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Social Dialogue as a Legal Opportunity for Revivifying the European Social Model

Because of the lack of interest among workers and employers in negotiating collective agreements in local labour relations, the European Union started to use the social dialogue between the social partners functioning within the common market as a tool for creation of the European Social Model. Contemporary economic crisis hampered a development within the Union (in parallel with the common market) of a cohesive area of freedom, safety and justice with social peace considered its most characteristic feature. A report of the Commission of October 2010 still considers the social dialogue a foundation of this model in social relations governed by labour laws and driven by the Union social policy[1] since according to the Treaty of Lisbon the social dialogue is one of the measures for democratisation of the European Union.[2] According to the provisions of 8a TEU, the functioning of the Union shall be founded on representative democracy (8a(1)). They guarantee to every citizen the right to participate in the democratic life of the Union (8a(3)). According to article 8b(2) TEU the Union institutions are obliged to maintain an open, transparent and regular dialogue with representative associations and civil society. Article 8b(3) TEU imposes on the European Commission an obligation to carry out broad consultations with parties concerned, not only with social partners, in order to ensure that the Union's actions are coherent and transparent.[3] The author of this article deliberates on whether the process of representative democracy initiated by the Union institutions is an effective method to revive the European Social Model. The Union institutions argue that the social partners are not the only guarantors of social peace in the EU labour relations. According to a new approach (article 2(1) TEU), peace within the Union and therefore social peace in labour relations can be guaranteed by open and

[1] Industrial Relations Report, European Commission Directorate-General for Employment, Social Affairs and Inclusion, October 2010, p. 173.

[2] P. Syrpis, The Treaty of Lisbon: Much A do...But What About What?, Industrial Law Journal 2008, p. 227.

[3] ETUI/ETUC, Benchmarking Working Europe 2011, Brussels 2011, p. 85.

transparent social dialogue carried out with representatives of civic society, churches and religious associations, philosophical and non-confessional organisations, foundations and non-governmental organisations (article 17(3) TFEU).[4] In the professional literature deliberating on the issue of social dialogue in matters regulated in Title X "Social policy" of TFEU it is emphasized that the *Europe 2020 Strategy* makes no reference to social dialogue. The planned strategy of the Union activities is limited to reduction of poverty.[5] Perhaps the above strategy is an immediate response of the Union institutions to research and studies published in the Member States and concerning poverty and social exclusion, prepared on the occasion of announcing the year 2011 a European Year for Combating Poverty and Social Exclusion.[6] However, the fact that the Report on the social aspects of functioning of the European union in the current decade of 2011-2020 made only a marginal reference to the social partners, cannot be coincidental.[7] The minimal and unsuccessful activity of the Commission in matters relating to amendment of directives[8] inspired the lawyers specializing in the European labour law to develop and present proposals aimed at upgrading the social dialogue in the collective labour relations. A book titled *Resocialising Europe in a Time of Crisis*, published in 2013 by the Cambridge University Press, includes several dozens of studies concerning revival of the European social model. This was not the first time when the European lawyers specializing in labour law presented the economic crisis as a chance and necessity for restructuring the institutions of individual labour law.[9] In the collective labour relations the economic crisis - causing drastic limitation of tripartite social dialogue at the European level leading to adoption of normative agreements implemented in the European

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[4] Ibidem, p. 85.

[5] A.Bogg, R. Dukes, The European Social Dialogue: From Autonomy to Here (in:) Resocialising Europe in Time of Crisis, eds. N. Countouris, M. Freedland, Cambridge 2013, p. 466 ff.

[6] See: Polish report and studies on poverty published in a book Polska bieda w świetle Europejskiego Roku Walki z Ubóstwem i Wykluczeniem Społecznym *[Poverty in Poland and European Year for Combating Poverty and Social Exclusion]*, eds. H. Kubiak, Kraków 2012, *passim*.

[7] The Social Dimension of the Europe 2020 Strategy: A Report of the Social Protection Committee, 2011, p.8. The report mentions social partners once and considers them the entities with which - next to government authorities and civil society - cooperation should be maintained since the success of the social strategy depends on a "*close cooperation between all levels of government, social partners and civil society*".

[8] In 2010 the social partners were asked only twice to give their opinion on amendment of directives. See. ETUI/ETUC, Benchmarking Europe...,p.100.

[9] In Poland such proposal was presented by A.M.Świątkowski, Ustawa antykryzysowa z komentarzem *[Anti-crisis law with commentary]*, Biblioteka Monitora Prawa Pracy, C.H. Beck, Warsaw 2010, pp. 81-82.

labour law through directives and substantial expansion of practice of concluding non-normative agreements - inspired the lawyers specialising in the European and international labour law to submit two proposals. They are both associated with the necessity to amend TFEU and require that certain categories of matters listed in article 154(5) TFEU are not excluded from the competence of the European Union. Strike, lockout and other collective actions should be uniformly regulated in the labour laws of the European Union. A. Blogg and Ruth Dukes firmly state that "(...) *what is needed for an effective European social dialogue is a transnational right to strike*."[10] I share their opinion concerning harmonisation of the right to strike by means of a framework agreement negotiated by social partners carrying out a supranational social dialogue and concluding a normative agreement concerning regulation of both the right to strike and the right of employers to organize a lockout and regulation of the basic rules and procedures for carrying out the social dialogue by the social partners in particular Member States of the European Union. A. Blogg and R. Dukes limited their proposal to cover exclusively a harmonised regulation of the right to strike within the common European market. In their opinion, the right to strike regulated in the European labour laws, is an essential condition to restore balance in the collective labour relations and a chance to achieve permanent social peace since the ability of the trade unions to organize a strike will equalize the position of ETUC in negotiations carried out as part of the social dialogue with employers' organizations. For the quoted authors it is obvious that ETUC is a weaker social partner.[11] They also add that the social dialogue is carried out by the social partners "within the constitutional and legislative framework which strongly prefers no action in the field of social policy".[12] However, what they have regard to is not an inability to organize collective actions by the European Trade Union Confederation (ETUC), but an absence of regulated procedures to carry out negotiations by the supranational social partners. They emphasize that there are no legal grounds in article 154 TFEU for intervention by the Commission which - in their opinion - should have the possibility to exert pressure on the European organisations representing the interests of employers to modify their standpoint and make certain concessions in favour of the collective of European workers failing which the social dialogue would be ceased and social problems subject to the social dialogue would be regulated independently by competent Union institutions (Council and European Parliament

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[10] The European Social dialogue...,op.cit., p. 486.

[11] Idem. They wrote: "*It is undoubtedly true that the ETUC is the weaker of the social partners* (...)", p. 481.

[12] Idem.

or Parliament). According to A. Blogg and R. Dukes, because of the absence in article 154 and article 155 TFEU of the clause "*negotiate or we will legislate*" significantly weakens the position of ETUC in negotiations with employers' organisations. Therefore it contributes to reduction of importance of the social dialogue in the collective labour relations. This means that the balance between the social partners in the collective labour relations is a necessary element of social peace. Such balance can be maintained through direct intervention of public authorities. In this case such balance can be guaranteed by the Union legislative bodies. It can also be achieved by way of granting a trade union organisation representing the interests of workers the right to organise strikes. I share the opinion that the equal position of the social partners is a condition *sine qua non* for achievement of a balanced normative agreement which would guarantee the social peace. I do not agree with the opinion that it is necessary to regulate in the EU labour laws the right to strike only. I stand by the opinion expressed in the previous parts of the book according to which the collective of workers and the union organisation representing the rights of such collective enjoy the freedom to strike since such freedom is a necessary element of the freedom to act within the autonomy guaranteed by the fundamental international standards. Regulation of the foundations and conditions for enjoyment of the above freedom may reduce such freedom. Since only an authentic social dialogue may guarantee achievement of the social peace, the "threat" which may arise as a result of introduction in article 154 and article 155 TFEU of a provision addressed by the Commission to both social partners: "continue the social dialogue with the available legal means of pressure or an official legislative procedure will be initiated" requires regulation of not only the workers' right to strike but also the employers' right to lockout. According to A. Blogg and R. Dukes the main argument for granting to ETUC the right to organise strikes are legal and organisational obstacles in enjoyment of such right by this trade union confederation which would arise if the above postulate was fulfilled and if the right to strike was granted to workers under primary European laws. They refer to the statutes of the trade union confederation (ETUC) and indicate that entitled to organise collective actions are almost exclusively trade unions and trade union federations. ETUC was established exclusively to represent the interests of the collective of workers at the EU level. Therefore, if the right to strike was regulated in the primary European labour law - in which case it would be necessary to make certain amendments in article 153(1) TFEU and introduce a new provision which would guarantee to workers the right to unite in trade unions, the freedom to conduct union activity and organise strikes - ETUC, as a trade union confederation, would not

be able to exercise the above right despite the fact that now and in the future, also if TFEU is amended as proposed by the above mentioned authors, it enjoys and will still enjoy the freedom to strike which is based on the autonomy and independent and self-governed union activity consisting in European representation of the interests of workers' collective during negotiation (as part of the social dialogue) of the framework normative agreements.

In my opinion, a significant guarantee of social peace in the collective labour relations (after the social partners are vested with the right to organise collective actions during negotiating a normative agreement) is to authorise an independent body to supervise the legality of collective actions organised by the social partners. In the European Union such function is exercises by the European Court of Justice which in the past (as I have previously mentioned) dealt with disputes based on the European collective labour laws. The Court controlled enjoyment by the workers of their freedom to strike and examined representative rights of the social partners to participate in the social dialogue and to conclude supranational normative agreements considered by the EU institutions a condition necessary for the achievement of the social peace. Intervention of the Court in the social dialogue was strongly criticised in the European labour law literature.[13] The quoted author expressed an opinion that judicial authorities are not "the best to decide on such issues" as they violate the sphere which B. Bercusson considers (from the perspective of the social dialogue) - "sovereign and saint" (*tresspass on the sovereignty and sancity of the bargaining process*).[14] In the constitutional model of the European Union adopted in TFEU the Court of Justice of the European Union supervises compliance by all obliged entities with the European laws what guarantees that the Union is a the area of freedom, safety and justice, in particular where, in the cases relating to respect of fundamental rights (article 67(1) TFEU), there are no grounds to question the competences of the Union judicial authority in matters relating to evaluation of enjoyment of the union freedom, in particular enjoyment of the freedom to strike by workers and union confederation operating in the European space. A. Blogg and R. Dukes use the "*bargaining in the shadows of the law*" metaphor which was expressed years ago by B. Bercusson to illustrate the legal instruments applied by the Union legislator in article 138(4) TEC (now article 154(4) TFEU) to encourage the supranational social partners to start and continue the

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[13] B. Bercusson, European Labour Law, Cambridge University Press, Cambridge 2009, p. 584. According to A. Bogg, R. Dukes (op.cit, p. 475) B. Bercusson considered the intervention of the Court of Justice of the European Union an "illegitimate usurpation of authority".

[14] B. Bercusson, op.cit.

social dialogue "directed" by the Council in order to conclude framework normative agreements. I have already explained the meaning of that metaphor. In this fragment of the monograph I would only like to emphasize that the above metaphor is not related to collective actions initiated by social partners so that ETUC can exert pressure on employers' organisations for the latter to enter into a framework agreement negotiated under terms and conditions defined by the union confederation representing the interests of the European workers collective. Exercising by the Court of competences to control the legality of strikes and other collective actions organised by trade unions cannot be treated, as described by A. Blogg and R. Dukes, as a "shadow of the Union jurisdiction over the social dialogue".[15] The social partners do not conduct the social dialogue bearing in mind that the Union judicial authority will intrude in their competences to enter into a normative agreement if the agreement is not reached. A constitutional paradigm invoked by the quoted authors does not confer on the European Court of Justice any rights to create autonomous sources of European labour law. The EU treaties, as constitutional sources of the European law, do not provide for any competences of the European Court of Justice to undertake any legislative activities. Perhaps it is characteristic for the Anglo-Saxon labour law doctrine (which is very clearly visible in the analysed works of the British theoreticians of law) to understand the autonomy of the social partners, in particular the autonomy of trade unions, in such a way that it means a sphere absolutely free from any interference by the state, by state authorities, and first of all public judicial authorities. B. Bercusson, as a prominent representative of that social group, is seriously concerned that the EU justice "calls into question the autonomy of the social partners involved in the social dialogue".[16] His concern as to the involvement of the European Court of Justice in several categories of affairs excluded in article 154(5) TFEU from the competence of EU legislator, is explained as a long-established tendency among the British unions and lawyers representing workers' and unions' rights who take the point of view expressed by the unions regarding social relations governed by the British collective labour laws (which since the era of conservatists under direction of Margaret Thatcher until now have been to a large extent regulated by laws established by state authorities). A. Bogg and R. Dukes cite the views expressed in the middle of the 70s. by A. Flanders who believed that the lack of trust of the trade unionists in courts is determined genetically by a voluntary, based on specific concept of customary law (which guaranteed almost exclusively the legal

[15] Idem.

[16] Idem.

protection to contracts and ownership), approach of the British courts to the collective labour law.[17] By reference to the rulings of the Court of Justice in *Laval* and *Viking*, A. Bogg and R. Dukes present the views prevailing among the British lawyers specialising in the EU labour law, presented among others by E. Szyszczak[18] and T. Novitz,[19] in the previously cited publication on the conflict of freedoms protected by the primary European laws and conflicting interests of entrepreneurs from the "new" and "old" Member States of the European Union.[20] A. Blogg and R. Dukes recommend that the above presented response of the groups concerned, mainly trade unions, to the judgments of the Court of Justice, should be treated with a "certain dose of scepticism",[21] although they invoke a publication whose title suggests a parallel between the rulings of the European Court of Justice in the cases referred to above and a Loch Ness Monster.[22] The cited authors do not take a clear position "*pro*" or "*contra*" regarding the judicial control of collective actions and other decisions taken by social partners at the various stages of the social dialogue. They conclude that the Union institutions are responsible for promoting and supporting the social dialogue in the European space. They believe that because of a combination of different external circumstances, such as: global economic crisis which is particularly harmful to the Member States in the southern Europe, weak position of trade unions in the majority of the EU Member States, poor impact of the collective agreements, the Union institutions should stronger support the social dialogue. This is possible on one hand by a return to the previous practice of tripartite social dialogue, "directed" by the Commission, the normative effects of which - framework agreements as sources of law characteristic for both systems of law (European and national) - will be still implemented in the legal systems of the Member States in a regular EU legislative procedure, i.e. through directives of the Council and/or the European Parliament. However, they emphasize that the new, based on the previous principles, practice of social dialogue, should include, next to the social partners, other civil society stakeholders. They have not developed this postulate. They only underline that the concept of the enhanced social dialogue

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[17] A. Flanders, The Tradition of Voluntarism, British Journal of Industrial Relations, 1974, vol.12, p. 352.

[18] United Kingdom (in:) The Laval and Viking Cases. Freedom of Services and establishment v. Industrial Conflict in the European Economic Area, eds. R.Blanpain, A.M.Świątkowski, Bulletin of Comparative Labour Relations, 2009, No. 69 , p. 167 ff.

[19] United Kingdom (in:) Idem, op.cit., p. 177 ff.

[20] R. Blanpain, General Comments…(in:) Idem, p. xxii.

[21] A. Blogg, R. Dukes, op.cit., p. 490.

[22] D. Nicole, Europe's Lochner Moment, Public Law, 2011, p. 307 ff.

should be developed at the EU level. The EU institutions, in particular the Commission, should be responsible for launching legal and organisational procedures according to which an open, transparent and regular social dialogue will be conducted by the Union institutions, social partners and entities listed in article 17(3) TFEU (religious associations and philosophical organisations). Not all social policy matters listed in article 153(1) TFEU may be a subject-matter of the social dialogue between EU institutions, social partners and other entities listed in article 17(3) TFEU at the same time. It seems that according to A. Blogg and R. Dukes the subject-matter of the social dialogue is less significant than the legal requirements which should be adhered to by the organisers of the social dialogue. These include firm foundations for negotiation of collective agreements and strong trade unions in the EU Member States.[23] To strengthen both of these foundations of the permanent and effective social dialogue, the cited authors join the postulate presented in the European labour law doctrine [24] regarding the necessity for the accession of the European Union to the European Convention of Human Rights of 4 November 1950.[25] Accession of the European Union to this international treaty obligates to respect both aspects (positive and negative) of the fundamental right to form trade unions and the resulting freedom of trade unions to organise themselves. This means a general necessity to accept the workers' freedom to strike. According to A. Blogg and R. Dukes the economic crisis is a chance for the European Union and its Member States to strengthen the legal guarantees of the social peace in the collective labour relations.[26] Experiences of Greece[27] - where ultra-neoliberal approach of the state authorities to the practice of negotiation of collective agreements as an important foundation of the social dialogue, guaranteeing social peace was violated - prove that the guarantee of the social peace in labour relations are strong social partners, balance of power in the collective labour relations, obligation to conduct the social dialogue, collective agreements and other framework normative agreements. In their support of the absolute necessity for the European

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[23] The European Social Dialogue..,op.cit., p. 492.

[24] K.D. Ewing, J. Hendy, The Dramatic Impact of Demir and Baykara, Industrial Law Journal 2010, Vol. 39, p. 2 ff

[25] See: D. Gomien, D. Harris, L. Zwaak, Law and practice of the European Convention of Human Rights and the European Social Charter, Strassbourg 1999; C. Ovey, R. White, The European Convention on Human Rights, Oxford University Press, Oxford 2002, p. 290 ff.

[26] The European Social Dialogue..., op.cit., p. 490 ff.

[27] A. Koukiadaki, L. Kretsos, Opening Pandora.s Box: The Sovereign Debt Crisis and Labour Market Regulation in Greece, Industrial Law Journal 2012, Vol. 41, p. 276 ff

Union and its Member States to accept international standards of fundamental human rights A. Blogg and R. Dukes, make a typical mistake. They do not take into account the previously mentioned European Social Charter. They refer only to article 11 of the European Convention for the Protection of Human Rights. They do not take into account the case law of the European Court of Human Rights which paid particular attention to a so called "negative trade union freedom".[28] They do not take into consideration the fact that European Court of Human Rights rarely dealt with the issues of collective actions, in particular the freedom to organise strikes.[29] Moreover, the Court of Human Rights adopted a very careful attitude in matters relating to organising strikes.[30] It usually based on the quasi-judicial output of the European Committee of Social Rights (formerly the Committee of Independent Experts), an international body appointed by the Council of Europe to supervise compliance by the Member States with the standards regulated in the provisions of the European Social Charter of 1961 and a Revised European Social Charter of 1996.[31] For that reason it is more justified to call the European Union to ratify the Revised European Social Charter, an international treaty of the Council of Europe which in its article 5, article 6(1-3) and article 6(4) guarantees freedom of association of social partners (workers in trade unions, employers in employers' organisations), a right to conduct a social dialogue in a form of consultations and negotiation of collective agreements, as well as the right to organise collective action, in particular the workers' right to strike.[32] Ratification of the Revised European Social Charter could lead to creation by the international organisations - the Council of Europe and International Labour

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[28] Young, James and Webster v. United Kingdom, judgment of 13.8.1981, Series A. No. 44 (1982), 4 EHHR, p. 38; Sigurdur A. Sigurjónsson v. Iceland, judgment of 30.6.1993 r., Series A, No. 264-A (1993), 16 EHHR, p. 562; Sibson v. United Kingdom, judgment of 20.4.1993, Series A. No 258-A (1994), 17 EHHR, p. 193; Gustafsson v. Sweden, judgment of 25.4. 1996, (1996), 22 EHHR, p. 409; Sorensen v. Denmark and Rasmussen v. Denmark, judgment of 11.1.2006, Council of Europe Printing Office, Strasbourg 2006.

[29] See. D.J. Harris, M. O'Boyle, C. Warrick, Law of the European Convention on Human Rights, Butterworth, London, Dublin, Edinburgh 1995, p. 417 ff.

[30] A.M. Świątkowski, Ochrona praw człowieka w świetle przepisów prawa pracy i zabezpieczenia społecznego *[Protection of human rights in the light of labour laws and social security laws]* (in:) Każdy ma prawo do ... *[Everyone has the right to…]*, Warsaw 2009, p. 67-68.

[31] A. Świątkowski, *Quasi*-judykacyjna funkcja Komitetu Praw Społecznych Rady Europy *[Quasi-judicial function of the Committee of Social Rights of the Council of Europe]*, Państwo i Prawo 2003, vol. 8, p. 36 ff.

[32] See: O. De Schutter, Anchoring the European Union to the European Social Charter: The Case of Accession (in:) Social Rights in Europe, eds. G. De Búrca, B. De Witte with the assistance of L. Ogertschnig, Oxford University Press, Oxford 2005, p. 111 ff.

Organisation dealing with protection of fundamental human rights - of a uniform "platform of social rights" in Europe. It would be an effective response to the economic and social globalisation phenomenon which in the labour relations takes the form of a social dumping. Globalisation of social rights, in particular the rights included in the category of fundamental human rights governed by the labour laws (right to social dialogue, consultations, negotiation of collective agreements, organisation of strikes), consisting in unification of standards of legal protection of such rights, extending to them the international protection similar with this applicable to civic rights and freedoms protected by the European Convention on the Protection of Human Rights, would substantially contribute to achievement and maintenance of social peace in the collective labour relations. For that reasons, in chapter 19 of the latest collective work titled *Resocialising Europe in a Time of Crisis*[33] and dedicated to the issue of revival of the European social model, A.M.Świątkowski presented a proposal of restoration and revival of the European social model based on the protection of the right to social dialogue (association, consultation, collective agreements, strike) guaranteed in the European Social Charter.[34]

Adoption in the Lisbon Treaty of a uniform concept of citizenship of the European Union, according to which the Union citizenship cannot be treated by the Union authorities and citizens of the EU Member States solely as the right to move freely among the national labour markets of the Member States (therefore as a *sui generis* gateway to the common Union market) but also as a confirmation of the right to exercise the political, social and economic rights guaranteed by the European labour laws, obligates to adopt a uniform regulation of the foundations of the workers' rights.[35] The Union citizenship should be associated with a uniform legal status of citizens of the Member States and the respective rights regulated also by labour laws guaranteed by the national systems of labour law of the EU Member States.[36] Therefore it is necessary to build, at the EU level, a "law platform", a legal structure which would prevent competition between the authorities of the Member States

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[33] Eds. N. Countouris, M. Freedland, Cambridge University Press, Cambridge 2013. p. 390 ff.

[34] Resocialising Europe trough a European Right to Strike modelled on the Social Charter?, p. 411 ff.

[35] A.M. Świątkowski, European Union Citizenship and the Rights of Access for Welfare State: A Comparison with Welfare Rights Guaranteed by the Council of Europe as Seen from the Perspective of a New Member State (in:) Integrating Welfare Functions into EU Law – From Rome to Lisbon, eds. V. Neegaard, R. Nielsen, L.M. Roseberry, DJØF Publishing, Copenhagen 2009, p. 123 ff.

[36] A. M. Świątkowski, Ochrona praw człowieka w świetle przepisów prawa pracy... *[Protection of human rights in the light of labour laws…],*op.cit., p. 9.

of the Union in attracting international entrepreneurs to the national markets by reducing labour costs – limiting the workers' rights and social rights of the Union citizens, extensive liberalisation of protective labour laws, allowing the employers to apply completely flexible model of management of labour forces.[37] Since the legal constructs and terminology applied in the labour law are full of concepts characteristic for neoliberal economists, the fundamental workers' rights may only be protected by legal mechanisms and procedures applied for the protection of human rights. A right to live in peace is one of the fundamental human rights. Therefore, the European Union by ratification of the European Social Charter (with its legal guarantees of respect for social peace in the collective labour relations based on the obligation of the Member States to promote the social dialogue by way of consultations and negotiations between the social partners (direct and/or tripartite), balance of the means of pressure in a form of collective actions which the social partners may apply during negotiations) would make a huge progress towards guaranteeing uniform standards of protection of the social peace in the collective labour relations. International standards regulated in the European Social Charter, guaranteeing the social peace, were regulated in accordance with the previously mentioned sequence. They are based on equal guarantees of workers and employers to create and join the organisations of social partners: trade unions and organisations of employers (article 5). The Member States to which the international standards regulated in the European Social Charter are addressed, were obligated to actively promote joint consultations between workers and employers (article 6(1)). They are obligated to support, where necessary and appropriate, the voluntary negotiations of the social partners aimed at conclusion of collective agreements and other normative agreements. If there is a difference in the opinions presented by the negotiating social partners, it is the obligation of the Member States to establish such legal mechanisms and to regulate appropriate procedures so that the social partners can, with no detriment to the idea of the social dialogue, voluntarily use their joint efforts to reach amicable resolution of a labour dispute (article 6(3)). The European Social Charter also obligates the Member States to respect the rights of workers and employers to initiate collective actions in case of conflicts of interests which cannot be resolved through negotiations, mediation or arbitration (article 6(4)). The most significant contribution of the European Social Charter and the European Committee of Social Rights of the Council of Europe (a body which supervises compliance by the Member States with the

[37] S. Deakin, F. Wilkinson, Rights versus Efficiency? The Economic Case for Transnational Standards, Industrial Law Journal, vol. 23, 1994, p. 289 ff.

provisions of the Charter and which fully specified the international labour law standards expressed in the Charter) is the aspiration to ensure balance at each stage of the process enabling establishment and maintenance of the social peace in the collective labour relations. At a stage of a collective dispute the Member States were obligated either to respect the freedom to strike or to guarantee to workers a general protection of right to organise and attend strikes. Article 6(4) of the European Social Charter does not differentiate between legal and illegal strikes. It only guarantees to the workers the right to strikes organised lawfully. Lawful strikes are those which are initiated by workers associated and non-associated in trade unions to protect their own or others economic and social rights and union freedoms. In fact, a condition necessary for a strike to be legal is that such collective action should be organised by a trade union organisation. Only where the national labour law systems limited the workers freedom to establish trade unions or hampered the procedures for establishment of union organisations the European Committee of Social Rights considered that the strikes organised by *ad hoc* strike committees are in accordance with international standards.[38] The right to strike is in fact a general right. However it is subject to certain limitations established by laws enacted by the Member States, provisions of collective agreements negotiated by the social partners or rulings of judicial authorities. Harmonisation of the national provisions and practices in application of the collective labour laws of the Member States is guaranteed by uniform or related strike procedures concerning democratic decisions on declaration of strike, warning an employer of the planned collective action, application by the social partners of the methods of amicable resolution of disputes, obligations connected with making it possible for the employer to manage the work establishments in strike. Social peace in the collective labour relations may be preserved not only with the social peace clauses but also by obligating organisers of the strike to ensure continuous functioning of the work facilities which cannot be stopped given the need to protect common interests. Organisers of a collective action are obliged to maintain regular contacts and continue systematic cooperation with an employer in order to minimise the risk of damage to the work establishment as a common good. A philosophy of the social dialogue in the course of the collective dispute which reached the last, most drastic phase means - for the collective of striking workers and a trade union - that organisers and participants of the strike are obligated to take care of the common good - the

[38] A.M. Świątkowski, Charter of Social Rights of the Council of Europe, Kluwer Law International, AH Alphen aan dern Rijn 2007, p.227 ff.; Tneże, Labour Law: Council of Europe, Wolters Kluwer Law & Business, AH Alphen aan den Rijn 2014, p. 204 ff.

strike-bound establishment. And on the part of an employer and employers' organisations representing interests of the employer or employers affected by the strike, ensuring social peace in labour relations means inability to take such legal actions which would be aimed at termination of employment relations with the striking workers for this reason only that they decided to take part in the legal collective action. In the context of international standards established in the European Social Charter which all systems of the Member States of the Council of Europe should satisfy, a strike is an expression of will of the workers' collective (workers employed by a given establishment) to cease work in order to exert pressure on the employer. A key principle of the individual labour law - an obligation of the employer to pay remuneration exclusively to workers who are employed and ready to perform work - is fully applicable. Therefore, during strike the workers are not entitled to remuneration.[39] However they retain other workers' rights and social rights depending on their seniority. A legal strike is not considered a circumstance which would guarantee to the strikers an immunity protecting them from civil and criminal liability for damage caused and for offences committed during the strike.[40]

Article 6(4) of the European Social Charter obligates the Member States to respect freedom of employers and employers' organisations to act collectively. As I have already mentioned, the legal basis for the freedom to organise lockouts is article 3(1) of Convention No. 87 ILO which guarantees to the social partners' organisations an independence and freedom to act in order to protect the employers' rights in the collective labour relations. Therefore, article 6(4) of the European Social Charter obligates the authorities of the Member States to respect full freedom of employers to organise lockouts and obligates the Member States to regulate in the national collective labour law the limits of exercising the above right. Because of the fact that the right of employers to organise lockouts was not clearly expressed in article 6(4) of the Charter, the European Committee of Social Rights concluded that the above mentioned right is not given protection equal to the protection of the right to strike provided for in the Charter.[41] In the monograph referred to below I called this argument "risky". Lack of guidelines concerning rights of the Member States to regulate the right of employers to organise lockouts cannot be considered an argument that article 6(4) of the Charter provides lesser protection to a legal lockout than to a legal strike. The legal

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[39] A.M. Świątkowski, Labour law…, op.cit., p. 215 ff.

[40] Idem, p. 216 ff.

[41] Conclusions VIII, p. 95. See: A.M.Świątkowski, Labour law...,op.cit., p.219.

mechanism of transformation of the basic freedoms resulting directly from the freedom of the social partners to associate in unions and professional organisations is identical. Regulation in the national collective labour laws of the rights of social partners to organise collective actions may only set out the procedures to exercise the freedom guaranteed under Convention no. 87 of ILO. Strike was mentioned in article 6(4) of the Charter as an example only. Apart from strike, trade unions representing workers' interests may organise also other collective actions, not mentioned in the cited article. The freedom of association and the resulting freedom of the social partners to act were repeated in article 6(4) of the Charter. It covers not only the right of workers to strike but also the right of employers to lockout. Absence of a legal basis in the national collective labour laws for exercising such freedom does not justify allegation that international standards expressed in article 6(4) of the Charter are violated if a Member State does not confirm the right of employers to organise lockouts.[42] The European Committee of Social Rights held that the judicial authorities of the Member States may introduce, *a casu ad casum,* certain limitations in exercising the above freedom by the employers.[43] Although formally the case law of the European Committee of Social Rights does not contain an *expressis verbis* definition of a principle of equality of the means of pressure which the social partners may exert on each other during the collective dispute, the lockout is considered an acceptable legal measure applied by the employers in order to maintain full balance between the social partners. The European Committee of Social Rights finds that contrary to the international standards of the collective labour law are such national collective labour laws which consider lockout a labour law tort and allow the competent public authorities in particular Member States to apply criminal sanctions (impose a fine) to employers who exercise the freedom to organise lockouts as a mean of pressure on the workers' collective prohibited under national laws.[44] The lockout is treated by the European Committee of Social Rights as a legally acceptable mean of defence of interests of the employer threatened by collective actions (strikes) initiated by workers.[45] Therefore, the Committee approves defensive lockouts which constitute a response to a threat of collective

[42] Conclusions II, p. 87 (Cyprus).

[43] Conclusions VIII, p. 95, p. 345.

[44] Case of Italy: Conclusions III, p. 38; Conclusions VI, 40; Conclusions IX-2, pp 48-49; Conclusions XV-1, vol. 2, p. 367.

[45] Case of France: Conclusions V, p. 48; Conclusions VI, p. 39.

action organised by workers.[46] So the European Committee of Social Rights in fact endeavoured, though to the lesser extent than in the case of protection of strike, to keep the balance between the means of pressure applied by the social partners so that the chance to reopen the social dialogue between the social partners who are temporarily the parties to a collective dispute is not lost.

Ratification by the European Union of the Revised European Social Charter would significantly contribute to revival of the social dialogue conducted on an equal footing by the social partners equally interested in attainment of permanent social peace.

[46] Case of Germany: Addendum to Conclusions XV-1, p. 27.