



EXECUTIVE SUMMARY

Symposium

Konvergenz statt Harmonisierung

4 and 5 May 2001,
Luxembourg

Abstract

In co-operation with the Luxembourg Ministry of Labour and Employment and the Luxembourg Institute for European and International Studies (LIEIS), the *Gesellschaft für Europäische Sozialpolitik in Bonn* (GES) organised an international conference on 'the possibilities, ways and concepts of the EU to contribute to the management of labour relations in the context of enhanced integration'. In the course of five discussion sessions, the participants debated the need and the conditions for EU social policy, its content and its structures, as well as the modalities of its conception and implementation.

Two main arguments emerged from the discussions: first, absolute harmonisation in the sense of uniformisation was rejected on the grounds of being politically undesirable and economically and socially questionable. Second, some convergence in the sense of steady progress towards a European social policy regime which respects national diversity received broad academic and political support.

In spite of many nuances, three stylised positions could be identified: on the one hand, those who favour EU minimum standards in specific areas of social policy and who plead for more convergence in other areas and, on the other hand, those who privilege the 'open co-ordination' method for the conduct of social policy at the EU level. They were also those who were critical of both methods, judging them to be insufficient to bring about both more convergence and coping with challenges such as new technology and enlargement. The main conclusions were that the EU matters for social policy, that its current content and structures must be thoroughly explored and that further progress depends on a clearly articulate political will throughout the EU.

I. Past, Present and (Possible) Future Tendencies of Social Policy in the EU

Abstract

The introductory session offered an assessment of past and present EU social policy-making: the presentations retraced the historical evolution of social policy within the European integration process and indicated the main stages and characteristics, as well as the successes and failures. The presentations also highlighted the main current trends and some of the key aspects of future European social policy.

1. Introductory Statement by Jean-Claude Juncker, Prime Minister of Luxembourg

The current range of EU social policy goes back to the second half of the 1980s and, more specifically, to the European Single Act and the Delors presidency of the European Commission. There has been a gradual extension of the scope of EU social policy, touching on domains as diverse as labour relations, social security, labour-market policies and employment strategies. What has emerged from this process is a set of actors on the transnational, national and local levels engaged in social policy conception and implementation and what characterises them is their combined scientific, political and social approach. In the light of the increasing complexity of policy-making and of the immense challenges facing the EU and with view to the 2004 ICG, there is now the two-fold need to bring in more strongly representatives of the civil society and to integrate with one another the various policy areas in order to ensure coherence and effectiveness. More specifically, the different policy areas which have a social component should be tied together, for instance labour policy, the 'broad economic guidelines' and structural policy.

In some areas of European social policy, minimum standards can be, and have been, envisaged as an effective means to conduct social policy. This should be accompanied by the exchange of information of national experience in implementing these minimum standards. EMU and the introduction of the Euro have enhanced, and not reduced, the possibilities of setting minimum standards. These remain an important tool to design and conduct social policy as they are an effective protection against an unacceptable 'race-to-the-bottom'. Minimum standards are all the more useful since they provide clear improvements to workers who have recently been less supportive of the European integration and whose backing is essential for enlargement and further integration to be successful.

At the same time, continuing differences make largely national social policy-making necessary in order to respect national particularities, for instance in areas such as child benefits or the pension system. Therefore, convergence is the most desirable strategy for the present and future of social policy, particularly analytical convergence in the area of social security and practical convergence in social law and labour relations. On the contrary, fully-fledged harmonisation is both politically undesirable and socially counter-productive.

2. Presentation by Prof. Meinhard Heinze, Director, Institut für Arbeitsrecht und Recht der Sozialen Sicherheit, University of Bonn

In the period from the European Single Act to the Amsterdam Treaty, the EU was accorded a wide range of competencies and structures aimed at conceiving and conducting social policy. For example, article 137 para. 1 of the Amsterdam Treaty enables the Council of Ministers to decide on minimum standards in consideration of national conditions. But European

competencies neither cover the whole of social policy nor are they self-contained: for instance, European labour law is extensive, yet some aspects are explicitly ruled out, such as unemployment benefits, strike law, right of association and lock-out. However, on the whole norm-setting powers have shifted from the national to the European realm.

Two aspects are central to the question of the nature and scope of the EU norm-setting powers: the principle of subsidiarity and minimum standards. The codification of subsidiarity in the Amsterdam Treaty means that it now determines whether and, if so, how social policy is conducted at the EU level. This gives rise to a whole EU social legislation and has implications for national social policy-making. But, at the same time, it regulates the intensity and scope of EU interventions in national legislation. In conjunction with the principle of excess prohibition (*Übermassverbot*) in art. 5 para. 3 of the Amsterdam Treaty, subsidiarity ensures that absolute uniformity in social policy cannot be introduced *de iure* by any EC institution. Instead, it seems that convergence and harmonisation (in the sense of a process towards adjustment in some areas) are the guiding principles, implying a universality of diversity and persuasion.

The 1994 Council of Minister decision marks another milestone in EU social policy by establishing consensus as a key principle underlying the EU's approach to social policy. It also emphasised the need to explore the whole potential of the Maastricht Treaty social protocol, particularly the provisions for minimum standards in labour relations, prior to any attempts to enhance the scope and intensity of EU social policy. Since this decision, there seems to have been a general move away from the method of binding minimum standards to the method of open co-ordination. Yet, regardless of the above methods that prevails, any attempt of uniformisation 'from above' would not only be *de facto* controversial but *de iure* impossible.

II. Are Minimum Standards the Appropriate Instrument to Achieve Convergence?

Abstract

The first discussion unit raised the question as to whether minimum standards are useful as a method for social policy-making in general and as an instrument to ensure convergence in particular. The relation between minimum standards on the one hand, and subsidiarity and social dialogue on the other hand, was also analysed. Questions and comments focused on the importance of process-led ways underlying EU social policy and on the question of representativity in relation to social dialogue.

1. Prof. Rolf Birk, Director, Institut für Arbeitsrecht und Arbeitsbeziehungen in der Europäischen Union, University of Trier

The term 'convergence' raises the question as to whether it denotes an open-ended process or an end in itself, and whether minimum standards are sufficient to achieve the aim of convergence. Even if the aim is defined (rather loosely) as integration, the question remains as to the scope and limits of minimum standards and the form they should take. A stylised description of five stages of integration in the area of social policy illustrates what is at stake:

- i. uncoordinated coexistence is increasingly untenable because it amounts to a simple acceptance of norms defined by international organisations such as the WTO

- ii. negative co-ordination: art. 137, para. 5 of the Nice Treaty defines a number of areas that are excluded from EU social policy (e.g. unemployment benefits, strike law, right of association, lock-out)
- iii. free co-ordination includes recommendations and guidelines on a voluntary basis
- iv. harmonisation denotes adjustment where the content of legislation is identical while the form of legislation can differ
- v. uniformisation means binding together convergence and harmonisation

Absolute harmonisation remains a possibility but uniformisation is excluded by the limitations of EU competencies in the field of social policy.

Basic social rights and minimum standards are not identical because some minimum standards do not derive from social rights, although all social rights (as contained in art. 136 and the Charter of Fundamental Rights) are in some sense minimum standards. An overarching structure would therefore be useful to frame the relations between different domains which are relevant for social policy-making.

As for social dialogue and subsidiarity, both can potentially be a pretext not to make use of existing possibilities for social policy. It is also important to take note of the fact that subsidiarity does not only refer to the distribution of competencies according to the level at which they can best be taken on, but also, more specifically, to the relation between the Council of Ministers and the social partners at the EU level. Balancing social policy-making between them is delicate since subsidiarity may favour the European social partners, while they are, for the most, unrepresentative, non-elected and granted competencies that by far exceed those of national social partners. One would therefore have to envisage other forms of participation for European actors in EU social policy.

2. Discussion

Comments and questions focused on

- i. the role of various processes (Luxembourg, Lisbon) for the evolution of social policy
- ii. the present and future importance of social dialogue and the conditions for its success
- iii. the possible decline of the method of minimum standards
- iv. the need to distinguish carefully the different terms in order to be clear about the aim of social policy-making

(1) Has the Luxembourg process regarding employment given European social policy a decisive turn towards the open co-ordination method and does such a process-led strategy involve a 'soft-law' effect? (Franz Terwey, European Social Insurance Partners)

(2) There is a need for a political approach to the question of the future of the European social dialogue in order that it may overcome the problem of representativity. Since representativity is crucial to the EU, it is necessary to bring in a wide range of actors, and European social dialogue is one way to achieve this (Lore Hostasch, former Austrian Minister of Employment)

(3) First, the Nice Summit has revealed and consolidated a turn away from social minimum standards, e.g. regarding protection against redundancy. Although minimum standards have

been introduced in areas such as discrimination, on the whole European political decision-makers refrained from making use of minimum standards in more classical areas of social policy. Second, social dialogue at the European level is to be understood politically, designed to confer greater acceptance upon increasing European integration. In this process, social dialogue as the possibility for more autonomous social partnerships is an attempt to integrate social partners more fully in European social policy-making and to ensure that the effective practice of the principle of subsidiarity undermines more ambitious proposals on the part of the European Commission (Klaus Schmitz, German Ministry of Labour and Social Affairs)

(4) A more careful distinction is needed between convergence, co-ordination and minimal prescription in order to pinpoint current trends in European social policy-making. Such a distinction brings out more clearly the novelty of the Lisbon and Nice Summits, namely a more open, non-prescriptive approach to EU social policy (Anne de Soucy, French Ministry of Solidarity and Employment)

There was agreement with the suggestion that the political dimension of the European social dialogue is decisive but what is problematic is its legal status, particularly in the light of the ‘representativity gap’. It was also said that the excessive focus on discrimination may undermine those aspects of labour law which are not related to any instance of discrimination (Prof. Rolf Birk)

Open co-ordination should not be seen as a panacea because it may lead to a reduced support for the already existing EU social policy regime. Convergence may also be more effective in fending off any attempts of uniformisation disguised as minimum standards (Prof. Meinhard Heinze)

III. The Role and Possible Reforms of the Social Dialogue

Abstract

The second discussion unit focused on the origins and evolution of social dialogue at the EU level. It was noted that there was a stark difference between legal provisions and practices and that there is a need to integrate more fully other policy domains. However, there was controversy over the need for further structures, as to representativity and over ways to improve flexibility.

1. Paul Windey, President, National Labour Council, Belgium

Since the Paris Summit of 1972, social dialogue in the widest sense of the term is part of European integration. Over the last 30 years or so, social dialogue has emerged in the Treaties but also in practice, spanning a wide range of structure and modalities, including information, consultation, concertation and negotiation, between variable actors such as workers, trade unions at the level of enterprise, at the national but also at the EU level, engaged in inter-professional, sectoral and intersectoral dialogue. Today, social dialogue has reached a critical juncture for a number of reasons: first, the margin of negotiation has increased since the end of the austerity policies aimed at qualifying for EMU. Second, social dialogue has been enshrined in the social agenda, and the new legal provisions should now be put into practice. Third, after several decades of a judicial approach to social dialogue, it is now also time to tighten the links between the economic, social and legal realms to ensure greater coherence and effectiveness. Fourth, the nature of social dialogue has changed to the extent that the two

partners have evolved: for example, many interlocutors of employers' associations are today no longer owners themselves but represent those who own the capital.

The EU has responded to some of these challenges by creating the European Works Councils, a new form of social dialogue involving a hitherto unprecedented 20,000 people at the European level. Similarly, the social agenda includes components other than the legal provisions. This is crucial to ensure that the social dialogue evolves towards greater legitimacy and more co-ordination, as well as becoming a strong pillar of a genuinely social democracy. If it thus evolved, then social dialogue would withstand all objections of obsolescence and instead become an integral part of EU social policy.

2. Alain Benlazar, Director, European and Multilateral Affairs, Air France

The external factors of globalisation and the internationalisation of markets require the mobilisation of all the available resources to adapt the European economy, including social dialogue. Concretely, the current restructuring plans in France underline the importance of information and consultation of the workers, and social dialogue is a particularly useful tool to this end. In line with the goal of the social agenda, the social partners and the state should work jointly at improving the economic and social environment. For instance, information exchange is decisive to avoid economic and social inefficiency, whether it is related to unemployment or labour shortage, i.e. either the risk of social dumping and a 'race-to-the-bottom' or the risk of competing for scarce qualified labour and a 'race-to-the-top'.

Enhanced flexibility is one possible response to this problem and, as part of the European social policy, it can take multiple forms: in the case of Air France, the creation of the European works councils, and the introduction of a European employment contract. Other measures by Air France include improving the portability and transferability of pensions and the financial participation of employees in the company's capital. Social dialogue should therefore encompass information, consultation and negotiation. In order to ensure the success of social dialogue, i.e. a balance of interests through compromise, it is necessary to give equal importance to the legal and practical dimension of social dialogue.

3. Jean-Claude Reding, Secretary General, OGB-L

At the European level, social dialogue is almost a form of tripartism due to the important role of the European Commission. This stark difference as compared to national forms of social dialogue begs the question as to the 'added value' of European social dialogue. Further specificities of European social dialogue include the wide array of structures and modalities and the framework within which it takes place, namely the three modes of co-ordination, convergence and harmonisation to achieve the goals of European social policy. In this light and against the background of a crisis of parliamentary democracy, social dialogue can be one response to the expectations of the population in the EU member-states.

From the perspective of the trade unions, social dialogue should be institutionalised, take place on the basis of 'best practices', and help shaping EC law more in line with national law. The current deficiency of European social dialogue is due to insufficient legal provisions and to the lack of will by the employers' associations to include collective bargaining. Above all, there is an urgent need to determine the finality of European social dialogue.

Among other open questions, representativity and decision-making are particularly important. First, it seems that the representativity of the ETUC is much less problematic than that of UNICE because the latter is not representative in a number of member-states, e.g. in Luxembourg it only represents the industrial sector. Second, there is a need to introduce qualified majority voting in order to improve the effective decision-making powers of social partners. Third, the principle of subsidiarity is particularly important in this process, both to avoid that EC legislation be passed and transposed into national legislation where this is undesirable, but also to eliminate the untenable situation of excluding collective bargaining at the EU level.

A successful example of social progress is parental leave which the European social partners introduced and for which there was no legal basis in a number of EU member-states. Reflections on the future of social dialogue should include three aspects: first, collective bargaining; second, the relations with the European Economic and Social Committee, namely regarding the newly established EU macro-economic dialogue; third, the interactions between inter-regional social dialogue and EU social dialogue.

4. Discussion

Comments and questions focused on

- i. the legitimacy of the European social partners at the national level
- ii. the effectiveness of European social dialogue
- iii. the need to specify the content of social dialogue and the need for more structures

(1) To what extent are decisions by the European social partners considered to be legitimate in the various member-states? The hostility of some employers' associations to an enhanced European social dialogue is due to the already high density of EU regulations in the area of social policy (Martin Gleitsmann, Austrian employers' association)

(2) The national social partners can be criticised for not making use of all the structures that are available to them and of the dynamic created by the Luxembourg process, particularly with respect to training and flexibilisation. European social dialogue is now so developed that it does not need any new structures that may lead to its institutionalisation. The European social partners could issue guidelines for collective bargaining and contribute to more co-ordination and transparency. This would be in the interest of trade unions and employers, e.g. in the telecommunications sector (Klaus Schmitz, German Ministry of Labour and Social Affairs)

(3) Art. 138 and 139 provide the possibility for collective bargaining at the EU level. How do social partners judge this legal possibility? (Otto Schulz, GES)

(4) Would it not be sensible to abolish some institutions (such as the Permanent Employment Committee) and introduce an instance of mediation to make European social dialogue more effective? (Horst Günther, former Secretary of State, German Ministry of Labour and Social Affairs)

(5) A detailed specification of the content of European social dialogue is missing from the Treaties and social partners only deliver effectively if they are heavily encouraged to engage

in discussions on concrete issues like the level of job protection. However, only if they did not act should the legislator step in and take action (Peter Clewer)

The replies included the argument that the legitimacy of European social partners is guaranteed not only by the support of the national executives but also by ratification on the part of all national parliaments. The legitimacy and the representativity of the European social partners are also a function of being recognised as legitimate interlocutors. Moreover, social dialogue is not in crisis, as most member-states have concluded social pacts in recent years (Paul Wendey)

Collective bargaining is important in the context of increasing transnationalisation but there are a number of obstacles, namely the fear by trade unions of a loss of leverage in national settings, the fear by employers of an excessive density of regulations, and by national governments of a loss of their role as mediators and thus a loss of sovereignty. More generally, there is a need to address the crisis of social dialogue at a national level by adjusting to the economic changes and at the European level by abolishing unnecessary structures (Alain Benlazar)

The fundamental problem is that too few governments are read to discuss the content, which is crucial to the future of social dialogue. The nature and scope of structures is a function of both the content and the level of decision-making. Collective bargaining is not simply about levels of pay, but also about working conditions. This is all the more important since some minimum standards are disguised minimal standards (Jean-Claude Reding)

IV. The Scope and Limits of the New ‘Open Co-ordination’ Method

Abstract

The third discussion unit dealt with retracing the origins and evolution of the open co-ordination method and with evaluating its meaning for social policy-making. It was stressed that this method should be seen as complementary to already existing instruments and that its effectiveness depends on specifying more clearly the content of EU social policy and on a stronger political will.

1. Maria João Rodrigues, Special Adviser to the Portuguese Prime Minister, Coordinator of the Lisbon Summit

The paper outlined the origins and evolution of the open co-ordination method, evaluated its scope and limits and pointed out some important aspects for the future of EU social policy. Introduced at Lisbon to implement the long-term strategy for higher economic performance and more employment and social cohesion, this method has been designed to respond to the challenges of both globalisation and national differences. It is a new form of governance at the EU and national level.

The Lisbon Summit defined not only a broad long-term strategy but also reinforced the governance centre at the European level, that is to say the political power to co-ordinate the various policies and oversee their implementation in the member-states. In the wake of the extraordinary Luxembourg Summit on employment, putting into practice common qualitative guidelines took the form of exchanging information on experience (‘best practices’) and defining specific targets, while respecting national specificities. Following the European

Strategy for Employment, the Lisbon Summit extended the open co-ordination method to the whole of the EU integration process, defining convergence to the main EU goals and subsidiary as the main principles of this method, under the leadership of the Council.

This method aims at fostering convergence and is inclusive, designed to deepen European integration. Among the various methods, it is intermediary and to be thought of as one tool within a wider set of instruments. It is open because it has a European but also a strong national outlook and because it is a function of targets and indicators. While it depends strongly on the Council for its operation, the European Commission has some scope for action, namely as a catalyst for initiating policy proposals. The main aspects for the future of this method are the interaction between the Parliament and the Commission, the link with social dialogue, its integration into Community law and its usefulness after enlargement.

2. Allan Larsson, former Director General, DG V, Employment, Industrial Relations and Social Affairs, European Commission

The origins of the open co-ordination method go back as far as the Amsterdam Summit where the need for flexibility became apparent in the light of the transversal and cross-policy dimension of unemployment and of the need to exchange experience on 'best practices' to fight long-term unemployment more effectively. At that time, social policy emerged as a crucial productivity factor, linked to the greater demands it was facing, namely to address the problem of demography, technology and equal opportunities. The greatest challenge was and continues to be the question of ways to integrate social policy with economic policy and environmental policy. The forthcoming Göteborg Summit will seek to respond to this. Beyond the co-ordination of these three sets of policies, the second major challenge is the successful combination of three long-term strategies: first, technology and the investment in the technologies of the future; second, flexibility and investment in human capital; third, pollution and investment in techniques aimed at replacing all production techniques causing pollution. The EU already exhibits a number of specificities and it disposes of all the necessary instruments to defend itself against all those strategies which may undermine them, namely the US model. The open co-ordination method is an additional instrument in this process.

3. Discussion

The comments and questions focused on what the role of the ECB could be for an overall strategy aimed at higher employment and more social cohesion (G. Ambrosi) and on the relation between minimum standards and the open co-ordination method (R. Eisenberg)

The national governments and the social partners should be much more affirmative in their argument that inflation is stable and that there is more room for growth in order to persuade the ECB to change its stance on interest rates. There was agreement with the argument that social minimum standards have not disappeared but indeed have been increased in the Nice Treaty. But, at the same time, it is important to recognise the novelty of the open co-ordination method, namely that it relies for its operation on voluntary action on the part of the member-states and that it could not guarantee the same effective standards, e.g. in the area of health and safety (Allan Larsson). It was also said that the open co-ordination method is neither capable nor designed to replace the Treaties, but that it should be seen as an additional instrument for the conception and implementation of social policy, particularly apt to share experience and overcome problems given the political will (Luc Wies).

V. Conclusions

The final discussion unit featured a round-table debate between Paul Windey, Rolf Birk, Alain Benlazar and Allan Larsson, chaired by the Luxembourg Minister for Labour and Employment François Biltgen. He underlined the importance to focus not only on the different methods but also on the content of social policy, which requires political determination to discuss the finality of convergence in the area of social policy and, more generally, of the whole European integration process.

The Nice Summit and the social agenda raise the question of the level of solidarity and the danger that the technocratic procedures might somehow water down the newly established content and structures. A strong participation of the social partners in the open co-ordination method is necessary both to avoid such a regression and to ensure and even enhance the wider popular support for European integration and European social policy-making. However, this new method was criticised for being too vague to bring about the ambitious progress demanded by many actors because it is likely to avoid decision-making and debates on the finality of the convergence process. It is also questionable what extent this method is compatible with enlargement and whether it is capable of bringing about the answer to the high expectation of an increase in visibility and transparency of EU decision-making. Minimum standards were said to be insufficient to cope with the challenge of new technology and many more tools are needed to ensure long-lasting, durable and sustainable development.

François Biltgen concluded that harmonisation and convergence are not mutually exclusive but together describe social policy in the EU: while harmonisation denotes the lowest level of EU policy (minimum standards which, in some cases, may be minimal standards), convergence refers to that which is capable of going beyond minimum standards and also drawing in other policies areas. Further progress depends first and foremost on reviving existing structures and methods and on honouring the EU as being, above all, a value community. Such progress will come only with the clear articulation of a political will throughout the EU for further integration generally and for more convergence in social policy in particular.

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