

THE ROLE OF SOCIAL DIALOGUE AND COLLECTIVE AGREEMENTS IN BUILDING THE EUROPEAN SOCIAL MODEL¹

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Abstract: *The modern European concept of collective labour relations is based on the social dialogue, which represents an opportunity for ensuring permanent social peace. The social dialogue is regulated by the provisions of the primary European law, conducted at the supranational level by the social partners functioning in the European social area. It is also an important model for conducting dialogue by the social partners in the EU Member States and for establishment by the authorities of particular EU Member States of the principles and procedures for the social dialogue in the labour law systems. The freedom of association, collective bargaining, social dialogue and quality of collective labour relations are the fundamental elements of the European social model. The collective bargaining as being a part of this model should promote workplace democracy, redistribution of resources, and efficiency of employment relations. However, collective agreements that may be concluded at the European level are still a novelty in the legislative system of European labour law and they do not play a role as the alternative sources of European labour law.*

Keywords: *European social model, social peace, collective bargaining*

INTRODUCTION

The right of employees and employers to form and join organisations or other formations has the same underlying basis – the freedom of association, which is considered one of the key principles of collective labour law. It is a constitutional freedom, which is enshrined in many international legal instruments and, in fact, in national constitutions of almost all countries.

The establishment and real implementation of the principle of the freedom of association, among other things, create preconditions for social partnership. It gives an opportunity to form and join associations whereby employees and employers may function as equal social partners, be able to achieve a social compromise mutually or together with the state and ensure the stability of mutual relations, avoiding social conflicts in this way.

The international community has been unanimous for a couple of decades regarding the necessity and significance of fundamental social cooperation as well as the principle of the freedom of association, which is the essential aspect for collective labour relations, and related individual collective rights. However, changing labour market conditions, affected by such phenomena as market globalisation and, recently, the economic downturn, have revealed that these labour rights are under threat and are vulnerable to breaches and restraints, if not directly then through other political or economic decisions that also have

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a direct impact on collective cooperation and work conditions of participants in labour relations. As pointed out by different authors, the following violations of collective labour rights were noticed and reported most often during the recent economic crisis:² (i) the diminution of the role or complete elimination (withdrawal) of social dialogue and its institutions; (ii) the decentralisation of collective bargaining by moving from bargaining at national/branch level to that at enterprise level; (iii) the application of the *in peius* principle in collective agreements; (iv) the reduction of the status and role of trade unions *vis-à-vis* the role of other representatives of employees, e.g., labour councils.

It appears doubtful at first sight that there is a direct relation between collective labour law and economic downturn; however, the freedom of association, collective bargaining, social dialogue and quality of collective labour relations are the fundamental elements of the European social model and a key to the European economic and social welfare.³

1. GOOD GOVERNANCE OF COLLECTIVE LABOUR RELATIONS VIA SOCIAL DIALOGUE

The modern European concept of collective labour relations is based on social dialogue. A legal basis for the social dialogue is provisions of art. 118a and art. 118b of the Treaty on European Union (“The Treaty of Maastricht”)⁴ of 7 February 1992 which are art. 138 and art. 139 of the Treaty Establishing the European Community (“the Amsterdam Treaty”)⁵. Both of the mentioned provisions of the Treaty Establishing the European Community were adopted by the Treaty on the Functioning of the European Union⁶ of 30 March 2010 as art. 154 of the Treaty on the Functioning of the European Union (former art. 138 of the Treaty Establishing the European Community) and art. 155 of the Treaty on the Functioning of the European Union (former art. 139 of the Treaty Establishing the European Community).

The social dialogue in collective labour relations means the exchange of substantive opinions between the social partners on matters of their interest which are regulated in the labour laws of the European Union and in the national systems of labour law of the EU Member States. In the European law literature the social dialogue is associated with negotiations conducted by social partners at different levels: supranational, national, regional, inter-sectoral/inter-professional, sectoral/professional, and at works level. The social dialogue is also a synonym of bilateral inter-sectoral/inter-professional negotiations at the supranational level, conducted by the social partners who develop their statutory activity at the EU level⁷.

² LÖRCHER, K. Legal and judicial international avenues: the (revised) European Social Charter. In: BRUUN, N. et al. (eds.). *The economic and financial crisis and collective labour law in Europe*. Oxford-Portland, Oregon: Hart Publishing, 2014, pp. 266–267.

³ COUNTOURIS, N., FREEDLAND, M. Resocialising Europe – looking back and thinking forward. In: COUNTOURIS, N., FREEDLAND, M. (eds.). *Resocialising Europe in a time of crisis*. Cambridge: Cambridge University Press, 2013, p. 499.

⁴ Official Journal C 326, 26/10/2012, pp. 0001–0390.

⁵ Official Journal C 340, 10/11/1997, p. 0173.

⁶ Official Journal C 326, 26/10/2012, pp. 0001–0390.

⁷ BOGG, A., DUKES, R. 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, 2013, pp. 466–492.

Because of the significant and far-reaching diversity of the social dialogue levels and huge variety of social partners representing similar parties to collective labour relations in different configurations, the social dialogue is a complicated social process which is difficult to be classified in legal terms⁸. The social dialogue regulated by the provisions of the primary European law, conducted at the supranational level by the social partners functioning in the European social area, is a model for conducting dialogue by the social partners in the EU Member States and for establishment by the authorities of particular EU Member States of the principles and procedures for the social dialogue in the labour law systems. Therefore, it is necessary to analyse the EU legislation, to present the positive and negative aspects of the European social model in order to determine whether implementation of the assumptions of such model provides serious guarantees for achievement and maintenance of the social peace in collective labour relations, different than those which before the EU accession in 2004 were guaranteed by a concept – applied in the “new” European states – of labour relations based on contradictory interests of the social partners⁹.

From the point of view of a lawyer specializing in the collective labour law the term “good state” means a democratic state whose authorities can properly and efficiently govern the collective labour relations, in such a manner so as to ensure achievement and maintenance of social peace via social dialogue between the social partners representing the collective interests of workers and employers. The social peace as a common good means a condition in which none of the social partners’ organizations (trade unions, employer organisations) see benefits in exercising the fundamental freedoms and/or rights to organise collective actions (strikes or lockouts) in order to exert pressure on the partner participating in the social dialogue. Art. 2 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on 13 December 2007, officially and solemnly declares that “The Union’s aim is to promote peace, its values and the well-being of its peoples” (Art. 2(1)). The said provision of the Treaty imposes an obligation on the authorities of the European Union and authorities of its Member States to guarantee to “<...> its citizens an area of freedom, security and justice <...>” (Art. 2(2)). In the collective labour law the above statements are understood clearly: the EU institutions are obliged to guarantee social peace in collective labour relations. A chance for achievement of permanent social peace in the collective labour relations via the social dialogue is a conviction, very common among lawyers specialising in the European Law, of the value of the social dialogue as a method serving good governance of a specific, important domain of public affairs¹⁰. Supranational collective agreements, industry-wide framework normative agreements and – what is most important in

⁸ Lo FARO, A. *Regulating Social Europe. Reality and Myth of Collective Bargaining in the EC Legal Order*. Oxford-Portland, Oregon: Hart Publishing, 2000, p. 21.

⁹ ŚWIĄTKOWSKI, A. M. Good governance of collective labour relations in EU *via* social dialogue. *Teisė: Vilnius University*. 2014, Vol. 92, pp. 7–18.

¹⁰ C. Welz was the first to apply the above principle in the European labour law literature to analyze the effectiveness of the social dialogue between supranational social partners in the European Union. WELZ, Ch. *The European Social Dialogue under Articles 138 and 139 of the EC Treaty. Actors, Process, Outcomes*. The Netherlands: Wolters Kluwer Law & Business, 2008, p. 106.

terms of social dialogue – also the agreements concluded by the social partners within particular sectors and professions, which are not of normative nature, may be successfully applied by the EU institutions and authorities in the EU Member States as the methods of good governance of social peace in labour relations¹¹. Consultations and social dialogue between the social partners conducting negotiations “guided” by the Commission (tripartite) and direct “autonomous” negotiations are considered the best example of the effective practical implementation of the principles of good governance at the supranational level within the European Union¹².

However, the sole compliance with the principles mentioned above does not guarantee achievement and maintenance of social peace in collective labour relations. Soon after the catalogue of principles underlying the good governance was formulated, a proposal was raised to add to the list an additional criterion of democratic legitimacy of the authorities responsible for the establishment and maintenance of social peace in collective labour relations. This principle assumes that agreed and approved decisions should be taken by democratically elected representatives of a certain group. Moreover, the functioning of this principle is based on confidence of a certain group in its representatives, authorised to conduct negotiations, and assume obligations in the name of the group. In collective labour relations, the principle of democratic legitimacy of authorities is applied respectively to both social partners, ensuring that they are represented by competent organizations: workers – by trade unions and employers – by employers’ organisations. The characteristic of this principle is the acceptance by the members of a certain group of a collective will expressed by representatives of the group, recognizing the democratic principles of such decision-making. The above-mentioned condition can only be met where each of the social partners involved in the social dialogue by participation on each phase of collective labour relations, i.e. consultations, exchange of views, negotiations, mediations, arbitration or collective actions (strike and/or lockout), aims to achieve the agreement acceptable to all. Therefore, the social peace is not a goal *per se*. The stability of the social peace negotiated by the social partners depends on the level of acceptance of the arrangements negotiated with the social partner by a group represented in the social dialogue conducted by each social partners’ organization¹³.

The purpose of social dialogue in collective labour relations is the redistribution between the social partners of the portion of assets, designated for a distribution, manufactured by workers in the establishments operated by entrepreneurs. Such distribution should be in accordance with the principles of social justice. Therefore, only fair distribution may constitute a solid basis for social peace in collective labour relations. The distribution is considered fair if it is impartial and guarantees the same opportunities to all the participants in the process of the redistribution of assets. The object of distribution in col-

¹¹ ŚWIĄTKOWSKI, A. M. Good governance of collective labour relations in EU *via* social dialogue. *Teisė: Vilnius University*. 2014, Vol. 92, pp. 7–18.

¹² Communication from the Commission of 25 July 2001 “European governance – A white paper”. COM(2001) 428 final. Official Journal C 287, 12. 10. 2001.

¹³ ŚWIĄTKOWSKI, A. M. Good governance of collective labour relations in EU *via* social dialogue. *Teisė: Vilnius University*. 2014, Vol. 92, pp. 7–18.

lective labour relations is a level of satisfaction of the economic interests and social needs of the social partners expressed by organizations representing groups of workers and employers.

However, practice shows that these values are highly vulnerable and exposed to a permanent danger. In particular, the recent economic crisis, which Europe and the world have experienced in the last years, has both negatively affected civil and political as well as economic and social rights.¹⁴ According to the Secretary-General of the Council of Europe, Mr. Thorbjørn Jagland, “People’s rights are ... threatened by the impact of the economic crisis and growing inequalities. ... European societies have suffered the effects of the recent economic crisis, which has deeply affected social cohesion in many Member States, and which may eventually threaten both the rule of law and democracy.”¹⁵ The economic crisis and its effects on industrial relations and working conditions are still changing the European labour world. The new EU economic governance tools had different consequences on individual Member States and their systems of industrial relations and working conditions.¹⁶ Despite country-level variations, the different European systems of industrial relations weathered the economic and social impact of the early phase of the crisis (2008–2010). Countries with strong social dialogue and/or industrial relations systems displayed better cooperation between the state, employers and employees. As for the second phase of the crisis (2010–2012), there have been many significant impacts of the crisis on a range of aspects of industrial relations, although in many cases it is difficult to disentangle the impact of the crisis from other longer-standing national industrial relations trends.¹⁷ The clearest finding has been an accelerated trend towards decentralisation in collective bargaining in many countries. Other changes have taken place in regard to collective bargaining and its related mechanisms: fewer extension mechanisms, more opt-out and derogation clauses, less favourability and more non-continuation of collective agreements upon expiry. The crisis has provoked a revision and amendments of these mechanisms in a number of Member States, in particular those severely hit by the downturn. The findings show that the crisis has caused an increase in job insecurity, with the negative consequences on well-being and health of employees. It leads to increased levels of stress, adverse social behaviour and other psychosocial disorders of employees. An increase in stress at work is reported more and more frequently. Moreover, there is a trend reversal suggesting that job satisfaction has risen in Europe since the crisis. However, it is not considered by the experts to be a very positive phenomenon, as rising job insecurity is obviously compensated for by the satisfaction of still having a job.¹⁸ Therefore, there have been serious effects of the crisis on industrial relations in the European Union. These

¹⁴ The Steering Committee for Human Rights (CDDH) of the Council of Europe. The impact of the economic crisis and austerity measures on human rights in Europe: Preliminary study on existing standards and outstanding issues, CDDH(2014)011, Strasbourg, 6 June 2014.

¹⁵ Report by the Secretary General of the Council of Europe. State of democracy, human rights and rule of law in Europe, (SG(2014)1- Final), Council of Europe, May 2014, p. 5, 40.

¹⁶ PETRYLAITĖ, D. Decent work in times of economic crisis: threats and lessons learned [in Lithuanian]. *Teisė: Vilnius University*. 2015, Vol. 94, pp. 149–162.

¹⁷ European Foundation for the Improvement of Living and Working Conditions. *Impact of the crisis on industrial relations and working conditions in Europe*. Eurofound: Dublin, 2014.

¹⁸ *Ibid.*

have triggered changes in labour market structures, significant changes in social relationships, such as fundamental changes in industrial relations and social dialogue structures, decreasing influence of social partners and collective bargaining, and unilateral decision-making by states.

2. SOCIAL DIALOGUE AS THE INSTRUMENT FOR SOCIAL PEACE

International practices and many countries have been observed to focus mainly on bipartite collective industrial relations between employer and employee representative organisations. However, the states with no deep-rooted traditions of this process more frequently use the model of industrial relations based on tripartite social dialogue between the social partners and the government or its institutions. The changing economic, social and political situation inevitably leads to another step in the area of social dialogue towards increasing the role of bipartite social dialogue which should serve the regulation of particular issues related to industrial relations, working and social conditions in the specific areas of their functioning – industrial (production) branches, regions.¹⁹ On the other hand, the situation in recent years has also revealed negative aspects, such as occasional demonstration of the limited practical interpretation of the ideas and objectives of social partnership, as well as attempts to satisfy the short-term and, unfortunately, often individual goals of specific social partner organisations. The public interest tends to be forgotten, whereas the opportunities offered by the proper implementation of social partnership relations and their outcomes in the strengthening of society and industrial democracy are underutilised.²⁰

Because of a lack of interest among workers and employers in negotiating collective agreements in local labour relations, the European Union started to use the social dialogue between the social partners functioning within the common market as a tool for the creation of the European Social Model. The contemporary economic crisis hampered a development within the Union (in parallel with the common market) of a cohesive area of freedom, safety and justice with social peace considered its most characteristic feature. A report of the Commission of October 2010 still considers the social dialogue a foundation of this model in social relations governed by labour laws and driven by the Union social policy²¹ since according to the Treaty of Lisbon the social dialogue is one of the measures for democratisation of the European Union²². On the other hand, the economic crisis is a chance for the European Union and its Member States to strengthen the legal guarantees of the social peace in collective labour relations²³.

¹⁹ PETRYLAITĖ, D. Collective labour relations in the centuries crossing: tasks and possibilities [in Lithuanian]. *Teise: Vilnius University*. 2007, Vol. 65, pp. 108–115.

²⁰ PETRYLAITĖ, D., PETRYLAITĖ, V. Social rights. In: KŪRIS, Egidijus (ed.). *Crisis, the rule of law and human rights in Lithuania*. Šiauliai: Titnagas, 2015, pp. 186–248.

²¹ European Commission Directorate-General for Employment, Social Affairs and Inclusion. *Industrial Relations in Europe 2010*. Luxembourg: Publications Office of the European Union, 2011, p. 173.

²² SYRPIS, P. The Treaty of Lisbon: Much A do...But What About What? *Industrial Law Journal*. 2008, Vol. 37, No. 3, pp. 219–235.

²³ BOGG, A., DUKES, R. 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, 2013, pp. 466–492.

The balance between the social partners in the collective labour relations is a necessary element of social peace. Such balance can be maintained through direct intervention of public authorities. In this case such balance can be guaranteed by the Union legislative bodies. It can also be achieved by a way of granting a trade union organisation representing the interests of workers the right to organise strikes. The equal position of the social partners is a condition *sine qua non* for the achievement of the balanced normative agreement which would guarantee the social peace.

The globalisation of social rights, in particular, the rights included in the category of fundamental human rights governed by the labour laws (right to social dialogue, consultations, negotiation of collective agreements, organisation of strikes), which consist of the unified standards of legal protection of such rights as well as extend the similar international protection as applicable to the civic rights and freedoms protected by the European Convention on the Protection of Human Rights, would substantially contribute to the achievement and maintenance of social peace in collective labour relations. Consequently, there is the only one way for the restoration and revival of the European Social Model – it has to be based on the protection of the right to social dialogue (association, consultation, collective agreements, strike) guaranteed in the European Social Charter²⁴.

The adoption in the Lisbon Treaty of a uniform concept of citizenship of the European Union, according to which the Union citizenship cannot be treated by the Union authorities and citizens of the EU Member States solely as the right to move freely among the national labour markets of the Member States (therefore as a *sui generis* gateway to the common Union market) but also as a confirmation of the right to exercise the political, social and economic rights guaranteed by the European labour laws, obligates to adopt a uniform regulation of the foundations of the workers' rights²⁵. The Union citizenship should be associated with a uniform legal status of citizens of the Member States and the respective rights regulated also by labour laws guaranteed by the national systems of labour law of the EU Member States²⁶. Therefore, it is necessary to build at the EU level a "law platform", the legal structure which would prevent competition between the authorities of the Member States of the Union in attracting international entrepreneurs to the national markets by reducing labour costs – limiting the workers' rights and social rights of the Union citizens, using the extensive liberalisation of protective labour laws and allowing the employers to apply completely flexible model of management of labour forces²⁷. Since the legal constructs and terminology applied in the labour law are full of concepts, which are characteristic for neoliberal economists, the fundamental workers'

²⁴ ŚWIĄTKOWSKI, A. M. Resocialising Europe through a European Right to Strike modelled on the Social Charter? In: COUNTOURIS, N., FREEDLAND, M. (eds.). *Resocialising Europe in a time of crisis*. Cambridge: Cambridge university press, 2013, pp. 390–413.

²⁵ ŚWIĄTKOWSKI, A. M. European Union Citizenship and the Rights of Access for Welfare State: A Comparison with Welfare Rights Guaranteed by the Council of Europe as Seen from the Perspective of a New Member State. In: NEEGAARD, U., NIELSEN, R., ROSEBERRY, L. (eds.). *Integrating Welfare Functions into EU Law – From Rome to Lisbon*. Copenhagen: DJØF Publishing, 2009.

²⁶ ŚWIĄTKOWSKI, A. M. Protection of human rights in the light of labour laws and social security laws [in Polish]. In: *Każdy ma prawo do ... [Everyone has the right to...]*. Warsaw: C. H. Beck, 2009, pp. 67–68.

²⁷ DEAKIN, S., FRANK, W. Rights versus Efficiency? The Economic Case for Transnational Standards. *Industrial Law Journal*. 1994, Vol. 23, No. 4, pp. 289–310.

rights may only be protected by the legal mechanisms and procedures applied for the protection of human rights.

3. COLLECTIVE BARGAINING AND COLLECTIVE AGREEMENTS AS THE CENTRAL SOCIAL DIALOGUE INSTRUMENT

Labour law is a branch of law that very quickly reacts to economic and social changes. This implies the difficult purpose of labour law: to set the practice of regulating public labour relations which has to ensure a balance between two factors of labour relations – labour and capital. Labour laws are no longer able to regulate all areas, create appropriate, optimal conditions, and ensure all possible social guarantees to employees. Therefore, a major role is ascribed to one of the instruments of collective labour law – a collective agreement.²⁸ The promotion of collective bargaining agreements is one of the most adequate ways to respond to market economy and globalisation-inspired changes in labour processes or labour market. Therefore, the right to bargain collectively should be given to every person working for others for pay who suffers a significant degree of democratic deficit or economic dependency in the work relationship. Collective bargaining laws promote workplace democracy, redistribution of resources, and efficiency²⁹.

The principle of balance between the parties to collective labour relationships, who are at the same time social partners, obligates the international organisations in their capacity as legislators to ensure the uniform regulation of rights to form and join trade unions and other workers' organisations as well as rights to negotiate and conclude, on equal footing, collective agreements and other normative agreements. The principle of balance in collective labour relations and the principle of equality of social partners in the light of the international public laws are interpreted as a source of competence of employers and their organisations to exert pressure on trade unions representing interests of the workers' collective and protecting rights of the members of such collective. The efforts of the state authorities with the aim of encouraging social partners to hold consultations through the workers' and employers' representatives in all matters of their mutual concern, and their obligation to support the mechanism of voluntary collective bargaining leading to the conclusion of collective agreements, which regulate conditions of employment, is another step in the process of introduction and strengthening the concept of social peace in labour relations. Collective agreements, as autonomous (established by the parties to the collective labour relations) and specific (characteristic for labour law only) sources of law, are based on the concept of partnership and cooperation between the workers' and employers' collectives. Their legal effect is derived from the consensus of the social partners' organisations and the obligation to comply with the commitments regulated jointly by workers' representatives (trade unions) and employers' representatives and their organisations in the concluded collective agreement. Therefore, a collective agreement is a basic legal guarantee of the introduction

²⁸ PETRYLAITĖ, D. Collective labour relations in the centuries crossing: tasks and possibilities [in Lithuanian]. *Teise: Vilnius University*. 2007, Vol. 65, pp. 108–115.

²⁹ DAVIDOV, G. Collective bargaining laws: purpose and scope. *The International Journal of Comparative Labour Law and Industrial Relations*. 2004, Vol. 20, No. 1, pp. 81–106.

and, most importantly, maintenance of social peace at the time when both parties to collective labour relations act as social partners.³⁰

The right of free decision-making on the content of a collective agreement is one of the key elements in the regulation of collective labour relations. Labour relations are specific public relations determining the need to combine centralised and contractual legal regulation which manifests itself through entering into collective agreements. Furthermore, considering the need for more flexibility, the strong centralised legal regulation, which is viewed as an imperative dictated by the market economy, should be reduced in labour law. In the modern concept of labour law, the need for flexibility is considered an inevitable must for national labour markets to retain their competitiveness in an increasing global fight and an inevitable response to changing business conditions. On the other hand, the doctrine of labour law admits that a collective bargaining agreement is a positive instrument in any case, which not only performs a protective function, but also serves as a favourable “calculation” instrument for employers. In other words, collective agreements clearly define the financial limits existing in labour relations. However, from a more detailed economic perspective, collective agreements are marked by “cartel operation”, as no additional requirements may be raised for their content during the period of validity of collective agreements. At the same time, the principle of “cartel operation” conflicts with flexible expansion to new markets. Parties bound by a collective agreement have found it much more difficult to react to increasing competition and abandon the provisions defined in the collective agreement³¹. Taking into account various views of labour law scholars, it may be generally concluded that collective agreements represent a core element in the terms of liberalisation and flexibility of labour relations. On the other hand, “framing” of labour relations in collective agreements and difficult modification thereof are indispensable in the states with a very broad and active scope of signing and application of collective agreements.

Both legal scholars and practitioners agree on the ambivalence of collective agreements. A collective agreement has elements of a civil contract. By entering into a contract and defining its terms and conditions, the parties as if create law themselves relying upon the principle of freedom of contract and the rules of dispositive law. Once concluded, the civil contract becomes a binding standard of conduct for the parties and actually has the same power as the rule of law. If any of the parties to the contract fails to fulfil the provisions of the contract or fulfils them improperly, the other party is entitled to apply to a court or exercise other remedies to defend his rights and interests which are enforced with the state’s help. Moreover, a collective agreement is held to be of a dual nature. On the one hand, it is based on a contractual nature and defines certain rights and obligations as any other contract. On the other hand, it is a “law” governing employment relationship supervised by the collective agreement. Therefore, the collective agreement by its function seems to trim between a national law and an individual contract between the employee and the employer.³²

³⁰ ŚWIĄTKOWSKI, A. M. *Legal guarantees of social peace in labour relations* [in Polish]. Warsaw: C. H. Beck, 2013.

³¹ LÖWISCH, M. *Arbeitsrecht: ein Studienbuch*. Düsseldorf: Werner, 2000, p. 74.

³² *Ibid.*, p. 73.

Historically, collective agreements were and are still considered national sources of labour law. At an earlier period of development of the current European Union the collective agreements were used as an important legal instrument for implementation in the EU Member States of international standards to which most of the Member States raised their reservations. In this way the legal measures relating such questions as parental leaves, legal guarantees of equal treatment of workers performing work under atypical forms of employment (fixed-term contracts and on a part-time basis) were implemented into Community law. Framework agreements having the character of supra-national normative agreements played a role of collective agreements. Conclusion of such agreements was possible only after all the parties concerned: Union institutions, authorities of the Member States, supranational and national social partners' organisations and non-governmental organisations representing the European civic society were made aware that the social dialogue of all the parties concerned acting in the European area allows to construct the European Social Model. The economic crisis slowed down the process of social dialogue and normative agreements - supranational collective agreements concluded in the European area. However, an amendment of primary laws - Treaty on the Functioning of the European Union and implementation of the Charter of Fundamental Rights of the European Union enables revival of the European Social Model³³. It brings hope that the European social area, its ideas and guarantees regulated in Title VI of the Charter of Fundamental Rights of the European Union ("Solidarity") will adapt within the common market and in all the EU Member States. As regards the European Union, the social dialogue is considered also a method of "good management" of matters falling within a competence of the Union institutions and relating to labour, employment and social policy.

European labour law does not contain standards regulating collective labour relations. For a long time the collective agreements were outside the legal regulation of the Community institutions. To some extent the lack of interest of the Community legislators in the collective agreements may be explained by far reaching differences in the legal nature of those normative agreements. To document such statement it suffices to recall far reaching differences in the legal nature of collective agreements in the legal systems of certain EU Member States. In the German labour law system the collective agreements are included - next to the Constitution, normative acts adopted by the state and contracts of employment - among the sources of labour law³⁴. In the French labour law system collective agreements play an important, however a secondary role. By establishing the minimum standard of legal regulation the state authorities enable the social partners to further extend the workers' rights in collective agreements. In the French labour law hierarchy collective agreements are classified outside the system established by normative acts adopted by the state authorities of various levels³⁵. In the British labour law system the collective agreements are considered a non-normative product of activity of the social

³³ See: COUNTOURIS, N., FREEDLAND, M. (eds.). *Resocialising Europe in a time of crisis*. Cambridge: Cambridge University Press, 2013.

³⁴ WEISS, M. *Labour Law and Industrial Relations in the Federal Republic of Germany*. Deventer: Kluwer Law and Taxation Publishers, 1989.

³⁵ DESPAX, M., ROJOT, J. *Labour Law and Industrial Relations in France*. Deventer: Kluwer and Taxation Publishers, 1987.

partners evaluated in terms of collective labour law as a peace treaty and in terms of individual labour law as a source of laws and obligations of the parties to the contract of employment³⁶. The reason of differences in the approach to collective agreements which are clearly visible in various systems of labour law of particular EU Member States is different understanding of autonomy of the social partners and of their interests in the collective labour relations. Collective agreements are a normative expression of the current relations between the social partners. In case of inability to persuade an employer to accept the terms and conditions of an agreement presented by trade unions, the trade union organisations representing the workers' interests may take collective actions, including strikes and other industrial actions. A strict relation between negotiations conducted by the social partners, collective agreements and collective actions would justify similar treatment by the authorities of the EU Member States of the above mentioned mechanisms of the collective labour law. However, contrary to the legal regulation of collective agreements, issues relating to negotiations of the social partners and offensive and defensive actions (strikes and lockouts) undertaken by the parties to collective labour relations were carefully and in detail regulated in the laws adopted by public authorities in all EU Member States.

Lawyers specialising in European labour law present two opposite approaches regarding regulation of legal issues connected with collective agreements at the European level. According to the first approach the collective agreements were outside the scope of interest of EU institutions. In their opinion, annex no. 3 to the Treaty of Maastricht including an Agreement on Social Policy between the Member States of the European Community (signed by representatives of all the Member States except a representative of Great Britain) also cannot be included in the rules of Community law which clearly enough specify the status of European collective agreements in the legal system of the European Union. The best known propagator of this idea is Tiziano Treu³⁷. In his opinion the Agreement on Social Policy constituting annex no. 3 to the Treaty of Maastricht can be considered a document which legalises the concept of collective agreements at the European level. Opposite opinion is presented by M. Weiss and B. Bercusson³⁸. In particular the latter believes that the Agreement on Social Policy constituting annex no. 3 to the Treaty of Maastricht sanctions the practice followed by international organisations considered predecessors of the European Union (EEC and EC), namely to entrust to the social partners the tasks imposed on the authorities of the Member States by secondary labour laws.

The applicability of collective agreements as legal instruments for the implementation of European labour law is significantly reduced because of exclusion - under the Agreement on Social Policy constituting annex no. 3 to the Protocol of Maastricht - of the pos-

³⁶ HEPPLER, B., FREDMAN, S. *Labour Law and Industrial Relations in Great Britain*. Deventer: Kluwer and Taxation Publishers, 1992.

³⁷ TREU, T. Social Policy in the Legal Order of the European Union and the European Economic Space. *Yearbook of Polish Labour Law and Social Policy: Jagiellonian University*. 1995, Vol. 7, 1995; TREU, T. European Collective Bargaining Levels and the Competences of the Social Partners. In: DAVIES, P. et. al. (eds.). *European Community Labour Law: Principles and Perspectives*. Oxford: Clarendon Press, 1996.

³⁸ WEISS, M. The Significance of Maastricht for European Community Social Policy. *The International Journal of Comparative Labour Law and Industrial Relations*. 1992, Vol. 8, No. 1, pp. 3–14. BERCUSSON, B. *European Labour Law*. London: Butterworths, 1996.

sibility to use the collective agreements in the implementation of directives concerning pay, the right of association in trade unions (workers), the right to strike or the right to lock-outs (art. 2(6)).

The exclusion of the possibility to regulate, through the collective agreements, the right to coalition and right of social partners to exert pressure on the other party to collective labour relations is not surprising since almost all aspects of collective labour law - except collective agreements and participation of workers' representatives in decision-making by the employer - were excluded from the Community regulation. There are essential differences between the collective labour laws of particular EU Member States in matters related to entities entitled to strike (workers or trade unions) or limits of intervention of state authorities when such right is exercised; the EU acts which form the system of European labour law do not regulate any of the above mentioned issues of the collective labour law. The exclusion of matters related to remuneration for work from the competence of social partners in negotiations preceding conclusion of a collective agreement seriously limits the ability to use the normative agreements for the implementation of directives setting out the minimum standards of the regulation of individual labour relations. Because of an equivalent nature of employment relations in which a worker undertakes to perform work in exchange for a remuneration paid by an employer, the reservation introduced in art. 3(6) of the Agreement on Social Policy prevents the implementation not only of directive no. 117 of 10 February 1975 (Equal Pay Directive 75/117/EEC), but also of most directives regulating labour relations.

The Agreement on Social Policy, constituting annex no. 3 to the Treaty of Maastricht, clearly recognizes the idea of social dialogue in the labour relations. Art. 3(1) of the Agreement imposes on the Commission an obligation to promote consultations between the social partners at the EU level. The Commission should take any relevant measures to facilitate the dialogue of the social partners by ensuring a balanced support for both parties to collective labour agreements: employers and trade unions. Art. 3(1) of the Social Agreement includes a reference to normative agreements concluded by the social partners at the supranational level. It is undoubtedly a significant change in the method of regulation the European labour law.

The concept adopted in the Agreement on Social Policy agreed upon in Maastricht is in compliance with two fundamental ideas on which European labour law system is based: voluntarism and subsidiarity. Both the theory and practice of the labour law uses the word "voluntarism" to denote the priority of collective agreements over laws enacted by public authorities to regulate labour relations³⁹. Such understanding of the word "voluntarism" strictly corresponds with the term "subsidiarity" applied in European law. The term "subsidiarity" is used to denote a privileged position of normative agreements negotiated by the social partners over the legislation adopted by public authorities. In this sense the principle of subsidiarity corresponds with the illustrative expression used by B. Bercusson, who wrote about the need of "bargaining in the shadow of law"⁴⁰.

³⁹ COLLINS, H. *Absentism in Labour Law*. Oxford: Oxford University Press, 1987.

⁴⁰ BERCUSSON, B. *European Labour Law*. London: Butterworths, 1996.

The Agreement on Social Policy, constituting annex no. 3 to the Treaty of Maastricht, regulates three types of collective agreements. The first ones are collective agreements concluded under art. 2(4) of the Agreement. They do not guarantee permanent implementation of directives. They are concluded for a strictly fixed term and are renewable. However, a condition necessary to renew the collective agreement is the renegotiation of the stipulations which must be compliant with the directives. Collective agreements do not guarantee stability of legal relations. Authorities of the EU Member States - on whom art. 2(4) of the Agreement on Social Policy imposed an obligation to take any measures enabling them to be in a position to guarantee the results imposed by the directive which is implemented at the request of the social partners through collective agreements - are obliged to take relevant measures for the implementation of directive. Rulings of the European Court of Justice presented in other parts of this volume, issued in: *Commission v. Italy* (C-91/81, 1982 ECR 723), *Commission v. Italy* (C-131/84, 1985 ECR 3531) and *Commission v. Denmark* (C-143/83, 1985 ECR 427) clearly indicate that the EU Member States are obliged to ensure compliance of the stipulations of collective agreements with European labour laws.

The second type of collective agreements was mentioned in art. 3 of the Agreement on Social Policy. Those collective agreements, concluded at the European level, were treated as an alternative to directives. The Commission, in fulfilment of its obligation to consult with social partners the legislative proposals in the area of European social law, is obliged to present to the social partners the contents of the intended legislation and to await their opinion or recommendation (art. 3(3)). On the occasion of the consultations, the social partners may inform the Commission of their willingness to start a social dialogue leading to the establishment of contractual relations between them, in particular, to conclude a collective agreement. A legal basis for normative agreements replacing directives is art. 4 of the Agreement on Social Policy.

The third type of collective agreements includes agreements concluded at the European Union level in accordance with the procedure regulated in art. 4 of the Agreement on Social Policy. Collective agreements may be concluded at the EU level solely by the social partners who are represented at the supranational level. A lack of guidance in European laws concerning the normative references of collective agreements negotiated at the EU level to other legislation included in the category of European law makes it difficult to analyse the new sources of law, which are only characteristic for European labour law. Such conclusions can be drawn from art. 4 of the Agreement on Social Policy. The social dialogue at the supranational level leading to conclusion of collective agreements at the EU level may be initiated only at the request of the social partners. The social partners are not bound by the made request, neither as regards commencement nor continuance of negotiations or - even more - conclusion of a collective agreement. The social dialogue is conducted in accordance with the principles characteristic for tripartite negotiations, i.e. with the participation of EU institutions: the Commission and the Council. For example, the Commission decides jointly with the social partners on extension of the period of 9 months during which the procedure referred to in art. 4 of the Agreement on Social Policy is to be initiated (social dialogue). The commencement of negotiations by the social partners does not limit the competences of the Commission to undertake activities aimed at adoption of the directive regulating the matters negotiated by the social partners. The fi-

nalisation of the Commission's initiative makes the negotiations (which result was to replace the legislative activity of the EU institutions) irrelevant.

Collective agreements that may be concluded at the European level are still a novelty in the legislative system of European labour law. However, they are not considered equal with secondary European laws mentioned in the provisions included in the category of the primary Community law. Currently, the collective agreements do not play role as the alternative sources of European labour law.

Nowadays, the minimum role of European collective agreements in shaping the rules of the labour law within the European Union may be explained by the ambiguous legal regulation of the analysed Agreement on Social Policy constituting annex no. 3 to the Treaty of Maastricht. The preferential treatment of collective agreements adopted in art. 4 of the Agreement is inconclusive. The basis for a possible decision on initiation of a social dialogue is the willingness to avoid obvious interference of representatives of the EU institutions considered "Eurocrats" rather than an actual need of negotiation between the social partners who are not yet established at the EU level. The above negative motivation is visible to a larger extent on the part of the employers' organisations. It is because the employers are more willing to undertake actions which enable them to have a direct impact on the content of laws. Also, trade unions are less interested in negotiations in which they cannot participate directly. A condition necessary for carrying negotiations at the EU level within the social dialogue is the establishment of appropriate organisational structures. And this implies the necessity to transfer the competences to negotiate the collective agreements to trade union confederations at the Community level. The reluctance of the national trade union organisations to transfer the powers to the supranational structures is decisive in the process of the delay of implementation of the Agreement on Social Policy - annex no. 3 to the Treaty of Maastricht in the part related to the replacement of directives by the provisions of European collective agreements.

Because of the fact that collective agreements at the European level are in theory an alternative for directives and in practice are not used as sources of European labour law, therefore, the lawyers specialising in European labour law took intensive efforts to identify the difficulties which should be overcome in order that collective agreements would become full-value sources of European labour law. The first guidance mentions the need to appoint the authorised social partners to negotiate collective agreements at the European level. Numerous organisations negotiating the collective agreements on a European scale at the industry or professional level havenot become eligible to conclude collective agreements to a broader scope which - according to art. 4 of the Agreement on Social Policy - defines the European area. Usually the normative agreements within a trade and within a profession which exceed the boundaries of the EU Member States are negotiated by representatives of the social partners representing the workers and the employers at a national level. However, a condition necessary for negotiations in the European area is to transfer the competences to conduct the negotiations to the organisations operating on a supranational scale. The national organisations representing employers and workers are not willing to transfer their rights - which they exercise while representing the parties to collective agreements - to other bodies operating beyond the borders of the EU Member States.

The reports on the possibilities to conclude collective agreements in the European area analysed by T. Treu and presented by the representatives of the EU Member States show that the conclusion of collective agreements at the European level is not considered a realistic idea by social partners⁴¹. According to the representatives of some EU Member States (Austria, Greece, the Netherlands, Italy) what can only be done at a European scale is to attempt to coordinate the collective agreements concluded at a national level. Supranational collective agreements may be concluded in the supranational groups of enterprises.

The collective agreements concluded in the supranational groups of enterprises cannot be identified with the collective agreements concluded in the European area. The collective agreements concluded in the supranational groups of enterprises do not regulate matters which fall within the *acquis communautaire* of the European Union, in particular, they are not concluded to replace directives. They also cannot be considered laws included in the Community *acquis communautaire*.

Other practical problem related to the replacement of directives with collective agreements is connected with the implementation of the provisions of such agreements negotiated by the social partners. In art. 4(2) of the Agreement on Social Policy - annex no. 3 to the Treaty of Maastricht - it was decided that collective agreements concluded in the European area will be performed in accordance with the procedure and practice agreed upon by the social partners, applicable in the EU Member States. In matters which are subject to art. 2 of the Agreement, the provisions of collective agreements will be implemented upon mutual request of the settling parties through a decision of the Council proposed by the Commission.

Question arises whether the procedure for the implementation of collective agreements stipulated in art. 4(2) is mandatory. If the answer is yes, then it should be considered who is obligated under art. 4(2) of the Agreement to implement the provisions of the collective agreements. Undoubtedly, the obligation to implement the provisions of directives or laws considered source of Community law alternative to directives was imposed on the authorities of the EU Member States. The said authorities may be obligated to regulate the procedure preceding the implementation of European collective agreements replacing the provisions of directives. The other option is to impose on the social partners negotiating a collective agreement at the European level an obligation to define procedural requirements connected with its implementation. The introduction of such provisions to the collective agreement does not release the authorities of the EU Member State from the obligation to ensure correct implementation of the provisions of such agreement. In the last option, the implementation of the European collective agreements takes place in compliance with the legal mechanisms of the Community law and provisions of the collective agreements. Despite the fact that the EU Member States are relieved from the obligation to regulate legal rules of the implementation of the provisions of European collective agreements, authorities

⁴¹ TREU, T. Social Policy in the Legal Order of the European Union and the European Economic Space. *Yearbook of Polish Labour Law and Social Policy: Jagiellonian University*. 1995, Vol. 7, 1995. TREU, T. European Collective Bargaining Levels and the Competences of the Social Partners. In: DAVIES, P. et. al. (eds.). *European Community Labour Law: Principles and Perspectives*. Oxford: Clarendon Press, 1996.

of the Member States are still obligated not to adopt any provisions which could delay or hamper the process of the implementation of the collective agreements.⁴²

The Agreement on Social Policy constituting annex no. 3 to the Treaty of Maastricht, gives new, enormous opportunities for the development of European labour law. In the hierarchy of sources of European labour law it places the collective agreements at an equal level with secondary Community laws. At the request of the social partners, the European collective agreements may replace directives. The opportunities presented, offered to the social partners by the Treaty of Maastricht, depend on the ability to use them. The experience of the last years has shown that the lawyers specializing in European labour law share a view that neither the social partners nor the authorities of the European Union and its Member States were able to develop the system enabling the efficient replacement of directives with the provisions of collective agreements concluded in the European area. The collective agreements and collective actions organised by workers and their representatives (trade unions) to exert pressure on the employers and persuade them to regulate the terms and conditions of employment and remuneration in the collective agreements are now considered a chance to revive the European Social Model⁴³ through collective agreements as specific sources of European labour law.

CONCLUSIONS

A comparable analysis of the provisions of international public labour laws regulating collective agreements shows substantial changes that can be achieved in collective labour relations in terms of ensuring social peace. Collective agreements as autonomous, thus the most effective rules of the labour law, may be used by the Member States for the temporary mitigation of a conflict of interests between the parties to collective labour relations. A social dialogue which is characteristic for the European concept of labour relations based on the community of interests of the social partners represents an opportunity for ensuring permanent social peace. Collective agreements are the foundation of a legal concept of peaceful collective labour relations.

The differences of interests between the “capital” and “work” existed in the past, still exist now and will exist in the future. However, despite those differences, both parties to collective labour relations (workers’ collectives and employers) and organisations representing their particular interests have a common interest. This common interest is social peace in collective labour relations. The state of social peace enables relatively fair distribution of assets earned by workers and entrepreneurs. Collective agreements are a legal instrument enabling such distribution of assets earned by the social partners. From the perspective of collective agreements it is necessary to develop - in all the parties interested in the achievement and maintenance of a social peace in collective labour relations - a conviction that a common interest has a greater value than contradictory interests of workers and employers.

⁴² WEDDERBURN, L. In derogability, Collective Agreements and Community Law. *Industrial Law Journal*. 1992, Vol. 24, p. 245.

⁴³ ŚWIĄTKOWSKI, A. M. Resocialising Europe through a European Right to Strike modelled on the Social Charter? In: COUNTOURIS, N., FREEDLAND, M. (eds.). *Resocialising Europe in a time of crisis*. Cambridge: Cambridge University Press, 2013, pp. 390–413.

The modern concept of collective labour agreements developed in the European Union is based on a well-established belief that the condition necessary to ensure permanent social peace in collective labour relations is the continuous social dialogue of the social partners and organisations representing their interests. The trademark of a dynamic modern European concept spreading around the world is the European social model. Its basic elements are: the idea of partnership and a regular, open social dialogue. A bilateral or a trilateral dialogue, moderated by state authorities, is a continuous process exercised at all stages (amicable and disputable) of collective labour relations. Active “actors” of that process are social partners’ organisations, government and non-government organisations representing social groups of the democratic local society interested in the maintenance of social peace. The collective agreements, normative agreements and other agreements - social pacts that guarantee fair distribution of assets earned jointly by the social partners are one of the fundamental legal guarantees of social peace in labour relations. The social peace clause included in the obligating provisions of collective agreements is considered a formal legal guarantee that employees will abstain from the initiation of collective disputes. The material guarantees of social peace are: legally guaranteed balance of power of the social partners’ organisations in the collective labour relations and transparent legal regulation of principles and procedures for collective bargaining and use by the social partners’ organisations - under supervision of judicial authorities - of legal instruments, in particular means of mutual pressure. From a legal perspective the prerequisite for effective guarantees enabling the achievement and maintenance of social peace in labour relations is the efficient introduction in the system of collective labour law of stimulators encouraging the social partners and organisations representing their interests to continuously and actively use the social dialogue method at every stage of collective labour relations. In the legal sphere the result of such dialogue are collective agreements.

The supremacy of the modern, European concept of collective labour relations over the traditional concept based on permanent conflict between the parties to collective labour relations is visible in:

- 1) not emphasizing the conflict of interests of the parties to collective labour agreements and emphasising the need to protect the social peace as an overriding common interest;
- 2) the introduction in labour laws of the instruments inspiring the social partners and representatives entitled to bargain collectively to conduct a social dialogue and replace the laws enacted by the state regulators with autonomous legal acts.

The experience of the international organisations: the International Labour Organization, the Council of Europe and the European Union proves that the social dialogue and the resulting supranational legal regulations which were originally an alternative method for the enactment of European law within the European Union can and should be used by the authorities of the Member States and social partners’ organisations in the EU Member States. The operation of the methods of good management of collective labour relations within the European Social Model by the government and the social partners’ organisations presented in this study is the valuable supplementation of the presented legal guarantees enabling the achievement of the overriding objective of the European Union mentioned in art. 2(1) of the Lisbon Treaty.