Global Workplace Law & Policy

Stagnation in social dialogue

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What scope is there for social partner dialogue?

The current economic situation remains affected by the Covid-19 pandemic; whether it is directly related to the virus' variants or the effects of emerging from lockdown.[1] Given these circumstances, the European Commission's recent activity is positive, even if we may criticise the details. One of the larger measures is the draft AI Act. The work/employment implications remain a matter for debate. Another initiative, there has been political agreement between the European Commission and the Member States regarding an adequate minimum wage directive. These legislative actions address working conditions largely at a more precarious level of work.[2] It is notable that these are EU Commission initiatives.

This post considers whether we are in the midst of stagnation in the role of social partner dialogue.

This query is prompted by the CJEU's *EPSU* decision of 2021.[3] *EPSU* creates a situation of dependency for social dialogue: such discourse can only exist so long as the Commission sets an agenda that permits it to happen; or if the social partners fit their framework agreements within the political aims of the Commission. The argument pursued here is that social partner dialogue has been attenuated by *EPSU* as a decision that reinforces the centralised power of the EU Commission. Positive, tangible outcomes of social partner dialogue are dependent upon the EU Commission's continued engaged activity in the area of employment (industrial relations). This is not something that historically has been persistently evident. Without either the Commission's continued active presence or a level of autonomy for social partners that is reinforced by the realistic opportunity to widely implement the outcomes of these discussions (namely framework agreements), social partner dialogue will remain contingent to an extent that limits its potential.

Social partners' framework agreements: The "right of the firstborn"

Articles 154 and 155 of the Treaty on the Functioning of the European Union (TFEU) provide for management and labour to conclude Community level agreements.[4] Roger Blanpain asserted that the social partners had the "right of the firstborn"[5] to create EU Law. When social dialogue provisions were first put forward, "the intended objective, which was shared by all the stakeholders … was undoubtedly to open up an area for collective bargaining at European level."[6]The Social Partners have achieved success through this path on several occasions: telework (2002), work-related stress (2004), harassment and violence at work (2007), and inclusive labour markets (2010). As one example, the telework agreement has been variously implemented within Member States.[7]

In the years since the framework agreement on inclusive labour markets, stagnation has been evident. One reason is the "tension between the autonomy granted by social partners under article 152 TFEU and the prerogatives enjoyed by the Commission in the EU legislative process".[8] The EU Commission's rejection of the Hairdressers' Agreement[9] as well as the decisions of the General Court and Grand Chamber in *European Federation of Public Service Unions (EPSU)* speak to this tension. The Hairdressers' Agreement had been called "a sign of the growing autonomy and maturity of the ESD."[11] The first *EPSU* decision was characterised as a by-product of the Barroso 2 EU Commission (2009-2014) when "the Commission opposed the idea that legislation in the social policy field could be triggered by initiatives outside its control."[12]

The Grand Chamber's decision in *EPSU*

This case centred on a general framework agreement reached by European level social partners responsible for public administration. This agreement extended rights of information and consultation to public administration workers.

Questions about the future of social dialogue, and particularly the social partners' role, were posed leading into the Grand Chamber's decision.[13] In dismissing EPSU's appeal, the Grand Chamber qualified the "right of the firstborn", thereby rendering it contingent.[14] The European Commission is not obliged to institute all agreements of the social partners.[15]Based upon the wording of the TFEU, particularly Article 155(2), the Commission is not obliged to put a proposal, pursuant to the social partners' agreement, before the Council. It has "a right to act and resumes control of the procedure",[16] and therefore has independence in the exercising of its functions.[17] The Commission is also not empowered to ensure any such law is passed; this being a matter for the Council to decide.[18] The Grand Chamber rejected any suggestion of an imperative to act on the outcome of negotiations amongst the social partners,[19] contending this

would grant the partners a "greater influence over the content of legal acts adopted in relation to social policy … than that which may be exerted by Parliament."[20] A key aspect of the CJEU's decision was the concept of the general interest which it described as "whether it is appropriate to submit a proposal to the Council on the basis of an agreement".[21] The determination of appropriateness allowed the Commission to consider "political, economic and social" factors in determining the possible implementation of the agreement at the EU level.[22] It is notable, then, that the general interest seems to be based upon the idea of the EU governance framework being representative of the general interest. By implication, the social partners are not viewed as representative of the general interest; presumably because they are 'only' representative of industrial relations actors: "management and labour, even when they are sufficiently representative and act jointly, represent only one part of multiple interests that must be taken into account in the development of the social policy of the European Union".[23]

There have been critical readings of this decision. Manuel Antonio García-Muñoz Alhambra argues that the CJEU's decision can be traced to "the ideas and dynamics introduced by the EU Better Regulation agenda. In this context, the EPSU rulings seem to be nothing less than the final episode in the unprecedented difficulties that EU social dialogue and collective bargaining have encountered in recent years."[24] Silvia Rainone contends that this decision "legitimizes the expansion of political control over agreements negotiated by employer associations and trade unions, control that had emerged since the Barroso II presidencies in the context of "smart regulation" policies." She concludes that the European Union favours social dialogue "only as long as the Commission deems it appropriate."[25]

Clearly, there are questions regarding the role of the social partners, as well as the status of framework agreements, not to mention how this decision may diminish dialogue amongst the social partners. While these agreements may, pursuant to Article 155(2) TFEU,[26] be implemented at the Member State level, initiatives can be imbued with greater significance if there is an EU-wide effort at implementation.

The right to disconnect and its future in the EU

On 21 January 2021, the EU Parliament called upon the Commission to propose a law on the right to disconnect,[27] but added that pursuant to the TFEU, the social partners have a three-year period within which to reach an agreement, before any legislative proposal could be laid down. The timeframe stems from the *European Social Partners' Autonomous Framework Agreement on Digitalisation* (FAD),[28] which was completed in June 2020.

The FAD discussed the right to disconnect in a limited manner. That document suggested discussions remained at an early stage. For example, the concept remained challenging to define as one aim for future discussion based on the FAD is "[a]chieving clarity on the legitimate expectations that can be placed on workers when using such devices".[29] The FAD aptly elaborates upon the "risks and challenges around the delineation of work and of personal time both during and beyond working time."[30] Connecting and disconnecting draws attention to 'work-life balance', whether (and if so when) work stops in a digitalised workplace. The FAD frames the matter as an "employer's duty to ensure the safety and health of workers in every aspect related to the work";[31] which is one of health and safety. This topic also implicates the Working Time Directive.[32]

Establishing a right to disconnect within each Member State remains viable, but likely results in a patchwork of varying forms of 'rights to disconnect'.

The concept originated in France as it attempted to regulate the challenging division between on and off-duty work in a digitalised setting. The concept began with a decision of the Labour Chamber of the Cour de Cassation[33], and was subsequently brought into law[34]. The right means that a worker can disengage from the workplace when not working. The point has become more problematic with information technologies that enable the workplace to infiltrate the worker's life at any point of the day. The argument for such a 'right' has been that disengaging from the workplace is in itself beneficial (such as for health considerations).

Not all Member States have followed a similar path though. Portugal, as one example, passed Law 83/2021, of 6 December 2021 (in force as of 1 January 2022), which amended the teleworking framework set forth in the Portuguese Labour Code (PLC), to impose a duty on employers of not contacting employees outside regular working hours. As Mariana Pinto Ramos has pointed out, it is unclear if this duty to abstain and a right to disconnect are the same thing. Ireland is another example. According to the Department of Enterprise, Trade and Employment, Ireland has a right to disconnect.[35] However, the right only exists as part of the Workplace Relations Commission's *Code of Practice for Employers and Employees on the Right to Disconnect*.[36] The 'right' is not truly enforceable. An employer insisting on contacting and compelling an employee to carry out further work "outside of normal working hours" on a persistent basis does not constitute an offence. Instead, the fact of such failure may be admissible as evidence (pursuant to s.20(9) of the Workplace Relations Act 2015). It may be considered by any trier of fact insofar as any *Code* provision appears to be relevant to the immediate proceedings. This means there is only the possibility that an employee who is penalised for refusing to attend to work matters outside of normal working hours can try to admit evidence of this response and to request the trier of fact take this into consideration. A right that is more explicit, direct, and based in statute is likely needed for there to be an actual 'right to disconnect' that is more meaningful than rhetoric.

Ultimately, the problem with this patchwork approach would seem to be the disparities which the Commission is seeking to address with the adequate minimum wage directive and the draft platform work directive.

Delaying the right to disconnect for social partner dialogue: a contradictory step?

There are reasons to question the three-year timeframe regarding social dialogue on the right to disconnect, as well as the potential for leaving a crucial matter without action for that time. First, the idea that European social dialogue could preclude the European Commission's right of legal initiative has been contested by the European Trade Union Confederation (ETUC).[37] Second, it is quite unclear what sort of agreement could be reached based upon the FAD because it only sets out points for discussion.[38] It is hard to rely upon a shared commitment to addressing issues of digitalisation that does not have any concrete outcomes. A framework agreement on the right to disconnect would seem to have been encouraged (particularly taking instruction from *EPSU*) by the EU. Nevertheless, issues surrounding the digitalisation of work (of which the right to disconnect is one) need the kind of centralised coordination which the EU wants (and *EPSU* grants). Despite any understanding of the premises for the decision, *EPSU* arises at a remarkably poor time. The present is a pivotal period for dialogue amongst the social partners, and

for the realisation of such work at the Commission level. Consequently, the Commission is presently an important driver of the means to address significant work issues (notably those pertaining to the digitalisation of work) with an EU-wide effect.[39]

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Endnotes

[1] On the latter point, we can also point to some companies (such as airlines) endeavouring to return to something close to normal business, but with a less than normal complement of workers.

[2] Though the number of individuals who are supplementing income as opposed to drawing the majority or entirety of their income from platform work suggests that the latter group is relatively small.

[3] *European Federation of Public Service Unions (epsu) v. European Commission*, Case C-928/19, 2 September 2021, ecli:eu:c:2021:656.

[4] Initially this was done under Article 139 of the EC Treaty:

‘1. Should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements.

2. Agreements concluded at Community level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 137, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission.’

[5] R. Blanpain, *European Labour Law*, 14th ed. (Deventer: Wolters Kluwer, 2014), 216.

[6] J-P Tricart, *Legislative implementation of European social partner agreements: challenges and debates Working Paper 2019.09* (Brussels: ETUI, 2019), 46.

[7] European Commission, “Report on the implementation of the European social partners’ Framework Agreement on Telework” COM (2008) 412 final (2 July 2008).

[8] I. Senatori, “The European Framework Agreement on Digitalisation: a Whiter Shade of Pale?” (2020) 13 *Italian Labour Law E-Journal* 159, 161.

[9]https://osha.europa.eu/en/legislation/guidelines/european-framework-agreement-on-the-protection-of-occupational-health-and-safety-in-the-hairdressing-sector

[10] Case T–310/18, 24 October 2019 (General Court), affirmed by Case C-928/19 P, *EPSU*, 2 September 2021 (Grand Chamber).

[11] F. Dorssemont, K. Lörcher and M. Schmitt, “On the duty to implement social partners’ agreement

concluded at Union level: lessons to be learned from the Hairdressers-case” (2019) 48 *Industrial Law Journal* 571, 602.

[12] E. Somaglia, "Are the Prerogatives of EU Social Partners under Threat?" (2020) 6 *International Labor Rights Case Law* 156, 157.

[13] Some have been posed in Tricart, 47.

[14] Case C-928/19 P, *EPSU*, 2 September 2021 (Grand Chamber).

[15] "However, the existence of that autonomy, which characterises the stage of negotiation of a possible agreement between social partners, does not mean that the Commission must automatically submit to the Council a proposal for a decision implementing such an agreement at EU level at the joint request of the social partners, because that would be tantamount to according the social partners a power of initiative of their own that they do not have." *EPSU* [62].

[16] *EPSU* [64].

[17] *EPSU* [64]-[67].

[18] *EPSU* [62], [79].

[19] *EPSU* [65].

[20] *EPSU* [73].

[21] *EPSU* [47]

[22] *EPSU* [79].

[23] *EPSU* [80].

[24] M. García-Muñoz Alhambra, "An Uncertain Future for EU-Level Collective Bargaining: The New Rules of the Game After *EPSU*" (2022) *Industiral Law Journal* (forthcoming).

[25] S. Rainone, "EU Social Dialogue: Valuable, But Only When Appropriate?" (2022) 8 *International Labor Rights Case Law* 17.

[26] As the Grand Chamber noted in *EPSU* [68].

[27] European Parliament, Committee on Employment and Social Affairs, *Draft Report with recommendations to the Commission on the Right to Disconnect*, 2019/2181(INL), 28 July 2020.

[28] *European Social Partners' Autonomous Framework Agreement on Digitalisation* (22 June 2020). Available at: https://www.etuc.org/en/document/eu-social-partners-agreement-digitalisation.

[29] *Ibid* 10.

[30] *Ibid*.

[31] *Ibid.*

[32] 2003/88/EC.

[33] October 2, 2001 n°99-42.727.

[34] Article 55 under Chapter II ‘Adapting the Labour Law to the Digital Age’. Bruno Mettling (*Transformation numérique et vie au travail* (Ministre du Travail, de l’Emploi, de la Formation Professionnelle et du Dialogue Social) (September 2015)) suggested amending the French Labour Code to include the right to disconnect (*le droit de la déconnexion).*

[35] “I have signed a new Code of Practice giving all employees the Right to Disconnect. This is effective immediately”: Statement by Tánaiste and Minister for Enterprise, Trade and Employment Leo Varadkar TD as found in Department of Enterprise, Trade and Employment, “Tánaiste signs Code of Practice on Right to Disconnect” (1 April 2021)

[36] Workplace Relations Commission, *Code of Practice for Employers and Employees on the Right to Disconnect* (March 2021).

[37] ETUC, *Right to disconnect – Joint ETUC/ETUFs Letter to the Members of the European Parliament* (20 January 2021).

[38] For more extensive discussion of this Framework Agreement see, I. Senatori, “The European Framework Agreement on Digitalisation: a Whiter Shade of Pale?” (2020) 13 *Italian Labour Law E-Journal* 159; L. Battista, “The European Framework Agreement on Digitalisation: A tough coexistence within the EU mosaic of actions” (2021) 14 *Italian Labour Law E-Journal* 105; D. Mangan, “Agreement to Discuss: The Social Partners Address the Digitalisation of Work” (2021) 50 *Industrial Law Journal* 689.

[39] The effect of EU action part-time and fixed-term workers precipitated a shift that was absent for some Member States, such as the UK (as it was at that time): Deirdre McCann, *Regulating Flexible Work* (Oxford: Oxford University Press, 2008).

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