

# GOOD GOVERNANCE OF COLLECTIVE LABOUR RELATIONS IN EU VIA SOCIAL DIALOGUE

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*Stripsnyje supranacionaliniu Europos Sąjungos lygiu analizuojamas tinkamas kolektyvinių darbo santykių valdymas pasitelkiant socialinį dialogą, įvertinant suformuluotus tinkamo valdymo principus, kitus svarbius kriterijus socialinei taikai prižiūrėti ir jai garantuoti, skaidraus socialinio dialogo užtikrinimo galimybes, tinkamą pilietinės visuomenės atstovų dalyvavimą socialiniame dialoge ir viešosios valdžios atsakomybę. Taip pat analizuojami Europos Sąjungos teisės aktai ir rekomendacijos bei ekspertų nuomonė, atsižvelgiama į autoritetingas darbo teisės mokslininkų išvadas, atskleidžiant socialinio dialogo ypatybes ir trūkumus Europos Sąjungos lygiu.*

*The article analyses the good governance of the collective labour relations via social dialogue at the supranational level of the European Union, evaluating the formulated principles of good governance, the other important criteria to maintain and guarantee the social peace, the possibilities to ensure the transparency of social dialogue, the appropriate participation of civil society representatives in the social dialogue as well as the responsibility of public authorities. The article analyses legal acts of the European Union, recommendations and the opinions of experts, also taking into account the authoritative conclusions of labour law scholars, revealing the peculiarities and drawbacks of the social dialogue at the European Union level.*

## Introduction

The modern European concept of collective labour relations is based on social dialogue. A legal basis for the social dialogue is provisions of art. 118 a and art. 118b of the Treaty on European Union (“The Treaty of Maastricht”) of 7 February 1992 (TEU) which are art. 138 and art. 139 of the Treaty Establishing the European Community (“the Amsterdam Treaty”) (TEC). Both of the mentioned provisions of the TEC were adopted by the Treaty on the Functioning of the European Union (TFEU) of 30 March 2010 as art. 154 TFEU (former art. 138 TEC) and art. 155 TFEU (former art. 139 TEC).

The social dialogue in the collective labour relations means exchange of substantive opinions between the social partners on matters of their interest which are regulated in the labour laws of the European Union and in the national systems of labour law of the EU Member States. In the European law literature the social dialogue is associated with negotiations conducted by social partners at different levels: supranational, national, regional, inter-sectoral/inter-professional, sectoral/professional, and at works level. The social dialogue is also a synonym of bilateral inter-sectoral/inter-professional negotiations at the supranational level, conducted by the social partners who develop their statutory activity at the EU level<sup>1</sup>. Because of the significant and far-reaching diversity of the

<sup>1</sup> BOGG, A.; DUKES, R. The European social dialogue: from autonomy to here. In *Resocialising Europe in a time of crisis*. Edited by COUNTOURIS, M.; FREELAND, M. Cambridge: Cambridge University Press, 2013, p. 466.

social dialogue levels and huge variety of social partners representing similar parties to the collective labour relations in different configurations, the social dialogue is a complicated social process which is difficult to be classified in legal terms<sup>2</sup>. The social dialogue regulated by the provisions of the primary European law, conducted at the supranational level by the social partners functioning in the European social area, is a model for conducting dialogue by the social partners in the EU Member States and for establishment by the authorities of particular EU Member States of the principles and procedures for the social dialogue in the labour law systems. Therefore, it is necessary to analyze the EU legislation, to present the positive and negative aspects of the European social model in order to determine whether implementation of the assumptions of such model provides serious guarantees for achievement and maintenance of the social peace in the collective labour relations, different than those which before the EU accession in 2004 were guaranteed by a concept – applied in the “new” European states – of labour relations based on contradictory interests of the social partners.

## 1. Good Governance Principles

From the point of view of a lawyer specializing in the collective labour law the term “good state” means a democratic state whose authorities can properly and efficiently govern the collective labour relations, in such a manner so as to ensure achievement and maintenance of social peace via social dialogue between the social partners representing the collective interests of workers and employers. The social peace as a common good means a condition in which none of the social partners’ organizations (trade unions, employer organisations) sees benefits in exercising the fundamental freedoms and/or rights to organise collective actions (strikes or lockouts) in order to exert pressure on the partner participating in the social dialogue. The above mentioned attribute of “good state” applies respectively to the institutions governing the European Union, a specific regional international organization, which has a chance to gain a legal status of federal authority in the future federation of European states. Art. 2 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on 13 December 2007<sup>3</sup>, officially and solemnly declares that “The Union’s aim is to promote peace, its values and the well-being of its peoples” (Art. 2(1)). The said provision of the Treaty imposes an obligation on the authorities of the European Union and authorities of its Member States to guarantee to “<...> its citizens an area of freedom, security and justice <...>” (Art. 2(2)). In the collective labour law the above statements are understood clearly: the EU institutions are obliged to guarantee social peace in the collective labour relations.

A chance for achievement of permanent social peace in the collective labour relations via the social dialogue is a conviction, very common among lawyers specialising in the European Law, of the value of the social dialogue as a method serving good governance of a specific, important domain of public affairs<sup>4</sup>. Undoubtedly, the collective labour relations are such domain, and the social peace is an asset which the most important participants of the social life: social partners, state and the society, want to achieve and maintain. Just like the social peace which should also be presented as a process of specific phenomena and certain state of affairs, also the governance is characterised with dynamic

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<sup>2</sup> Lo FARO, A. *Regulating Social Europe. Reality and Myth of Collective Bargaining in the EC Legal Order*. Oxford-Portland, Oregon: Hart Publishing, 2000, p. 21.

<sup>3</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community. *Journal of Laws (Dziennik Ustaw) of the Republic of Poland*, 2009, No. 203, item 1569.

<sup>4</sup> C. Welz was the first to apply the above principle in the European labour law literature to analyze the effectiveness of the social dialogue between supranational social partners in the European Union. WELZ, C. *The European Social Dialogue under Articles 138 and 139 of the EC Treaty. Actors, Process, Outcomes*. The Netherlands: Wolters Kluwer Law & Business, 2008, p. 106 et seq.

and static terms used for presentation and analysis of the opposite social relations (cooperation and conflict) between different entities governed by public and private law<sup>5</sup>. What is characteristic for good governance is an extensive application of non-hierarchical decision-making methods.<sup>6</sup> Supranational collective agreements, industry-wide framework normative agreements and – what is most important in terms of social dialogue – also the agreements concluded by the social partners within particular sectors and professions, which are not of normative nature, may be successfully applied by the EU institutions and authorities in the EU Member States as the methods of good governance of social peace in labour relations. The “European” concept of good governance was presented in 2001<sup>7</sup> by a team of 15 specialists (*think tank*) in EU future development (*la cellule de prospective*), acting for the Commission under the guidance of Jérôme Vignon, former advisor of Jacques Delors<sup>8</sup>. The definition of “good governance” as a set of principles, processes and actions affecting the achievement of the desired goals in the European area was based on five points: openness, participation, responsibility, effectiveness, coherence. In the “White Paper” prepared by the Commission in 2001 social partners were attributed special role in the achievement of the planned goals in the European area via the “good governance” method<sup>9</sup>. Also the European civil society should follow two of the above mentioned principles of good governance: responsibility and openness<sup>10</sup>. Consultations and social dialogue between the social partners conducting negotiations “guided” by the Commission (tripartite) and direct “autonomous” negotiations were considered the best example of the effective practical implementation of the principles of good governance at the supranational level within the European Union<sup>11</sup>.

The principles of good governance mentioned above were introduced into the Treaty establishing a Constitution for Europe, EU Constitution, approved by the heads of EU Member States on Friday, 18<sup>th</sup> of June, presented and signed at the Capitoline Hill in Rome on Friday 29 October 2004. Art. I-47 of this legal act formulates the basic principles of “participatory democracy”. According to this, the EU institutions shall give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action (Art I-47(1)). The EU institutions were obligated to maintain an open, transparent and regular dialogue with representative associations and civil society of the European Union (Art. I-47 (2)). The Commission shall carry out broad consultations with parties concerned in order to ensure that the Union’s actions are coherent and transparent (Art. I-47 (3)). The transparency of work of the institutions, bodies, offices and agencies of the European Union was confirmed in art. I-50(1) of the EU Constitution which stipulates that the listed Union institutions shall conduct their work “as openly as possible”<sup>12</sup>.

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<sup>5</sup> WELZ, C. *The European Social Dialogue* <...>, p. 107.

<sup>6</sup> KOHLER-KOCH, B.; RITTBERGER, B. The “Governance Turn” in EU Studies. *Journal of Common Market Studies*, 2006, Vol. 44, p. 28 et seq.

<sup>7</sup> Commission of the EC. European Governance: A White Paper. COM (2001) 4238 final. Bruxelles, 2001.

<sup>8</sup> JOURDAIN, L. *Les mots de la Constitution européenne: La gouvernance (in:) Centre de recherche universitaire sur la construction européenne (CRUCE)*. Paris: PUF, 2005, p. 112 et seq.

<sup>9</sup> “Trade unions and employers’ organisations have a particular role and influence. The EC Treaty requires the Commission to consult management and labour in preparing proposals, in particular in the social policy field. Under certain conditions they can reach binding agreements that are subsequently turned into Community law (within the social dialogue). The social partners should be further encouraged to use the powers given under the Treaty to conclude voluntary agreements”. Commission of the EC. European Governance: A White Paper <...> p. 8.

<sup>10</sup> Commission of the EC. European Governance: A White Paper <...>, p. 15.

<sup>11</sup> Opinion of the European Economic and Social Committee on European Governance – a White Paper (COM(2001) 428 final). CES 357/2002 EN/o, Brussels, 2002, p. 6.

<sup>12</sup> See OBRADOVIC, D. Civil Society and Social Dialogue in European Governance. *Yearbook of European Law*, 2005, Vol. 24, p. 261 et seq.

The principles of good governance listed in the primary European law are treated by the international organizations as indicators which guarantee achievement of the desired state of social relations. In case of collective labour relations the concept of good governance of collective labour relations is identified with a social dialogue conducted in accordance with the principles formulated on the above mentioned five-points basis. Therefore the social peace in the collective labour relations is identified with a social dialogue of public institutions, social partners and other organizations of the civil society, openly and responsibly exchanging the views and opinions in matters relating to employment and social policy, maintaining mutual relations based on co-participation of actors of the social dialogue. Such conduct is efficient and guarantees coherence of the social structures.

## 2. Democratic legitimacy and social justice

However, the sole compliance with the principles mentioned above does not guarantee achievement and maintenance of social peace in the collective labour relations. The Commission was aware that the EU institutions do not operate in vacuum. Therefore the compliance by EU institutions and authorities of the EU Members States with the principles of good governance does not guarantee achievement of the desired results. Soon after the catalogue of principles underlying the good governance was formulated, a proposal was raised to add to the list an additional criterion of democratic legitimacy of the authorities responsible for establishment and maintenance of the social peace in the collective labour relations<sup>13</sup>. The above principle assumes that agreed and approved decisions should be taken by democratically elected representatives of a certain group. Functioning of the above mentioned principle is based on confidence of a certain group in its representatives, authorised to conduct negotiations and assume obligations in the name of the group. In the collective labour relations the principle of democratic legitimacy of authorities applies respectively to both social partners, provided that they are represented by competent organizations: workers – by trade unions and employers – by employers' organisations. Characteristic for this principle is acceptance by the members of a certain group of a collective will, expressed by representatives of the group, recognizing the democratic principles of such decision-making. The above condition can be met only where each of the social partners involved in the social dialogue conducted on each phase of the collective labour relations: consultation, exchange of views, negotiations, mediations, arbitration or collective action (strike and/or lockout) aims to achieve the agreement acceptable for each of the groups involved in the above process.

According to the above, the social peace is not a goal *per se*. The stability of the social peace negotiated by the social partners depends on the level of acceptance of the arrangements negotiated with the social partner by a group represented in the social dialogue conducted by each social partners' organization. The first sentence of the introduction to the ILO Constitution expresses a fundamental idea, emphasizing the importance of the social peace in labour relations: “<...> universal and lasting peace can be established only if it is based upon social justice; <...>”<sup>14</sup>. The above statement obligates to consider whether the said principles of good governance of social relations between the EU institutions, social partners and organisations functioning within the European civil society who wish to exert influence on employment and social policy matters, fall within a competence of the European Union. The purpose of the social dialogue in the collective labour relations is redistribution between the social partners of the portion of assets, designated for distribution, manufactured by workers in the establishments operated by entrepreneurs. Such distribution should be in accordance with the principles

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<sup>13</sup> Commission of the EC. Report from the Commission on European Governance. Luxembourg: Office for Official Publications of the European Communities, 2003, p. 34 et seq.

<sup>14</sup> *Constitution of the International Labour Organization*. International Labour Office: Geneva, 2010.

of social justice. It is because only fair distribution may constitute a solid basis for social peace in the collective labour relations. The distribution is considered fair if it is impartial and guarantees the same opportunities to all the participants in the process of redistribution of assets. The object of distribution in the collective labour relations is a level of satisfaction of the economic interests and social needs of the social partners expressed by organizations representing groups of workers and employers. It seems that in the process of evaluation of redistribution of assets by organisations representing social partners, two principles of theory of social justice developed by J. Rawls may appear helpful<sup>15</sup>.

According to the first principle of justice, a person has an equal right to the basic liberty only to the extent where it is compatible with similar liberty for others. In the collective labour relations the first principle of justice guarantees to each social partners' organisation participating in the social dialogue such share in the assets (subjected to distribution) which an active social partner – group of workers – is able to obtain from the other social partner – employer or employers with the use of peaceful arguments and means of pressure compliant with the collective labour laws. According to the above, the assets earned jointly by the social partners do not need to be distributed in equal parts.

According to the second principle of social justice of J. Rawls, social inequalities are to be arranged so that – based on a reasonable assessment – it can be expected that formally unequal distribution of assets which allow to satisfy the economic interests and social needs of a group of workers (as an active social partner) and the employer (managing the jointly earned assets) will be beneficial to each of the partners. C. Welz, who considered social justice the most important consequence of the European social dialogue<sup>16</sup>, cited the most important fragment of the book authored by J. Rawls concerning theory of justice according to which social justice is the highest value of the social institutions, to the same extent as the truth of the reasoning. The most precisely developed, the most beneficial but false theories must be changed or rejected; the same applies to the provisions of law. Regardless of their effectiveness or perfect technical construction, they should be reformed or annulled, if unfair<sup>17</sup>.

C. Welz presented a graphic pyramid of dependency between the principle of good governance and the social dialogue conducted by the social partners in the European area in matters relating to employment and social policy<sup>18</sup>. The chart he developed is based on internal relations between the principles of good governance. In his opinion, openness, participation and responsibility of the social dialogue prove the legitimacy of the decision-making processes – in matters relating to social policy – of EU institutions and supranational social partners. Proportionality and coherence as the principles of good governance, supplemented by the principle of subsidiarity of functioning of the EU institutions in all matters falling within a legislative competence of the Union, are the guarantee of effective governance in the field of employment and social policy. The legitimacy and effectiveness of actions of the EU institutions and social partners is a guarantee that the social policy within the European Union follows the principles of social justice.

### 3. Transparency

Because of the lack of justification of C. Welz's chart of dependency between the principles of good governance and the benefits of application of method of good dialogue for conducting effective and fair policy of employment and social policy within the European social model, verification of the thesis presented by the cited author is not possible. A closer analysis of arguments of C. Welz, confirmed

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<sup>15</sup> RAWLS, J. *Teoria sprawiedliwości*. Warsaw: Wydawnictwo Naukowe PWN, 2005 (Original Edition RAWLS, J. *A Theory of Justice*. Cambridge: Harvard University Press, 1971).

<sup>16</sup> WELZ, C. *The European Social Dialogue* <...>, p. 133 et seq.

<sup>17</sup> RAWLS, J. *A Theory of Justice* <...>, p. 3.

<sup>18</sup> WELZ, C. *The European Social Dialogue* <...>, p. 134–135.

by observations presented in the European labour law literature dedicated to the supranational social dialogue proves that negotiations and tripartite framework agreements, “guided” by the Commission, concluded by the social partners, as well as the autonomous, bilateral agreements not including legal norms are not as transparent as directives adopted by the Council and the European Parliament. Social partners conduct the social dialogue during closed sessions. Social partners’ organizations, as a rule, do not inform their principals (ETUC – associations of European workers; organisations of employers – entrepreneurs) of the state of affairs and the progress of negotiations<sup>19</sup>. Arrangements made between the social partners during a tripartite social dialogue “guided” by the EU institutions were communicated to the public on the occasion of adoption of directives implementing into the national labour law the normative contents included in the supranational collective agreements or sector-wide framework agreements. There is a significant difference – as regards transparency of the legislative processes – between labour legal acts enacted or enforced by the EU institutions and normative or collective agreements concluded by the social partners in the European area. The primary European law provides for the absolute obligation to publish any and all draft legal acts, reports of discussions on the said drafts and any proposed and implemented changes in the final version of a draft.

On the other hand, in the provisions of Title XI “Employment” and X “Social Policy” of TFEU, analysed in this monograph, there is no mention of the necessity to inform the concerned groups of workers and employers of the state of the social dialogue<sup>20</sup>. For that reason, a postulate was formulated in the literature of the European labour law, concerning imposing an obligation on EU institutions to publish – in the official and most common Union language – normative and other agreements negotiated by the social partners<sup>21</sup>. It is a minimalist postulate, still the only possible to be followed. The negotiations within the social dialogue are conducted in different official languages of the EU Member States. For that reason, publication of drafts, proposed changes and amendments introduced during the social dialogue would oblige the social partners to organize administrative services for the dialogue, in particular translators, at least to the same extent as in the European Parliament. The social dialogue as the alternative method of creation of European labour laws would become too expensive. For that reason C. Welz<sup>22</sup> and other authors referred by him<sup>23</sup> who criticise the EU institutions and supranational social partners for not following the principle of openness of the social dialogue as the first principle of good governance, do nothing more but express a general postulate: “More transparency: the social dialogue is not sufficiently known and understood”.

A catalogue of good governance of EU matters – presented by the Commission in 2001 – relating in particular to implementation by the EU institutions of well-considered, well-developed, effective social programmes, assumes participation in the social dialogue not only by social partners but also by organizations representing different segments, groups and categories of the European civil society<sup>24</sup>. However, the European model of the social dialogue is limited to consultations conducted by EU institutions with supranational social partners, negotiations of social partners functioning in the European area and EU institutions and negotiations conducted directly by the European social partners. Each of the three above mentioned forms of the social dialogue provides

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<sup>19</sup> KENNER, J. *EU Employment Law. From Rome to Amsterdam and Beyond*. Oxford/Portland (Oregon): Hart Publishing, 2003, p. 256.

<sup>20</sup> WELZ, C. *The European Social Dialogue* <...>, p. 543–544.

<sup>21</sup> FRANSSEN, E. *Legal Aspect of the European Social Dialogue*. Antwerp: Intersentia, 2002, p. 110–111.

<sup>22</sup> WELZ, C. *The European Social Dialogue* <...>, p. 544.

<sup>23</sup> KIRTON-DARLING, J.; CLAUWAERT, S. European Social Dialogue: an instrument to Europeanisation of industrial relations. *Transfer*, 2003, Vol. 9, No. 2, p. 258.

<sup>24</sup> Commission of the EC. *European Governance: A White Paper* <...>, p. 10.

for the participation – in different configurations – of one and the same partners, negotiating independently between each other, conducting dialogue between each other under the “guidance” of the Commission or presenting common or separate standpoints to the Commission. Therefore it is justified to conclude – as presented in the EU labour law doctrine – that the social dialogue in its current form is based on extremely limited concept of participation, dominated by professional monopolists – organised representation of few influential groups of interests, in particular social partners. Therefore the social dialogue practice does not correspond to the idea of extended participation in the dialogue by EU institutions and social partners of “ordinary” citizens<sup>25</sup>.

The literature of the European labour law does not present a proposal for participation of non-governmental organisations and other representative organisations of the civil society in the negotiations conducted by the social partners in order to regulate specific problems falling within the scope of the labour law or social policy. Art. 153(5) TFEU effectively hampers participation of organisations representing local communities threatened by collective actions organised by social partners who undertake activities to put pressure on the organisations of social partners who exert pressure to cause change in the negotiating positions. Lawyers specialising in the collective labour law have no doubts that the aim of the organised collective actions is to cause change in the negotiating positions of not only social partners’ organisations but also groups represented by such organisations during the negotiations, phases of peaceful resolution of collective disputes and during a collective action. However, the collective labour law literature has never presented a proposal to enable participation in the social dialogue – conducted at different phases, both via peaceful methods (negotiations, mediation, arbitration) and with direct pressure – by representative organisations of local community, civil self-government institutions as the parties concerned. It is commonly known that a strike or lockout has specific, harmful consequences not only for the situation of social partners and particular members of certain group represented by the partners’ organisations (certain workers and employers), but it also seriously complicates and disorganises the life situation of the local communities and their members – citizens, who – according to the concept of the European social model – should participate in the social dialogue so as to be able to influence – in the civil society – the state of affairs in their direct environment and their own life centre. I think there may be some hope for change of opinion on the issue in question resulting from the previously presented judicial initiatives of the Court of Justice of the European Union in *Viking*, *Laval* and other cases which refer to issues which formally fall outside the scope of legislative competences of the EU institutions<sup>26</sup>.

#### **4. Participation in the social dialogue civil society representatives**

However, there are no legal or formal grounds for hampering participation in the social dialogue of representatives of the civil society within particular EU Member States. For that reason, in the European labour law literature postulates were raised to include in the social dialogue – conducted in the European area – the national social partners and organisations representing their interests<sup>27</sup>. Positive experiences gained in several EU Member States (Austria, Greece, Spain, Ireland, Luxembourg, Portugal and Great Britain) clearly indicate the dependencies between the social dialogue conducted

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<sup>25</sup> WELZ, C. *The European Social Dialogue* <...>, p. 544.

<sup>26</sup> See: *The Laval and Viking Cases: Freedom of Services and Establishment v. Industrial Conflict in the European Economic Area and Russia*. Bulletin of Comparative Labour Relations, No. 69. Edited by BLANPAIN, R.; ŚWIĄTKOWSKI, A. M. The Netherlands: Kluwer Law International, 2009.

<sup>27</sup> ANDERSEN, Kaj S.; LARSEN, T. P. A New Mode of European Regulation? The Implementation of the Autonomous Agreement on Telework in Five Countries. *European Journal of Industrial Relations*, 2007, Vol. 13, No. 2, p. 181 et seq.

in the European area by the supranational social partners – who negotiated and concluded framework normative agreements concerning: parental leave (1995), part-time work (1997) and fixed-term work (1999) – and implementation of directives by the authorities of the EU Member States obligated to implement the Council directives no. 96/34/EC (parental leave), 97/81/EC, 99/70/EC adopted for the above mentioned framework agreements concluded between the main interbranch organisations of the European social partners. In all EU Member States mentioned above, the state authorities – prior to enactment of provisions adapting the national systems of labour law to the European normative standards specified in the industry-wide normative agreements concluded by the supranational social partners operating in the European area – held consultations with competent national social partners' organisations<sup>28</sup>. Recognizing the dependencies between the European headquarters of the social partners' organisations and the national centres of the organisations representing in the EU Member States the interests of workers (trade unions) and employers (employers organisations), the authorities in the seven Member States mentioned above treated the national social partners as experts and enabled them to significantly influence the contents of the labour law enacted by the competent legislative bodies in particular Member States. Although implementation of the sector-wide normative agreements of supranational social partners in particular Member States was not identical with implementation at the EU level (through transformation of a normative agreement into a directive which in particular Member States might take a form of a collective agreement transformed into a legal act adopted by the parliament), certainly there are substantial similarities in the methods applied by EU institutions and authorities of the EU Member States in the processes of adopting European labour laws and labour laws in particular Member States. As an exception from the said rule C. Welz<sup>29</sup> mentions Denmark where no positive dependencies were found between the social dialogue at the supranational level and a social dialogue of state authorities of this country with social partners' organisations in the process of adaptation of the national labour laws to the above mentioned directives.

T. P. Larsen and S. Kaj Andersen emphasize that both – periodic evaluations and the final conclusions of reviews of adaptation of the national practices to the autonomous agreements concluded at the supranational level by the industry and professional social partners' organisations in matters relating to teleworking and to protection of workers against harmful health consequences of stress at work - allow to advance a thesis on a positive influence of the concluded agreements (not considered sources of European or national labour law) on intensification of the social dialogue process in five EU Member States listed in the cited publication<sup>30</sup>.

## 5. Responsibility of public authorities

When considering the legitimacy of the social dialogue as the alternative process of creation of the European and national norms of labour law, one must not overlook the issues relating to responsibility of the public authorities – both EU and national authorities – for the compatibility of legal consequences of the social dialogue conducted by the social partners' organisations on two levels: supranational – at the EU level and at national level – within particular EU Member States. Liability for legal consequences of the social dialogue in the European law and in the national labour law systems of the EU Member States has not been carefully analysed in the European labour law doctrine. In the contemporary terminology applied in the social sciences, social partners' organisations are presented as corporations. Therefore, when EU institutions and authorities of the Member States grant to selected organisations

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<sup>28</sup> WELZ, C. *The European Social Dialogue* <...>, p. 546.

<sup>29</sup> Ibidem.

<sup>30</sup> ANDERSEN, Kaj S.; LARSEN, T. P. A New Mode of European Regulation? <...>, p. 181 et seq.

(representing, at the supranational level, opposite economic, social and political interests of the main participants in the political and economic life and social relations: groups of workers employed in the common EU market and groups of employers conducting service activity in the same market) the right to negotiate framework agreements (one of which – “tripartite” – are normative, and the other one – “autonomous” influence practice of the actors in the collective labour relations), such institutions and authorities may be subject to criticism that they delegate legislative competences to social partners involved in the social dialogue<sup>31</sup>.

One may attempt to resolve this doubt – which has its justification in the responsibility of the social partners’ organisations involved in the social dialogue (which at the same time do not have a legal status of representative bodies being the fundament of functioning of the European Union (art. 10(1) TEU)) – by reference to art. 11(1) TEU, legal provision stipulating that EU institutions and authorities of the Member States shall give EU citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action. A duty of the EU institutions – as mentioned above – is to maintain an open, transparent and regular dialogue with representative associations and civil society (art. 11(2) TEU). The social dialogue, regulated by the previously mentioned provisions of art. 152–155 TFEU, is a concrete expression of the legal obligation formulated in art. 11(3) TEU, addressed to the European Commission, on which obligation was imposed to conduct extensive consultations with the parties concerned in order to ensure coherence and transparency of Union’s actions. Therefore, undoubtedly the social partners’ organisations: trade unions and employers organisations have a legal status of the “parties concerned” with employment and social policy issues. Therefore they should be considered the parties responsibly conducting the business dialogue and negotiating the collective agreements and other agreements (normative and other) that shape the labour relations. In my opinion, there is no reason to raise doubts as to whether the activity of supranational social partners’ organisations may be accepted as a “form of substitute legislative activity of the European Parliament”<sup>32</sup>.

Referring to the provisions of art. 138–139 TEC (now art. 154, 155 TFEU), C. Welz resolves the above doubts and accurately considers the social dialogue a “necessary condition of functional democracy”<sup>33</sup>. To complement the above statement, one should mention the position formulated in art. 154–155 TFEU and a role of the European Commission as a significant legal guarantee of responsible, “guided” social dialogue. As there are no grounds to consider the “autonomous” agreements concluded by the social partners involved in the bilateral social dialogue the sources of law, it prevents allegations of possible lack of responsibility for the negotiated agreements contrary to the EU labour laws. Eventually, a direct involvement of the EU institutions (Commission and Council) and institutions competent to enact national labour laws, in the process of implementation of the European standards into the national systems of labour law in the EU Member States constitutes an additional argument against allegation of possible non-compliance with European laws of the provisions of labour law negotiated by the social partners.

*De lege lata*, the social dialogue in the European Union between the EU institutions and social partners’ organisations is based exclusively on the principle of functional representation of trade

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<sup>31</sup> Such supposition is visible in a non-reasoned statement of WELZ, C. *The European Social Dialogue* <...>, p. 546, who wrote: “*This* (principle of autonomy of social partners and their right to conduct social dialogue – note of A.M.Š) would imply that the national governments, the European Commission and the European Parliament could step back from their regulatory competences in favour of the principle of autonomy of the European social partners and of a decision-making process, which is based on sufficient functional representativeness”.

<sup>32</sup> SPIESS, U. *Sozialer Dialog ind Demokratieprinzip. Eine Untersuchung unter besonderer Berücksichtigung der legitimatorischen Kraft der Sozialpartner*. Berlin: Duncker & Humboldt, 2005, p. 167.

<sup>33</sup> SPIESS, U. *Sozialer Dialog ind Demokratieprinzip* <...>, p. 546–547.

unions, exercising the common EU principle of monopoly of trade union organisations in representing interests and defending rights of workers against employers and their organisations. Having regard to the above, the representatives of European labour law doctrine recognize<sup>34</sup> that supranational social partners functioning in the European area exhausted the reservoir of legitimacy guaranteed to them by the EU institutions therefore they are no longer considered by their principals – group of European workers, partners – employers’ organisations and EU institutions, as authorised parties to legal transactions regulated by the provisions of European law. Therefore they are not entitled to participate in the social dialogue at the supranational level, negotiate industry-wide framework normative agreements establishing the European standards of labour law. Objections as to the legitimacy of the social partners undermine the position of the social dialogue as an alternative (to the traditional law-making process of legislative bodies – European Parliament) method of making the European labour law. They also reduce the importance of the social dialogue as a technique used by EU institutions for good governance of matters relating to employment and social policy<sup>35</sup>. If we assume that good governance of labour relations in the European Union by the EU institutions is an indicator of guarantee of permanent social peace within the common market, then it cannot be unequivocally determined that the desired state of affairs has been guaranteed.

## Conclusions

I chose the example previously presented in the literature by C. Welz<sup>36</sup> on purpose, to illustrate the dependence between the practices of good management of the social policy matters by the EU institutions and the social dialogue conducted by the social partners. In matters which require specialized knowledge on discrimination procedures in labour relations which are resolved by the national judicial authorities, the social partners, because of the lack of specialized knowledge and lack of court experience, abstained from regulation of technical issues, directly associated with the principles of conducting labour disputes for protection of worker’s rights violated by the employers.

The above attitude to the use of the social dialogue method by the social partners proves their responsibility and can be considered a serious argument that the method of social dialogue with which far less sources of the European labour law were enacted than with the traditional law drafting technique cannot be considered less effective than enactment of the European labour laws by the EU institutions endowed with powers to create the European labour laws. A smaller number of collective agreements, normative agreements and other agreements negotiated by the European social partners’ organizations is not an argument which would prove minor importance of the social dialogue and lower efficiency of the agreements resulting from negotiations conducted by the social partners in the process of informed regulation of the labour relations which allows to reach the intended objective – to use the social dialogue for achievement and maintenance of the social peace. Each matter regulated in the framework collective agreements negotiated by the European social partners or regulated in the European labour laws enacted by the EU legislative authorities could be, because of the contradicting interests of work and capital, a subject-matter of a labour dispute. A dispute concerning the interests which, taking into account the social dialogue in the collective labour relations, should be resolved with the use of the social dialogue.

The advantages of the use of the social dialogue method for resolution of the collective disputes are as follows: first is a direct relation with the good management practices which require the substantial

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<sup>34</sup> WELZ, C. *The European Social Dialogue* <...>, p. 558.

<sup>35</sup> *Ibidem* <...>, p. 558–559.

<sup>36</sup> *Ibidem* <...>, p. 550.

decisions to be taken at the most appropriate level. In case of employment, social policy and collective labour relations it means the level of functioning of the social partners. The principle, regulated in the primary laws and applied in practice, of negotiating sectoral framework normative agreements as legal effects of a dialogue conducted by supranational social partners in the European area aimed at establishment of uniform European standards applied in the EU Member States, is the best method of harmonization of the collective labour law systems of the EU Member States, also because of the direct legal and organizational relations between the European organizations of social partners and their national counterparts involved in the social dialogue at particular stages (peaceful: negotiations, mediations, arbitration, and a collective dispute: strike, lockout) of the collective labour relations. Trade unions and employers' organizations are entities situated at the level at which actions regulated by the collective labour laws take place. They also have the most direct contact with collectives (workers and employers) whose interests they represent.

Participation of the European social partners in the EU labour law regulation process does not conflict the principles of subsidiarity and proportionality which set out the limits of powers of the European Union (art. 5(1) TEC), since the prohibition to regulate, at the EU level, the matters listed in art. 153(5) of the TFEU does not apply to social partners. According to the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States (art. 5(3) TEC). The social peace in labour relations on the common market can be guaranteed by law exclusively under national laws established according to a uniform model, therefore established similarly to the international standards established at the European level. Supranational social partners acting through their representatives functioning at the European level have the right and obligation to enter into and conduct a social dialogue in order to establish uniform legal guarantees for achievement and maintenance of the social peace in collective labour relations. Because they are not subject to the limitations defined in art. 5 TEC. The framework normative agreements negotiated by the supranational social partners may be implemented in a traditional way – through legal norms enacted by competent legislative bodies in particular Member States or through collective agreements negotiated by the national social partners. The principles of subsidiarity and proportionality do not apply in social relations which are subject to national labour law provisions in particular Member States. Therefore they also do not apply to collective agreements concluded in these States by the national social partners even if they are considered sources of the labour law under the generally applicable collections of law (codes).

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## **TINKAMAS KOLEKTYVINIŲ DARBO SANTYKIŲ VALDYMAS EUROPOS SĄJUNGOJE PASITELKIANT SOCIALINIŲ DIALOGĄ**

**Andrzej Marian Świątkowski**

S a n t r a u k a

Socialinis dialogas, reguliuojamas pirminės Europos Sąjungos teisės ir vykdomas socialinių partnerių supranacionaliniu lygiu Europos socialinėje teritorijoje, yra modelis, kuriuo socialiniai partneriai gali vadovautis Europos Sąjungos valstybėse narėse, leidžiantis konkrečių Europos Sąjungos valstybių narių institucijoms įtvirtinti socialinio dialogo principus ir procedūras darbo teisės sistemose. Dėl šios priežasties straipsnyje analizuojami Europos Sąjungos teisės aktai, rekomendacijos, autoritetinių mokslininkų nuomonės, nagrinėjant Europos socialinio modelio teigiamus ir neigiamus aspektus, kurie leidžia apibrėžti, kurios tokio modelio įgyvendinimo prielaidos garantuoja socialinės taikos pasiekimą ir priežiūrą kolektyviniuose darbo santykiuose.

Europos socialinio dialogo metodo naudojimas teisės aktų leidyboje rodo socialinių partnerių atsakomybę, ir nors juo remiantis yra priimama daug mažiau teisės aktų negu pagal tradicinę Europos Sąjungos institucijų teisės aktų leidybos sistemą, tačiau jo negalima vertinti kaip mažiau efektyvaus. Mažesnis kolektyvinių, normatyvinių ar kitų sutarčių, dėl kurių susiderėjo socialiniai partneriai, skaičius nerodo mažesnio jų indėlio naudojant socialinį dialogą siekiant socialinės taikos ir ją prižiūrint. Europos socialinis dialogas, vedamas supranacionalinių socialinių partnerių, yra svarbus kuriant bendrus europinius standartus, taikomus Europos Sąjungos valstybėse narėse. Tokių standartų kūrimas yra geriausias būdas suderinti kolektyvinius darbo santykius Europos Sąjungos valstybėse narėse dėl savo tiesioginių teisinių ir organizacinių ryšių tarp Europos socialinių partnerių organizacijų ir nacionalinių dalyvių. Europos socialinis dialogas taip pat neprieštaruja Europos Sąjungos subsidiarumo ir proporcingumo principams, nes bendrojoje rinkoje socialinė taika darbo santykiuose gali būti garantuota tik išskirtinai nacionaliniais teisės aktais, kurie yra įtvirtinti remiantis bendru modeliu, atitinkančiu tarptautinius standartus Europos lygiu. Supranacionaliniai socialiniai partneriai turi teisę ir įsipareigojimą vesti socialinį dialogą siekdami vienodų teisinių garantijų socialinei taikai kolektyviniuose darbo santykiuose užtikrinti, o norminiai susitarimai, dėl kurių susitaria supranacionaliniai socialiniai partneriai, gali būti įgyvendinti įstatymų leidybos organų tradiciniu būdu konkrečiose valstybėse narėse.

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