

Should we take the Potential of European Union Social Dialogue Seriously? Empty Hopes Related to the Article 152 of the Lisbon Treaty

Barbara Surdykowska*

Abstract

The aim of the paper is to provide an analysis of the European Union's commitments towards social partners resulting from Article 152 of the TFEU. We are witnessing a serious assault on the regulations stated in Article 152 TFEU. Firstly, the EU violates the autonomy of the social partners through country specific recommendations addressed to the Southern countries, in which it expects the member states to breach the autonomy of the national partners by arbitrarily changing the rules of collective bargaining. Secondly, the EU does not provide sufficient support to the social partners in their efforts to create a social dialogue framework in those countries where, for historical reasons, the dialogue mechanisms have not emerged. A holistic reading of Article 152 of the Treaty constitutes a basis for action on the part of the European Commission which should not only be limited to supporting social partners at the European level but also extended to enhancing capacity of trade unions operating at the national level.

Keywords: social dialogue, Lisbon Treaty, social partners, European Commission

* NSZZ Solidarnosc Experts' Office, Poland. The views presented in this paper reflect personal views of the author and not of the organisation.

Introduction

The process of the European Integration which started with the Paris Treaty and the Treaties of Rome has always had a strong economic dimension. Apart from some rather technical issues concerning the coordination of social security systems, the social issues have been seen as merely auxiliary to the overreaching, economic aim. The term ‘dialogue between management and labour’, which, as a process, should be developed by the European Commission, was included in the primary law of the European Communities only once the project of the Single Market had been embarked on including planned deepening of economic integration¹. It seems that it was an element of a wider strategy to secure the trade unions’ support of those European reforms which could have led to negative social repercussions (Hyman 2005). The European social dialogue could be said to have begun in 1992, when for the first time a mechanism was introduced which secured the participation of the European social partners in the creation of legislation in the social sphere. An unambiguous regulation obliging the EU to facilitate the dialogue between social partners has been included in the Treaty on the functioning of the European Union (hereafter: TFEU or the Lisbon Treaty) adopted in 2007².

The enlargement of the EU by the 11 post-communist countries of Central and Eastern Europe (CEE)³ has become the first serious challenge for the Union’s capacity of realizing this commitment as indicated by the treaties. This is particularly true when it comes to the question whether it is possible, on the central level, to create a positive impact on those member states which do not have their own tradition of social dialogue and advanced industrial relations.

Another challenge emerged in 2009 and concerns actions taken by the EU dealing with the consequences of the fiscal crisis, particularly the introduction of certain mechanisms of the so-called European economic governance. Their practical

¹ Article 22 of the Single European Act and consequently article 118b of the Treaty establishing the European Community.

² Currently the key document of the EU primary law (besides the Treaty on European Union). Previously known as the Treaty Establishing the European Economic Community, EEC Treaty (1958–1993, The Rome Treaty) and Treaty Establishing the European Community (1993–2009, Maastricht Treaty).

³ The 2004 enlargement apart 8 CEE post-communist countries included also Cyprus and Malta. In 2007 two more CEE countries joined the EU, i.e Romania and Bulgaria, finally Croatia (former part of Yugoslavia) in 2014.

application frequently leads to disruption or even destruction of the national systems of collective bargaining.

It has been 30 years since the first meeting between the president of the European Commission, Jacques Delors, with the leaders of the European social partners. It took place on the 31st of January 1985 in Val Duchesse Castle, the very same place where the decision on establishing of the European Economic Community has been taken in 1956. This meeting made it possible to lay the foundations of the European social dialogue. Last year we celebrated the 10th anniversary of the historic moment when the first 8 post-communist states joined the European Union and thus, theoretically at least, entered the sphere of the European social dialogue mechanisms. It is a good occasion to analyse the role of the social dialogue in the enlarged EU.

The aim of this text is to provide an analysis of the commitments towards social partners resulting from article 152 of the TFEU and to try and present an evaluation of whether they are actually being fulfilled. The deliberation will include two aspects mentioned above. As we can see, the first issue is the question of whether the EU helps to develop social dialogue. The second question is whether we are in fact witnessing an attempt to block it.

Article 152 TFEU Among other Treaty Regulations and the EU Charter of Fundamental Rights

Article 152 of the TFEU states that Union recognises and promotes the role of social partners at its level taking into account the diversity of national systems. It shall facilitate dialogue between the social partners respecting their autonomy. The Tripartite Social Summit for Growth and Employment shall contribute to social dialogue.

Firstly, it needs to be indicated who is the subject of the obligations listed in article 152 of the TFEU. According to article 13 paragraph 1 of the Treaty on European Union, the term signifies: The European Parliament, European Council, The Council, European Commission, European Court of Justice, European Central Bank and the Court of Auditors⁴. While discussing the commitments resulting from article 152 of

⁴ According to article 13 point 2 each institution acts within the limits of its jurisdiction as indicated by the Treaties, in accordance with the procedures and aims defined. The institutions cooperate and their actions are complimentary.

the TFEU we have to mention the more general institutional context of the Treaties. The architecture of the treaties is based not exclusively on regulations, but also on values⁵. These values are indicated in article 2 of the Lisbon Treaty – the EU is based on the principle of respect for the human person, liberty, democracy, equality, rule of law and respecting human rights, including minority groups.

These values are shared by all the Member States, where society is based on pluralism, non-discrimination, tolerance, solidarity and equality between men and women⁶. As J.-C. Piris points out, article 2 of the Lisbon Treaty is not only a symbolic and political statement, but it has a tangible legal value, too (Piris 2010).

It is the Lisbon Treaty that offers, for the first time, a legally binding formulation of fundamental rights. Firstly, it grants the Charter of Fundamental Rights legal status analogous to the other Treaties (article 6 paragraph 1 of the Treaty on European Union) and secondly, it contains a declaration that the EU would join the European Convention for the Protection of Human Rights and Fundamental Freedoms (article 6 paragraph 2). The crucial element of the document is paragraph 3 of article 6 which states that the fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and the constitutional traditions shared by the Member States are recognized as the basic principles of the European law.

In the domain that is of interest to us here, the key element of the Charter of Fundamental Rights is article 28, which indicates that both employers and employees or their representing organisations have the right, according to EU law and the member-states' individual legislation and practice, to become involved in collective bargaining on the relevant levels. It also guarantees that in case of a conflict of interests, they are able to actively defend their interests by taking collective action including strikes.

The scope of application of the Charter is defined in article 51 stating that the Charter applies to institutions, organs and organisational units of the Union while respecting the rule of subsidiarity and to member-states only insofar as they apply

⁵ A reference to values beyond article 2 of the Treaty is also made in article 7 point 1, 13 and 49 of the TFEU which cites legality indicators of the actions of EU institutions.

⁶ The principles of representative democracy are mentioned also in article 11 points 1, 2 and 3 of the TFEU. Through relevant measures the EU institutions enable European citizens and representative associations to express their opinions and publicly debate their views on all of the domains of EU activity. The institutions maintain an open, clear and regular dialogue with representative associations and civic society. The European Commission runs consultations with all interested parties in order to ensure coherence and transparency of EU actions.

EU law.⁷ Therefore, article 28 applies to two different domains: firstly to institutions, organs and organisational units of the EU and the member-states which implement EU law. From the point of view of article 152 of the TFEU, it is the first domain that is really important. As C. Barnard points out, article 28 of the Charter can be applied in three types of situations:

Firstly, it can be used as a point of reference for an evaluation of actions (or inactions) of institutions, organs and organisational units in a legislative process, but not exclusively within its framework;

Secondly, article 28 can serve as a justification for EU legislation (or proposed legislation). The best example is the draft of Monti II regulation, where in the preamble there is a direct reference to article 28 of the Charter. The basis of the issuing of the regulation was meant to be article 352 TFEU as article 153 paragraph 5 TFEU explicitly excludes the right to strike and the right to coalition from the EU competencies. As we know, Monti II regulation has not been implemented due to the so-called yellow card procedure initiated by the national parliaments. This legislative attempt is a good example of the usage of article 28 of the Charter as a justification of legislative actions.

Thirdly, article 28 of the Charter should be used as an interpretative key for the Court of Justice of the European Union. Just as a reminder, the rulings of the Laval Quartet had been made before the Lisbon Treaty was implemented and thus granted the Charter a legal status equal to the treaties (Peers, Hervey, Kenner, Ward 2014).

Article 6 of the TFEU also states that the European Union is obliged to join the European Convention for the Protection of Human Rights and Fundamental Freedoms. This issue has been carefully discussed in literature from the point of view of bargaining and strike rights. The reason for this is the ruling of the European Court of Human Rights concerning *Demir and Baykara*⁸ and *Enerji Yapi Yol Sen*⁹. In these rulings, the Court based its opinion on article 11 of the Convention which states the freedom of association, the right to collective bargaining and the right to strike. Also numerous legal analyses concerned the potential conflict between the rulings

⁷ In the later part of article 51 the European legislator indicates that they respect the laws, abide the regulations and support their application according to their authority and while respecting the limits of EU competencies as stated in the Treaties. According to point 2 the Charter does not increase the scope of application of EU law beyond the competences of the later; it does not constitute any new competences or tasks for the Union and it does not change the tasks and competences defined by the Treaties.

⁸ *Demir and Baykara v. Turkey* (12 November 2008, no 34503/97).

⁹ *Enerji Yapi Yol Sen v. Turkey* (12 April 2009, no 68959/01).

of the European Court of Human Rights and the rulings of the Court of Justice of the European Union concerning the so called Laval Quartet (Edwing, Henty 2010; Dorssemont 2011; Velyvyte 2014).

However, after the negative opinion of the Court of Justice of the European Union (Opinion 2/2013 issued on the 18th December 2014) on the compliance of the Convention pre-accession agreement with EU law means that EU access is postponed indefinitely and the path to this goal becomes highly problematic (Peers 2015). It has to be stressed that in the existing legal order the rights included in the Convention are already part of EU law as general rules of law (art. 6 point. 3 of the TFEU).

While discussing the legal context of article 152 of the TFEU, apart from the context of values (article 2 of the Treaty) and the fundamental rights, including the rights resulting from the constitutional tradition shared by the member states, we should mention the following conditions resulting from the Treaties:

- social aims indicated in article 3 of the Treaty, particularly paragraph 3¹⁰ ;
- the fact that the EU shares the social policy and social cohesion competences with the member states (article 4 paragraph 2 bi c TFEU);
- the fact that the EU has a supportive role concerning professional training (article 6 letter E TFEU)

While defining its policies and actions (article 9 TFEU) the EU takes into account:

- a) *the principle of ensuring the cohesion of its individual policies and actions*, accounting for all of its aims according to the rule of granted competencies (article 7 TFEU)
- b) *the rule of social responsibility*: the EU takes into account the exigencies related to supporting high level of employment, ensuring relevant social security, fighting social exclusion and ensuring high level of education and health protection (article 9 TFEU).

Article 152 TFEU does not define the scope of its application. In order to define it, one needs to provide an interpretation of its regulations.

Firstly, point 2 article 152 indicates unambiguously that the scope of application is not limited to ‘social policy’ as defined in title X of TFEU (as the scope is not limited to the issues included in the EU legislative competencies indicated in article 153 of the TFEU). The Tripartite Social Summit for Growth and Employment, mentioned in point 2 article 152, points out the economic development issues in the broadest

¹⁰ Article 3 TFEU – The EU creates an internal market. The actions aimed at a lasting development of Europe are based on sustainable economic growth, stable prices, social market economy with high competitiveness aiming at full employment and social progress.

sense, including, at the very least, the issues related to employment (title IX of the TFEU – Employment). It is also significant where article 152 is placed – it comes just after article 151 about the aims of European social policy and before article 153 which delimits the Unions’ competencies in this sphere. In other words, there is no doubt that the scope of article 152 is not limited to the EU legislative competencies in the sphere of social policy. Due to article 9 of the Treaty, which provides a horizontal social clause, all the spheres of European policies which are somehow linked to the social dimension, such as the fundamental rights, economic freedom and relations with external subjects, are included within article 152¹¹. It is a good moment to point out that article 9 mentions ‘relations with external subjects’ in the context of the relation between the European Commission and the International Monetary Fund.

As B. Veneziani points out, article 152 TFEU creates certain legal obligations for all of the EU institutions whenever their actions have social consequences. It is not limited to the obligations resulting from article 154 TFEU – consulting social partners or 155 TFEU – the right to negotiation for social partners (Veneziani 2012).

In order to decipher who is the actual addressee of article 152 we need to add a few more remarks. The EU accepts and supports the role of the social partners on its level while taking into account the variety of systems in the individual member-states. Article 152 undoubtedly creates certain obligations which are addressed to the European Trade Union Confederation (ETUC) and their industry federations.

Other addressees are BusinessEurope, CEEP and UEAPME and industry federations associating national industry employers’ organisations. The rights of the indicated social partners involve being accepted or promoted by the EU. Article 152 obliges the EU to facilitate the dialogue between the social partners and to respect their autonomy. It seems however, that understanding the obligations resulting from article 152 as limited to the European social partners is insufficient. ETUC is not an independent organisation and its ability to act (broadly understood as the capacity for mobilising its members, its financial capacity, its ability to influence individual member-state governments or the European Parliament) are directly dependent on the condition of its member organisations. The same rule applies to the other side of the dialogue and the employers’ organisations such as BusinessEurope, CEEP or UEAPME. It seems that the definition of being a ‘social partner’ is to represent

¹¹ Recommendations by the Transnational Trade Union Rights (TTUR) Expert Group to the European Trade Union Confederation (ETUC) on the effective application of the Functioning of the European Union (TFEU), in: N. Bruun, K. Lörcher, I. Schömann (eds.), *The Lisbon Treaty and Social Europe*, Oxford 2012, Hart Publishing.

the interests of either labour or capital. The ‘umbrella’ organisations participate in the process by representing their members – workers or employers. The European social partners are an emanation of their member organisations. It is obvious that in accordance with the principle of self-governance and autonomy of the social partners, the scope of competences which is transferred from the member organisations to the organisations operating on the European level depends on their sovereign decisions.

It does not seem possible to me, however, to separate the impact of those EU institutions which are directed exclusively at European partners from the impact of those whose actions are addressed to trade unions and employers’ organisations in the EU member-states. For instance, the actions which are directed at facilitating and improving the bilateral social dialogue of European Social partners (e.g. the current organisational or financial support provided by the European Commission) affects the actual position of trade unions within the member states, particularly those where bilateral dialogue is poorly developed. This dependence, however, works in both directions. Certain actions (the failure to act) of the EU institutions directed at either trade unions or the organisations of employers which operate on the national level can awaken or reassert the position and the actual negotiating capacity of the European social partners.

The deliberations concerning the obligations resulting from article 152 of the Lisbon Treaty can be separated into two spheres. The first one can be described as ‘active’, which consists in promoting dialogue and the social partners. It is in this sphere that, in my opinion, we witness negligence of the EU institutions towards trade unions and employers’ organisations of the new member states of Central and Eastern Europe. The second sphere is ‘passive’ and by this I mean demonstrating which of the actions EU or the European Commission should be stopped and what kind of action would be desirable taking into account and respecting the ‘autonomy’ of the social partners. It is an extremely important topic at the moment, particularly in the context of the direct interference with the autonomy of the national collective bargaining mechanisms which takes place through CSR (country specific recommendation) particularly in countries which have received financial aid.

Social dialogue in Central and Eastern Europe – the standards are produced not by the EU but multinational corporations

The development of the situation in Central and Eastern Europe is an interesting example of the real impact of the EU social dialogue regulations in condition where the mechanisms of the dialogue need to be built from scratch. The countries which were liberating themselves from authoritarian political systems had little experience and poorly developed traditions of industrial relations. The initial years of re-establishing

democracy meant, for some of them, a test of the neoliberal economic model which left no space for social dialogue. This is why the perspective of joining the European Union in 2004 created hopes, particularly for the trade unions, concerning the expected 'transfer' of the European social model to the new member states and a strengthening of the instruments of social dialogue in these countries (Gradev 2005). This process was alleged to be strengthened by the influx of foreign investment which, it was expected, would bring in a new, better culture of work (Meardi 2012).

The process of pre-accession negotiations did not indicate any interest in these matters on the part of the EU institutions. A healthy, functioning social dialogue did not constitute a separate accession criterion. It was merely one of the 'Copenhagen Criteria' regarding the stable functioning of democratic mechanisms¹². It is hard to ignore the fact that the enlargement process was above all 'economic' and thus any social dimension was pushed off the agenda (Keune 2008). There was no expectation for the new member states to implement the European social model. At the same time there was a lot of pressure for them to adopt certain elements of the *acquis communautaire*, particularly those relating to the internal markets, which have resulted in serious negative social effects in these countries. Such negative phenomena are: pressure on moderating wage schemes, increasing flexibility of the job market and weakening the negotiation position of the trade unions. The EU did not expect the candidate states to fulfil any of the criteria which could have led to strengthening the social dialogue such as the quota of workers included in collective labour agreements or the creation of mechanisms allowing for an effective bilateral dialogue. There was only one instance where the negotiation was put on hold while discussing the social chapter of the *acquis* with the Hungarian government. This, however, was caused by the introduction of drastic legal regulations which would have blocked any possibility of leading a social dialogue and could not be ignored by the EU negotiators (Gradev 2005).

Overall, the European approach turned out to be a belief in a simple 'mirror effect', where the signals sent by Brussels were expected to start adaptation processes in CEE and the existing social practices and standards were expected to gradually develop practices and standards which would be similar to the ones currently existing in old member-states (Lendvai 2004).

Ten years after the accession of the first eight post-communist countries, it turned out that there has emerged a specific, central-European 'model' of industrial relations. The European Commission cited some of its characteristics in a report:

¹² European Council in Copenhagen, *Conclusions of the Presidency*, 21–22 June 1993.

a small range of collective bargaining, the absence of industry level of the dialogue, frequently superficial level of the social dialogue, frequently superficial character of the tripartite relations and above all a growing fragmentation of the national systems of collective bargaining¹³.

A stark example of the engagement of public authority in the process of destruction of collective bargaining is Romania. For a few years now the country has experienced the so-called 'clear-up' of the labour law by the government – a process which is being called an authoritarian neoliberalism (Trif 2013). In 2011, Romania introduced a new labour law which abolished the possibility of signing nation-wide collective agreements (which had been practised before). The new law involved a serious limitation of the range of possible negotiations in the industry sector and made it impossible for nearly 90% of Romanian employers (Barbuceanu 2011). The confrontational manner in which this controversial reform has been implemented and several cases of trade union leaders being arrested have destabilised the system of industrial relations in Romania and has alarmed the International Labour Organisation (Trift 2013). When a subsequent Romanian government, which support from all trade unions confederations and employers association, proposed to reverse the previous reforms in 2012 the European Commission and IMF indicated their displeasure with proposals, strongly urging “ the authorities to limit any amendments to law on labour relations to revisions necessary to bring law into compliance with core ILO conventions. However, their recommendations still included points identified by the ILO as a violation of the conventions for instance the provision that national collective agreement ‘do not contain elements related to wages’, limits on the protection of trade unions representatives against discrimination in companies, and maintaining provisions ‘intended to avoid the proliferation of strikes’. The Romanian government eventually decided not to pursue the amendment it had been proposing (Drahokoupil, Myant 2015). In Romania story we can see clearly destructive role of European Commission.

One of the typical characteristics of the 'central-European model' is the growing role of multinational corporations as a disintegrating factor (Adamczyk, Surdykowska 2014). Contrary to naive expectations, the corporations from Western Europe do not play the role of 'missionaries' of the European social model and investment is not paired with better industrial relation standards. The opposite is true. The majority of multinational corporations profits from a weakness of the labour markets and

¹³ European Commission, *Industrial Relations in Europe 2012*, Luxembourg 2013, Publications Office of the European Union.

deliberately increase the fragmentation of collective bargaining. A typical example is Poland where almost one third of the industrial workers are employed by entities with foreign capital share¹⁴. As multinational corporations grew into the Polish landscape, the coverage of sectoral bargaining has been radically limited in the private economy. According to the estimates of NSZZ Solidarność, from over 1 million workers covered by so called multi-establishment agreements in the late 20th Century, there are less than 300,000 left. Currently there is only one sectoral collective agreement in which foreign corporations are represented. It concerns a highly specific sector, the aviation industry.

As David Ost puts it, what has been created in CEE might be described as an 'illusory corporatism' which serves to get the trade unions to accept their gradual marginalisation and to ease (to mask) the process of implementing neoliberal policies (Ost 2000). The tripartite socio-economic councils created in these countries are mostly superficial bodies which are not meant to be used in actual bargaining (Ost 2011).

We should also quote the diagnosis of G. Meardi who points out that the problems with social dialogue in new EU member states is not a proof of inability to adapt EU social standards regulations by post-communist states but a sign of weakness of the regulations themselves. In his view, an unpleasant fact has been made apparent, i.e. that the regulations were originally designed to serve mainly market purposes (Meardi 2012). It had not been seen in EU-15 countries where the industrial relation systems were already advanced, but it was made apparent in the new member-states. Thus, the experience of the enlargement has not only negated the existence of the social dimension of the 'European project' but also, according to Meardi, provided evidence that we are witnessing a neoliberal assault on the institutions of 'organised capitalism'. This is a very radical diagnosis and one does not have to agree with it. However, a drastically poor condition of the social dialogue in a greater part of Central and Eastern Europe leaves no doubt that article 152 TFEU makes promises which the EU is simply incapable to fulfil in the region.

While in the case of the new member states the impact of EU institutions on social dialogue is negligible, the situation in the South of the continent is very different. The impact is visible. However, this is hardly a reason for optimism as what it means in practice is the subordination of social dialogue to the principle of competitiveness.

¹⁴ A. Tobolska, Structure of foreign investment in the industry of Poland at the beginning of the second decade of the 21st century, *Bulletin of Geography. Socio-economic Series*, 2013, 22, p. 123.

The South – Economic Governance Through the Destruction of Social Dialogue?

The debt crisis which started in the EU in 2009 hampered such South-European countries as Spain, Portugal, Italy or Greece. This was inherent in its very nature. Introducing the common currency in 2002 had not been preceded by any actions facilitating the adaptation of those economies concerning the banking union for example (Adamczyk, Surdykowska 2013). At the same time, the countries which accepted the common currency had to abandon their national monetary policy and concede this power to the Central European Bank. Fiscal policy remained the prerogative of the member states. Under those circumstances, the only instrument left as an adaptation measure was wage control.

As pay-increase has been limited in all main Eurozone countries, the internal demand has imploded. At this point the financial institutions directed streams of capital to peripheral countries with limited financial assets. The lack of centralised control over this process resulted in an accumulation of external debt in countries where an intense influx of investment capital was paired with low productivity, and thus no return on capital could be guaranteed. This process, together with the earlier economic crisis in the Southern markets led to a serious macroeconomic instability. The Euro Plus pact signed in 2011 included measures for increased coordination of the national fiscal policies and introducing a mechanism of control which was expected to guarantee a review in case of any negative macroeconomic phenomena in the EU member-states, the so-called Excessive Imbalance Procedure. The real process behind these slogans was to create the possibility of intervening in the national-level wage negotiation process. This went against the ‘traditions of social Europe’ as well as the regulations of the Treaties which explicitly excluded wage negotiations and collective bargaining from the EU competencies (Meardi 2013). It meant an intervention in the national systems of social dialogue through the so-called *country specific recommendations* which defined the ‘correct’ macroeconomic policy. Another form of intervention were the projects of the famous *Troika* (EC, ECB and IMF) which presented struggling member states with a sort of ‘offer you can’t refuse’, which would in fact threaten to weaken or dismantle the national collective bargaining schemes.

The experiences so far indicate that these actions are a part of a coherent project aiming to put pressure on the national systems of social dialogue. Its main goal is to further decrease the importance of multi-employer negotiations. Let us look at the regulation of the Euro Plus Pact which states that every country will be responsible for any political action taken in order to support competitiveness, but priority will be given to reforms aiming to ‘review the wage setting arrangements, and, where necessary, the degree of centralisation in the bargaining process, and the indexation mechanisms, while maintaining the autonomy of the social partners in the collective bargaining process’¹⁵.

It would be hard to find a more direct example of the existing expectation to decentralize collective bargaining. The slogan of ‘maintaining the autonomy of the social partners’ sounds ridiculous to say the least. The pressure on decentralisation can be observed in the changes of legal regulations concerning the relation between higher level agreements and the departmental agreements (Clauwaert, Schömann 2012; Ghellab, Papadakis 2011). Before 2008 the majority of Western European countries had regulations stating that collective agreements made on the lower level can only increase the working standards defined in higher level agreements (Eurofound 2014). This principle was eventually abandoned in 2012 in Spain; Portugal also introduced a law allowing for a less profitable wage-fixing process on the departmental level. In Italy the social partners have been actually forced to sign agreements which moved the essential weight of the collective bargaining process to the departmental level.

The European Union is determined to protect the stability of the Eurozone and it will do so no matter the odds. The potential breakdown of the Eurozone would result in an economic and political calamity. In order to achieve this goal, the Union is prepared to make serious sacrifices, including the historically shaped collective bargaining schemes. This can be seen clearly in the example of *Troika*’s interventions in the Iberian Peninsula. Although the structures of collective bargaining have remained formally untouched, their legal ‘emptying’ resulted in a radical decrease in the number of collective agreements. Between 2008 and 2012 the number of collective agreements dropped by 43% (from 6000 to about 3400) and the number of workers included dropped by 41% (from 12 million to about 7 million). In Portugal, the same factors are even more dramatic. The number of registered collective agreements reduced by 71% (from 295 to 85), and the number of workers included in them decreased by 84% – from 1,9 million to 328.000 (ETUI 2014).

¹⁵ European Council, *Conclusions*, 24/25 March 2011.

The literature of the subject provides various evaluations of the impact of the new economic governance on the European markets and the level their autonomy in creating wage-fixing mechanisms. The experiences are not yet sufficient to draw final conclusions on whether or not the EU member states have lost their sovereignty in this area (Bekker 2013; Pochet 2010). However, some authors have attempted to indicate that a new border is being created between the core of the Union and periphery countries. Due to the crisis and the decentralising 'orders' of *Troika*, the industrial relations in the southern countries begin to resemble the unstable quasi-models of the new member-states (Meardi 2012 a).

Back to article 152 TFEU

It seems that we are witnessing a serious assault on the regulations stated in article 152 TFEU. It has several dimensions. Firstly, the EU violates the autonomy of the social partners through *country specific recommendations* addressed to the Southern countries, in which it expects the member states to breach the autonomy of the national partners by arbitrarily changing the rules of collective bargaining. Secondly, the EU does not provide sufficient support to the social partners in their efforts to create a social dialogue framework in those countries where, for historical reasons, the dialogue mechanisms could not have emerged. I would like to make myself clear here, so that the two points do not seem mutually exclusive: the first point concerning the deconstruction of the existing industrial relations and the second about lack of activity conducive to their creation. It should be stressed that article 152 TFEU indicates the necessity of accounting for the variety of national systems; the EU institutions cannot, for instance, promote a solution consisting in a collective labour agreement with an *erga omnes* effect – as we are dealing with industrial relations where collective agreements are signed for the members of a given trade union (Deakin 2012).

It is a simple example showing the variety of industrial relations in individual member states. It seems obvious, however, that the respect for the existing variety of national systems cannot at the same time assume respect for violating certain basic principles. There is no doubt that we cannot talk about one single model of industrial relations among the countries EU-15. It does not mean, however, that it is impossible to define a certain minimal accepted standard. It seems possible to define it at least through the norms stated in the ILO Convention ratified by the member states or

obligations resulting from the Council of Europe documents such as the European Convention on Human Rights or European Social Charter (or the Revised European Social Charter). If a member-state become a concern for the ILO controlling bodies such as the Committee on Freedom of Association or the Committee of Experts and the reason for concern is directly related to the autonomy and competences of trade unions, employers' organisations or the possibility of dialogue between them, these issues should not be ignored by the European Commission. The lack of legislative competences stated in article 153 point 5 (freedom of association, the right to strike, the right to lookout, remuneration) does not mean that the Commission has no impact on these areas through soft mechanisms (and above all the CSR).

Let us take the example of Poland. The Polish legal regulations do not account for the possibility for professionals to associate in trade unions unless they are workers, i.e a side in a work relation (performing subjugated labour). Without going into details of the Polish regulations it will suffice to say that it has been the subject of controversy and numerous authors point out that the Polish legal order breaches the ILO Convention 98. As a result of a complaint made by NSZZ Solidarnosc to the ILO Committee on Freedom of Association, the Committee has found irregularities and stated that Poland violated the accepted obligations which allow the workers to associate, and the right is not limited to people performing subjugated work (employees)¹⁶. It does need to be demonstrated how such a violation of the coalition law constitutes an infringement of effective trade union activity in Poland. In the end Polish Constitutional Court showed in his judgment from 02.06. 2015 that regulation in the Act on trade unions breaks rule of Polish Constitution¹⁷.

In my opinion a holistic reading of article 152 of the Treaty constitutes a basis for action on the part of the European Commission which should not be limited to supporting social partners on the European level. The Commission should also be concerned with the capacity of trade unions to operate on the national level as the condition of national members of European Trade Union Confederation has a direct impact of the ETUC as such¹⁸.

In the same way, the opinions of the Committee of Experts on the implementation of the European Social Charter (Revised European Social Charter) in the sphere where

¹⁶ Case 2888, http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_176577.pdf

¹⁷ Verdict of Polish Constitutional Court from 02.06. 2015 K 1/ 13; <http://trybunal.gov.pl/s/k-113/>

¹⁸ It is obvious that the ability of the employer's organisations to operate freely in the member states directly impact the condition and capacities of *BusinesEurope*, *CEEP* and *UEPME*.

they indirectly relate to the sphere of action of the social partners or the dialogue between them (articles 5. and 6. of the Charter) should be taken into account by the EC while constructing *country specific recommendations*¹⁹. Here again, we can cite the example of Poland. In the opinion issued by the Committee of Experts concerning the implementation of the European Social Charter there are concerns about the right to association or the ability of the accessibility of union functions to certain categories of workers²⁰. The objections of the Committee of Experts concerning Poland's compliance of the article 5 of the European Social Charter deal with issues which have a direct impact on the functioning of trade unions.

There are more examples like this. Recently there has been an abundance of objections raised by the controlling bodies concerning non-compliance with the Revised European Social Charter (articles 5 and 6). These objections concern predominantly the Southern European states which have made changes to their legal orders. The changes resulted from agreements made with Troika and the realization of the *country specific recommendations*, but the European Commission should account for these objections, irrespective of which member states they refer to²¹.

Other sphere concerns the European social partners. Here we need to discuss both the 'active' approach of the European Commission, unfortunately expressed in violation of the partner's autonomy and the 'passive' one what means lack of sufficient activity as regards improving social dialogue quality in post-communist countries.

Infringing the autonomy of the European Social Partners is a relatively recent phenomenon. A clear example of it is the story of an agreement concerning health and security regulations in the hairdressing industry. Its legal implementation by EU has been blocked despite calls from both the employers and the trade unions (Bandasz). A topic which is hotly debated at the moment is the new plans of the European Commission to introduce a mechanism of public consultation of the

¹⁹ Once again we can revoke article 151 TFEU: The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

²⁰ http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/PolandXIX3_en.pdf

²¹ Benchmarking Working Europe 2015, More of the same: Wages and Collective bargaining still under pressure, p. 54.

agreements concluded by the European social partners (as a part of a broader effort to simplify the legal process).

On the other hand, respecting the autonomy of the social partners should not mean the inactivity of the European Commission. This issue has been described in literature, one example is a wonderful text by Alan Bogg and Ruth Dukes entitled ‘The European social dialogue from autonomy to here’ (Bogg, Dukes 2013). The authors point out that the most radical formulations of the autonomy of the social dialogue can be found in the documents issued by the Commission itself. Let us look at a fragment of the Commission’s communication– The Commission will continue to encourage the development of bipartite social dialogue within the New Member States and will increase its support to the European social partners in order to deal with the consequences of enlargement. It is important to note that as the social partners are autonomous and social dialogue in the EU is based on the freedom of the right to association, capacity building is essentially a bottom – up process depending on the efforts of the social partners themselves²². As they point out, the creation and development of the social dialogue is depicted as an organic process which appears spontaneously as a result of interactions within civic society. According to the authors, such an approach involves magical thinking and does not reflect reality. Even in the United Kingdom it has not been an exclusively bottom up process (Ewing 1998).

As the European Socio-Economic Committee points out, increasing the autonomy of the social partners cannot weaken the Commission’s power to take initiative and incite action. On the contrary, these capacities need to support each other and be complimentary to the potential of social partners.²³ In the subject literature there are frequent references to B. Bercusson’s point about the “bargaining in the shadow of the law”, which took place in the 1990s when the European Commission made it clear to the legislative bodies that if no agreement was going to be made, the Commission would take independent legislative action. The last time we witnessed a similar approach was when an interesting cross-sector agreement concerning protection against the effects of breathing in silicon dioxide (the so-called NEPSI agreement). There are many reasons why the results of the European Social dialogue which we have observed in the recent period have been mediocre, but in my opinion they have

²² COM (2004) 557 final, point 4.4.

²³ Opinion of the European Economic and Social Committee concerning the structure and organisation of the social dialogue in the context of real economic and currency union SOC/507, 10th of September 2014, points 4.1.5.

resulted mainly from the passive approach of the relevant administrative unit of the European Commission, i.e., the DG Employment.

As I have already pointed out, the question of the condition of the European social dialogue is discussed in detail across literature on the subject (Müllensiefen 2012; Vigneau 2011). What seems to be missing is an analysis of the question to what extent article 152 TFEU and the obligations resulting from it (once we take into account the context of the Treaties and the fundamental rights which I have mentioned) is applied in a situation when EU institutions address their actions (often indirectly) at trade unions and employers' organisations in EU member-states. Their main tool are *country specific recommendations*. In my opinion it is not possible to, logically speaking, separate the influence exercised on the European social partners from influencing their national affiliates.

While analysing all these neglects of the European Commission it has to be said, its actual powers of 'command' (even in the metaphoric sense of the word) towards the EU member states are highly limited. As N.W. Barber puts it: 'The institutions of the Union are almost entirely reliant on the support of Member States to execute their commands; the Union lack a developed, autonomous, set of coercive institutions and the majority of its executive work is undertaken by officials of its Member States' (Barber 2010: 180).

This does not mean, however, that the Commission does not pursue any policy with regard to social dialogue. Yes, it does. Unfortunately it seems that neither on the EU level nor on the national levels the article 152 of the Lisbon Treaty is used in proper meaning. The Commission is 'active' when one could expect 'passive' approach respecting the autonomy of the social partners. On the other hand the Commission is 'passive' when more 'activity' would be needed, for example in the member states that have problems with social dialogue. Can we still be convinced that the wording of article 152 doesn't bring only empty hopes?

References

- Adamczyk, S., Surdykowska, B. (2013), 'Kryzys zadłużeniowy a presja na systemy rokowań zbiorowych w państwach UE', *Praca i Zabezpieczenie Społeczne* 1
- Adamczyk, S., Surdykowska, B. (2014). *Nadzieje i rzeczywistość: oddziaływanie europejskiego modelu społecznego na stosunki przemysłowe w Europie Środkowo-Wschodniej*, *Praca i Zabezpieczenie Społeczne* 2
- Bandasz, K., (2014), 'A framework agreement in the hairdressing sector. The European social dialogue at the crossroads', *Transfer. European Review of Labour and Research* 20(4)
- Barber, N.W. (2010). *The Constitutional State*, Oxford 2010, Oxford University Press

- Barbuceanu, S. (2011), *Annual Review 2011 on Labour Relations and Social Dialogue in South East Europe: Romania*, Fredrich Ebert Stiftung, available at: <http://library.fes.de/pdf-files/bueros/belgrad/08911.pdf> (20.03.2015)
- Bekker, S. (2013), 'The EU's stricter economic governance: a step towards more binding coordination of social policies?', *WZB Discussion Paper*, available at: <http://bibliothek.wzb.eu/pdf/2013/iv13-501.pdf> (15.04.2015)
- Bogg, A., Dukes, R. (2013), 'The European social dialogue: from autonomy to here', in: Countouris, N., Freedland, M. (eds.), *Resocialising Europe in a time of Crisis*, Cambridge, Cambridge University Press
- Bruun, N., Lörcher, K. Schömann, I. (eds.) (2012), *The Lisbon Treaty and Social Europe*, Oxford: Hart Publishing
- Clauwaert, S., Schömann, I., (2012), *The crisis and national labour law reforms: a mapping exercise*, Brussels: ETUI
- Deakin, S. (2012), 'In Search of the Social Market Economy', in: Bruun, N. Lörcher, K., Schömann, I. (eds.), *The Lisbon Treaty and Social Europe*, Oxford: Hart Publishing
- Dorssemont, F. (2011), 'How the European Court of Human Rights gave us Enerji to cope with Laval and Viking', in: Moreau, M-A (ed.), *Before and After the Economic Crisis*, Cheltenham: Edward Elgar
- Drahokoupil, J., Myant, M. (2015), Labour's legal resources after 2004: the role of the European Union, *Transfer: European Review of Labour and Research* 21, August 1
- ETUI, (2014), *Benchmarking Working Europe*, Brussels: ETUI
- Eurofound (2014), *Changes to Wage-Setting Mechanisms in the Context of the Crisis and the EU's New Economic Governance Regime*, Dublin: Eurofound
- Ewing, K.D. (1998), 'The State and Industrial Relations, Collective Laissez-faire Revisited', *Historical Studies in Industrial Relation* 5
- Ewing, K.D., Hendy, J. (2010), 'The Dramatic Implication of Demir and Baykara', *Industrial Law Journal* 39
- Ghellab, Y., Papadakis, K. (2011), 'The politics of economic adjustment in Europe: State unilateralism or social dialogue', in: *The Global Crisis: Causes, Responses and Challenges*, Geneva, ILO, http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_155824.pdf (12.04.2015)
- Gradev, G. (2005), 'Social Dialogue and Trade Unions in Enlarging Europe: Losers among Winners?', in: Dimitrova, D., Vilroks, J. (eds.), *Trade Union Strategies in Central and Eastern Europe: Towards Decent Work*, Geneva: ILO
- Hyman, R. (2005), 'Trade unions and the politics of European social model', *Economic and Industrial Democracy* 26(1)
- Keune, M. (2008), *EU enlargement and social standards: exporting the European Social Model?* Brussels: ETUI

- Lendvai, N. (2004), 'The weakest link? EU Accession: Dialoguing EU and post-communist social policy', *Jourl of European Social Policy* 14(3)
- Meardi, G. (2012a), *Peripheral convergence in the crisis? Southern and Eastern European labour markets and industrial relations*, Paper presented at the SASE Annual Meeting 28–30 June 2012, Boston, http://www2.warwick.ac.uk/fac/soc/wbs/research/irru/publications/recentconf/gm_sasel2paper.pdf (04.03.2015)
- Meardi, G. (2013), *European industrial relations under international pressure. A six countries comparison*, www2.gre.ac.uk/__data/assets/pdf_file/0006/665142/Guglielmo-Meardi.pdf
- Meardi, G. (2012), *Social Failures of EU Enlargement. A Case of Workers Voting with their Feet*, New York–London: Routledge
- Müllensiefen, T. (2012), 'The European cross-sectoral social dialogue between autonomous action and regulatory involvement', in: S. Smismans (ed.), *The European Union and industrial relations. New procedures, new context*, Manchester: Manchester University Press
- Ost, D. (2011), 'Illusory corporatism'. Ten Years Later, *Warsaw Forum of Economic Sociology* 2(1)
- Ost, D., (2000), 'Illusory Corporatism in Eastern Europe: Neoliberal Tripartism and Postcommunist Class Identities', *Politics & Society* 28(4)
- Peers, S., Hervey, T., Kenner, J., Ward, A. (eds.) (2014), *The EU Charter of Fundamental Rights. A commentary*, Oxford: Hart Publishing
- Peers, S., (2015), 'The EU's Accession to the ECHR: The Dream Becomes a Nightmare', *German Law Journal* 16
- Piris J-C, (2010), *The Lisbon Treaty*, Cambridge: Cambridge University Press 71
- Pochet, P. (2010), 'EU 2020 Social impact of the new form of European governance', *ETUI Policy Brief Issue* 5
- Trif, A., (2013), 'Romania: collective bargaining institutions under attack', *Transfer: European Review of Labour and Research* 19(2)
- Velyvyte, V. (2014), 'The Right to Strike in the EU after Accession to ECHR: A Practical Assessment', in: Freedland, M., Prassl, J. (eds.), *Viking, Laval and Beyond*, Oxford: Hart Publishing
- Veneziani, B. (2012), 'The role of the Social Partners in the Lisbon Treaty', in: Bruun, N. Lörcher, K., Schömann, I. (eds.), *The Lisbon Treaty and Social Europe*, Hart Publishing
- Vigneau, Ch. (2011), 'The future of European social dialogue', in: Moreau, M.-A. (ed.), *Before and After the Economic Crisis. What implications for the 'European Social Model'?*, Cheltenham: Edward Elgar