

Transnational collective bargaining and the institutionalized “social dialogue” at EU level

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Abstract

I. Collective bargaining developments

Traditional industrial relations limited the scope of national collective bargaining to the respective nation state. The logic behind such limitation was the fact that collective agreements represent labour market cartels. The scope of the relevant labour market therefore reflects the scope of the collective bargaining process. As soon as European integration created not only a common market for goods, services and capital but also for labour, restrictions to the scope of collective bargaining become dysfunctional: Transnational companies legally may take advantage of a common market by avoiding costly labour standards in one given country through relocating business activities to another country, thereby playing off conditions of employments for the workforce of different affiliated companies against each other. Collective bargaining in principle is established for avoiding a race to the bottom in contracts of employment. At national level mainly two options exist for meeting this goal: Statutory regulations creating legally binding effects for collective agreements and powerful industrial relation systems guaranteeing the same effect on factual basis. Additionally, the protective dimension of collective bargaining depends on the coverage of collective agreements. In several EU Member States, union density nowadays is in decline which can possibly also limit the coverage of collective agreements. In several Central European EU-Member States without a former tradition of collective bargaining, coverage rates from the start were in such low range¹ and seem unable to improve. Given such limitations, national collective agreements may no longer be the best option for guaranteeing fair conditions of employment to workers throughout the EU Member States.

In order to transfer to EU-level also the protective effect on working conditions in an integrated labour market to EU level, also the bargaining process has to develop a transnational scope. As EU fundamental market freedoms developed the potential to diminish the protective effects of collective bargaining at national level, potential counterbalancing tools also should be established at EU level. Can agreements resulting from transnational bargaining create reliable rights and obligations, and if so, for whom? Could they benefit even individual workers and employers? That the EU in principle is fully aware of the necessity of furthering transnational bargaining is reflected in the Charter of Fundamental Rights (Article 28) which guarantees a “right to negotiate and conclude collective agreements at the *appropriate level*”. At EU level, existing transnational bargaining instruments nevertheless don’t resemble national collective bargaining structures, as they lack both, auxiliary legislation and powerful industrial relations. Instead, the “social dialogue” is implemented, involving both sides of industry in the EU legislative process on the one hand and providing

¹ Anne Branch, The evolution of the European Social Dialogue towards greater autonomy- challenges and potential benefits, *International Journal of Comparative Labour Law and Industrial Relations*, 2005, pp. 321-346, p. 325.

opportunities for an autonomous contractual relationship between them, on the other. This had been described as one of the features of EU level industrial relations and therefore being fundamental to the European social model². To provide effective protection, transnational instruments need be capable of filling the gaps left at national level. Whether those preconditions can be met, still remains questionable.

II. Institutionalized Social Dialogue

Dating back to the “Social Protocol”³ annexed to the Maastricht Treaty of 1992, the institutionalized social dialogue is an early instrument for strengthening the social element of the European Union which originally focused much rather on economic than social integration. It is noteworthy that this Protocol itself reproduced the content of an agreement between social partners at EU- level⁴ which had been able to influence the political decision on how to reform the Treaties. After late political opinion changes in the UK⁵, this Social Protocol was included directly into Title XI of the EC-Treaty, Maastricht version. Meanwhile Articles 154 and 155 of the TFEU (in the consolidated version of Lisbon) establish the legal foundation for a social dialogue at Union level⁶. Both sides of industry, called the European social partners, have an active role to play in the legislative process. The EU Commission when proposing draft legislation to the Council consults employers’ and employees’ organizations in the social policy field⁷. While this consultative function became increasingly elaborated, the social dialogue meanwhile goes beyond the mere request for an opinion. Articles 154 (2) and (3) TFEU still oblige the Commission to firstly ask social partners’ opinion on the possible direction of legislative actions and secondly on the content of the envisaged legislative proposal. Additionally to commenting on the process, social partners can ask the Commission to stop its legislative proposal for a period of (regularly) nine months to allow for social partner bargaining for regulating the issue concerned through a collective agreement. Independent from any legislative proposals Articles 154 (4) and 155 (1) TFEU provide social partners with the option to initiate autonomous negotiations between them on any topic they wish to discuss, and to create contractual relations by concluding agreements either at sector level or cross industry. At both levels regular activities have taken place; for evaluating their effectiveness, the relevant mechanisms have to be looked at in some details.

² Even the very existence of a European social model prominently has been called into question by ECB president Draghi: interview with the *Wall Street Journal*, 23 February, 2012.

³ Olaf Deinert, *Der europäische Kollektivvertrag: rechtstatsächliche und rechtsdogmatische Grundlagen einer gemein europäischen Kollektivvertragsautonomie*, Nomos, 1999, p. 165 sequ.

⁴ Manfred Weiss, Social Dialogue and collective bargaining in the framework of social Europe, In: Spyropoulos /Fragiere (eds.), *Work and social policies in the new Europe*, 1991, pp.59-78, p.66.

⁵ Heinz-Dietrich Steinmeyer, *Der Vertrag von Amsterdam und seine Bedeutung für das Arbeits- und Sozialecht, Recht der Arbeit*, 2001, pp. 10-23, p. 11.

⁶ Brian Bercusson, *European Labour Law*, 2nd ed. 2009, pp. 521-562.

⁷ Stijn Smismans, The European Social Dialogue between constitutional and labour law, *European Law Review*, Volume 32, 2007, pp. 341-364, p. 343.

1. The sector level social dialogue

a) From consultation to negotiation

The European Commission promoted successfully⁸, not at least by covering the costs for their regular meetings, the establishment of “sectoral dialogue committees”⁹. Those committees are composed as bipartite bodies with a total number of participants of 40 persons maximum. Sector level social partners can initiate their establishment by jointly requesting to take part in such dialogue which will be approved upon certain conditions¹⁰, Art. 1 COM 98/500/EC: The respective parties “shall relate to specific sectors or categories and be organized at European level”; they shall “consist of organizations which are themselves an integral and recognized part of Member States’ social partner structures and have the capacity to negotiate agreements and are representative of several member States”; they shall “have adequate structures to ensure their effective participation in the work of the committees”. Practically, committees operate their membership on a basis of mutual recognition and comprise of representatives of one¹¹ (sometimes more) European trade union and employer organization, each representing several national organizations as their members. Once a committee has been established, it can agree on a definition of internal working rules, on a steering committee and a chairperson. Committee meetings shall take place at least once a year, otherwise as frequently as the members think adequate. Committees served primarily as consultation bodies to the EU Commission by giving their opinion on economic and social developments in their respective sector. Over time also their negotiating function was strengthened so that issues specifically relevant to the sector were discussed; of special concern were developments to strengthen the competitive position of the respective sector. All decisions are taken by consensus only. As some of the Committees in their internal rules explicitly exclude any conclusion of binding agreements, non-binding agreements are the rule. They nevertheless may relate to employment conditions such as working time¹² or health and safety provisions.

b) Autonomous implementation

For effective enforcement agreements would have to be implemented in one of two different ways: Either through EU institutions turning the agreement into a legislative instrument¹³ or through national social partners directing them to their respective industrial relations system.

⁸ The Committees are listed at: <http://ec.europa.eu/social/main.jsp?catId=480&langId=en>.

⁹ EU Commission, Decision on the establishment of Sectorial Dialogue Committees promoting the dialogue between social partners at European level, 20 May 1998 (98/500/ED), Official Journal 1998 L 225/27.

¹⁰ Edoardo Ales/Samuel Engblom/Teun Jaspers/Sylvaine. Laulom/Silvana Sciarra/André Sobczak/ Fernando Valdes Dal-Re, *Final Report to the EU Commission: Transnational Collective Bargaining: Past, Present, and Future*, 2006, p. 11.

¹¹ Klaus Lörcher, *Der Europäische Gewerkschaftsbund und seine Beteiligung am europäischen Arbeitsrecht*, *Neue Zeitschrift für Arbeitsrecht*, 2003, pp. 184-194, p. 187.

¹² These agreements relate to sectors excluded from the scope of application of the (general) Working Time Directive 1993/104/EC, for which sector-specific regulations deemed necessary. For obtaining binding effects, the agreements have been directed to the legislative implementation process described below: compare Directive 1999/63/EC (sea transport sector), Directive 2000/79/EC (civil aviation sector).

¹³ Prominent examples include: Working time in sea transport, Directive 1999/63/EC or working time in civil aviation, Directive 2000/79/EC.

The second option, turning to national social partners for implementation, provides the more “autonomous” solution as collective bargaining remains in the sphere of industrial relations using their specific instruments. At first sight this solution provides clear advantages over the alternative. When opting for implementation through the national social partners, bargaining committees are not bound by formal competence restrictions, so that subject matters excluded from the legislative competence of the EU could be dealt with. This option avoids reducing transnational collective bargaining to a mere pre-legislative process dependent on the initiative and political will of EU institutions to regulate certain issues. It also avoids dependency on the implementation through Member States whose governments at least partly act rather reluctantly when transposing Directives into national law. From this viewpoint the autonomous sector dialogue is capable of providing clear benefits for transnational collective bargaining¹⁴.

On the other hand, the output of the social dialogue at sectoral level could be described as “impressive”¹⁵ only in terms of their quantity. Social partners under this process issue regularly declarations, statements, opinions, recommendations, codes of conduct, or joint reports¹⁶. Many topics transcend pure labour law by including questions of enlargement of the Union, migration, the impact of the economic crisis, climate change, gender equality, employment, or health and safety. Prominently they also dealt with skills and training for enhancing the transparency and compatibility of qualifications and furthering cross-border mobility especially for young workers suffering from exceptionally high unemployment rates. Nevertheless, health and safety at the work place remains a core area of activity for social dialogue committees where they agree on measures for assessing and preventing risks or training and informing workers. They nevertheless mostly give recommendations towards national affiliates¹⁷. How effective any form of agreement finally becomes is not a matter of the institutional level of bargaining but much rather depending on the implementation.

Implementation of trans-sector agreements¹⁸ proved to be rarely fully effective. For enhancing effectiveness, agreements create reporting and follow up procedures¹⁹ by which national affiliates have to publicly take responsibility for the success – or the lack thereof – of the transnational collective agreement. That this will induce them to put extra effort into implementation is certainly not an automatic consequence. Taking the agreement on work

¹⁴ Olaf Deinert, Self-executing agreements in EC-law, In: Marc de Vos (ed.) *A decade beyond Maastricht – the social dialogue revisited*, Kluwer 2003, p. 50.

¹⁵ Stefan Clauwaert, 2011: 20 years of European interprofessional social dialogue: achievements and prospects, *Transfer*, Issue 17, 2011, pp. 162-179, p. 172; Stijn Smismans, The European social dialogue between constitutional and labour law, *European Law Review* 2007, p. 344.

¹⁶ European Commission, *Industrial Relations in Europe*, 2012, p. 273.

¹⁷ Manfred Weiss, Transnationale Kollektivvertragsstrukturen in der EG: Informalität oder Verrechtlichung?, In: Horst Konzen/Sebastian Krebber/Thomas Raab/Barbara Veit/Bernd Waas (eds.), *Festschrift Rolf Birk zum siebzigsten Geburtstag*, Mohr Siebeck, Tübingen 2008, p. 964; Volker Rieble/ Sebastian Kolbe, Vom sozialen Dialog zum europäischen Kollektivvertrag?, *Europäische Zeitschrift für Arbeitsrecht*, Volume 2008, Issue 1, pp. 453-481, p.461.

¹⁸ The most prominent trans-sector agreements dealt with tele-work (2002), work-related stress (2004), harassment and violence at work (2007), inclusive labour markets (2010).

¹⁹ European Commission, COM (2004) 557 final, 12 August 2004, Partnership for change in an enlarged Europe – enhancing the role of social dialogue; Ann Branch, The evolution of the European Social Dialogue towards greater autonomy: challenge and potential benefits, *International Journal of Comparative Labour Law and Industrial Relations*, Issue 21, 2005, pp. 321-346, p. 325.

related stress (2004) for an example, already the wording of the text indicated that it purported to “increase awareness and understanding of employers, workers and their representatives of work-related stress” and provide them with “a framework to identify and prevent or manage problems”. It could hardly come as a surprise that at the end of the three-years implementation period this agreement had been transposed into binding collective agreements only in few Member States²⁰, in others it has not been implemented at all or nothing has been reported on its implementation, while some States reported the agreement having “accelerated social dialogue and policy development”²¹. Even though the topic is certainly relevant for complementing the EU’s health and safety at work policy²², the agreement could not achieve more effects than having “put the issue high on the agenda at many negotiating tables”²³.

2. The Cross-Industry Social Dialogue

a) Autonomous implementation

Issues concerning not only one single sector of the economy but causing problems to several of them or concern general social policy decisions at EU-level are more adequately discussed at cross-industry level. This form of dialogue can either be initiated by consultation by the EU-Commission, Article 154 TFEU, or autonomous by the bargaining parties themselves. If either form of negotiation results in a formal agreement, such agreement, again, may be implemented by either national social partners collective agreements or by Council Directive, Article 157 (1) TFEU. Where bargaining parties prefer the autonomous approach by directing their agreements to the national industrial relations system, questions concerning the legal effects arise.

Direct legal effects of European agreements have not been created at EU level²⁴. Agreements on working conditions have to be implemented by third parties as the contracting parties themselves are not legally competent to create rights and obligations for individual workers and employers²⁵. EU law is equally unable to oblige national social partners to implement the European level agreements as such obligation would run counter their freedom to bargain collectively. This freedom could only be limited by internal rules²⁶ of procedure under which national affiliates either transfer their bargaining competence to the umbrella organisation as their representative, or accept a binding obligation to transpose agreements concluded at transnational level into national collective agreements²⁷. Where national social partners through their membership in a European umbrella organization have mandated such organization to create legal obligations on their behalf, they are obliged to negotiate with a

²⁰ Anne Branch, 2005 p. 333.

²¹ European Commission, *Industrial Relations in Europe 2010*, pp. 186, 187.

²² Anne Branch, 2005 p. 325.

²³ Stefan Clauwaert, 2011 p. 173.

²⁴ Stijn Smismans, 2007 p. 353, 360; Heinz-Dietrich Steinmeyer, 2001 p.19; Manfred Weiss, 2008 p. 964; for the opposite view: Olaf Deinert, Modes of implementing European collective agreements and their impact on collective autonomy, *Industrial Law Journal* Volume 32, 2003, p.323.

²⁵ Edith Franssen, Legal Aspects of the European Social Dialogue, *Intersentia*, 2002, p. 139.

²⁶ For the ETUC’s constitution: <http://www.etuc.org/a/70>.

²⁷ Volker Rieble/Sebastian Kolbe, 2008 p. 462.

view to implementation. In practice, asking for such mandate would face major objections. National organizations, especially on the employer's side are rarely interested in transferring their bargaining power to transnational level²⁸. They welcome such level of dialogue precisely because it aims at creating non-binding "soft law" provisions without specific obligations for results²⁹. It nevertheless remains an open question whether an obligation to negotiate predefined contents will be fully served. Internal rules of procedure may try to prevent lack of compliance by creating sanctions against non-complying affiliates. First and foremost, this means a threat with expulsion from the membership of the European umbrella organization. But whether this works as an effective deterrent, can be very much put into question. On the one hand, umbrella organizations do not want to expel their members. Not only do they depend on their members' financial and organizational contributions, they also need a wide scope of membership in different Member States in order to retain their status of EU-level representativeness. On the other hand, the expulsion from one EU umbrella organization doesn't seem very threatening to national affiliates. Finally expelling a national organisation cannot provide rights to individual workers and employers. The expulsion even leaves transnational bargaining without any addressee for implementation of agreements in the country concerned.

Implementing social dialogue agreements therefore remains dependent on the acceptance the respective agreement is able to create among national affiliates on both sides of industry. If national affiliates accept the European agreement as setting minimum standards for their bargaining process, they agree on guaranteeing at least such standard. Individual workers and employers will be bound by this national agreement according to national law. If, however, national social partners do not negotiate or do not fully arrive at the level the European agreement intended to prescribe, no such result can be obtained. If national social partners refuse implementing European agreements or implement them knowingly incomplete, there is not much to be done about this. Where social dialogue results in agreements unevenly implemented or partly not implemented at all, essentially the social partners' credibility seems to be at stake. Over and above the credibility issue, effectiveness represents a problem for the appropriateness of autonomous implementation measures for certain topics³⁰: While joint policy statements don't need implementation, any lack of effectiveness on their part doesn't pose legal problems. Where the creation of minimum standards or other mechanisms of worker protection is at stake, effective implementation is indispensable. Opting for autonomous implementation by national affiliates also for those issues poses considerable problems³¹. Such methods should only be used if other means are not available, for example because the EU Commission either lacks the legal competency or the political will to regulate

²⁸ Anne Branch, 2005 p. 335; Volker Rieble/Sebastian Kolbe, 2008 p. 462.

²⁹ Renate Hornung-Draus, Sozialer Dialog – Entwicklungsperspektiven und Grenzen aus Sicht der Arbeitgeber, In: Arnim Höland/Christine Hohmann-Dennhardt/Marlene Schmidt/ Achim Seifert (eds), *Arbeitnehmermitwirkung in einer sich globalisierenden Arbeitswelt, Liber Amicorum M. Weiss*, Berliner Wissenschaftsverlag, 2005, pp. 205-215, p. 213.

³⁰ Anne Branch, 2005 p. 335.

³¹ Stefan Clauwaert, 2011 pp. 169-179, p. 177; Antonio Lo Faro, Bargaining in the shadow of 'optional framework'? The rise of transnational collective agreements and EU law, *European Journal of Industrial Relations*, Issue 18, 2012, pp. 153-165, p. 154.

the respective topic, and if additional tools can be created for furthering the hitherto not impressive level of effective implementation.

b) Legislative Implementation

Directing agreements to EU institutions for implementation has obvious advantages for effectiveness: After conversion into a Directive and transposition into national law, the agreement will apply to workers and employers covered by the regulations' personal scope whether or not they are directly or indirectly members of the signatories. On the other hand, the contracting parties lose all competence on the future fate of their agreement³² when directing it into the legislative process. Instead, EU institutions become responsible to monitor the implementation at national level and the CJEU will have the sole interpretative competence over its content and meaning. Social partners jointly requested to turn into an EU Directive framework agreements topics high on the policy agenda of the EU Commission: Parental leave (Directive 96/34/EC, revisited by Directive 2010/18/EU of 8 March 2010), part-time work (Directive 1997/81/EC of 15 December 1997), and fixed-term work (Directive 1999/70/EC of 28 June 1999). Negotiations on other topics, such as the revision of the maternity protection Directive or the Temporary Agency Work Directive, have not been successfully completed. Even if the Commission consults social partners on legislative proposals for revising existing legal instruments, an agreement between employers' and employees' organizations will not automatically be achieved. Next to the uncertainty already implied in a bargaining process, social partner negotiations cost a lot of time: When the EU Commission consulted social partners on the content of the revised version to the working time Directive 2003/88/EC already in 2010, they indicated their willingness to start the bargaining process in November 2011. Whereas Art. 154 (4), (1) TFEU allows for a time period of 9 Months, social partners requested extending this time frame to 31 December 2012. Whether by that date the legislative process will be completed, is still not obvious.

(1) Democratic legitimacy of the implementation process?

Legislative implementation uses social partner bargaining as a tool by linking the organized interests of management and labour³³ with the EU's legislative power. This, at least in theory, can be understood as a way of strengthening democratic participation in the decision making process of EU institutions. This is of special importance as implementation of the collective agreement via Council Directive (Art. 155 (2) TFEU) would not involve the co-decision of the European Parliament³⁴ which otherwise would be necessary under the regular legislative process (Article 294 TFEU). The Commission instead only informs the Parliament that is thereby deprived of any influence on the Council decision whether or not to transform the respective collective agreement into binding EU law. Social partners' involvement in the

³² Social Partners nevertheless may initiate a new round of bargaining finally putting forward a revised version of the agreements. This would have to run through the complete legislative process.

³³ *Anne Branch*, 2005 p. 340.

³⁴ *Stijn Smismans*, 2007 p. 346.

process of creating such Directive functions as a replacement for representation of the European people. According to the decision of the European Court of First Instance of 17th June 1998³⁵ on the necessity of participation in the bargaining process of the employer organization back then representing small and medium sized enterprises, the participation of representative bargaining partners is susceptible of substituting Parliaments' participation. This reasoning nevertheless has a weak point as it is not established that transnational social partners in fact are representative for employees and employers concerned, let alone for "the European people". The question of representativeness therefore was heavily debated.

The EU Commission already in its Communication of 14th December 1993³⁶ explicitly demanded that partners to the cross-industry social dialogue be "representative". Meeting this obligation is controlled by the Commission against the following preconditions: Cross-industry bargaining should be organized at European level; it should consist of organizations themselves an integral and recognized part of social partner structures capable of negotiating agreements, should be representative, as far as possible, of all Member States, and should have adequate structures to ensure effective participation in the consultation process. According to the Court, European level umbrella organizations consisting of national organizations may count as representative only in so far as member organizations taken together will be regarded representative in their respective countries, i.e. fulfilling the criteria prescribed under national law or practice. Again, the requirement of representativeness is rather differently applied in EU Member States. Whereas in some countries workers or employers organizations are not recognized as competent to conclude legally valid collective agreements unless they fulfil specific criteria, others don't have formal preconditions. As trade unions and employer organizations operating as umbrella organizations at EU level³⁷ had never difficulties meeting such demand, this definition of representativeness is not a meaningful precondition for participating in the legislative process. This has been criticised³⁸ as ignoring the lack of representativeness of organisations not sufficiently acknowledged in several countries. Given that the union density rates in some Member States amount to only single digit percentage points, the existing criteria for representativeness totally neglecting membership rates are themselves not without weakness under the democratic legitimacy aspect³⁹. To make up for this point, Parliament needs to be more included into the legislative process.

(2) Limitations to legislative implementation

Collective agreements directed towards institutions have to be transformed into a formal legislative proposal from the EU Commission, consisting of general procedural articles

³⁵ Case T-135/96 "UEAPME v. Council of the EU", para. 88; compare: *Stijn Smismans*, 2007 p. 348.

³⁶ COM (93) 600 final, para. 24 and annex 2.

³⁷ For further information on the cross-sectorial social dialogue:

<http://ec.europa.eu/social/main.jsp?catId=479&langId=en>

³⁸ Achim Seifert, Transnational collective bargaining: The case of the European Union, In: Kitty Malherbe/Julia Sloth-Nielsen (eds.), *Labour Law in to the Future: Essays in honour of Darcy du Toit*, JutaLaw, South Africa, 2012, pp. 79-96, p. 81.

³⁹ *Heinz Dietrich Steinmeyer*, 2001 p. 21; *Manfred Weiss*, 2008 p. 961.

combined with the social partner agreement as an annex, and finally have to be signed into law by the European Council. Upon formulation of its proposal the Commission checks the agreements for several preconditions⁴⁰: The contracting parties have to be representative and mandated by their affiliates and the content of the agreement has to comply with provisions and principles of EU law, and to respect the development and competitiveness of small- and medium-sized enterprises. Such requirements are not based on treaty provisions itself but authored by the Commission seeking to comply not only with its general role as the treaty's guardian⁴¹ but also with the requirements of the Court of First Instance⁴², invoking the principle of democracy for introducing the representativity requirement into the collective bargaining process. If the Commission was of the opinion that the checks on form and content of the agreement provided insufficient results, the agreement doesn't have to be incorporated into EU law. The Commission is however not competent to alter or amend the agreement in order to make it acceptable; any alteration made by EU officials must count as a (new) legislative proposal instead of a social partner agreement to be implemented according to Article 155 (2) TFEU. The EU Council then has to take a decision, usually by qualified majority voting, unless subject matters are concerned requiring unanimity. The Commission⁴³ and the Parliament⁴⁴ stated the opinion that the Council decision is limited to either reject the proposal or accept it⁴⁵.

(3) Means of Legislative Implementation

Social partners can request EU regulation only when they have acknowledged the limitations of this procedure. The Councils' regulative power is limited to the enumerated catalogue of competences enshrined in Article 153 (1) TFEU. The most prominent of all conditions of employment regulated by collective agreements at national level, the amount of wages workers should earn, according to Article 153 (5) TFEU therefore remains excluded from agreements that are meant to be implemented through a Directive⁴⁶. This outcome has been put into question⁴⁷ by invoking an argument concerning the reason for limiting the regulatory power of the EU Council: If this limitation was introduced only due to concerns over possible resistance of social partners' organizations against any EU interference with their (national) collective agreements⁴⁸, limitations do not have to apply in a situation where not the EU legislator but social partners determine the content of the respective Directive. This argument is not totally convincing, though: Even though the fundamental right to collective bargaining

⁴⁰ COM (93) 600 final, no. 39; COM (2004) 557 final, no. 44.

⁴¹ Case T-135/96 "UEAPME v. Council of the EU", para. 88.

⁴² *Edith Franssen*, 2002 p. 203.

⁴³ COM (93) 600 final, no. 38.

⁴⁴ Resolution A3-0091/94 of 24 February 1994, Official Journal C-77/30, 14-3-1994, p. 31.

⁴⁵ Gabriele Britz/Marlene Schmidt, The institutionalized participation of management and labour in the legislative activities of the European Community: a challenge to the principles of democracy under Community Law, In: *European Law Journal*, Issue 6, 2000, p. 54; Armin Höland: "Partnerschaftliche Setzung und Durchführung von Recht in der Europäischen Gemeinschaft, *Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht*, Issue 9, 1995, pp. 425-451; p. 442-445.

⁴⁶ *Achim Seifert*, 2012 p. 81.

⁴⁷ *Edith Franssen*, 2002 p. 185, 186.

⁴⁸ Peter Lange, Maastricht and the Social Protocol: why did they do it?, *Politics & Society*, Issue 21, 1993, p. 11.

must be protected against governmental interference, this aim most likely is not the only reason for limiting the Councils' regulatory power. Member States equally want to avoid EU-level interference into their national social and labour market policy. This goal still remains still relevant if it is the social partners at EU level instead of the EU Commission interfering with national competencies. Social partners therefore better respect the limitations to regulatory competence if they intend to direct their agreements to the European institutions.

3. Effectiveness of the institutionalized social dialogue?

The implementation by legislation causes the opposite problems to what was discussed for an implementation via national social partners: While collective agreements initiated by the EU Commission and turned into Directives provide for binding implementation, they are few in numbers and difficult to obtain⁴⁹. This is due to the social policy agenda of both European institutions involved in the process, the Commission and the Council, becoming much less ambitious than they earlier used to be⁵⁰. As a consequence, a powerful incentive for starting negotiations is missing. Transnational trade unions lack legal and factual tools for concluding binding agreements as long as employer organisations prefer non-binding "joint texts". Agreements directed towards the national collective bargaining process, on the other hand, are much more numerous and concern a wider range of topics, but their effective implementation remains questionable⁵¹. Firstly, it depends on the rather fragile ability and willingness of national collective bargaining systems to deliver. When collective agreements are directed to national social partners, governments are not responsible for the outcome⁵². So much clearly follows from an interpretive declaration⁵³ annexed by the signatories already to the original agreement on Social Policy⁵⁴. European social partners therefore cannot themselves oblige Member States to legislate on the basis of their agreements or to actually implement such agreements. Secondly, turning a transnational agreement into several national agreements governed by rather different national legal systems⁵⁵ provides disparate outcomes not

⁴⁹ Antonio Lo Faro, 2012 pp. 153-165.

⁵⁰ Brian Bercusson, Implementation and monitoring of cross-border agreements, In: Konstantinos Papadakis (ed.), *Cross-border social dialogue and agreements- an emerging global industrial relations framework?*, ILO, Geneva 2008, pp. 131-158, p. 132.

⁵¹ As stated already by the EU Commission, Communication of 26 June 2002 (COM (2002) 341 final), More than 230 joint sectorial texts have been issued... However, in most cases, these texts did not include any provision for implementation and monitoring. ... They are not well known and their dissemination at national level has been limited. Their effectiveness can be called into question.

⁵² Bernd Waas, Der soziale Dialog auf Gemeinschaftsebene in neuem Licht – ein Blick auf „autonome vereinbarungen“ der Sozialpartner, In Arnim Höland/Christine Hohmann-Dennhardt/Marlene Schmidt/ Achim Seifert (eds), *Arbeitnehmermitwirkung in einer sich globalisierenden Arbeitswelt, Liber Amicorum M. Weiss*, Berliner Wissenschaftsverlag, 2005, pp. 193-203, p. 197.

⁵³ "The High Contracting Parties declare that the first of the arrangements for application of the agreements between management and labour at Community level... implies no delegation on the member States to apply the agreements directly or to work out rules for their transposition, nor any obligation to amend national legislation in force to facilitate their implementation."

⁵⁴ A legally binding quality of such agreements is accepted by B. Bercusson, p. 540/1.

⁵⁵ Olaf Deinert, Self-Executing Collective Agreements in the EU Law, in: Marc de Vos (ed.), *A Decade Beyond Maastricht: The European Social Dialogue Revisited*, Kluwer, 2003; Berndt Keller/Bernd Sorries, Sectorial social dialogues: new opportunities or more impasses?, In: Brian Tower/Michael Terry (eds.), *Industrial Relations Journal-European Annual Review 1997*, Blackwell, 1998, p. 84.

automatically in keeping with the principles of equality and legal certainty. Where independent transformation into a national agreement is provided for, its legal effects will be provided by the scope and guarantees of various national laws on collective agreements; neither equality nor comparability of outcomes can thereby be guaranteed for all employers and workers included into the personal scope of the transnational agreement.

III. Multinational Company Agreements

There is a third possibility for transnational bargaining to take place by way of a multinational company negotiating collectively with elected worker representatives. Under specific circumstances, international trade union federations (sometimes also national unions) conclude agreements (=International Framework Agreements⁵⁶) at the multinational company level⁵⁷; this paper does not deal with such IFA's as they primarily represent another type of soft law with specific implementation problems⁵⁸ comparable to the like of autonomous social dialogue agreements described above. For European multinational company agreements in the narrower sense, this evaluation slightly differs: they, too, represent a form of transnational bargaining, but with specific differences from the regular model. The employers' side is represented by the central management of a large undertaking or a group of undertakings instead of an employer's organization. Workers are represented by an elected body, usually the European Works Council⁵⁹ or an analogous representative institution including also non-European representatives. International trade unions also participate in the EU level bargaining process, but their presence doesn't replace EWCs as management prefers their presence for maintaining a good relationship with workers' representatives: EWCs enjoy statutory on-going information and consultation rights; disrespecting EWC's rights can lead to time consuming and therefore costly legal proceedings. This threat creates an incentive to central management to further co-operate with this representative body. Even negotiated texts not having any automatic legal effect in the sense that they could be legally enforced against the other contracting party, will therefore regularly be respected.

It must be borne in mind, though, that the legal effects *statutorily* attached to transnational agreements between central management and workers' representatives are limited in scope:

⁵⁶ European Foundation for the Improvement of Living and Working Conditions (Eurofound), Codes of Conduct and International Framework Agreements – New Forms of Governance of Company Level, 2008, p. 7 f.

⁵⁷ Dominique Bé, A report on the European Commission initiative for a European framework for transnational collective bargaining, in: K. Papadakis (ed.): *cross-border social dialogue and agreements*, International Institute for Labour Studies, Geneva, 2008, pp. 221-236; p. 223; John Gennard, Development of transnational collective bargaining in Europe, In: *Employee Relations*, Issue 31, 2009, p. 344.

⁵⁸ Eurofound, 2008 p. 4.

⁵⁹ Directive 2009/38/EC of 6 May 2009, OJ 2009 L 122/28: EWCs can be established in EU scale transnational undertakings with at least 1000 employees and at least 150 employees in each of at least two Member States. Their composition and participation rights are not prescribed by the respective Directive but result from a bargaining process between the central management and the employees, represented by a special negotiating body. Only if no agreement can be reached in six month of bargaining the Directives' subsidiary requirements apply giving information and consultation rights to the EWC. If an agreement is reached it can provide more far reaching participation rights.

only those agreements legally creating the EWC or joint texts resulting from the consultation procedure established by the EWC Directive can have binding effects as both contracting parties have a legal mandate to negotiate. Once negotiations relate to issues transgressing the Directive's entitlements, there is no structural mandate for either party to legally represent subsidiaries or subcontractors on the one side or such entities' employees on the other. As EWCs are lacking formal legitimacy concerning "collective bargaining" in a technical sense, the status and enforceability of agreements concluded remain controversial. In practical terms, an informal solution to such problem was developed by directing enforcement to central managements' business judgement. Should local management disagree with obligations undertaken, there are company law tools to influence or overrule their objections. Management will be inclined to enforce agreements, because lack of respect at national level is likely to cause problems in follow-up consultations with the EWC.

The process of dialogue resulting in a company agreement as such may at times even be initiated by workers representatives, but an agreement still will be obtained only in case central management perceives specific advantages⁶⁰ in engaging in such bargaining. Gains can potentially be made by avoiding conflicts over restructuring, by furthering acceptance of flexibilisation measures or by improving company-wide pension systems. While topics such as relocation or transfer of business or corporate social responsibility obviously are important for employees, reaching an agreement with workers' representatives might become equally useful for management. This form of co-operation being able to deliver numerous and meaningful transnational company agreements⁶¹ shows the potential of transnational bargaining. Nevertheless, the EWC as main actor on the employees' side⁶² legally represents a consultation and not a negotiation body. Factually, though, this institution developed way beyond the function legally assigned to it⁶³ for the simple reason that the multinational companies prefer EWCs for implementing management strategies and securing reliable transnational transactions. The conclusions to be drawn from this insight are rather modest: The most effective form of EU level collective bargaining is dependent on the collaboration of an institution legally not created for bargaining purposes, while the two levels of bargaining legally established for social dialogue perform this task much less effectively.

IV. Strengthening collective bargaining at EU level?

1. The Proposal for an "Optional Framework"

To help solve the dilemma of effectivity in EU level collective bargaining the necessity of a legal framework for concluding transnational collective agreements was again heavily

⁶⁰ Torsten Müller/Hans-W. Platzer/Stefan Rüb, Transnationale Unternehmensvereinbarungen und die Vereinbarungspolitik Europäischer Betriebsräte, In: *WSI-Mitteilungen* 2012, pp. 457, 458.

⁶¹ John Gennard, 2009 p. 344/5.

⁶² Achim Seifert, 2012 p. 88.

⁶³ John Gennard, 2009 p. 343.

debated. The EU Commission already in its Social Agenda of 2005⁶⁴ announced its willingness to create an “optional framework for transnational collective bargaining”. Even though this agenda’s approach was supported by the “Ales-Report” presented by an international group of experts⁶⁵, it met harsh criticism from all parties concerned⁶⁶. The first point of criticism was the suggested legal competence clause, Article 115 TFEU⁶⁷, for regulating an optional framework on transnational collective bargaining. Also substantive objections were of wide concern especially that such regulation may have negative consequences for collective bargaining at national level⁶⁸. Social partners objected to any EU interference with their autonomy⁶⁹. The employers’ side saw no necessity whatsoever for an “additional layer of EU collective bargaining over and above a national, sectoral, regional or company level”⁷⁰. Trade unions, on the other hand, primarily disagreed to participation of EWCs in the bargaining process but wished to retain a monopoly in negotiating for collective agreements⁷¹. Without going into details of such debate, its very existence makes clear that the creation of an optional framework for transnational collective bargaining will most likely not be successfully implemented in the near future.

2. *Overcoming some difficulties?*

What conclusions can be drawn from such experience? At national level, reliable legal effects of collective bargaining depend on enforcement mechanisms, either by industrial action or by auxiliary legislation⁷². All such mechanisms are absent from the European level. Social partner negotiations became part of the EU legislative process to replace them under the social dialogue. The effectivity of this solution nevertheless depends on both, the willingness and the ability of the EU Commission to push a social policy agenda⁷³. The Commission itself cuts back on such agenda. Even adapting already existing Directives to new developments initiated by interpretative statements of the Court frequently takes for years, if it succeeds at all. Where proposals are brought up, their success in the political arena is less likely than back in the 1990ies. The probability of convincing the European Council into social policy legislation has become more difficult the more members are present, and due to a striking economic crisis, social policy in many Member States tends to be among the first items to be

⁶⁴ Commission Communication of 9 February 2005, COM (2005) 33 final. Also: John Gennard, 2009, p. 342.

⁶⁵ Report on Transnational Collective Bargaining: past, present and future (2006), published under: <http://ec.europa.eu/social/main.jsp?catId=707&langId=en>.

⁶⁶ *Dominique Bé*, 2008, pp. 221-235.

⁶⁷ *Achim Seifert*, 2012 p. 92; *Manfred Weiss*, 2008 p. 973; *Volker Rieble/ Sebastian Kolbe*, 2008 p. 463.

⁶⁸ UNICE position paper (2004): “Commission communication on the social dialogue“, www.ettk.ee/upload/kooskolastus/unice_pp_COM_social_dialogue_2004_EN1.doc p. 2.

⁶⁹ *Achim Seifert*, 2012 p. 93.

⁷⁰ UNICE, press release of 9 February 2005, Commission social policy agenda must be consistent with the growth and employment strategy.

⁷¹ ETUC, Resolution adopted by the ETUC-Executive Committee “The coordination of collective bargaining”, 5-6 December 2005. Available at: <http://www.etuc.org/a/1847>.

⁷² This can include labour law providing for binding effects of agreements either for members of the bargaining parties or even erga omnes, it may also include general contract law, or a theory of incorporation of the agreements’ content into labour contracts or the political decision to establish social clauses in (public) procurement contracts.

⁷³ *Brian Bercusson*, 2009 p. 627.

reduced. While EU regulation was a realistic option, influencing its content through direct negotiations deemed preferable to employers⁷⁴. Nowadays political pressure is much less obvious, so that “negotiate or we legislate”⁷⁵ is no powerful threat anymore. Under such circumstances, employers see little advantage in creating enforceable “hard law” provisions through a voluntary agreement.

Replacing the incentive to bargain by the threat of an industrial action at European level is not an option, either: on the factual side, European level organisations lack the influence to call their national affiliates’ members to a strike. Legally, trade unions cannot rely on strike actions for furthering transnational bargaining as long as there is no transnational right to strike in a form the EU would be competent to protect in practice. Instead, legal consequences of transnational strike actions would be governed by the CJEU’s Laval-doctrine according to which the legitimacy of collective agreements for posted workers is severely restricted to issues listed in the Posting of Workers Directive and a minimum level of protection provided there. While there is little fighting power on the side of the unions and no legislative competence on the side of the EU to enforce transnational collective bargaining, which option does remain? As multinationals favour binding contracts for their ability to provide legal certainty primarily in their relationship with elected employee representatives, the interest of bargaining partners might point towards establishing transnational company agreements as a more effective alternative⁷⁶. But transnational company agreements cannot become a role model for the social dialogue as their success depends on legally establishing a lasting relationship between the bargaining parties as incentive for on-going co-operation. In the relationship between EU level social partners such obligation to establish a continuing bargaining process is lacking, as is the chance of establishing it. Even where it becomes more frequent to include trade unions as a party to a transnational company agreement, they, too, have to rely on the traditional enforcement strategies at company level. Therefore, mechanisms to enforce transnational company agreements remain primarily in the hand of central management.

Strengthening such company agreements at the expense of the traditional social dialogue might therefore not provide many advantages, as their effectiveness depends on the company’s discretion: What central management does not like will rarely be included into such agreement since neither elected worker representatives nor accompanying unions achieve the power to press for their own agenda. Such dependency can not create tools for strengthening the bargaining process. Therefore, enforcement of transnational agreements should not primarily rely on the company’s governing structures or on unions invoking court proceedings under the complex International Conflict of Laws rules⁷⁷. While there is no easy alternative at hand for influencing the process of bargaining and compromising as such, for minimizing enforcement problems the EU could develop statutory tools. Establishing a

⁷⁴ Renate Hornung-Draus, 2005 p. 213.

⁷⁵ Brian Bercusson, 2009 p. 558, p. 629.

⁷⁶ Dimitris Stevis, International framework agreements and global social dialogue – parameter and prospects, *ILO Employment Working Paper* No. 47, p. 5.

⁷⁷ Thomas van Hoek/Frans Hendrickx, International Private Law Aspects and Dispute settlement related to transnational company agreements, 2009, Final Report to the European Commission: <http://ec.europa.eu/social/BlobServlet?docId=4815&langId=en>.

European mediation system for solving transnational collective labour conflicts, including the interpretation and correct application of transnational agreements, could alleviate the enforcement of agreements. Ignoring at the national level what was agreed upon at EU level would finally be no viable alternative to delivering on the promises.