

THE SOCIAL CONCILIATION AND MEDIATION PROCEDURE IN BELGIUM

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I. GENERAL DESCRIPTION OF THE COLLECTIVE LABOUR RELATIONS SYSTEM IN BELGIUM

1. The role of the State — The institutional players

After England, Belgium was one of the western world's first industrialised countries. As such, it experienced major social tensions which characterised the second half of the 19th century. Here, as elsewhere, the origin was a situation in which confrontation and animosity were placed under the sign of the insurrectional strikes of 1886. At the time, coalitions of workers were banned, and social protection systems non-existent.

The authorities of the period, in a bid to reduce tensions, set up industrial and labour councils, the purpose of which was to establish permanent contacts between employers and workers. One of the most important tasks of these councils was to provide conciliation between the protagonists. However, owing to the way in which their members were appointed, they failed to achieve any noteworthy results and rapidly fell into disuse.

Consequently, before 1914 most collective labour disputes were settled on location, the outcome depending upon the relative strength of the parties.

The first serious attempts at third-party intervention go back to 1919, when the Minister of Labour, J. Wauters, himself stepped in to provide conciliation. In a circular dated 4 March 1919 he made it an official task of labour inspectors to ensure conciliation in the event of any actual or potential dispute.

These, then, were the first-ever appointed conciliators. During the same period, the first joint commissions were set up (without a precise legal status), but it was only after the strikes of 1935-36 that they genuinely provided conciliation in the event of labour disputes. The joint commission thus became the second player in the conciliation procedure.

After the second world war, employment legislation in the broader sense went through a period of unprecedented development, and the joint commissions - re-established under the legislative decree of 9 June 1945 - permanently and systematically assumed the task of providing conciliation in the main branches of private-sector economic activity.

For a time, labour inspectors also continued to act as mediators. However, it very quickly became apparent that the proliferation of social legislation was making the task increasingly difficult. Furthermore, as stated in an ILO recommendation, the roles of watchdog and conciliator were incompatible in practice, as the first of these involves coercive enforcement, while the second puts a premium on the negotiator's attitude and flexibility. Consequently, the first two social conciliators, seconded from the labour inspectorate, were appointed in 1947 by Minister Léon-Eli Troclet to deal with the most important disputes. They were first given a specific status in 1964, and their number increased to six.

A specific framework was finally established under Minister Louis Major, by Royal Decree of 23 July 1969 setting up a Collective Labour Relations Service (*Service de relations collectives de travail*) and establishing regulations covering its staff. This decree was adopted pursuant to the Act of 5 December 1968 on collective labour

agreements and joint commissions, which further extended the commissions' scope of action, particularly with regard to resolving collective disputes through conciliation.

The Collective Labour Relations Service now has four senior social conciliators, 13 social conciliators and 11 assistant social conciliators, who chair most joint commissions.

The institutional players in collective labour disputes were thus definitively designated during the post-war period: joint commissions on the one hand, and social conciliators on the other.

2. The social players

2.1 Trade union organisations

Article 3 of the Act of 5 December 1968 on collective labour agreements and joint commissions regards as representative “cross-industry organisations of workers established at national level and represented on the *Conseil central de l'économie* (Central Economic Council) and the *Conseil national du travail* (National Labour Council), with at least 50 000 members”. Belgium thus gives priority to the most representative trade union organisations, and the Act gives them specific powers, e.g. the right to take legal action or enter into collective labour agreements. However, this does not prejudice the principle of freedom of association. Any citizen may form a society, which others can join in order, for example, to protect their professional interests. However, associations which are unable to provide evidence of their representativeness in accordance with the criteria laid down by the Act will not be granted the privileges referred to above.

The Belgian legislator's objective is clearly to avoid the dissipation of workers among a large number of federations, which would also increase competition and rivalry. This is a fundamental factor in the cohesion of the Belgian system. The rate of trade union membership is very high (more than 60%).

The three representative trade union organisations in Belgium are:

1. *Confédération des syndicats chrétiens* (Confederation of Christian Trade Unions), which is a member of the World Confederation of Labour (approx. 1 400 000 members)
2. *Fédération générale du travail de Belgique* (General Labour Federation of Belgium), which is a member of the International Confederation of Free Trade Unions (approx. 1 200 000 members)
3. *Centrale générale des syndicats libéraux de Belgique* (General Organisation of Free Trade Unions of Belgium) (240 000 members).

The first two are both affiliated to the European Trade Union Confederation.

2.2 Employers

Employers are also very well organised, and the same criteria apply (apart from the minimum number of members). Employers' federations must in fact be representative in two respects. First of all, Article 3 of the Act imposes external or general representativeness; secondly, federations must show that they are representative of a specific branch of activity as stipulated in Article 42 of the Act (internal or specific

representativeness). For example, a representative of the federation of petroleum industry employers clearly could not sit on the joint commission responsible for the food industry. Most employers' associations are affiliated to the *Fédération des entreprises de Belgique* (Federation of Enterprises in Belgium), which is representative within the meaning of Article 3 of the Act, and each of the branch organisations affiliated to the *FEB* must show that it is representative of a specific sector. A special recognition procedure is in place for groups not affiliated to the cross-industry organisation. At the same level there are also three organisations of small and medium-sized enterprises: a French-speaking federation (*UCM*), a Flemish-speaking federation (*UNIZO*) and a farmers' organisation (*Boerenbond*).

II. METHODS OF RESOLVING LABOUR DISPUTES

2.1 Belgian law and the concept of strike or collective work stoppage

Belgium has ratified the European Social Charter, signed in Turin on 18 October 1961 and approved by the Belgian Act of 11 July 1990, and more specifically the provision included in Article 6(4) of the Charter according to which the contracting parties recognise “the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into”. As a result, there is a completely free right to strike in Belgium, subject to the limits imposed by the need to maintain essential services. The case law of the *Cour de Cassation* (Supreme Court) likens a collective work stoppage to a suspension of the employment contract. Consequently, even if no prior notice of a strike has been given to the employer, Belgian law does not include any legal constraints designed to make strikers return to work.

This means that the Belgian legislator has given priority to voluntary conciliation in the event of collective disputes, rather than arbitration or compulsory conciliation. This does not apply to the delicate issue, dealt with elsewhere, of rulings delivered by courts of first instance on the application of civil rights other than the right to strike. Furthermore, joint commissions, in their rules of procedure, refer to a notification procedure before the start of a conflict. This is not a binding rule, but a sort of code of conduct which employers and employees have imposed upon themselves. The present Government has submitted to the National Labour Council a declaration of intent addressed to cross-industry employers and workers with a view to the adoption of draft legislation consolidating the conciliation procedures — though without rendering them compulsory — and making labour courts exclusively responsible for dealing with matters relating to the right to strike and complaints concerning the violation of civil rights in connection with collective labour disputes. This of course involves issues relating to the occupation of, and free access to, workplaces.

2.2 The Belgian concept of conciliation and mediation

Before describing the social conciliation situation in Belgium, it is necessary to define the concept applied. In practice, social conciliation means a procedure for the amicable settlement of conflicts between employers and workers with the assistance of a neutral third party. In some countries conciliation may be compulsory or even a matter of public policy, as in France, where tribunals are used.

In Belgium, by contrast, conciliation in the event of disputes between employers and workers is always voluntary, taking place at the initiative of the parties involved. In other

words there are no statutory means of forcing an employer or trade union organisation to appear before the competent conciliation body.

However, the Belgian system does offer incentives to encourage mediation in the event of an actual or potential dispute. Many joint commissions have made provision in their rules of procedure for the parties to be asked to refer a matter to the conciliation panel at any time before the deadline stipulated in a strike notice is reached. This is not a directly binding obligation, as the chairman of a joint commission's conciliation panel cannot force the parties to appear before a tribunal. The system still cannot be described as compulsory conciliation in that the legal effects of the provision can be freely interpreted by a court, subsequently, only if the dispute brought before it is an individual one. The non-appearance of a protagonists before the conciliation panel may be evidence of bad faith, and this will be a factor in the court's considerations and decision.

This means that the Belgian legislator has given priority to voluntary conciliation and mediation in collective labour disputes and that the court acts as arbitrator only where the dispute takes on an individual character in the event of a personalised dispute (individual legislative provision) referring to a clause in a collective labour agreement, e.g. a wage agreement, or a civil right such as the right of ownership (occupation of premises), freedom to work or freedom of movement (strike pickets).

III. INSTITUTIONAL AND LEGAL FRAMEWORK

1. Competence and importance of joint commissions

The legal basis for the functioning of Belgium's social conciliation system is the Act of 5 December 1968 on collective labour agreements and joint commissions, which defines collective labour agreements (Article 5), criteria for the representativeness of employers' and workers' organisations (Articles 3 and 42), the tasks of joint commissions (Article 38) and the hierarchy of sources of law and obligations between employers and workers (Article 51).

Article 38 is the most important as regards conciliation in the event of labour disputes, in that joint commissions - made up of equal numbers of representatives of employers' and workers' organisations which are representative of the branch of activity in question - are responsible for:

- the conclusion of collective labour agreements,
- settling, by conciliation, all disputes between employers and workers,
- providing the Government and other bodies with opinions on subjects for which they are competent, and
- performing any other task entrusted to them by the Act (e.g. making administrative decisions on the recognition of economic and technical reasons for removing protection from certain workers who are members of works councils or in connection with maintaining essential services).

The joint bodies taken into account under the 1968 legislation are, in hierarchical order:

- the National Labour Council, at national and cross-industry level,

- joint commissions, at sectoral (generally national) level,
- joint sub-commissions, at sub-sectoral level.

Much has been said about the legal status of joint commissions, and it is sufficient here to explain that they are bodies set up under public law by the legislator as administrative authorities with regard to a number of their tasks. They are not legal entities in their own right, but are part of the Belgian State.

On 1 July 2001 there were:

- 104 joint commissions, 96 of them operational,
- 67 joint sub-commissions (62 autonomous, and 5 non-autonomous), 66 of them operational,
- 5 936 places on these commissions, occupied by 3 089 persons (including 306 women occupying a total of 504 places)¹.

It is important to remember that the activities of joint commissions cover the country's entire private sector, but not the public services. This does not mean that State employees in the broader sense cannot benefit from social conciliation, but merely that the legislation and arrangements applicable in their case differ from the private sector and must be examined separately. On the other hand, as a result of the total or partial privatisation of a number of public companies, some of them now have a mixed status. In this case the Government has expressed its intention of providing access to the traditional forms of social conciliation for such undertakings (broadcasting and private education, at a later stage postal services, railways and telecommunications). Other undertakings such as the national airline or public bus operators already have joint commissions under the Act of 5 December 1968.

Joint commissions and sub-commissions vary in importance, depending on the economic weight they represent and the number of workers covered. For example, the auxiliary national joint commission for white-collar workers covers more than 300 000 employees and 5 000 undertakings. It covers only white-collar workers and undertakings not covered by any other joint commission, and mainly salaried staff whose tasks are of an intellectual nature. The main traditional sectors each have their joint commissions: the chemical industry, iron and steel fabrication, construction and others. The same applies to services, where there are joint commissions for banking, insurance and distribution. Small joint commissions have also been established for specialised occupations such as horticulture, hairdressing and made-to-measure tailoring. As a result, the entire private economy in Belgium is covered by the network of joint commissions.

2. The role of joint commissions in the mediation process: prior conciliation

“In addition to their ‘legislation-linked’ activity, joint commissions play a major role in the event of collective disputes either in an undertaking or at sectoral level.

¹ Federal Ministry of Employment and Labour, *Introduction au budget du Ministère de l'Emploi et du Travail pour l'année 1998* (Introduction to the budget of the Ministry of Employment and Labour for 1998), Brussels, September 1997, pp. 32-37.

The joint commission's conciliation panel, after hearing the parties, makes a recommendation aimed at reaching a solution which is satisfactory to them both. Some 500 conciliation meetings are organised each year. If the conciliation panel fails to find a solution, the chairman of the joint commission, who is often also a social conciliator, may then take on the conciliator's role alone.

The conciliation panel's recommendation or the conciliator's proposal is designed to find a solution that is acceptable to each of the parties and will allow the resumption of industrial relations and activities in a calmer atmosphere. Under no circumstances will the point of view of one of the parties be imposed on the other, as such a method would be liable to cause humiliation, which would be prejudicial to the restoration of a good social climate".²

One of the special features of the Belgian system of labour dispute conciliation is that it is not solely concerned with disputes. It is, of course, the task of any conciliation panel and its chairman to intervene when a dispute has occurred. However, many more disputes can be avoided, misunderstandings cleared up, and legal opinions delivered by joint commission conciliation panels. This is what is known as "prior conciliation". It is essential to distinguish between prior conciliation and preventive conciliation, the difference being that the latter tends to be based on an expert's report, rather than conciliation as such. The UK's Advisory, Conciliation and Arbitration Service (ACAS) offers preventive conciliation, by providing requesting companies with a report with the aim, for example, of making work organisation more harmonious so as to reduce potential tensions and improve workforce performance within the production unit. Such tasks may also be entrusted to private consultants.

In Belgium, the prior conciliation system involves the parties asking for a conciliation panel meeting with a view to finding a solution to a tense situation, a latent conflict, or a dispute within an undertaking, sector or sub-sector. For example, the head of a company (who need not necessarily be a member of a representative employers' organisation), a trade union delegation or the chairman of a joint commission may, if he or she considers it useful, convene the conciliation panel before a dispute is declared, if a dispute is threatened, or even if there is a simple difference of opinion (e.g. in interpreting a clause in a collective labour agreement).

3. Types of dispute which can be referred to the joint commission

A generally accepted thesis is that "a conciliation panel is generally competent to resolve any questions likely to affect relations between employer(s) and worker(s). This general conciliation task is limited only by the fact that the agreement which may result from it depends on the subject of the dispute, and the conciliation procedure does not prevent the matter from being taken to court".³

In accordance with Article 38(2) of the 1968 Act referred to above, which defines the panel's task very generally as "preventing, or providing conciliation in the event of, disputes between employer and workers", chapter III of the Royal Decree of 6 November 1969 establishing general procedures for the operation of joint commissions and sub-commissions (*Moniteur Belge*, 18 November 1969) confirms that a joint commission

² Defort M., op. cit., p. 234.

³ Delattre E., *Le rôle des présidents et des conciliateurs sociaux* (The role of chairmen and social conciliators). Orientations, Ced-Samson, Brussels, December 1988, No 12, p. 260.

can set up an internal conciliation panel to prevent, or provide conciliation in the event of, disputes between employers and workers (Article 19); in the event of a dispute or threat of a dispute, the matter is referred to the chairman at the initiative of the “most diligent party” (Article 21).

Conciliation panels have dealt with all kinds of potential or declared disputes. Employers, for their part, would have preferred to refer so-called individual disputes to labour courts. Individual disputes are generally seen in a different light from collective disputes, for which conciliation panels are clearly competent. A labour dispute or collective dispute is defined as a conflict between a group of workers and one or several employers concerning employment-related problems. An individual dispute is an employment-related dispute between a worker and his/her employer.⁴

Employment-related problems include questions relating to:

- the legal status of workers;
- terms of employment, i.e. all the rights and obligations of workers under their employment contract;
- physical working conditions, i.e. the conditions under which work is performed which are likely to have an influence on workers’ mental or physical well-being, e.g. safety, hygiene or the arduous nature of work.

A secondary classification of disputes is possible, i.e.:

- legal disputes concerning compliance with an existing legal provision

and

- conflicts of interest (generally classified as economic disputes at international level) concerning the creation of a new right by amending an existing legal provision or introducing a new one.

A more in-depth analysis leads to the conclusion that the concept of collective dispute must be regarded in the broadest sense of the term. A dispute need not necessarily be about an employment-related problem in the strict sense, but may relate to “any interest which workers feel they have to protect”.⁵

Belgian conciliation panels have therefore had to deal with all types of question likely to give rise to a dispute, including purely psychological individual tensions. This has led Professor Blanpain to say that in Belgium “practically every kind of conflict can be made subject to conciliation”.⁶ Conciliation panels may even be consulted concerning matters which are not the subject of a dispute, for example where parties are seeking clarification on the scope of a clause in a collective agreement and consult the employers/trade union representatives who drafted it and who are also members of a conciliation panel.

⁴ Delattre E., op. cit., p. 261.

⁵ Commission of the European Communities, *Prevention and settlement of collective labour disputes in the Member States of the European Community*, Luxembourg, 1984, p. 9.

⁶ Blanpain R., *Prevention and settlement of collective labour disputes in the EEC countries*, Industrial Law Journal, Part II, September 1972, p. 151

The only potential criticism of the way conciliation panels work is that they have sometimes agreed to consider subjects which seem irrelevant to external observers, thus involving several people in a trivial matter which a simple dialogue within the company could have resolved. But even in such cases, referral to the joint commission is not without benefit, in that the failure of the trade union delegation and the management to discuss a minor issue suggests grass-roots communications and dialogue are not good. The joint commission's conciliation panel can then call on the parties to make a specific effort to improve things.

IV. EFFICIENCY OF THE SYSTEM

1. Terminology questions

The conciliation panels of joint commissions, and also social conciliators acting alone, issue recommendations which are generally complied with and thus have practical effects. It should also be borne in mind that the Belgian system is based on voluntary conciliation (requiring the support of all those involved) rather than arbitration (which would imply the enforcement of an arbitration decision).

The Belgian conciliation system may lead to mediation, and in the local vocabulary there is confusion between the two concepts. Conciliation means the traditional role of a third person acting as an intermediary between two parties. Mediation goes further, involving a more active role including the drafting of proposals with regard to the question raised.⁷ *“The only difference that can be identified is that the conciliator is first and foremost a facilitator in re-establishing good relations between parties, whereas the mediator, acting as facilitator at the start of negotiations, subsequently plays a much more active role”*.⁸

2. Appearance before the conciliation panel

Parties appearing before a Belgian conciliation panel are first of all asked to put their case. The social conciliator (chairman of the panel) invites the petitioning party (trade union delegation or the employer/employer's representative) to do so first, and then the other party is given an opportunity to reply. Next, the trade union and employer members of the conciliation panel have an opportunity to question the parties about the facts and arguments they have put forward. The panel members are permanent representatives of employers' or trade union organisations which are representative of the branch concerned. They are in most cases informed before the meeting, via their own channels, about the nature and scope of the matter referred to the panel.

This is certainly the case with the trade union organisations, as workforce delegates are bound to be members of the representative organisations, recognised by the law, which provide panel members. The situation in the case of employers is slightly more complex. The same lines of contact are in place between the employers' federation and the employer if the latter is a member of the federation. In the case of companies not affiliated to an employers' organisation, the employer delegates on the conciliation panel are not normally informed about the matter until the parties are heard. Yet even in such

⁷ de Roo and Jagtenberger R., *Settling Labour Disputes in Europe*, Erasmus Universiteit Rotterdam, 1994, p. 27

⁸ Delattre E., *Séminaire de formation de conciliateurs et médiateurs sociaux* (Seminar on training for social conciliators and mediators), ILO Geneva, 1998, p.12

cases they will receive partial information beforehand, as the joint commission's secretariat attaches to the notice of the meeting a copy of the reasoned request from the petitioning organisation.

In the case of conciliation with a view to sectoral negotiation of collective labour agreements, the problem of prior information clearly does not arise, as the details of the union's or employers' wishes are distributed before the meeting.

Once the meeting has completed the information/presentation/questioning stage, the members of the conciliation panel withdraw to a separate room to discuss the issues raised. Unlike the presentation of the parties' arguments, the discussions between the members of the conciliation panel are not minuted, as they are confidential. There has been a certain amount of criticism alleging secrecy and a lack of transparency in this respect. However, in our opinion, the deliberations between panel members must remain confidential for reasons of efficiency. Even at the present time, when the social and economic situation is more difficult, there is usually courtesy, mutual respect and trust among panel members. This makes it possible to express thoughts within the panel which would otherwise never be aired. This applies to discussions concerning delicate psychological questions such as the balance of strength between a trade union delegation and management, or highly confidential matters relating to a company's competitiveness.

The discussion within the panel offers the prospect of an agreement between its members with a view to drawing up a recommendation. In the past, when economic growth was universal, a consensus was reached more easily. At the moment, owing to the effects of globalisation of the economy, the points of view of employers and trade unions have become more radical, and it is more difficult to agree on solutions. Furthermore, when dealing with pay-related subjects, it is essential not to lose sight of the fact that the social partners' room for manoeuvre has been limited by the effects of the Act of 26 July 1996 on promoting employment and safeguarding competitiveness and by the application of the Act by the cross-industry organisations in their recent agreements covering 1999-2000 and 2001-2002.

In Belgium, as elsewhere, there is also a general trend towards taking more disputes to court. The same phenomenon is found in the field of social legislation. Contrary to what might be expected, it is not just the employers who decide to involve the legal system (problem of constraints). Workers who are not members of unions or who are members of certain organisations may feel that they have not received proper protection and therefore decide to take their demands to a labour court (e.g. disputes linked to the closure of S.A. Kone and collective redundancies at S.A. Continental).

These considerations mean that conciliation panel negotiators have to be stricter than before in adhering to the letter of the law, thus limiting the scope for creativity in reaching a compromise. For example, it is clear that, in the event of conciliation concerning restructuring within a company, the panel's proposals will have to take account of legal requirements concerning the granting of early retirement pensions, since agreements in this field require ministerial approval based on strict compliance with the legislation in force.

Other difficulties arise as a result of developments in the issues that are the subject of mediation. Apart from classic issues such as pay-related disputes and interpretation of agreement terms relating to classification of employees with regard to pay scales or authority relationships between workforce delegation and management, regular subjects of conciliation panel discussions include restructuring, mergers and closures.

Nevertheless, despite a climate which has become much more difficult compared with the period from 1946 to 1970, Belgian conciliation panels have continued to work effectively. It is very rare for a conciliation meeting to end without settling the dispute. Unfortunately, there are no statistics to corroborate this, but a systematic study would certainly do so. In cases which have not been resolved, for example following a strike, the conciliation panel may meet again and succeed in ending the work stoppage by proposing a compromise on a question for which previously no answer had been found.

This report is not the place to go into developments in declared disputes and strike statistics. Let it suffice to say that Belgium is also experiencing the general trend towards fewer labour stoppages. Where stoppages occur they are, as already mentioned, mainly a result of restructuring, mergers or closures, or increases in work rates which may or may not be linked to the introduction of new technologies.

The work of conciliation panels is organised in the most flexible manner possible. Any member may ask for a meeting to be suspended in order to consult a group of petitioners (who may or may not be part of his/her organisation) in order to assess the chances of a compromise or gauge the situation in respect of the balance of strength. In other cases, trade union or employer members of the panel may meet separately in order to work out a strategy for a compromise. The social conciliator/chairman may move to and fro between the two groups to obtain an overview. This demonstrates the high level of flexibility and adaptability of Belgian mediation bodies.

On the other hand, the independence and flexibility of conciliators is gradually being whittled away by the increasingly constrictive legal and administrative framework being imposed upon them.

3. Formulation of the conciliation panel's recommendation and its acceptance by the parties

When the conciliation panel reaches a conclusion, this is put to the parties in the form of a recommendation. It has already been emphasised that the wording of the recommendation will under no circumstances take on the aspect of an arbitration decision, and it certainly has no legal force. A recommendation, in both practice and law, is merely a proposal which the parties to whom it is addressed can reject. So are the recommendations of Belgian conciliation panels generally followed? Very much so, thanks to the structure of the Belgian conciliation system.

On the trade union side, all delegations, whether from companies or sectors, have their representatives on the conciliation panel who will have obtained information about the situation on which they are being consulted. In other words there is a permanent dialogue between the grass-roots trade union delegates and their permanent representatives on the conciliation panels. Except in very exceptional cases, this clearly means that a trade union will not "disown" its leaders, and leaders will not adopt options which are entirely contradictory to the wishes of the grass-roots membership.

In extremely rare cases a group of strikers has rejected a conciliation panel's proposals although these had been worked out with the assistance of their permanent representatives. However, such rejections have never accounted for as much as half a percent of recommendations made and have occurred mainly in a particularly emotive and tense situation following a very long factory occupation triggered, for example, by the relocation of the company. A trade union delegation might also be infiltrated by a

group of workers advocating an ideology which is not necessarily that adopted by their organisation as a whole.

On the employers' side, there are similar relationships between the employer and the federation to which he is affiliated. The same applies to sectoral negotiations, where the federation members make their wishes known to their negotiators, giving them a precise mandate to which they must adhere. In the event of difficulties, either side's delegation may ask for discussions to be suspended so that it can seek a new mandate based on the facts and developments which have emerged during the discussions. It is also clear that an employers' group cannot allow itself to impose on any of its members solutions which are completely unsatisfactory to them. The risk of losing members would be much too great. It is a feature of all intermediary organisations that they live from the contributions of their members. Resignations as a result of disagreements between employers affiliated to a federation are extremely rare. The situation is much more delicate where a company is not a member of an employers' association. In such cases the employers' representatives on the conciliation panel will have to be much more persuasive towards the company's management in order to gain acceptance for the envisaged solution or compromise. The danger of the recommendation being rejected is particularly real where a small firm not affiliated to a group feels that the balance of strength is in its favour, as trade union representation within its production unit is weak. In such a scenario the company's management may prefer to make the dispute an individual one and if possible take it to the labour court in the hope of a complete victory. However, even this is not a common occurrence.

4. Adoption of a position by a sole conciliator or group of conciliators

There is one final case, the adopting of a sole position by the social conciliator (chairman of the conciliation panel) or by one or several social conciliators appointed to deal with a specific dispute outside the forum of the conciliation panels of joint commissions. These are relatively exceptional situations. The current practice in the vast majority of cases is that a conciliation panel operates in accordance with the competent joint commission's rules, which lay down the relevant procedures. A conciliation panel is, in a way, a collective mediator which has the advantage of having among its members leading figures from employers' and trade union organisations in the branch of activity concerned, acting under the guidance of a neutral third party (social conciliator, civil servant, chairman of the joint commission). If this third party acts alone, his or her proposal does not have the strength of unanimity of proposals made by the panel. However, if he or she feels it is necessary to make a personal recommendation to avoid or end a dispute, this constitutes an overriding reason to act in this way. This is a situation in which the mediator must be in a position to offer the basis for a solution which the parties cannot officially approve but which they are able to put to their organisations (for the trade unions their general assembly, and for employers the management of a company or group of companies) with a view to avoiding a damaging strike or the continuation of an existing strike likely to jeopardise the survival of the production unit. In such circumstances the mediator will propose what is known as a survival plan, which under normal circumstances would be entirely unacceptable to the various parties concerned but which, given the imminent danger, is likely to obtain their grudging support.

Even more exceptionally, in particularly complex cases such as the crisis in the national airline company, the Minister has decided to appoint three social conciliators to help bring about a solution to difficulties caused by excessive social costs. Apart from the

psychological effects of this procedure, especially on the public and in the various media, it avoids the danger of a single mediator being rejected by one of the parties seeking to disguise either its unwillingness to make genuine concessions or its intention not to address the real difficulties. Clearly, it is not possible to accuse a team of conciliators of a lack of objectivity. Such a procedure is of course used very rarely, given the scope and importance of difficulties not resolved otherwise.

This description of how the Belgian conciliation model works makes it clear that even in the present circumstances, involving far-reaching economic and social changes and all the restrictions that the situation imposes on the smooth progress of negotiations between social partners, the desire of the organisations and the executive power is to ensure the survival of a system which continues to prove successful.

V. THE ROLE OF SOCIAL CONCILIATORS AND JOINT COMMISSION CHAIRMEN

1. State civil servants

The roles of the State and social partners have been defined as the system of industrial relations has developed, and what now needs to be done is to determine more precisely the *modus operandi* and legal status of the social conciliators responsible for negotiations within the joint commissions and their conciliation panels.

As social conciliators are paid by the public authorities, they are classified as civil servants, appointed by Royal Decree (like all level-1 State employees), and given a certain grade in the administrative hierarchy. In accordance with the Royal Decree of 23 July 1969 setting up a Collective Labour Relations Service and establishing regulations covering its staff, social conciliators are subject to the general regulations covering State employees (Royal Decree of 2 August 1937 and all subsequent amendments). This means they are subject to disciplinary proceedings like all other civil servants and to normal channels of authority outside the scope of their tasks as conciliators/chairmen. Assistant social conciliators have recently been made subject to an assessment system in the same way as civil servants of the same rank, and senior social conciliators and social conciliators will also be placed under a similar system applicable throughout the public service in the near future.

2. Joint commission chairmen

In addition to these general provisions of administrative law, there are further rules specific to social conciliators, concerning both the way they work and their recruitment. The Royal Decree of 23 July 1969 states that social conciliators and assistant social conciliators may be appointed as chairmen of joint commissions. In practical terms, at the moment, they chair nearly all joint commissions, and this accounts for their main activity, in terms of both quantity and quality.

Article 40 of the Act of 5 December 1968 on collective agreements and joint commissions stipulates the role of the joint commission chairmen. In the explanatory memorandum to Article 41 (now Article 40), the direct authority of the Minister of Employment and Labour over the chairmen of joint commissions is justified as follows: *“The functions of the chairman and vice-chairman require absolute independence from the parties, as well as competence in social affairs allowing them to manage debates efficiently and impartially. In the same way as social conciliators exercise their*

functions under the direct authority of the Minister of Employment and Labour, it appears appropriate to place all joint commission chairmen, when performing their tasks, under the authority of the same Minister”⁹.

It is also stated that *“The Minister’s authority over the chairman does not run contrary to the principle of the chairman’s independence from the parties”*.

The Council of State, during the same preparatory process, expressed the opinion that *“The chairmanship of joint commissions must be exercised with complete independence. Placing chairmen and vice-chairmen under the authority of the Minister could compromise this independence”*.

This extreme point of view has not been followed up; however, the Act enshrines the principles of the autonomy of chairmen with regard to the social partners and the direct authority of the Minister over chairmen.

3. Social conciliators

In addition to their role as joint commission chairmen, social conciliators may perform other tasks outside these bodies. Article 19 of the Royal Decree of 23 July 1969 states that *“In performing their tasks, the general administrator, senior social conciliators, social conciliators and assistant social conciliators are subject to the authority of the Minister of Employment and Labour”*.

The preamble to this decree explains in detail the way in which Article 19 should be interpreted. As mentioned above, this is in line with Article 40 of the Act of 5 December 1968.

The most significant part of the preamble states that *“In the opinion of representative workers’ and employers’ organisations, and according to various studies on the subject of collective labour relations as well as experience acquired in this field, civil servants responsible for social conciliation should be covered by special regulations, allowing the appointment of persons with the qualities that are essential for the successful performance of the tasks entrusted to them and guarantee that they are sufficiently independent to perform those delicate tasks”¹⁰.*

4. Extent of administrative responsibilities, and stability of conciliation exercises

As already explained, the main activity of social conciliators is to chair joint commissions. Over the past 20 years, the time spent by conciliators on administrative tasks has been increasing steadily. Although the nature of the subjects referred for conciliation has been changing (see above), the number of conciliation meetings has remained more or less constant, as shown by the following table, which shows the types and numbers of joint commission and sub-commission meetings during the period 1992-2000.

⁹ Delattre E., *“Le rôle des présidents et des conciliateurs sociaux”*, op. cit., p. 258

¹⁰ Delattre E., *“Le rôle des présidents et des conciliateurs sociaux”*, op. cit., p. 259

	1992	1993	1994	1995	1996	1997	1998	1999	2000
Plenary meetings	493	713	585	704	500	722	546	826	569
Conciliation meetings	449	531	416	368	385	381	379	321	343
Others	375	457	448	446	380	490	434	119	555

NB: More than two thirds of conciliation meetings were concerned with prior conciliation.

The fluctuating ratio between the number of plenary meetings and conciliation meetings is due to the fact that joint commissions tend to meet more when collective labour agreements are being renewed every two years.

Although the proportion of joint commission chairmen's work spent on conciliation and the conclusion of collective labour agreements is more or less constant, other responsibilities have been given to them and have not necessarily been taken into account in the above statistics. In practice, owing to changes in the economy and the enhanced role played by the State in social relations, chairmen have been given specific responsibilities under a series of new laws and regulations. For example, according to Articles 35(5) and 52 on the Act on apprenticeship in occupations performed by employed workers, the joint commission on apprenticeship is required to express an opinion within 60 days where an employer applies to terminate an apprenticeship contract on the grounds of the apprentice's unsuitability. Another example is the joint responsibility of the chairman and members of the apprenticeship commission in terms of their supervisory powers under this legislation with regard to in-company apprenticeship training.

Another point to note is that the chairman is required to ensure that deadlines are met with regard to the recognition of economic or technical grounds for removing protection from certain workers who are members of works councils, health and safety committees or trade union delegations.

Similarly, the rules on the introduction of new work organisation schemes (flexibility of working hours) also bring with them a special task for the chairman in the event of non-agreement at sectoral level. In such cases the chairman must submit the plans drawn up at company level to the parties by a specified deadline. The commission he chairs verifies the legality of these plans. Following the recent cross-industry agreements, a series of collective labour agreements have been concluded through the joint commissions, relating to employment promotion measures (career breaks with replacement obligation, part-time work, etc.). These agreements allow companies to implement one or other of these measures, in which case they are obliged to submit their plan to the competent joint commission for its opinion before the final ministerial decision is taken to grant them dispensation from part of their statutory social contributions.

Joint commission chairmen sometimes also have a specific role to play under decrees implementing the Act of 19 August 1948 on services of public interest in peace-time (maintenance of essential services in the event of a strike) or in connection with the application of social legislation specific to certain sectors such as sea fishing, ports, health services, ship repair yards and the diamond industry.

Social conciliators also have monitoring tasks, the legal basis for which is provided by Articles 52 and 53 of the Act of 5 December 1968 as implemented by the Royal Decree of 21 October 1969 (Article 2). However, in practice, social conciliators leave enforcement tasks to the social legislation inspectorate, as it would not be advisable to mix such tasks with social conciliation. The aim therefore was not to transform social conciliators into enforcement agents, but rather, in the event of serious disputes, to give them access to premises which would otherwise be closed to them, if necessary with the assistance of the forces of law and order.

There is not enough room here for a full list of all the new tasks of joint commission chairmen. Let it suffice to say that in the course of time their administrative responsibilities have grown considerably, following the proliferation of legislation, while the amount of work associated with mediation proper remains constant.

5. Recruitment conditions

The shift in social conciliators' duties towards more administrative tasks has led to a change in their recruitment conditions. At the moment there are four senior social conciliators, 13 social conciliators and 11 assistant social conciliators. The aim is also to make mediators available to public companies which have recently become independent or been privatised. Initially, for the recruitment of social conciliators and assistant social conciliators, the Royal Decree of 23 July 1969 laid down conditions only with regard to age (35) and experience in labour relations (10 years). The Royal Decree of 10 January 1994 amending that of 23 July 1969 introduced additional qualification requirements. For example, candidates must hold a higher secondary school leaving certificate and have 12 years' experience in dealing with social matters, including at least eight years in social relations between employers and workers. The minimum age has been reduced to 30. Applicants with a university degree require only eight years of experience in employer-worker relations, while the minimum age is the same.

6. The need for ongoing training

In the past, the situation was one of continuous economic growth. As a result, social conciliators, in addition to their administrative duties associated with the lodging of sectoral collective agreements, worked in isolation in their own sectors, though reporting on the results of their activities to the Ministry of Labour and the General Administrator of the Collective Labour Relations Service. The main duty imposed on them by the administrative authority was to promote good labour relations.

Owing to the changes which have made for a more complex society, monthly meetings are now held which are attended by social conciliators and senior officials from the Collective Labour Relations Service and the Minister's Office to explain the scope and practical effects of Government or legislative decisions in the field of collective relations. Judgments and decisions of the various courts and tribunals, including the Court of Justice of the European Union, are also covered. While this need for ongoing training as a result of changes in society is beyond dispute, it is regrettable that the activities of Belgian conciliators, though still completely free vis-à-vis the social partners, are increasingly impeded by legal and administrative structures established by the Government and legal system.

VI. GENERAL EVALUATION OF THE SYSTEM, AND OUTLOOK FOR THE FUTURE

Taking account of the very specific nature of social conciliation and the funding of the Collective Labour Relations Service within the general framework of the Ministry of Employment and Labour, the results achieved by the Service are assessed through monitoring and comment by the political world, namely the Government in the first instance and Parliament in the course of its discussion on the Ministry's budget. As in the case of all administrative units, the activities of the service to which the social conciliators are attached are the subject of financial controls by the Belgian Court of Auditors.

Any Member of Parliament may question the competent Minister about how a specific dispute or situation is to be resolved. This is particularly likely in the event of closures affecting large undertakings (Renault Vilvorde, Levis, Danone, Continental). The press is particularly interested in the activities of conciliators in such circumstances.

The Belgian conciliation system has also evolved. Apart from the traditional negotiation activities, globalisation of the economy and its consequences have brought the subjects of company restructuring and employee flexibility to the fore.

Although court involvement has been increasingly necessary with regard to enforcing individual rights, the use of social conciliators still remains part of our Belgian traditions. Mention has already been made of the Belgian Government's intention to table draft legislation after consulting the cross-industry social partners. The aim of this legislation will be to:

- encourage and promote social conciliation within companies;
- make jurisprudence consistent with the European Social Charter;
- strengthen the labour tribunal's social disputes unit.

These provisions must in no way adversely affect the fundamental right under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which states that everyone is entitled to a hearing by an independent and impartial tribunal if their rights are threatened, with a view to obtaining protection and compensation in the event of damage. The aim of the draft legislation is to increase the use of conciliation and mediation without making them obligatory. Nor is it a question of imposing court decisions, other than for the protection of individual rights, as explained above.

In addition to a certain trend towards taking individual disputes to court, there is also a desire to extend the voluntary conciliation process to non-merchant activity sectors or even to former public services that have been privatised. For example, social conciliators from the Federal Ministry of Employment and Labour are used in disputes in the subsidised French-speaking private education sector. Belgacom (the telecommunications company, which was formerly a public service) has just asked for a specific joint commission to be set up, including a mediation system. In other words, the Belgian social conciliation system, although it has changed, has a secured future among the ways of resolving disputes used in Europe.

VII. THE BELGIAN CONCILIATION AND MEDIATION SYSTEM IN THE CONTEXT OF COMMUNITY LAW

1. Compatibility between Belgian law and Community law

The free and voluntary nature of conciliation mechanisms means there is no incompatibility between Belgian collective employment law and Community directives, the latter having been incorporated into national law.

On the other hand, as the Belgian system is rather formalised, certain difficulties arise where disputes or potential disputes have transnational implications, e.g. the problems associated with the closure of the Renault Vilvorde plant. In our view, the most relevant point in this case is not that shortcomings were found in the application of Belgian legislation, but that the Belgian mediation mechanisms did not play their due role during the dispute. Prolonged efforts were needed before a social plan providing benefits such as additional redundancy pay, early retirement pensions and retraining aid was adopted.

Other similar disputes have occurred, and in the best case the conciliation route was taken only at the end. The most striking example was the dispute which occurred during the restructuring of the Liège site of the German tyre manufacturer Continental. The company had complied with Belgian legislation on the closure of establishments. The compulsory consultation of the works council had taken place, and negotiations on the adoption of a social plan had started with the trade union organisations. The help of the conciliation panel of the competent joint commission for the chemical industry was requested.

In the course of the difficult negotiating process which followed, the social conciliator (chairman of the joint commission) first of all drew up proposals which the trade union organisations were not even willing to submit to their members, as they regarded them as inadequate. In a second attempt, the social conciliator/joint commission chairman, with the help of the management, presented substantially improved proposals which included early retirement pensions, additional redundancy pay, retraining aid and the continued employment of 200 out of the Liège site's 800 workers. In a referendum 80% of the workers rejected these proposals. Acts of sabotage were perpetrated on the company's premises, and a minority group of workers issued a writ against the employer for damages for failing to comply with procedures, whereas the trade union organisations had never alleged any such failing. The group's management was inclined to abandon all discussions, close the site completely and limit itself to fulfilling its legal obligations

It was then the Minister of Employment and Labour decided to involve one of her own advisers in the conciliation process. The proposals were redrafted in the Minister's name, without affecting the cost to the company. This was an entirely exceptional initiative unknown in Belgian tradition. It gained the workers' approval, this time with an 80% vote in favour. An analysis of this dispute in no way suggests that the responsible conciliator was at fault, it was simply that the Belgian system, as sophisticated as it is, has its limits. In a dispute of such proportions (Renault etc.), it should be possible to involve a higher-level mediator, as ministers cannot of course get involved personally, via their advisers, in collective disputes of a certain proportion, especially transnational ones. There is no doubt that there is a gap here.

2. The added value of a European initiative on mediation in relation to the Belgian system

Where the restructuring of an undertaking has transnational implications, the examples described above show the added value of a European mediation initiative, even if the Belgian conciliation system otherwise continues to prove successful. Instead of appointing one of her staff after the successive failures of the usual conciliation process, the Belgian Minister of Employment and Labour would have been in a better situation if she had been able to suggest using a European mediation system. Should that also have failed, she would not have committed any political responsibility. If, however it had succeeded, there would have been a clear benefit to the local public authorities, the company and the workforce. The fact of being able to enter into framework agreements at European level can in some cases avoid or limit closures of operating units. Opel managed to achieve a general restructuring agreement with the trade union organisations covering all its European sites, even though it was necessary to negotiate specific procedures on the basis of national legislation and situations for each site, including the Antwerp factory, where it was then possible to limit job losses. In this particular case mediation was not necessary as a result of the social culture specific to the company, but in other situations it might well be that the good offices of high-level conciliation could achieve a similar result.

The same applies where a transnational company has opted for Belgian law as the basis for its European works council statute. Such statutes can be very complex, and taking the matter to a Belgian court is not necessarily the best way to improve relationships between management and workers. At present, it is not possible to call in the Belgian conciliator if the dispute goes beyond the national level. Here too, a European mediation system taking account of local contingencies would be in a position to prevent or help resolve problems. The same reasoning applies where a company establishes one or more sites in Belgium and encounters difficulties drafting or interpreting rules on worker involvement in accordance with Article 3 of the Directive supplementing the European company statute with regard to the involvement of employees. A similar reasoning can of course also be applied to the European cooperative.

In conclusion, Belgium's tradition of conciliation and mediation can be seen as one of the most advanced and firmly established in the world. For the moment, the only development that can be envisaged is the European-level negotiation of individual labour arrangements (wages, working conditions, working time, etc.). Belgian legislation, with its chain of minimum requirements, would not require much adaptation. Nevertheless, given the economic and social trends, the examples which have been described show that the system, as good as it is, can provide a response in certain situations only. In practice, it is Europe that could provide the contribution making it possible to reach solutions.

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