, Aldershot / Burlington, 2003, 58

²⁷ See for such a strategy M. Weiss, *Social Dialogue and Collective Bargaining in the Framework of Social Europe*, in G. Spyropoulos / G. Fragnière (eds.), *Work and Social Policies in the New Europe*, European Interuniversity Press, Brussels, 1991, 59

accelerate this process. The task is to build up a multi-level system with specific articulation on each level, with possibilities for feedback from one level to the other, with possibilities for mutual learning in the process of coordination. Such a system is supposed to leave the actors on lower levels utmost bargaining autonomy, but at the same time it puts pressure on them to cope with the frameworks established on higher levels. This „open method of coordination” in the meantime has become the catchword for the flexible strategy in balancing the needs for centralization and decentralization in a multi-level system of collective bargaining²⁸.

3.5. Employment Policy

The „open method of coordination” not only refers to coordinated collective bargaining, but to practically all policy areas in which the social partners are supposed to be integrated. A good example is the employment policy for which in the Amsterdam amendment to the EC Treaty „a co-ordinated strategy for employment” (Art. 125) was institutionalized. The genuine competence of the Member States in this very area remains uncontested. The Community is required to contribute to a high level of employment „by encouraging co-operation between Member States and by supporting and, if necessary, complementing their action”.

To make sure that this aspiration has a chance to be realized, the Chapter on Employment provides for several institutional arrangements: there is the Employment Committee, which is mainly supposed to monitor the situation on the labour market and the employment policies in the Member States and the Community and thereby help to prepare the relevant joint annual report by the Council and the Commission. In fulfilling its mandate, the Committee is required to consult the social partners. In order to make sure that the activities of the Employment Committee as well as the joint annual report by the Council and the Commission do not remain without consequences, the Chapter on Employment establishes additional powers for the Community. After examination of the joint annual report by the European Council and on the basis of the European Council's conclusions, the Council „shall each year draw up guidelines” (Art. 128 par. 2). The decision requires only a qualified majority.

²⁸ For a comprehensive analysis of this strategy see European Commission, Report of the High level group on industrial relations and change in the European Union, Office for Official Publications of the European Communities, Luxembourg 2002; see also C. de la Porte / P. Pochet, *Supple Co-ordination at EU Level and the Key Actors' Involvement*, in C. de la Porte / P. Pochet (eds.), *Building Social Europe through the Open Method of Coordination*, Inter University Press, Brussels, 2002, 27

This arrangement has led to manifold measures and significantly increased the interrelated activities between the Member States. The summits of Luxemburg, Cologne and Lisbon are important steps on this road²⁹. However, the results in detail are of less importance in the context to be discussed here. Important is the fact that the Chapter on Employment establishes a mutual learning process for the Community and the Member States, including not only governments but also the social partners. None of the Member States can escape the permanent dialogue and the permanent pressure implied by it. Best practices do not have to be reinvented all the time but can easily be communicated and imitated. The awareness by the media is growing significantly. The whole structure to an increasing extent is understood as a joint European activity. The goal – in spite of the wording of the Treaty – is a gradual denationalization and Europeanization of employment policy.

3.6. Employees' Involvement in Management's Decision Making

The perhaps most important input of the European Community into the field of industrial relations took place in the area of employees' involvement in management's decision-making³⁰. Just like in the area of collective bargaining the situation in the different Member States was characterized from the very beginning by extreme diversity. Some countries were not at all abiding to such a philosophy of cooperation at all, but focusing exclusively on conflict and collective bargaining. In order to guarantee at least a minimum of employees' influence in management's decision making, in the seventies of last century the European legislator already prescribed patterns of information and consultation in case of collective redundancies³¹ and in case of transfer of undertakings³², and later on in the eighties on health and safety³³. However, this was only a beginning. The program has become much more ambitious. In the meantime attempts were successful to establish patterns of employees' involvement on transnational scale and to uplift significantly the minimum level in the national context.

²⁹ For a very reliable assessment of this development see J. Goetschy, *European Employment Policy since the 1990s*, in B. Keller / H.-W. Platzer (eds.), *Industrial Relations and European Integration*, Ashgate, Aldershot / Burlington, 2003, 137

³⁰ For a description of the debates leading to this development see M. Weiss, *Workers' Participation in the European Union*, in: P. Davies et alii (eds.), *European Community Labour Law – Principles and Perspectives*, Clarendon Press Oxford, 1996, 213

³¹ (1975) Official Journal (OJ) L 48

³² (1977) OJ L 61

³³ (1989) OJ L 183/1

The first step in this direction was the Directive on European Works Councils (EWCs) in 1994³⁴. Instead of regulating everything in a substantial way it only provides for a procedural arrangement, establishing a special negotiating body representing the workers' interests and leaving more or less everything to negotiations between this body and the central management of a transnational undertaking or group of undertakings. It is up to the special negotiating body to decide with a two third majority not to request an agreement. Only if the central management refuses to commence negotiations within six months of receiving such a request, or if after three years the two parties are unable to reach an agreement, the subsidiary requirements set out in the Annex to the Directive apply. These subsidiary requirements are the only form of pressure available to the special negotiating body. Until the date of implementation into the national law of the Member States the Directive allowed for voluntary agreements where even the minimal conditions of the Directive did not play a role. In the meantime a bit more than a third of the undertakings covered by the Directive have implemented it in actual practice³⁵. Where subsidiaries of CEE States are involved, representatives of those candidate countries voluntarily have become included into the EWCs. This has turned out to be an excellent strategy to reduce reservations against employees' involvement in management's decision-making as they still exist in the CEE States³⁶. As empirical studies show the EWCs develop unpredictable dynamics of their own, achieving sometimes far-reaching agreements with the Central management: all depends on the interface with other factors of the overall industrial relations structure³⁷.

The same pattern as in the EWC Directive is followed by the second step, the Directive of October 2001 on employees' involvement in the European Company³⁸. The Directive has to be read together with the Statute on the European Company, which contains the rules on company law.

A European Company can only be registered if the requirements of the Directive are met. Thereby it is guaranteed that the provisions on workers' involvement cannot be ignored. The structure of the Directive is very much the

³⁴ (1994) OJ L 254/64

³⁵ For recent assessments of the factual implementation of the Directive see S. Demetriades, *European Works Councils Directive: A Success Story?*, in M. Biagi (ed.), *Quality of Work and Employee Involvement in Europe*, Kluwer Law International, The Hague / London / New York, 2002, 49 and T. Müller / H.-W. Platzer, *European Works Councils: A New Mode of EU Regulation and the Emergence of a European Multi-level Structure of Workplace Industrial Relations*, in B. Keller / H.-W. Platzer (eds.), *Industrial Relations and European Integration*, Ashgate, Aldershot / Burlington, 2003, 58

³⁶ For this effect see M. Sewerynski (FN 13) 272

³⁷ See T. Müller / H.-W. Platzer (FN 35) 80

³⁸ (2001) OJ L 294/22

same as in the Directive on European Works Councils: it provides for a special negotiating body, lists up the topics for negotiation and leaves everything to negotiations. In case the negotiations fail, there is a fall back clause, the so-called standard rules. The Directive contains two different topics, which have to be distinguished carefully. The first refers to information and consultation. Here the structure is very similar to the one developed in the Directive on European Works Councils. The application of the Directive on European Works Councils is excluded in the European Company.

The crucial and interesting topic of the Directive refers to employees' participation which is defined as „the influence of the body representative of the employees and/or employees' representatives in the affairs of a company by way of (1) the right to elect or appoint some of the members of the company's supervisory or administrative organ, or (2) the right to recommend and/or oppose the appointment of some or all members of the company's supervisory or administrative organ”. Normally it is up to the negotiations how such a scheme has to look like. Only in case of transformation the agreement „has to provide at least the same level of all elements of employees' involvement as the ones existing within the company to be converted into a European Company”. If in other cases a reduction of the participation level would be the result of the negotiations, qualified majority requirements apply which make sure that by way of agreement the existing highest level cannot be easily or carelessly reduced. If no agreement is reached, the standard rules apply and make sure that in cases where to a significant extent a scheme of workers' participation already existed prior to the engagement into a European company, the level of this scheme is maintained. However, no participation scheme is needed if none of the participating companies has been "governed by participation rules prior to the registration of the European Company."³⁹

Also the third and perhaps most important step, the Directive of March 2002 on the minimum framework for information and consultation on national level⁴⁰, is shaped according to the same philosophy. It sets some minimum conditions and leaves everything else to the Member States. The Directive applies to establishments of at least 20 employees and to undertakings of at least 50 employees. In the original version of the proposal reference was only made to undertakings.

³⁹ For a first evaluation of the Directive see M. Weiss, Workers' Involvement in the European Company, in M. Biagi (ed.), *Quality of Work and Employee Involvement in Europe*, Kluwer Law International, 2002, 63

⁴⁰ (2002) OJ L 80/29

The purpose of the Directive is „to establish a general framework setting out minimum requirements for the right to information and consultation of employees in undertakings or establishments within the Community”. The Directive defines the structure of information and consultation in a much more comprehensive way than this was done so far in other Directives. The definitions contain important procedural requirements. Timing, content and manner of information have to be such that it corresponds to the purpose and allows the employees' representatives to examine the information and to prepare for consultation. Consultation has to meet several requirements: (1) it has to be ensured that the timing, the method and the content are effective; (2) information and consultation have to take place at the appropriate level of management and representation, depending on the subject under discussion; (3) the employees' representatives are entitled to formulate an opinion on the basis of the relevant information to be supplied by the employer; (4) the employees' representatives are entitled to meet the employer and to obtain a response, and the reasons for that response, to any opinion they may formulate; and finally (5) in case of decisions within the scope of the employer's management powers an attempt has to be made to seek prior agreement on the decisions covered by information and consultation. Unfortunately the Directive does not tell what happens if an agreement is reached, but the employer does not implement it.

Information has to cover the recent and probable development of the undertaking's or the establishment's activities and economic situation in its broadest sense. Information and consultation has to take place on the structure and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged, in particular where there is a threat of unemployment. Finally, information and consultation has to take place on decisions likely to lead to substantial changes in work organisation or in contractual relations, including those covered by the Community provisions.

On the whole, the Directive remains very flexible and leaves the structural framework and the modalities to a great extent to the Member States. Nevertheless, it turned out that the opposition of some countries could only be overcome by granting transitional provisions. They are supposed to apply if at the date of the entry into force of the Directive in the respective Member State (March 2005) there is „no general, permanent and statutory system of information and consultation of employees, nor a general, permanent and statutory system of employee representation at the workplace allowing employees to be represented for that purpose”. In these countries the first two years after implementation into national law the Directive only applies to companies employing at least 150, or establishments employing at least 100 employees. In the third year this is lowered to 100 and 50. Afterwards the Directive applies as everywhere else. In short: those, who do not know a system of institutionalized system of employees' information and consultation are not exposed to a shock-therapy, but get the chance of a smooth transition.

The mere existence of these Directives does not leave any doubt that the promotion of employees' involvement in company's decision-making has become an essential part of the Community's mainstreaming strategy in its social policy agenda. It has transgressed definitely the „point of no return”. This policy is in line with the already mentioned Art. 27 of the Charter of Fundamental Rights of the EU, guaranteeing the workers' right to information and consultation. This has an important implication: countries with a tradition of exclusively adversarial structures have no longer a choice but to restructure their systems towards a concept of partnership and cooperation.

All these Directives have their weaknesses: they are unnecessarily complicated, not always consistent and above all very vague in their terminology. The Directive supplementing the Statute of the European Company as well as the Directive on a national framework for information and consultation have been watered down during the legislative process: the result is the lowest denominator. However, in assessing the importance of these measures for the future of industrial relations in the EU, these deficiencies should not be overstated. The decisive element is the fact that these instruments, taken as a whole, force all actors involved – trade unions and workers' representatives, employers' associations, employers and employees – to discuss and reflect on the potential of employees' information and consultation, and in the case of the Directive supplementing the Statute on the European Company even on workers' participation in company boards. Finally it has to be stressed that the Community's approach does not focus on introducing specific institutional patterns but simply stimulates and initiates procedures for the promotion of the idea of employees' involvement in management's decision-making.

4. Integration of Industrial Relations in an Enlarged EU

4.1. The Insufficiency of the mere Transposition of the *Acquis Communautaire*

In order to meet the Copenhagen criteria for accession the CEE States as well as all other candidate countries were required to transpose all EC legislation (the so-called *acquis communautaire*) in their respective legal systems. In view of the huge amount of such legislation this was a difficult task to be performed in a relatively short time. In general, the candidate countries – including the CEE States – had no problems to meet this precondition for accession. With the help of external experts (the so-called process of „screening”) they succeeded to an admirable extent in transposing the EU law into their respective legal

structure⁴¹. However, the gap between the law in the books and the law in action as indicated above also plays a role in this context. The focus remains on the normative level. As long as the institutions and actors guaranteeing a satisfying implementation in actual practice are not available and as long as the necessary resources for implementation are lacking it would be illusionary to assume that mere transposition of EU law does have an effective impact on the reality of the CEE States⁴². The danger cannot be denied that it might well remain to be mere window-dressing.

As indicated above quite a few Directives (as for example those on working time or on health and safety, two areas where the CEE States are still lagging far behind the present EU average⁴³) need the involvement of social partners and/or workers' representatives in order to be adequately implemented. This of course is not possible as long as the respective actors and instruments are still absent⁴⁴.

4.2. Social Dialogue and Collective Bargaining

In order to be able to participate in the cross-sectoral as well as in the sectoral social dialogues on European level there is a need for the respective structures in the national context. The same is true for the strategy of coordinated collective bargaining as described above. Here the deficits in the CEE States are significant. In particular social dialogue and collective bargaining at sectoral level are to be developed. If these intermediary structures are missing there will neither be an input to the European social dialogue from the CEE States, nor will they be able to adequately cope with the input provided by the social dialogue. Neither framework agreements concluded in the context of the European cross-sectoral social dialogue (like the one on tele-work) nor similar agreements or guidelines developed in the context of European sectoral social dialogues will have any relevance for the CEE States as long as there are no intermediary structures in place. And of course as long as trade unions and employers' associations do not have an appropriate organisational structure, they will not be able to play their respective roles in the mutual learning process, as it was sketched above by taking the example of employment policy. It cannot be denied that social partners and industrial relations in the CEE States are in danger to remain disconnected from the patterns established on European level⁴⁵. Then the highly praised open method of coordination could

⁴¹ See S. Clauwaert / W. Düvel, *The implementation of the social acquis communautaire in Central and Eastern Europe*, ETUI Interim Report, European Trade Union Institute, Brussels, 2000

⁴² M. Ladó / D. Vaughan-Whitehead (FN 6) 80

⁴³ *ibidem*

⁴⁴ *ibidem*

⁴⁵ This view is shared by M. Ladó / D. Vaughan-Whitehead (FN 6) 83

not work at all. The fight against this very danger is a challenge not only for the trade unions but also and in particular for the employers' associations. And it is of course also a challenge for the social partners of the present Member States and the present EU to support this development, as it was promised at the summit in Laeken when Belgium the last time had the Presidency of the EU.

In this context it should be mentioned that in the meantime particularly the trade unions have developed a significant amount of networks aiming at assistance and close cooperation. Already in 1993 the 'European Trade Union Forum for Cooperation and Integration' was founded. In addition there is for example the Baltic Sea Trade Union Network (BASTUN), where trade unions from Poland, Lithuania, Latvia and Estonia are closely cooperating with trade unions from Sweden, Norway, Finland and Denmark. Or based on the 'Interregional collective bargaining policy memorandum – co-operation networks of the trade unions', signed in Vienna in 1999, the metalworkers' trade unions of Germany, Austria, the Czech Republic, Slovakia, Slovenia and Hungary agreed on exchange of information and mutual support.⁴⁶

4.3. Employees' Involvement in Management's Decision Making

As shown above employees' involvement in management's decision-making has not only become one of the core activities in the mainstream of the EC social policy. It furthermore has reached a point where Member States no longer can escape. The latest with the recent Directive on a framework of information and consultation the question is no longer whether the Member States may have such an institutional arrangement, the question merely is how they shape it. But even in this respect the leeway is narrowed down: all the topics mentioned by the Directive are to be covered and the requirements for adequate information and consultation schemes are to be met. There is no doubt that the arrangements established so far in the CEE States do not live up yet to these standards. It is of course up to the CEE States whether they prefer a system exclusively based on trade union representation or a dual system with special elected bodies in addition to the existing trade unions. It is also up to the CEE States whether they establish different structures for enterprises where trade unions are present and where they are absent. So far the Directive does not prescribe anything since it refers to workers' representatives according to national law and practice. However, it has to be stressed that the Directive is only adequately implemented if workers' representatives in the establishments and undertakings covered by the Directive are available. It should be added that

⁴⁶ For these and quite a few other examples see R. Langewiesche / A. Tóth, Introduction: Making unification work, in: R. Langewiesche / A. Tóth, *The Unity of Europe – Political, Economic and Social Dimensions of EU Enlargement*, Brussels 2001, 7 (65 – 68)

this implementation problem is not only a problem for the CEE States but also for quite a few old Member States of the present EU. There will be a unique opportunity to learn from each other by way of an intensive exchange of information.

However, the problem for the CEE States is not only confined to the question how to shape the pattern of information and consultation, but to develop a consistent and coherent multi-level system of industrial relations, in which employees' involvement in management's decision making has its proper place. It is of utmost importance to organise a rather clear-cut division of labour between the system of information and consultation in management's decision-making and collective bargaining. If there are too many overlaps, the industrial relations machinery will not be able to function properly, and it will not gain the acceptance of the trade unions. It is important to develop the respective systems in cooperation with the trade unions. Whether they already are in a position to fulfil this role, however, may well be doubted.

4.4. Conclusion

The CEE States are still in the stage of transformation as far as industrial relations are concerned. Systems of employees' involvement in management's decision-making are rather the exception than the rule. And where they exist they are weak. There is not yet a consistent

multi-level system of industrial relations. Collective bargaining is still a rudimentary phenomenon, mainly taking place on company level. Intermediary levels of collective bargaining and social dialogue are missing. The private sector to a great extent is lacking collective representation whatsoever.

In this situation the accession to the EU means a particular challenge for both: for the EU in their attempt to build up an integrated system of industrial relations and for the CEE States in their aspiration not to be disconnected from this EU pattern. Thereby, EU enlargement could play the role of a catalyst in this process. As shown above, there is a likelihood that it will accelerate and shape to a certain extent the dynamics of transformation. And this of course again will have an impact on the future structure of the EU arrangements. There is not a one way perspective but reciprocity. The optimistic view would be that thereby a mutual learning process is established for the benefit of both: the EU as well as the CEE States. This, however, is not a short-term, but a long-term project.