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Summary

This article is intended to highlight the distinction between the concepts of the social and civil dialogue in the European Union and to evaluate the impact thereof upon its governance. At present, it hardly can be concluded that the involvement of interest groups in different policy processes in the Union through the civil and social dialogue dramatically increases efficiency of EU governance. The effective implementation of policies cannot be always guaranteed by involving civil actors. Indeed, this study demonstrates that there are considerable limitations on the part of the social partners and civil interest groups to contribute decisively towards efficient conduct of EU policies.

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1. The concept of participatory governance in the Constitution for Europe

The new Constitution for Europe signed by all the member states of the European Union (EU) on 29 October 2004\(^1\) introduces the concept of participatory democracy as an important element of the future EU governance.\(^2\) Article I-47 of the European constitution stipulates:

‘The principle of participatory democracy

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.

2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.

3. The Commission shall carry out broad consultations with parties concerned in order to ensure that the Union’s actions are coherent and transparent.

…….’

The inclusion of the principle of participatory democracy in the new Constitution for Europe has attracted considerable public attention. Indeed, the White paper proposals on better involvement and on consulting civil society drew, by far, more interest than any other theme during the public consultation on this document.\(^3\)

What this concept actually entails? Theoretically, the principle of participatory governance denotes ‘the regular and guaranteed presence when making binding decisions of representatives of those collectivities that will be affected by the policy adopted.’\(^4\) It means that those who could be affected by a decision, holders\(^5\), have to be involved in its creation and implementation. As a matter of fact, participatory governance involves only those organisations judged capable of contributing to the governance of the designated task (such as solicitation of indispensable information, contribution towards building of necessary consensus or towards the successful implementation of decisions) should participate. Participatory democracy requires that parties who are affected by legal provisions should be involved in the opinion forming process at the earliest possible stage and should be given the opportunity to bring their wishes to bear in this process and to put forward their proposals.

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1 Treaty establishing a Constitution for Europe, OJ C 310, 16.12.2004
2 The notion of governance is used in a variety of ways. A wide notion defines governance as every form of ordered rule and collective action to achieve policy results, by solely public, democratically legitimized actors (government) and/or private actors (see e.g. Commission of the European Communities (2002) ‘Report from the Commission on European Governance’, COM(2002) 705, Brussels, 11.12.2002, note 1 at p 8). The more restricted notion defines governance as those governing mechanisms which do not or only minimally take recourse to public authority and sanctions of government, that blur responsibility between the public and the private sector, and that rest on the interaction of a multiplicity of relatively autonomous actors who influence each other (e.g. Joerges, Christian et al (2002) Governance in the European Union and the Commission White paper, European University Institute: EUI working paper Law, no. 2002/8).
5 Different type of holders can be identified: right-holders, space-holders, knowledge-holders; shareholders, stakeholders, interest-holders and status-holders.
Although Article I-47 of the Constitution for Europe as a non-committal provision does not provide clear and operational definition of the notion of participatory democracy, it undoubtedly refers to the structuring of the involvement of so called civil society in Union law making and the implementation thereof designated at present as the civil dialogue.\(^6\) It stands for a range of patterns for consultation and discussion, such as particular fora or deliberative panels organised by the Commission at which civic organisations affected by certain political project or legislative initiative could express their concerns and opinions.\(^7\) Civil society organisations are the principle structure of society outside of government and public administration, including economic operators not generally considered being non-governmental organisations (NGOs).\(^8\) Both the concept of participatory democracy and the civil dialogue concern the structures intended to make possible for those affected by decisions, stakeholders, to participate in decision making process.

The Treaty of European Union that is currently in force does not make any reference to the civil dialogue. The Commission has developed this concept completely outside the Treaty framework. While the EU Treaty in force is silent as to the notion of the civil dialogue, it formalises the social dialogue, the involvement of European level employers’ and employees’ associations, so called social partners, in Union decision-making by virtue of Articles 138 and 139 EC. The autonomy of the social dialogue and its distinctiveness as to the concept of the participatory democracy is retained in the Constitution of Europe. It addresses the promotion of the dialogue between the social partners separately from the issue of the principle of participatory democracy in Article I-48.\(^9\)

Although the Constitution formally makes the distinction between the concepts of the civil and social dialogue, it does not provide the clear guidelines as to substantive differences between them. The lack of the operationalisation of the notion of participatory democracy contributes towards the bewilderment surrounding two of those concepts. The fact that the definition of the civil society adopted by the Commission in its White paper of governance includes the social partners additionally blurs the delimitation line between the social and civil dialogue in the Union.\(^10\) Furthermore, since, both the social and civil dialogue are based upon the

\(^6\) The opinion that the concept of participatory democracy as enshrined in the Constitution for Europe denotes the already established practice of the so called civil dialogue is upheld by the European Social and Economic Committee (European Social and Economic committee (2003) ‘Opinion addressed to the 2003 Intergovernmental Conference’, CESE 1171/2003, Brussels, 24-25 September 2003, p.2).

\(^7\) There is no clear-cut distinction between the civil dialogue and lobbying for both concern informal exchange of information between interest groups and Union institutions. Institutionalisation and structuring of the civil dialogue through the introduction of particular procedures and the imposition of minimum requirements which should be meet by civic groups in order to qualify them to take part in the consultation initiated by the Commission will in future establish a sort of delimitation line between those two phenomena.


\(^9\) Article I-48 of the Constitution for Europe reads:

The social partners and autonomous social dialogue

The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy. The Tripartite Social Summit for Growth and Employment shall contribute to social dialogue. The concept of the social dialogue is further elaborated in Articles III-211 and III-212 of the Treaty establishing a Constitution for Europe, OJ C 310, 16.12.2004.

\(^10\) Civil society includes the following groups: trade unions and employers’ organisations (social partners); organisations representing social and economic players, which are not social partners in the strict sense of the term (for instance, consumer organisations); non-governmental organisations which bring people together in common cause, such as environmental organisations, human rights organisations, charities; professional as-
preposition that citizens affected by decisions should have an equal and effective opportunity to make their interests and concerns known, substantive distinction between those two modes of governance is not easy to established.

The Commission itself has contributed towards insufficient delimitation of boundaries between those concepts by suggesting that ‘policy development related to consultation processes could build upon the experience from the social dialogue and should also aim at creating synergies between the European social dialogue and wider civil society consultation mechanisms’. It further adds to the confusion by claiming that ‘there was no single uniform model, which could be applied to the dialogue between the Commission and civil society organisations.’

This article is intended to highlight the distinction between the concepts of the social and civil dialogue in the European Union and to evaluate the impact thereof upon its governance.

2. The concept of the civil dialogue in the European Union

Informal consultation with interest groups has been constant and distinctive feature of the Commission’s pre-drafting phase of the European legislation preparation process from the very beginning of European integration. The Commission has contact with around 1500 interest groups. Two thirds of these represent business, one-fifth citizen interests, with the remainder representing professions, trade unions, and public sector organisations at national and regional level. In addition to these interest groups, an estimated 350 large firms, 200 regions, and 300 or so organisations supplying commercial public affairs services, are active in engaging EU politics.

The Commission consults interest groups when formulating its policies. It carries out those consultations in order to obtain information, data, statistics, knowledge and expertise necessary for discharging its responsibility to initiate law in the European Union. Since its in-house expertise is limited, information provided by private actors helps the Commission to offset the informational advantage of national officials.

The Commission does not only regard consultation of interested parties to be beneficial for the process of legislation drafting because it helps to ensure that its legislative proposals are...
sound, but it considers itself to be legally bound to do so.\(^\text{16}\) The Commission finds that its duty to wide consultation flows from the Protocol No 7 on the application of the principles of subsidiarity and proportionality, annexed to the Amsterdam Treaty which stipulates that ‘the Commission should […] consult widely before proposing legislation and, wherever appropriate, publish consultation documents’.

Consultations of interested parties by the Commission take place on an ad hoc base through different instruments, such as Green and White papers, communications, advisory committees, informal working groups, business test panels, ad hoc and on-line consultations, etc.

In order to be able to gather the widest possible range of information and expertise available, the Commission endorsed the policy of unrestricted access of interest groups to its officials and declined to introduce any system of licensing for groups that it consulted.\(^\text{17}\) The Commission did not impose any particular requirement upon interest groups that it engaged in dialogue with, nor it requested them to fulfil some formal conditions in order to be consulted.

This policy of open access should not be confused with the notion of equal access for all. ‘Ownership of resources, such as expertise or information, governs access of interest groups to EU institutions, not possession of an opinion worthy of equal consideration’.\(^\text{18}\) Interest groups consulted by the Commission are selected on the basis of their ability to solicit substantial policy input. The unrestricted access policy is intended to provide an incentive for specific interest groups to act as a producer of information, as means of assuring the viability of its proposals. Private actors can only stay involved with the Commission if they manage to present fresh information that is relevant to the decision.\(^\text{19}\) One means of reducing the costs of information search, when these appear to be excessively high might be to use agents who are specialised in the production of information.

Apart from engaging with interest groups for the purpose of consultation, the Commission also adopted very close relations with non-governmental associations participating in the distribution of EU aid to third countries.\(^\text{20}\)

Until the mid-nineties the Commission did not make any distinction between diffuse interest groups advancing widely held interests such as environmental protection, consumer protection, equal opportunities between man and women, and civil liberties and private interest groups, such as business associations, in its consultation policy deployed it the process of the preparation of legislative proposals.

In the years following the conclusion of the Maastricht Treaty, the Commission has begun to advocate structuring and the formalisation of the consultation process with non-profit organi-

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sations distinguishing its dialogue with them from its contacts with other groups.\(^\text{21}\) By that time the Commission has found it increasingly difficult to manage the logistics of ever growing numbers of lobbyists (20,000 of them around three or for every Commission policy making official)\(^\text{22}\) and in particular to reconcile the policy of open access with the principle of equal opportunity. The relationship between the Brussels and interest groups up to the 1990s could be described as being ‘clientele’, with the Commission selecting a few groups with which it felt comfortable as the appropriate representatives of social interests. Beginning at least with the Sutherland Report in 1992 the European Commission has sought to open its relationship with groups and to make those relationships more transparent. This has been done through creating a series of fora that promote relatively open dialogue on policy issue.\(^\text{23}\)

However, whilst the Commission’s dialogue with representatives of management and labour organised at European level called the social dialogue has its basis in law, the Commission intention to structure its dialogue with civic interest groups was not legally institutionalised. Although the Commission has over the years developed quite regular consultation with the diffused interest groups, this dialogue lacked formal Treaty recognition and stable structures. Declaration No. 23 attached to the Maastricht Treaty stresses the importance of co-operation between the European Union and charitable associations, foundations and institutions responsible for social welfare establishments and services, but it does not provide legal basis for the formal involvement of those groups in Union lawmaking. The subsequently adopted Amsterdam Treaty brought no change. Although the Comite des Sages, the expert group set up in 1996 by the Commission to examine the possibility of codification of the civil dialogue by the Treaty provision, was in favour of such an proposal,\(^\text{24}\) this was not accepted during the Amsterdam Treaty drafting. Similarly to Masstricht, the Amsterdam negotiations resulted only in the adoption declarations on voluntary services\(^\text{25}\) and sport\(^\text{26}\) to be attached to the Treaty that recognise the importance of exchange of information and experiences with non-profit organisations operating in the field of social services and sport, with particular emphasis on the encouraging European dimension of these associations.

As a matter of fact, the Commission itself renounced its plan of an explicit reference to the civil dialogue being enshrined in the Amsterdam Treaty. It rationalised that by the fear of the bureaucratisation.\(^\text{27}\) Instead, it opted for more flexible and less rigid and formal mechanisms,


\(^{25}\) Declaration 38 reads: The Conference recognises the important contribution made by voluntary service activities to developing social solidarity. The Community will encourage the European dimension of voluntary organisations with particular emphasis on the exchange of information and experiences as well as on the participation of the young and the elderly in voluntary work.

\(^{26}\) Declaration 29 states: The Conference emphasises the social significance of sport, in particular its role in forging identity and bringing people together. The Conference therefore calls on the bodies of the European Union to listen to sports associations when important questions affecting sport are at issue. In this connection, special consideration should be given to the particular characteristics of amateur sport.

such as advisory committee deliberation, debating and discussions at various policy fora, the setting up of new budget lines promoting co-operation with non-profit organisation and publishing of a directory on European non-profit associations in order to enable officials to consult more systematically and as widely as possible.28

The conceiving of the European Social Policy Forum in 1996 marked, according to the Commission, the beginning of a civil dialogue in the European Union,29 although non-profit organisations were first consulted in a systematic manner when preparing the 1993 Green paper on European social policy.30 Subsequently, the Commission has kept organising policy forums in other areas such as environment, trade,31 development,32 fisheries, information society, corporate social responsibility,33 corporate governance,34 enterprise and industry,35 education and dialogue with churches.36

Besides, the regular consultations were held between the Humanitarian Aid Office of the European Commission (ECHO) and more than 160 NGOs and the biggest pan-European environmental NGOs (‘Group of Eight’) and the Commission.37 Those fora are conveyed on informal and ad hoc basis and in the absence of legal framework provided by the Treaty or secondary legislation. Exceptionally, the participation of NGOs in work of some formally established committees such as the Consultative Committee for Co-operatives, Mutuals, Associa-

31 For an overview of the current status of the civil dialogue in trade see http://www.europa.eu.int/comm/trade/csc/dcs_proc.htm
32 With the goal of exchanging expertise and opinions on policy priorities, DG Development holds a continuous dialogue with CONCORD, the Confederation of European non-Governmental Organisations (NGO) for Relief and Development (http://europa.eu.int/comm/development/body/theme/ngo/index_en.htm)
34 http://europa.eu.int/comm/enterprise/consultations/index.htm
35 http://europa.eu.int/comm/dgs/policy_advisers/activities/dialogue_religions_humanism
Moreover, the Commission supports the involvement of civic groups in European governance through several civic participation programmes. For a number of years this support has been provided under headings in parts A and B of the EU budget. Most of those programmes have carried out without any legal basis. This led to the temporary suspension of those funding. As a consequence, awarding of grants for promoting civil dialogue is formalised by means of a Council Decision on civic participation. In addition to European umbrella organisations such as the Platform of European Social NGOs, those programmes are oriented towards non-governmental organisations, associations and federations working at European level or cross-industry trade unions, including grassroots and local community organisations. Support may also be granted to bodies pursuing an aim of general European interest, including ‘think tanks,’ and to organisations collaborating with the Commission under the Community Action Programme to combat discrimination. This approach has been changed after the publishing of the Commission’s White paper on governance in 2001 in which it called for the establishment of a stable framework to facilitate a more co-ordinated and structured dialogue with civic associations. The Commission opted for the institutionalisation and structuring of contact with the civil society by virtue of special provisions enshrined in the Constitution for Europe and adopted the definition of the civil society which includes economic operators not generally considered to make part of civic groups championing widely accepted causes originally regarded by the Commission as participants in the civil dialogue.

The Commission formalised the civil dialogue process through the adoption of general principles and minimum standards for consulting interested parties (hereafter the minimum standards). They have been applicable since January 2003. The minimum standards serves as a framework for structured consultation procedures conveyed with civic interest groups. The Commission claims that those principles should ensure that all parties affected by the proposal can become more involved, and on a more equal footing, in the process of consultation preceding EU legislation formulation. The aim is to ensure that the parties concerned would

41 Support for the running costs of the Social Platform provided under the Community Action Programme to promote active European citizenship amounts to 660 000 euros for years 2004 and 2005 (http://europa.eu.int/comm/employment_social/fundamental_rights/civil/civ_en.htm)
42 Four European umbrella NGO networks representing and defending the rights of people exposed to discrimination – AGE (The European Older People’s Platform), ILGA Europe (International Lesbian and Gay Association – Europe), ENAR (European Network Against Racism), and EDF (European Disability Forum) – are being granted a total of three million euros per year towards their running costs up to the end of April 2007 (http://europa.eu.int/comm/employment_social/fundamental_rights/civil/civ_en.htm)
have an opportunity to express their opinions. According to the Commission the purpose of adopting five minimum standards is to enable legislator to be sure of the quality, and particularly the equity, of consultations leading up to major political proposals. The move is motivated by three concerns: to systematise and rationalise the wide range of consultation practices and procedures, and to guarantee the feasibility and effectiveness of the operation; to ensure the transparency of consultation from the point of view of the bodies or persons consulted and from the legislator point of view; and to demonstrate accountability vis-a-vis the bodies or players consulted, by making public, as far as possible, the results of the consultation and the lessons. The Commission wants to assure that all parties are properly consulted.

The minimum standards are applied systematically to all major policy initiatives. They should be considered as a tool created by the Commission for the purpose of the operationalisation of its new commitment to introduce an impact assessments analysis for its initiatives in all EU policy areas, which is taking into account the economic, social and environmental impact of the proposal concerned. This strategy provides for all its policy proposals to be assessed for their impact upon the widest possible group of potential stakeholders, in order to ensure that consideration of the impact of measures is not simply restricted to an elite of those who are politically active on them. The first stage of the impact assessment process consists of applying the minimum standards to consultations preceding all the Commission legislative initiatives.

The main innovations generated by the consultation standards are: the definition of a minimum deadline for consultation, the obligation to report on the result, the obligation for an appropriate reaction to comments receive, the establishment of a single access point for all the Commission’s public consultations and the obligation of displaying of the results of public consultation on the Internet. Standards should be applied together with the following general principles: participation, openness, accountability, effectiveness and coherence. The Commission claims that it wishes to maintain an inclusive approach and not to create hurdles in order to restrict access to consultation process. Those standards also should not prevent lobbying. In other words, it does not intend to create new bureaucratic obstacles for purpose of limiting the number of those that can participate in consultation processes. Indeed, it provides assurance that ‘every individual citizen, enterprise or association will continue to be able to provide the Commission with input’. Its intention is to achieve the balance between open and focused, targeted consultation of those with a pertinent interest.

In the Commission’s view, these standards should improve the representativity of civil society organisations and structure their debate with the institutions. They are intended to reduce the

46 The largest number of consultations related up to now to agriculture and fisheries, employment and social policy, external relations, industry, justice and home affairs, transport and energy, the environment, economic policy, the information society and health and consumer protection (Commission of the European Communities (2004) ‘Report on European governance (2003-2004)’, SEC(2004) 1153, p.3.
48 See http://europa.eu.int/yourvoice/consultations/index_en.htm
49 At least eight weeks for receiving replies to written consultations or 20 working days’ notice for meetings.
51 Ibid., p. 11.
risk of the policy makers just listening to one side of the arrangement or of particular groups
getting privileged access. However, it does not apply accreditation requested by some
NGOs. The Commission is always rejected an official consultative status for NGOs along
the lines of existing accreditation systems in the United Nations and Council of Europe. For
those reasons the proposals are placed on the Internet for comments. Although this approach
has widen the scope of groups consulted, it has eroded traditional bi-lateral discussions be-
tween the Commission and certain interest groups.

The idea of drawing up more extensive partnership agreements with a number of organised
civil society sectors which would meet more stringent eligibility criteria than those required
by the minimum standards was considered but eventually not accepted by the Commission. The
aim of introduction of those partnership agreements would be to encourage, on the basis of
these agreements, civil society organisations to rationalise their internal structure, give guar-
antees of openness and representativeness and to confirm their ability to rely information or to
conduct debates within the member states. On the Commission’s part, partnership arrange-
ments will entail a commitment for additional consultations. In return, the arrangements will
prompt civil society organisations to tighten up their capacity to rely information or lead de-
bated in the member states. This has not been adopted because of opposition of the Euro-
pean Parliament and the concern that this there would be de facto establishment of a regime of
privileged associations. However, there is an exception to the Commission policy not to enter
into special partnership agreements with interest groups. Relations between the Humanitarian
Aid Office of the Commission (ECHO) and around 200 non-governmental organisation it co-
operates with are governed by Framework Partnership Agreements (FPAs). The purpose of
FPAA is to define roles, responsibilities, and legally binding rights and obligations of ECHO
and NGOs it collaborates with in the implementation of humanitarian operations financed by
the European Union.

The codification of standards for the conduct of the civil dialogue is accompanied with the
establishment of the CONECCS database (Consultation, European Commission and Civil So-
ciety), that offers the general public information on the civil society’s non-profit organisations
established at European level and the committees and other consultative bodies the Commis-
sion uses when consulting organised civil society in an informal or structured manner. This
database is constructed as a follower of the directory on European non-profit associations
This index of organisations, which was compiled on a voluntary basis, is intended to serve
only as an information source and not as an instrument for securing exclusive access to the
Commission consultative process. Part of the organised consultative process on the minimum

53 See Platform of European Social NGOs ‘Political recommendations on civil dialogue with NGOs at Euro-
   pean Level, 14 October 1999.
54 Open web consultations can be viewed at http://europa.eu.int/yourvoice/consultations/index en.htm
57 http://europa.eu.int/comm/echo/partners/fpa NGOs_en.htm
58 http://europa.eu.int/comm/civil_society/coneccs
59 See above
standards. It is not intended to serve as a system for accrediting certain organisations vis-a-vis the Commission. It should provide an overview of advisory committees set by the Commission and a non-exhaustive list of NGOs active at the European level. Not only NGO’s, but also private interest organisations such as World federation of Advertisers, the European Demolition Associations, or the Banking Federation of the European Union are included.

3. The concept of the social dialogue in the European Union
The Commission’s intention to standardise the involvement of non-profit associations in EU lawmaking denoted as the civil dialogue was developed in relation to the already established social dialogue between the European level management and labour. Articles 138 and 139 of the Treaty establishing European Community (EC) endow the associations representing employers and employees at the European level, the so called social partners, with law making and law implementation powers. Namely, the Commission’s legislative proposals in social policy are to be subject of a mandatory two-stage consultation process\(^{60}\) with the possibility for the Commission to suspend the legislative process in the social partners announce their intention to open negotiation. They can enter into intersectoral or sectoral\(^{61}\) agreements. There is also possibility for the establishment of company level social dialogue on the base of EC legislation within so called European work councils. \(^{62}\) At present, approximately 650 European work councils were set up in companies operating within the EU.\(^{63}\)

The opening of negotiations is totally in the hands of the social partners and the negotiation process is based upon principles of autonomy and mutual recognition of the negotiating par-

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ties. Should the social partners decide not to negotiate, the EU institutions regain their legislative competence.

If the agreement is concluded, the social partners may choose whether they wish to implement the agreement via collective bargaining or via a Council decision.

To date, the social partners, the European Trade Union Confederations (ETUC), the Union of Industrial Trade Union Confederation (UNICE) and the European Centre of Public Enterprises (CEEP), have concluded five intersectoral framework agreements under this procedure. Three of those were implemented by the Council, and two shall be implemented by the social partners themselves in accordance with national practices and procedures. Sectoral social partners adopted approximately 300 joint texts, of which three agreements implemented by the Council, and three by procedures and practices specific to management and labour. More recently the cross-industry and sectoral social partners have begun to adopt an

64 The social partner did not succeed to come to an agreement in the cases of European work council, burden of proof in sex discrimination, prevention of sexual harassment at work, national information and consultation, temporary work, and data protection at the workplace.


68 Directive 99/63/EC concerning the agreement on the organisation of working time seafarers concluded by the European Community Ship-owners’ Associations (ECSA) and the Federation of Transport Workers’ Unions in the European Union (FST), OJ L167/33, 2.7.1999; Directive 2000/79/EC concerning the European agreement on the organisation of working time of mobile workers in civil aviation concluded by the Association of European Airlines (AEA), the European Transport Workers’ Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air carrier Association (IACA), OJ L302/57, 1.12.2000. The railway sector social partners also requested the implementation of European agreement on certain aspects of the working conditions of mobile workers assigned to interoperable cross-border services. The adoption of a Council directive concerning agreement on certain aspects of the working conditions of railway mobile workers assigned to interoperable cross-border services of 27 January 2004 is foreseen (European Commission (2004) Industrial Relations in Europe 2004, Luxembourg: Office for Official Publications of the European Communities, p. 98.

69 Recommendation framework agreement on the improvement of paid employment in agriculture in the member states of the European Union concluded between the Employers’ Group of the Agricultural Professional Organisations in the European Union (GEOPA/COPA) and ETUC, the social partners represented in the Joint Committee on Social Problems Affecting Agricultural Workers in the European Union on 24 July 1997 (http://europa.eu.int/comm/employment_social/soe-dial/social/euro_agr/data/en/970724.doc), Recommendationary Framework Agreement in Telecommunication Sector concluded by the Communications International and Eurofedop, the social partners resented on the Telecommunications Joint Committee on 20 November
increasing number of new generation texts (autonomous agreements, guidelines, code of conduct, policy orientation etc.) with commitments or recommendations directed at their members and which they undertake follow-up themselves.\textsuperscript{70}

Up to now negotiations of the social partners operating at different levels (intersectoral, sectoral, company) have been conducted in isolation one from the other and there has been little interconnection between those different levels of the social dialogue. As from recent, the Commission has begun to call for more synergy between separate levels of the social dialogue. In its 2004 Communication on the social dialogue, the Commission expressed the possibility of enhancing synergies between the European cross-industry and sectoral levels.\textsuperscript{71} For example, in the area of lifelong learning, some sectors (postal services, banking, cleaning industry) have referred to the cross-industry framework of action. Similarly, on the topic of telework, social partners in the electricity and local and regional government sectors have adopted joint texts welcoming the cross-industry agreement and calling on their members to implement in their sectors in accordance with the procedures and practices specific to management and labour by the July 2005 implementation deadline for the cross-industry agreement. Both sectors also undertake to monitor the implementation of the agreement in their sectors in 2005.

The Commission also suggests that the social partners could explore the possible synergies between the European social dialogue and the company level, stating that one example could be a link between the sectoral social dialogue and European Works Councils (EWCs).\textsuperscript{72} It maintains that the range of issues being considered within EWCs is expanding beyond the core issues of company performance and employment and is now covering subjects with a strong European dimension, such as health and safety, equal opportunities, training and mobility, corporate social responsibility (CSR) and environmental issues. The Commission believes that in these cases there may be possibilities for synergies between the EU sectoral social dialogue and EWC and suggests that the European social partners could use the opportunity provided by the Commission’s recent consultation on the revision of the EWCs Directive\textsuperscript{73} to do this. The Commission also suggests that a link between social dialogue and company policies to promote CSR could be explored further.

The Commission has supported the social partners’ effort in various ways, including by providing financial assistance through its social dialogue budget headings. It provides both direct and indirect financial support to the social dialogue. In terms of logistic support, it finances the costs of dialogue meetings directly. There are also three budget headings which provide indirect financial support in the form of grants to social dialogue activities and industrial relations: (1) industrial relations and social dialogue (14 850 000 euros in 2004), information and


\textsuperscript{72} Ibid, p. 8.

training measures for workers’ organisations (14 200 000 euros in 2004), and information, consultation and participation of representatives of undertakings (7 million euros in 2004).74

The social partners can also apply for grants under the Commission’s education and training and health and safety budget headings. Indeed, numerous sectors have prepared training manuals with the help of such grants.

Furthermore, the current proposal of the new European Social Fund (ESF) regulation would allow at least two per cent of the ESF resources under the ‘convergence’ objective to be allocated to capacity building and activities jointly undertaken by the social partners, in particular as regards the adaptability of workers and enterprises.75

4. Civil and the social dialogue in the open method of co-ordination

Since it has been decided at the Lisbon European Council in 2000 that European regulatory policy making (lawmaking) should be complemented by persuasive policy co-ordination, named the open method of co-ordination (OMC), both the civil and social dialogue has been extended in this area.

The rudimental form of the OMC was introduced under the Maastricht Treaty in 1993 for the purpose of co-ordinating national macro-economic policies, and was applied in a somewhat different manner to employment policy by the Treaty of Amsterdam. The Lisbon European Council gave boost to the OMC. It is chosen to be one of the key methods for the implementation of EU strategy for improving European economy named the Lisbon strategy.76

The OMC is not designed to produce law at the Union level, it aims to co-ordinate the actions of the member states in a given policy domain and to create conditions for mutual learning that hopefully will introduce some degree of voluntary policy convergence. It helps member states to develop their own policies through the discussion and dissemination of best practices, with the aim of reaching commonly agreed goals. The OMC is realised through the following procedure: the production of guidelines drafted by the Commission and issued by the Council of Ministers to be translated into national policy through national action plans (NAPs), combined with periodic monitoring by the Commission, evaluation and peer review organised as mutual learning process and accompanied by indicators and benchmarking as means of comparing best practices.77 The OMC is applied as an instrument for the develop-


76 The Lisbon European Council held in March 2000 set the goal for the EU ‘to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion’. This strategy is intended to: (1) improve European competitiveness and (2) develop the European models of social protection, living up to the expectations of economic growth and of social cohesion. Overall, the strategy aims at raising productivity and potential gross domestic product growth. To reach this objective, the Lisbon strategy encompasses sound macroeconomic policies, stepping up the process of structural reform of economy and undertaking the measures for attaining high level of employment. This complementary approach leads to the synergy of macroeconomic, structural reform and employment strategies developed separately under so called Cologne, Cardiff and Luxembourg processes respectively (Presidency Conditions of the Lisbon European Council, 23 and 24 March 2003, para 40, and Presidency Conclusions of the Santa Maria Da Feira Summit, 19 and 20 June 2000, paras, 19-39 at, http://ue.eu.int/ueDocs/cms_Data/docs/pressData/annex/81035ADD1.pdf

ment of budgetary, economic, employment, and social inclusion policy, and a strategy in pension reform, information society, research and innovation, education and training and youth policy.\(^78\)

The OMC represents significant, though informal\(^79\), channel for the participation of non-profit groups and the social partners in EU governance. Indeed, it is intended by the Union institutions to improve transparency and democratic participation.\(^80\) Under the Lisbon strategy participation entails that ‘the Union, the member states, the regional and local levels, as well as the social partners and civil society, will be actively involved, using varied forms of partnerships.’\(^81\) Namely, the involvement of both civil and social dialogue participants is proclaimed to be an important component of the OMC.\(^82\)

5. Distinctive functions of the civil and social dialogue in EU governance

Although both civil and social dialogues foster the involvement of interest groups in European governance, their roles are considerably different. They occupy dissimilar positions in the Union decision-making process. While the social dialogue has gradually evolved into an independent lawmakering and policy-co-ordination procedure with autonomous agenda setting and implementation mechanisms that can replace Union law or the member states national action plans in the OMC case, though in very limited areas, the civil dialogue is confined to purely consultative function. The most significant distinction between the social and civil dialogue concerns their objectives and tasks. While the social dialogue is envisaged to be an efficient mechanism for day-to-day policy formation, the civil dialogue is seen as a forum in which the strategic problems of European society could be debated.\(^83\) The European social dialogue differs from the civil dialogue as it offers the opportunity of codetermination of European policy by the European social partners. Since the social partners, in contrast to non-profit groups, require considerable responsibilities for the implementation of Union policies


and enjoy substantial autonomy in discharging thereof, the role which two of those groups play in EU governance should be strictly distinguished.

5.1. Lawmaking

One of the most important differences between the social and the civil dialogue concerns their positions in the Union lawmaking process. There is no decision taking function envisaged for the participants in the civil dialogue. The civil dialogue has never been intended to exceed consultative, advisory function. Contrary to this, the social dialogue is designed to replace Union legislation by so called private interest governance in the area of work relations. Article 138 EC empowers the European associations of labour and management to regulate the number of work related issues through the conclusion of agreements and consequently displace the Union institutions from the sphere of lawmaking related to work.

The Commission emphasised in its 1994 White paper on social policy that a clear distinction has to be drawn between the negotiation process established under the social dialogue procedure and the consultation which the European Union must undertake to deal with social problems which cannot be dealt with by collective bargaining. In the Commission’s view the main aim of the civil dialogue is not policy formulation, as in the case of the social dialogue, but (a) to ensure that the views of non-profit organisations can be taken into account by policy makers, and (b) to disseminate information from the European level down to the local level. Obviously, the Commission has not provided for any prospect of giving the civil dialogue participants the real decision-making powers. It is confined to the debating arena which provides civil interest groups with an opportunity to be heard by the Commission, and within which they can express their views. Structuring of the civil dialogue through the introduction of the minimum standards for conducting of consultations with interest groups by the Commission has not changed this. While the formalisation of civic groups’ consultation by the Commission might strengthen the involvement of civil society organisations in the formulation of EU policy measures, no concrete delegation of policy formulation task took place.


85 Privatisation of the legislative process is not specific for the policy area covered by the social dialogue. It is part of a wider phenomenon of distanciation from legislation by state bodies in favour of more flexible arrangements where key actors tend to be private agents rather than public legislators. In the field of the internal market, for instance, with so called new approach to technical harmonisation, a large chunk of work previously understood to fall within the remit of the Union legislator was transferred to private standardisation bodies such as the European Committee for Electrotechnical Standardisation (CENELEC) and the European Telecommunications Standards Institute (Greenwood, J (2003) Interest representation in the European Union, Houndmills: Palgrave, p 66). In environmental law, the Sixth Environmental Programme places great stocks on voluntary action by private actors as an important mechanism to bring about desired environmental aims (see Decision No 1600/2002/EC of the European parliament and the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme, OJ L 242/1, 10.9.2002, Article 3(5)).


5.2. Co-ordination of policies in the EU (OMC)

Irrespective of the fact that both the civil and social dialogue protagonists have a role to play in the open method of co-ordination, their respective contributions differ substantially. The Union assigns to the social partners much greater responsibilities in all stages of the OMC, from designing policies to their implementation, than to non-profit organisations. Whilst the social partners are involved in drafting of policies governed by the OMC in an institutionalised manner, non-profit groups play neither formal, nor decisive role in this process. The entitlements of non-profit groups in this mode of governance are inferior to those granted to the social partners. Although various Union employment policy documents call for the cooperative partnership with non-profit organisations in the execution thereof, they underscore only the role of the social partners as the crucial players in the OMC. 89 Moreover, the mem-

ber states are reluctant to grant any other actors aside social partners a formal role within the process.\(^90\)

The social partners are assigned quite prominent functions in the OMC processes governing the co-ordination of economic, employment and social inclusion policies.

In the case of the economic policy, the European level social partners are closely involved in the discussion of the draft guidelines produced within the framework of the Macro-economic dialogue introduced by the Cologne European Council of 1999.\(^91\) These procedure aims at improving the interaction of macroeconomic policies and wage developments with a view to support non-inflatory growth and employment. To this end, the European level social partners and the European Central Bank, Council and Commission representatives meet twice a year, in March and May, within the framework of the Economic Policy Committee, for a confidential exchange of views on ways to promote adequate macroeconomic conditions.\(^92\)

Further, similar to the case of the social dialogue, the European level social partners do have the Treaty-based mandate to participate in the European employment strategy (EES) which is also governed by the OMC. The EES anticipates two types of the social partners’ participation. The first one concerns their participation at the EU and national levels in the preparation of the guidelines,\(^93\) EU reports and the national action plans\(^94\) drawn on the base of the Councils guidelines. The second relates to their involvement in the implementation of the guidelines and the process of monitoring thereof.

The social partners organised at European level are mandatory consulted within the Art. 130 EC Employment Committee which advises the Labour and Social Affair Council and the Commission in the process leading to the formulation of the Employment guidelines.\(^95\) The European social partners are also represented on the Social Protection Committee,\(^96\) which is also engaged in the process of the adoption of the employment guidelines. More significantly, the 1997 Luxembourg employment summit instituted the regular annual meetings between the European level social partners\(^97\) and the Employment and Labour Market Steering group that


\(^{93}\) These guidelines must be consistent with the broad economic guidelines issued in relation to EMU.


\(^{95}\) For details see Articles 2 and 5(1) of the Council decision of 24 January 2000 establishing the Employment Committee, 2000/98/EC, OJ L 29/21, 4.2.2000.

\(^{96}\) See Article 2.4. of the Council decision of 29 June 2000 setting up a Social Protection Committee, 2000/436/EC, OJ L 172/26, 12.7.2000. The Treaty of Nice recognises it in Article 144 EC.

\(^{97}\) The following European level social partners organisations participate in this process: the Union of Industrial Employers’ Confederations of Europe (UNICE), the European Centre of Enterprises with Public Participa-
advises the Council, and between the former and the Commission and the Troika for the purpose of deliberating employment guidelines. It has been decided at the Nice European Council for this gathering to take place before each Spring European Council. Since March 2003 this forum has been formalised through the establishment of a Tripartite Social Summit for Growth and Employment. It is intended to meet the need for coherence and synergy between various processes of consultation between the social partners and the EU institutions such as the above mentioned Cologne macroeconomic dialogue and the Tripartite Social Summit which has been held since 1997 in the context of the Luxembourg process dedicated to the employment issues. The social partners’ role in the Lisbon strategy should be further advanced through the establishment of the so-called European Partnership for Change, recommended by the High level group set up by the Commission on the request of the Brussels March 2004 European Council to carry out the mid-term review of the Lisbon strategy and incorporated in the latest Commission’s social agenda. The partnership should ensure gather social partners and other stakeholders around the key priorities of growth and employment. The social partners endorsed the idea at the March 2004 tripartite social summit. The precise tasks of this partnership are not clearly identified. It seems that it main purpose should be the provision of a link and thus a consistency between the national and the European level. The practical consequence of the introduction of this partnership will be more closed involvement in the formulation of the national action programmes.

National social partners also participate in the co-ordination of the social inclusion and vocational education and training policies. However, but the European management and labour organisations have considerably weaker advisory functions within the OMC process in
those areas, since their role in the co-ordination of those policies is not stipulated in the Treaty. On the social inclusion issues their opinion is to be sought by the Social Protection Committee, which is under obligation to ‘establish appropriate contacts with the social partners’ and not to conduct compulsory consultation with them.\(^{107}\)

The role of non-profit organisations in the OMC is much more modest in comparison to that assumed by the social partners. Their involvement is, with a few exceptions, of informal nature, and significantly less influential.

A part from relatively structured involvement of non-profit organisations in the social inclusion strategy, their participation in the OMC governing other policy areas is relatively sporadic and patchy. The Platform of Social NGOs is informally, but regularly, consulted by the Social Protection Committee which actively takes part in the co-ordination of employment and the social inclusion policies. Beside that, national civil society groups participate in the EU initiatives developed under the Lisbon strategy such as: EQUAL (a programme which aims to promote the transnational exchange of good practice on measures to combat discrimination and inequalities in labour market), ADAPT and EMPLOYMENT (the programme which links its local and national strategies to the National Action Plans for Employment (NAPs) aimed at developing innovative ways to deliver labour market and social inclusion policies), and URBAN and LEADER (the programmes aimed at promoting partnership in local employment in urban and rural areas respectively).\(^ {108}\) More recently, the European Youth Forum was called upon by the March 2005 Brussels European Council to be closely involved in the European youth pact which is to be realised within framework of employment and social inclusion strategies.\(^ {109}\) Further, national civil society associations together with the locally organised social partners are involved in the operationalisation of the Territorial employment pacts.\(^ {110}\) They should also assume a role in the partnership for growth and employment to be formed on the recommendation of the High level group which carried out the mid-term evaluation of the Lisbon strategy.\(^ {111}\) In the pensions OMC national affiliations of the European Anti-Poverty Network (EAPN) are engaged in consultation and deliberation on the production of national action plans,\(^ {112}\) while the European Older People’ Platform (AGE) obtained an informal advisory role.\(^ {113}\) Business representatives are consulted within the framework of the information society action plan.\(^ {114}\) The Commission as well organises the partnership with the self-managed associations with limited profit making, co-operatives and mutuals


\(^{110}\) Ibid, p. 9.


which work in the areas of social services, environment, culture and sport in order to boost job creation in this sector.\textsuperscript{115}

5.3. Implementation of EU policies

The second significant difference between the social and civil dialogue relates to their respective roles in the process of the implementation of Union policies: both based upon EC law and the OMC. While the social dialogue protagonists, are considered to be one of key actors in the implementation of European social legislation and the employment guidelines with the non-negligible degree of autonomy, non-profit associations are not recognised as agents capable of engaging in those process in a manner comparable to that of the social partners. They do not assume any role in implementation of EU policies. NGOs are, though, involved in the execution of humanitarian operations financed by the EU.\textsuperscript{116}

5.3.1. Implementation of European law

The Treaty makes possible for the member states to delegate the implementation of directives to the social partner, but the member states remain to guarantee the achievement of the intended result and the timely implementation of the directive (Article 137(4) EC).\textsuperscript{117} The social partners also play a role in the implementation of anti-discrimination directives adopted under Article 13 EC.\textsuperscript{118} In addition, many directives contain provisions allowing the social partners to adopt rules so as to take account of differences in national situations. In the case of the Working time directive ‘collective agreements or agreements between the two side of industry can be used to set certain standards\textsuperscript{119} and to derogate from those standards.\textsuperscript{120} In some cases, the social partners are directly requested to arrive through negotiation at responses to the goal set by the Community.\textsuperscript{121}

The social partners can also implement their framework agreements reached under the Article 138 EC in accordance to their own procedures and practices. This possibility is stipulated in Article 139(2) EC. Two agreements reached by ETUC, UNICE and CEEP are to be implemented in this way: the agreement on telework\textsuperscript{122} and the agreement on work-related stress.\textsuperscript{123} Furthermore, the national social partners are involved in the implementation and monitoring of programmes financed under the Structural Funds through the participation in the work of


\textsuperscript{116} http://europa.eu.int/comm/echo/partners/fpa_ngos_en.htm


\textsuperscript{119} Article 4.

\textsuperscript{120} Article 17. See also Barnard, Catherine (2002) ‘The social partners and the governance agenda’, European Law Journal, 8(1): 80-101, p. 86

\textsuperscript{121} This is established by Council Directive 94/45 of 22 September 1994 on the establishment of a European Works Council or a procedure in Community scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, OJ L 254/64, 30.9.94, Article 5.


\textsuperscript{123} http://www.etuc.org/IMG/pdf/Accord-cadres_sans_signat.pdf
committees set up by member states for that purpose.\textsuperscript{124} They also can participate in the work of the European Social Fund and apply for EU assistance granted in the framework of this fund.\textsuperscript{125} A proposal for the revision of the existing regulation on the European Social Fund (ESF) provides for even greater involvement of the social partners in programming, implementation and monitoring of its activities.\textsuperscript{126} For that purpose at least two per cent of the ESF shall be allocated for capacity building and activities jointly undertaken by the social partners.\textsuperscript{127} More modest role is assigned to non-governmental organisations. They are going to be consulted in ‘an adequate manner’ and gain quite limited access to the ESF funded activities in the domain of social inclusion and equality between women and men.\textsuperscript{128} Contrary to this, similar tasks are allocated to the social partners and civic groups in the process of the implementation of the EU cohesion policy.\textsuperscript{129}

The social partners are also involved in the work of five European agencies that provide information to the EU institutions in the policy making process.\textsuperscript{130} As a matter of fact, the Commission insists upon their greater involvement in the work of agencies.\textsuperscript{131}

5.3.2. Implementation of the OMC guidelines

The role of the social partners in the implementation of the OMC guidelines, in particular those related to employment, becomes ever more significant. It has been stated in the 2003 Employment Guidelines that their effective implementation requires active participation of


\textsuperscript{127} Ibid, Article 5(3).


social partners at all stages, from designing policies to their implementation.\(^{132}\) Not only that social partners should be more closely involved in ‘drawing up, implementing and following up the appropriate guidelines’, but they should shoulder responsibilities.\(^{133}\)

It is significant to point out that until recently, only national social partners and not European level peak associations of management and labour were invited to take part in the implementation of employment guidelines because those were addressed to the member states.\(^{134}\) This is to be changed. The 2003 employment guidelines call for reinforcing the role of not only national, but also European social partners in the implementation of the EES and request them to report annually on their contribution.\(^{135}\) This significantly strengthens the position of the social partners in this policy area since previously only the member states have been charged with the task of reporting. Now, the European level social partners are expected to assume similar competences to those of the member states in the process of the implementation of the employment objectives in the EU. The 2004 guidelines clearly indicate not only member states, but also the social partners as the equally liable bearers of responsibilities for achieving the EES objectives and targets.\(^{136}\)

As from 2001 the social partners are invited to develop their own process of implementing guidelines for which they have the key responsibilities and identify the issue upon which they will negotiate and report regularly on progress as well as the impact of their actions on employment and labour market functioning. This invitation is far more reaching than the classical Commission undertaking that the broader responsibility of the social partners and their contribution to the implementation of the guidelines needs to be recognised in full respect of their autonomy.\(^{137}\) The social partners are not only charged with considerably more demanding tasks in the OMC implementation process than non-profit groups, but they are even invited to set up their own process of implementation.

The social partners are currently encouraged not only to ‘shoulder’ the implementation of the employment policy objectives, but to developed their own implementation process by concluding agreements, where appropriate, and designing adequate indicators and benchmarks and supporting statistical databases to measure progress in the actions for which they are responsible within the EES.\(^{138}\) The first result of this more autonomous role of the social part-

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\(^{135}\) Council decision of 22 July 2003 on guidelines for the employment policies of the member states, 2003/578/EC, OJ L 197/13, 5.8.2003, p. 21


ners in the employment OMC was achieved in March 2002, when the European social partners agreed to a framework for action for the lifelong development of competence and qualifications (lifelong learning)\textsuperscript{139} and in 2005 when the framework of actions on gender equality was adopted.\textsuperscript{140} Implementation and monitoring of achievements rest exclusively with the social partners. The social partners decided to promote this framework in the member states and issued annually review developments at a national level and reported on the implementation of the action plan.\textsuperscript{141} Evaluations of the impact of those frameworks of actions on the companies and workers are due in March 2006 and 2010 respectively. Autonomy of the social partners involvement in the employment OMC is further enhanced by the adoption of their joint work programme 2003-2005 which foresee for broadening of the social partners independent actions in this area.\textsuperscript{142}

In contrast to the social partners, non-profit groups require considerable lesser responsibilities within the process of implementation of European OMC guidelines. Apart from being sporadically called upon to contribute towards translating into practice of guidelines adopted within the OMC, the civil dialogue participants’ contribution to the national action plans intended for their implementation has been very modest.\textsuperscript{143} Although some effort has been made to include civil society organisations in the NAP process on social inclusion, the quality of their participation has been regarded to be unsatisfactory by one of the most prominent European level NGO in this area, European Anti Poverty Network (EAPN).\textsuperscript{144} It emphasises that is all countries but Finland there was no consultation by government with NGOs for the selection of the good practice examples.

5.4. Consultation

This sharp distinction between the civil and social dialogues in the process of lawmaking, co-ordination and implementation of Union policies is blurred by the fact that both modes of governance assume very similar consultative functions. Indeed, the social dialogue covers two functions: decision making (lawmaking, policy co-ordination and implementation) and consultation, while the civil dialogue is confined to an advisory role.\textsuperscript{145} Both the social dialogue in its consultative function and the civil dialogue are employed in pre-drafting stage of the

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\textsuperscript{140} ETUC, UNICE, CEEP (2005) Framework of actions on gender equality of 22 March 2005, \url{http://www.unice.org}.

\textsuperscript{141} Until now three follow-up reports have been produced on lifelong learning. For the latest report see ETUC, UNICE, CEEP (2005) ‘Framework of actions for the lifelong development of competencies and qualifications: third follow-up report, \url{http://www.unice.org}.

\textsuperscript{142} \url{http://europa.eu.int/comm/employment_social/news/2002/dec/prog_de_travail_comm_en.pdf}


preparation of EU legislative and policy co-ordination documents. That means, that the Commission seeks opinion from both civil and social dialogue sets of groups when it embarks upon drawing up of legislative initiatives or the OMC guidelines. Both types of consultation concern the process through which the Commission wishes to trigger input of interested parties on the occasion of the formulation of an EU legislative proposal or a co-ordinative document. Such consultation enables the Commission to gather opinions of interested parties and take into account different views while drafting law initiatives and OMC guidelines. It also intends to assess the impact of any legislation or policy co-ordination objective by carrying out those two types of consultation. They are supposed to help the Commission and the other institutions to arbitrate between competing claims and priorities and to assist in developing a longer-term policy perspective.

Under Article 138 EC the Commission is obliged when submitting social policy proposals, to consult the European social partners twice during the process of drawing up an act: on the possible direction of Community action and on the content of the envisaged proposal. The civil dialogue also takes place at the phase of the proposal formulation by the Commission.

How this social dialogue consultation relates to that conducted under the civil dialogue? The relationship between two types of consultations is very complex and bound to generate a lot of confusion. In order to explain this complicated relationship, it is necessary to highlight the similarities and differences between the two forms of consultations.

5.4.1. Distinction between the civil and social dialogue consultative functions

Irrespective of the fact that both the social and civil dialogue consultations relate to the same phase of EU decision making and that the participants in the both modes are to be determined by the Commission, they significantly differ from each other. The Commission itself insists upon drawing ‘a clear dividing line’ between these two types of consultation.

5.4.1.1. The social dialogue consultation as an essential procedural requirement

Whilst the consultation with the social partners is compulsory and systematic, the Commission at present is not under obligation to seek opinion of civil dialogue protagonists. Formally, European institutions cannot take an action in the area of social policy without consulting the social partners, but they can pass laws without asking for opinion of civil dialogue groups. Failure on the part of the Commission to seek advise of the social partners on the social policy issues will amount to a breach of an essential procedural requirement in the same way as non-consultation of the European Parliament or the Economic and Social Committee, where en-
visaged in the Treaty, prompts the infringement of European law. 149 Such an obligation does not exist in relation to the consultation of organisations involved in the civil dialogue. 150 Consequently, while the social partners do enjoy the right to be consulted in the early stage of legislation preparation, the civil groups cannot claim such a right.

While the Commission is under legally binding obligation to consult the social partners before submitting legislative proposals in the area of social policy, it seeks advice from associations involved in the civil dialogue on its own motion. The objective of the civil dialogue is not to establish procedural rights, the respect of which would be subject to judicial control and review. 151

Consultation of civil society groups does not going beyond a right to be heard and it does not ensure the Commission’s proclamation from its earlier documents that the organisations of the civil society should receive appropriate feedback on how their contributions and opinions have affected the eventual policy decision.152 A real dialogue implies a right of the organisation to receive a reasoned answer to the suggestions it puts forward, it is manageable only insofar a selection is made among organisation. 153 The participants in the civil dialogue do not enjoy a right to receive an answer. The minimum standards do not provide for an effective follow-up procedure. The obligation of the Commission to react appropriately to comments received stipulated by the minimum standards does not confer any right upon parties which forwarded their opinions during the consultations to be informed in which extended their view has been embraced by relevant EU policy documents. The Commission finds the idea of providing feedback on an individual basis (feedback statements) not to be compatible with the requirement of effectiveness of the decision-making process. 154 An association which feels that the answer offered by the Commission is not satisfactory, is not entitled to apply for a judicial review of the quality of the grounds given in response to objections made in the course of the consultation procedure. The Commission clearly states in its minimum standards for conducting consultation with interest groups that the situation must be avoided in which a Commission proposal could be challenged in the European Court of Justice on the grounds of alleged lack of consultation of interested parties. In its view, such an over legalistic approach would be incompatible with the need for timely delivery of policy. 155 This approach risks, in view of some scholars, to remain purely formal way of legitimising decisions that depend on other parameters, if it is not paired with the possibility to seek a judicial control of the quality of the answers offered to the objections put forward by the organisations concerned.156

151 Ibid
155 Ibid, p. 10.
5.4.1.2. Criteria for the selection of parties participating in civil and social dialogue consultations

The second distinction between two of those forms of consultation concerns the process of the selection of parties for participation in a consultation.

The Commission has the autonomous right to seek information and invite consultation from any sources that it chooses. It is has the competency to select associations eligible to participate in both the civil and social dialogue. These organisations, however, were not granted a representational monopoly or accreditation, and in practice the Commission consults (numerous) other organisations as well. Interest groups have not been recognised or licensed by the Commission. Even though it has established procedures for according special status and preferential treatment to particular interest groups, that recognition is not generally limited to one organisation per category. So, in practice, the Commission has the unlimited discretion to choose which organisations to consult. As the consequence of that discretion, the Commission formulated the conditions for the participation of groups in both social and civil dialogue consultations.

It is important to emphasise that although in both cases the determination of eligibility of groups to take part in consultation firmly rests with the Commission, the selection criteria differ considerably. Namely, in order to take part in the civil dialogue or in the consultative phase of the social dialogue, interest groups are expected to meet certain requirements imposed by the Commission. However, the civil and social dialogue participants should fulfill two different sets of the conditions in order to secure place in the same process of pre-proposal consultation. Even though both the social and civil dialogue consultations relate to the situation preceding the formulation of the Commission proposal, they are subject to two distinct sets of eligibility standards. Moreover, since the Commission does not wish to reduce the number of participants in civil dialogue, it does not make access to consultations subject to a prior eligibility check. It examines whether they meet it requirements at the later stage, i.e. when it assesses the relevance or quality of comments expressed during the consultation. On the other hand, the social dialogue participants are screened before the launch of a consultation.

5.4.1.2.1. The question of representativeness

Both the civil and social dialogue participants are required to meet the Commission test of representativeness in order to qualify for the participation in EU consultations.

According to the Commission, the labour and management associations have to satisfy three conditions in order to take part in the consultative stage of the social dialogue. They should: (1) be cross-industry and shall be organised at European level; (2) consist of organisations which are themselves an integral and recognised part of member states social partners structures and with the capacity to negotiate agreements, and which are representative of all member states as far as possible; and (3) have the appropriate structures to ensure their effective participation in the consultation process. The question of representativeness is to be decided on case-by-case basis as the conditions will vary depending on the subject matter on which the consultation is undertaken. The Commission determines the eligibility of the parties on


the basis of representativeness studies that it carries out from time to time. At present, 70 organisations fulfil those criteria. However, the listing of groups meeting the eligibility requirements for participation in the social dialogue consultation does not imply an accreditation system. Consequently, the Commission does not consult only listed, but also all European or national organisations that might be affected by a proposal. Although the Commission is under obligation to consult social partners designated to be representative, it is not prevented from extending its consultation, on its own motion, to other parties, and indeed it does so.

As far as the civil dialogue consultation is concerned, the Commission introduces the criterion of the representativeness for organisations intended to participate in this forum, similarly as in the case of the social dialogue consultations. However, it does not elaborate what representativeness actually means for the purpose of the application thereof as a criterion for assessing the eligibility of groups taking part in the civil dialogue. How this concept relates to the representativeness requirement developed within the social dialogue consultation process is unclear. The Commission claims that the requirements in respect of representativeness vary in accordance with the nature of the responsibilities conferred on the players. They are limited in the event of simple consultation, but more binding where the social partners can lay down rules that become law. Consequently, the criteria of representativeness as applied in context of the social dialogue may be inappropriate in the area of the civil dialogue.

The social dialogue representativeness is predominantly determined in terms of membership. This ground is hardly applicable in the case of the assessment of representativeness of the civil dialogue participants. NGOs are almost never representative in terms of membership. Even so, there are some highly organised groups such as the Young European Federalists, that can claim an impressive membership all over Europe. However, this is an exception to the rule.

Whether or not NGOs are representative cannot be established exclusively in terms of members whom they speak for. The judgement must also take account of the ability of such bodies to put forward constructive proposals and to bring specialist knowledge to the process of democratic opinion forming and decision making since the objective of the civil dialogue con-

sultation is to provide a range of views on a particular issue as well as information gathering. Because of this, in the case of the civil dialogue representativeness should be understood rather in terms of the range of interests that an actor champions, than in terms of membership.

Since the social partners are expected to play an important role in the implementation of EU decisions preceded by the social dialogue consultation, their capacity to contribute towards their effective execution is of considerable significance for the determination of their representativeness. The social partners’ capacity to implement agreements or legislation is dependent upon their membership. That is the reason why the Commission takes into consideration the extensiveness of an association membership when it assesses its representativeness. Contrary to this, the civil dialogue protagonists are not significantly involved in the implementation of EU rules resulting from the decision-making processes that encompass consultations with civic groups. Thus, from this prospective, the membership cannot be regarded as decisive attribute of the representativeness of the civil dialog actors.

On the other hand, it is very difficult to determine exactly who represents a constituency of civil interest groups; they do not have readily identifiable constituencies. In most cases this is impossible because of great variety of organisations in one filed which all have different approaches to a given issue. The NGOs’ claim that they represent civil society cannot be easily validate since there are no established rules concerning the operations of the NGOs. Each sets up its own modus operandi. How independent are the NGOs from their donors, funding sources? By which mechanisms do the NGOs receive instructions from the constituencies they are supposed to represent? All those questions cannot be answered with high degree of certainty. Civic groups are designed as organisations for particular causes, rather than of it. While the social partners further the economic interests of their members – effectively to ensure that their members reap some kind of financial benefit as a consequence of their membership, civil groups galvanise public concerns and champion specific causes.

In addition, a NGO is legitimate not so much because it assembles a great number of people but rather because it has picked up an issue deemed important by the citizens and not sufficiently tackled by public institutions. NGOs are group for, not of, a particular cause, and cannot demonstrate themselves to be representative in the same way that a business associations can claim to represent a proportion of the total potential membership constituency. A good example might be the group SOS VIOL, which support rape victims. Obviously raped women are not keen on registering together in an association.

NGOs and Social Movement Organisations (SMOs) point out that increasingly civil society expresses fluidly in the type of formations that represent its values and opinions. New organisations often emerge quickly with strong popular support and dissolve or change into different organisations in a short time. Therefore an insistence on calculating membership would exclude an important part of civil society.


The difficulties in the application of the criterion of representativeness to the civil dialogue organisations have been recognised by the Commission. It emphasises that the issue of representativeness at European level should not be used as the only criterion when assessing the relevance or quality of comments. Other factors, such as their track record and ability to contribute substantial policy input to the discussion are equally important. It pledges that not only opinions of European level organisations are going to be taken into consideration, but also of those operating at national, regional and local level. In its view, minority views can also form as essential dimension of open discourse on policies. On the other hand, emphasises the Commission, it is important for it to consider how representative views are when taking a political decision following a consultation process. Until now the Commission did not clarify what constitute evidence of representativeness and whether only opinion of representative organisations should be taken into consultations.

5.4.1.2.2. Openness and accountability as additional eligibility requirements for the participation of civic groups in EU consultations

The Commission supplements the representativity requirement with the two additional ones: accountability and transparency. This is understood as meaning that NGOs are able to participate effectively and constructively in the opinion forming and decision making process through the provision of appropriate organisational structures and expertise. The introduction of two of those criteria reflects the Commission position that with the better involvement comes greater responsibility. Consequently, civil society must itself follow the principle of good governance, including accountability and openness, that governs the conduct of the Union institutions, though, it is not at all obvious why all organisations in civil society need to abide by the same accountability standards as political organisations, when they, as we showed above, do not perform any policy forming task within the EU.

The application of those criteria are intended to address the credibility concern related to internal governance procedures of NGOs which are commonly regarded to be insufficiently democratic. The main problem seems to be that decision making in NGOs is left in the hands of key officers, with very little – if any – supporters’ input. None of NGOs functions as a supporter-run organisation. Decision-making about lobbying or campaigning is heavily centralised, and shaped entirely by the relevant officers and not by supporters. NGOs cannot be held accountable to their own membership. This contributes towards the development of clientlism in NGOs. Supporters input into decision-making is usually minimal. NGOs often undertake activities about which their supporters know and understand very little, and with

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which they may disagree. Indeed, the recently conducted field work studies show that most NGO supporters do not seek to play an active role in the governance of the organisation.\(^{175}\) Their internal governance is too elitist to allow supporters a role in shaping policies, campaign and strategies. They do not function as supporters run associations. Supporters play no formal role in decision-making of any NGO.

The internal governance of European level interest organisations is even more detached from their supporters. Almost all European associations are organised as confederations, i.e. associations of national associations that do not admit individuals as members.\(^{176}\) These factors mean that EU interest organisations have a structural remoteness from the grass roots interests they represent.

Irrespective of the fact that the Commission intention to assess the quality of interest groups consultation contributions in terms of the compliance of their internal structure with the principle of good governance can be regarded to be appropriate in the situation when great number of NGOs operates in an undemocratic manner, many scholars consider that this Commission action encroaches upon associations’ autonomy.\(^{177}\) Namely, the danger is that civil society becomes subject to the colonising forces of the EU political and economic systems both in terms of their organisational forms and their rationalities, which undermine the structures and values associated with civil society. European civil society becomes governmentalised, in the sense of altering its organisational forms and its rationalities in order to facilitate its attempts to influence EU governance.\(^{178}\) This issue is most acute if we bear in mind that all participants in the social dialogue have undergone internal organisation reforms (ETUC 1991, UNICE, 1992; CEEP, 1994)\(^{179}\) in order to adjust their structures to the social dialogue requirements and improve their abilities to conclude Europe wide agreements (introduction on the mandate for negotiation\(^{180}\), removing requirements for unanimity). Similarly, eligibility and suitability criteria deployed for the selection of NGOs intended to enter into Frameworks Partnership Agreements with the Commission’s Humanitarian Aid Office (ECHO) that are applicable to the humanitarian operations sponsored by the EU also impose very strict rules in respect to internal organisations.\(^{181}\) Those are two years external audit obligation and specific requirements regarding administrative, financial and operational capacity of applying NGOs.

The Commission could try to interfere in the internal structure of civic organisations. It emphasises that it fully respects the independence of outside organisations. On the other hand, for the consultation process to be meaningful and credible it is essential to be spell out who

\(^{175}\) Ibid, p. 634.


\(^{180}\) Nevertheless, none of those organisations enjoys a general bargaining mandate, but rather must seek the agreement of their members afresh each time in order to enter negotiations, i.e. on an issue by issue basis. In addition, any agreement concluded through the social dialogue procedure is to be rubber stamped by all national affiliates.

\(^{181}\) The selection criteria which ECHO applies in order to determine eligibility of organisations intended to enter into this partnership are guided by three EC regulations on humanitarian aid (http://europa.eu.int/comm/echo/partners/selection_en.htm)
participate in it. The Commission by frequently emphasising accountability but also ‘the need to respect diversity and heterogeneity of the NGO community’ and ‘the need to take account of the autonomy and independence of NGOs’ assumes that the two concepts can be combined.¹⁸² But in many ways the two categories are different and not easily reconcilable.

5.4.1.2.3. The scope of application

The scope of the application of the criteria for taking part in the civil dialogue is not so well delimited as of those employed for licensing the participation in the social dialogue consultation. Whilst the Commission precisely delineates the ambit of use of the consultation standards in the social dialogue, doubts exist as to the exact area of operation of the civil dialogue requirements.

The Commission’s eligibility criteria designated for the social dialogue consultation are not applicable to the consultations within advisory committees or in the context of procedures aimed at garnering the views of interested parties, for example, through the adoption of a Green Paper.¹⁸³ A part from seeking advisory opinion from the social partners within the social dialogue on social policy issues, the Commission also carry out consultations in advisory committees established some areas of social policy. When serve on those committees, the social partners are not required to fulfil the social dialogue eligibility criteria in order to be consulted.

There are six advisory committees that consist exclusively of representatives of the European social partners. They advise the Commission on social security for migrant workers, freedom of movement of workers, European Social Fund, vocational training, safety, hygiene and protection at work and equal opportunities for women and men.¹⁸⁴ On all the other committees they are involved with, the social partners serve together with representatives of non-profit groups, companies or experts. Except for the one on Equal Opportunities, they are made up of national rather than European level social partners. This means that the position of the social partners is often not co-ordinated with the views expressed in other fora. Yet the Commission has a well-established tradition of consulting tripartite advisory committees at this stage of the policy making process. As a consequence both procedures currently take place side by side, which implies considerable overlap. To a large extent the two procedures consult the same persons, since the European social partners organisations consulted under Article 138 EC contact the relevant experts of their national organisations, but precisely these same experts are often appointed by their national organisations to sit on the advisory committees. Moreover, the two-stage consultation under Article 138 EC is a relatively rapid procedure compared with the advisory committee, the plenary of which meets only twice a year. The opinion of the committee is thus likely to arrive at a time when the Commission has already largely developed its draft on the basis of the social dialogue consultation. Since only the social dialogue


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consultation is obligatory, one could doubt the relevance of consultations on legislative proposals that take place in the advisory committees for the EU governance in future.

The civil dialogue minimum standards are applicable to the Internet based consultations undertaken during the first stage of the Commission impact assessment strategy deployed when it intends to launch any policy initiative or legislative proposal.

The second area of the employment of the minimum standards concerns work of the Commission’s informal advisory committees for organising an exchange of views with civic associations. While the Commission clearly states that consultation taking place in the committees established by the Treaty or EU legislation fall outside the range of the minimum standards, it indicates that they should be employed to work of its ad hoc committees. At present the Commission runs nearly 700 ad hoc consultation bodies in a wide range of policies. Although set up by the Commission, grounds for their establishment cannot be found in the Treaty or in EU legislation. Their composition, activities and impact remain rather opaque. By their vary nature, these forums provide privileged access to the Commission policy shaping process for a limited number of stakeholder organisations.

However, the scope of the application of the eligibility criteria stipulated in the minimum standards is far less clear than of those developed in the case of the social dialogue consultation. The reasons for the lack of clarity surrounding the use of the civil dialogue participation requirements are as follows: (a) the existence of several types of consultations with interest groups conducting by the Commission prior to the formulation or the adoption of law proposals that run parallel to each other; (b) the engagement of the same groups in different types of consultations taking part in the pre-drafting stage of the EC legislative process; and (c) and the fact that some groups participate in different capacity in variety of the pre-legislation consultations.

The Commission points out that the minimum standards criteria are not deployed in specific consultation frameworks provided in the Treaty (e.g. consultations taking place within the Economic and Social Committee, the Committee of Regions, the Article 138 EC social dialogue consultation, the Article 79EC transport committee, or the Article 113 EC committee) or in other consultative bodies based upon EU legislation, consultation required under international conventions, the comitology process, consultation of experts, dialogue with European and national associations of regional and local government in the EU.

185 The absence of a requirement to consult the advisory committee has been confirmed by the European Court of Justice in C-84/94 UK v Council (Working Time case) [1996] ECR I-5755, para 41.


187 European Commission 2002, European governance preparatory work for the white paper, Luxembourg Office for Official Publication of the European Communities, p. 75.


189 For example, the condition for participation of interested parties, including NGOs, required under Article 8 of the Aarhus convention (Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, http://europa.eu.int/comm/environment/aarhus/index.htm) to which the EU is party, are stipulated in Article 2 of the Directive 2003/35/EC of the European parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directive 85/337/EEC and 96/61/EC, OJ 2003 L 156/17, 25.6.2003 and in Article 6 of Direc-
The implications of the limitations imposed by the Commission upon the scope of the application of the minimum standards are quite significant for the further development of the civil dialogue in the Union. The most important consequence concerns the fragmentation and proliferation of rules governing consultation of civic groups by the Union institutions. Balkanisation of those rules, and the absence of a holistic and coherent approach of the Commission when it selects its collaborators among interested organisations obscure already Byzantine matrix of the civil dialogue. The codification of the participation of civic groups in EU governance is not regulated in an encompassing way.

This proliferation and segmentation of standards guiding the civil dialogue reflects the complexity of the concept itself. Namely, the notion of civil dialogue in the Union encompasses the wide range of actors (variety of non-profit interest groups, social partners), relates to various forms of consultative processes (pre-drafting of legislative proposals such as consultation held in different policy forums, consultation in committees on already formulated Commission proposals, such as the consultation in the European Economic and Social Committee, and spreads out through different modes of EU governance (e.g. lawmaking and policy coordination based upon the OMC). Such extensive and diversified deployment of the civil dialogue concept accounts for the compartmentalisation of the EU norms enacted for the purpose of regulation thereof. The lack of an operational definition of the notion of European civil dialogue and its frequent usage in dissimilar contexts of the EU governance contribute towards mushrooming of participation regulations. There is no coherent set of eligibility criteria for the participation of organisations in the civil dialogue as a whole. Each and every segment of this process is subject to a distinctive regime. Not only that different type of actors taking part in different forms of consultation (for example social partners consulted under Article 138 EC and non-profit groups participating in the Social Policy Forum) but also the same type of actors delivering opinion in the same phase of the same mode of governance are subject to different eligibility criteria. Indeed, the participation of civil society groups in the variety of consultations preceding the adoption of law proposals is governed by the rules differing from those stipulated by the minimum standards. For example, the Commission consultation with environmental interest groups taking part in the Environmental Policy Forum should be governed by the minimum standards. However, the Commission is going to gathering exploratory


193 The ESC considers that it should play a crucial role in defining and structuring civil dialogue and become ‘meeting place for organised civil society’ and an ‘essential link’ between the European Union and organised civil society, and a forum for civil dialogue (The European Economic and Social Committee has expressed this opinion on several occasions, most recently in European Economic and Social Committee (2004) Final report of the ad hoc group on structured co-operation with civil society organisations and networks, Rapporteur; Mr Bloch-Laine, CESE 1498/2003, Brussels, 17 February 2004, p. 8).
opinions of same groups required under the Arhus arrangements in accordance with entirely different criteria laid down in its documents implementing this international convention.\footnote{See above}

The situation is even more complicated as the result of the recent entry of the Economic and Social Committee (ESC) into the pre-drafting stage of the EU legislative process. The EC Treaty provides for the ESC to give its opinion after, rather than before, proposals have been transmitted to the legislature.\footnote{Article 257 EC} It officially does not participate in the pre-drafting stage of the EU legislative process, but delivers its opinion on the already adopted Commission proposal. Having found that its formal legal position minimises impact thereof upon EU decision-making,\footnote{Commission of European Communities (2001) European governance: White paper, COM(2001) 428, Brussels, 25.7.2002, p. 15.} and being of conviction that the Committee should become ‘an indispensable intermediary between the EU institutions and organised civil society,’\footnote{The European Economic and Social Committee has expressed this opinion on several occasions, most recently in European Economic and Social Committee (2004) Final report of the ad hoc group on structured cooperation with civil society organisations and networks, Rapporteur; Mr Bloch-Laine, CESE 1498/2003, Brussels, 17 February 2004, p. 2.} the Commission signed the Protocol with the ESC which contains express provision to the effect that the Commission should invite the ESC to issue exploratory opinions and that the Commission would rely on the ESC to deepen its relations with organised civil society.\footnote{Protocol governing arrangements for co-operation between the European Commission and the Economic and Social Committee, 24 September 2001, CES 1253/2001} The rationale behind this protocol is to rein force its function as intermediary between, on one hand, the EU institutions, and, on the other, organised civil society. This protocol provides for the Commission to consult the Committee on certain issues on an exploratory basis before even beginning to draw up its own proposal, allowing Committee to play useful consultative role at an earlier stage in the decision-making process. This means that civil associations organised at national level that participate in the ESC work are consulted prior to drafting of EU law once in their capacity as the ESC members and secondly can take part in the Internet consultation. At the first occasion their representiveness should be judged against EU rules governing the ESC activities,\footnote{regulation on ESC} and in the second situation the minimum standards are applicable.

The additional confusion regarding the application of the minimum standards is imposed by the fact that particular groups take part both in civil and social dialogue in their different capacities. For instance, when the Commission consults the social partners on the social policy issues within the Article 138 EC consultation it applies its social dialogue requirements, and when it seeks their opinion on identical issues within the framework of the European Social Forum the minimum standards are applicable. However, when the social partners are addressed by the Commission in their capacity as members of variety of committees operating in parallel to the minimum standards and the social dialogue consultations, they are subject to the set of the eligibility criteria which differs both from the minimum standards and the social dialogue requirements.\footnote{In principle the participants on those committees are co-opted from national government committees and national organisations of employers and employees. Three representatives are sent from each member state. Only representatives of trade unions and management serving on the Advisory Committee on Equal Opportunities for Women and Men are not chosen from the national level social partners’ organisations but originate from respective European confederations. For more details see Smismans, Stijn (2004) Law, Legiti-
We can conclude that the application of minimum standards is strictly confined to the pre-drafting stage of a legislative proposal formulation and that they are not intended to govern the participation of interest groups in the civil dialogue as a whole. More precisely, those standards are deployed by the Commission in three situations arising in the pre-legislative consultative process: (1) firstly, in the first stage of the Commission’s impact assessment analyses of its draft legislative proposals or any initiative it intend to launch, \(^{201}\) (2) secondly, when the Commission evaluates the interest groups contributions delivered in response to its Internet based consultations, and (3) when the Commission seeks advise of its numerous, informally set up committees. Those criteria shall apply only to consultation taking place outside fora institutionalised by virtue of the Treaty or EU legislation.

The organisations to which those requirements should apply are mainly those listed in the database CONECCS, although the criteria which are to be meet by organisations seeking to be included in this database differs substantially from those stipulated by the minimum standards. The CONECCS eligibility criteria are as follows: (1) an organisation must be a non-profit representative body organised at European level, i.e. with members in three or more EU countries, (2) be active and have expertise in one or more of the policy areas of the Commission’s activity, (3) have some degree of formal or institutional existence and a document that sets out its objective and the way it is to be managed; (4) have authority to speak for its members, (5) operate in an open and accountable manner, (6) and be prepared to provide any reasonable information about itself required by the Commission, either for insertion on the database or in support of its request for inclusion. \(^{202}\) The main difference between the minimum and CONECCS standards is that while only European umbrella organisations can be registered in the afore mentioned database, both national and EU level associations are entitled to participate in consultations governed by the minimum standards. Similarly as in the case of the minimum standards, the Commission has reinforced the requirements regarding accountability and openness of organisations and their capacity to provide input to the Commission.

One still not fully explained implication of the introduction of the minimum standards concerns the relation thereof with the 1992 code of conduct guiding the Commission’s relations with special interest groups. \(^ {203}\) This code covers the same type of consultations of the Commission with civil society organisations as the minimum standards. However, until now, the Commission remains silent as to how two of those sets of requirements relate to each other.

6. The social dialogue autonomy in EU governance

The most striking feature of the social dialogue that distinguishes it firmly from the civil dialogue is its autonomous nature. While the civil dialogue utterly depends upon the Commission initiative, the social dialogue has become quite independent from the Union institutions and


\(^{203}\) Commission of the European Communities (1992) ‘Communication from the Commission “An open and structured dialogue between the Commission and special interest groups”’, SEC(92) 2272, Brussels, 2.12.1992, Annex II: Minimum requirements for a code of conduct between the commission and special interest groups.
progressed towards an autonomous process for social standards definition.\(^{204}\) Whereas the civil dialogue can be regarded as by the Commission induced consultation, the social dialogue developed into an autonomous governance process, running parallel to the Union legislative and policy co-ordination activities.

The autonomy of the social partners in Union decision making has been significantly increased in the recent years. The Commission takes the view that in recent years it has been a qualitative shift in the nature of the social dialogue towards greater autonomy.\(^{205}\) The social partners’ joint contribution to the Leaken European Council of 7 December 2001\(^{206}\) was a critical step towards opening of an independent European level social dialogue, i.e. its greater autonomy. In their Leaken declaration, the European inter-sectoral social partners opted for (1) the creation their own work programme, and (2) a more independent social dialogue that is strongly bipartite, with voluntary, non-legally binding agreements to be implemented by the social partners themselves.

Their joint work programme for 2003-2005 was adopted in 2002.\(^ {207}\) It gives boost to their autonomous actions in the area of European social and employment policy, i.e. contributes towards the increase their independence in the EU governance.

The Commission supports the development towards more independent and autonomous social dialogue and non-legally binding agreements in the inter-sectoral social dialogue.\(^ {208}\) It called on the European social partners to further develop their autonomous dialogue and to establish joint work programmes, as highlighted in the European Council Laeken declaration and supported by the Barcelona European Council.\(^ {209}\)

6.1. Autonomy of social partner in EU lawmaking on social matters

In the area of EU social policy where the social dialogue procedure applies, the autonomy of the social partners is guaranteed by virtue of Article 138 EC. The opening of negotiations is totally in the hands of the social partners and the negotiating process is based upon principles of autonomy and mutual recognition of the negotiating parties.\(^ {210}\) Although the social partners under this procedure can independently determine subjects for the negotiations and implement


\(^{206}\) http://www.eiro.eurofound.ie./2001/12/feature/eu0112262f.html


\(^{208}\) The telework agreement was considered by the Commission to be the great success of the social dialogue (see the speech of Ms Diamantopulu, Commissioner for Employment and Social Affairs, EIRO, July 2002, http://www.eiro.eurofound.ie./2002/07/Feature/EU0207204F. htm).


concluded agreements through their national affiliations, until recently, they have always relied upon the Commission for the initiation of issues for negotiations and on the Council for implementation of the social dialogue agreement by European legislative acts. This practice has been discontinued. The social dialogue has in recent years progressed in the direction of ever increasing autonomy and emancipation from control of the EU institutions. The social partners are now acting in more autonomous manner, both in respect to the initiation and the implementation of European social agreements.

Although the social partners were not required to restrict their negotiation to proposals tabled by the Commission before the adoption of their multiannual programme, they in the past have never bargain on their own motion. Prior to its adoption UNICE obstructed any European level negotiations not prompted by the Commission and there was no joint social dialogue agenda set up by EU level employers’ and employees’ associations.

The adoption of their joint multiannual work programme makes possible for the social partners to develop into agenda setters in the European Union. This programme enables the social partners to gain control of their own independent social dialogue, and not longer merely to respond to consultations launched by the Commission under Article 138 EC. In the past, the social partners reacted to the Commission’s initiatives, but they have now become more independent in establishing European social standards. The work programme encourages a more autonomous social dialogue, which is not dependent on consultation from the Commission. It marks a significant departure from previous practice, which consisted of deciding on a case-by-case basis whether or not to deal with a specific issue in the social dialogue as incited by the Commission, and thus broadens the scope for autonomous action.

The programme is going to facilitate further development of their agenda-setting capabilities and enable management and labour organisations to become genuine partners in establishing European social standards. The social partners will become capable of assuming less reactive role in the social dialogue process. They will be able to undertaken their independent course of social action, parallel to that envisaged by the Commission, and consequently to release themselves from her control. Namely, tough the Commission cannot directly participate in collective negotiations when those are commenced on its initiative, it still retains some control over this process. Thanks to its obligation to promote the consultation of management and labour at Community level by ensuring balanced support of the parties stated in Article 138(1)

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211 The freedom of the European social partners to negotiate agreements that are not related to European policy proposals has been recognised in Article 12(2) of the 1989 Community Charter on the Fundamental Social Rights of Workers (Social Europe 1/92), the observance of which is guaranteed in Article 136 EC.

212 UNICE even declared that it would only agree to take up bargaining in the case of the Commission’s initiative (see UNICE (1999) Freeing Europe’s employment potential: European social policy on the eve of 2000 seen by companies, position paper. and Boockmann, Bernhard (1998) Agenda control by interest groups in EU social policy, Journal of Theoretical Politics, 10(2): 215-236, p. 220).


EC, the Commission is able to intervene in the social dialogue. It usually uses its task to supply the social partners with a document that constitutes the starting point and basis of their talks and its role to provide technical support, as a convenient tool of intervention.\(^{217}\) This venue for exercise the Commission supervision over the social dialogue ceases to exist when the social partners become in charge of their joint agenda. Furthermore, when agreements are negotiated on the Commission’s initiative, it may decline a request of the social partners to negotiate on a subject, if it deems the social partners insufficiently representative. In practice though, the Commission has never rejected a request of the social partners to suspend the legislative process. Agreements initiated on the basis of the work programme escape this never used, but nevertheless, the real constrains of the Commission.

The social partners’ adoption of the work programme does not suspend the Commission’s power to take initiatives under Article 138 EC. But, it changes the conditions under which it does so. The Commission has to share it right of initiative in the field of the social policy with that of the social partners. The right balance will have to be struck between the Commission’s power of initiative in the social field and the social partners’ independence. The strategic behaviour of the Commission, proposing legislation with the indirect aim of inducing the social partners to enter into negotiations, seems less likely in future. Considering the fact that the social partners have so far entered into negotiations on social policy ‘in the shadow of the law’, the prospects for the conclusion of this type of framework agreement on social policy are not so bright.

The programme of the social partners is neither exhaustive nor exclusive, for it is to be implemented in conjunction with the Social Policy Agenda which defines the Commission’s priorities in the social and employment fields for the period 2000-2005.\(^{218}\) Where questions are not included in their work programme but in the Social Policy Agenda, the social partners will still react as before. However, where subjects are included both in the social partners’ work programme and in the Commission’s agenda, the Commission will take account of the social partners’ activities in deciding how to proceed.\(^{219}\) One example is the issue of stress at work included in their work programme on which the social partners, as indicated above, decided to conclude a voluntary agreement,\(^{220}\) while this matter is also envisaged in the Commission’s Community strategy on health and safety at work 2002-6.\(^{221}\) The same is true of social responsible enterprise restructuring, where, at the social partners’ request, in 2002 the Commission suspended the second stage of consultation to give leeway to the social partners whose work programme includes preparation of joint guidelines.\(^{222}\) This does not mean that traditional legislative route will not be used any more.

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The first EU level cross-industry negotiations prompted by the social partners current 2003-5 work programme rather than by the Commission proposal, were successfully concluded on 8 October 2004.\(^{223}\) The agreement reached deals with work-related stress.

As far as the autonomous implementation of the social dialogue agreements is concerned, the agreement on telework concluded on 16 July 2002 by the ETUC, UNICE, CEEP is the first social dialogue accord to be implemented in accordance with the procedures and practices specific to management and labour in the member states.\(^{224}\) The telework agreement will be the first agreement ever to be implemented through the voluntary route foreseen in Article 139(2) EC. The accord should be applied within three years of its signature – by 16 July 2005. The above mentioned agreement on work-related stress is to be implemented in the same way.

Those two agreements make a break with the previous practice of the implementation of the social dialogue agreements by means of a Council directive. Consequently, the social partners will not be any more subject to the constraints of their autonomy, as in the cases when their agreements were implemented through EC law. If an Article 138 agreement is to be transposed in EU instrument, that can be done only by the Council on the proposal of the Commission.\(^{225}\) Although neither the Council\(^ {226}\) nor the Commission\(^ {227}\) has the right to amend the agreement submitted by the social partners for implementation via EC law,\(^ {228}\) in making its proposal for a decision by the Council, the Commission resumes control of the procedure. In its capacity as guardian of the Treaties,\(^ {229}\) the Commission has the right to assess the representativeness of the signatory parties, their mandate, the legality of the agreement, i.e. whether


\(^{226}\) Commission of the European Communities (1993) ‘Communication concerning the application of the Agreement on Social Policy, presented by the Commission to the Council and to the European Parliament’, COM(93) 600, 14.12.1993, paras. 15, 38 and 42; As a matter of fact the Council decision must be limited to making binding provisions of the agreement concluded between the social partners, so the text of the agreement would not form part of the decision, but would be annexed thereto (Ibid. para. 41). See also, Commission of the European Communities (1996) ‘Proposal for a Council directive on the Framework agreement concluded by UNICE, CEEP and ETUC on parental leave, COM (96) 26, Brussels, 31.1.1996 para. 30. The changes made by the Council never concerned the European agreement itself, but only the preceding articles which were added by the Commission.

\(^{227}\) The Commission has twice proposed the insertion of an amendment, a non- discrimination clause, in the main body of the draft directive to which the agreement has been annexed, but the Council rejected those alteration in both cases (see Article 2.5 of Commission of the European Communities (1996) ‘Proposal for a Council directive on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC’, COM(96) 26, 31.1.1996 and Article 3 of Commission of the European Communities (1997) ‘Proposal for a Council directive concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC’, COM(97) 392 , 23.7.1997.

\(^{228}\) In view of the Commission they even retain a priority role in the interpretation of the agreements’ provisions. According to Clause 4.6 of the Framework agreement on parental leave ‘any matter relating to the interpretation of this agreement at European level should, in the first instance, be referred by the Commission to the signatory parties who will give an opinion’. A similar provision is implied in the preambles of the part-time and fixed-work agreements. However, the European Court of Justice has not confirmed this.

\(^{229}\) See Article 211(1) EC
the contents of the agreement are in accordance with Community law, and the effects on small and medium-sized enterprise set out in Article 137(2). The Council, for its part, is required to verify whether the Commission has fulfilled its obligation. In order to respect bargaining autonomy of the social partners neither the Commission nor the Council is supposed to modify the agreement. The Council can either adopt an agreement or decline to endorse it. Even if the Commission has no formal right of modification, it may still modify an arrangement in an indirect way. The Commission could refuse to submit it to the Council and bring forward its own proposal instead. This proposal could adjust the agreement to the Commission’s own preferences. The Commission and Council have to ensure that other interests do not find themselves unduly ignored as a result of the social dialogue process.

This censorship of the Commission and Council relinquishes when the social partners, as in the case of the telework and work-related stress agreements, decide to implement their agreement reached under the Article 138 EC procedure by themselves. In that case, the social partners gain the independence from the Union institutions as to bringing into effect an agreement. But, this autonomy is not unlimited. This rout is considered by the Commission to be inappropriate where fundamental rights or important political opinions are at stake, or in situations where the rules must be applied in a uniform fashion in all member states and coverage must be complete. In those cases preference should be given to implementation by a Council decision. Autonomous agreements, concludes the Commission, are also not appropriate for the revision of previously existing directives adopted by the Council and European Parliament through the normal legislative procedure. Agreements on topics with a wider social impact, such as pension entitlements or working time, probably also would not be considered to be eligible to be implemented by the social partners themselves.

Moreover, the social dialogue agreements intended to be implemented by social partners do not absolutely escape the Commission control. It is adamant to undertaken its own monitoring of those agreements, to assess the extend to which they have contributed to the achievement of the EU objectives, and put forward a proposal for a legislative act should it decide that those accords do not meet the Treaty aims. The Commission may exercise its right of initiative at any point, including during the implementation period, should it conclude that either management or labour is delaying to pursuit of union objectives.

Another important change is that whereas in the past, social dialogue at the European and national levels was rather disconnected, now there is greater interaction between the two, with

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231 Ibid


233 Ibid
the European social dialogue having a greater impact than before on national social dialogue. This means that the national social partners now have a greater need to engage at the European level, but also that the impact of the European social dialogue will, in the future, largely depend on the way in which its results are reintegrated at the national level.

6.2. Autonomy of the social partner in the OMC

Besides gaining greater autonomy within the social dialogue procedure, which applies in the area of European social policy, the social partners are becoming more independent in their actions conducted within the OMC. Their autonomy within the OMC has been enhanced due to the role they have been assigned in the implementation of the Lisbon strategy and more generally in the synchronisation of other national policies through the OMC.

The joint work programme 2003-2005 has been actually adopted by the social partners in order to enable them to adequately and effectively respond to the increase of their responsibilities for the conception and implementation of the European strategy for growth and employment. In this programme, they agreed to report on social partner actions in member states that are relevant for the implementation of the European employment guidelines. The duty to report on the progress achieved in the implementation of employment guidelines originally has been reserved exclusively for the member states.

Their frameworks of actions for the development of competence and qualifications and on gender equality are based on that approach. Those frameworks of action that are not regulatory, the social partners are to implement on their own by making use of the open method of co-ordination machinery. The role of social dialogue in promoting vocational education and training and lifelong learning is likely to be increased through this mode of co-ordination. It is particularly significant that the social partners are producing annual reports on progress in the priority areas identified and that the social dialogue ad hoc group on education and training will undertake an evaluation after three years in March 2006.

6.3. Limitations of the social dialogue autonomy in Union lawmaking

Although the increased autonomy of the social dialogue in EU policy formation and implementation is the crucial factor that distinguishes it from the civil dialogue designed as a framework for conducting the consultations with interest groups by European institutions, the limits of this autonomy should be recognised.

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234 See the conclusions of the Lisbon, Barcelona, Nice, and Stockholm European Councils. Mr S. Dimas, Commissioner responsible for Employment and social Affairs, asserts in his address to the Tripartite Social Summit for Growth and Employment held on 25 March 2004 in Brussels that the success of the Lisbon strategy depends to a very great extend on the social partners’ commitment to take action in this area.


237 The position of the social partners should be especially enhanced in relation to the development of curricula and qualifications; the provision of information, advice and guidelines; and evaluating the impact on both companies and workers (Galgoczi, Bela, Celine Lafoucriere and Lars Magnusson (2004) eds., The Enlargement of Social Europe: The Role of the Social Partners in the European Employment Strategy, Brussels: ETUI).
First of all, the precise status and intended practical impact of the social partners’ instruments adopted under their joint work programme 2003-2005 is somewhat uncertain. For example, the European level social partners’ text of a statement on managing socially responsible enterprise reconstruction falls short of constituting a code of conduct or set of recommendations but, assuming that it is ratified by the national social partners organisations, it can be expected that trade unions and employee representative bodies such as European works Councils will seek to use its contents to promote good practice by companies in the handling of restructuring. However, unions are unlikely to see it as representing a comprehensive response to the challenges posed by restructuring.

As the social dialogue becomes triggered less by the Commission and depends more upon the willingness and capacities of the social partners to recognise joint concerns and make the necessary resources available for formulating and implementing joint policies, the issue of the social partner capability to sincerely engage in negotiation and effectively implement agreements is likely to aggravate the problems concerning willingness of the all parties to participate in the social dialogue, and those relating to implementation and monitoring. A social dialogue agreement independently initiated, adopted as an non-legally binding instrument to be implemented by the signatories themselves demands closer involvement of the member organisations in terms of mandating European level organisations, overcoming institutional diversity, and a coherent implementation and monitoring agreements. European management and labour has yet to undertake measures in order to curb those obstacles to autonomous social dialogue at EU level.

The newly developed practice of the social partner to initiate the European level negotiation on their own, as in the case of the stress at work agreement, without being stimulated by the Commission’s proposal, raises many controversies. Until recently, the main incentive for the engagement of the social partners into negotiations was the fact that the proposals launched by the Commission could have been adopted through the legislation if the social partners fail to reach an agreement. That happened on several occasions. Negotiation on data protection at the workplace even failed after adoption of the programme. In the absence of any economic pressure for both sides of industry to foster the collective bargaining on the EU level, and due to the lack of appropriate power balance between European trade unions and employer organisations, the incentive for the social partners to negotiate was the regulation that would be enacted if bargaining failed. In other words, the ability to pre-empt legislation for-

238 See above
mulated by the Commission prompted the social partners into negotiations when the incentive for UNICE was to obtain legislation which is more favourable to its interests than would be the case for legislation adopted via traditional channel. However, this negative motivation is rather weak and becomes less and less credible as a basis for the development of negotiating practice at EU level from the employers’ perspective since the stream of legislative proposals by the Commission is declining. 241

If the joint work programme 2003-2005 and not a Commission proposal is to serve as the basis for the initiation of the social dialogue, the treat of legislation ceases to provide the pressure to bargain. Whether the joint work programme can substitute the treat of the adoption of less favourable law as the incentive for conducting the EU social dialogue remains to be seen. This couches approach is even more justifiable if we take into the consideration that even the agreements concluded by the social partners within the social dialogue procedure in the shadow of law were modest in substantive terms. 242 Additionally, the collaboration of the social partners on issues occupying the central stage of work relations such as equal opportunities for men and women still need to be developed. 243

The second problem which cast doubts as to the significance of the increased autonomy of the social dialogue in EU governance concerns the implementation of Euro-agreements by management and labour. The question of how to ensure that agreements concluded at a European level are actually implemented at a national level gains on its importance when legislative route is not used any more. It is difficult to say how the implementation by the social partners themselves will work in practice, given the diverse industrial relations and employment regulation practices in operation in the different EU member states. The experience gathered from the implementation of two sectoral agreements on pay in agricultural sector and on telework which have been put into practice in accordance with national procedure and practices by the social partners themselves are not very encouraging. The Commission itself warns that due to inadequate technical capacities and insufficient representativeness of the social partners the effective implementation of those agreements may be problematic in numerous member states. 244

Once the social partners decide to implement their agreements in accordance with their own procedures and practices, the implementation becomes the responsibility of the members of the signatory parties, ETUC, CEEP and UNICE. In this case, a European collective agreement has to be implemented through national collective agreements. The terms of the European collective agreement will be reflected in the national agreements. Two basic obligations for signatory parties flow from the conclusion of European collective agreements: the obligation to exercise influence on their members to start collective negotiations at national level on the basis of the provisions of the European collective agreement and an obligation for the con-

cluding parties to restrain the members of their organisation from violating the provisions of the collective agreement. They also should make concrete efforts to influence their national affiliates to start collective negotiations at national level on the basis of the provisions of the European collective agreement. The legal basis for such an obligation would lay in the internal rules of the European organisation, i.e. would derive from the mandate granted by national affiliates to their European association to negotiate an agreement on the EU level. The three organisations can conclude the framework agreement on behalf of their national members.\textsuperscript{245} However, the European social partners are not endorsed by a general, comprehensive mandate to enter into negotiations on behalf of their affiliation. UNICE, CEEP and ETUC enjoy only case-by-case mandate which is to be granted for every single negotiation procedure on particular issue.\textsuperscript{246} Moreover, an agreement reached among those organisations under Article 138 EC has to be approved by the national associations and only after such an approval the European associations can eventually sign up to agreements.\textsuperscript{247}

Implementation of the social dialogue agreements via this route is not unproblematic.\textsuperscript{248} There are three major difficulties associated with the practice that no national labour and management organisations, but European association that concluded the social dialogue agreements are responsible for their implementation when the autonomous and not legislative path is chosen.

The first one relates to the fact that Community law does not give any possibilities for the enforcement of the European collective agreement towards national social partners’ organisations. Moreover, the Declaration 27 on Article 139(2) EC attached to the Amsterdam Treaty states that a agreement agreed upon by the social partners to be implemented in accordance to national procedures and practices implies no obligation on the member states to apply agreement directly or to work out rules of their transposition, nor any obligation to amend national legislation in force to facilitate their implementation.\textsuperscript{249} In contrast to the obligation of member states to guarantee the result imposed for all workers, including non-union members when implementing a directive by national collective agreement under Article 137(4) EC and according to the case law of the Court of Justice,\textsuperscript{250} there seem to be no obligation for a member state to amend legislation which is contrary to the terms of a European level agreement or provide adequate remedies for its breach. Previous decisions of the Court of Justice concerning the enforceability erga omnes of collective agreements intended to implement EC directives dictate that it should remain the state’s responsibility to evaluate the legal status of such collective sources as a means for the implementation of directives. The state has full control of devolution to the social partners and does not escape ultimate responsibility to enforce directives. No obligation of this kind exists in respect of the implementation of agreements con-


\textsuperscript{246} Ibid.

\textsuperscript{247} Ibid


cluded under Article 138 EC. At any rate, there is on the basis of Article 139 EC no legal obligation whatsoever for any national association to put a European collective agreement on the national negotiation table, nor is there an obligation of result, namely that there should be a collective agreement at national level. This is particularly important if one takes into consideration that the relations among European and national associations are not developed in a definitive manner.

The second problem concerns the lack of any power of European peak associations over their affiliates.251 The signatories of Euro-agreements can deploy only internal rules in order to ensure the compliance of their national members with the provisions of those accords. On the basis of internal rules of procedure, national organisations can be expelled if they do not act in conformity with these internal rules. This could be the case if they do not implement European collective agreement.252 The internal rules of procedure of most European social partners’ organisations do not, however, give any specific rules with regard to the obligations of the national affiliates flowing from the conclusion of the European collective agreements.

Furthermore, not all-national social partners are associated with the European organisations participating in the social dialogue.253 Arguably this could mean that the agreement might not apply in workplaces where either the employer is not affiliated to the national organisation which is in turn affiliated to UNICE or CEEP, or there is no union which is a member of the national union which is in turn affiliated to the ETUC. Thus, a situation could develop where coverage becomes patchy, particularly in member states characterised by relatively weak trade union density254 and representation at the work place and patchy collective bargaining coverage.255 The binding effect of the collective agreement can be extended to all workers and employers by means of a national legislative measure.256 This means that the agreement will apply to all workers and employers in the whole branch of industry, regardless of whether they are a member of a trade union or employers association. However, in the majority of member states the collective bargaining in principle revolves around the sectoral social partners’ level and quite rarely around intersectoral, cross-industry management and labour associations which further complicate the application of erga omnes validity rules. Organisations which are not affiliated to the agreement signatories can oppose agreement. Additionally, problems arise as certain member states do not have procedures to provide for an erga omnes effect of collective agreements, while at the same time, the binding effect of the collective agreements, as far the hierarchy of legal sources (legislation, work rules, individual agreements, customs, etc.) is concerned, differs considerably from country to country. Not all the member states have developed reliable methods for implementing universally and compulsory intersectoral nationwide collective agreements to the entire body of employers and employees. Namely, the collective bargaining practices vary significantly from the member state to the member state. The enforceability of social partners agreements on individual terms and

252 Ibid, p. 179
255 For an overview of collective bargaining coverage in the EU member states see ibid, p. 31.
256 For example in the Netherlands and Belgium, but not in the United Kingdom. For an overview of the practices of legal or administrative extension of collective agreements in the EU member states see ibid, p. 33.
conditions of employment may be extremely uneven in the various countries. Some member states have procedures for extension of agreements to the private sector as a whole, others do not. In some member states, e.g. Sweden, Denmark and Finland, there is no possibility of extending a collective agreement on non-unionised workers through state practices. Even where member states employ extension procedures for applying national collective agreements erga omnes, these rules differ greatly, particularly with respect to so-called normative clauses of agreements, i.e. those which Thus, there are no real guarantees that the agreement will be fully and erga omnes implemented through the existing national collective bargaining structures or mechanisms.

6.4. Limitations of the social dialogue autonomy in the OMC

The increased autonomy of the social partners within the OMC also should not be considered without reservations. Although the social partners are assigned quite prominent role in the formulation of the EES, the extent to which their opinion is taken into account is not clear. There was, also, little participation by the social partners in the shaping of the guidelines and the NAPs. It has been recognised in the official evaluation of the Employment strategy as well as in studies carried out by independent research institutions and scholars that the participation of national social partners is a weak point of the strategy, stemming partially from the difficulty that the social partners have in reaching agreements among themselves, though their participation in the EES has improved over last few years, and some good exemplary practices have been developed. The social partners point out that although they are usually consulted during the preparation of the NAPs, their comments are not equally taken


into account in all the member states. The synchronisation and streaming of the broad economic policy guidelines (BEPG) and EES did not change significantly ways of involving of social partners.

Current research indicates that the participation of the social partners in the OMC within the European Employment strategy has proven to be uneven, especially among trade unions. These studies suggest that the NAPs have only contributed to a genuine consultation between the social partners and governments in countries with economy wide agreements (Finland, Ireland, and the Netherlands) or those with experience of tripartite bargaining (Sweden, Austria, Denmark, Luxembourg). Even in those countries where consultation has taken place, the impact of the social partners was still only of limited nature, since governments view the NAPs as documents, which illustrate national policies of the past couched in the language of future policy action. The influence of the social partners is even more limited in the remaining countries, where at best formal and empty forms of consultations take place with the social partners. Moreover, the cross-national survey conducted by the European Foundation for the Improvement of Living and Working Conditions shows that contribution of the social partners to the development of national action plans on employment remains quite insignificant.

The shabbiness of the social partners participation in employment NAPs can be best illustrated by the de la Porte and Pochet finding based on the empirical studies that the involvement of NGOs in the social inclusion OMC, which is regarded as very weak, is better overall that that of social partners in the EES.

The real impact of the social partners texts adopted on their own initiative addressing the Lisbon themes is very limited. One common difficulty is that many of those texts contain imprecise and vogue follow-up provisions. Effective follow-up at national level is, however, only possible if the European social partners’ texts include detailed provisions on this.

Furthermore, the Commission finds that there is a lack of commitment to the Employment strategy on the labour side, and a reluctance to become involved on the employers’ side, both

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263 Ibid
at the European and national level\textsuperscript{269} since there is no convergence, but continuing divergence of the national industrial relations systems in Europe.\textsuperscript{270}

One of the possible explanations for the relatively feeble involvement of the social partner is the employment NAPs is that the agenda of the EES side-steps the main issues with which social partners are concerned: the EES is focused on increasing of the EU employment rate, while social partners are mainly interested in wage policies, although the Wim Kok group has managed to bring the issue on the agenda in the country specific recommendations.\textsuperscript{271} Second, the lack of financial resources could be an obstacle, although the social partners, as explained above, are entitled to apply to the European Structural Fund for grants for improving their organisational capacities. The lack of institutional rootedness of the EES within the national policy process and of the real benefits for employers’ and employees’ association also hinders their dedication to participate in the OMC.

7. Why the social partners enjoy stronger position in EU governance than civic groups

It has been shown, that although both the civil and the social dialogue have to play part in EU governance, the influence of later by far supersedes the input of the former. This inequality of powers of non-profit, diffuse interest groups on one side and management and labour on the other, evolved within the civil and social dialogue, persists in the OMC. Although both of those groups are guaranteed a place in EU policy creation and implementation, the position of civil groups is appreciably weaker.

Thus, one should ask why the desirability of a greater involvement of non-profit or civic groups in the process of the implementation of the European employment strategy and social policy has been (as shown above) declared in a range of Union documents, but very little has been done towards the operationalisation and putting into practice of these pronounced commitments.

The fact that the Commission insists on civil society meeting certain standards raises questions not only as to whether the Commission is consistent in its demands, but also as to whether a civil society which conforms to such demands carries with it the potential associated with the domain of social action.

It is submitted in this paper the social dialogue owns its superiority over the civil dialogue to its unique powers arising from the position of its protagonists in the sphere of production.

Although it can be credibly argued that the institutional structure of the voluntary organisations operating at the European level is inappropriate for the systematic engagement of these


associations in the Union policy process,\textsuperscript{272} the weakness of their transnational structure cannot be regarded as a reason for explaining the inferior position of the civil dialogue in the relation to the social dialogue. The institutional structure of the social dialogue participants, the European labour and business confederations, is also consider to be inadequate for their involvement in Union lawmaking.\textsuperscript{273} The Commission itself warns that the social partners have to develop internal structures that would permit them to react to developments at European level. This presupposes a real commitment from their members and providing them with adequate resources and structures.\textsuperscript{274} The Commission is, in particular, concerned with the technical capacity of the European social partner organisations to engage in the social dialogue.\textsuperscript{275} The limitations in the associational capacities of the social partner organisations concerns the lack of resources of European management and labour associations, difficulties with synchronisation of sectoral with cross-sectoral interests since European sectoral business associations are not incorporated in UNICE, and low governability of some national social partners structures for the implementation of cross-border co-ordination.\textsuperscript{276} The problem which the European non-profit organisations experience in respect of infrastructure, the heterogeneous nature of their members, the problem of representativity, the inability to implement mutual agreements, insufficient transparency in dialogue, etc. are equally applicable to the social partners. For example, although the question of representativeness of civil organisations raises more contraventions than that of the social partners, the later also experience problems in that domain. Indeed, an obviously difficulty here is that levels of membership, both for trade unions and employers’ organisations are, in many member states, low and what is worse, have been significantly declining over past two decades.\textsuperscript{277} The criteria of representativity specified by the Commission are strictly formal. They relate only to the associations’ organisational structure and say nothing about whether the agreements adequately address the interests that the agreement affects and supposedly represents. To be representative means ‘representing the objective interests of those affected and/or involved. The view that the three big umbrella organisations UNICE, CEEP, and ETUC represent all categories of employers and employees, seems to be a highly problematic expedient. Not only are many of the national trade unions and employers’ associations not include in these organisations,\textsuperscript{278} but the decision-making structures within them, based on the majority principle – often excludes or sidelines important

\textsuperscript{272} For a short overview of the scholarship claiming that due to lack of technical competence, resources, and negotiating skills NGOs are generally unprepared for the EU system see Ruzza, Carlo (2002) “‘Frame bridging’ and the new politics of persuasion, advocacy and influence’ in Alex Warleigh, and Jenny Fairbrass, eds., Influence and Interests in the European Union: The New Politics of Persuasion and Advocacy, London: Europa Publications, pp. 93-117, p. 95.


\textsuperscript{278} For example, one of the leading French unions, CGT is not member of the ETUC.
Furthermore, complication arises if one considers that certain groups of employees clearly appear as under-represented within the trade unions. The proportion of trade union members who are atypical workers - part-time workers, fixed-term and temporary workers - is usually considerably lower than their proportion within the workforce. In particular, women workers are underrepresented.

Thus, it can be concluded that the social dialogue does not owe its prevalence over the civil dialogue in EU governance to the better organised institutional structure.

We argue that the social dialogue derives its distinctiveness as to the civil dialogue from the special powers and responsibilities of its participants in the social-economic sphere within which these two modes of EU governance operate. The main factor which contributes towards the distinction of the roles of the social and civil dialogue in the EU policy process is the wide acceptance on the European level that only strategic actors such as management and labour representatives should be given a permanent and critical role in lawmaking, policy coordination and policy implementation because they are considered to be resourceful partners in carrying out Union key economic projects.

In the Commissions’ view the attainment of the Lisbon strategy goals depends to the considerable extend on the action taken by the social partners. Social dialogue is considered in the Union, as shown above, to be the driving force behind successful economic and social reformed envisaged in Lisbon.

The other important Union project, the establishment of the Economic and Monetary Union (EMU) cannot be either completed without the involvement of the social partners. The member states recognise the crucial importance of strict budgetary discipline and elimination of excessive general government deficit for the successful completion of Monetary Union. This budgetary discipline should contribute towards the strengthening of the conditions for price stability and non-inflationary economic growth which are the prime aims of the establishment of the EMU. The restriction of considerable increases in wages is an essential element of any economic strategy aimed at pursuing price stability and low inflation. Moreover, monetary policy itself becomes very difficult whenever wage responsiveness significantly varies across countries. Consequently, under EMU, nominal wages should on average progress in a manner that is compatible with the objective of price stability. This cannot be

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280 This problem is recognised by the Commission in (Social Europe, 4, 1995).


282 See Article 104 EC. See also European Council (1997) ‘Resolution of the European Council on the stability and growth pact’, Bull. EU 6-1997, point 1.27


achieved without the social partners’ support.\textsuperscript{285} In particular, the Council invited the social partners in member states to conclude wage agreements in accordance with four general rules: (i) aggregate nominal wage increases consistent with price stability; (ii) increases in real wages which safeguard the profitability of capacity-enhancing and employment-creating investment; (iii) taking better into account differences in productivity levels according to qualifications, skills and geographical areas; and (iv) avoidance of wage imitation effects.\textsuperscript{286} The collaboration with representatives of both sides of the production chain, employers and labour is considered in the Union to be the most suitable way for securing the national budgetary discipline deemed to be a necessary requirement for participation in the Monetary Union and ensuring that a reduction in the government deficit does not contribute to a sharp increase in unemployment. This prompts the Commission to conclude that ‘the EMU process and economic convergence have progressively make visible the importance of the role of social partners, not only in influencing the local competitiveness and employment conditions, but also as a major player in the achievement of growth and an employment-friendly overall policy mix in the Euro zone and in the Community.’\textsuperscript{287} Thus, the social partners gained privileged access to policy processes in the Union because they are considered to be in control of national working arrangement targeted by EU most pressing undertakings, the Lisbon strategy and the EMU requirements.\textsuperscript{288} On the other hand, civic interest groups not involved in economic activity are considered to be helpful but not essential and not the most capable partners in pursuing the abovementioned policy preference. The Commission finds that, within civil society, the social partners have a particular role and influence, which flow from the very nature of the subjects they cover and the interests they represent in connection with the world of work.\textsuperscript{289} The capacity of management and labour to conclude collective agreements on particular topics that include commitments, in the view of the Commission, distinguishes them substantially from other interest groups of a diffuse nature.\textsuperscript{290} This capacity of policy implementation serves as a ground for the reinforcement of the involvement of the social partners in the decision-making process of the Union, as called for in the White paper on European governance. As the Commission put it, the social partners are on account of their implementary ability singular, inimitable players in the Union governance.\textsuperscript{291} Consequently, the social partners and


\textsuperscript{288} Working conditions, definition of wage standards, continuing training, particularly in new technologies or organisation of work and working time are few examples of specific topics relevant for the Lisbon strategy and the EMU, which the social partners are entitled to deal with.


other interest groups are positioned differently in relation to the accessibility to the Union policy process.

8. The social dialogue and the civil dialogue: the complementary approach developed by the Commission

The structured involvement of interest groups in EU governance revolves around the phenomena of the civil and social dialogues. Against the background of the significantly developed social dialogue and the embedded role of the limited number of private interest groups from production in Union policymaking, the Commission launched the civil dialogue initiative, intended to introduce numerous interest groups organised outside the sphere of production in EU decision-making. Throughout this study it has been established that the social dialogue occupies more important place in the European policy formation and implementation process that the civil dialogue. The importance of the tasks assigned to the social partners in the EU governance exceeds by far the magnitude of the civil dialogue functions.

However, this inferior position of the civil dialogue in EU decision-making does not imply the existence of the contention between two of those modes of interest intermediation. The Commission considers the civil dialogue as a process complementary not antagonistic to the operation of the social dialogue. A civil dialogue at European level, in the view of the Commission, should take it place alongside the policy dialogue with the national authorities and the social dialogue with the social partners. The civil dialogue should not replace or compete with the social dialogue, but provide an adjunct to it. According to the Commission, the introduction of the civil dialogue is supposed to remedy the situation arising from the selective promotion of only producers’ interests underscored by the social dialogue and from the consequent neglect of groups which lie outside the productive centre of society. The EU is considered to systematically privileges business interest over other societal interests, thus creating special challenges to them. The Commission view that the social dialogue, which pursues the interests of producers, should be supplemented with the civil dialogue, which promotes interests excluded from profit-driven economic activity, and its proclamation for


strik ing a balance between economic and social aspects of Union social policy, should be ex-
amin ed in the light of a widespread concern that there is political distortion in the Union which follows from the promotion of the special interests of management and labour, and lack of balance between economic-related and other societal interests. 296 The civil dialogue should promote legitimate interests of non-productive part of the society and counter balance the interest representation of producers. 297 It is concerned to correct the perceived bias in existing contributions favouring business and organised interests. 298

Conversely, this Commission undertaking about complementarity of the civil and social dia-
logue and the balancing of interests’ role assigned to the civil dialogue is extremely difficult
to achieve in practice. For example, although the Commission consulted civil society associations on the issue of lifelong learning, the social partners used their vested position in the employment strategy to conclude the action plan on this matter without taking into consideration opinions expressed by the consulted civic organisations. This action plan which is to be im-
plemented by the social partners by means of the OMC became an integral part of the official Union employment strategy.

Furthermore, the complementarity doctrine is difficult to reconcile with the fact that not only non-profit associations but also the social partners are parties to the civil dialogue. It is hard to expect that the social dialogue efforts of producers to shape European social and employment policies can be successfully balanced or offset through the civil dialogue if management and labour organisations are its legitimate participants.

Although the Commission emphasises the distinc tion between the social and civil dialogue modes of consultations, 299 it does not provide clear guidelines as to how this difference can be determined. The Commission’s instruction that the social partners should be included in the civil dialogue ‘in view of their civic rather that their collective bargaining functions’ 300 contributes very little towards enforcing of the complementarity doctrine since it neither identifies the distinctive roles of social partners and voluntary associations in the civil dialogue, nor it provides the particular criteria for the clear division of responsibilities and tasks of both sets of organisations. It only instructs the social partners to co-operate with non-profit organisation in all fields without specifying the terms of such partnership. 301 As more helpful, but not deci-


299 See above


sively enlightening, can be considered the Commission proclamation that while the social partners acting within the social dialogue address the economic aspects of Union social and employment policies, non-profit organisation need to be actively engaged in helping to reconcile economic performance with a social solidarity.302

While the attainment of the complementarity approach in the meaning of the balancing of interests is difficult to achieve, the complementarity of functions as the rationale behind the introduction of two of those dialogues is more plausible.

The codification of interest groups participation in European governance emanated in the civil and social dialogue reflects the Commission’s intention to improve the capacity of policy making in the EU.303 Both the civil and social dialogues represent the modes of governance perceived at the European level to contribute towards better governance in the European Union, i.e. towards greater efficiency and democratisation of Union policymaking.304 The formalisation of the civil society involvement in EU policy-making is expected to contribute towards its greater efficiency and legitimacy. Civil groups and the social partners are proclaimed to play a prominent role, since their active engagement is considered to be necessary to remedy legitimacy and efficiency deficits in the Union. The institutionalisation of the dialogue between the EU institutions and the civil society should be considered in the light of the White paper assumption that better consultation of civic interest groups is in both the immediate and the long-term interest of the EU, not only for providing of better policies but also for more efficient implementation.305 This imperative to improve the effectiveness of the implementation of its policies drives the EU towards the closer co-operation with interest groups. The encouragement provided by the EU institutions to the further development of the civil and social dialogue is prompted by the Commission’s presupposition that the actors that bear the implementation costs of a political decision and are directly affected by a measure should be in-


303 A political process is considered to have political capacity (a) when a decision can be reached without long negotiations, and (b) when it enjoys the political support of all concerned actors and therefore has a high consensus capacity (Heritier, Andrienne (2003) ‘New modes of governance in Europe: increasing political and policy effectiveness?’ in Borzel, Tanja and Cichowski, Rachel, eds., The State of the European Union: Law, Politics, and Society, Oxford: Oxford University Press, pp. 105-126, p. 107.


volved in the policy formulation in order to ensure its efficient implementation. The fact that they participate in this process, formulating policy goals as well as choosing the instruments of implementation will cause them to support politically a policy measure that they might have opposed under the traditional legislative mode of governance. More encompassing the participation of actors that are affected by a policy in the decision-making process, the higher the resulting democratic legitimacy and effectiveness of this policy. In brief, it is argued that both the civil and social dialogues have a high political institutional capacity because – by involving all affected actors – they generate support for the policy initiative, shorten the time needed for decision-making, an increase the likelihood of coming to an agreement. The call for the closer involvement in EU governance actually reflects the Commissions conviction that the engagement of stakeholders in the policy process can improve capabilities of the Union to achieve its purposes in less costly manner. For example, the involvement of the social partners is requested in area of the cohesion policy because it is believed that it could reduce the presently high costs of managing of the Structural Fund, one of the main players in this domain. Consequently, the social partners are, in general, accorded significantly formidable role than civil interest groups in EU governance because their ability to contribute towards implementation of European policies.

Can interest groups involved live up to such great expectations? Whether the greater participation of interest groups in the EU policy process can contribute towards the enhancement of legitimacy in the Union is the issue that exceeds the scope of this article. In the literature at present exists no common opinion on this matter. While some authors argue that organised interests could provide a core contribution to the reduction of the democratic deficit in the EU, others view their stronger involvement as strengthening of the neo-liberal capitalist dominance of the European process. The Commission itself does not advocate that the involvement of interest groups can necessary increase legitimacy. Although, the participation of civil organisations and the social partners in European policy making and implementation can be regarded as good option for securing to comply on part of targeting groups as well as for obtaining knowledge about policy effects – and thereby a good option for achieving governability, their involvement cannot guarantee considerable improvement of the legitimacy in the Union. It is more intended to improve effectiveness and the efficiency of the EU decision-making, while disregarding issue of legitimacy. The Commission acknowledges ‘that the White Paper’s call for the inclusion of more players in the policy process, while necessary,
does not by itself lead to increased democratic legitimacy of policies and institutions. It further insists that the better involvement of more players will actually enhance the effectiveness and efficiency of the decision making system in the Union. Similarly, the White paper assumes that consultations will not institutionalise conflicts, but instead serve to secure effective policy shaping.

At present, it hardly can be concluded that the involvement of interest groups in different policy processes in the Union dramatically increases efficiency of EU governance. The effective implementation of policies cannot be always guaranteed by involving civil actors. Indeed, this study demonstrates that there are considerable limitations on the part of the social partners and civil interest groups to contribute decisively towards efficient conduct of EU policies. The social partners face significant barriers throughout the range of Union policies in the exercise of their autonomous functions, particularly those related to the implementation. As shown above, the engagement of the social partners in the implementation of the social policy agreements and the employment guidelines within the OMC meets considerable challenges. Current research suggests that both on the national as well as the European level, the social partners have been, by large, left on the margins of the EES. The contribution of the civic interest groups to the improvement of effectiveness of EU governance is even more doubtful. The extent to which the opinions of civil organisation expressed in consultations carried out by the Commission are incorporated into its legislative proposals is unknown. Simultaneously, the impact of the engagement of civil associations in the various OMC areas has been minimal. Empirical research actually establishes that interest groups have not yet found a well-established place in the OMC. Moreover, some governments, such as Danish and Swedish, resist the greater involvement of civil society in the employment OMC since NGOs are perceived as an unpredictable factor in stable, traditional and well-functioning structures of social partnership of labour and management.

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311 Ibidem.