



ORIGINAL PAPER

Collective Bargaining and Solving Collective Labor Conflicts in the European Union: Several Models of Representing the Interests of Workers

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Abstract

Collective bargaining is one of the foundations of labor relations, which is common across most of the European Union's Member States, with the aim of establishing working and employment conditions, regulating relationships between employers and workers, and developing relationships between employers or their organizations and employees, represented by workers' organizations (trade unions) or otherwise provided for by national law. Depending on its scope, collective bargaining can take place at several levels: at the national level, at branch or sector level, at the level of profession, interprofessional negotiation, local or regional negotiation, bargaining at enterprise level. At the same levels, therefore, a collective labor conflict may also erupt. The present study illustrates several European models of representation of workers' interests in the conduct of collective bargaining and in solving collective labor conflicts.

Keywords: *trade union; employer; negotiation; collective labor contract; collective labor conflict.*

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The role of collective bargaining and collective agreements in the development of working relationships

Protection and exercise of employees' rights to collective action has both theoretical and practical importance because only by doing so they can promote their professional, economic, social interests through collective bargaining (and express their points of view regarding the legislative measures) or may obtain greater rights in addition to those covered by labour laws (by conclusion of collective agreement) and can defend their rights violated (by the onset and resolution of labour disputes).

Priority enjoyed by the national law on collective bargaining in labour legislation is fully consistent with international rules. Both the International Labor Organization and the European Union norms confer an important position to collective bargaining. Representation and collective defence of the interests of workers and employers being included, as a result of the Treaty of Lisbon, between the powers of support, complementarity or coordination between the European institutions and the Member States (Avram and Radu, 2008a: 44-51), a Member State may entrust the social partners, at their joint request, the implementation of European directives adopted in areas where the EU supports and supplements Member States to achieve social objectives (art. 153 par. 3 of the Treaty of Lisbon). There are specific issues of employment excluded from Union competence – wages payments, right of association, right to strike, the right to impose lock-outs (art. 153 par. 5 of the Treaty of Lisbon) that can be governed by means specific to national social dialogue, particularly by collective bargaining agreements concluded by social partners (Avram, Radu, 2012: 104). As regards the relationship between EU norms and national law, the principle of the primacy of EU law does not apply to those relations which do not fall within the scope of the EU competence and in respect of which the sovereign attributes of the State will continue to manifest (Avram, Bărbieru, 2009: 63).

Collective bargaining is one of the foundations of labor relations, which is common across most of the European Union's Member States, with the aim of establishing working and employment conditions, regulating relationships between employers and workers, and developing relationships between employers or their organizations and employees, represented by workers' organizations (trade unions) or otherwise provided for by national law. Depending on its scope, collective bargaining can take place at several levels: at the national level, at branch or sector level, at the level of profession, interprofessional negotiation, local or regional negotiation, bargaining at enterprise level.

Due to the formation of trade union federations at branch level, collective bargaining has become, in Europe, the main form of trade union-patronage relations. Patrons responded to this type of syndicalism by creating their own sectoral organizations. Branch-level negotiation has the advantage that it puts the company in the shelter of union activism. Of course, conflicts that arise around branch negotiations disrupt business activity, but they are not directed against a particular business or employer, for the employers' association is the one targeted. Consequently, "collective bargaining at the branch level moves the workshop or enterprise conflict to the branch level and does not affect the employer's decision-making power - at least in terms of salary levels" (Frăţilă, 2001: 51-52). Branch-level negotiation is advantageous not only because it diminishes the reasons for conflict at the workshop or enterprise level, but also because it facilitates the conduct of inter-branch national negotiations. In support of interprofessional negotiation came large companies that span different areas of activity and who continued to face multiple local claims and union activism, even after branch negotiation became a natural

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act in professional relationships. In an interprofessional negotiation, the most dynamic sectors have to accept some moderation in wages, while the less developed sectors benefit from an increase in pay levels (Frățilă, 2001: 51-52).

Italy has the strongest tradition in branch negotiation, but most often the agreement reached at this level serves only as a starting point for local and business negotiations, without too much influence (D'Agostino, Loiacono, 2009: 267-269). Unlike other European countries, collective bargaining at the branch level is less developed in the United Kingdom. In the British system, each trade union negotiates on behalf of its members with the employer or a group of employers (enterprise level negotiation) so that the results of the negotiation do not apply to all employees in a sector. Consequently, the variety of modalities and results of collective bargaining is much higher than on the continent (Avram, Radu, 2008b: 60-61).

However, interprofessional negotiation can not be considered a constant of professional relations in all European countries. Only in the Scandinavian Peninsula persisted for a longer period; in the countries of Latin Europe (France, Italy, Portugal, Romania, Spain) was very rare. Employers' associations have become increasingly hostile to national wage interprofessional agreements because they have found that they do not lead to wage moderation and do not allow for special private situations of companies to be taken into account. Unions, on the other hand, began to complain about the weakening of their position in front of their members because, in exchange for accepted wage moderation, they did not get any other compensatory advantages.

In Latin European countries, local or regional bargaining prevails for two reasons: firstly, employers' associations have lean structures and leave a lot of freedom to the individual employer; secondly, local negotiation offers employers the opportunity to be directly involved in the preparation and conduct of negotiations.

Enterprise-level negotiation is also relatively developed in Europe, but it is conducted within the framework of branch policies. In the UK, enterprise negotiation is permanent and often takes place in an informal, unregulated manner, but widely spread are the negotiations between employee and employers, which have a wide range of autonomy and the legal possibility to deny wage payments or other benefits to workers who refuse to sign personal contracts – “a clear blow at collective bargaining” (Eaton, 2000: 76).

In France, collective bargaining can take place at branch, professional or interprofessional level, and the territorial scope can be national, regional or local (Lyon-Caen, Pellisier, Supiot, 1994: 880-886). Enterprise-level negotiation may have as its object the creation of a conventional rule supplementing legal provisions or adapting and completing a convention or agreement concluded at a higher level (Frățilă, 2001: 51-52).

In all Germanic countries (Austria, Belgium, Denmark, Germany, the Netherlands), collective bargaining is doubled synchronized. First, the confederations unify the claims of federal organizations; then, the branches considered to be the most important lead the “benchmark” negotiations. The fundamental principle of this bargaining system is that the results of the negotiations are imposed on both employers and employees, members of the negotiating organizations. Thus a set of branch agreements emerged, to which no enterprise can escape. At the same time, enterprises are not obliged to negotiate, as they are covered by branch agreements, unlike in Romania, where collective bargaining (not the conclusion of the collective labor contract) is compulsory at the level of all units with a minimum of 21 of employees. Therefore, collective bargaining in Germanic Europe is characterized by the fact that it protects the

enterprise (the department, the workshop, etc.) from conflicts, the application of branch agreements being mandatory and also by the fact that the state favors the negotiation, although it is involved little in the development of professional relationships, and his role is rarely subject to contestation (Frățilă, 2001: 51-52). In the Germanic model, the tradition of collective bargaining has led to the building of a trustworthy relationship between the social partners over the years, which is also reflected by the terms by which they are appointed: Tarifspartners in Germany, social partners in Belgium and the Netherlands (Avram, Radu, 2008b: 61).

The collective bargaining agreement underpins relations established between employers and employees covered by this contract are both rights and obligations of both parties. Also in the collective agreement are provided possible solutions to resolve any misunderstandings between employees and employers. For example, pursuant to the stipulations of article 39 par. 1 of Law no. 202/2002 concerning the equality of chances for men and women, when the employees consider themselves sexually discriminated, they have the right to submit petitions to the employer or against him, if he is directly involved, and ask for the support of the trade union or the employees' representatives for solving the work situation. Unlike other state laws providing in detail the mediation procedure at the employer/unit level, Romanian Labour Code does not regulate the procedure of solving employees' individual petitions at employer's level. Because of the fact that this aspect is not regulated by law, it should be included as a distinctive issue in the content of collective labour contracts concluded at the unity level or internal regulations. Thus, in order to create and maintain a working environment meant to encourage the respect of each persons' dignity, through the agency of collective labour contract concluded at unity level, there shall be established procedures of amiably solving the individual complaints of the employees, inclusively the ones concerning cases of moral or sexual harassment (Radu, 2015: 95-99).

The collective bargaining agreement is leading to harmonize the interests of employers, employees and the general interest of society. Analyzing Law no. 53/2003 - Labour Code and labour law as a whole, unquestionably stands out that, in all respects, including in terms of content regulation, collective bargaining plays a preeminent role in Romania. After the emergence of Law no. 62/2011 on social dialogue the interests of employees have been severely affected by eliminating the possibility of negotiating and concluding a collective agreement at national level. As for contracts negotiated at the level of sectors, the collective labour contract will be registered at that level only if the number of employees in establishments-members of the signatory employers organizations is greater than half of the total number of employees in the business sector. If this condition is met, the application of collective labour contract registered at the level of a sector will be extended to all establishments in that sector by the order of the Minister of Labour, Family and Social Protection, with the approval of the National Tripartite Council, based on the request of the signatories of collective labour agreement at sectorial level (Article 143 para. 5 of the Romanian Law no. 62/2011 on social dialogue). Otherwise, the contract will be registered as a contract of group of units. A similar situation is registered in Hungary, where the revised Labour Code stipulates that the ministry of labour can extend branch agreements to the entire industry or sector in response to a joint request by the contracting parties but only if the parties are „representative in the industry concerned” (Kollonay-Lehoczky, Ladó, 1996: 136; Pollert, 2000: 192). These conditions lead to a continuous deterioration of industry agreements which are fewer and weak, providing only minimum standards for pay, leaves and work conditions, usually just above those provided

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for by law.

Collective bargaining and the conclusion of collective labor agreements/conventions are equally important for unitary and federal states. In all federal countries, collective bargaining is subject to two-pronged coordination. First, the confederations unified the federal claims, then the trade union confederations in the branches of activity that are considered the most important conduct the basic negotiations. The fundamental principle of this system is that the results of the negotiations are imposed on both employers and workers, members of the organizations involved in the negotiation. The consequence is a set of industrial agreements that no company can avoid (Radu, Avram, Nacu, 2011: 304).

In Germany, collective agreements (Tarifverträge), usually concluded at the branch level by the appropriate trade union and employers' association, are legally binding as long as they keep in line with the statutory minimum standards (Halbach, Poland and Schwedes, 1991: 303-304). A particularity of German law system is that there is no trade union law. Even though trade unions are generally defined as associations with no legal capacity, they are legally entitled to participate in collective bargaining as well as to take legal action or to be taken to court (Section 2 par. 1 of the Act on Collective Agreements and section 10 of the Labour Court Act). The duties and rights of trade union members are laid down in the relevant trade union's status (the constitution act). Even though the statuses may vary between different trade unions, they traditionally establish similar essential duties and rights. There are also written agreements concluded between the employer and the works council (a body representing the employees of the establishment) because „the relationship between the industrial unions and work councils in Germany seems to have been highly significant. Pressures for the decentralization of collective bargaining have been deflected onto the works councils. The works council system and its linkage with industry-wide bargaining has endowed the German economy with a unique capacity for what Thelen called “negotiated adjustment” (Thelen, 1993: 75). One factor that should not be neglected is co-determination, which contributes to the elaboration of various trade union policies that play an important role in the organization and functioning of the national economy (Eaton, 2000: 53-54).

Collective bargaining takes place over a written text (usually based on the previous collective agreement and legislation) on which the parties reach an agreement and which includes a social peace clause, that limits the possibility of triggering collective labor disputes to the (re)negotiation period. New employees' claims and other collective labor conflicts with the same object and between the same parties are forbidden throughout the duration of the collective agreement. In this way, peace between the social partners is ensured both at the level of the enterprise and at the level of the branch of activity for the entire period of the collective convention's validity (Radu, Avram, Nacu, 2011: 305).

Collective bargaining can also take place at the enterprise level but companies are not obliged to negotiate, because they are covered by branch agreements (this does not mean that enterprise-level bargaining is prohibited).

German government has a discrete role in employment relations. Its contribution is notable in two aspects: first, sets the legal framework of negotiation and conflict; second, government can intervene when there is an extension of a collective agreement, its role being to convince companies that are not members of employers' organizations to meet agreement's conditions. A collective agreement may be declared as generally applicable to all employment relationships within its geographical scope, whether or not the employer or the employee are members of the parties to the agreement. This

declaration is done by the Ministry of Labour, if at least 50% of the employees who come under the agreement's geographical area are hired by employers already bound by the agreement; the accordance of both industrial partners is required (Radu, Avram, Nacu, 2011: 305).

Solving collective labor conflicts in EU member states

Collective conflicts are the traditional weapon of trade unions. Its use is based on strengths and union capacity. In states where syndicalism is influential, the strike is essentially used as a threat. In countries with weak syndication, the strike often "escapes" the control of organizations.

The kind and the level of a dispute often have important legal and strategic consequences for determining the method for resolving it. The "classical" classification of labor conflicts divides them into conflicts of interest and conflicts of rights. While conflicts of interest are work conflicts which have as their object the establishment of working conditions when negotiating the collective labor agreements and which refer to the interests of a professional, social or economic nature of employees, conflicts of rights concern the exercise of certain rights or the fulfillment of obligations under laws or other normative acts, as well as collective or individual labor agreements. Such conflicts therefore concern the rights of employees already born. The current Romanian regulations on labor conflicts - Law no. 62/2011 - divides labor conflicts into: a) collective labor conflict - the labor conflict between employees and employers that breaks out as to the commencement, conduct or conclusion of negotiations on contracts or collective agreements; b) individual labor conflict - the work conflict which has as its object the exercise of certain rights or the fulfillment of obligations arising from individual and collective labor contracts or from collective agreements and civil service relationships, as well as from laws or from other normative acts.

In the case of a conflict of rights its settlement can be done under the conditions and according to the procedure provided by the law - as a rule, by introducing an action at the court - or, if there is a valid collective contract in force, this same agreement might include dispositions setting out the mechanism the parties must follow in the event of a individual dispute. Depending on the national legislation, there may be legal provisions requiring that certain collective disputes must follow certain compulsory steps or must be solved in a specified manner for reasons of public or private interest protection; e.g. a collective dispute involving an essential public service may be subject to compulsory arbitration under the law (ILO Office, 2007: 19).

In European countries, collective labor disputes are settled either in amicable ways (alternative dispute resolution) or through strike. All methods of alternative dispute resolution (conciliation, mediation, arbitration) involve the participation of a neutral third party and the degree of its intervention makes the difference between one procedure or another (ILO Office, 2007: 3).

In some EU member states, there is no distinction between conciliation and mediation or these terms tend to overlap (Malta and Slovenia). In other states, there is a definite difference, yet subtle, between the two amiable forms of solving the conflicts. While the conciliator has the task of facilitating communication between the parties of the dispute, without being able to make any concrete proposal to resolve the conflict, the role of the mediator also involves the presentation of some variants of settlement that the parties can accept or reject (ILO Office, 2007: 3).

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Conciliation procedure may be compulsory or conventional – depending on the legal frame specific to each country. In France, conciliation is, as a rule, conventional. Normally, any collective agreement must include a clause concerning the conciliation procedure if a conflict arises between the two parties. Often, conciliation is direct; it takes place between the two parties without the participation of a third party. If there is no conventional procedure or if it has not been able to function, the parties may resort to the formal procedure, which has a subsidiary character. It involves the conciliatory intervention of public authority. Thus, at first the informed prefect can take the initiative to bring together the parties and try to reconcile them. In addition, a conciliation attempt will be carried out within regional or national tripartite commissions (employers' representatives, employees and public authorities). Conciliation only leads to a voluntary agreement. If it succeeds, the minute has the value of a agreement, with the same authority and effect as a collective agreement. In the event of failure, the minute shall record the points of disagreement in order to facilitate a possible mediation.

In Romania, conciliation is compulsory. The representative trade union or employees' representatives shall notify in writing the territorial labor inspectorate or the Ministry of Labor about the triggering of the collective labor conflict. The Delegate of the Ministry of Labor/ the Territorial Labor Inspectorate plays the role of conciliator.

In some EU countries, labor inspection services play a prominent part in the prevention and resolution of collective conflicts. Basically, there can be distinguished two models (systems). Under the French system, labor inspectors often function as conciliators in cases of collective disputes (Greece, Spain, Turkey, Romania). Under the British tradition, labor inspectors are strictly forbidden from interfering in industrial disputes (Cyprus, Germany, the Nordic countries). The Polish system is an intermediary model in which the law compels employers to bring a dispute to the attention of the regional labor inspector who then typically requires that a workplace inspection be carried out. Although the labor inspector does not behave as a conciliator or as a mediator, the recording of the results of the inspection, the finding of contraventions and the possible sanctioning of the employer with the fine contributes to the solving of the collective labor conflicts at the enterprise level (ILO Office, 2007: 13).

Mediation is a procedure that follows, in principle, conciliation in case of failure. Unlike the Romanian system, in France, if the parties wish, they can resort directly to mediation without using the conciliation procedure. Also, in the event of a failure of conciliation, parties may prefer mediation to arbitration, and finally, after the failure of conciliation, it is common for neither the parties to the conflict nor the chairman of the National Commission of Collective Negotiation nor the Minister of Labor to trigger the mediation procedure. Mediation, initially optional (requires the parties' agreement), may be binding if the chairman of the National Commission of Collective Negotiation or the Minister of Labor asks the parties to resort to it after the failure of the conciliation, even if none of the parties wants it (Roy, 2009: 150). In France, the mediator is either elected by the parties or, in the absence of the agreement, elected by the minister from the list of impartial and competent persons established by him after consultation with the most representative trade union organizations. In the first instance, the mediator plays the role of a qualified investigator. Like a training judge, he collects documentation on the dispute (economic situation of the enterprise, worker's condition). For this purpose, he has investigative powers: he can use expertise (e.g. accountancy expertise), witness audition, and gather information from all interested parties. After receiving the memoirs of the parties, he summoned them and tried to reconcile them. The mediator's mission must be

completed within one month (which may be extended with the agreement of the parties to the dispute). It shall be expressed in reasoned proposals bearing the title of recommendation. This recommendation, proposed to the parties, is not binding. The parties may reject the mediator's proposals. This rejection must be motivated. Otherwise, the mediator records the parties' agreement, which has the same value as a collective agreement (Lyon-Caen, Pellisier and Supiot, 1994: 880-886).

Arbitration is another stage in solving a collective labor conflict, which may be mandatory or voluntary, binding or advisory – depending on the legal circumstances or the choice of the parties. As a general rule, arbitration should be freely chosen and the parties should be bound by the final decision. Compulsory arbitration, which is imposed by law, is generally contrary to the principle of voluntary negotiation of collective agreements (Gernigon, Ordero and Guido, 2000: 40-41). There is an exception, however, in cases involving essential services, the interruption of which would endanger human life, personal safety or health of the whole or a part of the population.

Usually, arbitration typically follows after attempts at conciliation and/or mediation between the parties have proven unsuccessful (the case of Romania). In Bulgaria, when a collective dispute is not solved through mediation, the parties may voluntarily agree to submit the conflict to an individual arbitrator or an arbitration commission (voluntary arbitration). Whichever option is chosen, the arbitration process involves the hearings of both parties after which the arbitrator(s) deliver(s) a binding decision in the matter. Alternatively, during the course of the hearings, the parties may be persuaded to sign an arbitration agreement, which has the same legal value as an arbitration decision but the way of resolving the dispute is freely chosen by the parties instead of being imposed by the arbitrator(s). Mandatory arbitration is provided only in one hypothesis: if no agreement is reached between the parties to the conflict on the performance of minimum activities during the strike (Alexandrov Sashov, 2018: 195).

The usual way of solving collective labor disputes in Germany is arbitration. This procedure aims at reconciling conflicting interests and preventing the outbreak of collective actions (collective cessation of work, for example). Even when a collective dispute broke out, arbitration trials can also be made to reach an agreement and thus end this action. In any case, arbitration always has the purpose of contributing to the conclusion of a new collective agreement and thus to maintain social peace. There are two kinds of arbitration: conventional and state arbitration. Conventional arbitration intervenes if the parties to a collective agreement have agreed in a separate agreement that they will go to arbitration before a conflict begins. The state arbitration procedure is triggered only if the direct conciliation between the parties has been discontinued or the conventional arbitration procedure has failed (Halbach, Poland, Schwedes, 1991: 303-304).

In Greece, a collective labor dispute is subject to arbitration either directly, with the agreement of both parties or after a failed mediation. In the latter case, the party who requested failed mediation and the party that accepted the mediator's proposal unilaterally may request arbitration. Employees retain the right to strike during negotiations and during mediation or arbitration. However, this right is temporarily banned if trade unions or employee representatives have resorted to arbitration after accepting the mediator's proposal (Kerameus, Kozyris, 1993: 254-255).

In any event, arbitration involves the participation of a neutral third party who has the duty to examine all the case documents and the evidence provided by both parties and to issue a decision that definitively ends the conflict (ILO Office, 2007: 17-18).

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The decision rendered in arbitration is binding on the parties, being equivalent to a collective agreement. Thus, triggering a strike with the same object and between the same parties after the end of the arbitration procedure becomes illegal.

One feature existing in nearly all EU member states – excepting France – is the peace obligation deriving from the collective agreements, the clause on which the collective action/strike is forbidden during the lifetime of the collective agreement.

The right to strike is, in most EU countries, guaranteed in the Constitution, with the exception of Austria, Belgium, Ireland, Luxembourg, Malta, the Netherlands, and the UK (Warneck, 2007: 7). In some countries (Germany and Finland) the right to strike derives from the constitutional freedom of association. There are also some states in which this right has been mainly developed through the jurisprudence of the courts: Belgium, Denmark, France, Ireland, Italy, Luxembourg and the Netherlands (Warneck, 2007: 7).

Prohibitions and limitations on the exercise of the right to strike may result from certain legal dispositions concerning collective disputes resolution. In some countries, strike among public employees in the military, police and emergency services is restricted or even prohibited by law. Wild cat strikes are illegal; also strikes with a clear political character.

Procedural conditions for declaring, conducting, suspending and terminating the strike are governed by either law or collective agreements and relate most often to conciliation and mediation procedures, notice periods, the minimum number of votes to be scored before a strike is taken. Only trade union organizations (representative or not, as the case may be) and elected representatives of the employees have the right to declare strike in order to support and defend the social, professional and economic interests of the employees as well as their statutory rights. The obligation of the strike's organizers to hold a ballot before adopting the strike decision may be laid down either in legislation (Romania) or in the collective agreement (Denmark) or in the trade union statutes (Germany and the Netherlands).

Requiring the parties to pursue conciliation or mediation before strike is legitimate as long as these two amiable procedures are not so complex or slow that a legal declaration of strike becomes impossible in practice or loses its effectiveness (ILO, 2006: 132).

Exercise of the right to strike must not be done abusively by employees. Abuses make strike illegal. In most EU countries the fact of stopping work by the employee in order to take part in a legal strike can not constitute a reasoned justification for termination of the employment contract; neither the contract can be abolished, nor can the employer dismiss the strikers. During a legal strike, the employment contract is suspended and wage entitlements are not paid during this period. Nevertheless there are still some European states in which participating in collective action/ strike is still considered a breach of the main obligation of employees – that of performing the work: Austria, Denmark, Ireland and the UK. An illegal strike is considered a termination of the contract with serious consequences. The employer may claim damages (either to the union, or the individuals or both) and dismiss the strikers, provided that such dismissal is done in a manner that does not constitute an abuse of rights.

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