

# **THE STATE'S RECOGNITION OF SOCIAL PARTNERS IN SOCIAL SECURITY**

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## **1. INTRODUCTORY THOUGHTS**

It is argued that social partners play a vital role at striking a balance in the distribution of labour, as well as social and economic rights and obligations among different interest groups belonging to different layers of the civil society. The balance reached is supposed to be in the greatest interest of the society as a whole, where wants and needs of one group should not, at least not to a large extent, outweigh those of the other group(s). The processes of striking such a balance are however almost proverbially torn between various interests of the employers, the employees and the state, all trying to reach an outcome that is supposed to be best for them.

The aim of this article is to examine legal paths through which the interests of the two categories of social partners, i.e. employers and employees, can be achieved or ways in which interests, opinions and beliefs of social partners can have an impact on social security. The state, although at the national level sometimes considered as the third social partner, is thereby set aside and considered in the capacity of a somewhat superior subject recognizing (or not) the two categories of social partners in a number of ways, related to social security.

## **2. SOCIAL SECURITY: STATE'S OR (CIVIL) SOCIETY'S OBLIGATION?**

The starting point into the investigation of different forms of state's recognition of social partners in social security is the question, under whose obligation does the latter fall. If social security is considered to be only an obligation of the state (and local) government(s), then at least theoretically no special formal recognition of social partners apart from general mechanisms of liberal democracy is required in order for the system to be legitimate. If the case is the opposite,

and income security<sup>1</sup> is considered to be the sole obligation of the individual or – to set aside in this article the notion of a fully private insurance scheme stemming from one’s unconditional individual responsibility for his life choices<sup>2</sup> – the (non-state or civil) society, then not only is formal recognition of social partners and also other individuals reflecting the civil society’s structure a mandatory condition for the social security system to be legitimate, but it is also mandatory for the state to be excluded from society’s affairs as much as possible.

However, things in life are not either black or white, and the same applies to the obligation for providing the citizens’, other categories of individuals or even all members of the society<sup>3</sup> with an adequate level of *social security*. In a more abstract manner social security could be defined as protection provided by the *society* to its members in case of loss or reduction of income, e.g. in case of sickness or injury, accident at work or occupational disease, invalidity, old-age, decease, unemployment, maternity and paternity or parenthood in general, or increased costs, e.g. in case of illness or when forming a family, through a process of broader or narrower social solidarity.<sup>4</sup>

Setting aside the two previously mentioned purely theoretical models of sole state or sole (non-state or civil) societal obligation for social security, it can be argued that social security is both. It is a state obligation usually stemming directly or indirectly from international law and national constitutional provisions, and at the same time an obligation of the working individual and the employer paying for the system, thus possessing the right to decide on ways in which particular rights and obligations should be implemented.<sup>5</sup> Even more so, in a truly corporatist socio-political organization of a liberal society, the state is after all “only” a special corporatist group in a pluralist structure comprised of a number of other groups (e.g. unions, chambers, public and

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<sup>1</sup> In this case, the proper notion used is (*private*) *income security*, rather than *social security*, which assumes the existence of publicly organised (by the state or local communities) social schemes providing income security to members of the (broader state or narrower local community) society.

<sup>2</sup> It is also not the aim of this article to address the question of public or private responsibility for income security, but the recognition of (civil or private) initiatives of social partners in administering the social security system and providing social security for individuals, mostly workers.

<sup>3</sup> See Article 22 of the Universal Declaration of Human Rights.

<sup>4</sup> Strban (2012), p. 513-514.

<sup>5</sup> Since this article is fore and foremost examining the social partners' institutional participation in social insurance schemes.

private societies, etc.).<sup>6</sup> In that sense, it possesses an obligation of cooperating with other interest groups, most importantly with employee's and employers' representatives, in implementing economic and social policies. Members of particular groups are therefore included in particular decision-making processes concerning the state's constitutional and international obligation to guarantee social security, re-defining the distinction between public and private, since both the state, and state non-related groups can influence economic and social policy and hence also the social security system.

The most genuine reflection of such cooperation might be the social dialogue carried out between employees, employers and the state. A genuine division of competence between the state and members of the civil society is for instance stemming from the Croatian constitution (Article 57),<sup>7</sup> stipulating that the right of employees and their family members to social security and social insurance shall be regulated by law and collective agreements. In line with such reasoning is also Article 60 of the same constitution, stipulating that in order to protect their economic and social interest, all employees shall be entitled to form trade unions and be free to join and leave them. It is of course not uncommon for the freedom of trade unions, a reflection of the broader right to freedom of association, to be included among constitutional provisions (see also Article 76 of the Slovenian constitution).<sup>8</sup> It is nevertheless worth noting that the Croatian constitution mentions explicitly *economic and social* interests.

However, once again referring to the question under whose obligation does social security fall, the distinction between (i) establishing, (ii) administering and managing, and (iii) financing the social security system has to be taken into consideration.

### **3. FORMS OF RECOGNITION**

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<sup>6</sup> For a comprehensive insight into the theory of corporatism see e.g.: Jessop in: Hartman, Kjaer (2015), pp. 29-33 or Newman (1981) pp. 3-73. For the notion of tripartism see: pp. 75 and the following.

<sup>7</sup> The Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*), Official Gazette RC, No. 56/1990, last amended in 2014.

<sup>8</sup> The Constitution of the Republic of Slovenia, (*Ustava Republike Slovenije* - URS) Official Gazette RS, No. 33/1991, last amended in 2016.

Social partners enjoy (formal) state recognition within different institutions and their organizational structures (e.g. social insurance carriers), and through the state's recognition of internally or externally effective processes having either a direct or indirect impact on social security. Internally effective are processes or decisions that have a direct effect only on the subjects reaching the decision, in Slovenia e.g. drafting the insurance carriers' statute. Such decisions can however have an indirect external effect, e.g. the appointment of the institute's director to some degree influencing the system according to its own policy. Externally effective are processes or decisions that have a direct effect (also or in the first place) on other subjects than the one's reaching the decision, e.g. defining the basket of health services. However, it has to be noted that particular legal acts can have different effects in different legal orders. Unlike in Slovenia, where the health insurance carrier's statute's external effect is as a rule limited and only indirect, in Germany, carriers' statutes also have an external effect.<sup>9</sup>

Within the structure of social insurance carriers,<sup>10</sup> social partners can be recognized as members of a number of different bodies (e.g. assemblies, managing boards, councils). In that capacity, in which they take on the cloak of the insured individuals and that of the employers, social partners partake in the system they pay for. The inclusion of employee's, employers', and commonly also state's representatives in the decision-making procedures is not only a reflection of the societies corporatist structure, but also of the state's obligation to establish the social insurance system, and (usually) the state's, employee's and employer's obligation of financing and administering the system.

Members of the carriers' governing bodies can be appointed, elected within representing organizations or elected in "general" elections – e.g. the case of the German social elections (*Sozialwahl*),<sup>11</sup> in the course of which different organizations of social partners undertake the compilation of lists of candidates, i.e. insured individuals, from which the future members of a variety of self-governing parliaments are to be elected. In case elections known as the peace

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<sup>9</sup> See: Strban (2005), p. 150.

<sup>10</sup> The Austrian legislation prescribes three main mandatory bodies to be included in the structure of the social security institutions, i.e. the General Assembly, Board of Management and Board of control, consisting of insurance agents, i.e. employee's and employers' representatives. See: § 419, 420 ASVG.

<sup>11</sup> Strban (2005), p. 143.

elections (*Friedenswahl*) take place, the latter are carried out without any procedures of an electoral nature, since social partners beforehand agree on the selection of candidates and propose them in numbers coinciding with the number of open seats in parliament.<sup>12</sup> In that case, the candidacy process might be even more important than the process of elections.<sup>13</sup>

Secondly, employers' and employees' representatives can be included in representative bodies composing national parliaments, e.g. the case of the Slovenian National Council,<sup>14</sup> acting as a representative body for social, economic, professional and local interest, possessing, among others, powers of a suspensive veto and legislative proposal in relation to the National Assembly.<sup>15</sup>

Thirdly, social partners can be recognized as members or even founders of different bodies having an indirect effect on social security by means of executing their powers of consultation and supervision (e.g. in Slovenia, the Economic and Social Council).<sup>16</sup>

Fourthly and lastly, they can be recognized through formal or informal (political) procedures and the recognition of acts stemming from such procedures, namely formal or informal processes of social dialogue taking place either between employers' and employee's representatives, or among the representatives of both interest groups and the government. From the viewpoint of social security, both forms of procedures are relevant in cases of social partners negotiating (the level) and implementing social rights or proposing other statutory or regulatory amendments –

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<sup>12</sup> See § 46, SGB IV.

<sup>13</sup> Bley et al. (2001), p. 147.

<sup>14</sup> Article 96 of the Constitution of the Republic of Slovenia.

<sup>15</sup> The Slovenian parliament however consist of dominant legislative body, i.e. the National Assembly and an incomplete second body, i.e. the National Council, possessing the right to a veto in the legislative process (in which case the Assembly has to pass the same law with absolute majority in order to be effective). Due to the Council being only an incomplete legislative body, the Slovenian parliament can be described as bicameral only in a wider notion of the word. However, the Council's mechanisms are beyond the mechanisms of some second houses of parliament in pure bicameral systems. Therefore, the true nature of the Slovenian parliament is open for discussion See: Kaučič, Grad (2008), pp. 198-199.

<sup>16</sup> Social partners are for instance included as members of advisory bodies at three levels of the state (national, regional and local) in Denmark. See: Jørgensen, Carsten, Contribution to EIRO comparative study on social partners and the social security system – Case of Denmark, available at: <https://www.eurofound.europa.eu/observatories/eurwork/comparative-information/national-contributions/denmark/contribution-to-eiro-comparative-study-on-social-partners-and-the-social-security-system-case-of-0> (August 2017)

e.g. to the organizational structure of the insurance carrier – that can have a direct or indirect effect on social rights. The same applies to informal procedures of different forms of political pressure and strike, the latter being in itself a formalised process if carried out in accordance with statutory provisions.

The present article addresses in depth only the question of social partners' institutional recognition within the framework of social insurance carriers and the two forms of social dialogue. The first taking place between the representatives of employees and employers (bipartite social dialogue), and the second taking place between the latter groups and the representatives of the government (tripartite social dialogue). Apart from social insurance schemes, the recognition of social partners in national protection schemes is rather partially addressed alongside the Bismarckian model with regard to unemployment insurance.

Some other important forms of recognition are also excluded. Such is the case of social partners' participation in legal proceedings. They may act as agents in front of labour and social courts, or as lay judges,<sup>17</sup> and the participation of social partners in formal and quasi-formal stages of the legislative procedures, when not acting in the capacity of members of advisory bodies, (e.g. economic and social councils). The role of social partners at the EU level in the light of Articles 153, 154 and 155 of the TFEU is also omitted. The same stands for the European Economic and Social Committee (EESO), grounded in Article 300 of the TFEU as a representative of the civil society as a whole (apart from social partners also including parties from the socio-economic, civic, professional and cultural areas) and acting as an advisory body to the European Parliament, the Council and the Commission.

#### **4. INSTITUTIONAL PARTICIPATION**

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<sup>17</sup> See e.g. Articles 14 and 16 of the Slovenian Labour and Social Courts Act, (*Zakon o delovnih in socialnih sodiščih - ZDSS-1*), Official Gazette RS, No. 2/2004, last amended in. Lay judges should enhance the democracy of judicial processes. When the court decides in a senate, there is one representative of social insurance carriers and one representative of the insured individuals present next to the president of the senate, who is a professional judge. It might happen that the professional judge is outvoted and has to justify a decision of the lay judges. The latter applies to social disputes. In case of labour disputes workers' and employers' representatives are included.

Institutional participation of the insured, as already noted commonly brought about by means of empowering social partners' (employers and employees) as members of different governing bodies of social insurance carriers (usually: pension and disability insurance, health insurance and unemployment insurance, in some countries also long-term care insurance), is a key element of ensuring self-governance in and decentralization of social security. The term *decentralization* is however divided into two sub-categories, i.e. functional and territorial decentralisation.

*Functional decentralization* is referring to the transfer of state's (government's) competence in a certain field onto other subjects, not including only managerial and administrative, but some extent also autonomous regulatory (and executive) powers. The act of functional decentralization ensures a shift in or at least a balance of powers between the government establishing the social insurance scheme and the community of the insured (whose rights are at stakes), in a Bismarckian system of social insurance also including the employers, who possess the obligation of financing the scheme. However, the institutional inclusion of the latter group is sometimes being referred to as questionable, since employers are usually not directly involved in the system, meaning that their rights are not at stake. Nevertheless, they do directly co-finance the system,<sup>18</sup> and their participation is therefore legitimate whenever the number of votes coincides with their financial obligations.

*Territorial (or regional) decentralization* may refer to multiple insurance carriers for the same social security scheme (e.g. pension or health insurance) in the state territory. It may also refer to a purely organizational or technical distribution of different institutions' local offices, units or branches throughout the state territory, of an otherwise territorially centralised social insurance carrier. In this case regional (or territorial) decentralization is a synonym for the state of administrative *deconcentration*.<sup>19</sup>

The internationally established obligation of institutional participation of social partners is, at least implicitly, stemming from several ILO documents.<sup>20</sup> However, for a balance to be

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<sup>18</sup> In the case of health care see: Strban (2005) p. 147.

<sup>19</sup> Mišič, Strban (2017), p. 1. See also: Pieters (2006), p. 16.

<sup>20</sup> See: Art. 72, ILO Convention No. 102. It also has to be noted that Conventions No. 24 and 25, as well as Recommendation No. 29 provide for the self-regulatory nature of the carriers. The participation of the insured is

established and effectively maintained, the structure of the governing bodies ought not to be tilted in the direction of the state or other any subjects that would result in the system being carried by third-party management (*Fremdverwaltung*),<sup>21</sup> neither ought the state possess other tools of influencing self-governing powers vested in the institutions' members. Unless of course, the state is obliged to tax finance the system alongside the employees' and employers' contributions. The greater that obligations are, the greater the influence should be, as it is shown on the case of Slovenia's health, and pension and disability insurance carriers (see *infra*). However, it has to be once again noted that the state commonly possesses the initial obligation of establishing (and implementing) a social insurance scheme. In that sense, co-financing of the system should not be used as the only argument for allowing the government to partake in the decision-making processes. At the same time, a complete take-over of the administration of social insurance by the state might transform social insurance scheme into a national protection scheme.

Apart from the above described form of institutional participation, social partners form or partake in the activities of different specialized bodies, commonly economic, social, or similarly named councils. Of course, depending on their main field of competence. Under the Slovenian legal order, such is the Economic and Social Council (ESC), the country's head consultative and coordinative institution for social dialogue. The ESC was established by social partners and the government in the year 1994.

In the following paragraphs, a more detailed analysis of the social insurance carriers' governing bodies, their organization, structure (inclusion of social partners) and competence in the case of three Slovenian carriers is carried out. It may serve as offering a starting ground for further comparative explorations of other selected systems, of which some are at least in part already included in the present text. The ESC, a reflection of the third form of recognition mentioned in

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also prescribed by the Convention No. 130, also including – unlike Convention No. 102, where this possibility is left at the discretion of the legislator – employers' representatives.

<sup>21</sup> For the participation of other interest groups (not the state) in decision-making processes regarding the insured see: Kötter (2000), p. 168.



the introductory, will be also be discussed together with similar bodies from other legal systems.<sup>22</sup>

#### **4.1. Functional decentralization: the case of social insurance carriers**

Social insurance carriers are commonly organized as (semi-)public<sup>23</sup> institutes or corporations, e.g. in the case of German healthcare carriers as self-governing public corporations,<sup>24</sup> usually containing elements of both forms of legal entities. The carriers' legal framework has a direct effect on how representatives of different interest groups, i.e. social partners, can cooperate in and influence the decision-making processes. It is dependent both upon on the “static” material law of organizational structures, stipulating who is the competent authority to reach a certain decision, and its “dynamic” aspect as its procedural counterpart, determining the processes or means of reaching a decision.

As noted, social insurance carriers reflect the division of competence between the state and other subjects in the field. In the case of Slovenia, two ministries are responsible in the field of social security, i.e. the Ministry of Labour, Family, Social Affairs and Equal Opportunities, and the Ministry of Health. Both are responsible for policy development, supervision and analysis, and most importantly possess the power of proposing new legislation and drafting bylaws and other rules and regulations. On the other hand, the public institutions, i.e. social insurance carriers, are responsible for administering and managing the social insurance schemes.

In a functionally decentralized system, they are established as autonomous and self-administrative (self-governing) institutions. They are governed by public law and are at the same time (to a certain extent) state-independent.<sup>25</sup> Slovenia, which is a state governed by the rule of law and a social state, is according to the wording of Article 2 of the Constitution established as

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<sup>22</sup> For a comprehensive overview of the role of social partners regarding decision-making processes in the field of social and employment legislation in 30 different countries see: European Employment Policy Observatory (2016), p. 13 and the following.

<sup>23</sup> See: Pieters (2006), p. 16.

<sup>24</sup> See § 4, SGB V.

<sup>25</sup> Kresal et al. (2016), pp. 41-42.

a normative welfare state.<sup>26</sup> The provision does not have a solely political meaning, but imposes upon the state a clear legal obligation of providing and effectively safeguarding social rights of its citizens and any other individuals fulfilling the conditions of obtaining a certain right. In accordance with Article 50 of the Slovenian Constitution, the state is under the obligation to regulate mandatory health, pension, disability and other social insurance and to ensure its proper functioning. The latter obligation is realized through the establishment of specialized legal entities in the field of social security, namely the Health Insurance Institute of Slovenia (HIIS), Pension and Disability Insurance Institute of Slovenia (PDIIS) and the Employment Service of Slovenia (ESS).<sup>27</sup> After their establishment, the government is monitoring the suitability (proper and competent execution) and legality of the subjects' activities. Their functioning is at the same time subject to processes of *regional decentralisation* or *deconcentration* through the establishment of several regional and local units approximating the Institutes' activities to their insured persons.

Similar is the case of other European decentralized systems, e.g. the Austrian social security system, in which several decades ago, the government excluded social insurance from the state's duties and transferred it into the self-regulatory realm of independent carriers and their members, possessing the powers of reaching and issuing authoritative decisions in the course of administrative procedures, whilst being subject to monitoring powers of the court of audit and the principle of legality.<sup>28</sup> The state, not having a direct influence on the social insurance, satisfied itself with the powers of supervision.<sup>29</sup> Such functionally decentralized arrangement is reflecting the notion of legal self-regulation, i.e. a corporate and functional shift of powers and duties onto the self-responsible (civil) society, including elements of internal (providers' organization, financial powers, etc.) and external self-governance in relationships among the

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<sup>26</sup> See: Strban (2013), p. 3 or Mišič (2016), pp. 65-67.

<sup>27</sup> In Belgium, publically established institutions such as the National Institute for Sickness and Invalidity Insurance, National Institute for Employment Services, or the National Institute for Pensions, enjoy administrative autonomy under a managerial committee composed of an equal number of representatives of both employers' and employee's organizations. In the case of self-employed persons, the committee is composed of representatives of organizations of the self-employed. Regarding the Belgian system, we are most grateful to Eleni De Becker (Institute for Social Law, Leuven) for providing useful general information on the topic and more specifically informing us on the advice of the Belgian Council of State (*Raad Van State*). We are also thankful to Verena Zwinger (WU Wien) for providing us with the general out-line on the topic regarding the Austrian system.

<sup>28</sup> See: Krejci (1977), p. 93.

<sup>29</sup> Tomandl (2002), p. 33. See also: Schulin (1994), p. 204.

carrier and the insured individuals.<sup>30</sup> In that sense, social partners present a direct extension of the self-empowered society.

## **4.2. Organization, structure and competence of social insurance carriers**

As already mentioned, HIIS, PDIIS and ESS are established by the government as autonomous, state-independent and self-governing institutions governed by public law. The carriers' headquarters are located in the capital city of Ljubljana, with their regional units and local offices spread throughout the state territory, ensuring the accessibility of their services in an effective and efficient framework. Hence, despite territorial centralisation, administration is regionally deconcentrated.

In its structure, all carriers include employees' and employers' representatives. Social partners thus partake in decision-making processes having either an internal or external effect, and influence the social security system in a direct or indirect way.

### **4.2.1. Health insurance**

The HIIS's managing body is the Assembly, composed of 45 members: 20 employers' representatives, organized in chambers and other organizations, and 25 representatives of the insured persons having a slight upper hand over the employers.<sup>31</sup> Out of the employers' representatives, 16 members are elected by organizations and employers organized at the Chamber of Commerce and Industry of Slovenia (CCIS) and other employers' organizations in the country. Other 4 members are acting as representatives of employers in the field of public administration and noneconomic services of general interest and are directly appointed by the government. On the insured individuals' side, 15 members of economically active insured persons are elected by representative trade unions at the state level, meaning that 31 out of the 45 members – the remaining 10 are elected by farmers', pensioners' and organizations of the

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<sup>30</sup> For more on the topic see: Schnapp in: Schulin (1994), p. 1191 and Maier in KassKomm § 29, SGB IV, p. 2.

<sup>31</sup> Article 71 of the Health Care and Health Insurance Act (*Zakon o zdravstvenem varstvu in zdravstvenem zavarovanju - ZZZV*), Official Gazette RS, No. 72/2006, last amended in 2015.

disabled – are elected or appointed by subjects fitting into the category of social partners.<sup>32</sup> The downside of such structure might be that non-organized individuals (e.g. the self-employed) are not given a direct voice. However, the interests of the self-employed are to be represented by the Chamber of Craft and Small Business of Slovenia, an employer’s organization that is unlike the CCIS not explicitly mentioned in the Statute of the HIIS, but falls among other employers’ organizations.

It could be argued that the recognition of social partners should be accompanied by full and equal recognition of all individuals that are members of the community of the insured, a group based on vertical and horizontal solidarity, non-discrimination and equality. However, there is a very small number of not directly represented individuals, who might be directly affected by the decisions reached by the community of the insured when seeking health care under the public scheme. It seems however that the proportionate representation of labour and capital presents the most effective structure for carrying out tasks of corporate management with certain limitations of self-governance legitimating the decisions in relation to the not directly represented individuals.

The HIIS is operating in a two-tier system of self-government, next to the Assembly there is the Management Board.<sup>33</sup> If the Assembly’s president is elected among the representatives of the insured individuals, his deputy is elected among the employers’ representatives and *vice versa*.<sup>34</sup> From the group of representatives from which the Assembly’s president was not elected, the Management Board’s president is elected, striking a balance between the groups. In general, the Management Board’s membership resembles the ratio in the Assembly, the latter being the more important of the two bodies.

The Assembly can reach valid decisions, having either a previously mentioned internal or external effect. An example of an internally effective decision is the appointment of the HIIS

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<sup>32</sup> Article 14 of the Statute of the Health Insurance Institute of Slovenia (*Statut Zavoda za zdravstveno zavarovanje Slovenije*), Official Gazette RS, No. 87/2001.

<sup>33</sup> It can be argued that the managing board is an obsolete body that could in its functions be merged with the position of the director. See e.g. § 35a, SGB IV on the duties of the managing board.

<sup>34</sup> Article 17 of the Statute of the Health Insurance Institute of Slovenia.

Director General or the management of the financial surplus. An example of an externally effective decision is e.g. the determination of the maximum amount of co-payments. In both cases a quorum is set, i.e. more than a half of both groups or categories of its members have to be present in order for the Assembly to reach a valid decision.<sup>35</sup> Tasks of the latter among others comprise the determination of the policy and strategy for the development of the mandatory health insurance, setting the principles and guidelines for its implementation and financing, developing a proposal for contribution rates to be adopted by the state parliament, defining the scope of rights i.e. medical services, standards and norms of the mandatory health insurance in accordance with the legislative health care and health insurance act (ZZVZZ) and the amount of co-payments, after which the insured persons can claim medical services without limitations.

At the same time, the Assembly has the possibility to comment on the national health care policy. Its members also appoint the HIIS representative in the Assembly of Vzajemna Mutual Health Insurance Company, Slovenia's largest insurance company specialized in supplementary health insurance (insurance for co-payments). As an autonomous, state-independent and self-administrative institutions administering the mandatory health insurance, the HIIS most importantly possesses the power of drafting general legal acts (autonomous rules and regulations) concerning the exercise of rights from the mandatory health insurance. However, the latter have to be in line with legislative acts and international law, and ought only to determine the methods in which rights are exercised.<sup>36</sup>

Social partners acting in the capacity of members of the mandatory health insurance in accordance with the principle of self-governance and decentralization in possess powers of directly influencing the administration of the mandatory health insurance in Slovenia. They also have an indirect influence on the administration of the supplementary health insurance and determine the way rights stipulated by the legislator are exercised by the (insured) individuals.

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<sup>35</sup> Article 19 of the State of the Health Insurance Institute of Slovenia.

<sup>36</sup> Unfortunately, that is not the case with the current Rules on the mandatory health insurance. The latter namely commonly stipulate the scope of rights and obligations stemming from the mandatory health insurance, a power reserved for the legislator. See: Rules on the mandatory health insurance (*Pravila obveznega zdravstvenega zavarovanja*), Official Gazette RS, No. 79/1994, last amended in 2017.

Nevertheless, the majority of the Assembly's decision or at least the most important ones require formal approval of the government. Among them are drafting and amending the statute, the financial plan and the final balance report.<sup>37</sup> The parliament (not the government) gives consent to the appointment of the General Director, which shows the importance of health insurance.<sup>38</sup>

Nevertheless, the balance reached with the state's exclusion from appointing representatives into the managing bodies of the HIIS, seems to be of little importance at the end. The social partners' role or, more precisely, the role of state-independent representatives of the insured individuals and the employers, and their recognition is therefore limited. It could become more effective if the state limited its activities to the task of legal, administrative and financial supervision over the HIIS' activities.

The decline in the level of self-governance due to strong powers of the legislator was for instance also noticed in Germany, a country in which the social insurance model is historically built on the notion of self-government (*Selbstverwaltung*) of the insured and the employers,<sup>39</sup> with a number of provisions regulating the carriers' structure, the obligation of management cost coverage, maintaining reserves, etc., having the nature of heteronomous (state) and not autonomous legal rules. As in the case of Slovenia, a shift in powers towards the state, thus also away from social partners, could be observed. Such a shift may be perceived as legitimate, if it mirrors the increased role of the state in social insurances.

#### **4.2.2. Pension and disability insurance**

Unlike the HIIS, PDIIS is administering the mandatory pension and invalidity insurance<sup>40</sup> in a system of single tier self-government. Its managing bodies are the Council and the Director

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<sup>37</sup> Article 70 of the Health Care and Health Insurance Act.

<sup>38</sup> Article 29 of the State of the Health Insurance Institute of Slovenia.

<sup>39</sup> See: § 29, SGB IV.

<sup>40</sup> For a comprehensive review of the structure of the pension and disability insurance scheme including both the first and the second pillar see: Kresal et al. (2016), p. 169 and the following.

General, appointed by the Council (in accord with the government), without including the parliament in the decision-making process.<sup>41</sup>

The Council, the PDIIS' only self-governing body, is composed of 27 members: 7 representatives of representative trade union confederations at the state level, 1 representative of a representative organization for the working disabled individuals, 7 representatives of the employers at the state level, 7 representatives of the government, 1 representative of the Student organization of Slovenia, 3 representatives of pensioners' organisations at the state level, and 1 representative from the PDIIS' employees.<sup>42</sup>

In comparison to the Assembly of the HIIS, the PDIIS Council has fewer members, which is in line with the trend of the so called lean-management. What is more important than the number of representatives, is the structure of the Council's membership. The question of who is represented and even more so, who holds the majority of votes. The government namely has a larger share of votes, with representatives acting in direct governmental capacity and not merely being appointed by the state as employers' representatives. Conversely to the HIIS Assembly, in the PDIIS' Council, insured individuals do not have the majority of votes,<sup>43</sup> despite the fact that it is the rights and obligations of insured persons that are decided upon.

The Council's powers, same as the previously mentioned HIIS Assembly, can have either an internal or external effect and comprise, among others, the following activities: indexation of pensions and other benefits, adoption of the financial plan and annual report of the PDIIS, general act and statute adoption, and monitoring of the financial situation of pensioners and disabled workers.<sup>44</sup> Looking at the stipulated rights and obligations, it seems that the PDIIS Council comprised of several categories of insured individuals – that like in the case of the previously discussed HIIS Assembly to a large degree coincide with the category of social

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<sup>41</sup> Article 187 of the Pension and Invalidation Insurance Act (*Zakon o pokojninskem in invalidskem zavarovanju - ZPIZ-2*), Official Gazette RS, No. 96/2012, last amended in 2017.

<sup>42</sup> Article 186 of the Pension and Invalidation Insurance Act.

<sup>43</sup> Among 27 members, 14 members are representatives of the state and the employers.

<sup>44</sup> Article 186 of the Pension and Invalidation Insurance Act.

partners – does not possess as much powers as the HIIS Assembly or that the powers are not as decisive as in the case of the latter.

Given the fact that the state possesses more obligations but also more powers in the field of pension and disability insurance, it is not surprising that it has given less recognition to social partners in the institutional framework of the pension and disability insurance. A fact that might to some extent also resemble the relationship between members of the insurance community, to which the principle of solidarity applies differently than in the case of healthcare and where the insured person is seen more as an individual earning his proprietary safeguarded old-age benefit.<sup>45</sup>

This more individualistic approach might present legitimate grounds from shifting the powers away from the civil society, thus also away from the social partners, and onto the state, the final guardian of one's earned benefit in case of a financial downturn experienced by the insurance carrier. Moreover, the state has taken over part of financial burden of the employers and primarily co-finances the pension and disability insurance by taxes. Its role is not just in covering possible losses.

Nevertheless, the role of social partners concerning old-age security becomes evident when observing formal processes and informal political pressures taking place between employers', employees', and the representatives of the state. Such was for instance the case with proposed new pension and disability insurance act (ZPIZ-2). The Act has been passed by the parliament (also supported by one of the parties from the opposition) but it could not be enforced. The Federation of Free Trade Unions of Slovenia (FFTUS) has prevented the promulgation and publication of the Act in the Official Gazette with a request for a referendum. Their arguments included the belief that the economic crisis should not be solved on the shoulders of workers, the fact that consensus in the ESC was not reached, and the claim that they have a better proposal (which was never published). A time period has been set in which sufficient (more than 40.000) signatures of voters supporting such a request had to be collected. However – and now it becomes really interesting – during the period of collecting the voters' signatures, the parliament

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<sup>45</sup> See e.g. Strban in: Pavčnik, Novak (ed.) (2013), p. 376 and the following.



(supported by the government) addressed a question to the Constitutional Court, whether a referendum regarding a pension reform would be admissible under the Constitution. The main argument was, that the rejection of the Act at the referendum would cause unconstitutional consequences. From 2021 onwards, pensions could not be guaranteed, also due to the required long transitional period, and that the constitutional right to social security, explicitly including the right to a pension, would be breached.

Surprisingly, the Constitutional court rejected such arguments. It established that the constitutional right to a referendum (which was at that time rather broadly construed) could be limited only to protect another constitutional value (the right to social security), that has already been breached. In other words, a referendum could only be prohibited if the existing pension legislation would be unconstitutional and the adoption of the Act would be necessary to remedy the situation. In addition, macroeconomic, public finance and demographic arguments (which might justify the pension reform in the future) could not be considered by the Constitutional Court. Hence, the existing legislation was not deemed unconstitutional just because it could prove to be unsustainable in the future due to reasons residing outside of the Constitution.<sup>46</sup> This decision raised many questions, among them, could there e.g. be a referendum on tax legislation, or are there some fields that should be exempted from the referendum?<sup>47</sup>

In the case of ZPIZ-2, the social partners used the institute of a referendum initiative, a tool of democratic participation available to every single voter. After one gathers 2.500 signatures and submits the initiative in accordance to the law, the period in which 40.000 signatures are to be gathered is set.<sup>48</sup> Social partners do not possess a referendum request, obliging the parliament to call a referendum. However, such powers are apart from one third of parliament members and 40.000 voters in the hands of the National Council, the representative body of social, economic, professional and local interests.<sup>49</sup>

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<sup>46</sup> Decision No. U-II-1/11, 14.3.2011.

<sup>47</sup> See Article 90 of the Constitution of the Republic of Slovenia, since 2013 explicitly excluding legislation on taxes, customs and other compulsory contributions from the referendum.

<sup>48</sup> Article 16 of the Referendum and Popular Initiative Act (*Zakon o referendumu in ljudski iniciativi - ZRLI*), Official Gazette RS, No. 26/2007.

<sup>49</sup> See Article 96 of the Constitution of the Republic of Slovenia.

### 4.2.3. Employment services

Like the previously mentioned public institutes operating in the field of social security (healthcare, pension and disability), The ESS is also organized as a single, territorially centralized public institute at the state level, regionally and locally deconcentrating its administrative activities throughout the country through its regional offices and local units. Its undertakings have in part the nature of a public service and in part the nature of a public authority. Lifelong career orientation and employment brokerage, the two types of labour market services, and the active employment policy, executed in cooperation with social work centres, are being carried out as a public service, whilst the unemployment insurance is organized as a public authority.<sup>50</sup> Categorizations of activities as public services or as public authority effect the way rights and obligations are distributed among the government and other agents acting in the field. However, the majority of tasks in the field of labour market are in the state's competence.

The latter has to provide conditions for the successful functioning and development of both the compulsory and voluntary insurance and is also acting as a monitoring or supervising body. It also possesses the obligation of sustainably providing funds for the operation of the employment services, which is the public service side of ESS' activities. At the same time, the state provides the majority of funds for unemployment insurance, since the contribution levels are rather low.<sup>51</sup>

The ESS is managed by three bodies: The Employment Service council, the Expert council, an expert collegiate body of the ESS composed of 5 external experts and 2 experienced employees of the ESS, and the Director, presenting the institution's day-to-day managing body. The Council is composed of 13 members, 6 of which are appointed by the Government stemming from four

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<sup>50</sup> Article 74 in relation to article 15 of the Labour Market Regulation Act (*Zakon o urejanju trga dela - ZUTD*), Official Gazette RS, No. 80/2018, last amended in 2015.

<sup>51</sup> The rate stipulated for the insured individual is 0,14% and for the employer 0,06%. See Article 14 of the Social Security Contributions Act (*Zakon o prispevkih za socialno varnost - ZPSV*), Official Gazette RS, No. 18/1996, last amended in 2014. During the period of and after the financial crisis, the employer concluding a contract of employment for an indefinite time was exempt from paying the contribution for 2 years. If he concluded a fixed-term contract, he was to pay five times the amount of the contribution, i.e. 0,3%, throughout the employment period. See: Article of 39 of the Labour Market Regulation Act (*Zakon o urejanju trga dela – ZUTD-A*), Official Gazette RS, No. 21/2013.

different ministries.<sup>52</sup> Further 3 members are appointed by employer associations at the state level and 3 by representative trade unions at the state level, and 1 member is elected by the ESS' employees. The Council's powers are mostly limited to acts of proposal. It is the body adopting the ESS's statute, although it has to obtain governmental consent. Its obligations and powers are also prescribed in the statute, the autonomous act also setting rules of appointing or electing the Council's members.

It should not come as a surprise that the Government, also appointing the ESS's Director (who proposes the members of the Expert Council to be appointed by the Council), has the majority of votes in the relation towards social partners. Its powers are a legitimate reflection of its obligations, and once again show that health insurance might be the scheme most strongly associated with its insured individuals in the light of two forms of solidarity (vertical and horizontal), non-discrimination and equality.

Social partners can however have a more significant institutional role to play in the field of unemployment benefits, as it is for example the case in Belgium. Under the Belgian unemployment insurance scheme, social partners are not only included in the management committee supervising the National Employment Office, but three trade unions, now acting in a different legal capacity than mere associations, also serve as payment agencies distributing unemployment benefits. For the non-unionized workers, the cases are handled by the Auxiliary Fund for the Payment of Unemployment Benefits, organized as a public agency for workers not wishing to join a trade union.<sup>53</sup>

Social partners also possess a significant institutional (and other) role in the field of unemployment in Finland, where the majority of wage earners' unemployment funds (except the General Unemployment Fund, YTK)<sup>54</sup> are run by trade unions with social partners administering

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<sup>52</sup> The ministry competent in the field of labour (3 members), in the field of finance (1 member), in the field of education (1 member), and in the field of higher education (1 member). See Article 76 of the Labour Market Regulation Act.

<sup>53</sup> See: Faniel in: Lefresne (ed.) (2010), pp. 81-84.

<sup>54</sup> European Employment Policy Observatory (2016), p. 18.

the Unemployment Insurance Fund.<sup>55</sup> Regarding the administration of unemployment insurance, the case is similar in Sweden,<sup>56</sup> where unemployment insurance funds are administered by a variety of social partners (trade unions) and coordinated by the Unemployment Insurance Union. The system is apart from tax allocation financed by membership fees of affiliation to voluntary schemes, presenting 40 to 45% of the unemployment insurance funds after the reform took place ten years ago. However, before the reform, 80-90% of funds were allocated by taxes. The case is for instance different in Norway, where social partners are claimed not to have a particular role in the administration or organization of the unemployment benefit system, however, consultation and exchange of opinion in a tripartite format is claimed to be a common and legitimate element of the system.<sup>57</sup>

## 5. ECONOMIC AND SOCIAL COUNCIL(S)

The Economic and Social Council of the Republic of Slovenia (ESC), established in the year of 1994, is the main consultative and coordinative body in the field of social dialogue and social agreements.<sup>58</sup> Its structure is a reflection of the ILO's tripartite structure including not only employers' and employees' organizations but also the Government as a third "social" partner. All partners have an equal number of members and an equal number of votes.

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<sup>55</sup> Kauhanen, Merja, Contribution to EIRO comparative study on social partners and the social security system – Case of Finland, available at: <https://www.eurofound.europa.eu/observatories/eurwork/comparative-information/national-contributions/finland/contribution-to-eiro-comparative-study-on-social-partners-and-the-social-security-system-case-of-0> (August 2017)

<sup>56</sup> <https://www.eurofound.europa.eu/observatories/eurwork/comparative-information/national-contributions/sweden/sweden-social-partners-involvement-in-unemployment-benefit-regimes> (August 2017)

<sup>57</sup> See the case of Norway at: <http://www.eurofound.europa.eu/observatories/eurwork/comparative-information/national-contributions/norway/contribution-to-eiro-comparative-study-on-social-partners-and-the-social-security-system-case-of-0> (August 2017) See also: Vennesland, Tom E., Norway: Social partner's involvement in unemployment benefits regimes, available at:

<https://www.eurofound.europa.eu/observatories/eurwork/comparative-information/national-contributions/norway/norway-social-partners-involvement-in-unemployment-benefits-regimes> (August 2017)

<sup>58</sup> For instance, the Croatian system includes an independent body called the Service for Social Partnership, a successor to the Office for social partnership, organized at the Ministry of Labour and Pension System, promoting social dialogue and social partnership and acting as a supporting service to the unions, employers, members of the civil society, and local and regional self-government, and the government. For its activities see: Art. 61. of the Regulation on the internal organization of the Ministry of Labour and Pension System, Official Gazette RC, No. 21/2017.

The employers' representatives are appointed by employers' organizations and chambers representative at the state level. The employees' representatives are appointed by trade unions or confederations, also representative at the state level.<sup>59</sup> The state's representatives are appointed by the Government.

According to the Rules of Procedure, the ESC is active in the field of social agreements, social rights and rights stemming from social insurances, employment and labour policies, health and safety at work, collective bargaining, prices and taxes, economic system and policies, etc. It is also actively included in the processes of legislation drafting as a consultative body, whose decisions are considered to be binding for (working) bodies of the three partners included in its structure. If coordinated, social partners can outvote the state and thus, if the decisions are respected by the partners' bodies and the parliament, can have a strong effect in the field of social security and industrial relations.

Such forms of recognition or participation of social partners in the processes of shaping the social security system of a country are of course not a Slovenian exception, similar bodies can be observed in several European countries. For instance, the French legal order includes a constitutional assembly, consisting of 69 employees' representatives, 27 representatives of private industry, trade and services, 20 representatives of farmers, 10 representatives of the crafts, 4 representatives of liberal professions, and 10 qualified individuals in the field of economics. 60 members of the body come from the ranks of social and territorial cohesion and community life, and 30 from the ranks of environmental conservationist. Among others, the tasks of the French Economic, Social and Environmental Council, with its members basically covering the civil society as a whole, are to advise the government and parliament, and to participate in the development of economic, social and environmental policies, and promoting dialogue between different socio-professional groups to shape proposals in the public interest.<sup>60</sup>

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<sup>59</sup> The list of representative trade unions is available at:

[http://www.mddsz.gov.si/si/delovna\\_podrocja/delovna\\_razmerja\\_in\\_pravice\\_iz\\_dela/socialno\\_partnerstvo/seznam\\_reprezentativnih\\_sindikatov/](http://www.mddsz.gov.si/si/delovna_podrocja/delovna_razmerja_in_pravice_iz_dela/socialno_partnerstvo/seznam_reprezentativnih_sindikatov/) (August 2017)

<sup>60</sup> See: <http://www.lecese.fr> (August 2017)

The case is similar with the Spanish Economic and Social Council (ESC), an advisory body to the government established in the year 1991 with the Law on the Creation of the Economic and Social Council<sup>61</sup> also comprised of employers' and employees' representatives, and representatives of other interest groups.<sup>62</sup> The ESC's opinions on draft legislation and royal decrees in the field of socio-economic and labour policies are of a mandatory nature.<sup>63</sup>

Social and economic councils or similar bodies exist also in many other countries, e.g. in the Netherlands, Portugal, Bulgaria and Greece, whilst the Belgian system includes two separate bodies both consisting members from the ranks of employers' and employees' organizations, the Central Economic Council and the National Labour Council.

The impact of such forms of social partners' recognition on social security is dependent upon the organizational structure and legal status of the relevant bodies – whether they are independent in its organization and activities, or are they subject to state's powers, either by not being organized as a fully independent body (possibly when acting as a service of the ministry), or by being structured in a way that the state or one group of members can outvote the other(s). Even more important is the institutional role of such bodies and the nature of their decisions – are they acting as consulting bodies or for example partake in social dialogue procedures, do they have to be consulted by other bodies or is the call for advice left to the discretion of the latter, are they formally included in drafting procedures, and, most important, are their decisions in whatever way binding. In the case of Slovenia, the ESC's tripartite structure is a reflection of equal representation of all partners and their interests,<sup>64</sup> with the Council's decision having a binding effect on individual (working) bodies of all three partners.

## **6. SOCIAL DIALOGUE**

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<sup>61</sup> Ley 21/1991 de 17 de junio, de Creación del Consejo Económico y Social, Official Gazette from the 18<sup>th</sup> of June 1991.

<sup>62</sup> See Art. 2. of the Law on the Creation of the Economic and Social Council.

<sup>63</sup> See: <http://www.ces.es> (August 2017)

<sup>64</sup> See Article 5 of the Rules on functioning of the Economic and Social Council (*Pravila o delovanju Ekonomsko-socialnega sveta*), Official Gazette RS, No. 1/2017.

Another important form of recognizing social partners dealt with in this article are the two forms of social dialogue. The first one, commonly carried out at the enterprise and sectoral level,<sup>65</sup> is taking place between employers' and employees' representatives (bipartite social dialogue). The second one, usually carried out at national or sub-regional level,<sup>66</sup> is taking place among the employers' and employees' representatives and the government acting as the third "social" partner (tripartite social dialogue). ILO however excludes the government from the term *social partner*. In general, social dialogue includes all types of negotiation, consultation and exchange information among the two or among the three groups of representatives to achieve social and economic progress.<sup>67</sup> Special bodies, like the ESCs can also play an important role regarding social dialogue. According to ILO, the latter it is a vital mechanism for – among other – translating economic development into social progress, and social progress into economic development, and for guaranteeing social cohesion and the rule of law.<sup>68</sup>

The main aim of the bipartite social dialogue is to draft and implement collective agreements that can, apart from mostly industrial relations, also include social rights of workers, e.g. solidary assistance in cases of invalidity, longer disease or death of a family member. Collective agreements are a direct reflection of state's recognition of different members of the civil society, in this case employers and employees, namely by recognizing their right to draft autonomous regulation, sometimes with direct reference to collective agreements in the legislation<sup>69</sup> or even in the constitution.<sup>70</sup> In that sense, the autonomy of collective bargaining enjoys constitutional protection from the interference of the legislator.

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<sup>65</sup> Bronstein (2003), p. 37.

<sup>66</sup> *Ibid.*, p. 37. At the level of the enterprise, the Slovenian legislation for example provides for the participation of a worker's director or a worker's representative among executive directors of the enterprise representing the workers regarding human resources management and social affairs. See Article 84 of the Worker Participation in Management Act (*Zakon o sodelovanju delavcev pri upravljanju – ZSDU*), Official Gazette Rs, No. 42/2007. The form of workers' participation depends on the size of the enterprise and its format of management (tier or two-tier system). Forms of workers' participation at the level of the enterprise – next to the trade unions – is common in a number of European legal orders. A typical representative of an order including a dual system of representation with the inclusion of both the trade unions and workers' councils is Germany. See: Kresal Šoltes (2011), pp. 166-168. See also: Directive 2009/38/EC, from the 6<sup>th</sup> of May 2009.

<sup>67</sup> ILO (2013), p. 5.

<sup>68</sup> ILO (2008), pp. 7, 10.

<sup>69</sup> In Slovenian law see: Collective agreements act (*Zakon o kolektivnih pogodbah – ZkolP*), Official gazette RS, No. 43/2006, last amended in 2008.

<sup>70</sup> The Croatian constitution for instance includes a direct reference to collective agreements in the case of social security and social insurance of workers and their family members (see Art. 57).

As it is the case with both forms of social dialogue, the latter is a reflection of democratic participation in social and economic affairs. Of course, bipartite social dialogue apart from collective bargaining also includes any other forms of negotiation and cooperation, also dispute prevention and resolution.<sup>71</sup> At the same time the government can also partake in the bipartite social dialogue as an (major) employer in the public sector. In that capacity, it is of course not acting as a superior subject recognizing others, but as an equal contractual party to the employees' representatives. Collective agreements, the most important formal results of the bipartite social dialogue, are namely governed by the autonomy of its contractual parties. However, as a rule they ought to be in line with the constitution and the law, the country's public order, and also with the fundamental principles of international law and binding international treaties.<sup>72</sup> Under the Slovenian legislation, as it is also the case with several other legal orders,<sup>73</sup> collective agreements can in general only stipulate more favourable rights than the legislative act itself (principle of *in favorem laboratoris*).<sup>74</sup> This applies for instance to a longer period of annual leave, higher compensations, bonuses, etc. The rights can be limited only in cases explicitly stipulated by law.

In the case of EU Member States,<sup>75</sup> it can be observed that the subject of collective bargaining is defined broadly both in legislation and in practice, e.g. in Germany, where the social partners' autonomy is provided for by the Constitution (Article 9, Freedom of Association), and in France, where collective agreements include not only provisions on labour and employment conditions, but also on vocational training, education and social guarantees (Art. L 2221-1 and 2221-2, *Code du travail*).<sup>76</sup> A broad normative autonomy is also an element of Scandinavian, and of the Spanish and Belgian legal orders, the former of the two also including economic affairs, and the latter e.g. provisions stipulating the establishment of funds offering additional levels social

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<sup>71</sup> ILO (2013), p. 5.

<sup>72</sup> See: Kresal Šoltes (2011), pp. 158, 170-173.

<sup>73</sup> E.g. in France, see: *ibid.*, pp. 190-191.

<sup>74</sup> Principle of *in favorem laboratoris* is also explicitly recognised in the case law of Slovenian courts, e.g. judgment of the Slovenian Supreme Court No. VIII IPS 125/2005, SI:VSRS:2005:VIII.IPS.125.2005, or conclusion No. VIII DoR 45/2016-10, SI:VSRS:2016:VIII.DOR.45.2016.10.

<sup>75</sup> See e.g.: Kresal Šoltes (2011), p. 24 and the following.

<sup>76</sup> See: Kresal Šoltes (2011), pp. 216-217.



security at the sectoral level.<sup>77</sup> In Austria agreements include provisions concerning maternal and paternal leave, family member care, etc.

It can be argued, that the parties (social partners') normative autonomy, as a direct reflection of their state's recognition normally includes all labour and employment related affairs and also workers' social guarantees, that is social rights.<sup>78</sup> For instance the previously mentioned solidary assistance, work-absence compensations, health condition as criteria for worker retention in case of layoffs, etc. Such broad powers of social partners' autonomous legal regulation should come as no surprise, since they are grounded in a number of European legal traditions, as noted usually stemming from the constitutional category of freedom of association or its more concrete manifestation, i.e. freedom of trade unions (see Art. 76 of the Slovenian Constitution), and a number of international documents from the ILO,<sup>79</sup> the UN and Council of Europe. The autonomy of collective bargaining therefore has a status of a fundamental right and is a general principle of the EU law.<sup>80</sup> However, collective bargaining is also faced with several limitations also stemming from the EU law, namely from limitations posed by the free movement of persons and services and the freedom of establishment.

Regarding the second kind of social dialogue, i.e. the tripartite social dialogue also including in its process the government, the two social partners are not recognized as subjects having the power of drafting and implementing autonomous legislation (i.e. collective agreements), but as equal parties involved with the government in any forms of negotiations, discussions, exchange of opinion, etc., aiming to settle specific questions or in general bring about the long-term welfare of the society, development and social peace. The wider notion of the tripartite social dialogue (or tripartite cooperation), often also including the fourth component, i.e. members of a

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<sup>77</sup> *Ibid.*, p. 218-219.

<sup>78</sup> It can generally be observed, that collective agreements can also stipulate social rights or regulate matters of social security, – a fact that has for instance in Belgium been confirmed in an opinion delivered by the Belgian Council of State (Adv. RvS, Parl. St. Senaat 1966-67, nr. 148) – but it is yet to be statistically examined to what extent they do so in different legal orders. Looking at collective agreements under the Slovenian and Croatian legal order, they usually contain provisions regarding solidary aid (assistance).

<sup>79</sup> E.g. Convention No. 87 on Freedom of Association and Protection of the Right to Organise, Convention No. 98 on the Right to Organise and Collective Bargaining (both among the eight ILO fundamental Conventions), Convention No. 154 on Collective Bargaining.

<sup>80</sup> Kresal Šoltes (2011), p. 34.

variety of NGO's and other interest groups,<sup>81</sup> could more precisely be understood as including all of the above-mentioned elements, striving towards welfare and social peace, whilst the more narrowly interpreted notion of tripartite social dialogue could be in the case of Slovenia more formally associated to the conclusion of a social agreement.

The most important formal result of the social dialogue concluded among employers', employees' and government's representatives is namely supposed to come in the form of a binding agreement concerning not only fiscal and tax affairs, competitiveness of the economy, industrial relations, but also social security and social assistance, the establishment and implementation of a long-term care scheme and personal assistance,<sup>82</sup> cultural development, and also "provisions" on the social dialogue itself. The agreement also stipulates its validity. However, the agreement is binding only as long as all parties adhere to it and can be regarded as a more or less policy-oriented document. It does not stipulate rights and obligations out of which a clear legal sanction would follow, but merely tasks prescribed to different parties in different fields of the agreement.

In that sense, it could be argued that the second form of social dialogue offers more potential in bringing about greater change in the field of social security if the social partners are able and willing to agree on proposed changes and its implementation, and the first form not being able to bring about changes to the system as a whole, but at the same time presenting a more effective tool of implementing changes at the company or industry level. Looking at the Slovenian example, the case of long-term and personal assistance schemes included in the social agreement for the year 2015 and 2016 backs up the claim, since not following the agreement, the act on personal assistance (ZOA) did not include a much-needed long-term care scheme. However, according to the Slovenian Governments' observations in the period from 1994 to 2004, the processes of tripartite social dialogue including long processes of negotiation and coordination, in which trade unions opposed the extension of the working period and the increase in the retirement age, have led to some important legislative changes, i.e. a then new ension and

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<sup>81</sup> [www.vlada.si/fileadmin/dokumenti/cns/doc/050415155619A\\_20sv13.doc](http://www.vlada.si/fileadmin/dokumenti/cns/doc/050415155619A_20sv13.doc) (August 2017)

<sup>82</sup> The establishment of a long-term care and personal assistance was one of the goals stipulated in the Social agreement for the 2015-2016 period. However, the Personal assistance act (*Zakon o osebni asistenci* – ZOA), Official Gazette RS, No. 10/2017, date of application: 01. 01. 2019, did not establish a social insurance for long-term care.

invalidity insurance act.<sup>83</sup> More recently, social partners have called for tripartite negotiations regarding the healthcare reform proposed by the Ministry of Health.<sup>84</sup>

## 7. CONCLUDING REMARKS

We can conclude that social partners possess different, but important tools of influencing the social security system, as it is the case of influencing other fields, e.g. the field of industrial relations. Such possibilities are reaching all the way from informal processes, e.g. processes of social dialogue possibly not resulting in a formal document or statement, to processes aiming at achieving what is supposed to be a binding result, and those reaching fully formally binding decisions. Such are mostly processes taking place within the framework of different institutional structures, fore and foremost social insurance carriers, but also by means of drafting and implementing autonomous rules having the possibility of stipulating concrete social rights or enhancing the level of the ones that are already statutory prescribed. The latter of course being collective agreements.

What is common to all cases is the fact the state or the government is the subject empowering social partners in the field of social security, whether by recognizing them as equal contractual or negotiation parties, or by stepping aside and allowing them to act as autonomous subjects, staying true to the notion of decentralization and self-government. However, in the end the state always remains responsible for guaranteeing social security with its legislative power, which has to be exercised in accordance with national constitutions, EU and international law.

At least in the case of Slovenia, it could be argued that the insured individuals (and the employers), selected among the lines of social partners, are the ones to the largest extent financing the health insurance system and therefore obtaining the most rights and influence in that field of social security. Thereby the largest inclusion of social partners can be observed within the mandatory health insurance scheme. However, the tables start to turn in the case of

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<sup>83</sup> [www.vlada.si/fileadmin/dokumenti/cns/doc/050415155619A\\_20sv13.doc](http://www.vlada.si/fileadmin/dokumenti/cns/doc/050415155619A_20sv13.doc) (August 2017)

<sup>84</sup> See: <https://www.eurofound.europa.eu/observatories/eurwork/articles/slovenia-social-partners-have-mixed-reactions-to-proposed-healthcare-reform> (August 2017)

pension and disability insurance, in which the government is obtaining more and more influence for reasons of financially disburdening the employers, and nearly make half of a circle in the case of unemployment insurance and especially the wider notion of employment services. Nevertheless, social partners are also involved in other processes of influencing the government's unemployment policies, namely the process of social dialogue. As observed in the case of ZPIZ-2, such is also the case with retirement (pension) policies.

It can be concluded that the inclusion of social partners in the decision-making processes in social security is legitimate in all cases, in which it is reflecting – fore and foremost by number of votes – the balance between rights and obligations posed on the state and on the social partners as representatives of the insured individuals. Apart from the state possessing the major obligation of establishing and in a Bismarckian scheme commonly co-financing social insurances, a reason speaking in favour of certain limitations of institutional self-government is the fact that legislator's and government's decisions are binding both for the directly represented and not directly represented individuals. The case is different in a small number of cases where the decisions of the insured can have an effect of the legal status of the not directly represented, an issue only briefly addressed in this article.

On the other hand, it is important that social partners are included in different processes of influencing the social security system or even possess autonomous tools of granting (a higher) level of social rights not only because they co-finance the schemes. Such an arrangement is namely a reflection of true democratic participation of maybe the most important members of the pluralistic civil society and their different voices in processes that at least in long-term affect one's quality of life and enhance his or her freedom.

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