Possibilities and Limitations of a Further Development of the Social Dialogue at the EU Level for the Public Services of the Member States

- Social Dialogue within the Scope of EUPAN -

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Study for the Federal Ministry of the Interior

European Institute of Public Administration

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I. BACKGROUND

1. Introduction

The European Public Administration Network (EUPAN) is an informal cooperation between the Member States’ ministers and Directors General responsible for public services and public administration, as well as the working groups on Human Resources, Innovative Public Services, E-Government and Better Regulation. The primary objectives of this cooperation are to exchange information and experiences, to compare current developments and reforms, and to promote EU-wide concepts and strategies for administration and public services.

Informal social dialogue has been in existence for several years in the form of meetings of the EUPAN Directors General with representatives of the European federations of trade unions for an exchange of positions and information on various subjects. The issue of a formalisation of social dialogue according to articles 138 and 139 of the EC Treaty, including the establishment of a dedicated committee for (sectoral) social dialogue, has been discussed for some time. It became material when the ministers for public administration and public services called for a report in a resolution passed during Luxemburg's Presidency in June 2005. The resolution welcomes the agreement by the labour representatives to a joint delegation and orders the Directors General to investigate the possibilities for further development of the social dialogue within the EUPAN network.

2. Objective of this study

According to the ministerial resolution of June 8 2005, a report on the possibilities for further development of social dialogue within EUPAN is to be presented for the upcoming conference of the ministers for public services in June 2007. This requires that possible methods of implementation be pointed out and made available for decision-making.

This study is based on the EIPA publication „European Social Dialogue and the Civil Services – Europeanisation by the back door?“ by Michel Mangenot and Robert Polet¹, which investigates substantial, basic issues of European social dialogue in public administration at a unitary government level, as well as on the British Presidency's study „Report on the Survey into the Social Dialogue“ (2005)² and the Austrian Presidency's strategy paper „Next Steps in Social Dialogue“ (2006)³.

¹ Mangenot, M./Polet, R., European Social Dialogue and the Civil Services. Europeanisation by the back door?, European Institute of Public Administration, Maastricht 2004.
² Cf. http://www.forum.europa.eu.int (under DG Meetings – British EU Presidency). Quoted in the following as "study by the British EU Presidency”.
³ Quoted in the following as "strategy paper by the Austrian EU Presidency".
Particularly in the EIPA publication by Michel Mangenot and Robert Polet, the negative effects of non-participation are given as the primary reason why the social partners in public service should participate in the general social dialogue. For instance, (legally binding) regulation that affects public services has been passed in European social dialogue without any involvement by the social partners in public services. Neither the Council of Ministers nor the Commission may modify agreements that have been made between the social partners. The regulatory content of the agreement is negotiated exclusively between the social partners. As long as the employers in public services do not participate, they have no influence in the European dialogue. Mangenot/Polet coined the term „Europeanisation through the Backdoor“ for this practice.

The study
- investigates possibilities for a more intensive social dialogue within the network, and for a further development of current procedures for informal social dialogue in a results-oriented way,
- points out options for action that could possibly lead to the development of a formal social dialogue within EUPAN according to Art. 137 f. TEC,
- gives an overview of the rules and procedures used in similar processes of social dialogue in other sectors and points out alternatives,
- uses a variety of practical examples to illustrate how social dialogue in centralised public administration might be realised in practice,
- proposes concrete, practice-oriented wordings for regulation.

The primary objective is to provide the Directors General of public services and other interested parties with an overview of the discussions related to social dialogue and point out possible perspectives for development. The author of this study considers this investigation primarily an impartial service to all Member States. The pros and cons of a formalisation of social dialogue will be scrutinised nonetheless. Since recommendations for action are being made to the Directors General, the taking of positions is inevitable. In the end however, this is merely a practice-oriented evaluation of arguments. The decisions regarding this important subject are made by the responsible persons, committees and organisations.

In this study, European social dialogue is defined as a term according to the declaration by the European Commission (see http://ec.europa.eu/employment_social/social_dialogue/index_en.htm):
"[The dialogue] refers to the discussions, consultations, negotiations and joint actions undertaken by the social partner organisations representing the two sides of industry (management and labour).

At the European level, social dialogue takes two main forms - a bipartite dialogue between the European employers and trade union organisations, and a tripartite dialogue involving interaction between the social partners and public authorities. (...) European social dialogue complements the national practices of social dialogue that exist in most Member States. Furthermore, it is the essential means by which the social partners assist in the definition of European social standards, and play a vital role in the governance of the Union. European-level social dialogue has received strong institutional recognition in
the EC Treaty and in the conclusions to a number of key European Council meetings, notably those in Laeken and Barcelona.4

This study was written in German. I would like to thank the translators for rendering this paper into English (which certainly is not an easy thing to do). Because of the need for translation, many quotations and the footnotes were left in the original wherever possible (English, mostly). For this I would like to apologise, especially to the German readers.

Ms. Assessor Jenny Schulz was of great help in writing this study. I would like to especially thank her. Thanks are due also Ina Schöneberg, Joachim Vollmuth, Manfred Späth, Chris Alard, Nadja Salson, Jürgen Noack, Nadia vom Scheidt, Hans Georg Gerstenlauer, François Ziegler and Asli Ozceri.

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4 (European social dialogue is a unique and indispensable component of the European social model, with a clearly defined basis in the EC Treaty). It refers to the discussions, consultations, negotiations and joint actions undertaken by the social partner organisations representing the two sides of industry (management and labour). At European level, social dialogue takes two main forms - a bipartite dialogue between the European employers and trade union organisations, and a tripartite dialogue involving interaction between the social partners and the public authorities. European social dialogue has resulted in a variety of outcomes, including the adoption of over 300 joint texts by the European social partners. Combining the values of responsibility, solidarity and participation, European social dialogue complements the national practices of social dialogue which exist in most Member States. Furthermore, it is the essential means by which the social partners assist in the definition of European social standards, and play a vital role in the governance of the Union. European-level social dialogue has received strong institutional recognition in the EC Treaty and in the conclusions to a number of key European Council meetings, notably those in Laeken and Barcelona.
II. SOCIAL LAW AND PUBLIC SERVICES

1. Europeanisation without the Member States? The impact of Community legislation and the Europeanisation of public services

The Member States are free to manage and expand their public service as they wish. Member states therefore differ considerably in their administrative and governmental structures. However, the fact that the Community has no direct authority over public service legislation does not mean that European integration is without impact on national public services. Quite the contrary. Almost through the backdoor, national public services are being affected by the process of European integration. A pressure for adaptation arises specifically from the passing of legislation within the scope of European social policy and social dialogue, from the freedom of movement stipulated in article 39 of the EC Treaty, from periodic contact between national public servants at the European level, from informal administrative cooperation between the Directors General of public services at the EU level, from cooperation in the drafting and implementation of Community legislation, from shared principles regarding the rule of law, or from the increasing internationalisation of public services.

The general impact of the process of integration on public services needs to be differentiated into the direct and indirect effects of Community legislation on public services and national civil servants law.

<table>
<thead>
<tr>
<th>EU processes and legislation – direct and indirect impact</th>
<th>Effects on public service and human resources policy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Decision-making processes in Brussels</td>
<td>Effect on human resources (travelling to Brussels, time for meetings, national civil servants in EU institutions) Development of new skills (negotiation, languages) Requirement for EU knowledge (Community legislation, EU institutions, rules of procedure)</td>
</tr>
<tr>
<td>Implementation of Community legislation on national, regional and local levels</td>
<td>National civil servants are required to report implementation measures to Brussels Civil servants are required to align planning and programs with Community legislation Precision in implementation and execution of Community legislation (controlling, protective mechanisms etc.) Member states are required to appoint certain regulation authorities (telecommunications, environment, agriculture)</td>
</tr>
<tr>
<td>Direct impact of Art. 39 TEC and secondary law– freedom of movement of workers</td>
<td>Opening of public service for EU citizens Mutual recognition of diplomas Coordination of pensions systems Recognition of seniority and work experience Mutual information exchange about free jobs (points of contact)</td>
</tr>
<tr>
<td>Direct impact of Articles 13 and 141 TEC and secondary law</td>
<td>Principle of non-discrimination Equality of treatment and opportunity</td>
</tr>
<tr>
<td>EU social legislation (Articles 136-141 EC Treaty) (workplace health and safety, hours, age-based discrimination, etc.)</td>
<td>Health protection No discrimination based on age Provisions on working hours Provisions on parental leave and permanent contracts Agreements about teleworking and stress at work Social dialogue</td>
</tr>
<tr>
<td>Indirect impact of best practice and informal cooperation within EUPAN</td>
<td>Benchmarking and best practices for HRM, IPSG and e-government (particularly CAF)</td>
</tr>
</tbody>
</table>
In total, Community legislation impacts national public services indirectly in at least four areas, namely

- the principle of effectiveness in the implementation of Community legislation,
- the duty to cooperate with the Community in communications and administration,
- the obligation to consult with the public in decision-making processes and in the implementation of Community legislation,
- the realisation of the economic policy objectives in the Treaty through liberalisation, competition and performance enhancement (for public services).

a) In this context, the effects of primary law on national public services need to be further differentiated:

- the Europeanisation of basic principles (democracy, good governance, efficiency and effectiveness, rule of law, free enterprise)\(^7\) and the development of overall principles for public administration (good administration, transparency, abatement of deficiencies in practice, etc.)\(^8\);
- the principle of non-discrimination in Art. 13 TEC
- the effects of the Maastricht criteria and the Lisbon strategy on public finance and the competitiveness of public services
- the principle of labour freedom of movement and the reservation – which is to be interpreted conservatively – regarding public service in Art. 39 paragraph 4 TEC;
- the provisions on equality according to Art. 3 paragraph 2, and Art. 141 TEC;
- the provisions on social and labour legislation in article 137 of the EC Treaty;
- the provisions on social dialogue in articles 138 and 139 of the EC Treaty;
- the interpretation of Art. 10 TEC and the rulings by the CJEC about the factual and efficient implementation of Community legislation;
- the rules of competition in Art. 86 TEC and the privatisation of former authorities or public companies (mail service, railways, etc.).

b) The effects of secondary law (e.g. anti-discrimination directives) on public services also require further differentiation.

---

EU LEGISLATION AFFECTING PUBLIC SERVICES

Primary law: Principle of the Rule of Law, Art. 6 TEC, Principle of Loyalty, Art. 10 TEC, Right of Good Administration, Art. 41 CFR

Secondary law:

**EQUALITY, ART. 141 TEC**


Council Directive 2004/113 EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services

**FREE MOVEMENT FOR WORKERS, ART. 39 TEC**
Regulation (EEC) No. 1612/68 of the Council Of 15 October 1968 on freedom of movement for workers within the Community

Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (as amended)


Directive 2002/73/EC of the European Parliament and the Council as regards access to employment, vocational training and promotion and working conditions

**WORKING CONDITIONS, ART. 136, 137 TEC**


c) besides primary and secondary law, the **rulings by the CJEC** in particular have frequently (and sometimes highly controversially) illustrated the significance of Community legislation for national public services, exemplified by the fields of working hours (e.g. on-call hours for physicians) and the recognition of diplomas in France (the Burbaud case of 9 September 2003). In ongoing infringement proceedings before the CJEC, Greece is charged with employing insufficient personnel in its national veterinary services to comply with its obligations to implement and enforce of Community legislation in this field. This case exemplifies the impact of Community legislation on public employment in the Member States in spite of their bearing the legal responsibility for human resources policy.

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9 see the collection of rulings at http://www.curia.eu.int/jurisp/cgi-bin/form.pl?lang=de
2. Why are European social law and social dialogue important?

In the field of social policy the Community may act only "if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community" (Art. 5 paragraph 2 TEC). Moreover, the Community may only support and complement the activities of the Member States in order to realise its social-policy objectives (Art. 136 TEC). Beyond this, the provisions adopted do not prevent Member States from "maintaining or introducing more stringent protective measures" (Art. 137 paragraph 4 TEC).

Finally, certain issues (as per Art. 137 paragraph 5 TEC) may not be decided at the EU level. For decisions in other areas, either the principle of unanimity or the principle of a qualified majority is applicable. There has also repeatedly been a need for clarification which areas of social and labour law may by regulated by EU institutions, because the primary responsibility lies with the social partners. European social and labour law are therefore governed in practice by a principle of dual subsidiarity.

Despite these limitations to the Community's competence, legislation in these areas continues to affect public services. This development primarily concerns European social policy. Research by Falkner/Treib concludes that there were a total of 56 social policy directives at the end of 2002\textsuperscript{10}.

For the Directors General of public service, legislation that is applicable to public service is particularly important. It is also highly important to confirm which categories of occupation these acts of legislation refer to. Are some social policy directives applicable to all workers in the public sector? Or are they applicable only to those employed under private law? Are some civil servants under public law also affected? Are there exceptions for top-level civil servants, police, firemen, military personnel, physicians, etc.?

Even these questions illustrate how EU regulation at times governs highly specific and technical issues that are extremely important to the social partners in public service. Conversely, non-participation by the social partners in the drafting of this type of regulation could lead to great problems and uncertainties in the implementation.

2.1 To which categories of personnel does EC law apply?

As far as the applicability of primary law is concerned, the CJEC has been using an increasingly liberal interpretation\(^\text{11}\) of the term of worker in recent years.\(^\text{12}\) The cases in which Member States may resort to the exceptions in Art. 39 paragraph 4 TEC are defined quite well as a result.

**Exceptions according to Art. 39 paragraph 4 TEC**

<table>
<thead>
<tr>
<th>Definition by the CJEC</th>
<th>Agencies that are concerned with</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>a) the enforcement of sovereignty, or</td>
</tr>
<tr>
<td></td>
<td>b) the maintenance of the general affairs of the</td>
</tr>
<tr>
<td></td>
<td>State or other public corporations</td>
</tr>
</tbody>
</table>

| European Commission     | Military                                  |
|                        | Police and other law-enforcement authorities |
|                        | Justice                                   |
|                        | Tax authorities                           |
|                        | Diplomatic service                        |
|                        | State ministries (limited)                |
|                        | regional authorities (highly limited)     |
|                        | local authorities (highly limited)        |
|                        | central banks (highly limited)            |
|                        | other public institutions whose tasks include |
|                        | carrying out sovereign powers              |

On the other hand, the CJEC has also found that there is no harmonised definition of worker in Community legislation, that the definition depends on the field of application\(^\text{13}\) and may vary between directives, as will be illustrated in the following. Regarding individual directives, sometimes not the definition of worker in Community legislation is important, but rather the national definitions of civil servant and employee in the Member States.

---


\(^{12}\) on the CJEC’s methods of interpretation Borchardt, in: Fuchs, Rechtsschutz im europäischen Sozialrecht, marg. no. 141 ff.

\(^{13}\) Martinez Sala, case C-85/96, marg. no. 31, Coll. Rulings 1998, p. I-2691
<table>
<thead>
<tr>
<th>Member State</th>
<th>Percentage of civil servants in public service</th>
</tr>
</thead>
<tbody>
<tr>
<td>Greece</td>
<td>Ca. 90%</td>
</tr>
<tr>
<td>France</td>
<td>Ca. 80%</td>
</tr>
<tr>
<td>Belgium</td>
<td>Ca. 78% (federal), ca. 50-60% (regional)</td>
</tr>
<tr>
<td>Spain</td>
<td>Ca. 59%</td>
</tr>
<tr>
<td>Austria</td>
<td>45-50% (66,5% at federal level)</td>
</tr>
<tr>
<td>Germany</td>
<td>Ca. 43% (federal 68%, Länder 58%, local 12%)</td>
</tr>
<tr>
<td>Denmark</td>
<td>Ca. 36%</td>
</tr>
<tr>
<td>UK</td>
<td>Ca. 10%</td>
</tr>
<tr>
<td>Sweden</td>
<td>Ca. 0,05% (almost exclusively judges)</td>
</tr>
</tbody>
</table>

Source: Comp. Demmke, 2005

In their Green Paper on "Modernising labour law to meet the challenges of the 21st century" the European Commission concluded that "the consistent application of EU labour law can be put in question, particularly in the context of the trans-national operation of businesses and services, through the variations in the definitions of worker used in different directives. (...). Outside of the specific context of freedom of movement of workers, most EU labour law legislation leaves the definition of ‘worker’ to the Member States. (...). Divergence in the scope of national definitions of ‘employee’ in such circumstances is difficult to reconcile with the Community's social policy aims ..."14.

(See the overview on the following pages)

2.1.1. **Who is affected? The quality of social legislation (or lack thereof) and its impact on public services**

Depending on the subject and the political field, the effects of Community legislation on national public services should be rated differently. European social legislation in particular is quite an opaque subject. There are highly specialised directives like Dir 83/477/EEC by the Council, of 19 September 1983, on the protection of workers from the risks related to exposure to asbestos at work. The majority of directives are individual or implementing directives according to Art. 16 of Dir 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work.

The coordinating social law in its present form is not only extremely complex, but also highly convoluted. This however reflects merely the diversity of national social security systems.15

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15 Fuchs, in: Fuchs, Europäisches Sozialrecht, marg. no. 102 f.
The definition of the terms "employee" and "civil servant" in EU Directives

<table>
<thead>
<tr>
<th>Directive</th>
<th>Applicable to the public service</th>
<th>definition of worker</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001/23/EC (transfer of undertakings)</td>
<td>(+)</td>
<td>national</td>
</tr>
<tr>
<td>93/104/EC, amended by 2000/34/EC (working time)</td>
<td>(+)</td>
<td>= every person employed by an employer, including trainees and apprentices but excluding domestic servants (Dir 89/391/EC)</td>
</tr>
<tr>
<td>1999/70/EC (fixed-term work)</td>
<td>no details, according to the Commission (+)</td>
<td>no definition; &quot;... as regards terms not specifically defined. … Member States are allowed to define them in conformity with national law or practice as is the case for other Directives on social matters using similar terms, provided that the definitions in question respect the content of the framework agreement&quot;</td>
</tr>
<tr>
<td>76/207/EC, amended by 2002/73/EC (equal treatment)</td>
<td>(+)</td>
<td>no explicit definition, but general definition of the ECJ applies: &quot;a person who performs services of some economic value for and under the direction of another person in return for which he receives remuneration&quot;</td>
</tr>
<tr>
<td>89/48/EC (recognition of diplomas)</td>
<td>(+)</td>
<td>no use of the term worker, instead &quot;regulated profession&quot; = defined as having a Community meaning and without regard to the qualification of the profession as one of the civil service</td>
</tr>
</tbody>
</table>

---

16 Wendelboe, C-19/83 + Danmols Inventar, C-105/84 + Collino/Chiappero, C-343/98 + EFTA Court judgement E-3/2001
17 e.g. Simap, C-303/98 + Jaeger, C-151/02
18 e.g. Gerster, C-1/95 + Kreil, C-185/98
19 e.g. Burbaud, C-285/01 + Fernández de Bobadilla, C-234/97
20 see Commissioner Diamantopoulou on behalf of the Commission replying to question E-1505/02 of Stavros Xarchakos and E-1495/02 of Konstantinos Hatzidakis of 29.05.2002, OJ Nr. C 277 E of 14.11.2002, S. 0216, 0220f
21 see e.g. Lawrie-Blum, C-66/85
<table>
<thead>
<tr>
<th>applicable to civil servants</th>
<th>(-)</th>
<th>(+)</th>
<th>unclear</th>
<th>(+)</th>
<th>(+)</th>
</tr>
</thead>
<tbody>
<tr>
<td>excluded groups of workers</td>
<td>everybody who according to the national definition is not a worker (e.g. in Germany all civil servants)</td>
<td>seafarers acc. to the definition of Dir 99/63/EC + extensive catalogue of derogations (see annex p. 3) + according to the reference Dir 89/391: certain specific activities in the public service (e.g. police, army, civil protection)</td>
<td>unclear as to how far civil servants might be ex- or included</td>
<td>(-) (the principle of equal treatment knows no exemption for certain groups, exemptions only possible for other public reasons, where the job depends on a specific gender or to promote female employment 22)</td>
<td>civil servants that fall under the exemption of Art. 39 (4) TEC or individual posts that are justified according to the criteria laid down in Gebhard, C-55/94 1. non-discrimination 2. obligatory reasons in the public interest 3. aptitude 4. necessity/proportionality</td>
</tr>
</tbody>
</table>

22 Sirdar, C-273/97 + Lommers, C-476/99
<table>
<thead>
<tr>
<th></th>
<th>Dir 96/34/ECG (parental leave)</th>
<th>Dir 97/81/EC (part-time work)</th>
<th>Reg 1408/71/EC (amended several times, last COM (2003) 0468) (on the application of social security schemes to employed persons and their families moving within the Community)</th>
</tr>
</thead>
<tbody>
<tr>
<td>applicable to the public service</td>
<td>(+)</td>
<td>no details, probably (+)</td>
<td>(+)</td>
</tr>
</tbody>
</table>
| definition of worker      | Dir applies to all workers who have an employment contract or employment relationship as defined by the law, collective agreements or practices in force in each Member State | no definition                 | worker = any person  
(i) ..., any person who is insured, compulsorily or on an optional continued basis, for one or more of the contingencies covered by the branches of a social security scheme for employed persons;  
(ii) any person who is compulsorily insured for one or more of the contingencies covered by the branches of social security dealt with in this Regulation, under a social security scheme for all residents or for the whole working population if such person: can be identified as an employed person by virtue of the manner in which such scheme is administered or financed, or - failing such criteria, is insured for some other contingency ... under a scheme for employed persons, either compulsorily or on an optional continued basis;  
(iii) any person who is voluntarily insured for one or more of the contingencies covered by the branches dealt with in this Regulation, under a social security scheme of a Member State for employed persons or for all residents or for certain categories of residents if such person has previously been compulsorily insured for the same contingency under a scheme for employed persons of the same Member State; |

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24 ECJ has not yet had to decide on the applicability to civil servants, s. Steinicke /. Bundesanstalt für Arbeit, C-77/02, judgement of 11.09.2003, para. 52  
25 Niemi , C-351/00, 12.09.2002, para.10,11, 45
<table>
<thead>
<tr>
<th>applicable to civil servants</th>
<th>(+)</th>
<th>unclear</th>
<th>(+), since the extension of the range of applicability through Reg 1606/98</th>
</tr>
</thead>
<tbody>
<tr>
<td>excluded groups of workers</td>
<td>(-)</td>
<td>unclear as to how far civil servants might be ex- or included</td>
<td>non-insured workers</td>
</tr>
</tbody>
</table>

The following two examples illustrate the relevance of Community legislation for public services on the one hand. On the other, they demonstrate that secondary EC law has very different effects on the different categories of occupation in national public services. One reason for this is the lack of linguistic quality in Community legislation. A participation by the employers of public service in the social dialogue could have the advantage of exerting an a priori (stronger, positive) influence on the quality of the legislation.
2.1.1.1. Case examples Dir 93/104/EC\textsuperscript{26} (working time) and Dir. 89/391/EEC (health protection)

The so-called working time directive is currently being re-negotiated at the EU level. It has not been passed yet, however. The following discussion therefore concentrates on existing law.

Council Directive 93/104/EC of 23 November 1993 includes provisions for certain defined aspects of working time organisation like minimum rest periods, maximum allowable working time, annual leave, as well as night and shift work, referring to itself as "a practical contribution towards creating the social dimension of the internal market" in the introduction.

It relates to other directives that stipulate minimum requirements for worker health and safety in work environment, and it accords with the basic Council directive 89/391/EEC of 12 June 1989.

This is particularly relevant for the present case: Since Dir 93/104/EU does not provide a definition of worker, the definition in Dir 89/391 has to be used.

Accordingly, a worker is any person who is employed by an employer, with both directives expressly stating applicability to both the private and public sectors. There is a comprehensive, explicit list of exceptions. Since no reference to national definitions is being made, it has to be assumed that the Community definition of worker includes civil servants.

The directive therefore applies to public service.

Dir 89/391 as a basic directive limits the applicability to public services for specific occupations like police, armed forces and disaster relief; the objective of the directive however is still to be observed to the extent possible.

In principle the directive also applies to civil servants. Directive 93/104/EC however, both in its original form and as per directive 2000/34/EC, provides an extensive catalogue of exceptions that justify non-compliance with individual, important provisions in the directive.

Materially the directive is thus applicable to the entire public service with only sailors being personally exempt. Personal applicability however is further limited de facto by numerous additional limitations and exceptions, particularly with regard to workers in public service.

It appears justified to make exceptions to working time conditions for occupations that by nature have to deviate from fixed working hours from time to time, such as police. However, a catalogue of exceptions as extensive as the one provided in Dir 93/104 leads to a factual circumvention of the directive in many areas. For example it is not clear why it should be justified to make such far-reaching exceptions - going beyond what is required for the operation of the hospital - for physicians in training, but not for doctors or other personnel. The CJEC therefore states that the exceptions in the directive have to be interpreted conservatively.

\textsuperscript{26} Changed by Dir 2000/34/EC of 22 Jun 2000
2.1.1.2. Case example, Dir 76/207/EEC (equality of treatment)

Article 141 TEC states the principle of equal treatment. It has been further substantiated by numerous directives, such as Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. This directive was last amended by the Council and Parliament Directive 2002/73/EC of 23 September 2002, which defines, for example, direct and indirect discrimination and sanctions.

According to item 21 of the reasoning for Dir 2002/73/EC, the Member States should promote dialogue between the social partners and with non-governmental organisations to combat different forms of discrimination. Article 8b of Dir 2002/73/EC requires Member States to take adequate measures to promote social dialogue.

It is true that the directive refers to workers or employees only in general terms, without defining these terms more closely. It is however to be assumed that the common definition used in Community legislation is applicable. According to continual rulings by the CJEC, the principle of equal treatment therefore applies to the whole public services sector and even to the specifically national sector of the armed forces. 27 In the Kreil case, which was about a German woman applying for acceptance as a soldier by the Bundeswehr, professional soldiers were categorised as workers in principle.

Both the primary law's principle of equal treatment and its secondary law consequences are therefore applicable to the entire public service and all civil servants. Directives in this field have an immediate, harmonising effect on the public services of the Member States. Exceptions for certain civil servants or occupations are not possible.

Furthermore, according to rulings by the CJEC, the ban on discriminating inequality of treatment between male and female workers applies not only to public agencies, but extends to all collective bargaining agreements as well as any contracts between private persons. This ban also applies to unilateral acts by employers towards their personnel. 28

The directive provides that Member States may adopt affirmative-action policies specifically for women that may in effect be possibly discriminating against men. In the Lommers case 29 the CJEC ruled that it is compliant with the principle of equal treatment if a married father and civil servant in a Dutch ministry is denied access to a subsidised daycare facility run by the ministry, on the grounds that the daycare centre as an affirmative-action, anti-discrimination measure is open only to the numerically under-represented, female employees of the ministry. However, the CJEC expressly pointed out that in the case of a single father the ruling would have had to be different. On the other hand, the CJEC ruled in the Moulin case 30 that civil servants' claim to pension rights in case of early retirement in order to care for an ailing spouse is due not only to women desiring to care for their husbands but also vice versa, ruling that a gender-based differentiation was discriminatory.

Unequal treatment is permissible only if public security is at stake. However, decisions on these grounds by the Member States are not generally exempt from the applicability of

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27 e.g. Gerster, case C-1/95, ,marg. no. 18, Coll. Rulings 1997, p. I-274 ; Kreil, case C-185/98, marg. no. 18, Coll. Rulings 2000, p. I-69
28 see Wiebke Busch ./. Klinikum Neustadt GmbH & Co, Betriebs-KG, case C-320/01, Submissions by Prosecutor General Ruiz-Jarabo Colomer, marg. no. 24
29 Lommers ./. Minister van Landbouw, Natuurbeheer en Visserij, case C-476/99
30 Henri Moulin ./. Recteur de l'académie de Reims, case C-206/00, Coll. Rulings 2001, p. I-10201
Community law and have to be reviewed individually. In the Sirdar case\(^{31}\) the CJEC ruled that excluding women from special combat units was justified because of the type and the circumstances of the required activities.

In this sense, the court has found in other cases that gender may be an indispensable requirement for prison guards\(^{32}\) or for certain activities such as those of police during severe riots\(^{33}\), making a refusal to hire women compliant with Community law.

**Because of its clear definitions and consistent court rulings, directive 76/207/EEC has a most direct and unequivocal effects on the entire public service.**

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\(^{31}\) Angela Maria Sirdar */. The Army Board und Secretary of State for Defence, case C-273/97, Coll. Rulings 1999, p. I-07403  
\(^{33}\) Marguerite Johnston */. Chief Constable of the Royal Ulster Constabulary, case C-222/84, marg. no. 37, Coll. Rulings 1986, p. 01651
III. SOCIAL DIALOGUE IN PRACTICE

1. The significance of Art. 137 TEC to social dialogue

The previous discussion has demonstrated that the EC Treaty permits the European Commission to propose regulation that is relevant to public services. In most areas, the social partners enjoy the right of consultation. On the other hand, social partners on their own may conclude binding agreements as per Art. 139 TEC only on issues that were proposed according to Art. 137 TEC. As a result, any evaluation of the significance of Art. 139 TEC depends directly on the activities of the Commission with regard to Art. 137 TEC. Another question is how frequently the social partners would be able to make use of their right to appropriate a legislative initiative planned by the Commission (Art. 138 paragraph 4 TEC) and supplant it with an agreement of their own (Art. 139 TEC). The social partners would in fact become a legislative organ of the Community. Particularly with regard to these cases of non-participation by the employers in public service, it is justifiable to speak of "Europeanisation through the backdoor".

This danger has been described in an EIPA publication by Mangenot/Polet. It is however of predominantly theoretical nature. In reality the commission has been reluctant to use its right to make proposals in this area. There are four reasons for this:

Since the passing of the white paper on European Governance in 2001, a decline in the use of traditional legal instruments and classical Community methods has been observable at the EU level. This development has created the necessary space for new instruments and methods of regulation. Particularly the implementation of the open coordination method has been conducive to new, soft-law methods, as well as benchmarking and best practices.

The Commission's social policy programme includes very few concrete proposals for new acts of legislation.

Some of the fields listed in Art. 137 TEC are entirely or at least partially absent from the central national social dialogues in many Member States. In the UK, for example, only a portion of the fields listed in Art. 137 TEC are negotiated in the central social dialogue. Consequently, some other Member States have demanded to limit the discussion to so-called core issues. It is therefore unlikely for the employers' representatives to agree to a comprehensive negotiating mandate for all the fields listed in Art. 137 paragraph 1 TEC.

The intensity of regulation based on Art. 137 TEC has been comparatively low. There are many reasons for this. For example, the term of working conditions (Art. 137 paragraph 1b TEC) includes many properties that were already covered by Art. 137 paragraph 1a TEC. The major portion of regulation was made here. No further regulation has been passed because paragraphs 1 c, d, f and g require unanimity. There is also the clause of exclusion in Art. 137 paragraph 5.

Thus it is to be expected that the commission will continue to be very cautious with new initiatives pertaining to Art. 137 TEC. This is particularly true for proposals in those areas that require unanimity (i.e. Art. 137, paragraph 1 c, d, f, g). The assessment of Art. 137 TEC and its relevance for public services (as well as social dialogue) depends

therefore on whether a decision requires unanimity or just a qualified majority. Art. 137 provides a staggered procedure for this: In principle, all decisions pertaining to paragraphs 1 a, b, e, h, i, j, k of Art. 137 TEC are made by a qualified majority. All other issues require unanimity. However, excepting Art. 137 paragraph 1 c, the Council of Ministers may decide unanimously to require only a qualified majority for issues pertaining to paragraphs 1 d, f, g of Art. 137 TEC. In practice, this means that regulatory initiatives pertaining to paragraphs 1 a, b, e, h, i, j, k of Art. 137 are more likely than those of other fields. Future social dialogue will therefore probably focus on these areas.

<table>
<thead>
<tr>
<th>Voting method</th>
<th>Applicability</th>
</tr>
</thead>
<tbody>
<tr>
<td>Qualified majority</td>
<td><strong>Art. 137 paragraph 1 a, b, e, h, i, j, k TEC</strong> working environment, working conditions, information and consultation of workers, integration of persons excluded from the labour market, equal opportunities, combating of social exclusion, modernisation of social protection systems</td>
</tr>
<tr>
<td>Unanimity</td>
<td><strong>Art. 137 paragraph 1 c, d, f, g TEC</strong> social security and social protection, protection of workers where their employment contract is terminated, representation and collective defence of the interests of workers, conditions of employment for third-country nationals</td>
</tr>
<tr>
<td>Qualified majority, if previously agreed unanimously</td>
<td><strong>Art. 137 paragraph 1 d, f, g TEC</strong> protection of workers where their employment contract is terminated, representation and collective defence of the interests of workers, conditions of employment for third-country nationals</td>
</tr>
<tr>
<td>Unanimous only</td>
<td><strong>Art. 137 paragraph 1 c TEC</strong> social security and social protection of workers</td>
</tr>
<tr>
<td>No regulation allowed</td>
<td><strong>Art. 137 paragraph 5 TEC</strong> pay, right of association, right to strike, right to impose lock-outs</td>
</tr>
</tbody>
</table>
1.1. The scope of applicability for Community social policy (Art. 137 TEC) and its effects regarding the work of EUPAN

1.1.1. What does EUPAN do? Focuses of work and EU law

The EUPAN network discusses a variety of issues that may be regulated either internationally, or at the EU level, or nationally. EUPAN is therefore by no means exclusively concerned with EU issues.

<table>
<thead>
<tr>
<th>EUPAN topics</th>
<th>International law</th>
<th>EC law</th>
<th>no/unclear legal basis at the EU level</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ethics, integrity, corruption</td>
<td>Freedom of movement, employment (Lisbon), working conditions, discrimination, pensions; Art. 13 TEC, Art. 39 paragraph 4 TEC, Art. 125, Art. 136-141 TEC, Art. 141 TEC</td>
<td>Pay-for-performance, CAF, e-government, performance management, status developments</td>
<td></td>
</tr>
</tbody>
</table>

EUPAN also discusses topics that go beyond the boundaries of Art. 137 TEC. A good example for this is the interpretation of Art. 39 TEC, which has been discussed by the Directors General since 1994. Current horizontal key issues (going beyond Art. 137 TEC) like the Lisbon strategy have become important in the new millennium.

EUPAN frequently discusses topics that only barely fit the term of "working conditions" in Art. 137 TEC (e.g. leadership, e-government, quality management and CAF, performance assessment, etc.). Other subjects (like ethics and integrity, combating corruption) have primarily been raised internationally (UN, European Council, OECD).

1.1.2. Art. 137 TEC and EUPAN

Conversely, the working focuses listed in Art. 137 paragraph 1 TEC significantly exceed the scope of EUPAN's previous work. EUPAN has never discussed the issues in Art. 137 paragraph 1 a, e, f, g, h, or j TEC, nor has it commissioned any studies in this area.

- Working environment (paragraph 1 a)

This includes all regulation designed to protect workers from the physical or psychological effects of exposure to occupational health hazards\(^{35}\), such as health protection, safety, workplace design etc.. This includes general standards on the social working environment, as well as the safe design of tools and materials. Directives benefitting all employees, or particular groups independent of the type of employment relationship or citizenship, as well as the many directives on technical safety are also covered\(^{36}\). Community legislation has accordingly been most active in these areas.\(^{37}\)

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\(^{35}\) CJEC case C-84/94, Coll. 1996 I, 5793, marg. no. 15; Langenfeld in: Grabitz/Hilf, 137 marg. no. 11; Boecken, in: Hailbronner/Wilms, Art. 137 marg. no. 10 ff.

\(^{36}\) Streinz Art. 137 marg. no. 11
• Working conditions (paragraph 1 b)
  The term of working conditions covers a lot of ground and is hard to define.
  The definition includes all those working conditions that are not already covered by
  paragraph 1 a.\textsuperscript{38} However, taking into consideration the other areas mentioned in
  paragraph 1, the per-case unanimity rule, as well as the rule of exclusion in Art. 137
  paragraph 5 TEC, a tighter interpretation is called for.

• Social security and social protection of workers (paragraph 1c)
  The term of social security is to be interpreted - as per Art. 42 TEC - in terms of public
  payments to employees in case of the materialisation of social risks (illness, maternity,
  age, infirmity, death, work-related accidents and occupational hazards, unemployment, as
  well as related payments to families).	extsuperscript{39} Primarily, coordinating measures against
discrimination based on nationality according to Art. 42 TEC were taken in this area.	extsuperscript{40}
Until today, no measure has been passed based on paragraph 1 c, although it would be
certainly possible to impose minimum requirements instead of merely coordinating
according to Art. 42 TEC.	extsuperscript{41}

• Protection of workers where their employment contract is terminated (paragraph 1 d)
  This (only) covers the (general) protection by labour laws in case of the termination of an
  employment contract, as well as the rights and obligations of the parties to the contract
  arising from such termination. Individual groups that require special protection are
covered by paragraph 1 a.	extsuperscript{42}

• Information and consultation of workers (paragraph 1 e)
  This provision covers the duties of information and consultation that employers have
  towards their employees, excepting the rules on worker participation and co-
determination in paragraph 1 f. The provision does not cover any actual participation
  rights.	extsuperscript{43} \textsuperscript{44}

• Collective defence of the interests of workers and employers (Art. 1 f)
  This paragraph covers institutions for co-determination, in which the workforce may
  reach agreements with the management or influence decisions by management
  committees directly through participation.	extsuperscript{45} Taking into account paragraph 5, this has to
  include the right of association as far as external activities (excepting strikes and lock-

\textsuperscript{37} Comprehensively Langenfeld in: Grabitz/Hilf, Art. 137 marg. no. 10-35 and Boecken, in:
  Hailbronner/Wils, Art. 137 marg. no. 13-21
\textsuperscript{38} Streinz Art. 137 marg. no. 13
\textsuperscript{39} Streinz Art. 137 marg. no. 14; Boeckmann, in: Hailbronner/Wils Art. 137 marg. no. 44
\textsuperscript{40} Refer to Langenfeld in: Grabitz/Hilf Art. 137 marg. no. 76-80
\textsuperscript{41} Boeckmann, in: Hailbronner/Wils, Art. 137 marg. no. 42
\textsuperscript{42} Streinz Art. 137 marg. no. 16; Langenfeld in: Grabitz/Hilf, Art. 137 marg. no. 81
\textsuperscript{43} Boecken, in: Hailbronner/Wils, Art. 137 marg. no. 51
\textsuperscript{44} For previous legislation in this field refer to Langenfeld in: Grabitz/Hilf, Art. 137 marg. no. 60-72 and
  Boecken, in: Hailbronner/Wils, Art. 137 marg. no. 53-56
\textsuperscript{45} Streinz Art. 137 marg. no. 18, Langenfeld in: Grabitz/Hilf, Art. 137 marg. no. 82
outs) of the associations are concerned, i.e. the representation of the interests of workers and employers.\textsuperscript{46} Even collective bargaining law as such should to be interpreted as a "collective defence of worker and employee interests", excepting regulation on payment or labour disputes\textsuperscript{47}. Paragraph 5 cannot cover collective bargaining rights for the reason that these rights are expressly given a status independent of the right of association in Art. 140, and because collective bargaining is mentioned as a right of its own, e.g., in the European Social Charter.\textsuperscript{48}

- **Conditions of employment for third-country nationals (paragraph 1 g)**

This is not the right to regulate the access of third-country nationals to the Member States' labour markets, but instead the right to regulate the conditions of employment for non-EU citizens already legally residing in Community territory. The requirements for legal residence continue to be a responsibility of the Member States.\textsuperscript{49}

- **Integration of excluded persons (paragraph 1 h)**

This provision differs from Art. 150 TEC in that it covers activities focusing on the integration of unemployed, personally disadvantaged persons. Activities for initial and continuing vocational training, as well as vocational integration and reintegration into the labour market are covered by Art. 150 TEC. The difference between these two norms may be vague.\textsuperscript{50} The rules of procedure according to Art. 150 paragraph 4 are the same as those in Art. 137 paragraph 2.3. However, the exclusion of harmonisation in Art. 150 paragraph 4 is to be observed. Governmental employment policy is covered by Art. 125 ff. TEC. Again, the exclusion of harmonisation in Art. 129 paragraph 2 needs to be observed.

- **Equality between men and women (paragraph 1 i)**

Equality of opportunity between men and women requires equal access to employment (including promotion) across the entire labour market; equality of treatment covers direct and indirect discrimination and refers to the actual workplace.\textsuperscript{51} With regard to Art. 3 paragraph 2 or Art. 141 TEC, Art. 137 paragraph 1 i TEC provides a merely supplementary competence, which appears unfortunate even in its wording.\textsuperscript{52} The procedure in Art. 141 paragraph 3 TEC, however, is identical to the one in Art. 137 paragraph 2.3, and it includes a guarantee. Art. 141 TEC is therefore pertinent in this area.\textsuperscript{53} The inclusion in the catalogue in Art. 137 paragraph 1 TEC is relevant because of the reference in Art. 139 TEC. On the other hand, the implementation of an agreement

\textsuperscript{46} Streinz Art. 137 marg. no. 17

\textsuperscript{47} Refer to Langenfeld in: Grabitz/Hilf, Art. 137 marg. no. 81 f.; Boecken, in: Hailbronner/Wilms, Art. 137 marg. no. 59

\textsuperscript{48} In whole Boeckmann in: Hailbronner/Wilms Art. 137 marg. no. 110

\textsuperscript{49} Boecken in Hailbronner/Wilms Art. 137 marg. no. 63; Streinz Art. 137 marg. no. 19

\textsuperscript{50} Cf. Streinz Art. 137 marg. no. 20

\textsuperscript{51} Boecken, in: Hailbronner/Wilms Art. 137 marg. no. 69

\textsuperscript{52} Cf. only Streinz, Art. 137 marg. no. 21: "Wenn Gleichheit zu sichern ist, dann ist sie zu gewährleisten: Mindestvorschriften sind dafür untunlich."

\textsuperscript{53} Streinz Art. 137 marg. no. 21
between the social partners by Council decision is prohibited by Art. 141 paragraph 3 TEC.54

- Combating of social exclusion (paragraph 1 j)
"Measures" according to Art. 137 paragraph 2 a) serve the coordination between Member States (see also the wording of Art. 129 TEC). They do not justify any financial support for important Community measures against social exclusion. Other than in Art. 140 TEC, the Council is the empowered instance, not the Commission55.

- Modernisation of social protection systems (paragraph 1 k)
This includes all collective systems for the transfer of payments intended to secure against social risk. Paragraph 1 c) applies to regulation pertaining to the legal status of employees.56

54 Boecken in: Hailbronner/Wilms Art. 137 marg. no. 70, on previous legislation marg. no. 71 ff.
55 106/96 (CJEC Coll. 1998, I-2729, 2755 ff. marg. no. 26 ff.)
56 Comprehensively Boecken in: Hailbronner/Wilms Art. 137 marg. no. 79-82
1.2. Social dialogue – the challenge of defining topics

For formal social dialogue, the definition of issues is of particular importance. In principle, social partners may discuss any topic. They may also focus on specific fields. Finally, Art. 137 TEC permits participants to focus on the issues of formal social dialogue first. In the following, the parallels between EUPAN and the EC Treaty are illustrated, as well as the topical interests of the various players (Member States, Commission and trade unions). Proposals for the subjects of future discussion are made based on this information.

1.2.1. Common issues between EUPAN and Art. 137 TEC

Primary EU law imposes immanent limitations on efforts to harmonise social policy. The issues in Art. 137 paragraph 5 TEC (pay, the right of association, the right to strike or the right to impose lock-outs) are specifically prohibited from becoming EC competences.

Art. 137 TEC intersects with the EUPAN agenda primarily on the issues of general working conditions, equality of opportunity for men and women, as well as the modernisation of social security (pensions).

With regard to the definition of future topics in social dialogue, the terms of working environment and working conditions may seem to be "Trojan horses" (at least in the view of certain Member States). Both terms may be interpreted very liberally, allowing social dialogue to deal with an extremely wide range of topics.

1.2.2. Proposals by trade union delegations (TUNED)

Informal social dialogue with trade union federations has been in place for several years. In the past, the Directors General have repeatedly invited trade unions for consultations (usually at the conclusion of the meetings of the Directors General). These consultations have been intensified recently, and they have resulted in bilateral resolutions. For example, a declaration on "diversity" was passed under the British EU Presidency. During the Finnish Presidency, an opinion by the Directors General and TUNED on "leadership" was accepted.

In spite of this development towards a more intensive cooperation on issues, the social partners have not agreed to which issues so far. Issues are selected primarily "ad-hoc". From the trade unions' point of view, this situation is even more unsatisfactory because the handling of topics is determined individually by each Presidency and is therefore highly discontinuous. This assessment is justified. Because of the currently informal and ad-hoc character of social dialogue, the quality of the discussion is lacking.

In order to remedy this, TUNED has included in its Roadmap of 2 June 2006 a proposal to define joint global issues with the employers, which may be defined more precisely individually afterwards. These topics include:

57 Streinz Art. 136 marg. no. 10
• A strategy for growth and employment (e.g., analysis of the open-coordination method, demographic change, equality and equality of opportunity)
• Improvement of high-quality public administrations (e.g. the development of common indicators)
• Good governance, e.g. efficient implementation of EU legislation, better regulation.

For future formal cooperation TUNED proposes that the social partners agree on a set of issues for a (several) year programme. A similar proposal has been made in the strategy paper by the Austrian EU Presidency: "In order to clarify the future areas and forms of cooperation between Directors General and the Trade Union Delegation including the options discussed under UK Presidency and to properly include this cooperation in the settings and working procedures of EPAN, the Austrian Presidency suggests to incorporate these areas of cooperation in the Mid-Term Programme 2008-2009 to be elaborated during the incoming Presidencies in 2007."58

It is readily apparent that the suggested issues in the Roadmap exceed the scope of Art. 137 TEC. Moreover, global issues like e-government and "Better Regulation" require better definition.

The proposal of a roadmap does however represent a positive effort towards a more structured and continuous social dialogue.

1.2.3. Proposed topics and initiatives by the Committee on Local and Regional Government and the European Commission

Among the possible starting points for a future selection of issues are the working programme of the Committee on Local and Regional Government, the Green Paper by the European Commission on "Modernising labour law to meet the challenges of the 21st century" of 22 November 2006, as well as the Social Agenda of the European Commission (COM (2005) 33 final.), which was passed in 2005. On the other hand, this programme presents little in the way of concrete proposals (particularly those based on Art. 137 TEC).

A more detailed analysis of the selection of topics by the Committee on Local and Regional Government yields a very broad range of issues.59 Examples are:

- changes in national and EU labour law,
- development of new forms of work,

58  "In order to clarify the future areas and forms of cooperation between Directors General and the Trade Union Delegation including the options discussed under UK Presidency and to properly include this cooperation in the settings and working procedures of EPAN, the Austrian Presidency suggests to incorporate these areas of cooperation in the Mid-Term Programme 2008-2009 to be elaborated during the incoming Presidencies in 2007."58. Cf. the strategy paper by the Austrian EU Presidency indent no. 4

59  Detailed information on the work of the Committee on Local and Regional Government can be found on the CIRCA homepage (http://forum.europa.eu.int/Public/irc/empl/sectoral_social_dialogue/library?l=/regional_government/2006&vm=detailed&sb=Title)
– worker health and safety,
– relevance of HRM for the qualification of employees,
– new recruiting strategies,
– affirmation of the principle of equality and supporting diversity in public administration,
– e-government and other innovative public services.

E-government is particularly conspicuous as an issue in this context because it is difficult to subsume under Art. 137 TEC.

In November 2006 the European Commission published a new green paper with the intention of "launch[ing] a public debate in the EU on how labour law can evolve to support the Lisbon Strategy's objective of achieving sustainable growth with more and better jobs". This green paper raises the question of how to combine greater flexibility with the maximum possible amount of security (flexicurity) in the future. This issue relates to Art. 137 TEC.

1.2.4. Which issues do the member states want to discuss?
A study by the British EU Presidency in 2005 has shown that the range of issues proposed by the Member States is very wide. It includes issues like "life-long learning", mobility, civil servants' ethics, performance management, demographic development and steering of ageing processes, etc. Mobility is a field of great mutual interest.

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### Important issues - answers by the Member States to the UK study

<table>
<thead>
<tr>
<th>Country</th>
<th>Issues</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cyprus</td>
<td>Modernisation of public services</td>
</tr>
<tr>
<td></td>
<td>Fiscal consolidation and its impact on working conditions</td>
</tr>
<tr>
<td></td>
<td>Outsourcing and its impact on working conditions</td>
</tr>
<tr>
<td>France</td>
<td>Possibly combating discrimination, working conditions and work safety</td>
</tr>
<tr>
<td>Greece</td>
<td>Constitutional issues</td>
</tr>
<tr>
<td>Germany</td>
<td>Art. 137 EGV</td>
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<tr>
<td>Hungary</td>
<td>Civil servant status</td>
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<td></td>
<td>Freedom of movement and public administration</td>
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<td>Working conditions</td>
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<td>Italy</td>
<td>Jobs and civil servant codices</td>
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<td>Lithuania</td>
<td>Working conditions, quality and recruiting</td>
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<td>Malta</td>
<td>Efficiency and effectiveness (the pay-productivity relation), incentives</td>
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<td>instead of sanctions, reemployment, further training, skill development,</td>
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<td>manpower reduction, flexibility and working conditions, effective use of</td>
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<td>manpower, diversity, and family-friendly measures.</td>
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<tr>
<td>Netherlands</td>
<td>Transferability of pension rights, (European methods of calculation,</td>
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<td>freedom of movement and public administration)</td>
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<td>mutual recognition of diplomas, governance and integrity charta</td>
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<td>Portugal</td>
<td>Social policy (security and social protection of workers, workplace</td>
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<td>hygiene and safety).</td>
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<td>Slovakia</td>
<td>Income of civil servants</td>
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<td>Minimum standards for civil servants in welfare</td>
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<td>Slovenia</td>
<td>Working time</td>
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<td>Spain</td>
<td>Mobility</td>
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### 1.2.5 Recommendations

The Directors General are interested in a very wide range of informal and formal dialogue issues. It is however unlikely that there will be a willingness to discuss a wide range of topics in formal dialogue on the employer side (Directors General). One reason for this is that the national social dialogue in a number of Member States covers only a limited number of issues. Why should these Member States be interested in a wider range of issues at the EU level?

In order to prevent unnecessary centralisation tendencies and to achieve the highest possible degree of flexibility we propose the following procedure:
To begin with, it is probably a good idea to get to know each other and build mutual trust. Therefore, large and ambitious projects should be avoided at first. This view is also shared by the trade unions: "If sectoral committees for social dialogue are established, their initial results will in all likelihood be non-committal in nature". Therefore, "a learning phase is required before genuine consensus and concrete, binding results will become visible".

Too great a diversity of issues might have contradictory effects on cooperation, since an intensive and broad cooperation requires corresponding administrative structures (e.g. establishment of several working groups) and (human) resources, while concrete benefits are still uncertain. The employers will hardly agree to this.

1) Social partners limit themselves to the substantial issues that are covered by Art. 137 TEC and/or have been treated in EUPAN (insofar as they concern the Member States' public services).

Equality of opportunity and diversity,
working conditions and improved working environment,
modernisation of social protection systems

2) Aside from this, the social partners may discuss any issues listed in the European Commission's social-policy agenda or in the Commission's Green Paper, issues for which new initiatives by the Commission may be expected (insofar as they affect European services).

3) Finally it may be worth considering whether to discuss the challenge of social dialogue in the new Member States (according to the model in the Committee on Local and Regional Government). It is conceivable to ask the European Commission for financial support in this matter.

The discussion of these subjects might continue at an informal level by the Directors General. Whether to involve trade union representatives in the discussions (informally) is within the discretion of each Presidency (in consultation with the Troika).

1.3. Social dialogue decision-making process and Art. 139 TEC

1.3.1. Competences of the social partners

The social partners ("management and labour") are mentioned several times in the TEC, particularly in Articles 125 f., 130, 136, 137, 138, 144 TEC. It is important to discern whether the term refers to management and labour at a national level or at the

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62 Ibid.
Community level. Insofar as a participation by the social partners at the Community level is the intended meaning, the social partners should be involved according to the stated procedures. In the negative: Wherever the Community-level social partners are mentioned in the Treaty, there will be no consultation with the (national) public employers, who have not yet joined the European Social Dialogue.

The Treaty permits the social partners to discuss any labour-law related subjects, i.e. including those covered by Art. 137 paragraph 5 TEC (e.g. pay, right of association, strikes, lock-outs). Since the Treaty of Nice grants the social partners extensive rights of autonomy, they are free to discuss the entire scope of social and labour law. The principle applies that the social partners may discuss anything, whereas the European institutions may not stipulate everything. Legally spoken, Community competence in social issues extends only as far as Art. 137 paragraph 1 TEC. In these areas, the European Commission may propose bills, and/or the social partners may have an autonomous social dialogue. It is however to be expected that European trade unions will demand that the employers discuss and open to negotiation all the issues. From the trade unions' point of view, this range of issues might also include aspects of pay and/or the right to strike (Art. 137 paragraph 5 TEC). The employers however are not required to accept these offers of discussion.

1.3.2. The significance of Art. 139 TEC to social dialogue

While the definitions of social dialogue and social partnership are very wide-ranging, the ability of social partners to reach agreements according to Art. 139 TEC is limited to the areas listed in Art. 137 TEC. Art. 139 paragraph 1 TEC grants the European social partners an autonomous right to initiate and negotiate agreements. If the participating social partners reach an agreement, this agreement may be adopted by the Commission and made into law by the Council. Via the transformation of European law into national law, agreements between the European social partners may become legally binding.

The Treaty proposes two different methods for legally binding implementation (Art. 139 TEC paragraph 2, 1st and 2nd clauses, see diagram). According to this article, agreements are implemented either in accordance with the procedures and practices specific to management and labour and to the Member States (1st clause), or by a Council decision (2nd clause). According to the wording of the Treaty, both methods are equivalent. Yet it should be considered that highly different scopes of action are at issue here: a national-level implementation of an autonomous decision by the European umbrella organisations of the social partners versus a legal strategy with (more comparable) implementation and realisation.63

THE ROLE OF SOCIAL PARTNERS IN THE EU DECISION-MAKING PROCESS

1. PARTICIPATION IN THE EU DECISION-MAKING PROCESS

a) Consultation phase

- Consultation in the context of the “Sozialen Dialoges”, Art. 138 II, III TEC
- Social partners decide whether they themselves wish to take the initiative and negotiate measures for themselves, Art. 138 IV TEC

Maximun duration of 9 months for the consultation process, Art. 138 IV 2 TEC

Yes ➔ Normal procedure through EU legislation (Council, Commission, sometimes EP), Art. 137 II TEC

No ➔ Self-regulation by agreement between the social partners, Art. 139 TEC

b) Decision-making phase
2. PARTICIPATION IN THE IMPLEMENTATION/REALISATION

Agreement of the social partners at EU level
Art. 139 I TEC

Execution/implementation of the agreement
Art. 139 II TEC

Directly and autonomously

According to the specific procedures + practices of the social partners + Member States
Art. 139 II 1.Alt. TEC

Indirectly via EU institutions

always in the areas encompassed by Art. 137 TEC

APPLICATION of the signatory parties of the agreement to Commission,
Art. 139 II 2. Alt.TEC

PROPOSAL of the Commission

DECISION of the Council

By qualified majority
Unanimity
1.3.2.1. Which are the practical examples for the implementation of agreements according to Art. 139 TEC?

In the majority of those cases in which Community legislation affects public services, the Member States have influence and control over the legislation process, for example by participating in Council working groups during the drafting of a law. The above-mentioned Directives 93/104/EC (working time) and 76/207/EEC (equal treatment) have been negotiated in the normal, "open" process of legislation. However, this is not true for some other Directives, such as 1999/70/EC (fixed-term work contracts), which was passed in the European social dialogue according to Art. 139 TEC. The content of this Directive has therefore been negotiated exclusively between the social partners. The Council is not permitted to modify the contents of the agreement and may only – requiring a joint application by the parties signatory – take a legally binding decision according to Art. 249 TEC.

Lacking formal representation in the European social dialogue, (employers in) public services have only very limited influence and are not consulted by the Commission on initiatives concerning social dialogue. After all, without a formal organisation the Directors General of public service may not initiate an autonomous social dialogue (Art. 138 TEC), nor may they make legally binding agreements as per Art. 139 TEC. This exclusion of the public employers from social dialogue may in certain conditions (Art. 139 TEC) result in a Europeanisation without the involvement of the Member States (Mangenot/Polet), and it raises questions of legitimacy.

Until today, three directives based on Art. 139 paragraph 2 clause 2 TEC have been passed in inter-sectoral dialogue:

1.3.2.2. Dir 1999/70/EC (fixed-term work contracts)

This Council Directive of 28 June 1999 concerns the realisation of a 1999 framework agreement on fixed-term contracts between several cross-industry organisations (ETUC, UNICE, CEEP)\(^\text{64}\). Its purpose is to commit the Member States to passing worker-protection regulation that stipulates the conversion of any perennial series of fixed-term work contracts to a permanent contract, putting a stop to a commonly used way of circumventing social-protection measures.

The Commission works on the assumption that the Directive is basically applicable to public service.\(^\text{65}\) In addition, there is an implicit reference to the requirement for a national definition of worker\(^\text{66}\). Any inquiries to the commission in this matter have not yet involved a civil servant in public service, however.

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\(^{64}\) European Trade Union Confederation, Union of the Industries of the European Community, European Centre of Enterprises with Public Participation


\(^{66}\) Commissioner Diamantopoulou on behalf of the Commission replying to written inquiry about Dir 1999/70 to the Commission, E-1495/02 by Konstantinos Hatzidakis, of 29 May 2002, see above
In 2006, the CJEC pointed out in case no. C-212/04 that Directive 1999/70 also applies to fixed-term work contracts and working relationships. The Court concluded that the framework agreement works on the premise that permanent contracts are the normal type of working relationship. The Court also opines that the framework agreement is opposed to the application of any national regulation exclusively for the public sector that prohibits the conversion of sequential fixed-term contracts to permanent contracts.

The current state of affairs allows the following conclusions:

The Directive applies to public service.
The term of employee/worker is defined nationally.

1.3.2.3. Dir 97/81/EC (part-time employment)

This Council Directive of 15 December 1997 concerns the realisation of a 1997 framework agreement between the same cross-industry organisations (ETUC, UNICE, CEEP), which stipulates a number of general principles and minimum requirements for part-time employment. The framework agreement refers to itself as a contribution to an overall employment strategy and was passed in the light of the 1989 Social Charter as a measure for more employment, more organisational flexibility, more competition and better equality of opportunity between men and women. There is no explicit definition of employee, neither in the text of the directive nor in the framework agreement. Applicability to public service is to be assumed, however.

1.3.2.4. Dir 96/34/EC (parental leave)

This Council Directive of 3 June 1996 also concerns itself with the realisation of a framework agreement between the above-mentioned parties, namely the 1995 agreement on parental leave. It is also a result of the social-policy accord, which permitted the social partners to jointly apply for the realisation of Community-level agreements by Council decision on a proposal from the Commission (now Art. 139 TEC). The Directive does provide a definition for the term of worker, neither referring to the individual, national definitions nor adopting the common, Community-legislation definition by the CJEC verbatim. Applicability to public service is neither stipulated explicitly, nor is it excluded. The CJEC also seems to assume on principle that the Directive applies to public service.67

1.3.3. Art. 139 paragraph 2 clause 1 TEC

While there is a record of experience with the implementation of social-policy directives based on Art. 139 paragraph 2 clause 2 TEC, the same has been true only for a few years regarding the realisation of agreements according to Art. 139 paragraph 2 clause 1 TEC. Until today, the following agreements according to Art. 139 paragraph 2 clause 1 TEC have been realised:

67 see Wiebke Busch / Klinikum Neustadt GmbH & Co. Betriebs-KG, case C-320/01, Submissions by Prosecutor General Ruiz-Jarabo Colomer, marg. no. 19-22
- Framework agreement on teleworking, 2002
- Framework agreement on work-related stress, 2004
- Agreement on the European licence for drivers carrying out a cross-border interoperability service, 2004

The realisation of an agreement between the social partners according to Art. 139 paragraph 2 clause 1 TEC is a process occurring at the level of national legislation exclusively. The ifs and hows of implementation are left to the social partners. "Since social dialogue is bound by the collective bargaining structures and the labour laws in the Member States, the content and scope of applicability of collective bargaining agreements vary (...). The procedures according to Art. 139 paragraph 2 clause 1 TEC is therefore least effective in securing a harmonised implementation"68. Agreements between the social partners become Community legislation (e.g. a directive) and gain priority over national law only if they are made according to Art. 139 paragraph 2 clause 2 TEC. The agreement therefore has to be implemented by national legislation. This instrument is less difficult and offers a better guarantee for implementation than is the case with Art. 139 paragraph 1 clause 1 TEC.
Particularly the implementation of the teleworking agreement is considered by the European Commission a testing area for future agreements based on Art. 139 paragraph 1 clause 1 TEC. An initial implementation report on teleworking agreements was published in September 2006, and it confirms a very wide selection of instruments at the national level.

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68 Spieß, U., Sozialer Dialog und Demokratieprinzip, Berlin 2005, p. 92
"The tools and procedures of implementation chosen by social partners varied in accordance with national practices. They include, for example, social partner agreements in Spain or collective agreements in France, other joint texts negotiated by the social partners such as the joint recommendation prepared in the Dutch Labour Foundation. In some cases, implementation involved public authorities as was the case for the guidelines prepared in the United Kingdom. In other cases, the agreement leads to changes in national legislation, for example to clarify the extent to which labour law covers the situation of telework.

The choice of the tools and procedures of implementation was made jointly by employers and trade unions and was often the occasion of in-depth and sometimes difficult discussions between them. The difficulty of the exercise was sometimes linked to issues of substance, of procedure, or of the status of the implementation tool. This was probably due to the fact that it was the first time ever that the national social partners were asked to find a consensus on how to implement an EU framework agreement through their own means.

A further challenge to the national social partners was to develop a common understanding of what the joint approach to telework meant for both employers and workers in each country concerned and to reach a consensus on contentious aspects in light of the EU agreement. For example, within the National Labour Council in Belgium, social partners conducted extensive preparatory work to help them fully grasp the phenomenon, including interviews of social partners from the sectors most concerned to understand why telework had been introduced and for what purposes. In Finland and Norway social partners made a thorough analysis of their national labour legislation and existing collective agreements before coming to the joint conclusion that no legislative amendment was necessary. In Slovenia, these discussions are not finalised yet and social partners still have to decide whether the framework agreement will be implemented through amendments to the labour relations act or through sectoral collective agreements.

It is worthwhile noting that the implementation of the EU framework agreement through social partners’ own means was seen as an opportunity to boost bilateral social partner discussions at national, sectoral and company levels in some countries. For example, French, Polish, Italian and UK social partners explicitly welcomed the possibility to mirror at national level the bipartite commitment achieved at EU level.

Similarly, the promotion of the EU agreement was set as a priority of the general bilateral agreement concluded by Czech social partners in November 2004.

As can be seen below, the implementation of the EU framework agreement has been carried out in different ways across Europe. For the purpose of this report, the results have been grouped into two broad categories: collective agreements or other bilateral social partners’ agreements on the one hand, and legislation or other types of tripartite activities on the other hand.” CEEP/UNICE/ETUC/UEAPME, Implementation of the European Framework Agreement on Telework, September 2006, S.7.
1.3.4. The significance of social dialogue to the social partners in public services - summary

A comparison between the outlined directives repeatedly results in the conclusion that there is no one, harmonised definition of worker/employee in Community legislation but several, which may be defined depending on the respective legal instrument.

Consequently, depending on the definition of worker, civil servants are sometimes included in the protective scope of a directive and sometimes not for a variety of reasons, not all of which are entirely comprehensible. This results in a heterogeneous application of worker protection directives, with heterogeneous results, both within individual Member States and between States. The differences are not always significant. However, a far-reaching fragmentation ensues, which results also in legal insecurity regarding the realisation and implementation of worker-protection legislation.

It remains to be seen whether future effects on public service will primarily be a further harmonisation or fragmentation. It becomes clear however that these problems will not be solved if directives continue to be passed in social dialogue without reasonable participation and influence by the social partners in public service.
IV. EUPAN AND SOCIAL DIALOGUE – OPTIONS AND OPPORTUNITIES

1. Which are the options between the status quo and formalisation?

Even if Member States are reluctant to decide on a formalisation of the social dialogue, changes to the status quo are still a necessity. The British study on social dialogue already had concluded that "even those opposed to formal dialogue see benefits in less formal methods of contact, and there is a general willingness to consult trade unions or exchange information with them...". It is proposed, "that mutual areas of consideration are developed"69. Albeit being very carefully worded, this statement already goes beyond the status quo. The current social dialogue may reasonably be called ad-hoc and informal. For instance, Austria, Denmark, Finland and the United Kingdom recently consented to pick up certain topics (like worker mobility, leadership, or diversity), to organise and to invite the trade unions (TUNED).

An improved organisation of the informal dialogue may be a primary alternative between the status quo and a formalisation of social dialogue as per Art. 138 TEC. A meeting of the Directors General for example might agree to institutionalise periodical informal meetings (conferences) with the trade unions on certain topics. An added possibility would be a continuous participation of trade union representatives in the EUPAN working groups (particularly the HRM group). Finally it would be conceivable to create a sub-group on "social dialogue" that discusses – in an informal setting – such topics as agreed upon by both the Member States and the trade unions. For the search for topics, the opinions of the Member States (in the study by the British EU Presidency) could serve as orientation.

From the TUNED point of view, a formalisation of social dialogue is the best option. If this does not happen, TUNED proposes the following intermediate steps70:

- mutual recognition of TUNED and EUPAN as social partners,
- working out a joint programme and schedule, creation of 2-3 working group (with 10/15 members), as well as two annual plenary assemblies with all stakeholders,
- establishment of a joint secretariat (in order to prevent undue inefficiency in the cooperation with a rotating and periodically changing Presidency).

69 Study by the British EU Presidency, pp. 17/18.
70 Advice by Nadja Salson (EPSU)
With a future strengthening of informal dialogue it would also be necessary to decide on a set of rules of procedure for the joint working group and the steering group. The Committee on Local and Regional Government rules of procedure could be a suitable template to work from. However, the employers would activate significant resources (time and cost) for the informal realisation of the TUNED proposals, such as for establishing working groups and a secretariat. Under these circumstances, improving the structure of informal social dialogue does not appear particularly desirable: Work load and costs increase, but aid by the EU Commission, either financial or organisational, fails to appear.

2. Can Member States accept a formal social dialogue at all?

2.1 The position of the Directors General of public service

The position of the Directors General on a formalisation of social dialogue was first researched in 2004 (by Mangenot/Polet), and it was evaluated during the British EU Presidency in 2005. The results of the Mangenot/Polet report were presented to the Member States during a meeting of the Directors General in the November of 2004 (during the Dutch EU Presidency). A presentation of the results by Director General Monard concluded that a majority of Member States were in favour of a formalisation of social dialogue.

The British report (2005) also concluded that only very few Member States were opposed to a formalisation. With the exceptions of Cyprus, Luxembourg, Slovenia, Denmark and Sweden (which are already active in CEEP), most Member States have raised no fundamental objections to a formalisation of dialogue. Many Member States are positively inclined towards formal social dialogue (Austria, Germany, Belgium, Finland, Hungary, Italy, Malta, Slovakia). Other Member States represent critical but not negative positions. Ireland's opinion for example is that formal dialogue is acceptable as long as the interests of the employers are sufficiently represented. The Netherlands have made their assent to formal dialogue dependent on a) the assent of a majority of the Member States and b) whether the formal dialogue is effective and useful. Greece has made its consent dependent on an evaluation of costs and benefits, while France sees a necessity of resolving all the challenges obstructing a formalisation first. Portugal opined that the mandate for formal social dialogue should be "limited". Spain is also not opposed to the idea of formal social dialogue, provided that Spanish organisational peculiarities will be respected. Other Member States have not yet adopted a clear position.

Effects on EUPAN

Most of the Directors General see the value and significance of the EUPAN network in its informal character. The network was thus established with the aim of guaranteeing an international exchange of experience in the public service sector. A formalisation of social dialogue between the Directors General and TUNED could call this informal
structure into question by focusing the conceptual work of the network first and foremost around the aspect of the social dialogue. Meanwhile, the agenda of the Directors General Meeting and also (in particular) of the HRM (Human Resources Working Group) could be dominated far too much by dialogue topics. Consequently other informal topics would be pushed into the background. For the possibility does indeed exist that a formal dialogue would have important financial and organisational effects on the network. Thus the question arises whether additional meetings of the Director Generals would be necessary, whether new ad-hoc "social dialogue" groups would have to be established and whether the Troika would have to adapt its work method to the new challenges. All these challenges would have implications affecting finance and human resources.

**Effects on States with CEEP membership**

Some Member States already have an organised formal, cross-sectoral social dialogue. Thus there is no immediate incentive for these Member States to accept an additional, formal (sectoral) social dialogue in the EUPAN network.

**Devolution of powers**

Not all Directors General have a mandate for negotiating for the (entire) public service sector. In many cases the Directors General would have to coordinate with other Ministries in order to guarantee a social dialogue. The internal distribution of competencies has in its turn effects on EUPAN and the structural constellation of human resources. Thus a Sectoral Committee would look completely different in structural constellation to the Meetings hitherto of the Directors General.
Assessment of the major documents of the Ministers and Directors General and also of the Troika since 1991 relating to the statements on social dialogue in the national administrations

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<tr>
<th>Year, Level</th>
<th>Key Points</th>
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<tr>
<td>Ministers Maastricht November 1991</td>
<td>• Perusal of the Commission's suggestions as regards social dialogue; please supply regular information</td>
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<tr>
<td>Ministers Nancy February 1995</td>
<td>• Social dialogue should continue to be discussed at the European level</td>
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<tr>
<td>Ministers Strasbourg November 2000</td>
<td>• First discussion on the issue of creating a Sectoral Committee for social dialogue</td>
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<tr>
<td>Directors General Bruges November 2001</td>
<td>• Acknowledgement of the increasing importance of social dialogue in the Amsterdam Treaty, the provisions of which also relate to the public service sector of the Member States</td>
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<tr>
<td>Ministers La Rioja May 2002</td>
<td>• Increasing importance of the social dialogue in improving public service in accordance with the Declaration of Strasbourg was acknowledged; the initiatives set in motion by the Directors General are of great import and the meetings of the Troika DGs with the European trade unions should be continued</td>
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<tr>
<td>Directors General Denmark November 2002</td>
<td>• Repetition of the statements made in Bruges, emphasis on informality.</td>
</tr>
<tr>
<td>Declaration of the meeting of the Directors General and the European trade unions November 2002</td>
<td>• The growing importance of social dialogue is underlined by reference to the declaration of the Belgian Presidency.</td>
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<tr>
<td>Ministers Rhodes June 2003</td>
<td>• Support of the Commission's study on representativeness</td>
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| Ministers Rome December 2003 | • Informal European cooperation in public administration should be pursued further and extended, in order to promote exchange of information, best practices and joint activities of the modernisation process at the national and European levels.  
• Meetings of the Troika DGs with trade unions form an excellent strategy for constant and fruitful exchange of |
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<th>Event Details</th>
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<td>Directors General Dublin 2004</td>
<td>Discussion on representativeness of social partners</td>
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<td>Directors General and Ministerial Substantive Troika Maastricht November 2004</td>
<td>Positive response to the EIPA study on social dialogue, Disappointment at negative attitude of some trade unions to participation in dialogue with the DGs, Initiative for revival of endeavours is expected from the trade unions, likewise a solution of the representativeness issue and motivation for revival of the informal dialogue</td>
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<tr>
<td>Ministers Mondorf-les-Bains June 2005</td>
<td>Commitment to social dialogue, DGs should examine how it can be developed and improved; Positive response to the foundation of a pluralistic representation of representative trade unions</td>
</tr>
<tr>
<td>Document of the Luxembourg Presidency (accepted by the Troika)</td>
<td>Considerations on deploying a Committee on social dialogue for cooperation and reinforcement in mutual trust, Both sides might specify issues of mutual interest to discuss in accordance with the internal procedures existing at a local/regional government level, or even decide on long-term guidelines in the plenary assembly, A plenary assembly can be held in these terms under every presidency; the implementation of the guidelines can be effected more flexibly through working groups</td>
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<tr>
<td>DG Troika Berlin October 2005</td>
<td>Discussion and exchange of opinion on effects and structuring of a formal social dialogue</td>
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<tr>
<td>General Directors Newcastle December 2005</td>
<td>Positive response to joint conference on diversity with the Trade Union Delegation in Denmark in 2007, British study is presented on position of the Member States for formalising social dialogue</td>
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</table>
| Directors General Vienna May 2006 | • Positive response to progress in informal social dialogue during the Austrian Presidency and expectation that similar will also be achieved furthermore during the Finnish and German Presidency and reported to the meeting in 2007  
• Underlining of the cooperation with common Trade Union Delegation in preparing a joint seminar in May 2006  
• Theme of mobility of public employees was introduced and discussed; positive response to a joint declaration on this topic |
• Information on 46th meeting:  
a) The transitional rules on mobility of labour are exhaustively set out in the candidate contracts and hence cannot be subjected to discussion  
b) Discussions should be limited to the public service topics relevant for the DGs  
c) Recent developments in the coordination of social security, occupational pensions or mobility obstacles in the sciences and academe should be the key focus of discussions with the Trade Union Delegation. |
| Finnish Presidency Draft Resolution December 2006 | Directors General find it valuable to continue informal social dialogue regarding important substantial themes such as leadership, mobility and diversity. Directors General consider furthermore, that there is a need to examine all relevant elements and practical options concerning a social dialogue. The factual document produced under the Finnish Presidency, and the discussion generated thereof, form a sound basis for developing and improving the work before the ministerial meeting which will be held under the upcoming German Presidency |
| Mid-Term Programme 2006-2007, DGs, Luxembourg June 2005 | EPAN-Network guiding principles:  
• Reassessment of the role of public administration in the Lisbon Process  
• Giving priority to networking activities relating to the Lisbon Process |

**Other documents**
2.2 Social dialogue with a limited mandate

In a study by the British EU presidency in 2005, only a small number of Member States spoke against formal (sectoral) social dialogue in EUPAN. This does not mean however that Member States such as Denmark or Sweden are against social dialogue. Rather, these countries have structural reasons for being critical towards a formalisation of sectoral social dialogue between TUNED and the Directors General of public service (within EUPAN).

However, most Member States make their consent to a formalisation of social dialogue dependent on whether the mandate for sectoral dialogue will be limited. Many Member States (Austria, Belgium, Germany, the Netherlands, Great Britain etc.) believe that formal social dialogue should only apply to the central level of public service. Some statements by Member States suggest that certain sections such as police, the military, the judiciary and education (teachers) should be exempt. If a consensus regarding these limitations can be achieved, it in fact appears possible to find a broad majority for formal social dialogue.

3. Cost and benefits of social dialogue for the Member States

3.1 General

The above (legally binding) regulations were passed in the European social dialogue without consultation of the social partners in public services. Yet this issue appears to be insufficiently convincing to deduce a requirement for a European formal social dialogue in public services: until now only three directives were passed in European social dialogue according to Art. 139 TEC. Only about 2% of all agreements reached in social dialogue concern legally binding regulation.

In order to answer the question of whether a formal participation of the social partners in the social dialogue is desirable or not, other aspects need to be considered.

One of the most critical, fundamental issues in the debate for/against social dialogue is if and how (European) social dialogue may contribute to the competitiveness and the economic performance of a country. Because of the large diversity of national structures it is still almost impossible to say which system of social dialogue has the most positive effects on the performance of a national economy. „A definitive statement of the single best system is therefore impossible”71.

Consequently there is no best-practice model in the field of social dialogue today. The European Commission on the other hand has adopted the position that Member States with a developed social dialogue and strong trade unions yield better macro-economic results than systems (states) with an under-developed social dialogue structure.

However, the research does suggest that low coordination generally leads to poorer results than high coordination or no coordination at all.  

3.2 Positive aspects – benefits of a formal social dialogue

What are the positive aspects of a formalisation of social dialogue? Which benefits are there for employers? Why should employers agree to a formalisation of social dialogue – in spite of increasing tendencies of de-centralisation and flexibilisation at the Member-State level? The answer to this question has many layers. In general, there are economical, political and legal arguments for a formalisation of social dialogue.

3.2.1. Formal dialogue does not mean the end for the informal "EUPAN" network

For good reason, Member States keep highlighting the importance of the informal structure of the network. Would formalisation destroy this informal character? This assumption can be confuted: formalisation would not extend across the entire EUPAN network. In later parts of this study it will be demonstrated that the basic structures of EUPAN would continue completely intact. In fact, a formalisation of social dialogue would simply lead to a formalisation of a very limited part of a working group – to be newly set up – and Troika on social dialogue. The EUPAN network otherwise remains untouched.

3.2.2. Financing for projects in the field of social dialogue

Experiences with the sectoral committee for local and regional public service have shown that a formalisation of sectoral social dialogue has opened new possibilities for financing joint activities (through the Community budget). A focus of the work since 2004 (i.e. the creation of this sectoral committee) has been the financing and support for a joint project by the social partners for social dialogue in the new Member States. Similarly important and meaningful activities could be initiated by the Directors General, together with TUNED.

3.2.3. Formalisation does not mean legal codification

The formalisation of social dialogue in public service does not automatically result in a legal codification of social dialogue at the EU level. Considering the increased diversity and autonomy of the social partners, this is rather unlikely. Social dialogue offers – below the codified level of art. 139 TEC - an enormous potential for innovation. Its self-correcting properties make it different from the classical Community method. In April 2006, a coalition of social partners from several sectors signed the first agreement ever, regulating the protection of workers from silicon dioxide dust. Marginson also believes that the new (legally non-binding) method of steering is particularly promising in social dialogue. Especially regarding the "soft law" character of the measures and the increased

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72 Ibid.
74 What is meant is the so-called New Generation Method, which directs target recommendations to the national Members at EU level and checks whether these target recommendations have all been reached by the national Members. This method is very closely related to the so-called method of open coordination (MOC).
flexibility in their implementation, the dialogue has better prospects for acceptance and support (and success). New innovative social partners initiatives could be launched (e.g. on the effects of demographic change on the role of senior employees, life-long learning, ethics, anti-discrimination in performance evaluation etc.). Joint projects for the improvement and documentation of public relations for public services are also conceivable (flagships and role models - "where is public service superior to the private sector"). There are mutual interests with the trade unions in this area.

3.2.4. Competition policy arguments

Until now, the primary arguments for new social policy initiatives at the EU level were related to competition policy. For example, concerns that different standards for worker health protection, working time and gender-based discrimination could result in distortion of competition were the primary arguments for the harmonisation of national social standards. "Differences in industrial relations practices bring about differences in employment conditions: consequently, it could have been argued that the harmonization of national practices is important in order to avoid distortion of competition and/or to promote free movement of labour. It is no more arbitrary to use such an argument to justify the harmonization of industrial relations than to justify, for example, a directive on the transfer of undertakings. The impact on competition of differences in national regulations is no less direct in the former case than in the latter"75.

Today, the importance of European social dialogue viewed less as an instrument for the equalisation of the national competitive situations, although the question as to which effects social dialogue has on national and European competitiveness is still not answered conclusively76. Rather, social dialogue is occurring more in the context of governance and Lisbon discussions. In this setting, it is increasingly accepted that systems with a working social dialogue make a positive contribution to overall competitiveness and governance. In this light, national public services should be interested in placing emphases of their own.

3.2.5. Governance and contribution to the Lisbon strategy

Regarding the benefits of social dialogue, the European Commission argues in its 2006 report on industrial relations in Europe that cooperation between employers and trade unions (...) may contribute to increasing growth. It is also argued that social dialogue in public service may contribute significantly to the Lisbon strategy; i.e. as a global competition factor within the framework of European competitiveness77. The European Commission therefore views social dialogue as an important element in the European

77 The open method of coordination can be seen as a new approach to governance in the light of three characteristics of governance in the EU: the principle of subsidiarity, flexibility and legitimacy (D.Hodson/I.Maher, The Open Method as a New Mode of Governance: The Case of Soft Economic Policy Co-ordination, Journal of Common Market Studies 2001, pp. 719-746 (727)) The open method, being focused on horizontal learning processes and peer pressure where individual action runs counter to broadly accepted principles, is dynamic in nature, heterarchical, decentred as a modus operandi and without any particular rule or single policy objective as an objective (ibid., p. 728)
governance concept\textsuperscript{78} and within the Lisbon strategy. In its communication on "Partnership for change in an enlarged Europe - Enhancing the contribution of European social dialogue" (COM (2004) 557, final version 12 August 2004), the Commission concludes: "Sustainable employment and productivity growth needs to be underpinned by increased and more effective investment in human capital and better job quality. Well-developed working relationship systems can help to create favourable conditions for innovation, improvement of job quality and competitiveness"\textsuperscript{79}.

3.2.6. Political legitimacy and political mission:
The formalisation of sectoral dialogue at a central government level would affect a very large number of workers. Following the formalisation of the sectoral dialogue for regional and local administration in 2004, such a development would give new impetus to social dialogue at the EU level and highlight its legitimacy. Art. 2 TEU underscores the overall priority of social policy in the EU.\textsuperscript{80} Ministers and Directors General responsible for public services have repeatedly pointed out the importance of social dialogue. Positive opinions and requests to enhance social dialogue in public service were first voiced in 1991 and have since been on the agendas of the various presidencies.

3.2.7 More information
Besides the arguments set out above for a reinforced social dialogue, there is another significant argument for a formalisation of social dialogue in the legal sphere and in the practical consequences. Accordingly, in future the European Commission should have to consult the Directors General before circulating all socio-political proposals (Art. 138 paragraph 2 TEC). Afterwards the Commission should note the Directors General on the contents of the intended proposal (Art. 138 paragraph 3 EC Treaty). This means that the Commission has to have a double consultation with the Directors General\textsuperscript{81}. On the other hand, the Directors General receive the formal possibility of influencing the Commission prior to and during the processing of proposals and possibly prevent the adoption of guideline suggestions. Should it come to a formalisation of social dialogue, the Directors General thus acquire considerably more information and opportunities to influence than previously. Or, to put it another way: formalisation allows employers to control the development and the results of social dialogue. This view is also shared by the Commission\textsuperscript{82}.

3.2.8 More legal security and legitimacy:

\textsuperscript{78} The Commission defined governance for the purposes of its work programme as encompassing the rules, processes and behaviour that affect the way in which powers are exercised at the European level, particularly as regards accountability, clarity, transparency, coherence, efficiency and effectiveness (COM White Paper on European Governance, Commission Staff Working Document SEC 2000, 1547/7 final, 11 October, page 4)

\textsuperscript{79} European Commission, 2004, op. cit.

\textsuperscript{80} Streinz, Art. 136 marg. no. 4

\textsuperscript{81} However, it has not been sufficiently clarified what legal consequences occur when participation of (acknowledged) social partners is refrained from.

The formalisation of social dialogue for public services offers the incontrovertible advantage of informing Directors General on new Community initiatives more reliably, earlier, and better. They could therefore make much improved provisions that the effects of Community initiatives and their effects on public services are evaluated beforehand and more efficiently than hitherto. This kind of regulatory impact assessment could avoid later legal insecurities in implementation already at the preparatory stage. Thus in the past - especially in the three framework directives adopted in social dialogue – there has been constant insecurity whether and to what extent these directives are applicable to public employees.

In addition, comprehensive individual issues on the process have already been clarified for formalised cooperation. This permits a greater proportion of continuity and calculability of the total process.

3.2.9. More influence and improved lobbyism

Conversely, "Europeanisation through the back door" would no longer be possible in the future, since the Directors General would always be in a position to influence the decision-making process. This includes the possibility of stopping legal initiatives of the Commission and/or changing/tightening/watering down the regulatory contents of these initiatives, etc. Vice versa, Art. 138 and Art. 139 TEC permit employers to initiate a social dialogue and adopt measures (if they wish). The negotiations on teleworking and stress at work are practical examples for this.

“The true value of the ESD seems to lie in the entry into the European policy process it provides the social partners. It has been shown that the framework of the ESD has provided the sectoral social partners with an alternative channel for promoting their shared sectoral interests. The ESD has not developed into an alternative or complementary level of industrial relations or collective bargaining, but has taken a position within the European multi-level system of policy development. The influence the social partners can exert through this channel is not limited to social policy (as it is in the consultation procedure laid down in the Maastricht Treaty), but extends to anything within the Commission’s competences. As such, the most important value of the ESD is that it provides the social partners with a degree of influence in the European policy process83 “If Council directives, policy proposals, White or Green Papers have a potential effect on a sector, the social partners frequently use the ESD as a channel for access to the policy process in order to promote their sectoral interests. In most cases, this does not concern social or employment policy issues at all”84, “....it has been shown that especially in the sectoral dialogue the possibilities provided by the framework of the ESD have enabled the social partners to voice their opinion on virtually any legislative proposal at the EU level that has an impact on their sector”85

3.2.10. Learning process for new Member States

After all, a formalisation of social dialogue opens up a learning process for the Member States in which social dialogue has hitherto played only a subsidiary role. In this respect social dialogue may set an example "for countries with weak social dialogue structures

83  Ibid.
85  De Boer et al., cit. op., p. 67
It may demonstrate 'how social dialogue' works and that social partnership can lead to positive results that benefit both management and labour. To this extent, a formalisation of social dialogue would lead to a "Europeanisation of the social dialogue" in the new Member States. This development could also have positive effects both as regards political competition and with a view to the development of good governance.

3.2.11. Autonomy despite formalisation

EU social law has not by any means demonstrated that it is irrelevant for the Member States. It requires some "considerable reforms at the national level." However, there is no complete harmonisation even in areas such as work hours regulations or child-rearing leave. In actual fact, the danger of over-regulation and/or harmonisation in the field of EU social and labour laws has never cropped up simply on account of the formulation in the TEC. The social chapter in the Treaty of Nice is far more effective in guaranteeing the Member States a great measure of flexibility. It just enables the adoption of minimum standards. The Member States are not prevented from "maintaining or introducing more stringent protective measures" (Art. 137 paragraph 4 TEC). Finally, the treaty specifies that directives "shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings" (Art. 137 paragraph 2 (b) TEC). In recent years the issue has been raised time and again of how detailed a section should be regulated. The question had far more to do with whether anything at all should be regulated.

As in other areas, a new "regulation style" is being applied in the field of social politics. Thus the emphasis is moving further and further away from detailed forms of intervention to "softer" ones. Furthermore, application of methods of open coordination leads to a rejection of the once classical Community methods. MOC allow the specification of guidelines and qualitative and quantitative indicators for development in the Member States and also regular monitoring, assessment and reciprocal inspection. This has led to a new type of decision taking and to new instruments also in social dialogue. Thus, the social partners negotiate autonomously at the European level and decide on recommendations for their own national contract parties, "who (...) take over at the national level." Coordination does not yet imply harmonisation. Harmonising social laws would embrace regulations which would compel States to a corresponding adjustment to national regulations. With the exception of Art. 141, TEC, there is no inkling of this in Art. 137, TEC. The MOC supplement the political apparatus simply with the aim of supporting Member States in the step-by-step development of a strategy. The MOC specify common goals; but the option remains with the individual Member States as to which means it uses to attain these goals.

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87 Falkner/Treib, cit. op., pp. 235/236.
88 Falkner/Treib, cit. op., p. 234
89 refer to Bieber/Epiney/Haag, § 7 marg. no. 6
91 Fuchs, in: Fuchs, Europäisches Sozialrecht, Rz 37
3.2.12. Centralising social dialogue at the EU level – decentralisation in the Member States:
A study by the Austrian EU Presidency (2006)\(^{92}\) concluded that many EU Member States are pursuing a policy of decentralisation in human resources. This gives rise to the question as to whether a social dialogue at the EU level would have centralising effects. “In fact, many observers are still doubtful as to the future of the European social dialogue. Some contest the need for such a highly centralised level of regulation, and claim that the trend is towards deregulation and decentralisation. Firms and workers are expected to be flexible and are badly served by the inflexibility that often characterises central regulation (....) On the other hand, the real world is not characterised solely by decentralisation, fragmentation and flexibilisation. There are powerful “currents” of centralisation.....”\(^{93}\). Neither does the above-cited study of the Austrian EU Presidency see an unambiguous trend towards complete decentralisation. One can speak far more of a development aiming at a better balance between decentralisation and centralisation.

3.2.13. No Europeanisation of the formal social dialogue.
Formalising the formal social dialogue in the public service sector is subject to criticism in the national public services, since this development could lead to a competency transfer (and thus to a centralisation of competencies for public services) in Brussels. Supporters of a formal dialogue counter this with the argument that this is an extremely theoretical fear. A look at the actual practice would very quickly rebut this fear. Accordingly, the development hitherto in social dialogue has contributed only to a "limited development of a European system of industrial relations"\(^{94}\). Considering the ongoing expansion of the EU to 27 Member States and an increasing heterogeneity in the structures of social dialogue at the national level, the danger of a strong Europeanisation of the public service sector is not imminent. This diagnosis does not mean, however, that the developments in social dialogue are insignificant. On the contrary: The study by Falkner and Treib shows "that the EC social directives under investigation have resulted in tangible improvements for many groups of workers in the Member States..."\(^{95}\). Another study by Marginson sees the benefits of the new sectoral social dialogue in a changed objective of social dialogue. Whereas in the past dialogue was conducted primarily in order to influence European developments, today the practice of adopting target agreements, guidelines and basic agreements directed at the national level (and at national Members) is becoming increasingly common\(^{96}\).

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\(^{92}\) Demmke, C./Hammerschmid, G./Meyer, R., Decentralisation and Accountability as a Focus of Public Administration Modernisation, Maastricht 2005.


\(^{94}\) De Boer et al. op. cit., p. 54

\(^{95}\) Falkner/Treib, op. cit., p. 227.

\(^{96}\) Marginson, op. cit., p. 516.
3.3. Open questions and implementation problems

3.3.1. Necessity of political will
An important prerequisite of a successful dialogue is a minimum of trust and the readiness to work together effectively and efficiently. A successful dialogue therefore does not only depend on whether the social partners can recognise the added value in the European social dialogue. In addition, a dialogue firstly has to be trained. So the first tangible results cannot be expected on the short term. Which makes allowing sufficient time for an effective dialogue all the more important. Until now it is not clear whether there exists a great readiness in all Member States for cooperation. “If either is unwilling, there will be no favourable prospect for the development of a fruitful dialogue”97. "In the end, the decision of the social partners to engage in social dialogue hinges predominantly on their perception of potential benefits. If there seems to be a lack of such benefits at European level, it is not worth the effort to overcome the above-mentioned problems of diversity”98.

3.3.2. The added value of formal social dialogue is highly dependent on the European Commission.
The willingness of the social partners to negotiate hinges on which social policy initiatives are being planned by the European Commission, exerting pressure on the social partners (Art. 138 TEC)99. The position of the European Commission is more defensive than offensive. In recent years the Commission has very much held itself back in issues of legal initiative. It has increasingly respected the wish of the social partners to conduct a more self-reliant dialogue and to guarantee the autonomy of the social partners100.

But this raises the question as to what significance a formal social dialogue has without the pressure of negotiations101. From the point of view of the Member States there is moreover the classical possibility of exercising influence on the traditional legislation processes of the EU, when social policy proposals (such as the working time directive) are negotiated in this way in any case102. All the while, the Commission's approach is directed towards supporting qualitative changes oriented towards more autonomy, responsibility and negotiating capability of the social partners, namely at both the central and the sectoral levels. This affects all phases of the political process. Other than in the three basic agreements of the 1990s outlined above, national associations should play a central role in the implementation of bilateral, autonomous agreements. This is after all an expression of the qualitative change in social dialogues using methods of open

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98  De Boer et al., p. 55
100 Commission, 2004 op. cit.
101 De Boer et. al., op. cit., pp. 55/56.
102 Over and above this there is still the option of guiding the decision-making process via the national influence channels (The evident question is why one would want to discuss issues, or even negotiate agreements within the framework of the ESD, if a more favourable outcome can be achieved through other channels available in the multi-level system of European policy development, principally the national system of industrial relations” (De Boer, op. cit., p. 55/56.)
coordination, which here demonstrate their benefits in comparison with classical Community methods.\(^{103}\)

### 3.3.3. Implementation problems of the agreements

The question regarding the benefits of a political sector can also be answered by examining whether the (legal) instruments in question are correctly and punctually implemented and executed. The issues of the conceptually correct and punctual implementation of Community laws in the Member State has been under discussion for years. In the sector of European social policy, Falkner and Treib come to the conclusion that "there are considerable implementation deficits in the EU, both in the legislative adoption of European standards and in the areas of their enforcement and practical application"\(^{104}\). These problems cropped up even more so in the sector of social dialogue, since implementation of the resolved agreements according to the procedures and practices specific to management and labour and of the Member States (Art. 139 paragraph 1) throws up special challenges and issues. Hence in 2005 the coverage rate of execution for autonomous agreements (Art. 139 TEC paragraph 1 TEC) was between 20% in Lithuania and Latvia and up to 100% in Austria and France\(^ {105}\). As ever, the "central problems of implementation and monitoring (...) have not been solved"\(^ {106}\). Accordingly one might ask what the benefits of a long-term social dialogue are if the results are not or only partly implemented. From the Commission's point of view, therefore, the implementation of the Teleworking Agreement is a test case for the effectiveness of agreements resolved on the basis of Art. 139 paragraph 1 TEC\(^ {107}\). If the Member States do not or only inadequately implement these new instruments, the Commission will leave the option open of making a suggestion for a directive, if need be. However, some Member States are against Art. 249 TEC as a regulating instrument in the social sector.

### 3.3.4. Centralisation of competencies in Brussels?

Establishing a formal dialogue for the Directors General of the public service sector arouses misgivings in some countries, since there is the fear that such a development could lead to competency transfer in the public services – a Europeanisation of the public services. Very similar argumentation applies to the fear of centralisation of social dialogue at the EU level. Many critics of this development see a contradiction between the present trend towards decentralisation and flexibility in industrial relations and the attempt to formalise social dialogue at the EU level. “In fact, many observers are still doubtful as to the future of the European social dialogue. Some contest the need for such a highly centralised level of regulation, and claim that the trend is towards deregulation and decentralisation. Firms and workers are expected to be flexible and are badly served

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103  In whole Keller 2006), p. 155 ff
105  Ann Branch, op. cit., p. 327.
106  Keller, Aktuelle Entwicklungen, op. cit.
by the inflexibility that often characterises central regulation” 108 Particularly countries that unilaterally stipulate the working conditions for civil servants might also harbour concerns about these national structures being thwarted by a Europeanisation of the formal dialogue.

3.3.5. Resource wastage and inefficiency in social dialogue hitherto

Occasionally the Directors General draw attention to the danger of resource wastage – without additional benefits. Thus results hitherto have yielded few tangible results in the Committees. There is also the danger that a very large number of issues might be discussed at the EU level, even if this is not true for national social dialogue. The study by the British Presidency has indeed demonstrated that the range of topics proposed by the Member States is very wide. This brings with it the danger furthermore that social dialogue is given a quantitative rather than a qualitative dimension.

An effective and efficient formal social dialogue at EU level thus presumes that there is agreement on each topic that is to be discussed. Besides, a social dialogue is only beneficial if these topics are substantial and do not affect areas that would not be the subjects of discussion on the national level either. The Austrian answer to the British study on social dialogue (2005) thus demanded that a social dialogue should keep very close to the limits of the Social Chapter in the Treaty: "Social Dialogue must not become a Trojan horse which could wear away the principle of subsidiarity". From this perspective, therefore, a limited and substantial catalogue of topics should be determined before talks with the trade unions are started.

3.4. Conclusion and recommendation to the Directors General

Research hitherto has shown numerous positive aspects supporting formal social dialogue, however, open questions and implementation problems have to be taken into account.

<table>
<thead>
<tr>
<th>Positive aspects</th>
<th>Open questions and implementation problems</th>
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<tbody>
<tr>
<td>- The majority of the Member States are in principle for it</td>
<td>- Incompatibility with the situation in some Member States</td>
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<tr>
<td>- The majority of the member states for EUPAN as forum</td>
<td>- Negative effects on EUPAN structure</td>
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<tr>
<td>- Results of social dialogue hitherto are also very positive</td>
<td>- Experiences hitherto not only positive</td>
</tr>
<tr>
<td>- Social dialogue as contribution to the Lisbon Process</td>
<td>- Danger of inefficiency, choice of topics too spread out</td>
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<tr>
<td>- Potentially positive effects on political competition</td>
<td>- Limitation to substantial topics necessary</td>
</tr>
<tr>
<td>- No danger of Europeanisation of the public service sector</td>
<td>- Competency extension of the EU to public services</td>
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<tr>
<td>- More legitimacy by a formalisation of social dialogue</td>
<td>- Differing mandates of the Directors General</td>
</tr>
<tr>
<td>- More influence of employers through improved options of influence, lobbying and information</td>
<td>- New personnel structure of the Committee necessary</td>
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<tr>
<td>- More legal security</td>
<td>- Centralisation of the dialogue on EU level?</td>
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<tr>
<td>- Accustomed and practised processes</td>
<td>- As yet great problems of implementation in social dialogue</td>
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<tr>
<td>- Learning processes for the new Member States</td>
<td>- Change of formal structure does not influence the (possibly nationally dominated) status quo of interests</td>
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<td>- Autonomy of the social partners</td>
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<td>- No danger of over-regulation by soft law</td>
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<tr>
<td>- Continuity, calculability and trust</td>
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<tr>
<td>- Diffusion of the public service sector to national collective negotiations</td>
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Countering this, when weighing up the advantages and disadvantages of a formal dialogue, it must be concluded that the advantages of a formal dialogue outweigh the disadvantages. Accordingly our research will be a recommendation FOR a sectoral, formal social dialogue.
This recommendation depends on certain prerequisites, however. In particular, concerns regarding the effects of a formal dialogue on EUPAN should be scrutinised. The key topics of a social dialogue are to be limited and exactly pre-defined. Finally, a future social dialogue must be prevented from creating more resource wastage than it produces as benefits.

Yet the advantages outweigh the disadvantages: most Member States support a formal social dialogue. They are justified in seeing the advantages formalisation can bring as regards their own lobbying capacity, information acquisition, and capability of consultation. In addition, a formalisation of social dialogue would have important legitimising effects: "Europeanisation through the backdoor" would no longer be possible. Moreover, it is left to the social partners how far they wish to enter into social dialogue. The agreement allows the social partners an optimal degree of flexibility. Furthermore, it is not to be expected that in future too many legally binding initiatives will crop up. Thus hardly any negotiations will have to be conducted in "the shadow of the law".

However, this also means that whatever happens social dialogue might turn out to be a toothless tiger and employers will be the first to see there are no benefits involved. But this all depends on the political will of employers and labour to practise a social dialogue that is profitable and efficient for both sides.

4. Cross-sectoral or sectoral dialogue?

4.1. Cross-sectoral dialogue in CEEP

In principle, there are two possible levels for a formalisation of social dialogue – cross-sectoral and sectoral. As the name implies, the cross-sectoral social dialogue affects all sectors. In contrast, the sectoral social dialogue refers to only one sector (e.g. the central public service sector). As yet, successful social dialogues have been practised on both levels at EU level.

For an inter-sectoral solution the only option would involve membership within the European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest (CEEP)\(^\text{109}\). In this case a mandate of Ministers would have to invite the Directors General to enter a dialogue with the institutional partners in cross-sectoral social dialogue with the support of the European Commission. In a formal social dialogue, the Directors General, each one as a (small) part of CEEP, would then have to vote internally and coordinate their representational competency and also their conceptual positions in the context of the CEEP "Social Dialogue" Committee.

CEEP is the European interest group of business concerns and organisations with public participation, and of business concerns and organisations that provide services in the general interest. CEEP is likewise the European association of public employers and as such one of the European social partners recognised by the EU Commission.

\(^{109}\) http://www.ceep.eu/
As a cross-sectoral European social partner, the CEEP organises "social dialogue" at the European level together with the Union of the Industries of the European Community (UNICE) and the EU Trade Union Confederation (ETUC). Most of the members of CEEP are firms and organisations in the sectors of transport, energy and water supply, disposal, housing sector, post and telecommunications, research, credit and insurance industry and in other public service sectors. Meanwhile, regional and local employers associations of the public services are members of CEEP.

As yet five public employers associations of the public service sector belong to CEEP: United Kingdom (the Cabinet Office, among others), Italy (ARAN), Denmark (State Employers Authority), Finland (State Employers Authority) and Sweden (Swedish Agency for Government Employers), which cover the central state level.

Membership in CEEP is independent of the tenure of the firms and organisations. It is also independent of whether these are active at international, national, regional or local level.

Regarding the effects of a CEEP membership on representation of interests, Denmark opines that CEEP suffices for work at the cross-sectoral level, while Sweden thinks that the informal social dialogue as practised by the Troika of Directors General and the European Trade Union Organisations works well and is an appropriate process for application on the sectoral level.

Membership in CEEP - i.e. in cross-sectoral dialogue - has the benefit that the Directors General of the public service sector would be represented in a body that has already seen negotiations in the cross-sectoral social dialogue for some time. Membership in CEEP thus offers Member States a certain degree of professionalism and continuity. Besides, there is another argument for an cross-sectoral dialogue: According to Polet/Mangenot, some Member States entered the CEEP in order to exercise a certain degree of "control" over the cross-sectoral dialogue. Accordingly, membership in the CEEP could be used to prevent agreements in cross-sectoral dialogue from being counter to national and local HRM decentralisation trends.

This argument does not convince, however, since cross-sectoral dialogue has as not yet or scarcely ever contributed to the centralisation of social dialogue. Since it is hardly conceivable at the moment that in future a sectoral social dialogue between the trade unions and TUNED could lead to more legal activity (e.g. through Art. 139 TEC), membership in CEEP will not lead to serious centralising effects.

Moreover, some Member States doubt whether the CEEP structures are at all compliant with the specific interests of central public service employers. There are no definite answers to this question.

But it must be said that, from the CEEP perspective, the "intrusion" by central public service employers presents a problem and opens up a debate of both legal and political nature. This problem was underlined especially in the Swedish answer in the British study on social dialogue: „.....many countries’ central administrations have not yet
separated their role as employer from other government business, why they most likely can not join the CEEP.\(^{110}\)

Mangenot/Polet, too, doubt that representatives of the national governments fit into the structure of the CEEP. "On the one hand, in terms of activity, economic environment and working conditions, public enterprises (whatever the level of public participation in their capital) are clearly different from public administrations. On the other hand, most of these public enterprises are already participants in social dialogue in the Sectoral Committees for their own sector of activity or are likely to join this social dialogue or participate in the formation of a specific new Sectoral Committee. For example, Sectoral Committees have already been established for the postal sector, telecommunications, sea transport, civil aviation and railways.

In addition, it seems logical to exclude from the social dialogue in the public administration sector the armed forces and the police service and their staff as well as the diplomatic corps and the judiciary. We have seen, for example, that international agreements, both at the Council of Europe and at the International Labour Organisation, provide an exception for these services in terms of negotiating working conditions.\(^{111}\)

Hence the prospect of expanding Director General membership in CEEP appears problematic at least. CEEP is reluctant (for legal and political reasons) when it comes to the membership of 27 employer representatives from the public service sector. However, neither Denmark nor Sweden see any reason as yet to reconsider their membership in CEEP. So the question arises whether a sectoral dialogue is possible a) without the participation of these Member States or b) with the participation of these States as CEEP observers. This issue is addressed in Chapter V, 2.2.1.

4.2. The sectoral social dialogue

In the past, sectoral social dialogue has received less attention than the cross-sectoral dialogue. This is astonishing, since most of the social dialogue between the Member States takes place on sectoral level. Sectoral dialogue "represents the backbone of the bargaining structure in most continental countries."\(^{112}\) However, there are trends to supplement or replace the inter-sectoral and sectoral social dialogue with social dialogue at the level of the organisation ("in smaller countries sector bargaining finds itself squeezed between the national and the company level")\(^{113}\).

As a rule, the benefits of sectoral dialogue are its greater flexibility in comparison with cross-sectoral dialogue. In his study, Marginson establishes that cross-sectoral dialogue can in any case address only a limited number of issues that are of interest for the relevant

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110 Study by the British EU Presidency, pp. 91/92.
111 Mangenot/Polet, op. cit., p. 66.
(sectoral) social partner. In contrast, sectoral dialogue is capable of responding to more specific issues\textsuperscript{114}.

4.2.1. Committees in the sectoral social dialogue

When analysing the results of previous social dialogue at the EU level there it is important to differentiate between the development of the number of Sectoral Committees, the number of social dialogues, as well as the qualitative and quantitative results of the dialogue\textsuperscript{115}. The European Commission sees a significant indicator for success in the sectoral social dialogue especially in the growing number of Sectoral Committees. Indeed, the number of Sectoral Committees has grown constantly (if slowly). By 2006 there were 33 Sectoral Committees involving very different sectors.

- Agriculture
- Audiovisual Banking
- Chemical industry
- Civil aviation
- Cleaning industry
- Commerce
- Construction
- Electricity
- Extractive industry
- Footwear
- Furniture
- Horeca
- Hospitals
- Inland waterways
- Insurance UNI-Europa
- Live performance
- Local and regional government
- Personal services
- Postal services
- Private security
- Railways
- Road transport
- Sea fisheries
- Sea transport
- Shipbuilding
- Steel
- Sugar
- Tanning and leather
- Telecommunications
- Temporary agency work
- Textile and clothing
- Woodworking

\textsuperscript{114} Cf. Marginson, op. cit., p. 512.

Each Committee specifies its rules of procedure. The Committees meet at least once a year for a plenary assembly. More specific issues are addressed at extended sessions in the secretariat or in smaller working groups. Preparation of the sessions, working out the agenda and the follow-up are usually transferred to the specific secretariats of the social partners in collaboration with the Commission. According to estimates\textsuperscript{116} the Sectoral Committees cover more than 50\% of all employees in the EU today.

4.2.2. Present results in the sectoral dialogue

According to a study by Pochet (2005), 353 measures had been adopted in the sectoral social dialogue by the year 2005\textsuperscript{117}.

\textsuperscript{116} Cf. Marginson, P., op. cit., p.514; EIROONLINE (2004) mentions 52\%

The majority (216) of these measures involved Joint Positions and Statements (46). As yet, 5 statements were adopted in the Committee on Local and Regional Government.

Of all measures met as yet on the sectoral level, only 5 (i.e. 2% of all measures) were legally binding agreements (cf. Pochet 2005, 321). In only three cases were agreements based on Art. 139 paragraph 2 sentence 2 TEC.

Source: Pochet (2005)\(^{118}\)

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\(^{119}\) Pochet, op. cit., p. 321
Results based on Art. 139 paragraph 2 sentence 2 TEC in the sectoral dialogue

- European Agreement on the regulation of working hours for seamen, 1998
- European Agreement on work organisation of flying personnel in civil aviation, 2000
- Agreement on certain aspects of working conditions of mobile railway workers employed in cross-border interoperability service, 2004


Source: Pochet (2005)

The following issues have received the most attention (especially after 1998). a) social dialogue, b) working conditions, c) economic and sectoral policies and d) further education\(^{120}\).

\(^{120}\) Pochet, op. cit., p. 326.

<table>
<thead>
<tr>
<th>SSD : Number of documents by topic (1978-2004)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1978-1997 : white : 162 docs</td>
</tr>
<tr>
<td>1998-2004 : grey : 191 docs</td>
</tr>
</tbody>
</table>

- Ec. and/or sectoral pol. 28
- Social dialogue 48
- Working conditions 26
- Training 23
- Employment 26
- Health and safety 15
- Soc. aspects of Community pol. 15
- Working time 16
- Enlargement 14
- Non-discrimination 18
- Sustainable development 14

Source: Pochet (2005)

According to Keller, the issues addressed by social dialogue do not usually involve potentially conflict-loaded industrial relations. Thus, "success in bilateral, autonomous negotiations was limited almost by definition to consensual issues". Particularly the UNICE has displayed very little willingness to negotiate and come to agreement in recent years, due to the fear that the situation could only become worse. European institutions were clearly the primary addressees of the joint work, followed by national associations and the European social partners. Keller's statements also confirmed that 75% of all common positions were addressed to the European institutions. Thus, the real objective of these positions was to influence European institutions, rather than to commit members to actions of any particular kind.

Thus, the social partners only rarely manage to agree to enter (binding) negotiations. If this happens it is mostly because they fear the imposition of possibly unfavourable Community measure by Community institutions (as with the parental leave directive).

The trend in the choice of social policy instruments is clearly towards the new forms of self-regulation, particularly since the so-called Laeken Declaration in 2001. This

121 Keller, Aktuelle Entwicklungen, op. cit.,
122 Pochet, op. cit., p. 328.
123 "Three-quarters of all joint statements are targeted exclusively at EU politics, which means that these results are in no way intended to commit the national affiliates to anything, but are targeted purely at influencing European policy in some way. If one adds those statements that are targeted at both the member organizations and EU politics, the percentage is even higher, 85 per cent.” De Boer, et al., p. 62.
124 Spieß, op. cit. p. 24
development towards legally non-binding apparatuses is negatively estimated by most experts, since it concerns purely "intentional declarations" (Keller), especially as regards the results ensuing from social dialogue. However, other observers also point out the opportunities ensuing from this development: The new social dialogue generation is leading to a situation where the "social partners direct recommendations to their members at a European level and the national social partners follow up at national level"

This benchmarking and monitoring process was adopted from the open coordination method. Though seen critically (in academia), it is not judged exclusively negative.

4.2.3. Advantages of sectoral dialogue in EUPAN

Experts like Keller, Falkner and the European Commission are at present aware that the significance is shifting towards sectoral social dialogues. "Sectoral social dialogue is a more suitable regulation instrument for the development of a 'European' labour and social policy than cross-sectoral dialogue (....). Compared with cross-sectoral social dialogue, better and better adapted agreements may be negotiated -- more flexible and more specific."\textsuperscript{127}

Consequently the majority of EUPAN members, too, take a positive stance towards a sectoral dialogue. Also the local and regional public services – jointly with EPSU – resolved as early as 2004 to set up a Sectoral Committee. The decision to participate in cross-sectoral social dialogue (and membership in CEEP) would contradict this development.

4.3. Conclusion

When choosing between the options of a sectoral or cross-sectoral social dialogue, most Member States end up with a positive vote for the sectoral dialogue. A fundamental reason for this stance is that a sectoral dialogue is more flexible than cross-sectoral dialogue within and between the major social partner organisations. After all, it is not clear at present whether the statutes of the CEEP permit candidacy of all central public

\textsuperscript{125} "The declaration by the inter-sectoral social partners confirms that the direction in which the ESD is developing is clearly away from the path of legally binding agreements. While it has been shown that in terms of actual results, this path has not been much trodden before, this formal statement obviates any further prospects for the conclusion of European collective agreements, and further confirms the non-existence of a European system of industrial relations. By focusing on more voluntary agreements, the inter-sectoral social partners more or less confirm the limitations imposed by the cross-national diversity identified in the introduction to this article. Without a realistic threat of legislation enabling the Commission to pressure the social partners into negotiations, and with the wide differences on a variety of aspects of employment regulation both between and within countries, it seems unlikely that many framework agreements will be concluded in the future, let alone implemented by Council decision. In its communication on the ESD in 2002, the Commission stated that the social partners will have to make the first move towards negotiating a framework agreement, thus implicitly affirming its refusal any longer to steer the ESD. Cf. European Commission, 2002, p. 8.

\textsuperscript{126} European Commission/DG V (2004), The promotion of social dialogue in an enlarged Europe. Luxembourg, COM 2004, 557 final 14

\textsuperscript{127} Keller, Sektorale Sozialdialoge, in: Baum-Ceisig/Faber, A., op. cit., p. 239. Falkner (2003) says, the "Cross-sectoral dialogue is running out of steam." The European Commission (2002,9) also sees advantages in sectoral dialogue
For these reasons – from the employers' point of view – sectoral dialogue is preferable to cross-sectoral dialogue.

5. Social Dialogue within the Scope of EUPAN

Recent years have especially demonstrated that despite its (financial) limitations the network was capable of further developing its work in a very flexible form, with the aim of improving the performance of administrations and the quality of the services they provide. The "representative character" of this network as a "social partner" is uncontested, since it is made up of the Ministers responsible for public administration and their Directors General, who engage in social dialogue with the trade unions in most Member States.

The possibility of using the EUPAN network for social dialogue seems thoroughly realistic. A process could be carried out on the sector level of the "central government public services" which would operate according to the following steps:

a) A decision of the Ministers could transfer the responsibility for the necessary organisational steps to the Directors General within the framework of EUPAN.

b) The form of organisation then found would be requested to initiate discussions with "TUNED" and the European Commission in order to prepare the establishment of a European social dialogue committee for the "public service" sector.

This future formalisation of social dialogue could be supported by the resources already available in the Community budget, thus "facilitating this dialogue". An organisational structure for central government employers organised within the network framework could gain benefits from the budgetary and logistical support of the European Union and the Commission - in the same way as the other protagonists in the European social dialogue are supported.

5.1. Is EUPAN acceptable to the Member States as a forum for formal social dialogue?

Most Member States who took part in the poll run by the British EU Presidency are of the opinion that EUPAN could be a forum for a formal social dialogue. Nearly all critical comments from the Member States do not refer so much to EUPAN as a possible forum for a formal social dialogue. Some Member States (e.g. the Netherlands and Sweden) have a far greater fear that a formalisation of social dialogue within the EUPAN framework could seriously affect its present structure. In this case, a formalisation of social dialogue could make additional demands on organisational, financial and human resources which the network cannot as yet resort to. Conversely, however, it is precisely the financial and organisational support on the part of the European Commission that ensures that EUPAN resources are not overtaxed.
The status of formed opinion within the Member States was not yet defined in 2006. At the time the British study on social dialogue was being composed, various Member States had not yet defined their positions. However, it was apparent that a large majority of Member States was not opposed to a formalisation of social dialogue. This positive vote is bound to several conditions, however. Most of the Member States are only prepared to accept formalisation if the mandates are limited to the central public service sector. Over and above this, there seems to be a majority voting for a limitation of the choice of topics. So no majority exists for a choice of topics that would extend beyond the topic list of Art. 137 TEC. This restriction is significant, because through it other topics would be excluded, for instance the freedom of movement for those employed in public service (Art. 39 paragraph 4 TEC).

5.2. The question of representativeness

"Social partners" is not defined as a term in the Community treaties. Usually this is the recognised parties in collective bargaining in the respective Member State. Art. 138 f TEC is particularly crucial for the representation of the interests of workers and employers. Yet, the Commission is obliged to hold a consultation for proposals pertaining to Art. 137 TEC only if there is an intention of using it as a basis for Community legislation. Therefore the term needs to be better defined to make it discernible from a purely informal, advisory participation of organisations prior to legislation. This applies all the more as regards the social partners' competency, granted through Art. 139 TEC, of drawing up autonomous agreements. Representativeness is seen as a key criterion, as well as the technical capacities, as far as the texts of the social partners are concerned.

In its decision of 20 May 1998, no. 98/500/EC, Official Journal L 225/27, the Commission states that a committee attached to the Commission for the sectoral dialogue is the best representative forum to integrate the participation of the social partners in improving working and living conditions. The objective was to rationalise the dialogue by reducing the number of Committee members, to specify the strategic sectors, and also to reinforce cross-sectoral coordination. The Commission sets up the following criteria for participation in the sectoral dialogue in the corresponding committees (Art. 1 of the decision of 20 May 1998, no. 98/500/EC):

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128 In detail Spieß, op. cit., § 18, also on various criteria of the other Community organs and in literature
129 Streinz Art. 137 Art. 28
130 Spieß, § 18 p. 225; e.g. in Grabitz/Hilf, 138/marg. no. 4, given
131 E.g.: There are no defined selection criteria for the ESC (acc. to 257 ff) or for the Employment Committe (Art. 130), which fulfil advisory functions
132 in whole Spieß, op. cit. § 18, who quotes occasional divergent opinions in the literature, § 18 II 2, p. 230 f
134 s. Final report by the European Social Observatory on sectora social dialogue, p. 3
135 Official Journal L 225/27, representativeness criteria for the first time in COM 1993 (600) final, number 24
a) sectoral and occupational-specific characteristic of the organisation; structure on European level
b) Associations in the organisation shall be integral and acknowledged part of the system of industrial relations in the specific country, able to negotiate agreements and be representative in several Member States
c) suitable organisational structure, to be able to take part in the consultation process

Based on these criteria, the Commission sets up a directory of the European social partner organisations to be consulted according to Art. 138 TEC\textsuperscript{136}; the directory is subject to continuous review by the Commission. As a result, the Commission commits itself. The Commission makes decisions based also on political opportunity and the willingness of the social partners to enter binding framework agreements.\textsuperscript{137} The criteria for representativeness are worded deliberately vaguely, since the right of "any social partner to choose its negotiating counterpart is a key element of the autonomy of the social partners.\textsuperscript{138} The CJEC has also made statements to this effect.\textsuperscript{139}

As regards the representativeness of an association, there must be a distinction between the consultation as per Art. 138 TEC for Commission initiatives within the scope of Art. 137, and an autonomous agreement of the social partners in terms of Art. 139 TEC. The Commission has to be open to consultation in terms of Art. 138 at least for the associations it acknowledges as representative. It can involve other organisations at discretion and will scarcely be inaccessible for well-founded concerns and requests. When the procedure accords with Art. 139 TEC, there has to be a distinction between the following: an agreement at Community level might be the result of a consultation as per Art. 138, as is the case with the framework agreement on teleworking (2002) or the agreement on stress at work (2004).\textsuperscript{140} Afterwards the signatories are obliged either to encourage their members to act according to the European agreement, Art. 139 paragraph 2 sentence 1 TEC.

However, in areas that are covered by Art. 137 TEC, they can, in terms of Art. 139 paragraph 2 sentence 2, also apply for a decision to be taken by the Council after proposal of the Commission. The framework agreements on child-rearing leave, part-time work and fixed-term work contracts were for instance negotiated by the Commission in the context of the consultation in terms of Art. 138 and subsequently yielded a corresponding guideline of the Council.\textsuperscript{141}

The procedure of negotiation is decided exclusively between the negotiating organisations.\textsuperscript{142} Their representativeness therefore has to correspond with the content of the agreement, which according to the CJEC requires that the individual signatories to the framework agreement are representative of all groups of organisations and employees at the European level.\textsuperscript{143}

\begin{itemize}
\item \textsuperscript{136} recently Appendix 5 on COM 2004, 557 final
\item \textsuperscript{137} Keller (2006), Sektorale Sozialdialoge, op. cit., p. 156
\item \textsuperscript{138} COM 1998 (322), p. 15
\item \textsuperscript{139} Ruling of 17 Jun 1998 in case T-135/96
\item \textsuperscript{140} Cf. COM 2004, 557 final, p. 16 f
\item \textsuperscript{141} Cf. COM 2004, 557 final, p. 16 f
\item \textsuperscript{142} CJEC op. cit., marg. no. 74-79
\item \textsuperscript{143} crit. Spieß, op. cit., § 18 II 3, p. 231: It does not state any precise criteria for ascertaining total representativeness
\end{itemize}
Prior to a corresponding proposal to the Council, the Commission reviews the claim of representativeness by the parties, their mandate, the validity of the terms and conditions according to Community legislation, as well as the relevance for small and medium businesses according to Art. 137 paragraph 2b sentence 2\textsuperscript{144}.

For EUPAN, the essential criterion of (total) inherent representativeness for matters referred to in Art. 137 TEC is fulfilled in the employers’ capacity for public service. Furthermore, the Commission requires a "European structure" without additional organisational specifications. This means it neither requires that all Member States have to be spoken for, nor that EUPAN has to demonstrate a certain formal structure. From the point of view of the Commission, all that counts is the result, in other words the negotiating partners have to have a corresponding mandate for agreements.

5.3. The problem of the authority of representation for the respective delegations

The answers of the Member States on the issue of authority of representation (in the British study on social dialogue) have turned out to be very varied. For instance the Directors General are in part not authorised to conclude binding agreements for the public service sector. Another problem affects the situation in some Member States in which civil servants have no or only limited collective bargaining rights. Europeanising social dialogue (Art. 139 TEC) enables the civil servant trade unions of these States (at least indirectly) to enjoy collective bargaining rights at the EU level. However, we can hardly expect this to be realised in practice after the implementations carried out beforehand.

The differing situations in the Member States have two special consequences for the formalisation of social dialogue (in the framework of EUPAN).

Firstly: Various Directors General would have to coordinate their mandate to negotiate in future with other Ministries or authorities. This means that within the scope of a formalisation of social dialogue probably the human resource structural constellation of the Directors General Meetings and of the Troika would also change. Nor could we exclude the fact that different Member States and also the European Commission would take part in the meetings with a larger number of participants.

Secondly: Since the majority of Directors General do not as yet have sufficient authority of representation for the entire public service sector, such a mandate to negotiate is required for the central public services. The results of the British study on social dialogue demonstrate that such a mandate is a realistic proposition.

\textsuperscript{144} CJEC op. cit., marg. no. 85 ff
V. ORGANISATIONAL EFFECTS OF SOCIAL DIALOGUE FOR EUPAN

In the past not only the discussions on social dialogue have been growing more and more in scope in the EUPAN network. The additional workload primarily affected the meetings of the Directors General, the work of the Troika and the HRM working group. The effects on the Troika became the particular subject of discussion for the first time during the Austrian EU Presidency. To quote the strategy paper of the Austrian EU Presidency "Next Steps in Social Dialogue" During the Austrian Presidency, substantial preparation of the meeting of the Directors General with the Trade Union Delegation will be carried out within the Troika Secretariat including members of the Trade Union Delegation (………). This may serve as a pattern for future Presidencies". Therefore the Directors General have to decide what role the EUPAN DG Troika should play in future social dialogue. The ad-hoc group for social dialogue that met during the German Presidency might have concrete proposals to make here.

The growing significance of social dialogue in the framework of the EUPAN network raises the question of the effects of social dialogue on the network. The Directors General are invited to find solutions for the future organisational configuration of the network. This challenge is independent of the issue of formalisation (yes or no) of the social dialogue.

1. Effects of a formalisation of the social dialogue on EUPAN

Many Member States fear that the formalisation of the social dialogue could directly affect the informal structure of EUPAN. The fears relate above all to a) the network's informal character and b) the effects of a formalisation of the social dialogue on organisation, personnel and finance. One of the things depending on the answer to these questions is the consent of the Member States to a formalisation of the social dialogue. Thus these fears must be examined closely.

1.1. The end of informality?

Most Member States see the great benefits of the EUPAN network in its informal character. EUPAN offers a welcome forum in which Member States can exchange information and experience in an unconstrained way, without having to worry about legal and political consequences. A formal social dialogue thus contradicts the basic principles and objectives of EUPAN. This global assessment needs closer examination, however.
First of all, the effects of formal dialogue on EUPAN depend on the mandate and on the working programme of the Sectoral Committee. Direct effects on EUPAN structures are only to be expected wherever the Committee discusses subjects that also fall into the subject groups of EUPAN. The wider the range of topics in the sectoral dialogue, the greater the effects on EUPAN. Conversely the following applies: the more specifically and clearly the issues in sectoral social dialogue are defined, the greater the autonomy of EUPAN, and the more robust is the boundary between the two areas. A formalisation of social dialogue thus does not have to have serious effects on EUPAN, if the Directors General agree upon confining social dialogue to a defined range of subjects. So the activities in the framework of the IPSG and e-government groups could even remain completely uninfluenced by a formalisation of social dialogue. Also the Directors
General meetings can be continued without having to yield to a dominance of discussions specific to social dialogue. Therefore it is absolutely conceivable that a social dialogue will take place at the start or end of a Directors General meeting also in the future (possibly in a modified structure).

Hence the following applies in principle: The clearer and more confined the range of issues in social dialogue is defined, the less EUPAN will be affected. Social dialogue does therefore not preclude a continuation of the informal character of EUPAN.

The type and contents of the working programme would also determine how often the Sectoral Committee gets together. The Commission decision of 20 May 1998 in Art. 5 paragraph 3 requires that the Committee meets at least once a year. This seems to be a pragmatic initial solution also for the Sectoral Committee proposed here, since it can save personnel and organisational resources.

1.2. What additional obligations ensue for the Member States in a formal social dialogue?

In the issue of additional obligations, we must first of all ask whether the formalisation of social dialogue leads to an additional workload or even whether load shedding is conceivable with the establishment of a social dialogue.

At first sight this question seems redundant, since additional formalisation and the setting up of a Sectoral Committee also implies an additional workload. Such a development does indeed mean additional (work) obligations from the Member States. It involves the consensus and coordination of Member State positions, the preparation of a working programme with TUNED, the preparation and definition of the agenda of the Sectoral Committee, etc. Even more important and work-intensive are the consultations with the Commission. Thus the Commission shall regularly request the social partners

- to communicate to it according to Article 138 paragraph 3 TEC a statement or recommendation on targets and contents of the endeavoured proposal;
- possibly to inform the Commission of their intention, according to Article 138 paragraph 4 and Article 139 TEC, of introducing negotiating procedures on the basis of the proposals in the present document.

Finally the Commission shall regularly ask the social partners if necessary to add to the statements or recommendations of the social partners an estimate of the consequences of the proposed measures and possible alternative suggestions. In concrete terms, the formalisation of social dialogue thus means that the benefits of formalisation (more influence and more information) is accompanied by more obligations and increased workload.

1.2.1. Time and term of consultation of the Social Partners

The time and term of the Commission's consultation with the social partners is a special issue that has not been precisely determined. Normally the Commission gives "the social partners 6 weeks to make their statement. On this basis the Commission thinks its proposal over once more and then begins the second stage of the consultation; the social
partners have another six weeks’ time to renew their statement. It is not clear how much time is provided to the Commission to review the statements by the social partners. So a total of 12 weeks is available to the social partners to address an initiative of the Commission. Only practice can show whether this period is sufficient. Meanwhile this term is certainly too short for conceiving new proposals. An interesting aspect of this point is that a flexible handling of terms is provided for consultation of the Economic and Social Committee (Art. 262 TEC). In Art. 262 paragraph 2 TEC there is only a minimum provision which allows the Council or the Commission to set a time limit. This term has to be at least 4 weeks. Also Art. 138 paragraph 4 TEC implies that the terms can be handled flexibly.

Additional workload is directly dependent on further developments and decisions:
   a) Are there new legal initiatives of the Commission founded on the legal basis of Art. 137 TEC which are of significance for the social partners?
   b) Do the social partners want to initiate a formal dialogue in any case (Art. 138 and Art. 139 TEC)?
   c) Is there any readiness on the part of the Directors General to confine themselves to Art. 137 TEC, or do they wish to take part in a further informal dialogue (e.g. within the scope of Art. 136 TEC)?

Is the range of topics agreed upon with the trade unions (the working programme) detailed and does it demand intensive attention on the part of the employers?

It is obvious that a formal social dialogue within the scope of Art. 138 TEC and Art. 139 TEC would be more work-intensive than an informal dialogue. Nevertheless, participation of the Directors General in the informal dialogue has even now already become time-intensive. But this whole issue depends a great deal on the willingness of the national delegations to engage in an informal dialogue. Previous experience with the Committee on Local and Regional Government does not indicate that the effort is too great.

1.3. How far could social dialogue relieve the workload for EUPAN?

The setting up of a Sectoral Committee could indeed relieve EUPAN's workload and thus even reinforce the informal character of the cooperation. This would be the case, for instance, if the Directors General Meetings conduct discussions and negotiations on social dialogue only in the context of the specific body set up for it. The traditionally informal character of the Directors General Meetings could thus be continued – completely irrespective of this.

However, the future workload of the Directors General depends very greatly on how the human resource constellation of the SSDC (Sectoral Social Dialogue Committee) is structured. In so far as the Directors General are identical with employer representatives in social dialogue, this leads to increased burdening. Potential unburdening effects at working group level (HRM, IPSG, e-government) likewise depend first and foremost on whether additional working groups are set up. Conversely, the workload could increase if in future additional technical discussions on social dialogue topics are to be conducted in the HRM working groups (as proposed later in this document). All other groups experience no changes in their work method.
2. The organisational structure of social dialogue within EUPAN

2.1. The example of the Committee on Local and Regional Government

It is obvious that certain methods of work, rules of procedure and rulings of the Committee on Local and Regional Government might serve as a model for a committee at the central level. The following will therefore attempt to present the most important information and characteristics of this committee.

The Committee on Local and Regional Government was founded on 13 January 2003. The Committee accepted a rule of procedure (see Appendix) already at its first session, stating joint recommendations on teleworking and adopting its work programme. CEMR and EPSU European Personnel Selection Office adopted a joint resolution in 1998 in order to achieve equality of men and women at work. This supported the Member Organisations in developing a strategy covering programmes with positive measures as well as the diversification of education, training and professional opportunities for women, campaigns against sexual harassment, the promotion of work-life balance and the campaign for equal pay for equal work. In 2004 the Committee for Sectoral Social Dialogue called on its Member Organisations to implement the cross-industry framework agreement on teleworking in accordance with national procedures and practices. The social partners agreed to organise their actions in 2006 and 2007 revolving around four key topics: strengthening of social dialogue in the local and regional authorities of the new Member States and the candidate countries, support of the reform process in the local and regional authorities, promotion of diversity and equality in the local and regional authorities and assessment of the experience made with various types of public service provision.

The organisational structure of the Sectoral Committee consists of the SSDC, a steering group, technical working groups and a secretariat of trade unions and employers. The European Commission supports it in an advisory capacity at all work levels.

146 Detailed information on the work of the Committee on Local and Regional Government can be found on the CIRCA_Webpage (http://ec.europa.eu/employment_social/social_dialogue/sectorial18_de.htm)
2.2. Proposal for an organisational structure in a future Sectoral Committee for central administrations

2.2.1. Options for the organisational structure
There are several options conceivable for the organisational structure. The pre-eminent question is the level the social dialogue committee (SDC) should be settled at. In EUPAN this could be either the Directors General or the working groups. Possible options are in accord with this:
Option A "DG level":

a) The Directors General Conference is nominated to the EU Commission as Sectoral Committee. The corresponding sessions with TUNED take place at the beginning and end of each Directors General Meeting.

b) The HRM working group is assigned the preparation of the social dialogue issues. The meetings held 4 times a year are used for this. The duration of the meetings are extended if need be to 2 days.

c) A mixed steering group is set up, which is to prepare the sectoral committee. It consists of 6 trade union representatives and 6 EUPAN employers (after the model of the Regional Committee).

d) The setting up of a Brussels administration for employers (a so-called common "phone number").

It would be expedient for the Sectoral Committee to convene at the start or end of each Directors General Meeting. In this way the Directors General would avoid unnecessary organisational, travel and accommodation expenses. A joint steering group (consisting of members of the Troika or an extended Troika, as well as trade union representatives) could likewise get together prior to the Sectoral Committee meeting. If the example of the Committee on Local and Regional Government were followed, this Steering Committee would have 6 members on each side (i.e. a total of 12 members plus perhaps the European Commission).

Option B: "WG level":

a) A new SD-WG is to be set up and nominated as Sectoral Committee to the EU Commission. It is affiliated to the HRM working group (in part optional personal equality). Their meetings take place 4 times a year straight after the HRM meetings.

b) The SD-WG reports to the Directors-General meeting twice a year, also the other WGs. If agreements are made in terms of Art. 138 f. TEC, the corresponding decision of the SD-WG (EUPAN-intern) is placed subject to consent on the part of the Directors General Meeting.

c) The sessions of the SD-WG are prepared by a mixed steering committee. It is structured on EUPAN side after the model of the Extended Troika.

d) The administrative structure in Brussels for the employers (so-called joint "telephone number") is covered by each Presidency (or if necessary a coordinated EUPAN MS of the Troika) at their permanent representation.

This option would mean a noticeable relief of workload for the Directors General. The setting up of a special working group would also make it possible to take into account in a relatively simple way the problem of action legitimacy of individual
EUPAN Member States – inner-state authority of representation. They could send representatives who are authorised to act into the WG, or on the other hand receive them. Meanwhile personal identity with the HRM working group could remain.

If individual EUPAN Members prefer to continue an established cooperation in CEEP and limit themselves to this, they could dispense with cooperation in the SDC-WG without any problem. It would be important in this context to provide as well for a situation where the Presidency wishes to remain in CEEP and thus has no inherent interest in social dialogue in EUPAN. A solution for this could be found in its assigning another Member of the Extended Troika to take on the chair of the SDC-WG.

Furthermore, an appropriate connection to the level of the Directors General would have to be assured. In this context, a regular obligation to report the latter's Meetings would have to be provided for. For the – presumably rare – situations of preparing a binding directive in terms of Art. 139 TEC, matters should be negotiated subject to the approval in favour of the Directors General – regardless of and in addition to the specific inner-state agreement requirements.

To maintain an adequate administrative structure in Brussels on the part of the employers, one must keep in mind for both options that EUPAN avails of a structure with the tradition of the Extended Troika that has for years continuously shown a considerable organisational achievement and also obtained remarkable results. The CIRCA network in addition offers an expansive and proven basis for communication. To meet the demands of an adequate administrative structure in Brussels, a contact partner should be added to the permanent representation of the specific presidency. Within the background of the existing EUPAN administrative structure, this would however mean no extra pressure worth mentioning on the specific permanent representation.

The question of which of the two options is more suitable and thus should be preferred should not be put to the vote at this point. Both options have advantages and disadvantages as regards decision-making structures. In the end it all depends to a great extent on the acceptance in the network, which can only be judged after the discussions in the planned EUPAN ad-hoc group. Apart from this, it seems expedient to have coordination talks with the EU Commission before a final decision is made.
Option A: "DG level":

Social Dialogue Committee (DG-SDC)
Directors General of the EUPAN-MS European Commission + TUNED
At least once a year

Working groups or HRM working group
Max. 2 x 27 Members + European Commission
At least 4 times a year

Steering committee
2 x 6 Members (possibly Troika and trade unions), possibly European Commission
At least once a year

Adequate permanent administrative structure
1 person in Brussels

EUPAN
Option B: "WG level",

Directors General of the EUPAN-MS:
receive reports of the SDC-AG;
Approval reservation for binding decisions

Social Dialogue Committee (SDC-AG)
attached to HRM working group
Delegated persons of the EUAPN-MS + EU Commission + TUNED
At least twice a year

Steering Committee
Members (poss. Troika + trade unions) +
EU Commission
At least twice a year

Adequate structure for employers:
Permanent representation of specific presidency

EUPAN
2.2.2. Participation by the Member States and the CEEP countries in the Committee – all Member States?

Although the contract in Art. 138 TEC and Art. 139 TEC contains a ruling for social dialogue, yet social dialogue takes place on a voluntary basis. Hence there is no obligation on the part of the social partners to take part in social dialogue. Over and above this, Art. 1 (b) of the decision of the European Commission of 20 May 1988 requires that the organisations participating in social dialogue have to be representative for "some" (i.e. not for all) Member States.

Because of the membership of some Member States in CEEP, the question arises of how the issue of membership in the Sectoral Committee should be regulated. To reach a conclusion here, the experience gathered by other committees (especially the Committee on Local and Regional Government) might be beneficial. In practice it can indeed be observed that not all Member States involve themselves in the work of all the committees. Thus it happens that the Committee on Local and Regional Government convenes, although not all Member States take part in the negotiations and discussions. So it is also conceivable that the Sectoral Committee ("Central Public Service") between EUPAN and TUNED may convene without the participation by all Member States. The major consequence of the non-participation of some Member States is the fact that no legally binding decisions can be made based on Art. 139 paragraph 2 sentence 2 TEC (i.e. a decision of the Ministers on a Directive). However, even a minority of the social partners can agree on a legally binding measure based on Art. 139 paragraph 2 sentence 1 TEC.

In short: it is not necessary for all Member States to take part in the Sectoral Committee. Conversely, it would be conceivable that the Member States with CEEP membership might take part in the meetings of the Sectoral Committee as CEEP members.

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TUNED (EPSU; CESI)  
EUROFEDOP

SDC/SD-WG Steering Group

EUPAN  
CEEP
### 2.2.3. The effects on the work of the EUPAN working groups

The decision for the formalisation of social dialogue directly affects the EPAN working groups. These effects involve components that both relieve and on the other hand add to the workload.

<table>
<thead>
<tr>
<th>Level</th>
<th>Adding or relieving workload</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ministers' Meeting</td>
<td>As previously, about every 18 months; additional workload only in formalisation and agreements in the Sectoral Committee, regular consultations on developments necessary</td>
</tr>
<tr>
<td>Directors General</td>
<td>As ever, 2 informal work meetings a year, Option A: additional sectoral dialogue at start or end of the Directors General Meeting, Option B: additional sectoral dialogue only for binding decisions Definition and decision on work programme, other meetings only on defined work programmes, informal meetings no longer necessary with trade unions, sectoral dialogue possibly in modified structural constellation</td>
</tr>
<tr>
<td>Troika</td>
<td>As previously, 3-4 times a year, additional workload depends on formation of an &quot;adequate administrative structure&quot;, and on the participation of the Troika in the steering committee Option A: 12 members in steering committee (possibly participation of Troika) Option B: Extended Troika</td>
</tr>
<tr>
<td>Troika Secretariat</td>
<td>As previously, 3-4 times a year, no changes</td>
</tr>
<tr>
<td>Working Groups</td>
<td>Option A HRM working group (in future meets 4 x 2 days, discusses social dialogue topics on each 2nd day, Option B: Report made to Directors General Setting up of additional social dialogue groups only necessary if additional, very technical aspects are discussed (with participation of the trade unions) IPSG (no change) E-government (no change)</td>
</tr>
<tr>
<td>Administrative structure</td>
<td>Option A: permanent structure in permanent representation or authorities in Brussels Option B: Task acceptance by Presidency (Troika) and permanent representation</td>
</tr>
</tbody>
</table>
TUNED in particular proposes setting up two or three additional social dialogue working groups in future. These groups, which stand open to all Member States, would have the primary task of working on selected topics (together with the trade union representatives). The groups would also have a preparatory function for the meeting of the Sectoral Committee and of the steering committee. The setting up of sub-groups in the sector of social dialogue is not unusual. The Directors General have in the past made constant use of ad-hoc groups. These ad-hoc groups were always composed differently and existed over different periods.

### Examples of ad-hoc groups in the history of EUPAN

- "Pension Group" (1995)
- "Evaluation Group of the EUPAN Network" (2003/2004)
- "Lisbon Group" (2004/2005)
- "Ethics Group" (2006) (independent)

The main difference to the ad-hoc working groups hitherto consists in the fact that the social dialogue groups a) receive a permanent structure and b) might be supported financially by the European Commission.

The disadvantage of such a proposal is obvious: the convening of two or three additional working groups would lead to a considerable extra burdening of resources. Therefore we submit the following alternative proposal:

- a far more resource-saving alternative would be to extend the HRM working group meetings to twice 2 days (per Presidency). Each second day could then exclusively address the social dialogue. This means that the HRM working group would then meet at least 2 days 4 times a year, allowing 1 day 4 times a year for addressing the social dialogue at working group level. This option has an additional advantage: presuming a formalisation of social dialogue takes place, travel and accommodation costs would (probably) be financed by the European Commission. In comparison with previous practices in the HRM group, this could yield additional financial relief.

### 2.2.4. Is a secretariat necessary? On the interpretation of Art. 1 (c) of the decision of 20 May 1988

The first thing to take heed of is Art. 1 (c) from the Commission's decision of 20 May 1988, which requires the specific social partners to "avail of adequate structures" which ensure an effective participation in the work of the committee. According to the Commission's interpretation, the term "adequate structure" does not necessarily require that a proper employers' secretariat be established. However, there should at least be a Brussels "phone number" - i.e. an administrative structure which is available at any time for dialogue and communication with the Commission and the trade unions.

The specific social partners in the Sectoral Committee on Local and Regional Government have not set up their own secretariats. But both social partners have permanent contact partners in Brussels. The question now arises whether this "light"
structure of the Committee on Local and Regional Government might also be a model for EUPAN.

Before we go into this question, we have to clarify first of all which organisational structures are demanded by a formal sectoral dialogue. Here we must distinguish first of all between

- the "Plenary Meeting" of the SDC Committee (DG or WG level), which each convene once or twice a year,
- the work of a mixed steering committee, which prepares the agenda and the SDC meeting,
- the creation of its own administrative structure, which coordinates the position of the employer and communicates on a horizontal level.

The setting up of an effective administrative structure raises the question whether a permanent employers' secretariat is necessary. This involves intrinsic cost issues that would not be easy to solve.

The author's research for this study has shown that it is not necessary to set up a permanent secretariat. Experience in the Committee on Local and Regional Government has shown that the workload for the liaison to the employers amounts to approximately one workday a week. Among the tasks for the contact partner to the Council of European Municipalities and Regions (CEMR) are networking with EPSU, preparation of agendas, preparation of joint statements, and the like. Further tasks could include submitting an application for a joint project before the European Commission.

Despite these qualified requirements, it remains to be scrutinised whether the employers have to create an administrative structure in Brussels which can fulfil these requirements and the demands of the specific Commission decision in Art. 1 (c). The European Commission would no doubt scarcely acknowledge the EUPAN Troika as an adequate administrative structure in terms of the Commission decision of 1988. Such a structure would also have the disadvantage that technical support would be subject to a permanent rota procedure and continuity of work could not be guaranteed.

Therefore the following considerations might be presented as a solution to this issue.

b) Option A: The Directors General could ask a (national) authority in Brussels for technical support.

a) Option B: The Member States could create a corresponding administrative structure in one of the Permanent Mission of the Member States. At the suggestion of a willing Member State an administrative agency could be created that is then transferred to another Member State after a specific term of 2 years. Technical support is supplied by the Member State. Another option would also be the delegation of a national civil servant into the permanent representation, in order to take charge of these tasks.

2.2.5. The role of the Troika

The preceding chapter addressed the establishment of an administrative structure in Brussels. An additional option for the Directors General would be to assign the Troika with the task of technical support for the employers. This option offers a maximum of flexibility (in political, infrastructural and financial issues). However, it is not certain that the Troika would be accepted by the Commission as an "adequate structure" in terms of
the aforementioned Art. 1 (c). This is even more pertinent in that the Troika does not embody a continuous organisational structure and the contact partners constantly change. Meanwhile the question arises whether or not assigning the issues of social dialogue to the Troika is accompanied by an unwanted change in "working culture" within the Troika. Accordingly, the informal character of the cooperation would doubtlessly change through a formalisation of work in terms of social dialogue. EUPAN dealings that would normally be informal could take a back seat in significance. This would be the case above all if the persons involved are specialists in social dialogue, come from additional Ministries and authorities, and have little to do with other EUPAN activities. To avoid this kind of development, the enlistment of a special "social dialogue" Troika could be considered, which only concerns itself with social dialogue. This means that the customary, informal EUPAN Troika Meetings are separate from the meeting of the special social dialogue Troika. The extra burden on the employers would be limited to a single additional Troika meeting.

Another problem consists in limiting the Troika each time to specifically defined Member States. This could mean that other interested Member States might feel left out of the Troika's secretariat work. On the other hand, it is also just as conceivable that a Troika member has no interest whatever in (sectoral) social dialogue. To avoid this (political) problem, the composition of the Troika should be structured openly. This type of flexible framework could also pass over the Troika Member States who are not interested in social dialogue.

2.2.6. The role of the European Commission

Most Sectoral Committees use the opportunity of transferring technical and organisational aspects of the Sectoral Committee to the European Commission. As regards the Committee on Local and Regional Government, the following organisational structure has been resolved upon:

The Commission performs all secretariat tasks for the Committee on Local and Regional Government at the levels of the Committee, the working groups and the steering group. Besides this, the financing of committee work is in part taken over by the Commission. If one was to keep to the traditional model of the other Sectoral Committees, the Member States could ask the Directorate-General service to take over the technical support of the Sectoral Committee, also of the working groups and of a mixed steering group, in order to prepare the Sectoral Committee. This option also offers the advantage that Member States can find support in the experience of the DG engagement in social dialogue.
Financial support from the European Commission

There were hitherto two different possibilities to gain the financial support of the Member States.

On the one hand, the Commission – in the framework of the ESF Fund – supports interventions through the ESF Ordinance for the planning period 2007-2013. These are focus on four core areas:

- Increasing the flexibility of workers and organisations
- Improvement of access to employment and labour force participation
- Strengthening of social integration by fighting discrimination and facilitating access to the labour market for disadvantaged people
- Promotion of partnerships to target reforms in the spheres of employment and integration.

On the other hand, according to the EU budget line 04 03 03 01 and according to Ar. 138 and 139 TEC, the Commission may support social cross-sectoral and sectoral dialogue. The sub-programme's social dialogue provides that measures of financial support have priority that serve the preparation and execution of social dialogue in terms of Art. 138 TEC. These could take the form of seminars, conferences and measures that contribute to the participation of social partners in the European employment strategy.

BUDGET LINE 04 03 03 01
INDUSTRIAL RELATIONS AND SOCIAL DIALOGUE
VP/2005/002

The budget line is structured into four sub-programmes:

I. Support of social dialogue at European level
II. Support of the financial participation of workers
III. Improvement of knowledge in the sector of industrial relations
IV. Social responsibility of business enterprises (CSR - Corporate Social Responsibility)

I. Eligible for funding:
- Social partners
- Organisations engaged in industrial relations
- State agencies
- Organisations of civil society

This budget situation was allotted obligations in 2005 amounting to 11 925 000 euros. At least half the funding was provided for the support of social dialogue at European level (sub-programme I)\(^{147}\).

\(^{147}\) Further information on the objectives and priorities of the budget line, on the eligibility for funding of activities and applicants, on co-funding amounts and on other conditions can be found at the following address: http://forum.europa.eu.int/Public/irc/empl/vp_2005_002/library
2.3. What further organisational follow-ups are necessary?

Presuming there is a decision for a sectoral social dialogue, the following requirements are incumbent upon EUPAN:

- Ministers' mandate to the Directors General for the formalisation of social dialogue and deployment of a Sectoral Committee,
- Joint application of the EUPAN employers and TUNED to the Commission for participation in/towards formalisation of social dialogue,
- Creation of common rules of procedure for social dialogue,
- Determination and adoption of a joint working programme
- Specification of common rules of procedure for the committee, the steering group and for the working group.

1. A mandate is necessary for the formalisation of social dialogue and the deployment of a Sectoral Committee "Social Dialogue in Public Service" from the Ministers in charge of the public services in the Member States of the EU. The Ministers assign the Directors General to take all necessary steps (see below) to achieve a formalisation of social dialogue. The Ministers furthermore determine that the Committee only addresses issues that concern the central public service sector in the specific Member States. This decision can be taken by the Member States that wish to take part in the sectoral dialogue. Hence no unanimity is necessary in this.

2. Correspondingly all measures should be decreed at the national level to guarantee an adequate authority of representation for each delegation.

3. The social partners jointly apply to the European Commission for participation in the dialogue at European level. The associations representing employers and employees at European level must fulfil the aforementioned criteria at the time of application: their work must be specific to sector or occupation and they should avail of a structure at European level;
   - They must consist of associations that are integral and acknowledged part of the system of industrial relations in the specific country, able to negotiate agreements and be representative in several Member States;
   - They must avail of suitable structures to be able to participate effectively in the Committee's work.
   - According to information of the European Commission, it takes about 6-9 months for a decision on representativeness to be concluded. This decision could thus still be effected during the French EU Presidency.

4. The committee defines its rules of procedure (cf. the model of the rules of procedure of the Committee on Local and Regional Government in the Appendix of this study). The committee meets at least once a year for a
plenary assembly. More specific issues are addressed at extended sessions of the Troika, the Troika secretariat or in smaller working groups. Thus the Committee on Local and Regional Government has specified that up to 60 representatives can participate in the Committee sessions. Meanwhile, the travel and accommodation expenses are determined according to the relevant rulings of the European Commission. Preparation of the sessions, working out the agenda and the follow-up can be organised by the specific secretariats of the social partners or in collaboration with the Commission. Regarding the Sectoral Committee on Local and Regional Government, the European Committee has taken over the secretariat function for the committee, the ad-hoc group and the so-called steering group.

5. It is in any case reasonable to define rules of procedure for the steering group and working group. The Committee on Local and Regional Government can serve as a model here (see Appendix to this study). This already specified rules of procedure for the Sectoral Committee right at the start on 13 January 2004 and on 18 February rules of procedure as well for the steering group and working group. The first two-year programme was likewise adopted on 13 January 2004.

2.4. Conclusion

A sectoral social dialogue in the framework of the EUPAN network has political, legal, organisation and financial effects.

The financial effects are limited. The Treaty allows the Commission in principle to support social dialogue. This means that additional technical and financial capacities can be bolstered by allocations from the EU budget.

As regards the legal and political effects, it can hardly be expected (at least medium-term) that the formalisation of social dialogue will lead to the adoption of legally binding agreements in terms of Art. 139 TEC.

The organisational effects do not indicate any threat that EUPAN would be overly burdened as an informal network under the burden of the formal dialogue. The structures established hitherto may remain for the most part. Neither is there any fear that the network would lose its informal character (at least not in the areas that are not discussed in the Sectoral Committee). The deployment of a Sectoral Committee could even relieve the network to a certain extent. The human resources working group in particular could confine its range of topics even more to informal subjects. Conversely, the traditional topic of "mobility" could finally be entrusted to the Sectoral Committee.

Despite these perspectives, the effects of a formal social dialogue on EUPAN are not easy to estimate. With a corresponding restriction of topics it would be sufficient to convene the committee once or twice year. Such a procedure would not present any special,
additional, organisational challenges. However, it might be necessary to place an increased burden on a steering group (consisting of members of an extended Troika) with the tasks of social dialogue. Since it is conceivable that not only Troika Member States want to get involved in this work, voluntary augmentation of this groups should be considered. Financial support could (as already stated) be afforded by the EU budget.

The (possible) creation of additional, mixed social dialogue working groups will be an extra burden to the human resources in the Member States. On account of the probable partial personal identity, we suggest carrying out the meeting straight after the HRM working group meeting.

Formal social dialogue gives Member States more rights. But this brings with it more obligations, above all as regards consultation obligations towards new initiatives and proposals of the Commission. The joint statements demand efficient preparation. Meanwhile, Committee Meetings must be prepared and the opinions of the Directors General brought into agreement. This gives rise to the question of how the creation of an administrative structure is organised for the "Employers' Platform" in Brussels. This structure does not have to be expensive, nor (organisationally) complex. However, it will be necessary at least to set up a common "telephone number" in Brussels.
VI. References


Demmke, C., Are Civil Servants Different because they are Civil Servants?, Maastricht 2005.


Kampmeyer, E., Protokoll und Abkommen über die Sozialpolitik der EU, 1998


VII. Annexe

1. Report on implementation of the work programme of the European Social Dialogue Committee on Local and Regional Government

2. Rules of procedure of the Sectoral Committee of the European Social Dialogue Committee on Local and Regional Government

3. Rules of Procedure of the Steering Group of the European Social Dialogue Committee on Local and Regional Government
European Social Dialogue Committee on Local and Regional Government

REPORT ON THE IMPLEMENTATION OF THE 2004/2005 WORK PROGRAMME

The present report summarises the initiatives carried out in the years 2004 and 2005 to implement the first work programme of the European Social Dialogue Committee on Local and Regional Government. It is proposed for adoption at the plenary meeting of the Committee, taking place in Brussels on Tuesday 31st January 2006.

Adoption of the rules of procedure

EPSU and CEMR adopted the internal rules of procedure of the sectoral social dialogue Committee at its inaugural meeting of 13th January 2004. These rules were supplemented by the internal rules of procedure for the steering group and the ad hoc working groups, which were agreed upon at the Steering Group meeting of 18th February 2004.

Description of the 2004-2005 work programme

The first bi-annual work programme was also adopted at the inaugural meeting of the Committee on 13th January 2004 and contained the five following agreed themes for joint action:

1. Adoption of a statement supporting the implementation of the cross-sectoral agreement on telework in the local and regional government sector;
2. Identifying and supporting the local and regional dimension of the European Employment Strategy (EES);
3. Reinforcing the development of social dialogue in the local and regional government sector in the new Member States;
4. Reflecting on the European Commission’s Green Paper on public procurement and Public Private Partnerships, and,
5. Collecting and evaluating innovative initiatives on good public sector management, including the promotion of high standards of human resource management and the development of high performance working practices.
INTERNAL RULES OF PROCEDURE FOR THE EUROPEAN SECTORAL

SOCIAL DIALOGUE COMMITTEE FOR THE LOCAL AND REGIONAL GOVERNMENT SECTOR

Adopted 13 January 2004

Preamble

In the framework of the European Commission Decision of 20 May 1998 annexed to its Communication entitled "Adapting and promoting the social dialogue at Community level" COM (1998) 322, the Employers’ Platform of the Committee on Local and Regional Government (CEMR-EP) and the European Federation of Public Service Unions (EPSU) have requested the establishment of a Social Dialogue Committee in the Local and Regional Government sector.

CEMR-EP and EPSU recognise each other at all levels as being representative of the interests of employers and employees in the EU local and regional government sector in accordance with Annex 1 of European Commission Communication COM(98) 322.

The Committee’s work programme, and the formulation and implementation of statements or common positions agreed in the Committee shall take account of specific national contexts, which differ in the way public services are organised and provided and in the way social dialogue practices and procedures are determined.

In accordance with article 5§1 of the aforementioned Commission Decision which states that “each Committee shall, together with the Commission, establish its own rules of procedure”, the Internal Rules of Procedure for the Committee are set out below.

Clause 1- Objectives

The Committee's objectives are:

Deliver opinions to the Commission on initiatives with regard to social and employment policy and the development of European policy having consequences in these areas for the local and regional government sector.

Encourage and develop the social dialogue at European, national and local level in the local and regional government sector.

Clause 2 –The Dialogue

In order to achieve these objectives, the Committee shall:

Work in a spirit of co-operation and consensus.
Adopt in plenary a multi-annual work programme, based on themes identified and agreed jointly;

Organise the implementation of the work programme in a flexible manner, establishing ad hoc working groups as necessary on specific subjects;

Meet in plenary session at least once a year;

Promote the discussion and/or implementation, for instance, of policies, statements and recommendations adopted by the Committee at national, regional and local levels;

Regularly evaluate and update its work programme;

Liaise closely with the Commission Secretariat and include Commission officials in its discussions as appropriate;

**Clause 3- Appointment of Chairperson**

The Committee will agree a chairperson and a vice-chairperson. One will be appointed by CEMR-EP; the other by EPSU. The role of chair and vice-chair will alternate between the two organisations at two-yearly intervals.

In the event that the individuals holding the role of chairperson or vice-chairperson become no longer engaged in the work of the sectoral social dialogue committee, a successor will be appointed by the employers’ or the employees’ side for the remainder of the term;

**Clause 4 – Committee Steering Group**

The Committee will establish a Steering Group whose function shall be to prepare and co-ordinate the meetings of the Committee in liaison with the Commission's services. This Group shall be composed of members appointed by CEMR-EP and EPSU. The Steering Group will agree its detailed working methods.

The Steering Group will comprise of up to 6 representatives for each side.

The Commission services will provide the Secretariat for the Committee and for the Steering Group.

The Steering Group will meet at least once a year.
Clause 5 – Composition of the Committee

The Committee will be composed up to a maximum 60 representatives from current and new Member States, (30 each side). At least 10 representatives per side will be present when decisions are taken.

CEMR-EP and EPSU will co-ordinate respectively the employers’ and workers’ delegations and invite their representatives to the various meetings and activities of the Committee, Steering Group and Ad Hoc Working Groups taking into account the need for gender and geographical balance.

No remuneration shall be paid to Committee members in respect of functions exercised or as regards participation in meetings.

Accommodation and travel expenses will be reimbursed in accordance with the Commission’s procedures.

Clause 6 - Secretariat

The Commission shall provide the Secretariat for the Committee, the Ad Hoc Working Groups and the Steering Group.

The Secretariat shall inform CEMR-EP and EPSU of documents relating to the sector and forward texts adopted by the Committee to external parties, including relevant Commission services.

Clause 7 - Confidentiality

Without prejudice to the provisions of Article 214 of the Treaty, if the Commission informs the Committee that the opinion requested relates to a subject that is confidential, members undertake not to disclose information they may receive through their work in the Committee, working groups or in the Steering Group.

Clause 8 – Commencement of Rules of Procedure

These Internal Rules of Procedure will enter into force on adoption by the Committee.

Clause 9 – Review and Amendment of Rules of Procedure

CEMR-EP and EPSU may review these internal rules of procedure at the request of one of the parties mentioned in the preamble. Any changes will be taken by consensus.
Sectoral social dialogue committee in local and regional government

Internal rules of procedure for the steering group and the ad hoc working groups

to be read in conjunction with the committee rules of procedure

Steering group

Purpose and objectives
The function of the steering group is to prepare the plenary meetings of the sectoral committee and to follow through mandates given by the plenary in liaison with the Commission’s services.

Functioning
1. Meetings of the steering group will be prepared through co-operation between the CEMR-EP and EPSU secretariats in liaison with the Commission services. The Commission services will provide the secretariat to the steering group.
2. The steering group will follow through the decisions of the plenary and will oversee the work of the ad hoc working groups and approve their objectives.
3. The CEMR-EP and EPSU secretariats will ensure the liaison with their respective members of the steering group between meetings and will co-ordinate the positions of the employers and employees accordingly.
4. The steering group may authorise the drafting of opinions (through the establishment of ad hoc working groups) in the event that the Commission should seek a consultation.
5. The steering group will make full use of email in both its discussions and decision-making processes. This will be facilitated by the CEMR-EP and EPSU secretariats.
6. The steering group will meet at least once a year. The language used will be English.

Ad hoc working groups

Purpose and objectives
Ad hoc working groups will seek to fulfil the tasks assigned to them in the plenary based on the broad terms of reference as set out in the work programme text and detailed by the steering group.
**Functioning**

1. The steering group will agree the composition of the ad hoc working groups which will be balanced between employers and employees and take into account the wishes of all members and the desire for gender and geographical balance. The Secretariats will try to assure interpretation in up to four languages.

2. The terms of reference of each ad hoc working group will have its basis in the decisions of the plenary.

3. The term of each ad hoc working group will cease once its work is fulfilled.

**Relations between the steering group, the ad hoc working groups and the plenary**

1. The CEMR-EP and EPSU secretariats will provide periodic email updates to their respective members of the steering group on the state of play within the current ad hoc working groups. They will also facilitate communication from the steering group to the ad hoc working groups.

2. The ad hoc working groups will periodically report back to the meetings of the steering group and will present their findings to the plenary on the work they have carried out.

*Text agreed by Steering Group following meeting on 18 February 2004*

******
Review of the action taken in implementation of the work programme

1. Adoption of the joint statement on the cross-sectoral agreement on telework

On 13th January 2004, EPSU and CEMR adopted a joint statement supporting the implementation in local and regional government of the European framework agreement on telework signed by the cross-sectoral partners (UNICE-UAPME, ETUC and CEEP) on 16/7/2002.

With this statement, CEMR and EPSU also agreed to monitor and to report in 2005 on the developments towards the use of the cross-sectoral agreement. Stefan Clauwaert from the European Trade Union Institute (ETUI) gave an update on the implementation at a working group meeting in September 2005, based on national implementation reports. However assessment of the situation in local and regional government proved difficult as in many countries discussions at cross-sectoral level had not yet started or were on-going. Information was also hard to collect. Work will however be pursued in this field in the first semester of 2006, notably with a view to feed into the implementation report that will be produced by the cross-sectoral European social partners by April 2006.

2. Reinforcing the local and regional dimension of the European Employment Strategy and the National Action Plans on employment

An ad hoc working group on employment was set-up in March 2004 to identify and assess the different national practices in involving local and regional authorities in the National Action Plans on Employment. A joint questionnaire was prepared and sent to the respective members of CEMR and EPSU. The responses were then gathered in a report assessing the form and scope of the involvement of social partner organisations in local and regional government in the preparation of the National Action Plans on Employment in 10 countries. The report, which was presented at the plenary meeting of the sectoral social dialogue Committee on 17th November 2004, also contained forward-looking suggestions to reinforce the local and regional contribution to the European Employment Strategy in the future.

Building on the results of this report, EPSU and CEMR furthermore organised a workshop on EU employment policies on 19th May 2005, during which they discussed the local and regional government contribution to the implementation of the Integrated Guidelines for Growth and Jobs adopted at European level for the 2005-2008 period. The workshop resulted in the adoption of a joint statement on the European Employment Policy, in which CEMR and EPSU emphasised the need to allocate sufficient resources to local and regional authorities to enable them to fulfil their dual role as public employers and service providers. The social partners also asked the European Commission to facilitate the development of local partnerships involving all stakeholders concerned, as a tool to promote employment and entrepreneurship at the level closest to citizens.
3. Supporting the development of social dialogue in local and regional government in the new Member States and in candidate countries

To implement this priority, a joint project was undertaken, with the financial support of the Commission. This project included in its first phase the preparation of a survey by an external consultant (ECOTEC Consulting Ltd), providing an overview of existing social dialogue structures in local and regional government in the 10 new Member States and in the three candidate countries, with a more in-depth analysis of the situation in five countries (Estonia, Hungary, Poland, Slovakia and Turkey). The study was then launched at a pan-European conference organised on 14th October 2005 in Budapest, which gathered over 80 delegates from national associations member of EPSU and CEMR in some 20 countries. This conference provided an opportunity to discuss the findings of the study, as well as to identify issues of common concerns and pathways for future joint activities in the follow-up of the project.


A working group met to discuss the Green Paper on PPPs in July 2004. However, despite an interesting exchange with the Commission at the meeting, there was no agreement at the time to continue work in this area.

5. Collecting and evaluating innovative initiatives on good public sector management, including the promotion of high standards of human resource management and the development of high performance working practices

An ad hoc working group on human resources management (HRM) was set-up in January 2004 to work on this priority. It was mandated with the concrete task of collecting cases of good practices, which were then presented at a seminar on strategic HRM in local and regional government, held in Brussels on 15th November 2005. The workshop included a number of presentations by representatives of CEMR and EPSU member associations of HRM strategies aimed at improving efficiency in the provision of local and regional public services, while at the same time increasing the skills and well-being of employees in the sector. The partners agreed on the importance of HRM as a tool to increase both efficiency and work quality in LRG, and the report of the meeting contains some proposals for further work.
The members of the Social Dialogue Committee are invited to:

- Approve the present report on the implementation of the 2004-2005 work programme,

148 The database is available in English, French and German and can be accessed from the following link: http://europa.eu.int/comm/employment_social/dsw/dspMain.do?lang=en