



European

social dialogue

Achieving successful H&S regulation

EU 'social dialogue' allows self-regulation of employer-employee matters on a host of work-related issues. The industrial minerals business can benefit from this but, argues *Ursula Schliessner* of Brussels legal firm McKenna, Long & Aldridge, must be willing to come to the table.

SOCIAL dialogue involves negotiating with unions and, therefore, causes fear within the industrial sector. This article describes the mechanisms of social dialogue at European Union (EU) level and its unique position in the EC Treaty, allowing for self-regulation by the social partners.

In the past, social partners have used their regulatory competencies only in traditional employer-worker relations, ie. organisation of working time and workers' representation. There is now increased momentum and willingness to extend self-regulation to health and safety (H&S) issues. In the future, the mineral industry may be able to replace unpractical general H&S legislation with more sector-specific tailored self-regulation. In June 2003, the European Commission confirmed that it would conduct social dialogue on the issue of respirable crystalline silica.

The legal basis

The Single European Act of 1 July 1987 (Article 118A of the EEC Treaty) allowed for the first time an operational provision on H&S at work. According to Article 118A, Directives could be adopted by qualified majority providing minimum requirements for H&S.

In December 1989, 11 out of 12 member states adopted the Social Charter, affirming that equal importance must be attached to social and economic aspects of the single market. This was to reduce economic disparities in working conditions across member states, and to take account of the intention that the internal market should improve the social rights of citizens as well as benefit business. However, the Charter was merely a declaration of intent.

The same member states adopted an agreement on social policy, which was annexed to a Social Protocol incorporated into the Maastricht Treaty in December 1991. This Protocol expressed the determination to make significant advances in social policy.

Austria, Finland and Sweden joined the Social Protocol when they acceded to the EU, and in May 1997, the UK decided to join the Social Protocol. As a result, the agreement was incorporated into the Amsterdam Treaty. The Nice Treaty made further amendments.

As a result, in the area of social policy, social partners have a unique position in the system of the EC Treaty not granted to other interest groups:

- they may be entrusted at member state level with the implementation of Community Directives (Article 137 (3) EC Treaty)
- they are consulted twice (compulsory) on potential EU social policy legislation (Article 138 (2) and (3) EC Treaty); on the 'if' and the 'what' - so called first stage and second stage social dialogue consultation
- they are in a position to suspend (for nine months) the legislative procedure by jointly exercising their right to enter into negotiations with a view to self-regulation (Article 138 (4) EC Treaty)
- they are entitled to self-regulation (Article 139 (1) and (2) EC Treaty); and a Council/EP decision may endorse their self-regulation on a proposal of the Commission, effectively providing a degree of certainty for the future that the Community will not legislate on the subject of an agreement

Policy statements

Following the incorporation of the social dialogue provisions into the Amsterdam Treaty, the European Commission adopted its second Communication on Social Dialogue¹, installed sectoral social dialogue committees and defined the criteria for the establishment, composition and operation of the sectoral social dialogue committees².

At the Lisbon European Summit in 2000, the so-called Lisbon strategy was adopted, whereby social components have to be included in all major areas in which the EU acts. In the same year, the Commission also presented its Social Policy Agenda³. Finally, in 2002 the Commission adopted a new dedicated Communication on Social Dialogue: 'The European social dialogue, a force for innovation and change'⁴.

In its 2002 Communication, the Commission proposes a series of initiatives, mostly of organisational nature, designed to strengthen the social dialogue (eg. conferences, national round tables, improved procedures for consulting the social partners on European initiatives, social partners to submit annual reports on their contributions, set-up of a new 'tripartite social summit').

The Commission views social dialogue as one component

of its 'Better Governance' initiative⁵ and wants to raise the profile of social dialogue. The Commission openly requests social partners "to make better use of their European bargaining area by concluding, on the basis of experience acquired, agreements incorporated into Community law or implemented in accordance with their own national procedures and practices..."⁶

The Commission recognises social dialogue as a valid policy instrument in its newest H&S strategy, the Commission Communication of 11 March 2002 on adapting to change in work and society: a new Community strategy on health and safety at work (2002-2006)⁷. This is particularly the case in regard to more effective application of existing legislation as a means to address questions concerned with promoting well being at work; as a way to address risks and problems specific to sectors of activity and occupation; and as a means to address new risks of a multifarious nature (eg. stress at work).

The Council also endorsed this approach. In its Resolution of 3 June 2002, the Council emphasised the so-called European social model, based among others, on social dialogue involving "improving quality of employment with particular reference to health and safety at work. The Council shares the Commission's opinion that social dialogue is a key factor in finding new ways forward, both in effectively implementing the legislation in force and in addressing the risks and problems specific to the various sectors and occupations". The Council also calls on the social partners to "promote and publicise at the workplace the proper application of occupational risk prevention principles, particularly through sectoral social dialogue at all levels.

EC Treaty provisions

Article 138

1. The Commission shall have the task of promoting the consultation of management and labour at Community level and shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties.
2. To this end, before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Community action.
3. If, after such consultation, the Commission considers Community action advisable, it shall consult management and labour on the content of the envisaged proposal. Management and labour shall forward to the Commission an opinion or, where appropriate, a recommendation.
4. On the occasion of such consultation, management and labour may inform the Commission of their wish to initiate the process provided for in Article 139. The duration of the procedure shall not exceed nine months, unless the management and labour concerned and the Commission decide jointly to extend it.

Article 139

1. Should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements.
2. Agreements concluded at Community level shall be implemented either in accordance with the procedures and practices specific to management and labour in the member states or, in matters covered by Article 137, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission.

The Council shall act by qualified majority, except where the agreement in question contains one or more provisions relating to one of the areas for which unanimity is required pursuant to Article 137 (2).

Social dialogue practices

Following from the above, it is surprising how little has been achieved in the last 12 years. True, the number of social dialogue committees formally approved by the European Commission has steadily risen (currently 27). It includes a Committee on Mining, with EMCEF (European Mine, Chemical and Energy Workers Federation), APEP (European Potash Producers Association), Euracoal and Euromines as members and IMA Europe will soon be admitted.

The Commission counts as many as 230 joint sectoral and 40 cross industry texts adopted by the social partners, such as joint opinions, statements, declarations and recommendations on a variety of matters. There are also numerous new type texts, such as code of conducts and good practices. Several of these relate to H&S matters, eg. in the cleaning, construction, and sugar sectors.

However, the number of (two-sided binding) agreements concluded to date has been limited, and it is not clear from the available documentation whether all or some of these would qualify as formal agreements under Article 139 EC Treaty.

Other than the agreement on teleworking which has one section that is H&S-related, there is currently no agreement at all, qualifying under Article 139 EC Treaty or not, on the topic of H&S.

There are probably several reasons why the number of agreements, let alone Article 139 EC Treaty agreements, is low. Firstly, many sectoral social dialogue committees are rather recent. Secondly, representation and the possibility to legally commit may be limited in several sector

organisations. Thirdly, the European level may be too remote from the national level to provide adequate impetus and energy to reach commitments, and interests may be too diverse within the sector organisations or between member states to provide for common ground.

Also, there may be reluctance on both sides to enter into binding agreements, in particular where this is not a tradition at national level or where the employers or the employees have had negative experiences. Finally, in some instances, the Commission and/or the social dialogue organisations may not have encouraged the sectors to take that route.

In this respect, with only 13 formal social dialogue consultations based on Article 138 EC Treaty launched between 1993 and 2003 (including three related on H&S (asbestos, self-employed workers, stress), it comes as no surprise that the number of agreements concluded to date is limited. Of the 13 consultations launched, it appears that 4 have resulted in the successful conclusion of formal Article 139 EC Treaty agreements, all of which were later translated into Directives under Article 139 (2) EC Treaty (Directive 2000/79 working time - for aviation only; Directive 1999/70 on fixed term work; Directive 97/81 on part-time work; Directive 96/34 on parental leave). Interestingly, all but the imitative relating to working time in aviation are horizontal social dialogue initiatives.

Unresolved issues

There are a number of unresolved legal issues surrounding the interpretation of the social policy provisions of the EC Treaty. Opinions are particularly divided along the British and German lines and centre on questions such as:

- Is social partner consultation under Article 138 (2) EC Treaty compulsory?
- What is the legal effect if such consultation has been omitted?
- Are the social partners entitled to legally challenge any measures adopted without their proper consultation?
- What are the criteria/parameters for a so-called (formal) agreement under Article 139 (2) EC Treaty, as opposed to a code of conduct or a voluntary initiative?
- Under what circumstances is the European Commission entitled to propose, and the Council/European Parliament entitled to adopt, legislation that has been made the subject of a social dialogue agreement?
- Is there any adjudication for the admission or refusal to approve membership in a social dialogue committee, or for the set-up of a new social dialogue committee?

Needless to say, there is no case law by the Community courts answering any of the above questions.

The latest Commission Communication (COM (2002) 341 Final) usefully fixes the Commission's interpretation on some of the salient issues. The Commission considers Article 138 EC Treaty consultation as compulsory. The Community institutions intervene, at the Commission's initiative, only where negotiations fail; so-called social subsidiarity. To that end, the Commission has announced that it will draft an internal code of conduct on consultation with the social partners.

The Commission has also confirmed in its recent Communication that social dialogue consultation will be distinguished from consultation in the existing advisory committees (eg. the Advisory Committee on Safety and

Health at Work). Finally, the Commission has confirmed that whenever formal agreements are endorsed by Council decisions, the Council is not allowed to deviate from the substance of the agreement.

The recent Communication also contains a number of announcements for highly important and desirable initiatives, such as clarifying access to social dialogue committees, setting rules on representation, and increasing transparency for social dialogue consultation.


Opportunities

Given the business community's need for greater flexibility, less red tape, reliance on self-regulation, and its embracing concepts such as corporate social responsibility, it is surprising that the social policy provisions of the EC Treaty have triggered so little interest. However, the Commission has not publicised them much either.

It is the author's view that social dialogue presents unique opportunities for both employers and employees, including in the area of H&S. It is possible to come to tailor-made solutions for individual industry sectors. The provisions adopted could be more detailed and more practical than those adopted for several sectors by traditional regulation, and if tackled correctly, enforcement and application would be easier and more committed on both sides.

Framing measures such as research, monitoring, training and consultation would inevitably create an increased knowledge base, providing better protection of the employees while keeping compliance cost reasonable.

Traditional regulation does not aid dissemination of good practices at all levels, while good social dialogue could do just that. Bi-partite development of rules could ensure a balanced approach, shepherded and initiated by the Commission and possibly endorsed by the Council and European Parliament.

There is a growing recognition, including at the policy maker level, that the existing legislation has not always delivered the desired results and that it may be time to try new avenues. The social dialogue provisions of the EC Treaty provide a unique regulatory means of doing this. The business community should use the current conciliatory climate to be proactive in this regard. 

References

1. COM (1998) .322 Final 'Adapting and promoting the social dialogue at Community level'. The first Communication dates from 1996: 'Concerning the Development of the Social Dialogue at Community level' (COM (1996) 448 Final).
2. Official Journal L 225 of 1998.
3. COM (2000) 379 Final.
4. COM (2002) 341 Final.
5. COM (2001) 428 Final.
6. COM (2002) 341 Final, p. 16.
7. COM (2002) 118 Final.



Bd. S. Dupuis 233, Box 124, B - 1070
Brussels, Belgium.
Tel: 32 2 524 55 00. Fax: 32 2 524 45 75.
E-mail: secretariat@ima-eu.org
Website: <http://www.ima-eu.org>