TRANSNATIONAL COLLECTIVE BARGAINING IN EUROPE

A proposal for a European regulation
on transnational collective bargaining

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GRENSOVERSCHRIJDENDE COLLECTIEVE ONDERHANDELINGEN IN EUROPA

Een voorstel voor een Europese verordening over grensoverschrijdend collectief onderhandelen

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VOORWOORD

Het gebed zonder einde is tot een einde gekomen. Dat wil echter niet zeggen dat het klaar is. Dat is namelijk een status die onderzoek naar zich immer ontwikkelende onderwerpen zoals (grensoverschrijdende) collectieve arbeidsovereenkomsten zich niet kan aanmeten.

Ik lees graag voorwoorden. Als één ding duidelijk wordt bij het lezen van voorwoorden, dan is het wel dat schrijven een solitaire aangelegenheid is. Dat kan ik inmiddels beamen. Gedurende mijn schrijftijd heb ik te weinig aandacht besteed aan de wereld om mij heen, aan familie en vrienden. Die tijd hoop ik in te halen. Voor nu is een excuus op zijn plaats aan al die mensen. Daarnaast blijkt uit de door mij gelezen voorwoorden dat het voorwoord een geschikte plaats wordt bevonden om mensen te bedanken. Bij het zodoende ontstane gebruik sluit ik mij graag aan.

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Het onderzoek naar grensoverschrijdende collectieve arbeidsovereenkomsten heb ik in juni 2008 afgerond.

Rotterdam, augustus 2008

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CHAPTER 1

INTRODUCTION

1. Research subject

In many European countries collective labour agreements play a crucial role in organising industrial relations. A research of the European Industrial Relations Observatory ("EIRO") established that in the year 2002 more than 70% of the employees within the member states of the European Union ("Member States") at that time, excluding Greece, were, on average, covered by a collective labour agreement.[1] These collective labour agreements are all concluded regionally or nationally and are therefore limited by the rules and the jurisdiction of the country to which they apply. Clearly, as the integration of the Member States develops further and as globalisation is a fact nowadays, labour relations are becoming more and more international. As is, or at least should be, (collective) labour law.[2] Social partners, the key figures in collective labour law, could take advantage of the international opportunities presented to them. They could, for instance, enter into transnational collective labour agreements that apply within the entire European Union ("EU") or within a number of Member States. This brings us to this thesis' research subject: transnational collective labour agreements having force in the EU. Two preliminary questions will be answered before moving on towards the main matter of this research.

The first preliminary question is rather straightforward: is there a need or demand for transnational collective labour agreements? There are several angles to approach that question. A first angle could be to analyse the challenges for and the role of the European social partners from a historical point of view. It should be established whether their role has changed in time enabling

1 Reference is made to the EIRO publication from M. Carley, *Industrial relations in the EU, Japan and USA, 2002*, 24 February 2004, page 18.

2 Or, as the Commission has put it: "European integration is gaining ground and because of the integration of our economies the social partners are increasingly having to take this development into account." Commission Communication COM (1998) 322, final, *Adapting and promoting the Social Dialogue at Community level*, page 4.

and possibly even stimulating them to conclude transnational (European) collective agreements. The position of other European stakeholders, most notably the Commission of the European Communities, plays a role in this as well. A second angle is to analyse whether collective bargaining becomes more international and whether transnational collective labour agreements already have been concluded. "Europeanisation" of collective bargaining and especially the conclusion of transnational collective labour agreements might indicate a market for transnational collective labour agreements. A last angle is to list the potential advantages and disadvantages of transnational collective labour agreements and balance these. If the possible advantages outweigh the possible disadvantages, this would indicate a need for transnational collective labour agreements.

Should transnational collective bargaining prove interesting for the social partners, the second preliminary question is whether there is a need for a new legal framework on transnational collective labour agreements. The word "new" is used deliberately. At EU level the European social partners have already been given the chance to conclude European collective agreements within the so-called European social dialogue.[3] Pursuant to article 139 of the EC Treaty these agreements can either be implemented by a Council decision or in accordance with the normal procedures and practices specific to management and labour and the Member State. This method of European collective bargaining should be analysed. It should be established whether this institutionalised type of European collective bargaining, laid out in the EC Treaty, forms a proper basis for transnational collective bargaining. If this existing legal framework does not seem to suffice, it should be established whether there is a need for another legal framework for transnational collective labour agreements.

Only once it is established that (i) there is a need or demand for transnational collective labour agreements, while (ii) there is a need for a new legal framework on transnational collective labour agreements, the last question becomes relevant: how should such a new legal framework be shaped? That in fact is to the main goal, the actual research subject of this thesis: an attempt will be

3 The "European social dialogue" covers two aspects: (i) the negotiation and conclusion of agreements at Community level between European social partners and (ii) the cooperation between the Community institutions and the European social partners. The European social dialogue is often viewed within the context of articles 136 – 139 of the EC Treaty, which will be discussed in detail in chapter 5. See: E. Franssen, *Legal aspects of the European Social Dialogue*, Intersentia, Antwerp – Oxford – New York, 2002, page 3.

made to formulate possible criteria and suggestions for realising European legislation on concluding transnational collective agreements.

2. Demarcation of the boundaries

Given the above, this thesis ultimately concerns European legislation on transnational collective agreements. Exactly what is considered a "transnational collective labour agreement" referred to in this thesis is therefore relevant. In order to explain that term a distinction should be made between (i) a "European" transnational collective labour agreement and a national collective labour agreement having an international force and (ii) collective bargaining with trade unions and with others employee representatives.

2.1 "European" transnational collective labour agreements v. "national" transnational collective labour agreements

Transnational collective labour agreements could be regarded as collective labour agreements that cover (have force in) more than one jurisdiction. Such agreements already exist, as will be explained in chapter 4, section 3. Still there are important differences between these existing transnational collective labour agreements and the ones proposed in this thesis.[4] Transnational collective labour agreements proposed in this thesis are embedded in European legislation. Pursuant to this suggested European legislation, these agreements have to be equally recognised and applied in the jurisdictions of all Member States. These "European" transnational collective labour agreements therefore have Community effects and not merely national effects. The existing transnational collective labour agreements do not have such Community effects, but only national effects: they are "national" transnational collective labour agreements. National transnational collective labour agreements are agreements that satisfy the national requirements that collective labour agreements need to satisfy for the country concerned, having a scope of application covering several jurisdictions. This is, however, a practical definition of a national transnational collective labour agreement. From a purely legal stance, there is no such thing (yet) as a "transnational collective labour agreement".[5] There

4 In chapter 14, section 7 I will propose a definition for "transnational collective labour agreement" for the purposes of European legislation.

5 From a comparative law perspective, a "collective labour agreement" is simply not an unambiguous phenomenon. See A.A.H. van Hoek, *Internationale mobiliteit van werknemers. Een onderzoek naar de interactie tussen arbeidsrecht, EG-recht en IPR aan de hand van de Detacheringsrichtlijn* [*International mobility of employees. A research to the interaction between employment law, EC-law and PIL in connection with the Posted Workers Directive*], SDU, The Hague, 2000, page 487.

are no specific rules on subjects like the procedure, the negotiating agents and the binding powers of a transnational collective labour agreement:[6] a transnational collective labour agreement simply has no specific legal status, and certainly no Community status.[7] Its actual (national) status and effects must, in consequence, be determined by national law on a case-by-case basis, in accordance with the principles of private international law.[8] This may bring about specific (and undesired) difficulties, as set out in chapter 6, section 6.3. National transnational collective labour agreements are therefore not a suitable alternative for European transnational collective labour agreements. Consequently, this thesis focuses on European transnational collective labour agreements, being collective labour agreements based on European legislation, having force in more than one Member State. This is not to say that national transnational collective labour agreements are entirely without relevance for this thesis. The mere existence of these agreements shows that there is a demand for transnational collective labour agreements. However, the exact legal implications of these national transnational collective labour agreements are not the subject of this thesis.

6 E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, report for the European Commission, February 2006, page 27.

7 A possible exception to this statement, depending on how transnational collective labour agreements are defined, constitutes the agreement between the Special Negotiating Body and the company on the basis of the European Works Council Directive (Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees OJ L 254, 30 September 1994, pages 64 – 72) and the Directive on the SE (Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, OJ L 294, 10 November 2001, pages 22 – 32). These types of agreements are, however, not concluded with trade unions, and are therefore in my view not to be regarded as (transnational) collectivive labour agreements.

8 E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, page 21.

2.2 Collective labour agreements v. employee representation at the workplace

Closely related to collective bargaining is employee representation or participation at the workplace. Workplace representation in the EU is normally organised by Works Councils and/or trade union representatives.[9] It is promoted by European legislation, including the 1994 European Works Council Directive.[10] In practice some transnational collective bargaining takes place between multinational companies and their European Works Councils.[11] Furthermore, employee representation or participation at the workplace is of great relevance for many industries in Europe and has a close link in many Member States to trade unions and even collective bargaining. Nevertheless, this representation and participation should be distinguished from collective bargaining and the conclusion of collective labour agreements. After all, in the collective bargaining process trade unions serve as management's countervailing power to negotiate wages and working conditions.[12] This is normally not the case when it comes to employee representation or participation at the workplace; Works Councils are not entitled to conclude collective labour agreements in many Member States, while trade unions are allowed to do this in all Member States.[13] There are more arguments against an overly active role of the European Works Council (the most logical counterparty besides trade unions) in transnational collective bargaining. Bargaining with the European Works Council raises many questions, including: (i) the bargaining topics (which with regard to the European Works Council should logically be limited to issues on employee representation), (ii) the legitimacy of the European Works Council to go beyond mere information and consultation, (iii) the lack of independence of the European Works Council towards the company, (iv) the European Works Council's relation towards trade unions and (v) the legal status of such agreements.[14] From the outset, European Works Councils (or

9 European Commission, *Industrial Relations in Europe 2006*, June 2006, page 57. See for this document: http://ec.europa.eu/employment_social/social_dialogue/reports_en.htm.

10 Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees OJ L 254, 30 September 1994, pages 64 – 72.

11 See chapter 4, section 3.

12 European Commission, *Industrial Relations in Europe 2006*, page 58.

13 See chapter 13, section 5.1.

14 See also: E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, page 20.

other similar employee representative bodies) do not seem the most suitable parties in transnational collective bargaining. As this thesis focuses on such bargaining, employee representation or participation falls outside the scope of this thesis. Only occasionally will this topic be touched upon when it is relevant to the actual topic: transnational collective labour agreements.

2.3 Further limitations

It is common in many Member States that employees and civil servants are distinguished. Moreover, civil servants are frequently excluded from the scope of European Directives.[15] This thesis focuses solely on employment relations between the employer and employee; it does not deal with civil servants. Possible administrative procedures relating to civil servants are therefore excluded from the scope of this thesis. Furthermore, this thesis mainly focuses on bipartite collective labour agreements, which are agreements concluded between both sides of the industry (management and labour). Tripartite collective labour agreements, which are agreements involving the government as well, will only occasionally be mentioned.

3. Research method

The above defines the research subject. This section focuses on the research method. This entire thesis is based on research of literature, legislation (including treaties) and jurisprudence. An important tool for this kind of international research is comparative law. There is a broad consensus that comparative law can be a useful research tool and has many functions and benefits.[16] Two generally recognised benefits relevant for the underlying thesis are: (i) comparative law can be used as an aid to the legislator;[17] and (ii) comparative law can be used to unify law.[18]

Since this thesis ultimately aims to suggest possible criteria for realising European legislation (unified law) on the conclusion of transnational collective labour agreements, it is logical to use comparative law as a research tool.

15 See for example Council Directive 98/59/EC on Employee Information and Consultation in case of Collective Redundancies (OJ L 225, 12 August 1998, pages 16 – 21).

16 D. Kokkini-Iatridou et all, *Een inleiding tot het rechtsvergelijkende onderzoek* [*An introduction to the comparative law research*], Kluwer, Deventer, 1988, page 15 *ff* and pages 26 *ff*.

17 K. Zweigert and H. Kötz, *An introduction to comparative law,* translated by T. Weir, Clarendon Press, Oxford, 1987, pages 15 – 17.

18 K. Zweigert and H. Kötz, *An introduction to comparative law*, pages 23 – 27.

However, whether this tool may be used when attempting to formulate new European legislation on concluding collective labour agreements is not beyond discussion. This discussion takes place on two levels: (i) is comparative law in general permitted when suggesting new European law and (ii) is comparative law useful within the specific field of collective bargaining, given the different basis on which collective bargaining takes place in the individual Member States on one hand and in the EU on the other?

3.1 Is comparative law permitted as a tool in order to draft European legislation?

According to some scholars, comparing law (or policies) of the different Member States in order to try to find important similarities on which basis European legislation can be recommended serves no goal. According to them, a totally new system should be pursued, separate from the laws of the Member States, that does justice to the standards, values and dynamics within the EU.[19] According to Tromm, for example, it is impossible to formulate European policy (in the field of transportation) based on national policies.[20] Every national policy, including harmonised European policy based on national law, is deemed to fail. European policy should according to Tromm necessarily be a "thirteenth" policy (currently a "twenty-eighth" policy) that should end all national policies. Although Pieters also pursued a "thirteenth" system in order to draft European legislation with regard to social security, he did analyse common mutual principles of the Member States, which he used as a basis for European law.[21]

Others take opposite views and argue that solely on the basis of comparative law, future European legislation should be designed. According to Martin, comparing different law models in national legislation could lead to the conclusion that one of those models, that fits best the aim of the European Community, should be used as a basis for European legislation. Such comparison could also lead to a new model, based on processes that exist

19 For a clear overview of this discussion reference is made to L. van Herk, *Arbeidsvoorwaardenvorming op Europees niveau* [*Constituting employment conditions on European level*], Utrecht, 1988, pages 11 *ff*.

20 J.J.M. Tromm, *Juridische aspecten van het communautair vervoersbeleid* [*Legal aspects of Community policy on transportation*], T.M.C. Asserinstituut, The Hague, 1990, page 423.

21 D. Pieters, *Sociale Zekerheid na 1992; één over twaalf* [*Social Security after 1992; one passed twelve*], Reeks sociale zekerheidswetenschap studies, KUB, 1989.

in most of the countries, or a model that applies best to all countries.[22] Kötz argues that the best method to draft common European law is to assess and compare different national laws, to find a solution for a certain problem in those laws, and to translate that solution into a concrete regulation.[23] According to him, one should, on a broad scale, identify a "common law" within the different countries involved, which is a more or less virtual law that thus does not actually exist in any one of those countries.[24]

Undeniably, it is true that the EU cannot be compared with any single Member State. Moreover, it cannot be reduced to the sum of all Member States together. After all, the EU has a system of its own with its own rules and dynamics.[25] However, these observations do not make a thorough research of the laws of the Member States superfluous. If by means of comparative law research it can be concluded that certain aspects with regard to the researched subject are viewed crucial in many or all Member States, it makes sense to include these aspects in proposals for European legislation. Moreover, the introduction of such a new European law will presumably proceed more smoothly if that law fits within the legal system of the Member States. A proper fit will more likely be the case if that European law contains parts or values of the law of the Member State involved.

Furthermore, comparing the legal systems of the different Member States could contribute to a better understanding of different visions and procedures in the separate countries. Such understanding might improve better acceptance of possible new rules. Assessing Member States' laws could also locate possible obstacles in national laws for implementing European law, which obstacles could subsequently be addressed. Moreover, comparative law could identify possible flaws and strengths in national laws that might help to clarify the needs of the Member States with regard to certain legal matters.[26]

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22 P. Martin, *Le droit social communautaire: droit commun des Etats membres de la communauté européenne en matière sociale?*, RTD eur. 30 (4) 1994, pages 610 – 618, as referred to by: L. van Herk*, Arbeidsvoorwaardenvorming op Europees niveau*, page 12.

23 H. Kötz, *Gemeineuropaïschen Zivilrecht*, in: Festschrift für Konrad Zweigert, Tübingen, 1981, page 497.

24 H. Kötz, *Gemeineuropaïschen Zivilrecht*, page 499.

25 Reference is made to the ruling of the European Court of Justice of 5 February 1963, case 26/62, *Van Gend & Loos vs. the Netherlands,* in which the Court ruled: "(…) the Community constitutes a *new legal order* of international law (…)" (emphasis added by author). This ruling has been confirmed several times.

26 L. van Herk*, Arbeidsvoorwaardenvorming op Europees niveau*, page 12.

It should not be forgotten that on occasion the European Court of Justice applies the "comparative method of Community law" too.[27] Although the Court views Community law autonomously and denies a decisive influence of a single national legal concept, it tends to take into account national traditions, which it interprets and elevates to Community principles of law.[28]

Finally, it is no coincidence that one of Europe's most well known comparative scholars, David, stated that comparative law plays an important role in the development of law as a science, and in the development of new international law that fits the conditions of the modern world.[29]

For these reasons, comparative law can and must play an important role when suggesting new European legislation.

3.2 Is comparative law useful with regard to collective bargaining?

Although, as set out above, comparative law can be an important tool in order to formulate possible new European legislation in general, there is an additional obstacle to surmount when it comes to using comparative law in the specific field of European collective law. There seem to be important differences between collective bargaining on national level and on European level. These differences may stand in the way of using comparative law in this specific area of the law.

In most Member States, three classical rights are of crucial importance in their respective laws on concluding collective agreements: (i) the freedom of

27 D. Schiek, *Autonomous Collective Agreements as a Regulatory Device in European Labour Law: How to read Article 139 EC*, Industrial Law Journal, Volume 34, Number 1, March 2005, page 28.

28 This can be witnessed, for example, with regard to the classical right associated with collective bargaining. Reference is made to chapter 8 of this thesis.

29 R. David (C. Jauffret-Spinosi), *Les grands systèmes de droit contemporains*, edition 11, 2002, pages 8 and 9.

association, (ii) the right to collective bargaining and (iii) the right to strike.[30] For this reason, it would appear logical that European collective bargaining could not exist without these rights.

According to Franssen, these rights are indeed preconditions for the development of a European social dialogue.[31] Although she concludes that said rights are recognised on a European level, and takes these rights as a basis when discussing the European social dialogue, she also observes that there is a difference between the conclusion of collective agreements on a European level and a national level.[32]

Lo Faro, however, denies that the above-mentioned triptych of rights is respected under European law. Basically, he argues that the social partners lack autonomy and freedom of association on a European level.[33] Moreover, he points out that the right to strike is excluded from the Community competences.[34] Consequently, Lo Faro argues that said classical rights cannot form a basis for analysing European collective bargaining.[35]

Lo Faro's and Franssen's arguments that today's European collective bargaining can not really be compared with national collective bargaining are persuasive, as are Lo Faro's arguments that the social partners lack autonomy (his arguments will be discussed in depth in chapter 6 of this thesis). Therefore, one should be careful when applying national laws of Member States to collective agreements concluded on a European level. Although Lo Faro's

30 Or, as Dorssemont puts it: "Collective agreements constitute a spontaneous and natural outcome of the recognition of three fundamental workers' rights: (a) the freedom of association, the right to form and join trade unions, (b) the right to strike and (c) the right to or freedom of collective bargaining." F. Dorssemont, *Some Reflections on the Origin, Problems and Perspectives of the European Social Dialogue*, page 9, in: M. de Vos (ed.), *A Decade Beyond Maastricht: The European Social Dialogue Revisited*, Kluwer Law International, The Hague, 2003. See also A.T.J.M. Jacobs, *Het recht op collectief onderhandelen in rechtsvergelijkend en Europees perspectief* [*The right to collective bargaining in comparative and European perspective*], Samson H.D. Tjeenk Willink, Alphen aan den Rijn/Brussel, 1986, page 65.

31 E. Franssen, *Legal aspects of the European Social Dialogue*, pages 8 *ff*.

32 E. Franssen, *Legal aspects of the European Social Dialogue*, page 78.

33 A. Lo Faro, *Regulating Social Europe: reality and myth of collective bargaining*, Hart Publishing, Oxford and Portland, 2000, page 106 respectively pages 92 *ff*.

34 A. Lo Faro, *Regulating Social Europe: reality and myth of collective bargaining*, pages 101 *ff*.

35 See also F. Dorssemont, review of E. Franssen's *Legal aspects of the European Social Dialogue*, SMA 2003-6, page 277.

observation that at present the three classical rights that form the basis of concluding collective agreements in Member States cannot be used to analyse the current European social dialogue might be correct,[36] that does not mean that future European collective bargaining should not be based on these classical rights. On the contrary, Lo Faro's analysis on European collective bargaining at present adds fuel to the argument to draft European legislation ensuring these three basic rights in order to conclude "proper" transnational collective agreements in a European context. He argues that:

> once decided, the attention to draw collective bargaining into the sphere of legal relevance of the Community system (…) surely implied the need to adjust the principles prevailing in the legal order within which collective bargaining is destined to operate, with the consequent provision of the principles of freedom of association and the right to strike, without which collective autonomy cannot properly be regarded as such.[37]
> (….)
> In the context of the legal regulation of employment, procedural social rights consist, in essence, in the right to bargain together with, as their indispensable corollary, the right to strike. Only their express constitutional recognition within the Community system can prevent European collective bargaining from being reduced to the status of a mere regulatory technique (…).[38]

And that gives sufficient reason to thoroughly assess the laws in the different Member States where these rights are long since recognised. I feel strengthened in this conclusion by the words of Kahn-Freund stated on occasion of a meeting of an elitist group of labour lawyers that gathered in the sixties and discussed, amongst others, the topic "Collective bargaining and the Law". On that occasion, he stated that "comparative analysis must precede the study of harmonizing processes under EC law and ILO conventions, even when there is pressure to respond to supranational goals".[39]

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36 A. Lo Faro, *Regulating Social Europe: reality and myth of collective bargaining*, chapter 4.

37 A. Lo Faro, *Regulating Social Europe: reality and myth of collective bargaining*, page 102.

38 A. Lo Faro, *Regulating Social Europe: reality and myth of collective bargaining*, page 153.

39 This quote derives from: S. Sciarra, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; Draft General Report*, page 9. The report can be found on: http://www.unifi.it/polo-universitario-europeo/ricerche/collective_bargaining.html.

3.3 Conclusion and way to proceed

For the above-mentioned reasons, comparative law will play an important role in this thesis. The laws on collective agreements in four Member States will be analysed. The similarities and differences between these laws will be assessed and, to the extent possible, put in an EU-perspective. Taking these similarities and differences into consideration, an attempt will be made to formulate possible criteria and suggestions for realising European legislation on concluding transnational collective labour agreements. Obviously, the own nature and dynamics of the EU will not be disregarded in that research. In this respect I agree with the statement of Keller that "any attempt or any search for a homogeneous model of European industrial relations which is too closely tied to a national model is and will remain fruitless".[40]

The real challenge is to develop a system that is neither too closely related to the law of one singular Member State, nor forgets to take into account the experience and know how concerning industrial relations already present in the Member States, and furthers the Community interests.[41] Striking in this respect is the relatively old but in my view still valid opinion of Advocate-General Lagrange in a case unrelated to employment law:[42]

> (…) the case law of the Court, in so far as it invokes national laws (as it does to a large extent) to define the rules of law relating to the application of the Treaty, is not content to draw on more or less arithmetical 'common denominators' between the different national solutions, but chooses from each of the Member States those solutions which, having regard to the objects of the Treaty, appear to it to be the best or, if one may use the expression, the most progressive. This is the spirit, moreover, which has guided the Court hitherto.

The relevant Member States whose laws are scrutinised are (i) the Netherlands, (ii) Germany, (iii) Belgium, and (iv) the United Kingdom. There are a number of reasons for choosing these countries. For one, they are chosen because they include two major players in Europe (Germany and the United Kingdom), including the country that cradled modern collective bargaining (the United

40 B. Keller, *National industrial relations and the prospects for European collective bargaining – The view from a German standpoint*, in W. E. Lecher and H. W. Platzer, *European Union – European Industrial Relations? Global challenges, national developments and transnational dynamics*, Routledge, London, 1998, page 57.

41 See also D. Schiek, *Autonomous Collective Agreements as a Regulatory Device in European Labour Law: How to read Article 139 EC*, pages 28 and 29.

42 Opinion of Advocate-General Lagrange of 4 June 1962 in C-14/61, *Hoogovens/ High Authority of the European Coal and Steel Community*.

Kingdom).[43] Furthermore, by researching a common law country (the United Kingdom) and civil law countries (the others), the research will be balanced better. The same balance is sought when it comes to the nature of the different national systems on collective labour agreements.[44] The United Kingdom on the one hand has a system that is primarily based on contract, as only those employers and employees that, by agreement, have incorporated a collective labour agreement need to apply that collective labour agreement. The system in Belgium, on the other hand, is predominantly an institutional system. If a collective labour agreement applies to an employer, all employment agreements between that employer and its employees are automatically governed by that collective labour agreement. The systems in the Netherlands and Germany are situated somewhere in the middle. A collective labour agreement in these countries automatically applies to the employment agreements between the employer who is bound by that collective labour agreement and its employees who are member of the contracting trade union(s), but does not automatically apply to employment agreements between this bound employer and its employees who are not member of the contracting trade union(s). The laws of the aforementioned four countries therefore cover much ground and are, to some extent, representative for Europe. A final consideration for choosing these countries is a pragmatic one, as I am able to understand the language of these four countries. Obviously, it must be admitted that researching the laws of "merely" these four countries cannot replace a full research on the laws on collective labour agreements in all Member States. Therefore, the results of the assessment of the laws of these four countries are compared with relevant parts of the laws of other Member States. This makes the research as complete as possible, while still being workable.

4. Research angle

The topic "transnational collective labour agreement" can be approached from many different angles. There are, for instance, political, sociological, economical and legal considerations. This research primarily focuses on the *legal* aspects of transnational collective bargaining. I realise that, in particular with regard to the question whether there is a need or demand for transnational collective labour agreements, this constitutes a limitation. The answer to this question, as given in this thesis, is therefore not entirely complete. Although that may be disappointing, this is in my view to be favoured over a thesis integrating different scientific angles, drafted by an author who is foremost a

43 A.T.J.M. Jacobs, *Het recht op collectief onderhandelen in rechtsvergelijkend en Europees perspectief*, pages 26 and 27.

44 This is an important element which will receive ample attention in chapter 15.

lawyer. This is not to say that this thesis fully disregards other disciplines than law, as a number of socio-political arguments will be submitted as well. These arguments are, however, limited in number and primarily based on research done by others.

5. Structure of the thesis

This thesis is divided into three general parts. Part I gives necessary "background information" on transnational (European) collective bargaining, and tries to answer the two preliminary questions. Part II deals with important international legal concepts concerning collective bargaining, sets out the national collective bargaining systems of the Netherlands, Germany, Belgium and Great Britain,[45] and compares and analyses these systems, putting the results in a broader, European perspective. Part III draws conclusions and puts forward recommendations for establishing European legislation on concluding transnational collective agreements.

5.1 Part I: Necessary background information / answering the preliminary questions

In order to place the subject of transnational collective bargaining in a proper setting, chapter 2 provides a brief introduction of the institutions of the European Community, the manner how Community legislation is drafted and the most important cross-industry social partners involved in the European social dialogue. The aim of this chapter is not to be all inclusive, but merely to give brief background information. Chapter 3 gives an overview of the history of the European social dialogue, the changed challenges for and the role of the European social partners, and their subsequent repositioning. It includes a description of the view on the European social dialogue from a number of European institutions. Chapter 4 deals with the Europeanisation of national collective bargaining in Member States and the achievements of the social partners in the field of transnational collective bargaining in Europe. Chapter 5 scrutinises the institutional framework of the European social dialogue, as laid out in the articles 136 – 139 of the EC Treaty. Chapter 6 will set out flaws and limitations attached to the current European bargaining system. These are unwanted, as will be set out in chapter 7, since transnational collective bargaining may indeed prove valuable for several reasons. In the same chapter, it will be argued that there is a need or demand for transnational collective

45 To be more precise, the laws of England and Wales, and to a certain extent also Scotland (there are some minor differences in Scottish law) are scrutinised.

labour agreements, and that a new legal framework on transnational collective agreements is required.

5.2 Part II: Essential supranational legal concepts on collective bargaining and national laws

Part II presents in chapter 8 an overview of the "classical rights" on the conclusion of collective agreements from a supranational perspective: (i) the freedom of association, (ii) the right to collective bargaining and (iii) the right to strike. It also sets out the reach that the European social partners have in transnational (European) collective bargaining. Chapters 9 up to and including 12 will respectively set out the legal national systems on collective bargaining in the Netherlands, Germany, Belgium, and Great Britain. These chapters are helpful for a better understanding of the proposal for new legislation on concluding European collective labour agreements that follows in part III, but are not a necessity to read. Chapter 13 brings these four chapters together as it analyses and compares the aforementioned four different legal systems. Chapter 13 is written in such a manner that it can also be understood without having perused the previous four chapters. The chapter does not only assess the laws of the four countries that were subject to research, but it also gives a broader view on collective labour agreements in Europe, including other Member States.

5.3 Part III: Evaluation and suggestions for new legislation on concluding European collective agreements

Part III draws the principal lessons from parts I and II and gives suggestions for realising European legislation on concluding transnational collective agreements. Chapter 14 proposes the legal basis on which European legislation on transnational collective bargaining can be based, explains its relation with the European social dialogue, sets out the most feasible bargaining levels, and explains the principles upon which transnational collective bargaining should be based. Finally, it suggests a definition for transnational collective labour agreements. Chapter 15 proposes the binding powers a transnational collective labour agreement should have. It also sets out which parties are to be involved in transnational bargaining under the proposed European system. Chapter 16 deals with important "technicalities" of the transnational collective labour agreement, such as its enforcement, its term and termination, possible after-effects that its provisions may have and the reach of the social partners when concluding transnational collective labour agreements. Chapter 17 summarises this thesis.

PART I

NECESSARY BACKGROUND INFORMATION / ANSWERING THE PRELIMINARY QUESTIONS

CHAPTER 2

EUROPEAN INSTITUTIONS, LEGISLATION PROCESS AND SOCIAL PARTNERS

1. Introduction

In order to place the subject "European legislation on transnational collective bargaining" in a proper setting, a brief introduction of (i) the institutions of the European Community, (ii) Community legislation and (iii) the European social partners is required. This chapter should not be considered as a thorough elucidation of these subjects, but it merely gives general and compact background information.

As will be set out in this thesis, the institutions of the Community – and most notably: the Commission of the European Communities – have played an important role in the development of the European social dialogue. This makes sense, since one of the Commission's official tasks is to promote the consultation of management and labour at Community level and to take any relevant measure to facilitate their dialogue. Furthermore, Community institutions are capable of transferring agreements concluded by the social partners into European legislation. This is a crucial aspect of the current European social dialogue and will be discussed in depth in chapter 5. Given the above, a basic understanding of the Community's institutions is, if not a necessity, at least very helpful to understand the European social dialogue. For that reason, said institutions will be introduced in section 2.

Given the fact that, as just mentioned, agreements entered into by the social partners may be implemented by a Council decision, a basic knowledge of the Community's legislative process is also necessary. Consequently, said process will be briefly introduced in section 3.

For obvious reasons the social partners themselves play a crucial role in the European social dialogue. Section 4 therefore briefly sets out exactly which parties are considered social partners. Furthermore, the most important and generally recognised cross-sectoral social partners will be introduced in the same section.

Section 5 will summarize the contents of this chapter.

2. Institutions of the European Community

The five most relevant institutions of the Community that are of importance for this thesis, in the sequence in which they are set out in part five of the EC Treaty ("Institutions of the Community"), are: (i) the European Parliament, (ii) the Council of the European Union (the "Council"), (iii) the Commission of the European Communities (the "Commission"), (iv) the Court of Justice and (v) the European Council.[46] The role and powers of these institutions, based on the EC Treaty as currently in force will be described. On occasion, reference will be made to the changes that will take place should the Treaty of Lisbon enter into force.[47]

2.1 The European Parliament

The European Parliament consists of representatives of the people of the Member States (article 189 EC Treaty). These representatives are elected for a period of five years, each Member State having a fixed number of representatives (article 190 EC Treaty). The European Parliament elects its President and its officers from among its members (article 197 EC Treaty). The members of the European Parliament are divided into political groupings rather than nationality. There are currently 8 political groups, the three largest

46 Strictly spoken, institutions of the European Community are the five bodies mentioned on article 7 of the EC Treaty. That does not include the European Council, which in fact is solely an organ of the European Union. Reference is made to P.J.G. Kapteyn and P. VerLoren van Themaat, *Introduction to the Law of the European Communities*, Kluwer Law International, London-The Hague-Boston, third edition 1998, page 181. Consequently, the European Council is not mentioned in part five of the EC Treaty. The reference to "institutions" used in this chapter, which reference includes the European Council, is therefore not entirely correct but practical nevertheless.

47 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13 December 2007, OJ C 306, 17 December 2007, pages 1 *ff*. In this thesis, reference will be made to the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 115, 9 May 2008, pages 1 *ff*. Given the outcome of the referendum held in Ireland on the Treaty of Lisbon – a "no" – it is not clear whether the Treaty will enter into force (without amendments being made). The European Council needed time to analyse the situation. Reference is made to the Presidency Conclusions of the Brussels European Council, 19/20 June 2008, 11018/08, page 1.

ones being the European's People's Party, the Party of European Socialists and the Group of the European Liberal, Democrat and Reform Party.[48]

The European Parliament used to have merely an important budgetary role within the European Community. Its powers have grown considerably over time. Today it has – in addition to its budgetary role[49] – important decision-making and supervisory roles.

The European Parliament co-decides on many European acts, gives its assent or delivers advisory opinions (articles 192, 251 and 252 EC Treaty). The European Parliament furthermore may request the Commission to submit appropriate proposals on matters on which it considers that a Community act is required (article 192 EC Treaty). Pursuant to the Framework Agreement on relations between the European Parliament and the Commission, the latter is required to provide "a prompt and sufficiently detailed reply" to such a request.[50]

The European Parliament furthermore supervises the activities of the other Community institutions, in particular the Commission. At the request of a quarter of its Members, the European Parliament may set up a temporary Committee of Inquiry to investigate contraventions or maladministration of Community law (article 193 EC Treaty). Moreover, the Commission must reply orally or in writing to questions put to it by the European Parliament or its members (article 197 EC Treaty). The European Parliament may bring about a motion of censure on the activities of the Commission; if this motion is carried by a two-third majority of the votes cast, representing a majority of the members of the European Parliament, the members of the Commission must resign as a body (article 201 EC Treaty). Furthermore, the European Parliament appoints an Ombudsman empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role (article 195 EC Treaty). Finally, the European Parliament may initiate

48 Reference is made to P. Craig and D. de Búrca, *EU Law, Text, Cases and Materials*, University Press, Oxford, 2003, page 78.

49 Reference is made to the First and Second Budgetary Treaty, as described in Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities*, chapter V.

50 Agreement of 26 May 2005 (2005/2076 (ACI)), OJ C117E, 18 May 2006, pages 123 – 133.

proceedings before the Court of Justice challenging the legality of an act where necessary to protect its prerogatives (article 230 EC Treaty).

The Treaty of Lisbon will further enhance the role of the European Parliament. Should that Treaty enter into force, the European Parliament will see new powers emerge over the EU legislation, in particular due to the increase of the co-decision procedure. Its budgetary powers will expand, and it will receive a concurrent right of initiative for revision of the Treaties. The number of members of the European Parliament will be limited to 751.[51]

2.2 The Commission of the European Communities

The Commission, together with the Council the most important actor within the European Community,[52] currently consists of 27 members (article 213 EC Treaty).[53] This will be different from the date on which the first Commission following the date of accession of the 27th Member State of the Union takes up its duties (*i.e.* in principle as of November 2009). The number of members of the Commission shall from that moment on be less than the number of Member States. The actual number will then be set by the Council, acting unanimously.[54] The members of the Commission are chosen on grounds of their general competence and must be fully independent (article 213 EC Treaty). Also due to this, the Commission as a body has its own political responsibility, political task and accountability (to the European Parliament).[55] The members of the Commission are chosen for a five-year period (article 214.1 EC Treaty). The manner in which said members are chosen is laid out in article 214.2 EC Treaty and is basically the following:

The Council, meeting in the composition of the Heads of State or Government, nominates by a qualified majority of votes the person it intends to appoint as

51 For an overview of the changed role of the European Parliament under the Treaty of Lisbon, reference is made to: European Parliament, *Report on the Treaty of Lisbon*, 2007/2286(INI), 29 January 2008, pages 27 – 29.

52 Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities*, page 181.

53 As amended by article 4 of the Protocol on the Enlargement of the European Union, which Protocol is annexed as number 10 to the EC Treaty.

54 Article 4 of the Protocol on the Enlargement of the European Union. This downsizing of the European Commission is confirmed on the occasion of concluding the Treaty of Lisbon, and the number is set on 2/3 of the number of Member States. However, the moment of downsizing is delayed until November 2014. European Parliament, *Report on the Treaty of Lisbon*, page 32.

55 Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities*, page 201.

President of the Commission. The European Parliament must approve this nomination.[56] Subsequently, the Council adopts the list of other persons it intends to appoint as members of the Commission, and said list is drawn up in accordance with the proposals made by each Member State. This list is to be adopted by a qualified majority of votes of the Council and with common accord of the nominee for President. The President and other members of the Commission nominated in accordance of the above, must as a body be approved by the European Parliament. After such approval, the Council appoints them, acting by a qualified majority.

Pursuant to article 211 of the EC Treaty, the Commission shall:

- ensure that the provisions of the EC Treaty and the measures taken by the institutions thereto are applied;
- formulate recommendations or deliver opinions on matters dealt within the EC Treaty, if it expressly so provides or if the Commission considers it necessary;
- have its own power of decision and participate in the shaping of measures taken by the Council and by the European Parliament in the manner provided for in the EC Treaty;
- exercise the powers conferred on it by the Council for the implementation of the rules laid out by the latter.

The above-mentioned does not do full justice to the real powers of the Commission. In particular it does not emphasise the crucial part the Commission plays in the legislative process. The commission has, among other rights, the important right of legal initiative.[57] This has enabled the Commission to act as the "motor of integration".[58] What is furthermore helpful to this integration purpose is the fact that the Commission develops

56 This will change when the Treaty of Lisbon enters into force. The President of the Commission is in the future to be elected by the European Parliament on a proposal from the European Council. Reference is made to article 17.7 of the new Treaty on European Union.

57 It has this right since the common format within the relevant European Treaties is to stipulate that the Council and the European Parliament will act on a proposal from the Commission when making legislation. Reference is made to Craig De Búrca, *EU Law, Text, Cases and Materials*, page 59 – 60 and to Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities*, page 202.

58 Craig and De Búrca, *EU Law, Text, Cases and Materials*, page 60. Craig and De Búrca describe the Commission furthermore as "the single most important political force for integration, ever seeking to press forward to attain the Community's objectives"; Craig and De Búrca, *EU Law, Text, Cases and Materials*, page 64.

the Community's overall legislative plan for any year and its general policy strategies.[59] Finally the Commission exercises delegated legislative powers (article 202 and 211 EC Treaty).

Apart from having important rights with regard to legislation, the Commission also acts as a watchdog, basically in two manners. First, in certain specific areas the Commission investigates and even judges Treaty violations committed by Member States or private parties.[60] The Commission's decisions will be reviewed by the Community's court (normally the Court of first Instance).[61] Second, if the Commission considers a Member State in breach of fulfilling an obligation under the EC Treaty, it delivers a reasoned opinion and gives the State concerned the opportunity to submit its observations. If the State does not comply with the Commission's opinion within a time-frame set by the Commission, the latter may bring the matter before the Court of Justice (article 226 EC Treaty).

Apart from the above, the Commission has a very specific and important role when it comes to the European social dialogue. The Commission has the task of promoting the consultation of management and labour at Community level and must facilitate their dialogue by ensuring balanced support for the parties (article 138.1 EC Treaty). Within the Commission, the Directorate-General ("DG") for Employment, Social Affairs and Equal Opportunities is responsible for the European social dialogue. Within the DG, Directorate D1 is responsible for the cross-industry social dialogue and Directorate D2 is responsible for the sectoral social dialogue.[62] As will appear from this thesis, the Commission has acted as an important force in stimulating the European social dialogue.

2.3 The Council of the European Union

The Council consists of a representative of each Member State at ministerial level, who is authorised to commit the government of that Member State

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59 Craig and De Búrca, *EU Law, Text, Cases and Materials*, page 60.

60 The two most important areas are competition policy and state aids (article 85 and 86 EC Treaty). Craig and De Búrca, *EU Law, Text, Cases and Materials*, page 62 and Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities*, page 207.

61 Craig and De Búrca, *EU Law, Text, Cases and Materials*, page 62.

62 Amsterdam Institute for Advanced Labour Studies, *The European Social Dialogue: Development, Sectoral Variation and Prospects*, Report to the Ministry of Social Affairs and Employment, December 2002, page 31.

(article 203 EC Treaty).[63] It depends per subject to be discussed which ministers attend the Council meeting; if there is, for example, a general meeting, the ministers for foreign affairs will be present, if agriculture is on the agenda, the ministers of that area of expertise attend. The Council is the institution in the Community in which the Member Sates are represented as such; the members of the Council are representatives of their Member States.[64]

The presidency of the Council is held in turn by each Member State for a term of 6 months. The position of President of the Council has become more important during recent years and is today vital for the proper functioning of the Council.[65] The votes of the members of the Council are weighted, in a manner as laid out in article 205 EC Treaty.[66]

Pursuant to article 202 EC Treaty, the Council shall:

- ensure co-ordination of the general economic policies of the Member States;
- have power to take decisions;
- confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down.

The above-mentioned statutory description of the powers of the Council is rather vague. It does not make it clear that the Council exercises an important role in the legislative process. It does so in 4 different ways.[67] First, the Council must approve the Commission legislative initiative by vote in order for it to become law. Second, the Council may request the Commission to undertake studies and to submit proposals on subjects the Council considers desirable for the attainment of common objectives (article 208 EC Treaty). Consequently, the Council can pressurise the Commission into generating legislative proposals.[68] Third, the Council can delegate power to the Commission enabling the latter

63 The Council of the European Union has given itself this name in 1993 (OJ 1993 L 281, page 18). It is better known simply as the Council, which is also the name used in the EC Treaty.

64 Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities*, page 187.

65 Craig and De Búrca, *EU Law, Text, Cases and Materials*, page 67.

66 As amended at each time of accession of a new Member State. Reference is made to article 3 of the Protocol on the Enlargement of the European Union. The manner of weighing the votes will change should the Treaty of Lisbon enter into force. European Parliament, *Report on the Treaty of Lisbon*, pages 29 – 31.

67 Craig and De Búrca, *EU Law, Text, Cases and Materials*, page 69.

68 Craig and De Búrca, *EU Law, Text, Cases and Materials*, page 69.

to pass further regulations within a particular area. Last, due to the increasing complexity of the decision-making process within the Community, there is a further developed inter-institutional cooperation between the Commission, the European Parliament and the Council, enabling said institutions to enter into agreements concerning, among others, new legislative initiatives.[69]

2.4 The European Court of Justice

The judicial supervision in the Community is exercised by one institution – the Court of Justice – comprised of two bodies, the original Court of Justice of the European Communities (Court of Justice) and the Court of First Instance.[70] The Court of Justice consists of one judge per Member State and the Court of First Instance of at least one judge per Member State (article 221 and article 224 EC Treaty respectively). The Court of Justice is assisted by 8 Advocates-General, who make reasoned submissions on cases that require their involvement (article 222 EC Treaty). The Court of First Instance has no separate Advocates-General, although any judge may be called upon to perform the task of an Advocate-General.[71] The Judges of the Court of Justice and the Advocates-General are chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence; they are to be appointed by common accord of the governments of the Member States for a term of six years (article 223 EC Treaty). Roughly the same applies to the members of the Court of First Instance (article 224 EC Treaty). The Judges from both the Court of Justice and the Court of First Instance elect their President from among their midst for a three-year term (article 223 and article 224 respectively EC Treaty).

The Court of First Instance has, among others, jurisdiction to hear and determine at first instance actions or proceedings as set out in a number of articles in the EC Treaty (article 225 EC Treaty). Decisions given by the Court of First Instance may be subject to a right to appeal to the Court of Justice on points of law only (article 225 EC Treaty).

The Court of Justice has jurisdiction to give preliminary rulings concerning *i.a.* the interpretation of the EC Treaty and the validity and interpretation of

69 Craig and De Búrca, *EU Law, Text, Cases and Materials*, page 70.

70 Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities*, page 249.

71 Reference is made to article 49 of the Statute of the Court of First Instance. A Judge only rarely acts as an Advocate-General and only then in cases of legal difficulty. See Craig and De Búrca, *EU Law, Text, Cases and Materials*, page 91.

acts of the institutions of the Community. The court of each Member State is allowed to request the Court of Justice to give a ruling on the aforementioned subjects; the highest court of a Member State is even required to do so (article 234 EC Treaty). The Court of Justice more or less shaped its own jurisdiction by broadly interpreting article 220 EC Treaty, an article which stipulates that the Court of Justice and the Court of First Instance are to ensure that in the interpretation and application of the EC Treaty the law is observed. By doing so, the Court of Justice assumed competency in matters that were not listed in the EC Treaty.[72] It furthermore extended its role by developing principles of a constitutional nature as part of Community law, to which it then holds the Community institutions and Member States bound.[73] The Court of Justice's active role has furthered legal integration in the European Community and has given "flesh and substance to an 'outline' treaty".[74]

Should the Treaty of Lisbon enter into force, it will not bring about major changes in the composition and organisation of the Court of Justice. The most notable change is that the institution will be renamed into "Court of Justice of the European Union", comprising the "Court of Justice", the "General Court" (Court of First Instance) and possible "specialised courts", instituted by a regulation.

2.5 The European Council

Pursuant to article 4 of the Treaty on European Union, the European Council exists of "the Heads of State or Government of the Member States and the President of the Commission". The ministers for foreign affairs and a member of the Commission assist them. The European Council meets at least twice a year, under the chairmanship of the Head of State or Government of the Member State which holds the Presidency of the Council (of the European Union). Since the European Council consists of the Heads of State or Government, it can take "top-level" decisions.[75]

The institution "European Council" has existed for quite some time. During the 1960s the Heads of Government came together on a regular basis, but is

72 Craig and De Búrca, *EU Law, Text, Cases and Materials*, page 97.

73 The first case being: European Court of Justice, 12 November 1969, C-29/69, *Stauder v. City of Ulm*.

74 Craig and De Búrca, *EU Law, Text, Cases and Materials*, page 87.

75 Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities*, page 185.

was only in 1974 at the Paris summit that it was institutionalised.[76] The first mention in a Treaty followed in 1986, in the Single European Act.[77] Today the European Council is mentioned on several occasions in the EC Treaty, but remains outside its main framework.[78]

The statutory defined role of the European Council is that it is to provide the Union with the necessary impetus for its development and that it is to define the general political guidelines thereof (article 4 of the Treaty on European Union). However, more roles are to be distinguished, including (i) discussing the development of the Community and Union itself, (ii) confirming important changes in the institutional structure of the Community, (iii) focusing on significant constitutional initiatives, (iv) focusing on the state of the European economy, (v) conflict resolution, (vi), initiating or developing particular policy strategies, (vii) focusing on external relations and (viii) considering new accessions to the Community.[79] Article 15.1 of the Treaty on European Union, as amended by the Treaty of Lisbon, makes clear that the European Council shall not exercise legislative functions.

3. Community legislation

There are three relevant aspects as to Community legislation for a better understanding of this thesis. First, it is important to establish in general terms when and to what extent the institutions of the Community are entitled to exercise their powers. Second, it should be summarised how Community legislation is drafted. Third, the different types of Community legislation are to be distinguished.

3.1 Community powers to legislate

The European Community has not received a *carte blanche* to exercise powers. It can only act within the limits of the powers conferred to it by the EC Treaty (article 5 EC Treaty); there must, in other words, be conferred or attributed powers. There is not a general stipulation that confers powers to Community institutions, but this is done "by the grant of a plurality of specific powers of decision (attributed powers) which are defined as accurately as possible

76 Craig and De Búrca, *EU Law, Text, Cases and Materials*, page 71.

77 OJ 1987 L 169, pages 1 – 17.

78 Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities*, page 183.

79 Craig and De Búrca, *EU Law, Text, Cases and Materials*, pages 73 – 74.

in the various Treaty articles according to their nature and subject-matter".[80] Attribution of powers thus occurs on an article-by-article basis. As a result, Community Acts must be properly based on a suitable article of the EC Treaty giving specific competence to draft such Acts.[81]

Moreover, the Community institutions must refrain from taking action if such an action could just as well be taken by the Member States. This is the so-called principle of subsidiarity. Furthermore, the Community may not go further than what is necessary to achieve the objectives of the EC Treaty. This concerns the so-called principle of proportionality. These two principles, as well as the principle of conferred or attributed powers, follow from article 5 of the EC Treaty, which reads as follows:

> The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.
>
> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.
>
> Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

This stipulation, in particular with regard to the principles of subsidiarity and proportionality, requires further explanation. Subsequently, its importance with regard to European (collective) employment law will be explained.

The fact that the Community must act within the limits of its powers is rather self-explanatory. Such is not the case with regard to the principle of subsidiarity. All proposed actions in areas that do not fall within the exclusive competence of the Community must pass the subsidiarity test. It is highly debatable exactly which areas fall within the *exclusive* competence of the Community.[82] However, the answer to this question, if such an answer could be given at all, is not of material importance to this thesis and will therefore

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80 Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities*, page 234.

81 Craig and De Búrca, *EU Law, Text, Cases and Materials*, page 122.

82 For a summary of this debate reference is made to Craig and De Búrca, *EU Law, Text, Cases and Materials*, page 133.

not be dealt with. More relevant to this thesis is the principle of subsidiarity itself and particularly its implication on European (collective) employment law.

Given article 5 above, three (intertwined) subjects are relevant:[83] (i) the Community can only take action if the objectives of that action cannot be sufficiently achieved by the Member States, (ii) the Community can better achieve the action and (iii) if the Community does act, it should not go beyond what is necessary to achieve the objectives of the EC Treaty.

The first two subjects are jointly referred to as the test of comparative efficiency; is it better for the action to be taken by the Community or the Member States?[84] Whether proposed action passes the comparative efficiency test should be determined by the following guidelines:[85]

- the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States;
- actions by Member States alone or lack of Community action would conflict with the requirements of the EC Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests;
- action at Community level would produce clear benefits by reason of its scale or effects, compared with action at the level of the Member States.

The last (third) test regards proportionality, the Community should only legislate to the extent necessary and, if necessary, as simply as possible.[86] Directives are preferred to regulations and framework agreements to detailed measures. Community should moreover leave as much scope for national decision as possible.[87]

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83 Craig and De Búrca, *EU Law, Text, Cases and Materials*, page 135.

84 Craig and De Búrca, *EU Law, Text, Cases and Materials*, page 135.

85 Article 5 of the Protocol on the application of the principles of subsidiarity and proportionality, as annexed as number 30 to the EC Treaty.

86 Article 6 of the Protocol on the application of the principles of subsidiarity and proportionality.

87 Article 7 of the Protocol on the application of the principles of subsidiarity and proportionality.

Questions on subsidiarity can be judged by the European Court of Justice. Logically, the outcome of litigation on this topic depends very much on the level of scrutiny applied by the Court of Justice: does it, for instance, strictly apply the test of comparative efficiency? Strictly applying that test will not always be easy, as the answer to the question whether is it better for the action to be taken by the Community or the Member States generally involves complex socio-economic analyses. The indications are that the Court of Justice uses a relatively "light" test when assessing whether the Community institutions comply with the subsidiarity test.[88]

Should the Treaty of Lisbon enter into force, the requirement for the Union to strictly comply with the principles of subsidiarity and proportionality will strengthen. In particular, the national Parliaments will be entitled to monitor compliance with these principles (article 12(b) of the amended Treaty on European Union). They gain the right to be informed in good time of all legislative proposals of the Commission (or another institution if appropriate), which must substantiate that said principles are complied with. Subsequently, the national Parliaments may, within eight weeks following the forwarding of the proposal at hand, send directly to the Union institutions opinions setting out the reasons why they view that the proposal does not comply with the principles of subsidiarity and proportionality. Should at least one-third of the national Parliaments consider that the proposal violates the aforementioned principles, the Commission must reconsider its proposal. Subsequently, the Commission may decide to maintain, amend or withdraw the draft, giving reasons for this decision. If the number of negative opinions of the national Parliaments represents at least a simple majority of the votes allocated to the national Parliaments, the proposal should also be reviewed. Upon continuation by the Commission of that legislative proposal, the legislator (the European Parliament and the Council) need to consider whether it is compatible with the principle of subsidiarity. If, by a majority of 55% of the members of the Council or a majority of the votes cast in the European Parliament, the legislator is of the opinion that the proposal is not compatible with the principle of subsidiarity, the legislative proposal shall not be given further consideration.[89] These changes lead to more influence of the Member States on the principles of subsidiarity and proportionality.[90]

88 See, including references to case law, Craig and De Búrca, *EU Law, Text, Cases and Materials*, page 137. See also R. Barents, *Het subsidiariteitsbeginsel en het Hervormingsverdrag*, [*The pinciple of subsidiarity and the Reform Treaty*], Nederlands Tijdschrift voor Europees Recht, 2007/11, page 256.

89 Reference is made to the protocol on the application of the principles of subsidiarity and proportionality, as annexed as number 2 to the Treaty of Lisbon.

90 R. Barents, *Het subsidiariteitsbeginsel en het Hervormingsverdrag*, page 261.

The above makes it clear (at least on a theoretical level) if and, if so, to what extent Community action is allowed. How does this relate to the field of European (collective) employment law?

Given the rules of subsidiarity, prior to any action being taken in the aforementioned field, the question should be answered who should act: Community institutions, the State or other governmental bodies on the one hand or – as the case may be – social partners on the other hand?[91] This question became in particular relevant upon the introduction of the 1992 Protocol on Social Policy, which enabled social partners to (indirectly) "draft legislation".[92] It is an issue often referred to as "horizontal subsidiarity". Whereas "vertical subsidiarity" governs relations between the Community's public law institutions and those of Member States, horizontal subsidiarity refers to a division of governance between actors of a different nature acting at same geographical level; either public (governments) or private law actors (social partners) at the same geographical level should act.[93] If a certain issue can be equally well or better dealt with by the social partners, as opposed to public authorities, the social partners should be given the opportunity to act on the basis of horizontal subsidiarity.[94] This is in line with the Commission's point of view, as stated in the following:[95]

> In certain sectors for which the Amsterdam Treaty introduces new responsibilities (*e.g.* for creating a European area of freedom, security and justice, and in the fields of social policy and discrimination), there is a need for "active subsidiarity" as a means of achieving the new objectives set out in the Amsterdam Treaty. In other sectors, the Commission is seeking greater cooperation with the Member States, the local and regional authorities and civil society, with a view to the shared application of Community and national instruments in order to achieve a common goal.

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91 R. Blanpain, *European Labour law*, Kluwer Law International, The Hague/ London/New York, ninth revised edition 2003, page 44 and pages 571 – 572.

92 See chapter 3, section 2.3.2. See also B. Bercusson, *European Labour Law*, Buttersworth, London/Charlottesville/Dublin/Durban/Edinburgh/Kuala Lumpur/ Singapore/Sydney/Toronto/ Wellington, 1996, page 532.

93 F. Dorssemont, *Contractual governance by management and labour in EC labour law*, in: A.A.H. van Hoek, T. Hol, O. Jansen, P. Rijpkema, R. Widdershoven (eds.), *Multilevel Governance in enforcement and Adjudication*, Intersentia, Antwerpen – Oxford, 2006, pages 288 and 289.

94 R. Blanpain, *European Labour law*, page 45.

95 Commission Report to the European Council, COM (2000) 772, final, *Better lawmaking 2000*, page 3.

That still does not answer the question exactly when – if on the basis of vertical subsidiarity a matter should be dealt with on Community level rather than on Member State level – the social partners should, on the basis of horizontal subsidiarity, take precedence over the legislative institutions of the Community. Here, it should be emphasised that the subsidiarity test is a *relative* test, aiming to answer the question which level is better equipped to take an action. That may sometimes be the legislative institutions of the Community, as they have swift, efficient and legally certain tools at their disposal. Sometimes, however, the track-record of the social partners may indicate that they are better equipped to deal with a specific topic. An original first choice for the social partners is not necessarily a final choice. If the social partners are unable to reach an agreement within a reasonable period of time on a specific topic which needs to be addressed on Community level, the conclusion must be that the social partners are apparently not best equipped to deal with this specific topic after all, and the matter can be referred to the legislative institutions of the Community. There is no real necessity to interpret the (horizontal) subsidiary principle in such a manner that either a higher or a lower level receives the allocation of powers. The test of comparative sufficiency already implies that it is not a question of exclusive allocation, but a question of *better* allocation.[96] In fact, this system is applied in the European social dialogue as set out in chapter 5. The European social partners may take over a legislative proposal from the Commission in order to reach an agreement on the subject at hand. If they fail to reach such an agreement (in good time), the Commission retakes the initiative and may continue with its proposal. It is no coincidence that the Economic and Social Committee (ECOSOC) argued that the (current) articles 136 – 139 EC Treaty may be viewed as "an indication of the application of horizontal subsidiarity at EC level".[97]

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96 B. Bercusson, *European Labour Law*, page 534. This applies in particular to horizontal subsidiarity, as it is questionable whether the rules of article 5 of the EC Treaty (strictly) apply to horizontal subsidiarity. Bercusson takes the view that they do not. That would entail that there is more room to manoeuvre when it concerns horizontal subsidiarity, when compared to vertical subsidiarity. See B. Bercusson, *European Labour Law*, pages 556 and 557.

97 See the Opinion of the Economic and Social Committee on the Communication concerning the application of the Agreement on Social Policy presented by the Commission to the Council and to the European Parliament OJ C 397, 31 December 1994, pages 40 *ff*, paragraph 1.3.6. ECOSOC considers horizontal subsidiarity as "the division of responsibilities between the social partners and the authorities". See paragraph 1.3.1.

From the above, including the Commission's quote stated above, it can be derived that the Commission investigates what the most appropriate level will be for the adoption of rules.[98] This could well be the social partners' level. To summarise, there are reasons to argue that the principle of subsidiarity illustrates that certain problems are better addressed by the social partners, rather than state authorities, as these social partners are the most appropriate parties for taking action.

3.2 Drafting of Community legislation

Now the (complex) process by which the Community enacts legislation will be briefly discussed. There are 6 different procedures for drafting Community legislation: (i) the Commission acting alone, (ii) the Council and Commission acting alone, (iii) the Council and Commission acting after having consulted the European Parliament, (iv) the Council and Commission acting in cooperation with the European Parliament, (v) the Council and Commission acting in co-decision with the European Parliament and (vi) the Council, Commission and European Parliament acting in assent.[99]

It is rather unusual that (i) the Commission enacts legislation on its own.[100] An example of this can be found in article 86.3 of the EC Treaty, which delegates powers to the Commission to address appropriate directives or decisions to Member States regarding their involvement in public undertakings.

In a few instances (ii) the Council can draft legislation on the initiative of the Commission. Examples of this include articles 26 (The Customs Union), 45 and 47 (Right of Establishment), 49 (Services) and 101 and 103 (Economic Policy) of the EC Treaty.

In other instances (iii) the Council can enact legislation upon the Commission's proposal, after the European Parliament has been consulted thereon. If the European Parliament is not consulted, the measures can be annulled.[101] The Council is not, however, bound to the European Parliament's opinion. Examples of this manner of drafting Community legislation include articles 19 and 22 EC Treaty (Citizenship of the Union), 89 (Aids granted by States), 93 (Tax Provisions) of the EC Treaty.

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98 COM (2000) 772, page 4.

99 Craig and De Búrca, *EU Law, Text, Cases and Materials*, page 140 and further.

100 Craig and De Búrca, *EU Law, Text, Cases and Materials,* page 140.

101 Graig and De Búrca, *EU Law Text, Cases and Materials,* page 141. Reference is also made to the case-law mentioned in footnote 7 on said page.

After time has passed since the setting up of the Community, the European Parliament has gained influence. This also has been the case in the legislative process. Article 252 EC Treaty sets out the manner in which (iv) the Council, Commission and European Parliament can draft Community legislation in mutual cooperation. This procedure must be followed anywhere where the EC Treaty refers to article 252 EC Treaty (article 251.1 EC Treaty). Examples include articles 99 and 102 of the EC Treaty (Economic Policy). The procedure as set out in article 252 EC Treaty basically works as follows:[102]

a. The Council, acting by a qualified majority on a proposal from the Commission and after obtaining the opinion of the European Parliament, will adopt a common position.

b. The Council's common position will be communicated to the European Parliament. If, within three months of such communication, the European Parliament approves this common position or has not yet taken a decision, the Council shall definitively adopt the act in question in accordance with the common position.

c. The European Parliament may, within the period of three months referred to above, by an absolute majority of its component members, propose amendments to the Council's common position. The European Parliament may also, by the same majority, reject the Council's common position. If the European Parliament has rejected the Council's common position, unanimity shall be required for the Council to act on a second reading.

d. The Commission shall, within a period of one month, re-examine the proposal on the basis of which the Council adopted its common position, by taking into account the amendments proposed by the European Parliament.
   The Commission shall forward to the Council, at the same time as its re-examined proposal, the amendments of the European Parliament which it has not accepted, and shall express its opinion on them. The Council may adopt these amendments unanimously.

e. The Council, acting by a qualified majority, shall adopt the proposal as re-examined by the Commission. Unanimity shall be required for the Council to amend the proposal as re-examined by the Commission.

102 The procedure is fully set out in article 252 of the EC Treaty.

f. In the cases referred to in points (c), (d) and (e), the Council shall be required to act within a period of three months. If no decision is taken within this period, the Commission proposal shall be deemed not to have been adopted.

Article 251 of the EC Treaty confers yet more powers to the European Parliament in the legislative process. This article deals with the "co-decision" procedure of (v) the Council, Commission and European Parliament. It applies to the adoption of any act under the EC Treaty where reference is made to article 251 of the EC Treaty (article 251.1 EC Treaty). Examples can be found in articles 12 (Discrimination), 18 (Right to Move) and 137 (Social Policy) of the EC Treaty. The procedure set out in article 251 of the EC Treaty has become the main method for drafting Community legislation,[103] and will even gain further dominance should the Treaty of Lisbon enter into force.[104] The co-decision procedure basically works as follows:[105]

a. The Commission will submit a proposal to the European Parliament and the Council.

b. The Council, acting by a qualified majority after obtaining the opinion of the European Parliament: (i) if it approves all the amendments contained in the European Parliament's opinion, may adopt the proposed act as amended, (ii) if the European Parliament does not propose any amendments, may adopt the proposed act, or (iii) will otherwise adopt a common position and communicate it to the European Parliament.

c. If, within three months of the above-mentioned communication, the European Parliament: (i) approves the common position or has not taken a decision, the act in question shall be deemed to have been adopted in accordance with that common position, (ii) rejects by an absolute majority of its component members the common position, the proposed act shall be deemed not to have been adopted, or (iii) proposes amendments to the common position by an absolute majority of its component members, the amended text shall be forwarded to the Council and to the Commission, which shall deliver an opinion on those amendments.

d. If, within three months after the matter being referred to it, the Council, acting by a qualified majority, approves all the amendments of the

103 Graig and De Búrca, *EU Law Text, Cases and Materials,* page 145.

104 European Parliament, *Report on the Treaty of Lisbon*, page 37.

105 The procedure is fully set out in article 251 EC Treaty.

European Parliament, the act in question shall be deemed to have been adopted in the form of the common position thus amended; however, the Council shall act unanimously on the amendments on which the Commission has delivered a negative opinion. If the Council does not approve all the amendments, the President of the Council, in agreement with the President of the European Parliament, shall within six weeks convene a meeting of the Conciliation Committee.

e. The Conciliation Committee shall have the task of reaching agreement on a joint text, by a qualified majority of the members of the Council or their representatives and by a majority of the representatives of the European Parliament. The Commission shall take part in the Conciliation Committee's proceedings and shall take all the necessary initiatives with a view to reconciling the positions of the European Parliament and the Council. In fulfilling this task, the Conciliation Committee shall address the common position on the basis of the amendments proposed by the European Parliament.

f. If, within six weeks of it being convened, The Conciliation Committee approves a joint text, the European Parliament, acting by an absolute majority of the votes cast, and the Council, acting by a qualified majority, shall each have a period of six weeks from that approval in which to adopt the act in question in accordance with the joint text. If either of the two institutions fails to approve the proposed act within that period, it shall be deemed not to have been adopted.

g. Where the Conciliation Committee does not approve a joint text, the proposed act shall be deemed not to have been adopted.

The final manner to enact Community legislation, is (vi) by mutual consent of the Council and European Parliament on an initiative of the Commission. The assent procedure can be found in several articles of the EC Treaty, such as article 105.6 and 107.5 (Monetary Policy) and article 161 (Economic and Social Cohesion) of the EC Treaty.

3.3 Types of Community regulations

There are different types of Community instruments. These are set out in article 249 of the EC Treaty:

> In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council and the Commission shall

> make regulations and issue directives, take decisions, make recommendations and deliver opinions.
>
> A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
>
> A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
>
> A decision shall be binding in its entirety upon those to whom it is addressed.
>
> Recommendations and opinions shall have no binding force.

The EC Treaty only rarely prescribes exactly in which of the aforementioned ways a measure has to be implemented. This is normally at the discretion of the Community's institutions.[106]

Regulations are (i) binding upon all Member States and (ii) generally and (iii) directly applicable within these Member States. The general application concerns the impersonal, non-individual character of the regulations.[107] "Directly applicable" means that they automatically apply; there is no need for separate national legal action in order to implement the regulations.[108] Regulations have to be executed by the President of the European Parliament and by the President of the Council and published in the Official Journal of the European Union. They shall enter into force on the date specified in them or, in absence thereof, on the 20th day following that of their publication (article 254 EC Treaty).

Directives do, in deviance from regulations, not have to be directed to *all* Member States and require a form of implementation by the Member States in order to apply within that Member State.[109] The directive is therefore only binding as to the result to be achieved.[110] The exact form of implementation is at the choice of the Member State involved; the implementation must however

106 Craig and De Búrca, *EU Law, Text, Cases and Materials*, page 112.

107 Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities*, page 324.

108 Craig and De Búrca, *EU Law, Text, Cases and Materials*, page 113.

109 Craig and De Búrca, *EU Law, Text, Cases and Materials*, page 114.

110 Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities*, page 324.

be clear and legally certain.[111] Directives which are addressed to all Member States must be published in the Official Journal of the European Union and shall be effective on the date specified in them or, in absence thereof, on the 20th day following that of their publication (article 254 EC Treaty).

Decisions are fully binding on those to whom they are addressed. They must be properly notified to its addressee(s) and shall take effect upon such notification (article 254 EC Treaty). Decisions that are adopted pursuant to article 251 of the EC Treaty shall be published in the Official Journal of the European Union and shall come into force on the date specified in them or, in absence thereof, on the 20th day following that of their publication (article 254 EC Treaty). Any natural or legal person to whom the decision is addressed may institute proceedings against it before the Court of Justice and have its legality assessed (article 230 EC Treaty).

Recommendations and opinions have no binding force. Article 211 of the EC Treaty renders the Commission the right to formulate recommendations and deliver opinions on matters dealt with in the EC Treaty.

Although the Lisbon Treaty essentially leaves the typology of instruments unchanged, it makes a distinction between legislative acts (drafted by the legislative authority, *i.e.* the European Parliament and the Council) and implementing acts (implementing the aforementioned legislative acts by the executive). Legislative acts will have supremacy over executive acts.[112]

4. (Cross-sectoral) social partners

4.1 Social partners

Social partners are to be divided into employees' representative organisations (trade unions) on the one hand and employers' representative organisations on the other.[113] Social partners are different in nature from other organisations,

111 Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities*, page 330.

112 European Parliament, *Report on the Treaty of Lisbon*, pages 35 and 36.

113 Although not entirely correct, in this thesis the concept "social partners" may also be used to indicate the parties that are capable of entering into collective labour agreements. In that situation it not only refers to organisations of employers and employees, but also to individual employers, as the latter may also validly conclude collective labour agreements. The context in which the concept "social partners" will be used will make clear whether or not it also includes employers.

like pressure groups or interest groups, because of their ability to take part in the collective bargaining process.[114]

In order for the social partners to be able to participate in the (institutionalised) European social dialogue, the organisation involved should:[115]

(i) be cross-industry or relate to specific sectors or categories and be organised at European level;
(ii) consist of organisations which are themselves an integral and recognised part of Member State social partner structures, have the capacity to negotiate agreements and are representative of all Member States, as far as possible;
(iii) have adequate structures to ensure their effective participation in the consultation process.

According to the Commission, in a European context the social partners' organisations continue to evolve. National affiliates continue to join and new groups are set up.[116]

Since there are many sectoral social partners, hereinafter only the cross-industry social partners will be introduced. In chapter 4, section 4 – in which the achievements of the sectoral social partners will be discussed – a general overview will be given of the sectoral social partners.

4.2 The cross-industry employees' organisations

By far the most important cross-industry European trade union is the European Trade Union Confederation ("ETUC"). Besides ETUC, however, there are two other cross-industry trade unions, the Council of European professional and managerial staff EUROCADRES ("EUROCADRES") and the European Confederation of Executives and Managerial Staff ("CEC"). These three organisations jointly form "labour" in the cross-industry social dialogue. Before introducing the three parties further, it is good to note that the three organisations work closely together.

In the year 2000 ETUC signed a cooperation agreement with EUROCADRES and CEC. In this agreement, CEC and EUROCADRES affirm the importance

114 COM (1998) 322, page 4.

115 Commission Communication, COM (1993) 600, final, *Concerning the application of the Agreement on social policy*, page 2. See for further details chapter 5, section 2.2.

116 COM (1998) 322, page 4.

of the social dialogue process and the involvement therein for professionals, managers and executives. CEC and EUROCADRES acknowledge ETUC's key role in this dialogue. They also accept ETUC's proposal for them to establish a liaison committee on behalf of managerial and executive staff. This liaison committee facilitates cooperation between the organisations involved in, among other things, negotiating with employers' organisations. In negotiations, one representative from EUROCADRES and one from CEC may participate. The aim of the agreement is basically to adopt a joint trade union approach. If there are any disagreements between the parties involved in negotiations these will be resolved internally, so as not to block progress in negotiations. It is also provided that, outside the negotiating process and the issues they decide to pursue together, EUROCADRES and CEC retain their autonomy of expression and activity.[117]

4.2.1 The European Trade Union Confederation (ETUC)[118]

ETUC was founded on 8 February 1973 by seventeen national organisations in order to counterbalance, as a trade union, the economic forces of European integration.[119] ETUC aspires to be "a unified and pluralistic organisation representing all working people at European level".[120] Currently,[121] 82 national trade union confederations from 36 European countries are members of ETUC, as well as 12 European Industry Federations. This amounts to a total of approximately 60 million members, which constitutes approximately 90% of all union members in Europe.[122] ETUC represents organisations of different ideological, religious and organisational backgrounds.[123]

ETUC seeks to (i) influence European legislation and policies by, among others, making direct representations to the Community institutions (including the Council, Parliament and Commission) and (ii) establish industrial relations with the employers at European level by means of the European social

117 The above information is based in the EIRO publication of T. Weber, *Managerial and professional unions agree to cooperate in European social dialogue*, 28 August 1999, page 1.

118 The information hereunder has been derived from ETUC's website (www.etuc.org), unless otherwise stipulated.

119 Reference is made to page 7 of ETUC's Constitution and ETUC's website.

120 Reference is made to page 7 of ETUC's Constitution.

121 That is: June 2008.

122 Amsterdam Institute for Advanced Labour Studies, *The European Social Dialogue: Development, Sectoral Variation and Prospects*, page 28.

123 Amsterdam Institute for Advanced Labour Studies, *The European Social Dialogue: Development, Sectoral Variation and Prospects*, page 28.

dialogue. ETUC is recognised by the European Community as a representative cross-sectoral trade union organisation at European level.[124]

ETUC's members confirmed the primacy of national-level collective bargaining; ETUC still receives a case-by-case negotiation mandate from its members.[125] The manner in which ETUC decides whether or not to adopt European collective agreements concluded in the European social dialogue is based on a complicated double procedure. In brief, a majority of all member organisations must agree and, of those, a qualified majority must be organisations established in Member States.[126] Consequently, there is no requirement of unanimity.

4.2.2 The Council of European professional and managerial staff (EUROCADRES)[127]

EUROCADRES is the European representative organisation of employees holding professional or managerial posts. EUROCADRES has more than 5 million professionals and managers in membership throughout Europe. They work in all branches of industry, both manufacturing and service, and in the civil and public services. EUROCADRES acts on the behalf of European professional and managerial staff to: (i) develop employment in Europe; (ii) secure fair conditions on mobility; (iii) guarantee recognition of qualifications and diplomas; (iv) improve education and life long learning; (v) realise equal opportunities; (vi) monitor working conditions and working time; (vii) enhance collective bargaining at all levels; and (viii) promote Responsible European Management and Corporate Social Responsibility. It is an organisation associated to ETUC. EUROCADRES is recognised by the Commission as a European social partner and it participates at European level in the social dialogue and collective bargaining.

Pursuant to article 26 of EUROCADRES' statutes, its organs shall endeavour to achieve the widest possible measure of agreement when making decisions. When voting is necessary, the decisions require a majority of two-thirds of the votes cast (except for certain "constitutional" decisions). EUROCADRES did not provide any information on the voting mechanism in place in case

124 Reference is made to chapter 5, section 2.2 of this thesis.

125 Amsterdam Institute for Advanced Labour Studies, *The European Social Dialogue: Development, Sectoral Variation and Prospects*, page 29.

126 L. Betten, *The Democratic Deficit of Participatory Democracy in Community Social Policy*, European Law Review, February 1998, page 32.

127 The information hereunder has been derived from EUROCADRE's website (www.eurocadres.org), unless otherwise stipulated.

of adoption of European collective agreements concluded in the European social dialogue.

4.2.3 The European Confederation of Executives and Managerial Staff (CEC)[128]

CEC was established in 1989. CEC promotes and defends the interests of managers in Europe. It represents the specific views of managers towards the Community institutions and other stakeholders. Through its national member organisations and professional federations CEC represents 1.5 million managers in Europe. CEC is an independent social partner in the European social dialogue.

With regard to the adoption of a European collective agreement, CEC does not have a specific voting procedure in place. As already mentioned, CEC is part of the negotiation group in the frame of the liaison committee CEC-EUROCADRES. It consults and reports to its member organisations on the negotiation process. As a consequence, the final agreed text is supported by the negotiator and the officers, and communicated to CEC member organisations. Unless the agreement is contrary to the interests of the member organisations (which, according to CEC never happened in practice) the text is approved.[129]

4.3 The cross-industry employers' organisations

Also on the side of employers, there are three organisations that are involved in the cross-industry European social dialogue.

4.3.1 The Union of Industrial and Employers' Confederation (UNICE) / BUSINESSEUROPE[130]

The Union of Industrial and Employers' Confederation (UNICE) was founded in 1958 by 8 national organisations from 6 different European countries in order to track the political consequences created by the Treaty of Rome.[131] UNICE changed its name into BUSINESSEUROPE as of 23

128 The information hereunder has been derived from CEC's website (www.cec-managers.org), unless otherwise stipulated.

129 This information derives from CEC, as kindly sent to me by Mrs. A. Guillemin of CEC.

130 The information hereunder has been derived from BUSINESSEUROPE's website (www.businesseurope.eu), unless otherwise stipulated.

131 The referred to "Treaty of Rome" is the Treaty establishing the European Community, as amended by subsequent Treaties, Rome, 25 March 1957.

January 2007, but will in this thesis still regularly be referred to as UNICE. BUSINESSEUROPE is a cross-sectoral employer's organisation. Its mission and priorities are to: (i) implement the reforms for growth and jobs, (ii) integrate the European market, (iii) govern the EU efficiently, (iv) shape globalisation and fight all kinds of protectionism, (v) promote a secure, competitive and climate-friendly energy system and (vi) reform European social systems to respond to global challenges. BUSINESSEUROPE strives for, among others, permanent liaison with official institutions. BUSINESSEUROPE has created an informal network in which European sector-level employers' associations meet to discuss European policy on an informal basis.[132] In 2003 (as it was then known) UNICE had 36 members and 3 observers from 29 countries, including the EU countries, the European Economic Area countries, and some Central and Eastern European countries. BUSINESSEUROPE is the largest European employers' organisation in terms of economic coverage. It is a recognised cross-sectoral social partner.[133]

When making decisions, BUSINESSEUROPE normally seeks a consensus among its members, and does not adopt a position if that is contrary to the justified interests of one of its members. BUSINESSEUROPE has, however, the possibility of approving proposals unless three Member States vote against it. In the case that it concerns a draft agreement negotiated in the framework of the European social dialogue, specific rules apply. For a debate on the social dialogue to be valid, there must be a quorum of at least two-thirds of member-federations properly represented at the Council of Presidents' meeting, whose country is affected by the proposal in question. To enter into a negotiation within the social dialogue, at least four-fifths of members who have voting rights (*i.e.* full members) must agree to start the negotiations. A draft agreement, once negotiated, must be adopted only by consensus among all the members with voting rights and whose country is affected by the agreement in question.[134]

4.3.2 The European Centre for Public Enterprises (CEEP)[135]

European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest (CEEP) was established in 1961 as an

132 Amsterdam Institute for Advanced Labour Studies, *The European Social Dialogue: Development, Sectoral Variation and Prospects*, page 30.

133 Reference is made to chapter 5, section 2.2 of this thesis.

134 This derives from articles 6.3 and 7.8 of BUSINESSEUROPE's statutes, as kindly sent to me by Mr. P. Kettlewell of BUSINESSEUROPE.

135 The information hereunder has been derived from CEEP's website (www.ceep.org), unless otherwise stipulated.

international non-profit association for scientific purposes. CEEP is a cross-sectoral organisation representing enterprises and employers' organisations with public participation and enterprises carrying out activities of general economic interests. CEEP incorporates several hundred member associations, enterprises and organisations in over 20 countries, having a total impact amounting to one-sixth/one-seventh of the entire European trading economy. One of CEEP's main objectives is to represent enterprises and other employers with public participation, and of general economic interest, vis-à-vis the European institutions. CEEP is known to be more willing than BUSINESSEUROPE to be involved in the European social dialogue.[136] CEEP is one of the three cross-sectoral employers' organisations recognised by the Commission.[137]

Although not explicitly mentioned in CEEP's rules of procedure, the decision-making process concerning the adoption of European collective labour agreements is dual: first, in the Social Affairs Committee of CEEP and second in the General Assembly of CEEP. In both cases unanimity is required.[138]

4.3.3 The European Association of Craft, Small and Medium Sized enterprises (UEAPME)[139]

The European Association of Craft and Small and Medium Sized enterprises (UEAPME) is an employer's organisation representing the interests, at European level, of crafts, trades and small and medium sized enterprises in the whole of Europe. It has 81 member organisations consisting of national cross-sectoral federations, European branch federations and other associate members, all supporting small and medium sized enterprises. Across the whole of Europe, UEAPME represents over 11 million enterprises with around 50 million employees. UEAPME considers itself as the 'voice' of crafts, trades and small and medium sized enterprises, one of its aims is being able to represent the common interests of its members vis-à-vis the European institutions. UEAPME is recognised as a cross-sectoral European Social Partner.[140]

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136 Amsterdam Institute for Advanced Labour Studies, *The European Social Dialogue: Development, Sectoral Variation and Prospects*, page 30.

137 Reference is made to chapter 5, section 2.2 of this thesis.

138 This information was kindly provided to me by Mrs. M. Vandomme of CEEP.

139 The information hereunder has been derived from UEAMPE's website (www.ueapme.com), unless otherwise stipulated.

140 Reference is made to chapter 5, section 2.2 of this thesis.

For many years UEAPME felt excluded from European bargaining by UNICE, CEEP and ETUC. This problem, however, was solved by the conclusion of a cooperation agreement between UEAPME and UNICE on 4 December 1998. According to this agreement, UEAPME recognises UNICE as the sole European organisation representing cross-industry businesses of all sizes, and acknowledges that the vast majority of businesses represented by UNICE are small and medium sized enterprises. In turn, UNICE recognises that UEAPME is the main cross-industry organisation representing the specific interests of small and medium sized enterprises at European level, for which reason it has a role to play in the social dialogue and can, in cooperation with UNICE, make a useful contribution to defending the interests of employers in negotiations with ETUC. UNICE will consult UEAPME before expressing positions on behalf of employers in public or in negotiations or other meetings in the social dialogue. Representatives of UEAPME will play a full part in preparatory meetings of the employers' group, and in plenary meetings with the ETUC. UNICE will take into account as much as possible UEAPME's views expressed during preparatory meetings of the employers' group. UEAPME, however, does not have a veto over any negotiations. Because of this cooperation agreement, UEAPME is, through UNICE, fully involved in the European social dialogue.[141]

Although the above makes clear that UEAPME cannot block negotiations initiated by UNICE (BUSINESSEUROPE), for which reason UEAPME's opinion is not decisive, it is still valuable to know how decisions on European collective labour agreements are made. The rule at UEAPME is the simple majority also for such collective agreements. However, in practice, UEAPME tries to reach a consensus during the entire negotiations and prior to the vote procedure.[142]

5. Summary

There are five institutions of the Community that are relevant for this thesis: (i) the European Parliament, (ii) the Council of the European Union (the Council), (iii) the Commission of the European Communities (the Commission), (iv) the Court of Justice and (v) the European Council.

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141 The information set out in this paragraph derives from: Institut des Sciences du Travail, in its assessment of UEAPME, to be found on www.trav.ucl.ac.be/partenaires/eu-6-en.html and from the EIRO publication from P. Foster, *European employers' organisations forge closer links within social dialogue*, 28 March 1999, page 1.

142 This information derives from UEAPME, as kindly sent to me by Mrs. L. Volozinskis of UEAPME.

The European Parliament has important budgetary, decision-making and supervisory roles.

The Commission is a very important actor within the European Community. The Commission (i) ensures that the provisions of the EC Treaty and the measures taken by the institutions thereto are applied, (ii) formulates recommendations or delivers opinions on matters dealt with in the EC Treaty, (iii) has its own power of decision and participates in the shaping of measures taken by the Council and by the European Parliament, and (iv) exercises the powers conferred on it by the Council for the implementation of the rules laid out by the latter. The Commission moreover plays a crucial part in the legislative process having, among other rights, the important right of legal initiative. This enabled the Commission to act as the "motor of integration". Apart from the above, the Commission has a very specific and important role when it comes to the European social dialogue; it has the task of promoting consultation of management and labour at Community level and must facilitate their dialogue by ensuring balanced support for the parties involved.
The Council (i) ensures coordination of the general economic policies of the Member States, (ii) has decision-making powers and (iii) confers on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down.

The Court of Justice, comprised of two bodies (the Court of Justice of the European Communities and the Court of First Instance), exercises the judicial supervision in the Community.

The statutory defined role of the European Council is that it is to provide the Union with the necessary impetus for its development and that it is to define its general political guidelines. More roles are, however, to be distinguished, including discussing the development of the Community and Union itself, confirming important changes in the institutional structure of the Community, focusing on significant constitutional initiatives, focusing on the state of the European economy, conflict resolution, initiating or developing particular policy strategies, focusing on external relations and considering new accessions to the Community.

The European Community cannot unlimitedly exercise powers. It can only act within the limits set out in the EC Treaty. Moreover, the Community institutions must refrain from taking action if such action could just as well be taken by the Member States (principle of subsidiarity) and may not go beyond what is necessary to achieve the objectives of the EC Treaty (principle of proportionality). The Commission will have to investigate what the most

appropriate level will be for the adoption of rules. This also entails that certain problems should be addressed by the social partners, being the most appropriate level for taking action (horizontal subsidiarity).

There are 6 different procedures for drafting Community legislation: (1) the Commission acting alone, (2) the Council and Commission acting alone, (3) the Council and Commission acting after having consulted the European Parliament, (4) the Council and Commission acting in cooperation with the European Parliament, (5) the Council and Commission acting in co-decision with the European Parliament and (6) the Council, Commission and European Parliament acting in assent. The most common manner in which to enact Community legislation is the fifth manner mentioned above.

There are different types of Community regulations: (1) regulations, (2) directives, (3) decisions, (4) recommendations and (5) opinions.

A regulation has general application and is binding in its entirety and directly applicable in all Member States. A directive is binding upon each Member State to which it is addressed as to the result to be achieved. A decision is binding in its entirety upon those to whom it is addressed. Recommendations and opinions do not have any binding force.

Social partners should be divided into employees' representative organisations (trade unions) on the one hand and employers' representative organisations on the other hand. Social partners are different in nature from other organisations because of their ability to take part in the collective bargaining process.

In order for the social partners to be able to participate in the (institutionalised) European social dialogue, the organisation involved should: (i) be cross-industry or relate to specific sectors or categories and be organised at European level; (ii) consist of organisations which are themselves an integral and recognised part of Member State social partner structures, have the capacity to negotiate agreements and are representative of all Member States, as far as possible and (iii) have adequate structures to ensure their effective participation in the consultation process.

The European Trade Union Confederation (ETUC) is the most important cross-industry employees' representative organisation that is able to participate in the European social dialogue. The relevant cross-industry employers' representative organisations participating in the European social dialogue are (i) the Union of Industrial end Employers' Confederation (UNICE), as of 23 January 2007 called BUSINESSEUROPE (ii) the European Centre of

Enterprises with Public Participation and of Enterprises of General Economic Interest (CEEP) and (iii) the European Association of Craft and Small and Medium Sized enterprises (UEAPME).

CHAPTER 3

THE CHANGING CHALLENGES FOR AND THE ROLE OF THE EUROPEAN SOCIAL PARTNERS

1. Introduction

Now that the relevant Community institutions and the cross-industry social partners have been introduced, it is time to briefly set out the history of the European social dialogue and the (changing) role therein of the social partners.

In section 2, the history of the European social dialogue and the role herein of the European social partners as from the nineteen fifties until the year 2000 will be described. All "major" events in that period in the field of the European social dialogue will briefly be discussed. In section 3 it will be argued that since the year 2000 the challenges for and the role of the social partners have changed drastically, which will culminate in a preliminary conclusion in section 4. These changes have not escaped the European social partners' attention and have led to their repositioning (section 5). Both the High Level Group on Industrial Relations and Change of the European Union and the Commission wish to enhance the position of the European social partners due to said changes and welcome their repositioning (section 6). After that, new developments (the European Consitution and the Treaty of Lisbon) have further emphasisid the importance of the role of the European social partners in the Community, as will be set out in section 7. The above will be summarised in section 8.

2. 1950 – 2000: the social partners' European role until the Lisbon European Summit

Before starting to discuss the role the European social partners have had in the Community, I will first identify three seperate powers or activities of these social partners in the Community. First, European social partners may have a consultative role: the institutions of the Community may ask the social partners' opinion on specific issues. European social partners may furthermore negotiate voluntary (non-binding) agreements, such as guidelines, codes of

conduct, or policy orientations. These are (transnational) tools, not based on a legally recognised power to conclude collective labour agreements. Last, European social partners may enter into proper collective bargaining, leading to binding (transnational) collective agreements. It is in particular important to keep the distinction between collective negotiation, resulting in non-binding agreements, and collective bargaining, leading to binding collective agreements, in mind when analysing the role of European social partners in the Community.[143]

2.1 The early years

On a theoretical level, the possible influence of the social partners within a united Europe has long since been recognised. From as early as the end of the fifties, scholars discussed the advantages of European collective agreements.[144] These scholars argued that European collective agreements could possibly speed up European integration, create equal competition conditions, promote social justice and free movement of workers.[145]

Attempts to establish a European social dialogue in the seventies and the first half of the eighties failed. This can be attributed to the economic climate, the Euro-scepticism of political leaders, the lack of European competency in the area of social policy (the requirement of unanimity) and the organisational weakness of the social partners involved.[146]

2.2 The eighties: Val Duchesse, Single European Act and the Community Charter

The above-mentioned status quo was broken due to the upcoming Single European Act. As a consequence thereof the social partners started playing a "real" role in the European Community as from the mid-eighties.[147] In 1984, the Council stated in the Second Social Action Plan that a consensus

143 With regard to that distinction and its importance, reference is made to: E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, pages 8 and 9.

144 For an overview of some of these scholars, reference is made to Franssen, *Legal aspects of the European Social Dialogue*, page 59, note 56.

145 See for example G. Sadtler, *Europäische Tarifverträge*, Neue Juristische Wochenschrift, volume 22, 1969, page 962.

146 Amsterdam Institute for Advanced Labour Studies, *The European Social Dialogue: Development, Sectoral Variation and Prospects*, page 19.

147 Amsterdam Institute for Advanced Labour Studies, *The European Social Dialogue: Development, Sectoral Variation and Prospects*, page 19.

between the social partners had to be reached in order to seek full and better employment, to improve living and working conditions and to realise the full and free circulation of workers.[148] In 1985, J. Delors – at that time President of the Commission – invited three cross-industry social partners to a meeting in Val Duchesse. These parties were ETUC, UNICE and CEEP.[149] There, these three social partners agreed upon furthering the European social dialogue on an informal and voluntary basis.[150]

In order to further stimulate the social dialogue, article 22 of the Single European Act,[151] entering into force on 1 July 1987, introduced a new article 118B to the EC Treaty that stated:

> The Commission shall endeavour to develop the dialogue between management and labour on European level which could, if the two sides consider it desirable, lead to relations based on an agreement.

Ironically, 1987 was also the year that ETUC left the social dialogue resulting from the Val Duchesse meeting, because the European social developments came to a halt and it became evident that UNICE considered the social dialogue as a forum for non-binding voluntary discussion only.[152] The adoption of the Community Charter of Fundamental Social Rights of Workers, introduced in 1989, led to the come-back of ETUC and thus restarted the European social dialogue. Article 12 of this Charter re-emphasized the social partners' right to enter into agreements.[153] It states that "the dialogue between the two sides of industry at European level may, if the parties deem it desirable, result in contractual relations in particular at inter-occupational and sectoral level".

2.3 The nineties: the Joint Agreement, the Protocol on Social Policy and the amendment of the EC Treaty

During the nineties the position of the social partners was strongly enhanced due to institutional changes and the progressive attitude of the Commission.

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148 Franssen, *Legal aspects of the European Social Dialogue*, page 60.

149 Franssen, *Legal aspects of the European Social Dialogue*, page 61.

150 Reference is made to Commission Communication COM (1996) 448, final, *concerning the Development of the Social Dialogue at Community level*, page 2.

151 OJ L 169, 29 June 1987, pages 1 – 28.

152 Amsterdam Institute for Advanced Labour Studies, *The European Social Dialogue: Development, Sectoral Variation and Prospects*, page 20.

153 In as far this right needs a separate legal basis, an item that will be discussed in chapter 6, section 4.1.

In this decade many foundations have been laid in order to provide the social partners with a strong starting position to play a relevant role within the European Community.

2.3.1 1991: Joint Agreement of the social partners

On 31 October 1991, UNICE, ETUC and CEEP concluded an important Joint Agreement.[154] In this agreement they proposed the wording for the anticipated new articles 118, 118a and 118b of the EC Treaty. These draft articles concern (i) the social partners' position to implement directives in Member States, (ii) the Commission's task to promote the consultation of social partners and to facilitate the European social dialogue and (iii) the social partners' right to enter into agreements, which could be implemented by a Council decision. The Joint Agreement formed an important basis for the 1991 Protocol on Social Policy, which will be discussed below.[155]

2.3.2 1992: the Protocol on Social Policy

At the intergovernmental conference in Maastricht in 1992, the political agenda included the amendment of the EC Treaty in order to draft legislation on certain social matters by a qualified majority of votes (instead of unanimity) and to officially strengthen the position of the social partners.[156] The United Kingdom could, for reasons of domestic politics, not agree to these amendments. It did, however, condone the other Member States to

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154 The conclusion of the Joint Agreement came as a surprise. It was thought that UNICE would never agree to such agreement, since it always had been very reluctant to further the European social dialogue and it had relied on a veto in the Council when it came to – in the opinion of UNICE: undesirable – European legislation in the field of social policy. UNICE, however, (rightly) expected that the intergovernmental conference in Maastricht in 1992 would lead to decision-making in said field by a qualified majority of votes in stead of unanimity, and for that reason it rather secured its position itself within the European social dialogue. Reference is made to Amsterdam Institute for Advanced Labour Studies, *The European Social Dialogue: Development, Sectoral Variation and Prospects*, page 20 – 21 and Franssen, *Legal aspects of the European Social Dialogue*, page 64.

155 Reference is made to the legal notice on employment and social affairs, *Social Dialogue*, page 1 of the chapter on Joint Opinions, as published on the internet on www.europa.eu.int.

156 Reference is made to R. Blanpain, *The European Union, Employment, Social Policy and the Law*, page 18 and C. Engels and L. Salas, *Labour Law and the European Union after the Amsterdam Treaty*, page 74, both in R. Blanpain (ed.), *Institutional Changes and European Social Policies after the Treaty of Amsterdam*, Kluwer Law International, The Hague-London-Boston, 1998.

go ahead.[157] Consequently, these other eleven Member States concluded the Protocol on Social Policy that was subsequently annexed to the EC Treaty. The Protocol on Social Policy only applied to these 11 Member States – thus not to the United Kingdom – as a result of which a two-track social policy in the European Community was introduced.[158] The wording of the Protocol on Social Policy is mainly the same as the wording that has been suggested by the social partners in the Joint Agreement.[159]

Article 1 of the Protocol on Social Policy stipulates that the Community and its Member States shall *i.a.* promote the dialogue between management and labour.

Article 2 of the Protocol on Social Policy sets out that the Community shall support certain specific social policy issues, such as improvement of working conditions, the information and consultation of workers and equal treatment. To that end, the Council could adopt directives by a qualified majority of votes. In other fields of social policy the Council can only adopt directives unanimously. The directives adopted could be implemented by the social partners within a Member State, should the Member State involved so desire.

Pursuant to article 3 of the Protocol on Social Policy, the Commission should promote the consultation of the social partners on a Community level, to which end it should consult them prior to submitting proposals in the field of social policy. At the social partners' request, they can start negotiations on issues the Commission intends to submit proposals on. If these negotiations actually lead to agreement, this agreement may subsequently be implemented either through a Council decision or in accordance with the normal procedures and practices of the social partners and the Member States (article 4 of the Protocol on Social Policy). Besides this, article 4 also opened the possibility for the European social partners to enter into agreements on other issues.

Given the above, the Protocol on Social Policy (i) enhanced the possibility to draft Community legislation in the social policy field (due to the Protocol a qualified majority of votes suffices for a number of subjects instead of the previously required unanimity of votes) and (ii) attributed an important role

157 Engels and Salas, *Labour Law and the European Union after the Amsterdam Treaty*, page 74.

158 Reference is made to the preamble of the Protocol on Social Policy.

159 See for a thorough comparison of the text of both documents: B. Bercusson, *European Labour Law*, pages 523 *ff*.

to the social partners in this process. It did not, however, apply within the whole Community, due to the already mentioned United Kingdom's opt-out.

2.3.3 1993: Commission Communication concerning the application of the Agreement on social policy

In 1993, the Commission adopted a Communication concerning the application of the Agreement on social policy.[160] Herein, the Commission set out how it will deal with the new situation created by the Protocol and which social partners it will recognise for consultation purposes. The Commission announced how to involve the social partners in the consultation process, how this could lead to agreements and how these agreements could be implemented.

2.3.4 1996: Commission Communication "the Development of the Social Dialogue at Community level"

In 1996, the Commission adopted a Consultation Communication in order "to find ways to strengthen the social dialogue, to make it more adaptable and to associate the work of the social partners more closely in the development and implementation of EU policies, particularly employment and economic growth".[161] The Commission stressed it would continue to give its full support to the social dialogue, since it had made significant achievements and had showed rich potential for developing a partnership approach to social policy, which can play an important role in supporting European integration.[162] The social dialogue could, according to the Commission, prove valuable in developing and completing action on employment at Community level and could be further developed on other levels than just the Community level. It could also be important with regard to transnational industries and at regional levels, particularly in cross-border regions.[163] At sectoral level, as well, the social dialogue could be given more substance.[164]

In order to gather as wide a range of views as possible on the means to be employed to promote and develop the European social dialogue, the

160 COM (1993) 600 final.

161 COM (1996) 448, page 1b.

162 COM (1996) 448, pages 3 and 4.

163 COM (1996) 448, page 16.

164 COM (1996) 448, page 7.

Commission invited all relevant organisations to share their opinion. Further steps would be taken after receipt of these responses.[165]

2.3.5 1997: The Treaty of Amsterdam

In the above-mentioned Consultation Communication the Commission also stressed that the Protocol on Social Policy should be integrated in the EC Treaty.[166] The Commission's wish became reality during the intergovernmental conference in Amsterdam in 1997. The United Kingdom repealed its opt-out and accepted the Protocol on Social Policy.[167] This Protocol was subsequently almost literally transferred to Title XI (Social Policy, education, vocational training and youth) of the EC Treaty. This title will be discussed in depth in chapter 5 of this thesis.

2.3.6 1998: Commission Communication "Adapting and promoting the Social Dialogue at Community level"

During 1997, more than 80 replies were received from national and European employers' and employees' organisations, European institutions and national authorities on the Commission's request as laid out in the above-mentioned 1996 Consultation Communication. The 1998 Communication from the Commission "adapting and promoting the Social Dialogue at Community level" draws the "principal lessons" from the above consultation, and from recent developments.[168] According to this Communication, the Commission has set itself three objectives: (i) a more open social dialogue, (ii) a more effective dialogue between the European institutions and the social partners and (iii) the development of a real collective bargaining at European level.

The Commission intended to reach these objectives through key actions in four main fields: information, consultation, employment partnership and negotiation. Obviously, that last aspect is the most relevant for this thesis.

The Commission will encourage the further development of contractual relations between social partners, both at cross-industry and sectoral levels. The Commission states that "an active dialogue between management and labour leading to shared goals and practical commitments is the raison d'être

165 COM (1996) 448, page 2.

166 COM (1996) 448, page 2.

167 Blanpain, *The European Union, Employment, Social Policy and the Law*, page 21.

168 COM (1998) 322, page 3.

of the social dialogue".[169] In two paragraphs the Commission presented its view on European collective agreements (particular on concluding collective agreements under the Treaty of Amsterdam):[170]

> The Commission considers that the development of contractual relations, as set out in the new treaty [the Treaty of Amsterdam; author], is a most effective mechanism to implement relevant commitments on Social Policy. The Commission therefore hopes the social partners will further develop their contractual relations at both inter-professional and sectoral level. Relations based on agreements should take their place alongside legislation in the development of social policy. The Commission considers that sectoral agreements between social partners can form an important basis for achieving social policy objectives, including the process of making agreements binding through Community law at the request of the social partners.
>
> The Commission will continue to give strong support to the initiation of negotiations under this procedure, pointing out that both the inter-professional and sectoral social partners are encouraged to take their responsibilities in this respect.

The Commission made a strong appeal to the social partners to take the necessary steps to ensure that their dialogue remains strong and continues to attract widespread support.[171] It furthermore requested the candidate countries to promote their social dialogue structures.[172]

3. 2000 – today: the social partners' changing European role and the altered challenges they face

The role of and the challenges for the European social partners have gradually but distinctively changed from about the year 2000. As from then, their part in the development of Europe has been viewed more and more crucial.

3.1 The Lisbon Strategy, European governance, Union enlargement and new challenges

The following noteworthy changes have occurred from about the year 2000:

169 COM (1998) 322, page 12.

170 COM (1998) 322, pages 14 and 15.

171 COM (1998) 322, page 13.

172 COM (1998) 322, page 17.

3.1.1 2000: The Lisbon European Summit

In March 2000, the Lisbon European Summit took place and brought about the so-called Lisbon Strategy. The Lisbon Strategy is a commitment to bring about economic, social and environmental renewal in the EU. In March 2000, the European Council in Lisbon drafted a ten-year strategy to make the EU the "most competitive and dynamic knowledge-based economy in the world".[173] Under the strategy, a stronger economy will drive job creation alongside social and environmental policies that ensure sustainable development and social inclusion.[174]

The role the Commission has in mind for the social partners in this process is of the utmost importance. In the year 2000 contribution of the Commission to the spring European Council meeting it stated:[175]

> The social partners have a crucial role to play in helping to manage the transition to a knowledge based economy and society. Their contribution is needed not only as a result of the radical change in the world of work, but also because of the need to ensure a common understanding on all the elements required for a dynamic economy – in the linked chain from people to ideas to finance to market.

The importance of the social partners in modernising Europe and taking it to a competitive economy was stressed again shortly thereafter by the Commission in its Social Policy Agenda, where it deemed the development of social dialogue at European level "a key tool for the modernisation and further development of the European social model".[176]

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173 Reference is made to the Presidency Conclusions of the Lisbon European Council, DOC/00/08, page 2.

174 For a brief overview of the Lisbon Strategy, reference is made to the European Website: www.europa.eu.int/comm/lisbon_strategy.

175 Commission Communication COM (2000) 7, final, *The Lisbon European Council – An Agenda of Economic and Social Renewal for Europe, Contribution of the European Commission to the Special European Council in Lisbon, 23 – 24th March 2000*, page 22.

176 Commission Communication COM (2000) 379 final, *Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, Social Policy Agenda*, page 23. For further information on the role of the social partners in the Lisbon Strategy, reference is made to C. Barnard, *EC Employment law*, Oxford University Press, 2006, pages 151 *ff*.

The role the European institutions have in mind for the social partners in achieving the goals as set out in the Lisbon Strategy, was the first step of their altered position in Europe.[177]

3.1.2 2001: White Paper on European Governance

In the 2001 White Paper on European Governance the Commission observes a paradox in Europe: on the one hand Europeans want political leaders to find solutions for major problems, on the other hand they increasingly distrust institutions and politics, or are simply not interested in them.[178] This is particularly the case at EU level. For that reason said White Paper assesses the way in which the Union uses the powers given by its citizens. It proposes opening up the policy-making process to get more people and organisations involved in shaping and delivering EU policy. Moreover, it promotes more openness, accountability and responsibility for everyone involved.

In order to achieve the above-mentioned, the Union must, according to the Commission, better combine different policy making tools such as legislation, social dialogue, structural funding and action programmes.[179] There should also be more involvement of the general public in shaping and implementing EU policy, in particular of the civil society.[180] Trade Unions and employers' organisations – as a part of the civil society – (should) have a particular role and influence within it. After all, the EC Treaty requires the Commission to consult management and labour in preparing proposals in the social policy field, and they can enter into agreements that could subsequently be turned into Community law. The Commission thus requests the social partners play

177 The fact that the Lisbon Strategy did not take off as planned, does not alter the role of the (European) social partners in achieving the Lisbon Strategy objectives. Their role remains crucial in the relaunch of the Lisbon process in 2005. See for this relaunch: C. Barnard, *EC Employment law*, pages 157 *ff*.

178 Commission Communication COM (2001) 428, final, *European Governance, A White Paper*, page 3.

179 COM (2001) 428, page 8.

180 COM (2001) 428, page 14. "Civil society" includes social partners, non-governmental organisations, professional associations and alike. For the exact definition of organised civil society reference is made to the Opinion of Economic and Social Committee on the role and contribution of civil society organizations in the building of Europe, OJ C 329, 17 November 1999, page 30.

a role in overcoming the European governance problem.[181] This is the second step of the altered role of the social partners in Europe.

3.1.3 2002: The High Level Group Report

In January 2002 the High Level Group on Industrial Relations and Change of the European Union (the "High Level Group") published its report on "Industrial Relations and Industrial Change" (the "Report"). The Report aims to outline the manner on which industrial relations actors,[182] but also governments, the Commission and other policy-makers can respond to the altered challenges facing European societies and play their role in changing management through meaningful social dialogue and improved partnerships.[183]

The above-mentioned "altered challenges" include globalisation, enlargement of the Union, shift from economic and monetary responsibility from national to European level, technological change and the transition to a knowledge economy, demographic trends (ageing, declining birth-rate and immigration), and changes in the labour market (a new balance between family, work and education).[184] The High Level Group argues that these "unprecedented" challenges are changing the role of and the problems to be addressed by the actors of industrial relations. It therefore requires the development of a new

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181 This is an ongoing programme and is part of the EU's "Better Regulation Strategy". This strategy aims at simplifying and improving existing regulation, to better design new regulation and to reinforce the respect and the effectiveness of the rules. The strategy is based on three key action lines: (i) promoting the design and application of better regulation tools at the EU level, (ii) working more closely with the Member States to ensure that better regulation principles are applied consistently throughout the EU by all regulators and (iii) reinforcing the dialogue between stakeholders and all regulators at the EU and national levels. This last key action is founded on the participation of civil society, including social partners. Reference is made to ec.europa.eu/governance/better_regulation/index_en.htm. For an overview of the follow-up initiatives triggered by the White Paper on European Governance, reference is made to S. Smismans, *New governance – The solution for active European citizenship, or the end of citizenship?*, Colombia Journal of European Law, 2007, volume 13, number 3, page 8.

182 The term "Industrial Relations" in the Report is used in a broad sense, not only covering the relation between workers and management or between the organisations representing them (being the social partners), and not only involving the regulation of wages and employment conditions, but also the relevant legal and institutional frameworks and public policies. Reference is made to page 9 of the Report.

183 Reference is made to page 9 of the Report.

184 Reference is made to pages 11 – 15 of the Report.

agenda for the industrial relations. This agenda should, among others, include (further) development of a general framework to enhance competitiveness and innovation with social cohesion, the possibility to adjust wages rapidly, new forms of flexible employment and working time and better working conditions and work organisation.[185] Obviously, these are all subjects that directly involve the social partners. These altered challenges are the third step of an altered position of the social partners in Europe.

But industrial relations should, according to the High Level Group, not only focus on these challenges. Industrial relations can also contribute to good (European) governance.[186] This particularly applies to the bipartite process of the industrial relations. The High Level Group holds collective bargaining as "an important regulatory institution of employment relations in democratic market economies".[187] Furthermore, industrial relations can push forward the European strategy for economical and social modernisation (Lisbon Strategy), fostering modernisation based on new social contract, exploring new ways to strengthen competitiveness with social cohesion and creating better prospects for employment.[188] Finally, the High Level Group argues that the social partners' position in the candidate countries should be further developed.[189] This subject has been further elaborated on in the Communication discussed below.

3.1.4 2002: Commission Communication "the European Social Dialogue, a force for innovation and change"

Also in 2002, the Commission published its Communication "the European Social Dialogue, a force for innovation and change".[190] The aim of this communication is to lay the ground work for strengthening social dialogue in an enlarged Europe.[191] This Communication essentially builds further upon the above-mentioned Report.

In this Communication, the Commission observes that the social dialogue "is a key to better governance".[192] It also notes that the European Social

185 Reference is made to pages 17 – 23 of the Report.

186 Reference is made to page 24 of the Report.

187 Reference is made to page 24 of the Report.

188 Reference is made to page 9 of the Report.

189 Reference is made to page 31 of the Report.

190 COM (2002) 341, final.

191 COM (2002) 341, page 7.

192 COM (2002) 341, page 7.

dialogue is a force that promotes change through its positive management. The dialogue is an important tool in achieving the Lisbon Strategy: it could bring the modernisation announced at the Lisbon European Council for all key issues on the European agenda. Attainment of two important strategic goals, full employment and reinforced social cohesion, depends, according to the Commission, to a considerable extent, on the action taken by the social partners.[193]

Finally, the Commission states that the social dialogue will be an important issue with regard to the enlargement of the Union. The Commission points out that the social dialogue "is enshrined in the Treaty and forms an integral part of the *acquis communautaire*".[194] The social partner structure in the candidate countries should be strengthened. The social partners in the countries that were already part of the Union that day could assist them with this strengthening process. According to the Commission the social partners of the candidate countries have an important role to play in the context of the pre-accession strategy.[195]

This enlargement-process of the EU is the fourth step of the changing role of the social partners. Not only does the position of the social partners change due to the accession of new countries and are the social partners to play an important role in the pre-accession process, but their challenge remains in full force after said accession. The social partners can (and must) play an important role in the further development of these countries.[196] The Directorate-General for Employment and Social Affairs of the Commission noted:[197]

> The social dialogue plays an essential role in the context of enlargement. It is seen not only as an element of the Community *acquis*, highlighted during the pre-accession process, but also as a means of implementing it in the field. The social partners can therefore ensure that all Community provisions, after being formally adopted by the governments of the candidate countries, are properly implemented in the world of work and in business. Moreover, the social dialogue can act as

193 COM (2002) 341, page 6.

194 COM (2002) 341, page 19.

195 COM (2002) 341, page 20.

196 See for example: C. Welz and T. Kauppinen, *The Role of Social Dialogue in the Acceding Countries during the Preparatory Phase for Economic and Monetary Union (EMU)*, The International Journal of Comparative Law And Industrial Relations, Winter 2004, pages 583 *ff*.

197 Reference is made to the European Commission, Directorate-General for Employment and Social Affairs, *The sectoral dialogue in Europe*, December 2002, page 7.

> a 'driver', able to reconcile sometimes divergent interests between the different socioeconomic players in the European Union and the candidate countries. (…) There is no doubt that the social dialogue will be one of the keys to the success of the enlargement and to the challenges to be met within a renewed European Union.

Consequently, the fact that these countries are today full members of the EU does not change the fact that industrial relations in these countries need attention for many years to come.

4. Preliminary conclusion: the role of and challenges for the European social partners have changed

From the developments set out above, it can be derived that the role of and the challenges for the European social partners have been altered significantly in recent years. Due to (i) the social partners' role in achieving the goals of the Lisbon Strategy, (ii) their position in proper European governance, (iii) the altered challenges and (iv) their assistance of the social partners in the then candidate and today newly joined countries, the social partners have a new and increasingly important position in the Union.

This new position has been explicitly acknowledged by the High Level Group in relation to the altered challenges facing the social partners. In its Report, the High Level Group has stated:[198]

> These processes [the altered challenges; author] are changing the role of and the problems to be addressed by the actors involved in industrial relations.

The Commission has also recognised the strongly altered position of the social partners. In its Communication on the European Social Dialogue, a force for innovation and change, the Commission noted: [199]

> The social dialogue has entered a new era, moving on from setting in place the tools (consultation on Community initiatives, possible negotiation of independent agreements) enshrined in the Treaty.

198 Reference is made to page 9 of the Report.

199 COM (2002) 341, page 22.

In its 2002 research, the Amsterdam Institute for Advanced Labour studies also concluded that, 10 years after the social partners have entered into the Joint Agreement, "the European social dialogue has arrived at a crossroads".[200]

5. The repositioning of the European social partners: a new role

The above-mentioned changes have not escaped the European social partners' notice. In the joint contribution by the social partners to the Laeken European Council of 7 December 2001,[201] ETUC, UNICE/UAPME and CEEP expressed their intent to reposition their role in the light of (i) the debate on Europe's future and governance, (ii) the (at that moment) future enlargement of the EU and (iii) the completion of the economic and monetary union. Basically, the European social partners planned not to be fully dependent on the Community institutions anymore. Instead of solely acting after having been consulted by the Commission and to have their subsequent agreements exclusively implemented by a Council decision, as they did before, the European social partners now rather take the initiative themselves and implement their agreements autonomously, with the instruments of industrial relations available to them at the national level.[202]

In the Laeken declaration, the above-mentioned social partners deemed it necessary to reaffirm (i) the specific role of the social partners, (ii) the distinction between bipartite social dialogue and tripartite concertation, (iii) the need to articulate tripartite concertation around the different aspects of the Lisbon Strategy and (iv) their wish to develop a work programme for a more autonomous social dialogue.

With regard to (i) their role, ETUC, UNICE/UAPME and CEEP agree with the Commission that they have a role in proper European governance. Notwithstanding this, the Commission should take into consideration the specifics of the social dialogue. According to said social partners, the nature of the responsibilities of the social partners, their legitimacy and their representativeness, together with their capacity to negotiate agreements places the social dialogue in a special position.

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200 Amsterdam Institute for Advanced Labour Studies, *The European Social Dialogue: Development, Sectoral Variation and Prospects*, page 101.

201 This joint contribution is available on ETUC's website; www.etuc.org/en/dossiers/colbargain/splaeken.cfm.

202 See on this, for instance, S. Smismans, *The European Social Dialogue in the Shadow of Hierarchy*, Journal of Public Policy, 2008, volume. 28, number 1, page 171.

Moreover, (ii) the social partners insist in making a clear distinction between the bipartite social dialogue and the tripartite concertation between the social partners and the European public authorities. The tripartite concertation should (iii) take place by means of a tripartite concertation committee, replacing the Standing Committee on Employment, which would be the forum for concertation between the social partners and the public authorities on the overall European strategy defined in Lisbon. The committee should also examine the Community's overall economic and social strategy ahead of the Spring European Council.

With regard to (iv) the social dialogue, the social partners announced a reflection on the best way of developing a more autonomous social dialogue. ETUC, UNICE/UAPME and CEEP will discuss what measures should be taken to better organise the work of the social dialogue in a work programme. That work programme will make use of different instruments (various types of European framework agreements, exchanges of experience, awareness-raising campaigns, open debates, etc.) and would comprise a balanced range of themes that interest both employers and workers. Although the social partners will decide on and implement the fruits of their works autonomously, they will take into account that their work programme should make a useful contribution to European strategy, and for growth and employment as well as preparing for enlargement of the EU. This work programme, and more in general the achievements of the above-mentioned cross-industry social partners, will be discussed and briefly analysed in chapter 4, sections 5 and 6.

6. The response of the High Level Group and the Commission to the new role of the European Social Partners: strengthening their position

The above-mentioned repositioning of the European cross-industry social partners is well received by the Community institutions and other European organs, as will be set out below. These parties are prepared to enhance the position of the European social partners in order to assist them in dealing with their new position and challenges.

6.1 The High Level Group

Given the above-mentioned changed challenges, the High Level Group takes the opinion that the industrial relations require assistance. It therefore

intends to further improve the role of the industrial relations in the EU.[203] The High Level Group argues that there needs to be a focus at EU level on key areas where a strategic role can be played that will enhance the effectiveness and efficiency of the industrial relations process, foster social dialogue and encourage agreements at all levels.[204] Against that background, the High Level Group has presented a list of proposals to "enhance the interaction of industrial relations at the different levels".[205]

First, the High Level Group focuses on the enhancement of the industrial relations process at European level. It subscribes to the social partners' point of view as set out in the Laeken declaration to establish a new committee at the highest political level close to the Spring European Council in order to rationalise and simplify the consultation and concertation process.[206] It considers this to be important as it gives the social partners the possibility to discuss the interdependent policies of Lisbon Strategies. According to the High Level Group, tripartite process can provide useful strategic information to all actors and it can also lead to effective partnership for action. It is also useful for improving public policies and facilitating agreements between social partners.[207] Moreover, the High Level Group deems it important to enhance the bilateral process as well, "promoting the initiative and responsibility of the social partners themselves".[208] This is in line with the "autonomous social dialogue" as pursued by the social partners in the Laeken declaration.

Second, the High Level Group wishes to reinforce the instruments of industrial relations at European level. It points out that new approaches on regulation underline the merits of co-regulation – the social partners should be involved in fundamental decisions and discussions and play a role in both formulation and implementation[209] – without undermining the role and responsibilities of public authorities.[210] It furthermore stresses that new regulation should be based not only on a normative approach leading to binding rules (legal provisions or social agreements), but also on a learning process based on guidelines and benchmarks designed to improve actual behaviour.[211] There

203 Reference is made to page 5 and 32 of the Report.

204 Reference is made to page 5 of the Report.

205 Reference is made to page 33 of the Report.

206 Reference is made to page 34 of the Report.

207 Reference is made to page 35 of the Report.

208 Reference is made to Page 35 of the Report.

209 Reference is made to Page 33 of the Report.

210 Reference is made to page 35 of the Report.

211 Reference is made to Page 35 of the Report.

should be a balance between these two approaches. The High Level Group suggests that the social partners "mix" the instruments (i) negotiating agreement, (ii) drafting recommendations and joint opinions, (iii) exchange of experience and benchmarking, and (iv) with certain new instruments in order to obtain their goals. According to the High Level Group, a new combination of framework agreements and recommendations can enrich bipartite process.[212] This is also in line with the wish of the social partners as set out in the Laeken declaration to make use of "different instruments".

6.2 The Commission

The Commission wishes to enhance the role of the social partners in Europe as well. It intends (i) to develop fresh approaches to consultations on employment, economic policy and social protection and (ii) to introduce new ways of contributing to implementation of the economic and social reform strategy, particularly in the context of the European coordination of employment policies.[213]

With regard to consultation, the Commission (i) intends to consult the social partners on the main initiatives having social repercussions, (ii) will set up an interdepartmental working party with the remit of drawing up an inventory of consultation methods and structures in place and helping to involve more closely all the departments concerned by activities connected with social dialogue, and (iii) will draft an internal code of conduct on consultation with the social partners.[214]

The Commission issued several ideas on how the social partners could be more involved in contributing to economic and social reform strategy, such as expanding the agenda of the social dialogue, encourage setting up new sectoral groupings for the social dialogue, improving monitoring and implementation of agreements reached between the social partners etc.[215]

Moreover, the Commission has introduced a proposal for a Council decision establishing a Tripartite Social Summit for Growth and Employment.[216] This

212 Reference is made to page 35 of the Report.

213 COM (2002) 341, page 6.

214 COM (2002) 341, page 9.

215 COM (2002) 341, pages 14 *ff*.

216 Proposal for a Council Decision establishing a Tripartite Social Summit for Growth and Employment, 2002/0136, as attached to COM (2002) 341.

proposal was adopted by a Council Decision on 6 March 2003.[217] Recital (4) of this Council Decision clearly ties setting up the Tripartite Social Summit for Growth and Employment to the social partners wish as laid out in the Laeken declaration. The Tripartite Social Summit for Growth and Employment must ensure that there is continuous concertation between the Council, the Commission and the social partners, in order to enable the social partners to contribute to the various components as set out in the Lisbon Strategy (article 2). The Tripartite Social Summit for Growth and Employment shall consist of the Council Presidency and the two subsequent Presidencies, the Commission and representatives of the social partners represented at the highest level (article 3.1). The Tripartite Social Summit for Growth and Employment shall meet at least once a year, just before the Spring European Council (article 5.1).

But also in its 2004 Communication "Partnership for change in an enlarged Europe – Enhancing the contribution of European social dialogue", the Commission makes it evident that it wishes to further strengthen the position of the European social partners.[218] The purpose of this Communication is to promote awareness and understanding of the results of the European social dialogue, to improve their impact, and to promote further developments based on effective interaction between different levels of industrial relations.[219]

The Commission welcomes the social partners' wish to pursue a more autonomous dialogue and to contribute achieving the Lisbon objectives.[220] It also continues to encourage the development of bipartite social dialogue within the new Member States and will increase its support of the European social partners in order to deal with the consequences of enlargement.[221] Furthermore, the Commission will monitor and help to improve the impact and follow-up of the European social dialogue.[222] It encourages the European social partners to improve the clarity of their texts and include detailed follow-up provisions in the new generation texts (the "different instruments"

217 OJ L 70, 14 March 2003, pages 31 – 33.

218 COM (2004) 557, final.

219 COM (2004) 557, page 4.

220 COM (2004) 557, page 8. The Commission does, however, have certain reservations as to the "autonomous dialogue" when it comes to implementing agreements autonomously in accordance with article 139.2 of the Treaty. Sometimes agreements can, according to the Commission, better be implemented by a Council decision. This will be discussed further in chapter 5, section 6 hereof.

221 COM (2004) 557, page 9.

222 COM (2004) 557, pages 9 and 10.

as mentioned by the social partners in the Laeken declaration).[223] For these reasons, the Commission has attached two exhibits to the Communication stating the different typologies of the results of the European social dialogue and a checklist for new generation texts.[224]

6.3 Conclusion

From the above it can be concluded that the High Level Committee and the Commission are willing to cooperate with and to stimulate the new position of the European social partners in the European social dialogue. The European social partners therefore have an excellent opportunity to further develop the European social dialogue and to bring it to the next level.

7. Recent developments on the role of the European social partners

The developments concerning the role and importance of the European social partners did not halt in recent years. The Community legislator wishes to attribute the European social partners an important position, initially in the European Constitution, and later on in the Treaty of Lisbon.

The European Constitution had a specific role in mind for the social partners within the EU.[225] Title VI of the European Constitution concerns "the democratic life of the Union" and introduces the principle of representative democracy, the principle of participatory democracy and the role of the social partners herein. Article I-45 of the European Constitution makes clear that the working of the Union is founded on representative democracy, in which citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council, and are themselves democratically accountable either to their national parliaments or to their citizens. Citizens have the right to participate in the democratic life of the Union and decisions shall be transparent and as closely as possible to the citizens. Political parties at Union level express the will of the Union citizens. But apart from being a representative democracy, the Union will also abide by the rules of participatory democracy. Article I-46 of the European Constitution states that the institutions of the Union shall give citizens and representative associations the opportunity to make known and publicly

223 COM (2004) 557, page 7.

224 COM (2004) 557, exhibits 2 and 3.

225 European Constitution as signed on 29 October 2004 and published in OJ C 310, 16 December 2004, pages 1 – 474.

exchange their views in all areas of Union action. These institutions shall maintain an open and regular dialogue with representative associations and civil society, and shall carry out broad consultations with parties concerned. Citizens are awarded a right to take the initiative of inviting the Commission to submit appropriate legislative proposals, provided that these citizens amount to not less than one million, coming from a significant number of Member States. Finally, article I-47 of the European Constitution stipulates that the EU recognises and promotes the role of the social partners at Union level. It shall furthermore facilitate dialogue between the social partners, respecting their autonomy. Given the fact that the European social partners can be "representative associations" and are part of civil society as referred to in article I-46 of the European Constitution, they were to play an important role in the participatory democracy of the Union. That role is further emphasised by recognising the importance of the social partners and their autonomy in article I-47 of the European Constitution, inserted in the title on the democratic life of the Union. The main idea is inspired by the governance debate, as briefly mentioned in section 3.1.2 above.[226] As is known, the European Constitution is not ratified by France and the Netherlands due to the "no" votes of their citizens. During the meeting of the European Council of 21 and 22 June 2007, it became clear that the European Constitution will not be ratified anymore.[227] That, however, does not affect the fact that the Community institutions and the Member States wished to award an important role to the European social partners with regard to the democracy of the Union. Furthermore, it makes apparent that the European social partners' autonomy is fully recognised at EU level.

But also the Treaty of Lisbon emphasises the importance of the European social partners. Article 10 of the amended Treaty on European Union repeats the above-mentioned principle of representative democracy, while article 11 does the same with regard to the principle of participatory democracy. An equivalent of article I-47 of the European Constitution is, however, lacking from the Treaty of Lisbon. That is not to say that the importance of the European social partners has diminished, as article 152 of the Treaty on the functioning of the European Union makes clear: "The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy. The Tripartite Social Summit for

226 S. Smismans, *New governance – The solution for active European citizenship, or the end of citizenship?*, page 10.

227 Presidency Conclusions to the Brussels European Council 21/22 June 2007, 11177/07, page 15.

Growth and Employment shall contribute to social dialogue." Although it is not certain that the Treaty of Lisbon will be ratified, as set out in chapter 2, section 2, the continuing importance of the European social partners is clearly recognised in this Treaty. The same applies to the European social partners' autonomy.

8. Summary

The social partners used to play a very modest role at European level. Only since the mid nineteen eighties their role gradually enhanced. The 1985 Val Duchesse meeting kicked-off the European social dialogue. From there, it further developed. An important part of this development was the 1991 Joint Agreement between UNICE, ETUC and CEEP, which laid the foundation for the 1992 Protocol on Social Policy drafted at the Maastricht European Summit. This Protocol stipulated that the social partners were to be consulted prior to the Commission submitting legislative proposals in the field of social policy. At the social partners' discretion, they could initiate negotiations in order to reach an agreement on the issue at hand, which could subsequently either be implemented autonomously or by a Council decision. This Protocol was incorporated in the EC Treaty at the Amsterdam European Summit in 1997.

Since 2000, both the challenges for and the role of the social partners within the EU have changed significantly.

At the year 2000 Lisbon European Summit, a new European strategy (the Lisbon Strategy) was set out. The Lisbon Strategy is a commitment to bring about economic, social and environmental renewal in the EU. The European Council drafted a ten-year strategy to make the EU the world's most dynamic and competitive economy. The social partners are to play an important role in this strategy, assisting the EU in reaching the goals set at the Lisbon Summit.

In 2001 the White Paper on European Governance was published. In this White Paper, the Commission noted that on the one hand Europeans feel alienated from the Union's work, while on the other hand they still expect European-wide action in many domains. The Commission consequently decided to reform European governance and aimed to open up policy-making to make it more inclusive and accountable. One of the methods to achieve this is to better use different policy tools, including the European social dialogue.

Furthermore, as from the beginning of 2000, the European Union was on the brink of enlargement. The social partners were to play an important role in this process. They needed to "smoothen" the enlargement, mainly by assisting the social partners in the then (in 2000) candidate countries. That role would remain relevant even after the accession of said countries.

In the meantime the industrial relations' role and problems changed, as Europe faced new challenges: globalisation, economic and monetary union, technological change and the transition to a knowledge based economy, changing employment and labour markets, demographic change and new balances between family, work and education.

These developments came together in the 2002 report of the High Level Group on Industrial Relations and Change in the European Union. In that report it was argued that industrial relations (which include the social partners) can make an important contribution to good governance and push forward the Lisbon Strategy. The industrial relations were also to play a relevant role in the enlargement process and in dealing with the above-mentioned new challenges. This was subsequently affirmed and further emphasised by the Commission in its important 2002 Communication "the European social dialogue, a force for innovation and change". The Commission hailed the social dialogue as the driving force behind successful economic and social reforms.

In the light of these changes, the cross-industry European social partners (ETUC, UNICE/UAPME and CEEP) announced in their December 2001 Laeken declaration that they intend to reposition their role. They deemed it necessary to reaffirm (i) the specific role of the social partners, (ii) the distinction between bipartite social dialogue and tripartite concertation, (iii) the need to articulate tripartite concertation around the different aspects of the Lisbon strategy, and (iv) their wish to develop a work programme for a more autonomous social dialogue.

This "repositioning" has been welcomed by the High Level Group and the Commission. Both wish to further strengthen the position of the European social partners. The 2002 report of the High Level Group, the 2002 Commission Communication "the European social dialogue, a force for innovation and change" and the 2004 Commission Communication "Partnership for change in an enlarged Europe – Enhancing the contribution of European social dialogue" all propose measures to enhance the European social partners' position. The importance of the European social partners is subsequently clearly confirmed in the recent European Constitution and the Treaty of Lisbon.

CHAPTER 4

THE EUROPEANISATION OF COLLECTIVE BARGAINING AND EUROPEAN AGREEMENTS REACHED

1. Introduction

As set out above, the social partners face altered challenges, and have announced the intention to reposition their role in the joint contribution at the Laeken Summit in December 2001. Notwithstanding the fact that the social partners feel that they should reposition, they were not completely inactive in the past either. They have concluded multiple joint statements, joint declarations and also agreements. Hereafter, some of these achievements in the international field will be summarised.

Section 3 discusses transnational collective labour agreements concluded at company-level. After that, the results of the European social dialogue will be set out. Since there is a rather clear distinction between sectoral and cross-industry bargaining and negotiations in the European social dialogue, the achievements at both levels will be discussed separately in sections 4 and 5 respectively. Section 6 gives some brief comments on the results achieved in transnational collective bargaining and negotiations, also in the light of the repositioning of the European cross-industry social partners. However, prior to discussing these achievements having a transnational effect, section 2 gives an overview of the "Europeanisation of collective bargaining" at *national* level. In this section examples will be given of the influence of the European integration on all parties involved when fixing purely national employment conditions collectively. Section 7 summarises this chapter.

2. The Europeanisation of national collective bargaining

It would be a misconception to assume that the "Europeanisation of collective bargaining" is solely achieved by the European social dialogue and its actors, the European (cross-industry and sectoral) social partners and European institutions, most notably the Commission. On the contrary, national collective bargaining and negotiations also lead to the Europeanisation of collective bargaining, involving many more actors than the above-mentioned.

Important aspects leading to the Europeanisation of national collective bargaining and negotiations are European legislation, such as the criteria on the European Monetary Union ("EMU"), and European integration, causing country borders to open up and resulting in transnational coordination. Europeanisation of national collective bargaining and negotiations take place at many levels. At least the following levels should be distinguished: (i) country level, (ii) inter-regional level, (iii) company level, (iv) European sectoral level and (v) European cross-industry level. All these levels will briefly be discussed hereafter.[228]

2.1 Examples of Europeanisation of national collective bargaining at country level

At country level, several tripartite "social pacts" have created new constraints for collective bargaining in order to contribute to the country's effort to fulfil the criteria for EMU and/or to improve national competitiveness within the Single European Market.[229] Four examples of tripartite social pacts aimed at enhancing competitiveness and at meeting the EMU criteria are presented in the table below.[230]

Ireland	The national agreement, Partnership 2000 (1997–2000), makes an explicit reference to the Maastricht criteria and EMU. Among other matters, the agreement specifies maximum limits for wage increases in the private and public sectors, with the express aim of improving competitiveness and fulfilling the EMU convergence criteria.

228 This section merely gives a brief overview of the Europeanisation of collective bargaining. For a more complete overview reference is made to: T. Schulten, *Europeanisation of Collective Bargaining, An overview on Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy,* WSI Discussion Paper No. 101, May 2002, as published on www.boeckler.de/pdf/p_wsi_diskp_101.pdf and to E. Mermet and P. Clarke, *The coordination of collective bargaining in Europe*, annual report 2002, European Trade Union Institute, Brussels, 2003.

229 Reference is made to the EIRO research of 1999 from P. Marginson and T. Schulten, *The Europeanisation of collective bargaining*, 28 July 1999, page 2. See also C. Welz and T. Kauppinen, *The Role of Social Dialogue in the Acceding Countries during the Preparatory Phase for Economic and Monetary Union (EMU)*, pages 583 *ff*.

230 These examples derive from: P. Marginson and T. Schulten, *The Europeanisation of collective bargaining*, page 2 and 3.

Italy	The December 1998 tripartite *Social pact for development and employment* paid particular attention to the consequences of EMU for economic policy choices and industrial relations. In an explicit reference to conditions in other European economies, the pact stipulates that the reference point for future national sector-level negotiations should not be the national, but the average European, inflation rate.
Portugal	The tripartite *Strategic concertation pact* of December 1996 "has as its goal the full integration of Portugal in the building of Europe, through improving competitiveness and promoting employment and social cohesion". The pact includes wage guidelines. The social pact was seen as an important factor in helping Portugal to become a member of EMU.
Norway	The tripartite Social Pact covering the 1993-1997 period attempting to improve national competitiveness, stating that the wages should grow at a rate approximately 2% below that of Norway's main competitors.

However, probably the most far-reaching Member State's attempt to improve its own competitiveness in the light of European integration is the 1996 Belgian Act on Employment Promotion and the Preventive Safeguarding of Competitiveness.[231] Pursuant to this Act, the Belgian social partners must take into account the forecast rise in wages in Belgium's three main trade partners – Germany, France and the Netherlands – when negotiating on the maximum possible wage increase over the subsequent two years. Should the social partners fail to agree on such a maximum, the government takes over and fixes such a maximum itself.

Considering the above, the Member States involved can – with or without the social partners' assistance – have a significant influence on the Europeanisation of collective bargaining, either through the conclusion of tripartite Social Pacts, or through state legislation.

231 *Wet tot bevordering van de werkgelegenheid en tot preventieve vrijwaring van het concurrentievermogen*, published on 1 August 1996, file number 1996-07-26/32.

2.2 Examples of Europeanisation of national collective bargaining at inter-regional level

Since the late-1990's, trade unions have started to strengthen cross-border trade union cooperation in the field of bargaining policy.[232] The importance of this was already observed by the Commission in its 1996 communication concerning the Development of the Social Dialogue at Community level. The Commission noted a growing need to assist the development of "new levels of dialogue".[233] Such new levels include the social dialogue at regional level, "particularly in cross-border regions where the Internal Market and other EU policies are having a significant effect".[234] This observation has been further emphasised in the Commission's 1998 Communication, in which it argued that there is a growing cross-border social dialogue at regional level "both in relation to employment and the implementation of directives on working conditions".[235]

The most well-known inter-regional group that focuses on cross-border negotiation is the so-called "Doorn Group", named after the Dutch town Doorn where its first official meeting took place.[236] It is established by trade unions from the Benelux Countries and Germany, but later on unions from France joined as well. The initiative originated from the Belgian trade unions and dates from 1996, the year in which they were confronted with the above-mentioned Act on Employment Promotion and the Preventive Safeguarding of Competitiveness. Considering this Act, the Belgian trade unions had a particular interest in cooperating with unions in neighbouring countries.[237]

On 4 and 5 September 1998 the leaders of trade unions of said countries (all major confederations were represented) met in order to discuss collective

232 T. Schulten, *Europeanisation of Collective Bargaining, An overview on Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy,* page 5.

233 COM (1996) 448, page 16.

234 COM (1996) 448, page 16.

235 COM (1998) 322, page 18.

236 R. Blanpain, *European Labour law*, page 567.

237 EIRO publication from T. Schulten, *Unions in Benelux and Germany favour close transnational coordination of bargaining policy in EMU*, 28 October 1998, page 1.

bargaining trends and the possible impact of the EMU.[238] In their declaration dated 5 September 1998, they noted the following:[239]

> The economic growth of recent years has produced too few results for workers in terms of more jobs, the reduction of unemployment and the improvement of purchasing power. In the participating countries – and in Europe as a whole – the rise in labour productivity has been to the unilateral benefit of capital. Employees' share of the national income (the wage quota) has gone down. A continuation of this trend in the macroeconomic distribution of income is unjustifiable. The participating trade union organisations call for a change of trend, to the benefit of workers and their full participation in economic growth in the form of more jobs and improved purchasing power:
>
> a) The participating trade unions aim to achieve collective bargaining settlements that correspond to the sum total of the evolution of prices and the increase in labour productivity.
> b) The participating trade unions aim to achieve both the strengthening of mass purchasing power and employment-creating measures (*e.g.* shorter work times).
> c) The participating organisations will regularly inform and consult each other on developments in bargaining policy.
>
> The trade unions of the four countries intend to examine how they can back up their demands beyond national frontiers when necessary.
>
> By attuning their wage policies, the participating organisations aim principally to prevent a bidding down of collectively bargained incomes between the participating countries, as sought by the employers. The trade unions see this neighbourly initiative as a step towards European cooperation on collective bargaining.
>
> The participating trade union organisations have decided to keep each other intensively informed about their collective bargaining demands and results. To this end, a coordinating group of experts has been established, which is meeting regularly to exchange information and experience on collective bargaining. This working group also serves as a forum for information exchanges between the participating organisations on initiatives vis-à-vis their governments and on state measures that impact on bargaining policy.

238 T. Schulten, *Europeanisation of Collective Bargaining, An overview on Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy*, page 6.

239 Reference is made to the Doorn declaration, as published in the Dutch language on www.icem.org/update/upd1998/doornnl.html, and is (partially) translated on www.icem.org/update/upd1998/upd98-73.html.

The Doorn initiative can be seen as "a genuine pioneering step towards an Europeanisation of collective bargaining",[240] as it was the first time that unions had determined a joint cross-border bargaining guideline for their national bargaining policy.[241] Through annual two-day meetings with top level representatives of the unions involved and more regular meetings by a small "coordinating group of experts"[242] the Doorn Group closely coordinates collective bargaining. The original focus of the Doorn Group was very much on wage policy.[243] This has somewhat changed over the years. At subsequent meetings topics included: safeguarding and creation of employment, working time and lifelong learning.[244]

The Doorn Group has considered its creation and its declaration as an important step towards European coordination on collective bargaining and had hoped that its initiative would have set an example for other countries in the EU.[245] However, to date, the Doorn initiative has remained rather unique and has found no real successors in other European regions.[246] Nonetheless, there are other, though less extensive and less inclusive, examples of groups that have played their part in the Europeanisation of national collective bargaining at inter-regional level. One such example is the German Metalworkers' Union IG Metall, which has launched an initiative for cross-border collective bargaining networks at inter-regional level in 1997.[247] Under this initiative, each IG Metall district organisation needed to develop a solid network of collective bargaining cooperation with the neighbouring countries Metalworkers' Unions. This initiative has intensified in 1999, when the

240 T. Schulten, *Unions in Benelux and Germany favour close transnational coordination of bargaining policy in EMU*, page 4.

241 T. Schulten, *Europeanisation of Collective Bargaining An overview on Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy,* page 7.

242 T. Schulten, *Europeanisation of Collective Bargaining An overview on Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy,* page 6.

243 T. Schulten, *Europeanisation of Collective Bargaining An overview on Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy,* page 7.

244 EIRO publications from: T. Schulten, *Unions makes positive assessment of transnational coordination of bargaining policy*, 28 September 1999, page 1; T. Schulten, *Doorn Group holds fourth annual meeting*, 28 September 2000, page 3; and T. Schulten, *Doorn Group holds fifth annual meeting*, 26 October 2001, page 2.

245 T. Schulten, *Unions in Benelux and Germany favour close transnational coordination of bargaining policy in EMU*, page 3.

246 T. Schulten, *Europeanisation of Collective Bargaining An overview on Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy,* page 8.

247 T. Schulten, *Europeanisation of Collective Bargaining An overview on Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy,* page 8.

close cooperation led to joint planning of collective bargaining. The unions participating in this network have developed the following:[248]

- a mutual exchange of trade union observers during collective bargaining rounds, including mutual participation in trade union collective bargaining committees, negotiations with the employers and industrial action;
- the development of a common day-to-day information system on collective bargaining issues;
- common training seminars on the system of collective bargaining and trade unions collective bargaining policy;
- common working groups on different collective bargaining issues;
- mutual recognition of trade union membership.

Initiatives like the ones in the metalwork industry have also been undertaken in other sectors, such as the construction,[249] chemical[250] and banking sector.[251] All in all, one must conclude that Europeanisation of collective bargaining at inter-regional level is a fact.

2.3 Examples of Europeanisation of national collective bargaining at company-level

In its 1996 Communication, the Commission observed an increasing need to assist, among other things, the social dialogue in the "growing transnational industries".[252] In its 1998 Communication, the Commission noticed "a fast-developing social dialogue within multinational companies".[253] This appeared from the fact that the social partners in the companies concerned concluded over 400 agreements in the era between the adoption of the Directive on the establishment of a European Works Council and its coming into force.[254]

Notwithstanding this development, there are only a few national collective agreements within multinationals that explicitly take into account the

248 T. Schulten, *Europeanisation of Collective Bargaining An overview on Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy,* page 9.

249 T. Schulten, *Europeanisation of Collective Bargaining An overview on Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy,* page 10; and P. Marginson and T. Schulten, *The Europeanisation of collective bargaining*, page 9.

250 P. Marginson and T. Schulten, *The Europeanisation of collective bargaining*, page 9.

251 P. Marginson and T. Schulten, *The Europeanisation of collective bargaining*, page 8.

252 COM (1996) 448, page 16.

253 COM (1998) 322, page 17.

254 COM (1998) 322, page 17.

(economic) conditions of other European countries. One of the most explicit references is probably the 1997 company-level agreement of British Vauxhall, in which pay is being linked to the movement of economic indicators in other European countries. Due to the management concern of the impact on production costs of the pound sterling continuing to trade at a high rate of exchange, part of the pay rise in the third and last year following the conclusion of the company-level agreement is contingent on sterling falling below a specified level against Deutsche Mark.[255]

What occurs more often is a form of "tied" bargaining within European multinationals. Although the negotiations are performed at local or national enterprise level, the reference points utilised by management in negotiations are European or wider.[256] Most multinationals collect data on labour-related aspects of performance, relating to the different countries in which they operate, such as overall labour costs, headcount, labour productivity, labour turnover and absenteeism, pay settlements and incidence of industrial disputes.[257] This data can be used in bargaining at local and national enterprise level over working and employment practices in the context of ongoing (actual and potential) decisions on investments, relocation of production and divestment or closure.[258] Changes in working practices and conditions are traded against securing either future investments or current production for the site involved. In the table below examples of multinationals' management utilisation of cross-border comparisons are set out:[259]

255 P. Marginson and T. Schulten, *The Europeanisation of collective bargaining*, page 9.

256 P. Marginson and T. Schulten, *The Europeanisation of collective bargaining*, page 9.

257 P. Marginson and T. Schulten, *The Europeanisation of collective bargaining*, page 10.

258 P. Marginson and T. Schulten, *The Europeanisation of collective bargaining*, page 10.

259 This table derives from: P. Marginson and T. Schulten, *The Europeanisation of collective bargaining*, page 10, 11 and 12.

Company/sector	Use of comparisons
Automotive	Press reports and research studies suggest that "coercive comparisons" are regularly used by the large automotive manufacturing multinational companies operating in two or more EEA countries – including BMW/Rover, Ford, General Motors, Peugeot, Renault and Volkswagen – in local negotiations aimed at securing productivity-enhancing concessions in working and employment practices in return for commitment to future investment in local operations.
Finnish forest products	The forest product multinational companies headquartered in Finland make frequent reference to the performance of their business units in other European countries – in terms of headcount, productivity and working time – in plant-level negotiations around production reorganisation.
Food industry	A study of the Greek, Spanish and UK operations of the European food business of a leading multinational found that a key dimension of the competition between plants in different countries for allocations of production for particular lines was, in terms of measures, introduced via local negotiations to increase the flexibility of employment and working.
Swatch, Toyota, Hoover	In recent years, decisions by Swatch to locate in Lorraine and Toyota in the north of France, and by Hoover to relocate part of its production from France to Scotland, have been supported by extensively publicised international comparative data on productivity levels, wage levels and flexibility.
UK engineering, printing and retail	Findings from a panel survey over five years of (national and multinational) companies in the UK engineering, printing and retail sectors, indicate that international "benchmarking" of employee performance is reasonably common in engineering, but unusual in printing, and rare in retail. It is suggested that changes in numbers employed and in work organisation, secured through parallel negotiations over working and employment practices, are the means by which management bring overall labour costs into line with those of international competitors in the sector.

But, unlike the above-mentioned might suggest, comparing group companies' data is not exclusively an employer's activity. Employees of the Czech car manufacturer Skoda, for instance, went on strike in April 2007 after their demand of a wage increase of 12% was denied. The reason of this firm pay demand was that Skoda employees would like to see their wages move towards those of their German colleagues assembling cars for parent company Volkswagen. The union head of Skoda expressed the opinion that the work of the Czech employees was just as good as the work of the German employees,

for which reason the salaries should be in line as well. The strike turned out effective, as Skoda had to agree on a 12.7% pay rise until the end of 2008.[260]

The above sufficiently shows that Europeanisation of national collective bargaining also occurs within multinationals situated in Europe.

2.4 Examples of Europeanisation of national collective bargaining at European sectoral level

Particularly since 1997, there have been various initiatives taken by European sectoral social partners aimed at a more explicit European coordination of national bargaining.[261] These initiatives almost exclusively originated from trade unions; very few European sectoral employers' organisations have systematically developed European coordination.[262]

One of the few European sectoral employers' organisations that did attempt to coordinate national collective bargaining from a European perspective is the Western European Metal Trades Employers' Organisation. This organisation produces a monthly newsletter on "international social policy developments", which includes information on recent national developments in sectoral bargaining and international statistics comparing industrial relations trends in the European metalworking industry.[263]

The European sectoral trade unions in the metal industry have put quite a lot of effort in the Europeanisation of collective bargaining as well. The European Metalworkers' Federation ("EMF") has developed "the most advanced approach towards a European coordination of collective bargaining in terms of content and institutional practices".[264] The EMF strategy contains two core elements. First, it has developed a joint commitment to European guidelines for national collective bargaining, which is meant to prevent downward competition. Second, EMF has developed certain minimum standards which all EMF affiliates should feel obliged to bargain for.[265]

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260 See the article: *Eastern Europe Pricing Itself Out of Cheap Labor Market?*, 18 April 2007, as published on the website Spiegel Online.

261 P. Marginson and T. Schulten, *The Europeanisation of collective bargaining*, page 7.

262 P. Marginson and T. Schulten, *The Europeanisation of collective bargaining*, page 6.

263 P. Marginson and T. Schulten, *The Europeanisation of collective bargaining*, page 6.

264 T. Schulten, *Europeanisation of Collective Bargaining. An overview on Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy,* page 11.

265 T. Schulten, *Europeanisation of Collective Bargaining. An overview on Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy,* page 11.

But not only EMF has developed a policy with regard to the Europeanisation of collective bargaining at European sectoral level. Many other European Industry Federations have followed EMF's example.[266] To summarise, European sectoral social partners, and particularly European sectoral trade unions, have developed an extensive network and coordination aimed at the Europeanisation of collective bargaining of its national affiliates.

2.5 Examples of Europeanisation of national collective bargaining at European cross-industry level

Arguably, the best example of a cross-industry organisation that calls upon its affiliates to take into consideration European wide policies in their national collective bargaining is ETUC. This is, however, a relatively recent development. Only since the end of the 1990's has ETUC's attention been drawn to European coordination of wage claims. Two developments caused this attention. First, ETUC has been confronted with the Doorn Group and the EMF initiative to coordinate collective bargaining, upon which this issue became more important within ETUC. Second, after the introduction of the EMU-criteria ETUC has been pressurised by European institutions to define its own position.[267] As a result of this ETUC has, among others, stated in its resolution drafted at its 1999 congress that it will:[268]

- promote a strategy for coordinated European collective bargaining at sectoral and inter-sectoral level and the securitisation of a consistent approach via coordination within ETUC;
- establish the tools and procedures needed for such coordination, including the creation of a committee for the coordination of collective bargaining policies and through reordering work and refocusing activities.

Following this resolution, ETUC has indeed actively coordinated national cross-industry collective bargaining through the drafting of guidelines.[269] These guidelines include, for example, the following issues: (i) strengthening

266 See the table as set out in: T. Schulten, *Europeanisation of Collective Bargaining An overview on Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy,* page 19.

267 T. Schulten, *Europeanisation of Collective Bargaining An overview on Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy,* page 21.

268 EIRO publication from T. Weber, Ninth *ETUC Congress calls for a European system of industrial relations,* 28 July 1999, page 5.

269 See for example the EIRO publication from A. Broughton, *ETUC Executive Committee endorses guideline on collective bargaining coordination*, 28 January 2001, page 1.

the qualitative side of collective bargaining, in particular with regard to equal pay and precarious employment , (ii) coordination on working time, (iii) ensuring progress for all workers and the preservation of sectoral/multi-employer bargaining systems, (iv) continuing the campaign for equal pay, and (v) contributing to the Lisbon agenda of the knowledge society.[270] ETUC has called upon a strict follow-up of the coordination guidelines.[271] ETUC even established so-called Interregional Trade Union Councils around borders with the main aim of establishing joint guidelines to avoid social and wage dumping.[272] At the end of 2006, 42 of these Councils have been established.[273] ETUC does not solely want to coordinate national collective bargaining, but in the longer-term it even aims for Europeanisation of trade unions.[274] From the above it can be derived that the Europeanisation of collective bargaining has also proved to be important for cross-industry European social partners.

3. Company-level transnational collective labour agreements

Bargaining for transnational collective labour agreements can be witnessed at company-level.[275] Two topics in particular attract the interest of multinational companies in this respect: corporate social responsibility and restructuring.[276] With regard to the first topic, a growing number of multinational companies is adopting codes of conduct establishing social rights and obligations for their employees. Where such codes used to be established unilaterally, today they are often the product of transnational bargaining.[277] In case of transnational restructuring – such as a merger, spin-off, a joint venture, a plant closure or

270 EIRO publication from B. Harper, *ETUC adopts resolution on coordination of collective bargaining*, 1 June 2004, page 2.

271 Reference is made to the Resolution adopted by the ETUC executive Committee on the coordination of collective bargaining 2003/2004 and the participation of workers, dated 17-18 March 2004, page 2.

272 E. Mermet and P. Clarke, *The coordination of collective bargaining in Europe*, page 42.

273 ETUC, *Activity Report 2003 – 2006*, published March 2007, page 65.

274 C. Degryse, *European social dialogue: a mixed picture*, ETUI report, 1 February 2000, page 8.

275 D. Bé, *A report on the European Commission initiative for a European framework for transnational collective bargaining*, in: K. Papadakis, *Cross-Border Social Dialogue and Agreements: An emerging global industrial relations framework?*, International Labour Organisation, Geneva, 2008, page 223.

276 E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, page 16.

277 E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, page 21.

another form of staff reduction - multinational companies also increasingly rely upon transnational collective bargaining.[278]

This development is in line with the general internationalisation of companies, which is in turn accommodated by European legislation. Both the aforementioned Directive on the establishment of a European Works Council and the Directive supplementing the Statute for a European company (SE) (which followed the Regulation on the Statute for a European company)[279] show the importance of multinational companies in Europe. These directives actually introduced a sort of transnational bargaining. After all, both directives empower a Special Negotiating Body to negotiate arrangements for the involvement of employees in the multinational company. That Special Negotiating Body is comprised of employees from different countries and the arrangements reached also have transnational effects, and can therefore be considered a form of "transnational collective bargaining". But also after the employee representation body is established – which can be best seen with regard to the European Works Council, as that body has been around for some time now – it sometimes continues to bargain with the multinational company.[280]

But more importantly for this thesis, as agreements concluded with employee representatives such as the Works Council are excluded from its scope,[281] multinational companies have also entered into collective bargaining with sectoral European trade unions on agreements that have international coverage. The first examples of framework agreements reached between these parties date back to the end of the 1980's, but as from 2000 their number increased significantly. Up to and including 2005 approximately

278 E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, page 28.

279 Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ L 294, 10 November 2001, pages 1 – 21.

280 An overview of results achieved between multinational companies and European Works Councils can be found in: E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, page 23

281 Reference is made to chapter 1, section 2.2.

35 framework agreements have been concluded.[282] But also 2006 and 2007 witnessed the conclusion of a number of transnational collective labour agreements at company-level. Examples are agreements concluded with the companies Schneider Electric, the Areva Group, PSA Peugeot Citroën and the Westdeutsche Allgemeine Zeitung Media Group.[283] Also notable are the international framework agreements concluded between the Suez Group on the one hand and the European Works Council Committee, French trade unions and ETUC on the other.[284] These agreements relate to topics that are normally dealt with nationally, including profit-sharing, job and skill requirements and equality and diversity.

On occasion, as also appears from the aforementioned example involving the Suez Group, not only the multinational company and a sectoral European trade union execute the transnational collective labour agreement, but national trade unions as well. This has, according to the Report, been the case in at least 8 transnational collective labour agreements.[285] In such cases, the transnational collective agreement is transposed into national collective

282 An overview of results achieved between multinational companies and European sectoral trade unions can be found in: E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, pages 24 *ff*. A word of caution is in place though. According to the Bundesvereinigung der Deutschen Arbeitgeberverbände, these framework agreements cannot be considered collective labour agreements with clearly defined obligations but rather "an expression of common principles and/or objectives for a shared corporate culture". See Bundesvereinigung der Deutschen Arbeitgeberverbände, *Position on discussions on an optional European framework for transnational collective bargaining*, Berlin, 6 November 2006, page 9, available at www.bda-online.de/www/bdaonline.nsf/id/48F1932D682E09E6C125728F005DAD69/$file/Stn-engl.pdf.

283 Reference is made to the following EIRO publications: M. Whittall, *Schneider Electric and European Metalworkers' Federation sign agreement in anticipating change*, 24 September 2007; V. Telljohann, *European Framework agreement on equal opportunities signed at Areva*, 5 February 2007; V. Telljohann, *Global framework agreement signed at PSA Peugeot Citroën*, 28 June 2006; and V. Telljohann and M. Tapia, *Landmark international framework agreement signed in media sector*, 19 November 2007.

284 Reference is made to the EIRO publication from V. Telljohann and M. Tapia, *Suez Group signs three international framework agreements*, 9 October 2007.

285 E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, page 27. The Report did not take into account the agreements concluded with the Suez Group, so the actual number exceeds 8.

agreements and submitted to the legislation of the countries in which the agreement has to take force.[286]

The above-mentioned development, that is the increasing number of transnational collective agreements concluded at enterprise level in recent years, is not strictly limited to Europe. A study of the International Labour Organisation established that at the end of the year 2007 62 international framework agreements were concluded on a global level. International framework agreements are negotiated instruments between multinational enterprises and global union federations, being international federations of national unions by sector of activity.[287] Although this number of 62 may be small compared with the number of unilateral codes of conducts adopted by multinational enterprises, the pace at which the international framework agreements have spread in recent years is notable. In the period 1988 to 2002 only 23 international framework agreements were concluded, the other agreements were signed in the years that followed. If, instead of merely focusing on agreements signed by a global union federation on labour's side, one should look at all transnational agreements concluded between a multinational enterprise and an employees' organisation (including European Works Councils and European trade unions), the number of agreements concluded would amount to hundreds, most of them adopted in the last few years.[288]

4. Bargaining in the European social dialogue at sectoral level

International collective bargaining and, in particular, transnational negotiations also occur at European sectoral level. In the 1998 Communication "Adapting and promoting the Social Dialogue at Community level", the Commission argued that "the sectoral level is a very important area for development both on general issues such as employment, industrial change

286 E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, page 27.

287 Although international framework agreements are concluded between a company on the one hand and a trade union on the other, these agreements cannot be considered "real" collective labour agreements, but rather "imperfect" collective labour agreements. K. Papadakis, G. Casale and K. Tsotroudi, *International framework agreements as elements of a cross-border industrial relations framework*, in: K. Papadakis, *Cross-Border Social Dialogue and Agreements: An emerging global industrial relations framework?*, International Labour Organisation, Geneva, 2008, pages 67 – 87.

288 K. Papadakis, *Introduction*, in: K. Papadakis, *Cross-Border Social Dialogue and Agreements: An emerging global industrial relations framework?*, International Labour Organisation, Geneva, 2008, pages 2 and 3.

and a new organization of work and on upcoming specific demands on the labour market."[289] The Commission therefore considered the development of negotiations at sectoral level "a key issue".[290] The Commission also noted that the sectoral potential for joint action and negotiation of agreements "is by no means used to the full".[291]

For these reasons, the Commission established Sectoral Social Dialogue Committees (SSD Committees) and thus confirmed the role and the representativeness of European employers' and employees' organisations.[292] The SSD Committees will, for the sector of activity for which they are established, (i) be consulted on developments on Community level having social implications and (ii) develop and promote the social dialogue at sectoral level.[293] The SSD Committees are established on the joint request of the social partners[294] representing both sides of the industry in the sector concerned.[295] The SSD Committees are bipartite committees and have a maximum of 40 representatives in all, with an equal number of representatives on both sides of the industry.[296] In general, the SSD Committees operate on the basis of mutual recognition and are mostly composed of one European trade union and one European employers' organisation.[297]

The effort that the Commission has put in the further development of the sectoral social dialogue seems to have paid off. In the years following 1998, the SSD Committees have been very active.[298] In its 2002 Communication "the

289 COM (1998) 322, page 14.

290 COM (1998) 322, page 14.

291 COM (1998) 322, page 14.

292 Commission decision of 20 May 1998 on the establishment of Sectoral Dialogue Committees promoting the Dialogue between the social partners at European level, 98/500/EC, OJ L 225, 12 August 1998, pages 27 and 28.

293 Article 2 of the Commission decision on the establishment of Sectoral Dialogue Committees promoting the Dialogue between the social partners at European level.

294 Exactly which parties qualify as social partners will be discussed in chapter 5, section 2.2.

295 Article 1 of the Commission decision on the establishment of Sectoral Dialogue Committees promoting the Dialogue between the social partners at European level.

296 Article 3 of the Commission decision on the establishment of Sectoral Dialogue Committees promoting the Dialogue between the social partners at European level.

297 E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, page 11.

298 See, for instance, for the results that have been achieved in the sectoral social dialogue during the years 2000 and 2001 the EIRO publication from A. Broughton, *Recent developments in sectoral social dialogue*, 4 February 2002, pages 1 and 2.

European social dialogue, a force for innovation and change", the Commission noted that the sectoral social dialogue had grown and it wished "to continue its support for the flourishing European sectoral social dialogue and to promote the establishment of further committees so that all main branches are covered".[299] The Commission noted that the sectoral level is the "proper level for discussing on many issues linked to employment, working conditions, vocational training, industrial change, the knowledge society, demographic patterns, enlargement and globalisation".[300] In 2003 the Directorate-General for Employment and Social Affairs of the Commission briefly set out the state of affairs in the sectoral dialogue in Europe, which at that moment consisted of 27[301] sectoral social dialogue committees.[302] The Directorate-General noted that, since the establishment of the SSD Committees, the social partners involved concluded approximately 230 commitments of different types and scale, such as opinions and common positions, declarations, guidelines and codes of conduct, charters, agreements etc.[303] Most of these commitments have been adopted to clarify the position of the social partners on a certain subject,[304] but other commitments have been implemented by a Council decision on the basis of articles 138 and 139 of the EC Treaty.[305]

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299 COM (2002) 341, page 16.

300 COM (2002) 341, page 16.

301 In the year 2004, 31 sectoral social dialogue committees have been established. Reference is made to annex 4 of the Commission Communication, *Partnership for change in an enlarged Europe – Enhancing the contribution of European social dialogue*, COM (2004), 557. In June 2007, 34 sectoral social dialogue committees are in place, and the social partners in three other sectors submitted applications to establish such a committee. Reference is made to: ec.europa.eu/employment_social/ social_dialogue/ sectoral_en.htm.

302 European Commission, Directorate-General for Employment and Social Affairs, *The sectoral dialogue in Europe*, Office for Official Publications of the European Communities, 2003, pages 20 – 45. The manuscript was completed in December 2002.

303 European Commission, Directorate-General for Employment and Social Affairs, *The sectoral dialogue in Europe*, page 10. For an up to date overview of all results achieved in the sectoral social dialogue reference is made to the special website on this topic: http://ec.europa.eu/employment_social /social_dialogue/index_en.htm.

304 European Commission, Directorate-General for Employment and Social Affairs, The *sectoral dialogue in Europe*, page 10.

305 This applies, for example, to the sectoral agreements on (i) working time in sea transport (Council Directive 1999/63/EC, OJ L 167, 2 July 1999, pages 33 – 37), (ii) civil aviation (Council Directive 2000/79/EC, OJ L 302, 1 December 2000, pages 57 – 60) and (iii) certain aspects of the working conditions of mobile workers assigned to interoperable cross-border services (Council Directive 2005/47/EC, OJ L 195, 27 July 2005, pages 15 – 17). Reference is made to COM (2004) 557, page 15.

In the December 2002 report "the European Social Dialogue: development, sectoral variation and prospects" the results of the European sectoral social dialogue were also analysed. This report was drafted by the Amsterdam Institute of Advanced Labour Studies at the request of the Dutch Ministry of Social Affairs and Employment. The report noted that the results of the European sectoral social dialogue had increased dramatically from the 1980's to the 1990's.[306] According to the report, the rapid increase in the 1990's could be largely attributed to the increasing number of sectors involved with the European sectoral social dialogue. The report sets out that the number of sectors in which results have been achieved has increased from 1 in 1978 to 28 in 2001.[307] The report clearly distinguished between joint statements and framework agreements. Joint statements are results reached without binding elements (and are therefore the result of negotiations) as opposed to framework agreements that are binding on the parties involved (and thus are the result of bargaining).[308] The report analysed that the majority of results that have been achieved in the European sectoral social dialogue relate to joint statements (210) and that merely 10% (20) relate to framework agreements.[309]

In 2006 the Directorate-General for Employment and Social Affairs of the Commission again conducted research on the development of the sectoral dialogue in Europe.[310] According to this report, the sectoral social dialogue "produces outcomes of practical importance and makes a significant contribution to the governance of the EU as a whole".[311] It notes that the SSD Committees have developed actions that enable them to respond flexibly in respect of their own needs and their sectors' interests. SSD Committees primarily seek action in three areas: (i) influencing their own members within the sector, (ii) ensuring that the sector's views are heard beyond the confines of

306 Which is especially easy to see in the table that can be found in: H. Benedictus, R. de Boer, M. van der Meer, W. Salverda, J. Visser and M. Zijl, Amsterdam Institute for Advanced Labour Studies, *The European Social Dialogue: development, sectoral variation and prospects*, December 2002, page 47.

307 Amsterdam Institute for Advanced Labour Studies, *The European Social Dialogue: development, sectoral variation and prospects*, page 47.

308 Amsterdam Institute for Advanced Labour Studies, *The European Social Dialogue: development, sectoral variation and prospects*, page 17.

309 Amsterdam Institute for Advanced Labour Studies, *The European Social Dialogue: development, sectoral variation and prospects*, page 48.

310 European Commission, Directorate-General for Employment and Social Affairs, *Recent developments in the European Sectoral Social Dialogue*, Office for Official Publications of the European Communities, 2006. The manuscript was completed in December 2005.

311 European Commission, Directorate-General for Employment and Social Affairs, *Recent developments in the European Sectoral Social Dialogue*, page 5.

the particular industry, and (iii) negotiating agreements for implementation.[312] The themes of interest of the SSD Committees mainly relate to:[313]

- Enlargement of the EU: SSD Committees have been actively engaged with the social partners of the acceding countries and have helped them to build their capacity to work effectively;
- Sector restructuring: SSD Committees have responded to restructuring needs through policy development, joint opinions and ideas and action through seminars, conferences and training;
- Corporate Social Responsibility: ideas of corporate social responsibility have been worked out in several sectors;
- Core labour standards: an important element in corporate social responsibility is the adoption of ILO core labour standards, such as freedom of association, the right to collective bargaining, and bans on forced and child labour and freedom from discrimination;
- Training and lifelong learning: many SSD Committees have focused on training, lifelong learning and disseminating best practices;
- Equal opportunities: SSD Committees have remained active in the field of equal opportunities; and
- Health and safety: SSD Committees have been concerned that general policies on health and safety are shaped to the needs of their particular industries and have acted on that in several sectors.

In his research, Pochet observes that the productivity (number of texts adopted) per sector varies considerably.[314] With regard to the number of documents adopted each year, there is no clear trend. The maximum number appears in the years 2000 and 2004 (40 documents). Furthermore, there is no visible trend towards the adoption of more binding texts. In fact, according to Pochet, fewer than 2% of the texts adopted at sectoral level are agreements with binding effects.[315]

The above sets out general activities and developments in the European sectoral social dialogue. Some of the most notable achievements in this dialogue will be discussed below.

312 European Commission, Directorate-General for Employment and Social Affairs, *Recent developments in the European Sectoral Social Dialogue*, page 6.

313 European Commission, Directorate-General for Employment and Social Affairs, *Recent developments in the European Sectoral Social Dialogue*, pages 7 – 9.

314 P. Pochet, *European social dialogue between hard and soft law*, Paper prepared for the EUSA Tenth Biennial International Conference, Montreal, Canada, May 2007, page 8.

315 P. Pochet, *European social dialogue between hard and soft law*, page 15.

The sector "agriculture" played a pioneering role in the European sectoral social dialogue. The first joint commission was established in 1974 and three agreements have been signed between 1978 and 1980.[316] The social partners involved were also responsible for the first "breakthrough" sectoral collective agreement that was concluded in 1997, the recommendation framework agreement on paid employment in agriculture.[317] For the first time, a European level voluntary agreement had been concluded that set out all essential elements of an employment relation, such as not to exceed weekly working hours, daily rest periods, maximum duration of night shifts and paid leave.[318] After this agreement, the social partners concluded a White Paper on vocational training in 2000 and an agreement on the elimination of restrictions on access to labour markets in the EU in 2002.[319] Also in 2002 the social partners entered into a European agreement on vocational training in agriculture, to be followed by the 2004 joint declaration "Health and Safety in Agriculture – Best practices and Proposals for Action", the 2005 European agreement on the reduction of workers' exposure to the risk of work-related musculo-skeletal disorders in agriculture and finally the 2005 joint declaration on health and safety.[320]

The European level social partners in the civil aviation sector have concluded an agreement on the organisation of working time in March 2000. The agreement is applicable to the mobile staff in civil aviation and contains stipulations concerning annual leave of 4 weeks, free health assessments, a maximum annual working time limit, a maximum "block flight time" and minimum rest requirements.[321] This agreement has been implemented by a Council directive on 27 November 2000.[322]

The Telecommunication sector has been the most productive sector in terms of the number of results attained. The social partners in this sector are, up

316 European Commission, Directorate-General for Employment and Social Affairs, *The sectoral dialogue in Europe*, page 20.

317 EIRO publication from T. Weber, *Framework agreement in agriculture: a milestone in the European sectoral social dialogue*, 28 September 1997.

318 T. Weber, *Framework agreement in agriculture: a milestone in the European sectoral social dialogue*, page 3.

319 European Commission, Directorate-General for Employment and Social Affairs, *The sectoral dialogue in Europe*, page 20.

320 European Commission, Directorate-General for Employment and Social Affairs, *Recent developments in the European Sectoral Social Dialogue*, page 12.

321 EIRO publication from A. Broughton, *Civil aviation social partners conclude working time accord*, 28 April 2000.

322 Council Directive 2000/79/EC, OJ L 302, 1 December 2000, pages 57 – 60.

to the end of 2002,[323] responsible for 30 joint statements and 2 framework agreements.[324] The joint statements mainly concern opinions of the social partners on certain developments in the EU, mostly attempting to influence the European decision-making process. The first framework agreement basically established the social dialogue in this sector, while the second framework agreement relates to telework. This agreement entails a number of rights and duties for both employers and employees with respect to teleworking.[325]

5. Bargaining in the European social dialogue at cross-industry level

According to the aforementioned report "the European Social Dialogue: development, sectoral variation and prospects", between 1986 and August 2002 the social partners at cross-industry level (UNICE (BUSINESSEUROPE), CEEP, ETUC and UEAPME) issued a joint statement or entered into a framework agreement 40 times.[326] Also in this case, the joint statements heavily outnumber the framework agreements. The cross-industry social partners entered into 36 joint opinions, the first being the so-called 1986 "Joint opinion on the community's cooperative growth strategy for more employment".[327] According to some, the first couple of joint statements were merely intended to show that the European social partners were able to draft joint opinions on complex issues.[328] Two important subjects on which joint statements have been issued are training and the future of the European social dialogue itself. The cross-industry social partners have, at the moment of drafting of the above-mentioned report, concluded 10 joint statements on training and education

323 For more recent development in this sector reference is made to: European Commission, Directorate-General for Employment and Social Affairs, *Recent developments in the European Sectoral Social Dialogue*, pages 83 - 85.

324 Amsterdam Institute for Advanced Labour Studies, *The European Social Dialogue: development, sectoral variation and prospects*, page 53.

325 Amsterdam Institute for Advanced Labour Studies, *The European Social Dialogue: development, sectoral variation and prospects*, page 50.

326 Amsterdam Institute for Advanced Labour Studies, *The European Social Dialogue: development, sectoral variation and prospects*, page 32.

327 Amsterdam Institute for Advanced Labour Studies, *The European Social Dialogue: development, sectoral variation and prospects*, page 32.

328 Amsterdam Institute for Advanced Labour Studies, *The European Social Dialogue: development, sectoral variation and prospects*, page 32.

and 6 on the European social dialogue.[329] A recent joint analysis focuses on how to deal with challenges confronting the European social partners, including globalisation, technological change and an ageing society.[330] The results of this joint analysis will guide and influence future initiatives of the cross-industry European social partners.[331] Besides issuing joint statements, the cross-industry European social partners entered into agreements as well. To date,[332] they entered into 6 framework agreements. These agreements have been either implemented by a Council decision by means of a directive (the first three), or by the social partners themselves in accordance with the procedures and practices specific to management and labour and to the Member States (the last three). The agreements will be introduced in the following paragraphs.

5.1 Framework agreement on parental leave

Through 1983 and 1984, the Council failed to act on the proposal for a Directive on parental leave for family reasons.[333] For that reason, the Commission consulted the social partners twice on the possible direction of Community action relating to reconciling working and family life. After this second consultation, the organisations UNICE, CEEP and UTUC informed the Commission of their desire to conclude a framework agreement on said subject matter. On 14 December 1995 they concluded the framework agreement on parental leave. The framework agreement was implemented by the Directive of 3 June 1996.[334]

The framework agreement sets out minimum requirements on parental leave and time off from work due to *force majeure*, as an important means

329 Amsterdam Institute for Advanced Labour Studies, *The European Social Dialogue: development, sectoral variation and prospects*, pages 33 and 34. For an up to date overview of all results achieved in the cross-industry social dialogue reference is made to the special website on this topic: http://ec.europa.eu/employment_social / social_dialogue/index_en.htm.

330 ETUC/CES, BUSINESSEUROPE, UEAPME, CEEP, *Key challenges facing European labour markets: a joint analysis of European social partners*, October 2007.

331 ETUI-REHS, *Benchmarking Working Europe 2007*, page 116.

332 That is June 2008.

333 Reference is made to the proposal for a Council Directive on parental leave for family reasons as published in OJ C 33, 9 December 1983, page 6 as amended on 15 November 1984 (OJ C 316, 27 November 1984, page 7). Reference is also made to recital 4 of the Council Directive on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, Council Directive 96/34/EC, OJ L 145, 19 June 1996, pages 4 – 9.

334 Council Directive 96/34/EC, OJ L 145, 19 June 1996, pages 4 – 9.

of reconciling work and family life and promoting equal opportunities and treatment of men and women. The agreement applies to all workers – men and women – who have an employment contract or employment relationship as defined by the law, collective agreements or practices in force in each Member State. Pursuant to article 2.1 of the framework agreement, men and women workers have a right to parental leave on grounds of the birth or adoption of a child to enable them to take care of that child, for at least three months, until a given age of up to 8 years. The Member States and/or social partners are to ensure that the employees can exercise this right and are protected from dismissal connected to taking parental leave (article 2.4). Rights acquired or in the process of being acquired by the employee on the date parental leave starts are maintained as they stand until the end of the parental leave (article 2.6). The employee should, as a rule, return to the same position after he or she has taken parental leave (article 2.5). Moreover, Member States and/or the social partners must take all necessary measures to entitle employees to time off from work on grounds of *force majeure* for urgent family reasons or sickness or accident making his or her immediate presence indispensable (article 3.1). Notwithstanding the framework agreement, Member States are free to apply for more favourable provisions than those set out in the framework agreement.

5.2 Framework agreement on part-time work

During the Essen European Summit, the European Council had stressed the importance of a more flexible organisation of work. The Commission consulted the social partners twice on the possible direction of Community action with regard to flexible working time and job security, in order for the social partners UNICE, CEEP and ETUC to announce their desire to agree on a framework agreement relating to part-time work. The Social Partners came to an agreement on said matter on 6 June 1997. The framework agreement was implemented by the Directive of 15 December 1997.[335]

The framework agreement sets out the general principles and minimum requirements relating to part-time work. Its purpose is (i) to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work and (ii) to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organisation of working time in a manner which takes into account the needs of employers and workers (article 1). The agreement applies to part-time workers who have an employment contract or an employment relationship in a Member State.

335 Council Directive 97/81/EC, OJ L 14, 20 January 1998, pages 9 – 14.

A "part-time worker" is an employee whose normal hours of work are less than the normal hours of work of a comparable full-time worker (article 3.1).

With regard to employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part-time, unless different treatment is objectively justifiable (article 4.1). Both the Member States and the social partners should identify and review obstacles which may limit opportunities for part-time work and, where appropriate, eliminate them (article 5.1). Employers should give consideration to an employee's request for transferring from full-time to part-time work and vice versa. Employers should also inform employees on the availability of part-time and full-time positions, facilitate access to part-time work and inform workers' representative bodies about part-time working in the enterprise (article 5.3). Member States and/or social partners may maintain or introduce more favourable provisions than set out in the Framework Agreement (article 6.1).

5.3 Framework agreement on fixed-term work

In its resolution of 9 February 1999 on the 1999 Employment Guidelines, the Council invited the social partners to negotiate agreements to modernise the organisation of work, including flexible working arrangements. Subsequently, the Commission consulted the social partners on the possible direction of Community action concerning flexible working time and job security. UNICE, CEEP and ETUC informed the Commission of their desire to enter into an agreement regarding fixed-term work. This agreement – the framework agreement on fixed-term work – was concluded on 18 March 1999. The agreement has been put into effect by the Directive of 28 June 1999.[336]

Said agreement sets out the general principles and minimum requirements relating to fixed-term work. Its purpose is (i) to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination and (ii) to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships (article 1). The agreement applies to fixed-term workers, with the exception of employees placed by a temporary work agency at the disposition of a user enterprise. Member States are free to stipulate, after consulting the social partners, the exclusion of the framework agreement from – briefly put – employment agreements with a training/apprenticeship goal (preamble and article 2

336 Council Directive 1999/70/EC, OJ L 175, 10 July 1999, pages 43 – 48.

of the framework agreement). A "fixed-term worker" is a person having an employment contract or relationship entered into directly between the employer and the worker where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event (article 3.1).

Pursuant to the framework agreement, fixed-term contracts should be the exception and contracts of an indefinite duration should be the rule (preamble). Moreover, fixed-term workers are not to be treated in a less favourable manner than permanent workers solely because they have a fixed-term contract, unless different treatment is justified on objective grounds (article 4.1). Abuse of fixed-term contracts should be prevented, by means of implementing one or more of the following measures in the Member States: (a) objective reasons justifying the renewal of such contracts or relationships, (b) the maximum total duration of successive fixed-term employment contracts or relationships and (c) the number of renewals of such contracts or relationships (article 5.1).

Fixed-term workers should be informed of possible vacancies in the undertaking and must be taken into consideration when calculating the threshold above which workers' representative bodies, provided for in national and Community law, may be constituted in the undertaking as required by national provisions (articles 6.1 and 7.1). Obviously, Member States and/or the social partners are free to maintain or introduce more favourable provisions for workers than set out in the framework agreement (article 8.1).

5.4 Framework agreement on telework

The fourth framework agreement entered into by the cross-industry Social Partners is the framework agreement on telework, concluded on 16 July 2000 by UTUC (and the liaison committee EUROCADRES/CEC), UNICE/UEAPME and CEEP. As opposed to the previous framework agreements, the framework agreement on telework has not been implemented by Council Decision. Instead, the framework agreement has been implemented by the members of the contracting parties in accordance with the procedures and practices specific to management and labour in Member States (article 12).

Pursuant to article 2 of the framework agreement, telework is "a form of organising and/or performing work, using information technology, in the context of an employment contract/relationship, where work, which could also be performed at the employer's premises, is carried out away from those

premises on a regular basis." The framework agreement applies to teleworkers, who are persons who carry out telework. Telework is voluntary for the worker and the employer involved. Teleworking may be required as part of a worker's initial job description or may be engaged in as a voluntary arrangement subsequently (article 3). The teleworker is entitled to all basic information with regard to his employment, such as information on applicable collective agreements, description of the work etc. Additionally, the teleworker may require further written information, such as the department of the undertaking to which the teleworker is attached, his/her immediate superior, reporting arrangements etc. (article 3). Teleworkers are entitled to the same employment conditions as comparable workers at the employer's premises (article 4). They also have the same collective rights as these workers (article 11). Moreover, teleworkers must have the same access to training and career development opportunities as comparable workers at the employer's premises and shall be subject to the same appraisal policies as those other workers (article 10). They should furthermore be able to communicate freely with workers' representatives (article 11). The employer informs the teleworker on relevant legislation and company rules concerning data protection and the employer must respect the teleworker's privacy (articles 5 and 6). The employer is, as a rule, responsible for the work equipment and the protection of the occupational health and safety of the teleworker (articles 6 and 7). The employer ensures that the teleworker will not be isolated from the rest of the working community in the company (article 9).

5.5 Framework agreement on work-related stress

Subsequently, on 8 October 2004 the cross-industry social partners UTUC (and the liaison committee EUROCADRES/CEC), UNICE, UEAPME and CEEP entered into the framework agreement on work-related stress. This framework agreement is to be implemented by the members of the contracting parties within three years of the date of signature, thus prior to 8 October 2007.

The aim of this framework agreement is to increase awareness and understanding of employers, workers and their representatives of work-related stress. The objective is to provide employers and workers with a framework to identify and prevent, or manage problems of work-related stress (article 2). The accord, however, does not cover violence, harassment and post-traumatic stress, since these issues shall be dealt with in separate negotiations (article 2). Stress is defined as a state that is accompanied by physical, psychological or social complaints or dysfunctions and which results from individuals feeling unable to bridge a gap with the requirements or expectations placed on them

(article 3). If a work-related stress problem is identified, action must be taken to prevent, eliminate or reduce it. The responsibility for determining the appropriate measures rests with the employer (article 4). More in general, the employer has the obligation under the framework directive 89/391 to protect the occupational safety and health of its workers. Pursuant to article 5, this duty also applies to problems of work-related stress in so far as they entail a risk to health and safety. Addressing problems of work-related stress may be carried out within an overall process of risk assessment, through a separate stress policy and/or by specific measures targeted at identified stress factors (article 5). The measures to prevent, eliminate or reduce problems of work-related stress can vary. These measures can be collective, individual or both. Anti-stress measures should be regularly reviewed once they are in place (article 6).

5.6 Framework agreement on harassment and violence at work

The most recent framework agreement entered into by the cross-industry social partners is the framework agreement on harassment and violence at work. This agreement is concluded between UTUC (and the liaison committee EUROCADRES/CEC), BUSINESSEUROPE, UEAPME and CEEP on 26 April 2007. This agreement is to be implemented by the members of the signatory parties within three year of the date of its execution. Implementation of the framework agreement does not constitute valid grounds to reduce the general level of protection afforded to workers in the field of this agreement.

The signatory parties consider harassment and violence unacceptable and condemn them (part 1). The framework agreement's aim is dual, as it is to (i) increase the awareness and understanding of employers, workers and their representatives of workplace harassment and violence and (ii) provide employers, workers and their representatives at all levels with an action-oriented framework to identify, prevent and manage problems of harassment and violence at work (part 2). Harassment and violence may take different forms. Harassment occurs when one (or more) worker(s) or manager(s) is (are) repeatedly and deliberately abused, threatened and/or humiliated in circumstances relating to work. Violence occurs when one (or more) worker(s) or manager(s) is (are) assaulted in circumstances relating to work (part 3). According to the signatory parties, raising awareness and appropriate training of managers and workers can reduce the likelihood of harassment and violence at work. Enterprises must clearly state that harassment and violence will not be tolerated. This statement will specify procedures to be followed where cases arise. These procedures will be underpinned by but not confined to the following:

- It is in the interest of all parties to proceed with the necessary discretion to protect the dignity and privacy of all;
- No information should be disclosed to parties not involved in the case;
- Complaints should be investigated and dealt with without undue delay;
- All parties involved should get an impartial hearing and fair treatment;
- Complaints should be backed up by detailed information;
- False accusations should not be tolerated and may result in disciplinary action;
- External assistance may help.

If harassment and violence have occurred, appropriate measures will be taken in relation to the perpetrator(s), which may include disciplinary action up to and including dismissal. The victim(s) should receive support and, if necessary, help with reintegration.

6. Some remarks on the results achieved in transnational collective bargaining and the repositioning of the cross-industry social partners

Here, the results achieved in transnational collective bargaining and negotiations will be briefly analysed (section 6.1). Furthermore it will be assessed whether the European cross-industry social partners actually repositioned themselves following their Laeken declaration (section 6.2).

6.1 A brief analysis of the results achieved in transnational collective bargaining

The above shows that there is a more or less vivid "transnational bargaining climate" in Europe. This is particularly true when output is considered. But when one considers the content of the collective agreements with an international scope, especially those agreements concluded within the European social dialogue, one has to conclude that many results are non-binding documents and non-binding joint statements (and therefore are the result of negotiations rather than proper bargaining). Besides, although these joint statements are considerable in number, they are often hardly shocking in content. For example, the content of the 36 cross-industry joint statements made until August 2002 mainly relate to training and the European social dialogue itself, and the 210 sectoral joint statements reached in the same period are mainly directed at European institutions.[337] This last category of

337 Amsterdam Institute for Advanced Labour Studies, *The European Social Dialogue: development, sectoral variation and prospects*, page 88.

joint statements has rather a political goal than a direct social or employment related goal.[338] There only have been a limited number of framework agreements concluded up to August 2002; 5 at cross-industry level and 20 at sectoral level. Their importance within the individual Member States is rather insignificant, since the provisions negotiated remain well below the minimum levels of employment conditions established in most Member States.[339] Also Pochet claims that the results of the sectoral social dialogue are, at least those regarding autonomous agreements, "unimpressive".[340]

6.2 Repositioning of the European cross-industry social partners?

As mentioned in section 5 of chapter 3, the cross-industry European social partners deemed it necessary to reposition. An important objective in that respect, as set out in the Laeken declaration, was their wish to develop a more autonomous social dialogue. As a part of objective, the cross-industry social partners ETUC, UNICE/UEAPME and CEEP have agreed on the "Work Programme of the European Social Partners 2003-2005" on 28 November 2002. According to its introduction, the work programme is build on "a spectrum of diversified instruments and comprises a balanced range of themes of common interest for employers and workers". The work programme is to make a useful contribution to the Lisbon Strategy as well as to the preparation of the enlargement. Its content is grouped around three priorities: employment, mobility and enlargement. On 23 March 2006 the same parties, together with the liaison committee EUROCADRES/CEC, concluded the "Work Programme of the European Social Partners 2006-2008." The social partners reiterate their support for the Lisbon Strategy aimed at turning Europe into the most competitive knowledge-based economy in the world, capable of sustainable economic growth, with more and better jobs and greater social cohesion. Through the second work programme, the social partners wish to contribute to and promote growth, jobs and the modernisation of the EU social model. The work programme focuses on Europe's major economic and

338 The Report states that "influencing European policy making is the main motivation of social partners for entering into the social dialogue", Amsterdam Institute for Advanced Labour Studies, *The European Social Dialogue: development, sectoral variation and prospects*, page 100.

339 Amsterdam Institute for Advanced Labour Studies, *The European Social Dialogue: development, sectoral variation and prospects*, page 100. According to ETUC, however, the framework agreement on parental leave improved social/employment law in five of the fifteen countries it took effect, and the framework agreement on part-time work improved the situation is Britain and Ireland. See C. Degryse, *European social dialogue: a mixed picture*, pages 10 and 11.

340 P. Pochet, *European social dialogue between hard and soft law*, page 12.

social challenges. In order to contribute to enhancing Europe's employment and growth potential and the impact of the European social dialogue, the social partners will undertake a joint analysis on the key challenges facing Europe's labour markets, looking at issues such as: (i) macro-economic and labour market policies, (ii) demographic change, active ageing, youth integration, mobility and migration, (iii) lifelong learning, competitiveness, innovation and the integration of disadvantaged groups on the labour market, (iv) balance between flexibility and security, and (v) undeclared work. These work programmes show that the cross-industry social partners want to shape the European future, taking into account Europe's challenges, independent from the Community institutions.[341] The cross-industry social partners have indeed been rather successful implementing these autonomous work programmes.[342] This development can be considered a part of the enhanced autonomy of these social partners. The same can be said about the implementation of the most recent three framework agreements. These agreements all had to be implemented autonomously, not involving the Community institutions in this process.

ETUC, in particular, seems very keen on firmly developing its position. At the eleventh Congress of the ETUC that took place in Seville on 21 – 24 May 2007, it adopted an "offensive" strategy and action plan, summarised in the Seville Manifesto. Basically, ETUC wants to strengthen European trade unionism and its own capacities to face several of its challenges. It plans to go on the offensive for: (i) a European labour market with a strong social dimension, (ii) a higher quality social dialogue, collective bargaining and workers participation, (iii) more effective European economic, social and environmental governance, (iv) a stronger EU, and (v) stronger unions and a stronger ETUC. The second "front" includes "more intense consideration of how to develop and coordinate European level collective bargaining, including at sectoral, cross border, and transnational company levels, and supporting the work of the European Industry Federations".[343] Given the Seville Manifesto, it seems that ETUC is aiming at a more prominent role in Europe.

7. Summary

The "Europeanisation of collective bargaining" is not solely achieved by the European social dialogue and its actors, the European (cross-industry and

341 See also S. Smismans, *The European social dialogue between constitutional and labour law*, European Law Review, 2007, volume 32, number 3, page 345.

342 ETUI-REHS, *Benchmarking Working Europe 2007*, pages 116 and 117.

343 Reference is made to the Seville Manifesto, which can be found on ETUC's website.

sectoral) social partners and European institutions, such as the Commission. National collective bargaining and negotiations can lead to the Europeanisation of collective bargaining as well. In this respect, at least five levels should be distinguished: (i) country level, (ii) inter-regional level, (iii) company level, (iv) European sectoral level and (v) European cross-industry level.

At country level, (tripartite) social pacts have been concluded in order to contribute to the country's effort to fulfil the criteria for EMU and/or to improve national competitiveness within the Single European Market. In Belgium, the social partners must, by law, take into account the forecast rise in wages in Belgium's three main trade partners when negotiating on the maximum possible wage increase over the subsequent two years.

At inter-regional level, several initiatives have been developed to coordinate national collective bargaining. The most well-known example of such inter-regional initiative is the Doorn Group. This group of representatives of Belgian, Dutch, Luxembourg, German and French trade unions has established cross-border guidelines for their national bargaining policies. Another example is the German Metalworkers' Union IG Metall that has launched initiatives for cross-border collective bargaining networks.

At company level, there is a modest trend towards Europeanisation of collective bargaining. Although negotiations are normally national, the reference points utilised by management (and sometimes labour) in negotiations are sometimes European (or wider).

At sectoral level, there have been several initiatives taken, primarily by trade unions, aimed at a more explicit European coordination of national bargaining. The most far reaching initiative originates from the European Metalworkers' Federation, and this organisation has developed (i) a joint commitment to European guidelines for national collective bargaining, which is meant to prevent downward competition and (ii) certain minimum standards that all EMF affiliates should feel obliged to bargain for. Other European Industry Federations, in one way or another, have followed this example.

At cross-industry level, it is mainly ETUC that has put energy into the Europeanisation of national collective bargaining. The ETUC actively promotes a strategy for coordinated European collective bargaining at sectoral and intersectoral level and the securitisation of a consistent approach via coordination within the ETUC.

At European company-level, quite a few transnational collective labour agreements have been concluded. This has partially been done with the European Works Council, but more importantly also with European sectoral trade unions, sometimes combined with national trade unions. The topics of corporate social responsibility and restructuring have attracted the interest of multinational companies in particular.

A relatively vivid European sectoral social dialogue exists. Since the establishment of sectoral social dialogue committees in 1998 until the middle of 2002, the social partners involved concluded approximately 230 commitments of different types and scale, such as opinions and common positions, declarations, guidelines and codes of conduct, charters, agreements etc. Most of these commitments have been adopted to clarify the position of the social partners on a certain subject. Some of these commitments have been implemented by a Council decision.

At European cross-industry level, between 1986 and August 2002 the social partners (UNICE, CEEP, ETUC and UEAPME) have issued joint statements and entered into framework agreements 40 times in the European social dialogue. Also in this case, the joint statements heavily outnumber the framework agreements. The cross-industry social partners have entered into 36 joint opinions, primarily dealing with training and the future of the European social dialogue itself. Said social partners have concluded six framework agreements, of which three have been implemented by a Council decision and three by the members of the contracting parties in accordance with the procedures and practices specific to management and labour and Member States.

Based on the number of results, transnational collective bargaining is intensifying. However, it should be noted that many results reached are non-binding (and therefore cannot truly be considered the fruits of proper bargaining). There has been only a limited number of binding framework agreements concluded. Their importance within the individual Member States is rather insignificant, since the provisions negotiated remain well below the minimum levels of employment conditions established in most Member States. The cross-industry social partners did, following their Laeken declaration, succeed in achieving a more autonomous bargaining process. ETUC particularly seems to aim at a more prominent role in Europe.

CHAPTER 5

ARTICLES 136 – 139 OF THE EC TREATY

1. Introduction

From the previous chapters, it can be derived that the European social partners have concluded a number of agreements and have an excellent opportunity to further enhance their output. Some of these agreements have been reached within the scope of the articles 136 – 139 of the EC Treaty. These articles contain the legal framework of the so-called (social) dialogue between management and labour. In this chapter, this legal framework will be discussed in depth.

In section 2, the mandatory consultation process of management and labour will be set out (article 138 of the EC Treaty). The Commission must consult the social partners in a two-stage process about all its proposals in the social policy field. Exactly which organisations qualify as "management and labour" and what proposals fall within "the social policy field" will be discussed in that section.

After the consultation process, the social partners are, on the basis of article 138.4 of the EC Treaty, entitled to enter into negotiations in order to conclude an agreement on the issue at hand, as will be dealt with in section 3. In this section special attention will be drawn to the question of which social partners may enter into such an agreement. But it seems that also without prior consultation the European social partners may, pursuant to article 139 if the EC Treaty, enter into agreements. This autonomous negotiation process and the parties involved in it will be discussed in section 4.

Article 139.1 of the EC Treaty stipulates that the European social partners may enter into "contractual relations, including agreements". Apparently, "contractual relations" must be viewed as a broad concept which includes "agreements". Although this distinction is rather puzzling, it has important consequences as will be argued in section 5. In the same section an attempt will be made to classify "contractual relations".

Once the social partners have reached an agreement (after the consultation process or autonomously), they can, pursuant to article 139.2 of the EC Treaty, either request it to be implemented by a Council decision or implement it themselves in accordance with the procedures and practices specific to management and labour and to the Member States. These methods of implementation will be scrutinised in sections 6 and 7 respectively. Section 8 will summarise this chapter.

2. The consultation of the social partners

Pursuant to article 136.1 of the EC Treaty, the Community and the Member States shall promote, among other things, the dialogue between management and labour. According to the third paragraph of this article, this development will *i.a.* ensue from the procedures provided for in the EC Treaty. Here, the fact that the European social partners are to be consulted in a two-stage process about all the Commission's proposals in the social policy field, comes into play.

2.1 Two-stage consultation process

2.1.1 Consultation stage 1

Pursuant to article 138.2 of the EC Treaty, the Commission shall consult the social partners before submitting proposals in the social policy field. Judging from the words used in this article (the Commission *shall* consult as opposed to *can* consult), this is not a discretionary power of the Commission, but an obligation.[344]

According to the Commission's Communication "concerning the application of the Agreement on social policy", the consultation will be initiated by sending the relevant social partners[345] a letter concerning the direction Community action in the social policy field might go. The social partners may – individually or collectively – reply by letter or, at their discretion, convene an ad hoc meeting.[346]

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344 See also E. Franssen, *Legal aspects of the European Social Dialogue*, page 79 and Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities*, page 1060. See furthermore the opinion of the Economic and Social Committee on the Communication concerning the application of the Agreement on Social Policy presented by the Commission to the Council and to the European Parliament, paragraph 3.3.4.

345 Which social partners are to be consulted, will be discussed in section 2.2 below.

346 COM (1993) 600, page 19.

There has been some discussion with regard to the duration of this first consultation stage. In its above-mentioned Communication, the Commission noted that the consultation period should not exceed 6 weeks.[347] This led to critical remarks from some important social partners, who favoured a period of several months.[348] As a result of this, the Commission argued in its 1996 Communication "the Development of the Social Dialogue at Community level" that, while the general time-limit should remain fixed on 6 weeks, the deadline for consultations should be adaptable and should be set by the Commission on a case-by-case basis, depending on the nature and complexity of the subject at hand.[349] In its 1998 Communication "Adapting and promoting the Social Dialogue at Community level" the Commission decided accordingly.[350]

2.1.2 Consultation stage 2

The second stage starts if, after having finalised the above-mentioned first consultation stage, the Commission considers Community action advisable. Whether or not this is the case, is entirely up to the Commission.[351] Should action be considered the way to proceed, the Commission shall consult the social partners on the content of the envisaged proposal, upon which these social partners can forward their opinion or even recommendation (article 138.3 of the EC Treaty).

According to the aforementioned Commission's Communication "concerning the application of the Agreement on social policy", this entails that the Commission will send a second letter to the social partners, incorporating the content of the planned proposal initiative, together with an indication of the possible legal basis thereof. The social partners should subsequently deliver to the Commission in writing and, where the social partners so wish through an ad hoc meeting, an opinion setting out the points of agreement

347 COM (1993) 600, page 19.

348 UNICE recommended a period of at least three months and CEEP considered a three to four months time-frame reasonable. Reference is made to E. Franssen, *Legal aspects of the European Social Dialogue*, page 79.

349 COM (1996) 448, page 13.

350 COM (1998) 322, page 9.

351 COM (1993) 600, page 19.

and disagreement in their respective positions on said draft text. The duration of this second stage should also not exceed 6 weeks.[352] [353]

2.2 Management and labour: which social partners are to be consulted?

As appears in articles 138.2 and 138.3 of the EC Treaty, the parties that need to be consulted in the two-stage consultation process are "labour" and "management". The EC Treaty does not define said parties. That raises the question of who these parties are.

As is set out in chapter 3, section 2.3 of this thesis, article 138 of the EC Treaty is originally based on article 3 of the Joint Agreement concluded between UNICE, ETUC and CEEP. These parties therefore logically classify as "labour and management" as referred to in article 138 of the EC Treaty. However, more parties are involved in the social dialogue.

In the period September 1992 up to July 1993 the Commission conducted an extensive study of European employers' and workers' organisations. The most important purpose of the study was to get an overview of who was represented by a number of European federations at all-industry level. There were two main lessons the Commission drew from the aforementioned research. First, it concluded that the diversity of practice in the different Member States is such that there is no single model as to representativeness that could be replicated at European level. Second, it stated that, since the different Member States systems have all taken many years to grow and develop, it is difficult to see how a European system can be created by administrative decision in the short term.[354]

Following said research, the Commission in its 1993 Communication "concerning the application of the Agreement on social policy" set out the

352 COM (1993) 600, pages 19 and 20.

353 The Economic and Social Committee considered this period of six weeks insufficient. Especially during the second phase, the social partners should be granted ample time in order to enable them to produce effective critiques on the content of, or detailed amendments to, the proposal or substantive recommendations. Reference is made to the opinion of the Economic and Social Committee on the Communication concerning the application of the Agreement on Social Policy presented by the Commission to the Council and to the European Parliament, paragraph 3.4.3.

354 Reference is made to annex 3 of COM (1993) 600. For a further analysis on these conclusions, reference is made to B. Bercusson, *European Labour Law*, pages 558 – 562.

criteria that organisations must meet in order to be consulted on the basis of article 138 EC Treaty. They should:

1. be cross-industry or relate to specific sectors or categories and be organised at European level;

2. consist of organisations which are themselves an integral and recognised part of Member State social partner structures and with the capacity to negotiate agreements, and which are representative of all Member States, as far as possible; and

3. have adequate structures to ensure their effective participation in the consultation process.

The European Parliament suggested to amend the above-mentioned criteria by including further considerations to the list: (i) the eligible organisations should be composed of organisations representing employers or workers with membership which is voluntary at both national and European level, (ii) they should be composed of members who are entitled to be involved directly, or through their members, in collective bargaining at their respective levels and (iii) they should have a mandate from their members to represent them in the context of the Community social dialogue and can demonstrate their representativeness.[355] The Economic and Social Committee also wanted to add to the criteria the capacity of the national social partners to negotiate for and bind national structures.[356] The Commission sought the opinion of the social partners on these proposed changes.[357] Although there was strong disagreement between the social partners on the aspect of representativity,[358] the Commission nonetheless observed in its 1998 Communication that "the vast majority of respondents were in favour of maintaining the current criteria determining which organisations should be consulted".[359] Consequently, the Commission maintained these criteria.

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355 Report of the Committee on Social Affairs, Employment and the Working Environment, on the application of the Agreement on Social Policy, 20 April 1994, PE 207.928/final, paragraph 1.

356 Opinion of the Economic and Social Committee on the Communication concerning the application of the Agreement on Social Policy presented by the Commission to the Council and to the European Parliament, paragraph 2.1.12.

357 COM (1996) 448, page 12.

358 E. Franssen and A.T.J.M. Jacobs, *The question of representativity in the European social dialogue*, Common Market Law Review 1998, page 1301.

359 COM (1998) 322, page 9.

What was somewhat peculiar was that the Commission in the same 1998 Communication proposed to establish sectoral dialogue committees,[360] for which it also fixed demands that organisations should meet in order to be eligible to participate in such committees. These demands are exactly the same as the three demands mentioned above, with the exception of the second demand, which requires organisations to be "an integral and recognised part of Member States' social partner structures and with the capacity to negotiate agreements, and which *are representative of several Member States*".[361] This demand seems to weaken the geographical dimension of the organisations participating in the European (sectoral) social dialogue to some extent.[362]

In any event, the fact that (apart from the change concerning the sectoral social dialogue) the requirements organisations should satisfy in order to participate in the European social dialogue remained unaltered, does not entail that the organisations that participate in the consultation process have remained the same as well over the years. Based on the above-mentioned representativeness study, the Commission has drafted a list of organisations that are to be consulted.[363] This list has been reviewed on several occasions over time[364] and there is a more or less ongoing research on the representativeness of the social partners. Today, there are about 50 organisations that are consulted in conformity with article 138 of the EC Treaty.[365] These organisations are the representative European social partners satisfying the Commission's requirements.

2.3 Social Policy field: exactly whereon are the social partners to be consulted?

Article 138.2 of the EC Treaty stipulates that the social partners are to be consulted on proposals in the "social policy field". Clearly, all proposals pertaining to issues laid out in the articles 137 and 140 of the EC Treaty are to

360 See chapter 4, section 4.

361 Reference is made to Article 1 of the Commission decision on the establishment of Sectoral Dialogue Committees promoting the Dialogue between the social partners at European level.

362 See also: J. Kirton-Darling (ed.), *Representativeness of Public Sector Trade Unions in Europe, State Administration and Local Government Sectors*, published by ETUI, Brussels, 2004, page 20.

363 Reference is made to annex 2 of COM (1993) 600.

364 On the occasions of COM (1996) 448, COM (1998) 322; and COM (2002) 341, for example, the list of organisations has been updated.

365 Reference is made to the social dialogue website (http://europa.eu.int/comm/employment_social/social_dialogue/represent_en.htm).

be considered proposals submitted in the social policy field. The social policy field must, however, be regarded as broader than this alone.

In its 1993 Communication, the Commission stated that the consultation procedures should apply to all social policy proposals, whatever legal basis is eventually decided on.[366] In Annex 1 to this Communication, the Commission provided an overview of the main legal bases for social policy measures. Apparently, the Commission intended to apply the consultation process to all social initiatives stated in that overview. Moreover, the Commission even reserved its right to engage in specific consultations on any other horizontal or sectoral-type proposal which has social implications.[367]

The Commission did indeed apply article 138 of the EC Treaty liberally.[368] Although it noted in 1996 that the consultation procedure is only mandatory within the context on the Agreement on Social Policy, it had committed itself, in order to standardise its approach, to applying this procedure for all social policy initiatives, irrespective of their legal bases.[369] In 1998 the Commission announced to develop and broaden its practice of consultations on those developments in the social policy field not covered by the formal consultations under article 138 EC Treaty, for example on green papers.[370] Later on, the Commission even further broadened the subject of consultation, where it expressed its intention to consult the social partners "on the main initiatives having social repercussions".[371]

Given the above, the Commission broadly defines the concept "social policy field" as used in article 138.2 of the EC Treaty. This is also recognised by scholars. According to Kapteyn and VerLoren van Themaat, the norm of instruction requiring consultation embraces all Community initiatives and proposals which have a social or socio-economic significance, such as measures implementing the present articles 42 and 158 – 162, and the articles 125 – 130 of the EC Treaty.[372] Franssen subscribes to this point of view.[373] European

366 COM (1993) 600, page 24.

367 COM (1993) 600, page 24.

368 Although it must be noted that the list of issues under consultation gets shorter every year. ETUI-REHS, *Benchmarking Working Europe 2007*, page 115.

369 COM (1996) 448, page 23.

370 COM (1998) 322, page 7.

371 COM (2002) 341, page 9.

372 Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities*, page 1061.

373 E. Franssen, *Legal aspects of the European Social Dialogue*, page 82.

bodies also view the social policy field rather broadly. The Economic and Social Committee, for example, stated that the aforementioned consultation procedure should be applied to every proposal "which is linked to social policy".[374]

3. From consultation to negotiation

3.1 The negotiation process

On the occasion of the above-mentioned consultation, the social partners are entitled to inform the Commission of their wish to enter into an agreement. This negotiation process may take up to 9 months and can be extended upon joint agreement between the social partners involved and the Commission (article 138.4 of the EC Treaty).

At or before expiration of said period of 9 months, the social partners must submit to the Commission a report concerning the negotiations. This report may inform the Commission that:[375]

A they have concluded an agreement and jointly request the Commission to propose that the Council adopts a decision on implementation;[376] or

B having concluded an agreement between themselves, they prefer to implement it in accordance with the procedures and practices specific to management and labour and to the Member States;[377] or

C they envisage pursuing the negotiations beyond the 9 months and accordingly request the Commission to decide with them upon a new deadline; or

D they are unable to reach an agreement.

374 Opinion of the Economic and Social Committee on the Communication concerning the application of the Agreement on Social Policy presented by the Commission to the Council and to the European Parliament, paragraph 3.3.1.

375 This overview literally derives from COM (1993) 600, page 3.

376 Reference is made to article 139.2 of the EC Treaty.

377 Reference is made to article 139.2 of the EC Treaty.

If the social partners have notified that no agreement can be reached, the Commission will examine whether action still is appropriate. The Economic and Social Committee, the Committee of the Regions and the European Parliament will in such a case be consulted in accordance with the procedures laid out in the EC Treaty.[378] If an agreement has been reached, there are – as can be derived from A and B above – two options available to the social partners: their agreement can either be implemented by a Council decision or in accordance with the procedures and practices specific to management and labour and to the Member States. These methods of implementation will be discussed in paragraphs 6 and 7 respectively.

3.2 The social partners involved

Just like the EC Treaty does not make evident which parties are to be consulted in the two-stage consultation process, it is also unclear which parties are entitled to enter into negotiation after finalising the consultation process.

The Commission attempted to give some clarity in its 1993 Communication "concerning the application of the Agreement on social policy". The Commission stated that it regards the negotiations between the social partners as an independent, autonomous activity.[379] Consequently, the social partners concerned are those who agree to negotiate with each other.[380] These observations did not, however, stop UEAPME from starting an important case against the Council regarding its alleged right to participate in negotiations under article 139 of the EC Treaty (at that time article 4 of the Agreement on Social Policy).[381] This matter concerned the following.

In 1995 the Commission consulted the social partners in the two-stage consultation process with regard to reconciling working and family life. At both stages, UEAPME took part in the consultation process, but it also urged the Commission to do everything in its power to ensure that certain important issues and certain representatives of management and labour were not to be excluded from possible negotiations. At the end of the consultation process, UNICE, CEEP and ETUC informed the Commission of their desire to enter into negotiations on parental leave. UEAPME was not admitted to these

378 Article 137.2 of the EC Treaty.

379 Whether these negotiations can truly be considered autonomous will be discussed in section 3.5, chapter 6 of this thesis.

380 COM (1993) 600, page 25.

381 Court of First Instance, 17 June 1998, T-135/96, *UEAPME/Council of the European Union*.

negotiations. The aforementioned parties agreed on the framework agreement on parental leave. They submitted this agreement to the Commission, with the request that it be implemented by a Council decision on a proposal from the Commission. Meanwhile, UEAPME informed the Commission of its regret on not having been able to participate in the dialogue between management and labour, and submitted its criticism of the proposed framework agreement.

On 3 June 1996 Directive 96/34, giving effect to the framework agreement, was adopted by the Council. On 5 September 1996 UEAPME lodged an application at the Court of First Instance, requesting the annulment of that Directive. UEAPME argued, briefly put, that it should have been party to the negotiations leading to the framework agreement. On this challenge of UEAPME, the Court had *i.a.* to verify whether the particular features of the procedure culminating in the adoption of said Directive had correctly been applied.[382]

The Court considered that neither article 3.4 nor article 4 of the Agreement on Social Policy (the current articles 138.4 and 139 of the EC Treaty) expressly identifies "management and labour" for the purposes of negotiations referred to. Nevertheless, the Court ruled that, the way in which the provisions are structured, and the existence of the prior consultation stage suggest that the representatives of management and labour which participate in the negotiations must, at the very least, have been among those consulted by the Commission. This does not imply, however, that all those consulted by the Commission have the *right* to take part in the negotiations. According to the Court, the negotiation stage depends exclusively on the initiative of those representatives of management and labour who wish to launch such negotiations. The representatives of management and labour concerned in the negotiation stage are therefore those who have demonstrated their mutual willingness to initiate the process provided for in article 4 of the Agreement on Social Policy and to follow it through to its conclusion. The Court thus concludes that the Agreement on Social Policy does not confer on any representative of management and labour, whatever the interests purportedly represented, a general right to take part in any negotiations entered into in accordance with article 3.4 of the Agreement on Social Policy, even though it is open to any representative of management and labour which has been consulted pursuant to article 3.2 and article 3.3 of the Agreement on Social Policy to initiate such negotiations. Moreover, the mere fact that UEAPME

382 One of the main difficulties of the UEAPME was the problem of admissibility. For an in depth view on that topic, reference is made to E. Franssen and A.T.M.J. Jacobs, *The question of representativity in the European social dialogue*, pages 1303 *ff*.

contacted the Commission on several occasions asking to participate in the negotiations between other representatives of management and labour does not affect that position, since it is the representatives of management and labour concerned, and not the Commission, which have charge of the negotiations stage properly so called.

This ruling gives important footholds when it comes to understanding which parties can participate in the negotiations as arranged for in the EC Treaty. These parties have to be (i) among those parties consulted by the Commission and (ii) admitted to the negotiation table by the other social partners involved.

3.3 Differing representativity demands depending on the implementation method?

The above gives an answer to the question of which parties may, following a consultation, enter into negotiations. Given the way the ruling of the Court of First Instance is phrased, it does not matter whether the parties that enter into the collective bargaining have an aim to have their agreement implemented by a Council decision or in accordance with the procedures and practices specific to management and labour and to the Member States. After all, the Court of First Instance simply ruled:[383]

> Thus neither Article 3 (4) nor Article 4 of the Agreement expressly identifies "management and labour" for the purposes of the negotiations referred to. Nevertheless, the way in which the provisions are structured and the existence of the prior consultation stage suggest that the representatives of management and labour which participate in the negotiations must at the very least have been among those consulted by the Commission.

Apparently, the Court of First Instance does not distinguish between management and labour mentioned in article 3.4 of the Agreement on Social Policy (article 138.4 of the EC Treaty; the parties that should be consulted) and management and labour mentioned in article 4 thereof (article 139 of the EC Treaty; the parties that may enter into an agreement); neither article identifies management and labour. It seems that these parties must, according to the Court, be considered the same. Indeed, the articles 138 and 139 of the EC Treaty use exactly the same terminology for the European social partners:

383 Paragraph 75 of the UEAPME case.

management and labour. Management and labour in both articles must therefore apparently be viewed identical.[384]

What may very well differ depending on the chosen implementation method is not so much the parties that are entitled to participate in negotiation, but their level of representativity with regard to the agreement they concluded. Undeniably true, all social partners need to be representative in order to be entitled to participate to the European social dialogue in the first place, but the representativity check seems to go further in case an agreement is implemented by a Council decision. In order to explain this, I will continue discussing the UEAPME case. As set out above, UEAPME had no *right* to participate in collective bargaining. But that was not the end of the case. The Court of First Instance subsequently focused on the role of the European institutions in relation to the European social dialogue. It ruled that, since the European Parliament does not participate in the procedure leading to the implementation of agreements entered into between labour and management, the principle of democracy on which the Union is founded requires that the participation of the people be otherwise assured, in this instance through the parties representative of management and labour who concluded the agreement which is endowed by the Council.[385] In order to make sure that that requirement is complied with, the Commission and the Council are, according to the Court of First Instance, under a duty to verify that the signatories to the agreement are sufficiently representative. Whether these parties are sufficiently representative must be measured in relation to the content of the agreement. If the contracting parties, taken together, are insufficiently representative, the Commission and the Council must, according to the Court of First Instance, refuse to implement the agreement at Community level. Should they fail to do so, the organisations that were consulted, but were not party to the agreement, and whose representation in relation to the content of the agreement is necessary to raise the collective representativity of the signatories to the required level, have the right to prevent implementation of the agreement by means of a legislative instrument at Community level.

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384 See in the same manner the report of the Committee on Social Affairs, Employment and the Working Environment, on the application of the Agreement on Social Policy, paragraph 4.

385 It is unclear on exactly which basis the Court of First Instance based its ruling that the "democracy" of the social partners can substitute Parliamentary democracy. Reference is made to , F. Dorssemont, *Over de 'representativiteit' van 'sociale partners' in de Europese Sociale Dialoog* [*About 'representativity' of 'social partners' in the European Social Dialogue*], Sociaal Recht, 2004, 4, page 147. See also A.T.J.M. Jacobs, *European Social Concertation*, page 365, in: S.A. Fareso (ed.), *Collective bargaining in Europe*, Madrid, 2005.

These organisations may bring an action for annulment of the Council decision implementing the agreement. The European Courts (the Court of First Instance and ultimately the European Court of Justice) therefore finally verify the level of representativity. In the underlying matter, however, the Court of First Instance decided that the original signatory parties were, even without UEAPME, sufficiently representative in order for the Council to decide to implement the agreement on parental leave.

Apparently, the signatory parties to the agreement must be sufficiently representative. This requirement, however, seems to focus on agreements that are to be implemented by a Council decisions. In any case, the Commission and Council must, according to the Court of First Instance, verify whether the agreement meets the representativity requirements. These institutions are only involved should agreements be implemented by a Council decision, and not in case they are implemented in accordance with the procedures and practices specific to management and labour and to the Member States. The Court of First Instance indeed solely focused on the first implementation method.[386] The line of reasoning used by the Court of First Instance does not seem to apply to agreements implemented in accordance with the procedures and practices specific to management and labour and to the Member States, as this implementation method does not involve Community institutions, and representativity of the social partners can therefore not "replace" the democratic role of the European Parliament. The requirement of "sufficient representativity" seems therefore not to apply to agreements concluded by the proper social partners (organisations that are among those parties consulted by the Commission and admitted to the negotiation table by the other social partners involved) that are to be implemented in accordance with the procedures and practices specific to management and labour and to

386 See for example paragraph 88 where the Court of First Instance states: "It is proper to stress the importance of the obligation incumbent on the Commissions and the Council to verify the representativity of the signatories to an agreement concluded pursuant to Articles 3(4) and 4 of the Agreement, *which the Council has been asked to implement at Community level*" (emphasis added).

the Member States.[387] Moreover, the EC Treaty itself does not formulate any representativity requirement.[388]

3.4 The situation after the UEAPME case

UEAPME appealed against the aforementioned ruling of the Court of First Instance. However, after UEAPME and UNICE reached a cooperation agreement on 4 December 1998, UEAPME withdrew the appeal,[389] for which reason the ruling "merely" remained a decision of the Court of First Instance. Still, the ruling gives footholds on three important topics: the parties involved in the social dialogue, the legitimacy of the social dialogue and the control by Community institutions of the social dialogue process.[390]

The parties which can participate in the negotiations, as arranged for in the EC Treaty, have to be (i) among those parties consulted by the Commission and (ii) admitted to the negotiation table by the other social partners involved. However, in order for their agreement to be implemented by a Council decision, they must, taken together, be sufficiently representative, which depends on the content of the agreement.[391] This level of representativity is to be verified by the Commission and Council and, ultimately, by the European Court. The Commission may not propose to implement and the Council may not implement the agreement at Community level, in case the representativity of the signatory parties is insufficient. The "representativity issue" seems not applicable should the signatory parties choose to implement their agreement in accordance with the procedures and practices specific to management and labour and to the Member States.

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387 Jacobs too claims that there is no state interference regarding representativity in case European agreements are implemented by the European social partners themselves. See A.T.J.M. Jacobs, *European Social Concertation*, page 384.

388 In my opinion the lack of the "sufficiently representative" requirement is not overly worrisome from a Community perspective as the agreements that are implemented in accordance with the procedures and practices specific to management and labour and to the Member States have little Community relevance. Lack of representativity may, however, cause problems when implementing a European agreement autonomously. Reference is made to chapter 6, sections 4.2 and 4.3.2.

389 J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, Ministry of Labour, Helsinki 2004, Finland, page 120. UEAPME also withdrew an identical law suit on the validity of the directive on parental leave (T-55/98). See also chapter 2, section 4.3.3.

390 Reference is made to B. Bercusson, *Democratic Legitimacy and European Labour Law*, Industrial Law Journal, Volume 28, Number 2, June 1999, page 154.

391 This topic will be further scrutinised in section 6.2.2.1 of this chapter.

The Commission obviously welcomed the ruling in the UEAPME case,[392] but remained sensitive to the matter at hand. In its 1996 Communication "the Development of the Social Dialogue at Community level", it stated that it continues to believe that only the social partners themselves can develop their own dialogue and negotiating structures, and that it cannot impose participants on a freely undertaken negotiation. The Commission, however, encouraged the European social partner organisations to cooperate more closely and be open and flexible in order to ensure appropriate participation in negotiations.[393] In its 1998 Communication "Adapting and promoting the Social Dialogue at Community level" the Commission reaffirmed that it is up to the social partners to decide who sits at any negotiation table and it is up to them to find the necessary compromises.[394] According to the Commission, the negotiation process is based upon principles of autonomy and mutual recognition of the negotiating parties.[395]

4. Autonomous negotiation within the framework of article 136 – 139 of the EC Treaty

The above section relates to negotiations following consultation. This sequence seems to naturally flow from the structure of the articles 138 and 139 of the EC Treaty, as the Court of First Instance ruled: first consultation, which may lead to negotiation.[396] This gives rise to the question whether social partners are solely entitled to enter into agreements within the scope of the articles 138 and 139 of the EC Treaty after consultation of the Commission. Some scholars have argued that this is the case. Very clear on this issue is Betten, who stated about negotiations without a prior consultation procedure:[397]

392 The Commission itself, just like the Court of First Instance, also links the right to be consulted to the right to enter into agreements. In its 2004 communication the Commission noted: "In order to identify the social partners to be consulted under Article 138 of the EC Treaty, the Commission carries out representativeness studies on the European organisations. This information is also important for the setting up of new sectoral social dialogue committees, *as well as the Commission's assessment of the representative status of the signatory parties to Article 139(2) agreements.*" COM (2004) 557, page 9 (emphasis added).

393 COM (1996) 448, page 14.

394 COM (1998) 322, page 12.

395 COM (1998) 322, page 14.

396 Paragraph 75 of the UEAPME case.

397 L. Betten, *The Democratic Deficit of Participatory Democracy in Community Social Policy*, page 29.

> In my opinion such negotiations would fall outside this procedure. Although, of course, a social dialogue can start without a Commission proposal, the results of that dialogue would not, however, fall under the MASP[398] (and, in future, the E.C. Treaty). Hence, an agreement by social partners not based on an initial Commission proposal, would fall outside the context of Community law. The MASP clearly implies that the social partners can take a proposal away from the Commission. If there is no such a proposal, there is nothing to take away. The other option would imply that social partners can set the agenda for the Community's (social) legislative programme; that would be contrary to the Commission's role in the Community.

The European Economic and Social Committee views this differently and simply states that the social partners may, before the Commission considers a possible direction of Community action in the social policy field and independent of the consultation, initiate the social dialogue autonomously. This autonomous social dialogue may, according to the European Economic and Social Committee, lead in accordance with Article 4 of the Joint Agreement to contractual relations, including agreements.[399]

The Commission was never particularly clear on this issue until its 1998 Communication "adapting and promoting the social dialogue on Community level". Herein it stated that "before proposing a decision implementing an agreement negotiated on a matter within the material scope of Article 2 ASP, *but outside the formal consultation procedure*, the Commission has the obligation to assess the appropriateness of Community action in that field".[400] The Commission affirmed this point of view later on as well.[401] Given the fact that the Commission itself takes this view – in fact restricting its right to initiative in a material sense - this position should be regarded as relatively reliable.[402]

398 Maastricht Agreement on Social Policy; author.

399 Opinion of the Economic and Social Committee on the Communication concerning the application of the Agreement on Social Policy presented by the Commission to the Council and to the European Parliament, paragraph 4.1.3.

400 COM (1998) 322 final, page 16, emphasis added.

401 The Commission stated, for instance, in 2004 that it has a particular role to play in the case of autonomous agreements implemented in accordance with article 139.2, *if the agreement was the result of an article 138 consultation* (COM (2004) 557 final, page 10; emphasis added). The way in which the Commission phrased this sentence logically brings forth that an agreement can also be implemented in accordance with article 139.2, if it was *not* the result of an article 138 consultation.

402 J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, page 102.

More importantly, it should indeed be noted that article 139 of the EC Treaty does not introduce the precondition to first enter into consultation, prior to concluding an agreement on the basis of article 139.1 of the EC Treaty. Article 139.1 does not give any reason to demand such a precondition either. On the contrary, this article stipulates rather generally that "should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements". In practice, this possibility also has been used. The maritime, transport and civil aviation sector agreements on working time, and the railway sector agreement on the working conditions of mobile workers assigned to cross-border interoperable services have, for example, not been concluded as a result of prior consultation under article 138 of the EC Treaty. These agreements used the space left in directives. This lack of prior consultation, however, gave no reason to refuse their implementation by a Council decision.[403]

Article 139.1 of the EC Treaty therefore (also) opens the way for "autonomous negotiations".[404] And exactly this is what the cross-industry European social partners wish to pursue according to their Laeken Declaration.[405] These agreements entered into after autonomous negotiations may, just as agreements entered into following consultation, be implemented by a Council decision or in accordance with the procedures and practices specific to management and labour and to the Member States.[406]

Unlike the situation in which the European social partners start negotiations after the two-stage consultation process, there is no formal negotiation process when it comes to autonomous negotiation. This makes sense, given the fact that these negotiations are, as said, *autonomous*. Furthermore, as opposed to "negotiation following consultation", there are no direct Community institution's interests at stake in autonomous negotiation. For instance, negotiation following consultation suspends the legislative process at Community level,[407] which gives valid reason to set strict deadlines concerning these sorts of negotiations. This is obviously not the case with autonomous negotiation. The lack of rules on the negotiation process, however, does not, in my view, bring forth that other parties than the social partners set out in

403 Reference is made to COM (2004) 557, pages 15 – 16.

404 In as far this needed opening, a subject that will be discussed in chapter 6, section 4.1.

405 Reference is made to chapter 3, section 5.

406 See also A.T.J.M. Jacobs, *European Social Concertation*, page 362. See furthermore S. Smismans, *The European Social Dialogue in the Shadow of Hierarchy*, page 170.

407 COM (2004) 557, page 10.

section 3.2 above may participate. The ruling of the Court of First Instance in the UEAPME case seems to apply to social partners that start autonomous negotiations under article 139 of the EC Treaty as well. After all, as set out, the Court of First Instance ruled that "management and labour" in articles 138 and 139 of the EC Treaty are one and the same. This brings forth that the European social partners who wish to start autonomous negotiations leading to an agreement referred to in article 139.1 of the EC Treaty, must be among the parties entitled to being consulted by the Commission. This seems in line with the Commission's own view in this respect. The Commission analyses representativity with regard to the European social dialogue on its website. It states that "the question of the representativeness of the organisations is fundamental as it constitutes the basis of their legitimacy for consultation by the Commission and for their contractual commitments".[408] Only representative organisations – being the organisations that are consulted by the Commission – are, according to the Commission, entitled to enter into contractual commitments within the context of the European social dialogue.

5. Contractual relations, including agreements

The above makes clear that European social partners may enter into negotiations after being consulted or autonomously. Pursuant to article 139.1 of the EC Treaty, these negotiations may lead to "contractual relations, including agreements". Apparently, "contractual relations" comprises a broader range of arrangements than "agreements" alone,[409] although it also has been argued that the difference between agreements and contractual relations is merely a semantic one.[410] Should there be a difference between both concepts, as the text of article 139.1 of the EC Treaty at least suggests, this difference is not entirely irrelevant, as will be argued in section 5.1 below. An attempt to classify the different sorts of contractual relations will be made in section 5.2.

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408 See the social dialogue website: (http://europa.eu.int/comm/employment_social/social_dialogue/ represent_en.htm.

409 This distinction between "contractual relations", as a genus, and its species "agreements" is rather puzzling. Most legal traditions tend to take "agreements" as genus. Reference is made to F. Dorssemont, *Some Reflections on the Origin, Problems and Perspectives of the European Social Dialogue*, page 11.

410 J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, page 30.

5.1 The relevance of distinguishing between agreements and other contractual relations

There are at least two reasons to distinguish "agreements" from other "contractual relations". First, the social partners whom have entered into negotiations on the basis of article 138.4 of the EC Treaty must within a 9 months period either conclude an agreement (or request further time to conclude an agreement) or inform the Commission that they are unable to reach an agreement. I refer to section 3.1 above. The Commission explicitly uses the word "agreement" and not the words "contractual relations". Second, only "agreements" can be implemented in accordance with article 139.2 of the EC Treaty. Apparently, contractual relations that are not agreements cannot be implemented in the fashion laid out in that article.

5.2 The different "contractual relations, including agreements"

As often is the case, the EC Treaty itself does not make clear what contractual relations and what agreements are. As Barnard puts it: "there is no indication as to what constitutes an agreement, nor what is considered a suitable subject-matter of the agreement".[411] The Commission, however, attempted to classify the various results of the European social dialogue. According to the Commission, there are four categories of results: (i) agreements implemented in accordance with article 139.2 of the EC Treaty, (ii) process-oriented texts, (iii) joint opinions and tools, and (iv) procedural texts.[412] Hereinafter, I will follow this classification.

5.2.1 Agreements implemented in accordance with article 139.2 of the EC Treaty

The Commission's classification of this category is, to say the least, odd. One would suspect that the Commission would define the term "agreement", so it can be assessed whether a result can be implemented in accordance with article 139.2 of the EC Treaty. This is, however, not the case. The Commission solely calls upon the social partners themselves to clarify "the terms used to describe their contributions and reserve the term "agreement" to texts implemented in accordance with the procedures laid out in Article 139(2) of the Treaty".[413] The Commission confirms this point of view later, where it states that the essential difference between agreements and other results is that

411 C. Barnard, *EC Employment law*, page 89.

412 Com (2004) 557, pages 15 *ff*.

413 Com (2002) 341, page 18.

the first "are to be implemented and monitored by a given date".[414] This, of course, does not give any clarity on the definition of agreement and is merely circular reasoning: an agreement is an agreement if it has to be implemented in accordance with article 139.2 of the EC Treaty.

Given the lack of a definition of the term agreement, there are two logical options to assess whether an understanding classifies as an agreement: (i) a more or less general and European definition of agreement should be followed or (ii) the definition of agreement stipulated in the law of the country that governs the understanding should be followed. As the latter option would lead to a changing definition of the term agreement, depending on the law that applies to the understanding, the first option seems best fit. This is even more so since international tools are as a general rule better able than national tools to explain a European concept.[415]

When defining a uniform definition of agreement, two institutions immediately come to mind: UNIDROIT and the Commission on European Contract Law (also known as the Lando Commission). UNIDROIT drafted the Principles of International Commercial Contracts, and the Commission Lando the Principles of European Contract Law. The only problem of both Principles is that they lack to provide a definition of the term agreement; they "merely" give information on concluding agreements, interpreting them etc. This, of course, also gives some insight in the different ingredients of an agreement.

Given the fact that both Principles refer to "parties", instead of one party, and topics like offer and acceptance are important, it is easy to conclude that at least two parties should be present in order to enter into an agreement. These parties must have the intention to be legally bound and they must reach sufficient agreement in order to conclude an agreement (article 2:101 of the Principles of European Contract Law and articles 1.3, 2.1 and 2.1.13 of the Principles of International Commercial Contracts). The agreement must have a certain (legal) effect on the parties (either one or more of the parties must perform; chapter 7 of the Principles of European Contract Law and chapter 6 of the Principles of International Commercial Contracts).

414 Com (2004) 557, page 7.

415 Blainpain agreed with M. Weiss that, should a European concept be insufficiently clear, international interpretation methods should prevail over national ones. R. Blanpain, *Sociale partners en de Europese Unie; taak en legitimatie* [*Social partners and the European Union; task and legitimacy*], in Betten et al. (ed.), *Ongelijkheidscompensatie als rode draad in het recht (Liber Amicorum M.G. Rood)* [*Compensation of inequality as the red thread in law (Liber Amicorum M.G. Rood)*], Deventer 1997, pages 293 and 294.

All in all, a general international definition of agreement could read as follows: an agreement is an act whereby two or more parties reach sufficient consent as to do or omit from doing something that affects their legal relation.

It remains questionable whether the aforementioned definition of agreement suffices for the purposes of article 139.2 of the EC Treaty. After all, the definition is rather broad and can even include the other categories mentioned below. Moreover, the definition is developed in a general context while, given the fact that the social partners must enter into the agreement referred to in article 139.2 of the EC Treaty, it makes sense that such an agreement should be some sort of collective agreement. This is, however, not beyond dispute. According to Kampmeyer, the term agreement as used in article 139 of the EC Treaty is not a collective agreement.[416] Whether or not this is the case, depends – again – on the definition of collective agreement. ILO recommendation no 91, for example, defines collective agreements as follows:

> (…) all agreements in writing regarding working conditions and terms of employment concluded between an employer or a group of employers or one or more employers' organisations, on the one hand, and one or more respresentative workers' organisations, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other.

Although this definition clearly is meant for national collective agreements as opposed to European collective agreements, one must conclude that the agreements reached so far under articles 136 – 139 of the EC Treaty fall within the definition of collective agreement.[417] This definition more accurately describes "agreement" as mentioned in article 139 of the EC Treaty. However, whether this definition always clearly distinguishes between "agreement" and other contractual relations remains to be seen.

5.2.2 Process-oriented texts

This category consists, according to the Commission, of a "variety of joint texts which are implemented in a more incremental and process-oriented way than agreements".[418] Again, the Commission does not really describe the content of these sorts of texts, but rather its implementation method. The

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416 Kampmeyer, as referred to in: E. Franssen, *Legal aspects of the European Social Dialogue*, page 102, note 2.

417 See E. Franssen, *Legal aspects of the European Social Dialogue*, page 103.

418 COM (2004) 557, page 16.

Commission, however, gives more insight to these sorts of texts by dividing them in three sub-categories. First there are frameworks of action, which consist of the identification of certain policy priorities towards which the national social partners undertake to work. Second, guidelines and codes of conduct fall in a sub-category. They make recommendations and/or provide guidelines to national affiliates concerning the establishment of standards or principles. Last, there are policy orientations, which concern texts in which the social partners pursue a proactive approach to promoting certain policies among their members.

5.2.3 Joint opinions and tools

The Commission defines this category as social partners' "texts and tools which contribute to exchanging information, either upwards from the social partners to the European institutions and/or national public authorities, or downwards, by explaining the implications of EU policies to national members".[419] According to the Commission, no implementation, monitoring and follow-up provisions are inserted in texts and tools in this category.

5.2.4 Procedural texts

This category consists of texts "which seek to lay down the rules for the bipartite dialogue between the parties".[420]

6. Implementation by a Council decision

Once the social partners have concluded an agreement concerning matters covered by article 137 of the EC Treaty, they can jointly request it be implemented by a Council decision on a proposal from the Commission (article 139.2 of the EC Treaty). According to the Commission, under some circumstances this manner of implementation should be chosen over independent implementation by the social partners. Where fundamental rights or important political options are at stake or in a situation where the rules must be applied in a uniform fashion in all Member States and coverage must be complete, preference should be given to implementation by a Council decision. The same applies to the revision of previously existing directives adopted by the Council and European Parliament through the normal legislative procedure.[421] The procedure for this form of implementation will

419 COM (2004) 557, page 18.

420 COM (2004) 557, page 19.

421 COM (2004) 557, page 10.

be set out below. Thereafter, the conditions an agreement must meet in order to be implemented this way will be discussed.

6.1 The procedure for implementation

Article 139.2 of the EC Treaty clearly stipulates that the agreement reached shall be implemented by a Council decision *at the joint request* of the signatory parties. Consequently, all parties to the agreement must consent to such a form of implementation. The EC Treaty does not give any requirements regarding the manner in which the signatory parties must offer the agreement to the Commission, but it makes sense that the request is done in writing and contains the agreement itself.[422]

The Commission subsequently verifies whether the agreement fulfils several conditions, which conditions will be discussed in section 6.2 below. The Commission will consider either or not to present the agreement for implementation to the Council. Should it decide not to do so, the Commission will immediately inform the signatory parties of the reason for its decision.[423] Should the Commission intent to present a proposal for a decision to implement the agreement to the Council, the Commission will provide the Council with an explanatory memorandum, giving its comments and assessment of the agreement concluded by the social partners.[424]

The Commission has not allowed itself to alter the agreement. It will merely propose, following the above-mentioned examination of the agreement, the

422 E. Franssen, *Legal Aspects of the European Social Dialogue*, page 187.

423 COM (1993) 600, page 29. It should be noted that some view that the Commission cannot refuse to propose the agreement to the Council. In their view the Commission has merely a "waitress" position. See, for example, B. Bercusson, *Democratic Legitimacy and European Labour Law*, page 162 and A.T.J.M. Jacobs, *European Social Concertation*, page 363. The Economic and Social Committee stated that "it is not clear that the Commission can refuse the second path [implementation by a Council decision]"; Economic and Social Committee on the Communication concerning the application of the Agreement on Social Policy presented by the Commission to the Council and to the European Parliament, paragraph 5.3.2. Other scholars simply agree with the Commission that it can refuse to propose to the Council the implementation of a European agreement. See, for example, L. Betten, *The Democratic Deficit of Participatory Democracy in Community Social Policy*, page 33. See also F. Dorssemont, *Contractual governance by management and labour in EC labour law*, page 291. More importantly, the Court of First Instance clearly held in the UEAPME case that the Commission is under the obligation to verify the agreement, which seems to imply that the Commission can refuse to propose the agreement to the Council.

424 COM (1993) 600, page 29.

adoption of a decision of the agreement as concluded.[425] The Commission does not allow the Council to amend the agreement either. According to the Commission, the Council decision must be limited to "making binding the provisions of the agreement concluded between the social partners, so the text of the agreement would not form part of the decision, but would be annexed thereto".[426] If the Council would decide not to implement the agreement as concluded by the social partners, the Commission will withdraw its proposal for a decision. In such a case, the Commission will examine whether another legislative instrument in the area concerned would be appropriate.[427]

The Council therefore in fact has merely a "yes" or "no" vote. The Council has accepted that it cannot modify the agreement.[428] It did, however, express its concerns about certain elements of the content of the first agreement implemented in such a manner (the framework agreement on parental leave), elements which were, according to some Member States, the responsibility of national authorities or concerned procedural and institutional matters.[429]

Pursuant to the second paragraph of article 139.2 of the EC Treaty, the Council shall decide on the proposal by qualified majority, except where the agreement in question contains one or more provisions relating to one of the areas for which unanimity is required based on article 137.2 of the EC Treaty.[430] In that case, the Council shall act unanimously.[431]

The EC Treaty itself simply refers to a Council decision to implement an agreement; no choice has been made as to which legal instrument would be the

425 COM (1993) 600, page 28.

426 COM (1993) 600, page 29.

427 COM (1993) 600, page 29.

428 The fact that the Commission and the Council cannot change the content of the agreement seems widely accepted. See J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, page 106.

429 COM (1996) 448, page 13.

430 Unanimity is required in the fields of: social security and social protection of workers, protection of workers where their employment contract is terminated, representation and collective defence of the interests of workers and employers, including co-determination and conditions of employment for third-country nationals legally residing in Community territory.

431 Some topics may prove difficult to classify, which can make it hard to determine whether a qualified majority suffices or that unanimity is required. Moreover, agreements that need to be implemented may contain topics to which the "qualified majority rule" applies, but also topics that need unanimity. See for these difficulties A.T.J.M. Jacobs, *European Social Concertation*, pages 374 and 375.

most appropriate means for implementation. According to the Commission, the choice of legal instrument (directive, regulation or decision) depends on the content of the agreement at hand.[432] To date, all agreements that have been implemented by a Council decision were implemented through a directive.

The EC Treaty does not reserve a role for the European Parliament in this procedure, this much to the disappointment of the European Parliament.[433] The Commission does, however, inform the European Parliament of the proposed implementation of the agreement concluded by the social partners. The Commission sends the European Parliament the text of the agreement, together with its proposal for a decision and the explanatory memorandum, so that the Parliament may deliver its opinion to the Commission and to the Council.[434]

The non-participation of the European Parliament in this legislative process – the European Parliament is informed but has no official role – could be considered as undermining the principle of democracy.[435] According to the Court of First Instance, as discussed, this principle is *not* undermined, as long as the social partners involved are sufficiently represented, which has to be examined by both the Commission and the Council. Through the participation of sufficiently represented social partners, the participation of the people of the European Union is, in the opinion of the Court, assured.[436]

6.2 Conditions attached to implementation of an agreement by a Council decision

An agreement concluded by the social partners must meet several conditions prior to its implementation by a Council decision. Only one condition derives directly from the EC Treaty and concerns the content of the agreement, which

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432 COM (1996) 448, page 13.

433 See J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, page 108.

434 COM (1993) 600, page 29. Once the Treaty of Lisbon enters into force, this information procedure will be formalised. From then, at the end of the first subparagraph of article 139.2 of the EC Treaty, the following sentence will be added: "The European Parliament shall be informed."

435 Many scholars argued for more inclusive participation of the European Parliament. See, for instance, L. Betten, *The Democratic Deficit of Participatory Democracy in Community Social Policy*, pages 34 and 35 and B. Bercusson, *Democratic Legitimacy and European Labour Law*, page 170.

436 UEAPME case, paragraph 89.

must be covered by article 137 of the EC Treaty.[437] The other conditions are, on the contrary, not mentioned in the EC Treaty itself, but are set out in the different Commission's Communications and the explanatory memorandums accompanying the proposals to implement agreements by a Council decision. There are basically 6 additional conditions,[438] which will be discussed below.

6.2.1 Condition imposed by the EC Treaty: the content of the agreement

As mentioned above, pursuant to article 139.2 of the EC Treaty, an agreement can only be implemented by a Council decision if it concerns matters covered by article 137 EC Treaty. Article 137 goes on to set out the fields in which the Community shall support and implement the activities of the Member States. These fields are:

a. improvement in particular of the working environment to protect workers' health and safety;
b. working conditions;
c. social security and social protection of workers;
d. protection of workers where their employment contract is terminated;
e. the information and consultation of workers;
f. representation and collective defence of the interests of workers and employers, including co-determination;
g. conditions of employment for third-country nationals legally residing in Community territory;
h. the integration of persons excluded from the labour market;
i. quality between men and women with regard to labour market opportunities and treatment at work;
j. the combating of social exclusion;
k. the modernisation of social protection system without prejudice to point (c).

However, article 137.5 of the EC Treaty stipulates that article 137 shall not apply to pay, the right of association, the right to strike and the right to impose lock-outs.[439]

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437 It is somewhat ironic to note that, although this condition derives from the EC Treaty, it has been a source of a long debate. See chapter 6, section 5.1.

438 A.T.J.M. Jacobs and A. Ojeda-Aviles, *The European social dialogue – Some legal issues*. In: *A legal framework for European industrial relations. Report by the ETUI Research Network on Transnational trade union rights*, Brussels, June 1999, page 61.

439 The scope of this stipulation will be scrutinised in chapter 6, section 5.1 and chapter 14, section 2.

6.2.2 Conditions imposed by the Commission/Council

As previously discussed, the agreements reached by the social partners can only be implemented by a Council decision upon a proposal from the Commission. The Commission therefore has the opportunity to verify the agreement and to decide whether or not it will indeed present a proposal for a decision to the Council.[440]

In its 1993 communication, the Commission noted it will prepare proposals for decisions to the Council following consideration of (i) the representative status of the contracting parties, (ii) their mandate, (iii) the legality of each clause in the collective agreement in relation to Community law and (iv) the provisions regarding small and medium-sized undertakings.[441] These criteria have been re-affirmed in 1998.[442] Although in its 2002 Communication the Commission did not mention "mandate" in its list of criteria for implementing an agreement,[443] it is unlikely that this criterion has become irrelevant, especially considering that agreements implemented by a Council decision after this Communication have been tested on mandate.[444] Beside these conditions, the Commission in fact also assesses the agreements in the light of two other criteria, (v) a general approval and (vi) the principle of subsidiarity. All these conditions will be discussed below.

6.2.2.1 The representative status of the contracting parties

Prior to implementing an agreement by a Council decision, it should be assessed whether the signatory parties to the agreement are sufficiently representative. Where a sufficient degree of representativity is lacking, the Commission and the Council must, according to the Court of First Instance in the UEAPME case, refuse to implement an agreement concluded by the social partners at Community level. Consequently, the representativity test is rather important.

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440 Assuming that the Commission indeed is entitled not to present the proposal to the Council. Reference is made to section 6.1 above.

441 COM (1993) 600, page 29.

442 COM (1998) 322, page 16.

443 COM (2002) 341, page 19.

444 As was the case with regard to the agreement between the Community of European Railways (CER) and the European Transport Workers' Federation (EFT) on certain aspects of the working conditions of mobile workers assigned to interoperable cross-border services, as set out in COM (2005), 32 final.

Let us scrutinise the representativity test applied by the Court of First Instance further. It ruled that it must be ascertained "whether, having regard to the content of the agreement in question, the signatories, taken together, are sufficiently representative".[445] This sentence gives rise to four remarks.

First, it is clear that the representativity must be viewed in relation to the specific agreement that is concluded. The Court of First Instance stated, apart from the above, that the representativity of the signatory parties must be measured "with respect to the substantive scope of the framework agreement".[446] It also verified which individuals were covered by the agreement.[447] Consequently, agreements may be legitimate when signed by organisations that are merely representative in view of the narrow scope of the agreement.[448]

Furthermore, it should be noted that the Court judges the representativity of the totality of the signatory parties, not the representativity of one single organisation.[449] As Bercusson puts it, "social partner organisations could sign an agreement which, cumulatively, achieved the requisite degree of representativity."[450]

Third, the degree of representativity must be "sufficient". There is therefore neither a need for an absolute degree of representativity,[451] nor did the Court of First Instance establish a 50% rule.[452] The party that challenges the directive that implemented the agreement, must state a strong case as to why its participation was truly needed in order to reach a sufficient level of representativity. The Court of First Instance clearly showed this by stating that UEAPME could not argue that "its level of representativity is so great that its non-participation in the conclusion of an agreement between general cross-industry organisations automatically means that the requirement of sufficient collective representativity was not satisfied".[453] Still, there seems

445 UEAPME case, paragraph 90.

446 UEAPME case, paragraph 91.

447 UEAPME case, paragraph 94.

448 B. Bercusson, *Democratic Legitimacy and European Labour Law*, page 156.

449 E. Franssen and A.T.J.M. Jacobs, *The question of representativity in the European social dialogue*, page 1309.

450 B. Bercusson, *Democratic Legitimacy and European Labour Law*, page 158.

451 B. Bercusson, *Democratic Legitimacy and European Labour Law*, page 157.

452 J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, page 124.

453 UEAPME case, paragraph 104.

to be a loophole, as the Court of First Instance stated as well that "if the various signatories to the framework agreement are to satisfy the requirement of sufficient collective representativity, they must therefore be qualified to represent *all categories of undertakings and workers at Community level*".[454] If a specific category is insufficiently represented by the signatory parties, they require another party that does sufficiently represent that category in order to conclude an agreement that can be implemented by a Council decision.

Last, it should be noted that the Court of First Instance is not particularly clear on the criteria of representativity.[455] It referred to the criteria set out by the Commission and to the cross-industry character, and the general nature of the mandate of the signatory parties.[456] It also acknowledged that the criterion of numbers of representativity may be taken into consideration. However, the Court of First Instance continued that these numbers are not decisive.[457] It stated that, although the UEAPME did have a considerable number of small and medium-sized enterprises amongst its members, UNICE also counted a substantial number of these enterprises amongst its members, and the wording of the framework agreement made it clear that their position was not left out of the negotiations leading to the agreement's conclusion.[458] The court of First Instance seemed satisfied that the interests of the small and medium-sized enterprises were taken into account.[459]

The above summarises the position of the Court of First Instance on the representativity test. But what about the Commission? As with the Court of First Instance, the Commission also never formulated "hard and fast rules" as to exactly when the social partners are sufficiently representative to warrant the implementation of their agreement by a Council decision. In its 1996 Communication, however, the Commission more or less had to address this issue, given the (at that time pending) UEAPME case. The Commission formulated rather vague criteria to assess the representativity of the social partners involved in an agreement. It considered:[460]

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454 UEAPME case, paragraph 94.

455 B. Bercusson, *Democratic Legitimacy and European Labour Law*, page 158.

456 UEAPME case, paragraph 96.

457 UEAPME case, paragraph 102.

458 UEAPME case, paragraphs 102 - 104.

459 B. Bercusson, *Democratic Legitimacy and European Labour Law*, pages 158 and 159.

460 COM (1996) 448, page 14.

> (…) the Commission does have the responsibility to assess the validity of an agreement in the light of its content, which requires an assessment of whether those affected by the agreement have been represented. The Commission considers that the question of the representativeness of the parties engaged in negotiation must be examined on a case by case basis, as the conditions will vary depending on the subject matter under negotiation. The Commission must therefore examine whether those involved in a negotiation have a genuine interest in the matter and can demonstrate significant representation in the domain concerned.

Apparently, the Commission will execute a twofold test. It assesses (i) whether those affected by the agreement have been represented and (ii) whether those involved in negotiation have a genuine interest in the matter and can demonstrate significant representation in the domain concerned. Both tests are factual and based on common knowledge. The Commission sets no specific criteria for its review. In subsequent Communications on the European Social Dialogue, the Commission continued to stress the importance of the representativity test ("it is important to emphasise that the Commission does not make a legislative proposal to the Council making the agreement binding if it considers that the signatory parties are not sufficiently representative in relation to the scope of their agreement"),[461] but gave no further criteria on exactly how the representativity would be verified.

The explanatory memorandums from the Commission to the Council, which accompany the agreements which are to be implemented (I refer to paragraph 6.1. above), provide some additional information on how the representativity test is applied. From these memorandums, it can be derived that a difference exists between both cross-industry agreements and sectoral agreements.

The cross-industry framework agreements have all been concluded by ETUC, CEEP and UNICE.[462] Perhaps for that reason, the representativity test as laid out in the explanatory memorandums is a more or less formal one. In the explanatory memorandum concerning the framework agreement on part-time work, for example, the Commission merely followed a three-step assessment.

First, the Commission noted that the three organisations involved met the three (representativity) criteria that were laid out with respect to the right to be consulted.[463] This is hardly surprising, since if the parties would not have met these criteria, they would not have been consulted on this issue in

461 COM (1998) 322, page 16.

462 Chapter 4, section 4.

463 COM (1997) 392 final, page 3.

the first place. Second, the Commission stated that the three organisations involved are the only three general cross-industry organisations that are on the list of parties that must be consulted. Third, the Commission noted that, from the employers' organisations, UNICE is the most representative of all industrial sectors and categories of enterprises and CEEP provides significant representation of public enterprises or enterprises with public participation in the Member States. On the side of the trade union organisations, the Commission considered ETUC "by far the most representative cross-industry trade union confederation". Combining these arguments, the Commission concluded that the three organisations fulfilled the condition of representativeness.

The representativity test is applied more elaborately when it regards sectoral agreements. This can be noted, for instance, in the explanatory memorandum accompanying the agreement between the Community of European Railways (CER) and the European Transport Workers' Federation (EFT) on certain aspects of the working conditions of mobile workers assigned to interoperable cross-border services.[464] In that case the Commission applied a four-step test.

First, the Commission noted that both signatory parties met the representativity criteria as required from the social partners in order to be consulted. Second, the Commission mentioned that the agreement only covered mobile workers assigned to interoperable cross-border services. Third, the Commission held that both contracting parties had substantiated that they are sufficiently representative of mobile workers in the railway sector. On balance, CER's members account for approximately 95% of all jobs in the railway sector and EFT represents the "vast majority of workers belonging to a trade union in the sector".[465] Fourth, the Commission observed that organisations representing the interests of infrastructure managers and railway companies at European level had been established, and that another European association made up of various independent trade unions for train drivers is in place. With regard to these organisations, the Commission considered that these were not yet

464 COM (2005) 32 final.

465 COM (2005) 32, page 3. It is noteworthy that in its motivation on representativity the Commission only gives actual numbers on the coverage rate on the side of the employers. These employers cover 95% of the jobs in the relevant sector. The Commission could just as well have chosen to define coverage as the number of employees (indirectly) represented by the contracting European employees organisation that are employed by an employer (indirectly) represented by the contracting European employers organisation, set off against the total number of jobs in the relevant sector. This would obviously lead to a much lower coverage rate. See also A.T.J.M. Jacobs, *European Social Concertation*, page 368.

regarded as representative of the sector and were therefore not consulted by the Commission. Consequently, the Commission concluded that the signatories of the agreement in question have sufficient representative status with regard to the railway sector in general and the workers who may be covered by the agreement's provisions.[466]

6.2.2.2 The mandate of the European Social Partners

An issue that is closely related to representativity, in any case in the situation at hand,[467] is mandate. The European social partners must sufficiently prove that they have had a mandate from their national members to negotiate the agreement.[468] The European organisations must thus show that they act on behalf of their national members.[469]

6.2.2.3 The legality of the agreement

It goes without saying that the content of the agreement that is to be implemented by a Council decision may not contravene Community law. For that reason, the Commission shall verify each clause in the collective agreements in relation to Community law.[470] In this respect, it should also be noted that the European social partners may provide for obligations on the

466 COM (2005) 32, page 6.

467 Although mandate is not always necessary when it comes to collective bargaining in many Member States – trade unions may be representative for a certain group of employees, and may (consequently) bind these employees in the bargaining process, without having to obtain specific individual mandates from these employees (*i.e.* mandate and respresentation are not one and the same) – in this case it is important as to assess that the European social partners indeed communicate the (majority) opinion of their members, the national employers' and employees' organisations. In the end, these members are representative for the ultimate consumers of the agreement, the employers and employees. For the difference between mandate and representation, I refer to A.Ph.C.M. Jaspers, *Representativiteit: representeren of vertegenwoordigen?* [*Representativity: representation or mandate?*], ArA 2008/1, pages 4 *ff*.

468 See for example COM (2005) 32, page 6; COM (1999) 203 final, page 5; and COM (1997) 392, page 4.

469 The manner in which the Commission verifies mandate differed to some extent in time. First the Commission simply stated it will check/verify mandate, subsequently it stated it will take mandate into account, thereafter it did not mention mandate al all and finally it returned by stating that it will assess mandate. Reference is made to J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, pages 130 and 131.

470 COM (1993) 600, page 29.

Member States in the agreement; this fact does not undermine the legality of the agreement. According to the Commission, the obligations imposed on the Member States do not derive directly from the agreement between the social partners but from the arrangement for applying the agreement.[471]

6.2.2.4 Small and medium-sized undertakings

Small and medium-sized undertakings have a nearly "sacred" position within the Union. If the Council wishes to support and complement the activities of the Member States in the fields specified in article 137.1 of the EC Treaty by means of directives, it must avoid imposing administrative, financial and legal constraints in a way which holds back the creation and development of small and medium-sized undertakings (article 137.2 under (b) of the EC Treaty). For that reason, the European social partners must take the position of these small and medium-sized undertakings into consideration when negotiating an agreement that should be implemented by a Council decision. To that end, the social partners tend to add a paragraph in the agreement concerning these undertakings. By way of example, reference is made to general consideration 7 of the framework agreement on part-time work, that stipulates:[472]

> Whereas this agreement takes into consideration the need to improve social policy requirements, to enhance the competitiveness of the Community economy and to avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

6.2.2.5 General approval of the agreement

Although the Commission claims to test an agreement only against four criteria, which are mentioned above, the explanatory memorandums betray further criteria. Although never stipulated explicitly, the Commission seems to examine the political merits of the agreements.[473]

Under the heading "Assessment of the agreement" the Commission noted, with regard to the framework agreement on part-time work, that it considers

471 For an example thereof I refer to the explanatory memorandum regarding the Framework Agreement on Fixed-term work, COM (1999) 203, page 7.

472 Council Directive 97/81/EC (OJ L 14, 20 January 1998, pages 9 – 14).

473 See A. Lo Faro, *Regulating Social Europe: reality and myth of collective bargaining*, page 114. See also J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, page 103.

part-time work "an important factor in promoting employment and equal opportunities for women and men". It also stated that the social partners' contribution is positive in itself and that it guarantees that consideration is given both to business competitiveness and to the interests of workers. It then claimed that it "wholeheartedly endorses the aim of the social partners' framework agreement and sees it as an important step (…)".[474] Only *after* these considerations, the Commission concludes, under the same heading "Assessment of the agreement", that "all the conditions are fulfilled for forwarding a proposal designed to implement the framework agreement between the social partners by way of a Council decision".[475] Given (i) that sequence – the Commission first positively receives the agreement, and only then decides to forward the agreement to the Council –, (ii) the positive wording, and (iii) the place where the Commission approves the agreement (under the heading "assessment of the agreement"), it should be concluded that the agreement must pass a general test applied by the Commission on its content.

The same sort of general test has been applied in the explanatory memorandum regarding the agreement on parental leave,[476] fixed-term work,[477] and the agreement between the Community of European railways (CER) and the European Transport Workers' Federation (EFT) on certain aspects of the working conditions of mobile workers assigned to inter-operable cross-border services.[478]

6.2.2.6 The principle of subsidiarity

Although in its Communications on the European social dialogue the Commission did not draw attention to this issue, another factor that must be taken into consideration when deciding whether or not to implement an agreement by a Council decision, is whether that decision meets the demands of the principle of subsidiarity.[479] It should thus be established whether the objectives of the proposed action cannot sufficiently be achieved by the

474 COM (1997) 392, page 6.

475 COM (1997) 392, page 7.

476 COM (1996) 26 final.

477 COM (1999) 203.

478 COM (2005) 32, page 8.

479 The Commission refers to "subsidiarity" in its explanatory memorandums, but regards this principle in a broad manner, including proportionality: "(…) the principle of subsidiarity as regards its two criteria, namely necessity and proportionality (…)." See COM (1997) 392, page 9.

Member States and should therefore be achieved by the Community and whether the action does not go beyond what is necessary to achieve the objectives of the EC Treaty (article 5 of the EC Treaty). For a more in-depth discussion of this principle I refer to chapter 2, section 3.1 of this thesis. All the agreements that are to be implemented by a Council decision must pass the subsidiarity tests. All explanatory memorandums specifically execute that test.

6.3 The legal effect of implementation by a Council decision

Once implemented by a Council decision, the agreement has a clear legal effect. As from that moment, the agreement is part of European legislation and enjoys such a status. As stated above, all agreements implemented to date by a Council decision have been implemented as directives. Their legal status is consequently one of a directive. The directive must be implemented prior to a given date and overrides deviating national legislation.

7. Implementation in accordance with procedures and practices in the Member States

Should the social partners decide not to request their agreement to be implemented by a Council decision, they can implement it "in accordance with the procedures and practices specific to management and labour and the Member States" (article 139.2 of the EC Treaty). This provision is subject to a declaration that was part of the Protocol on Social Policy ("the Declaration"):[480]

> The 11 High Contracting Parties declare that the first of the arrangements for application of the agreements between management and labour at Community level referred to in Article 4(2) will consist in developing, by collective bargaining according to the rules of each Member State, the content of the agreements, and that consequently this arrangement implies no obligation 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.

480 Reference is made to the declaration regarding article 4(2) of the Protocol on Social Policy (14).

Although the legal status of the Declaration is unclear (it is likely to be regarded as a non-binding and non-enforceable arrangement),[481] the content is certainly helpful to assess the scope of article 139.2 of the EC Treaty, since it derives directly from the 11 High Contracting Parties.

7.1 The procedure for implementation

According to the text of article 139.2 of the EC Treaty and the Declaration, the social partners may implement the content of a European collective agreement by means of national procedures, in accordance with the rules of each Member State. The formal rules of implementation at national level thus depend on the national law of each Member State.

7.2 Conditions attached to implementation in accordance with procedures and practices in the Member States

As opposed to the implementation of agreements by a Council decision, there are no limitations to implementing an agreement in accordance with procedures and practices in the Member States as to subject matter. Consequently, the European social partners may enter into agreements on all subjects they like. According to the Declaration, however, the content of an agreement may not contravene the laws of the Member State in which it is to be implemented.[482] Obviously, the content may not violate Community legislation either.

7.3 The legal effect of implementation in accordance with procedures and practices in the Member States

As will be set out in part II of this thesis, in most Member States collective labour agreements have a direct normative effect. This means that the normative parts of the collective labour agreements (*i.e.* the parts that regulate the employment conditions between the individual employer and the individual employee) directly apply to the employment agreement. Do

481 E. Franssen, *Legal aspects of the European Social Dialogue*, page 149. Also Szysczak and Toth argue that the Declaration has no legal effect. See, including references, J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, page 141.

482 According to Kapteyn and VerLoren van Themaat the Declaration is somewhat curious in this respect. According to them, it is obvious that agreements that have to be worked out on national level cannot "oust national legislation". Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities*, page 1062.

agreements implemented in accordance with procedures and practices in the Member States also have such a direct normative effect?

7.3.1 Direct normative effect of agreements implemented in accordance with procedures and practices in the Member States

The Declaration suggests that no such direct normative effect exists. It stipulates that the Member States are under no obligation to "apply the agreements directly or to work out rules for their transposition". It seems therefore that the social partners involved have to make sure agreements are properly implemented, prior for them having any normative effect.

Deinert, however, takes a different view given his "model of parallel status of effect".[483] According to him, European collective agreements have normative effect because of article 139.2, first part, of the EC Treaty. He argues that the EC Treaty provides 2 alternatives for the implementation of European collective agreements, which are equally effective. According to Deinert, the High Contracting Parties have drafted the first part of article 139.2 of the EC Treaty in order to attribute a new right to the European social partners.[484] Moreover, Deinert refers to the "freedom of collective bargaining", which he perceives as fundamental and existing on European level. He asks himself the question what good that right would do if European social partners are allowed to "conclude collective agreements on the one hand but to leave those agreements without any effects for the individual labour contract parties on the other hand"?[485] These effects on individual labour contracts are therefore, according to Deinert, also part of the freedom of collective bargaining.[486] In sum, Deinert takes the opinion that European collective agreements are automatically transferred into the Member States, and enjoy a legal status in that country equal to other (national) collective agreements in that country. The European collective agreements have normative effect, if and to extent that national collective agreements have such an effect as well within a jurisdiction.

The above is, in my opinion, not sufficiently convincing. The text of article 139.2 is rather clear and explicitly stipulates that agreements "shall be

483 O. Deinert, *Self-Executing Collective Agreements in EC Law*, page 43, in: M. de Vos (ed.), *A Decade Beyond Maastricht: The European Social Dialogue Revisited*, Kluwer Law International, The Hague, 2003.

484 O. Deinert, *Self-Executing Collective Agreements in EC Law*, page 37.

485 O. Deinert, *Self-Executing Collective Agreements in EC Law*, page 38.

486 O. Deinert, *Self-Executing Collective Agreements in EC Law*, page 38.

implemented (…)". This use of wording suggests (or rather: demands) an *action* to be taken,[487] and cannot possibly point to an *automatic applicability* of an agreement.[488] [489] Moreover, it seems rather odd that article 139.2 of the EC Treaty gives two implementation methods, while – if Deinert's opinion is to be followed – one is not really an implementation method at all, but a measure of direct applicability of an agreement. Furthermore, as it is already debatable whether on European level "freedom of collective bargaining" exists, it is far more debatable (and in my opinion very unlikely), that if such freedom exists, this would go as far as giving normative effect to an agreement reached.[490] Moreover, Deinert's argument that not attributing direct normative effect to agreements concluded in the European social dialogue would be at odds with the freedom of collective bargaining, is not entirely convincing. Among all the different legal effects that can be assigned to collective labour agreements (and are assigned in the various Member states), it is hard to see why the option of national implementation of the European agreement would violate the freedom of collective bargaining. [491] Finally, I mention that the European collective agreements reached in the past that were to be implemented by the mechanisms and practices of the Member States, have been transposed actively in the different Member States. According to the first joint report on the implementation of the framework agreement on telework, presented to the European Commissioner for employment, Social Affairs and Equal Opportunities on 11 October 2006, all 25 Member States

487 According to the Webster's new Twentieth Century Dictionary of the English Language, unabridged, second editions, 1971, the word "implement" means to carry into effect, to provide with the means for carrying into effect etc. This suggests an action to be taken.

488 Deinert notes that at first glance the text of article 139.2 of the EC Treaty indicates a need for transposition agreements. According to him, however, the text only seems unusual with regard to legal systems with detailed regulation on collective employment law. If we would turn to other countries, such as Denmark, where no Collective Agreements Acts exist and the social partners themselves arrange for that law, the reference is article 139.2 of the EC Treaty "seems to have a very deep meaning". I honestly do not see that. If the text would have the meaning as suggested by Deinert, it would not have a "very deep meaning", but it would simply be "very unclear". It does not make any sense to stipulate a text that unclear, while the text, if read in the way Deinert suggests, would have an enormous impact. It furthermore makes no sense that the text would only be logical with regard to a few countries, in this case being Denmark (and even then it is not clear at all), and not to many other European countries.

489 See also F. Franssen, *De Europese sociale dialoog* [*The European social dialogue*], Arbeid Integraal 2007/1, page 24.

490 See chapter 8, section 4.2.

491 S. Smismans, *The European social dialogue between constitutional and labour law*, page 361.

(except for Cyprus, Slovakia, Estonia and Lithuania) actively implemented the telework agreement. This has been carried out in line with national industrial relation systems, more specifically through national and sectoral collective agreements, codes of conduct and legislation.[492] Apparently, the (European) social partners themselves are also of the opinion that European collective agreements lack direct normative effect.[493]

7.3.2 Binding effects of the agreement to be implemented in accordance with procedures and practices in the Member States

As argued above, agreements that are to be implemented nationally lack a direct normative effect. The question still remains whether they are binding in another form and, if so, on whom. Four parties can be relevant in this respect, being (i) the European social partners themselves, (ii) the national members of these European social partners, (iii) the individual employers and employees and (iv) the different Member States. With regard to each party it should be first assessed whether an institutional binding effect exists (based on article 139 of the EC Treaty). If this is not the case, it should subsequently be verified whether there is any contractual obligation on that party.

7.3.2.1 The European social partners

An obvious question that needs answering is whether a collective agreement poses any binding effects on the European social partners on the basis of article 139 of the EC Treaty. The first paragraph of this article sets out that these social partners may enter into contractual relations, including agreements. This stipulation "merely" entitles the European social partners to enter into an agreement and does not impose any obligation on them. The second paragraph, in as far as is relevant to the underlying subject, stipulates that agreements reached shall be implemented in accordance with the procedures and practices specific to management and labour and the Member States. It is, however, unlikely that this stipulation is directed at the European social partners. After all, the European social partners are

492 Reference is made to the EU press release on 11 October 2006, *Turning European Social dialogue into national action – workers and employers implement telework agreement*, as published on www.europe.eu.int/rapid/pressReleases.

493 Attributing direct normative effect to European agreements would also raise important questions of legitimacy. See on this: S. Smismans, *The European social dialogue between constitutional and labour law*, page 361. See also section 7.4 below.

not capable of implementing collective agreements nationally.[494] Only their members, the national social partners, have that capacity. It should therefore be concluded that article 139 of the EC Treaty does not bind the European social partners with regard to the conclusion *and* national implementation of European collective agreements.[495]

Notwithstanding said conclusion, there could be an obligation on the European social partners to either force or urge their members to implement their agreement nationally. The former seems illogical; if the European social partners were entitled to represent the individual members and have done so in good faith, I cannot, in the absence of a specific legal stipulation to that effect, see any reason why the European social partners are under the legal obligation to force their members to implement the agreement. Any action to that effect should be directed to the individual members themselves. Article 139.2 of the EC Treaty could, however, bring about an obligation on the European social partners to perform to their best ability to stimulate their members to implement the agreement. A same effort obligation could derive from the contractual relation between the European social partners, either explicit as part of the contract, or implicit, as a part of contractual good faith, imposed on the parties involved by the law governing the agreement.[496]

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494 This conclusion is somewhat in strains with the fact the term "management and labour" used in article 138 and other parts of 139 of the EC Treaty refers to *European* social partners. Normally, terms used in legislation - especially in one and the same article of a piece of legislation - should have the same meaning (see also section 3.3 above). However, the words "management and labour and the Member States" as used in article 139.2 of the EC Treaty seem to have to be read in conjunction. As the Member States are not obliged to implement European agreements, as will be set out in section 7.3.2.4 below, their mentioning in article 139.2 must have a different purpose. In my opinion, these words entail that "management and labour" at Member State level – that is: national social partners – should implement the European agreement. Obviously, the text would be much clearer if it would have said "management and labour *in* Member States". For this discussion I also refer to section 7.4 below.

495 See also E. Franssen, *Legal aspects of the European Social Dialogue*, page 129 and R. Blanpain, *Europese raamovereenkomsten, de toekomst van het Europees Arbeidsrecht* [*European framework agreements, the future of European employment law*], Arbeid Integraal, 2007/1, page 9.

496 Franssen is of the opinion that such obligation exist. She also refers to G. Schnorr who subscribes to this point of view. See E. Franssen, *Legal aspects of the European Social Dialogue*, page 126. The Commission also takes this opinion. It states: "there is an obligation (…) for the signatory parties to exercise influence on their members in order to implement the European agreement"; COM (2004) 557, page 16.

To summarise, article 139 of the EC Treaty does not impose any institutional obligations on the European social partners, with the possible exception that, once an agreement has been reached, they should urge their members to implement that agreement.

As will be argued in chapter 8 of this thesis, within Europe freedom of contract exists. With regard to the European social partners, this freedom is formalised in article 139.1 of the EC Treaty. Consequently, the European social partners may enter into agreements with binding effects. Whether, from a contractual point of view, an agreement reached contains any binding elements upon the European social partners themselves, depends on the content of the agreement in connection with the law applicable thereon. In deviation of Franssen,[497] the latter has, in my opinion, as a rule to be established in accordance with rules of private international law.

Which set of private international law rules is to be used, depends on the law of the state of which a court is competent in the matter at hand.[498] Within a European context, the competent court should normally be determined on the basis of the Council Regulation on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters.[499] Once the court of a Member State proofs competent, the law governing the European collective agreement should in principle be determined in accordance with the Convention on the law applicable to contractual obligations (Rome Convention).[500] In the end, all Member States are party to the Rome Convention (the Rome Convention is part of the *acquis communautaire*). This Convention applies if its (i) material, (ii) formal and (iii) temporal requirements are met.

Pursuant to article 1, the Rome Convention materially applies to contractual obligations in any situation involving a choice between the laws of different

497 E. Franssen, *Legal aspects of the European Social Dialogue*, page 117.

498 The European Court of Justice seems not to be competent with regard to autonomous agreements concluded by the European social partners. See, including references, J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, page 144.

499 EC Regulation 44/2001, OJ L 12, 16 January 2001, pages 1 – 23.

500 The Rome Convention is going to be replaced by a regulation, Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4 July 2008, pages 6 – 15, hereinafter to be referred to as Rome I. Rome I shall pursuant to article 29 apply from 17 December 2009, and only slightly modifies the Rome Convention. This replacement will not affect the analysis in this thesis on applicable law, unless expressly stated otherwise.

countries.[501] The question is whether European collective agreements involve such a choice of law. Should the contracting parties be situated in different countries, there is no doubt that the agreement involves different jurisdictions, as a consequence whereof the Rome Convention materially applies. But even when the contracting parties are all formally established in the same country, which is not unlikely since all cross-industry social partners are situated in Belgium,[502] the agreement may still very well have important international aspects to it invoking the material application of the Rome Convention. Such an agreement could, for example, give rise to international obligations. And exactly this is quite often the goal of a European collective agreement: it obliges the individual members of the European social partners to implement the contents of the agreement within the different national jurisdictions. Having said that, it is useful to bear in mind the original report accompanying the Rome Convention, which gives important rules for the Convention's interpretation.[503] With regard to article 1 this report states:

> It must be stressed that the uniform rules apply to the abovementioned obligations only "in situations involving a choice between the laws of different countries". The purpose of this provision is to define the true aims of the uniform rules. We know that the law applicable to contracts and to the obligations arising from them is not always that of the country where the problems of interpretation or enforcement are in issue. There are situations in which this law is not regarded by the legislature or by the case law as that best suited to govern the contract and the obligations resulting from it. These are situations which involve one or more elements foreign to the internal social system of a country (for example, the fact that one or all of the parties to the contract are foreign nationals or persons habitually resident abroad, the fact that the contract was made abroad, *the fact that one or more of the obligations of the parties are to be performed in a foreign country* [emphasis added by the author], etc.), thereby giving the legal systems of several countries claims to apply. These are precisely the situations in which the uniform rules are intended to apply.

501 Article 1 also excludes certain types of agreements from the scope of the Rome Convention, which exceptions are normally irrelevant for collective agreements.

502 E. Franssen, *Legal aspects of the European Social Dialogue*, page 117. See also J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, page 132.

503 Report on the Convention on the law applicable to contractual obligations by M. Giuliano Professor, University of Milan (who contributed the introduction and the comments on Articles 1, 3 to 8, 10, 12, and 13) and P. Lagarde Professor, University of Paris I (who contributed the comments on Articles 2, 9, 11, and 14 to 33), OJ C 282, 31 October 1980, pages 1 – 50.

In situations in which the European collective agreement's goal is its implementation in different European countries, the agreement falls, given the report, within the material scope of the Rome Convention. If, however, the European social partners are all situated in the same country and conclude an agreement that merely affects them nationally, the Rome Convention does not apply.

Pursuant to article 2, the Rome Convention has a universal formal character. Consequently, the court of a contracting state must apply the rules from this Convention, regardless of whether the dispute concerns parties from contracting states or other states. In other words, the Convention is a "uniform measure of private international law which will replace the rules of private international law in force in each of the contracting states"[504] (obviously only with regard to subject matters covered by it and subject to any other convention to which the contracting states are party as stipulated in article 21 of the Rome Convention). Moreover, the choice of law laid out in the Convention may result in the law of a state not party to the Convention being applied.

Finally, with regard to the Convention's temporal scope, article 17 stipulates that the Convention shall apply in a contracting state to contracts made after the date on which the Convention has entered into force with respect to that state. It thus depends on the national legislation of the state concerned as from when the Rome Convention applies.[505]

Given the above, the Rome Convention normally applies to European collective agreements entered into by the European social partners with an aim to be implemented nationally. It is therefore relevant to assess the consequences of the Rome Convention on the law applicable to these agreements.

According to article 3.1 of the Rome Convention, the contract is governed by the law chosen by the contracting parties. This choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. In case a choice of law is absent, the agreement shall be governed by the law of the country with which it is most closely connected (article 4.1 of the Rome Convention).

504 Reference is made to the comments in the report concerning article 2.

505 Rome I shall, pursuant to article 28, apply to contracts concluded after 17 December 2009.

Pursuant to article 4.2, it is presumed that the contract is most closely connected with the country where the party who (i) is to effect the performance which is characteristic of the contract and (ii) entered into the contract in the course of his trade or profession has, at the time of conclusion of the contract, his principal place of business. Should said party, under the terms of the contract, have to perform through a place of business other than his principal place of business, the country in which that other place of business is situated will be considered the country that is most closely connected to the agreement. The aforementioned rules regarding the "close connection" do not apply if the characteristic performance cannot be determined. Moreover, these rules shall not apply if it appears from the circumstances as a whole that the contract is more closely connected with another country (article 4.5 of the Rome Convention).

When applied to European collective agreements, the agreement will be governed by the law that has been chosen by the social partners involved. In default of an express or implied choice by the parties, the law applies of the country with which the agreement is most closely connected. In the case of agreements that are to be implemented in all Member States in accordance with article 139.2 of the EC Treaty, it will most likely prove very difficult to determine which party is to effect the performance which is characteristic of the contract. After all, all parties involved (and primarily the national social partners situated in the different Member States) must equally cooperate with the implementation process. Therefore, not the characteristic performance but other factors should determine the country with which the agreement is most closely connected. If, as will be the rule in many situations, the contracting parties are situated in Belgium and the agreement is also concluded in that country, it is, in my opinion, logical that Belgian law, as the law of the country most connected to the agreement, shall govern the agreement.[506]

Given the above, it must be concluded that possible obligatory effects of the European collective agreements on the European social partners have to be assessed by the terms of the contract interpreted by the law that applies to the agreement.[507]

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506 R. Blanpain, *Europese raamovereenkomsten, de toekomst van het Europees Arbeidsrecht*, page 8.

507 Blanpain argues that European collective agreements that are to be implemented autonomously do not impose binding obligations upon the European social partners, as they not wish such obligations to exist. See R. Blanpain, *Europese raamovereenkomsten, de toekomst van het Europees Arbeidsrecht*, page 9.

7.3.2.2 The members of the European social partners

It is uncertain whether article 139.2 of the EC Treaty poses any obligations on the (national) social partners to implement a European collective agreement. The wording used in this article seems to suggest that indeed such legal obligation exists. In any case, it says that agreements "shall be implemented", which normally involves a legal obligation. This is the view of the Commission.[508] As mentioned above, if such obligation exists, it is directed to the members of the European social partners, the national social partners, since only they have the capacity to implement agreements in accordance with the procedures and practices specific to management and labour and the Member States. But does such obligation really exist? This is, to say the least, questionable.

First, it should be borne in mind that the EC Treaty contains rights and obligations of the different Community institutions; it is not designed to impose obligations on private organisations (such as national social partners).[509] Therefore, it seems illogical that article 139.2 of the EC Treaty imposes an obligation on the national social partners.

Second, article 139.2 of the EC Treaty does not make clear as to whom it concerns. Although, as stated above, it must be directed to the national social partners, it is unclear exactly to *which* national social partners. Are only national social partners represented by the European social partners who entered into the collective agreement subject to a possible legal obligation, or are *all* national social partners regardless of their role in the agreement bound by such possible legal obligation? It seems strange to distillate an important institutional obligation from an arrangement that in itself is unclear to whom it is directed. This is an indication that such institutional obligation does not exist.

Third, an obligation on the national social partners to implement a collective agreement seems to be at odds with the freedom of collective bargaining that exists on national level.[510] Although national social partners that were duly represented by the European social partners could be considered to have used

508 COM (2004) 557, page 16.

509 B. Bödding, *Die europarechtlichen Instrumentarien der Sozialpartner*, page 77, as referred to by E. Franssen, *Legal aspects of the European Social Dialogue*, page 121.

510 Reference is made to chapter 8, section 4.1. See also E. Franssen, *Legal aspects of the European Social Dialogue*, page 130.

their freedom through the European social partners,[511] that cannot be said with regard to national social partners that were not represented. This last category may also be effected by article 139.2 of the EC Treaty, as argued in the paragraph above. If this indeed would be the case, it would be at odds with these national social partners' freedom of collective bargaining; they are forced to use their right to collective bargaining to implement a bargaining result in which they did not participate.

Fourth, not all agreements concluded at European level have to be implemented (either by a Council decision or nationally). European social partners may very well conclude agreements that merely affect themselves. An obligation to implement such an agreement, as seems to follow from the wording of article 139.2 of the EC Treaty, is therefore not logical.[512] This is also an indication that such an obligation does not exist.

Last, the wording "shall implement" as used in article 139.2 of the EC Treaty, should probably not be taken literally with regard to the national social partners, since exactly the same wording does not have to be taken literally with regard to the Community institutions. As set out in section 6.1 of this chapter, the Council is free either to implement the European collective agreement or to refuse such implementation. This freedom exists regardless of the fact that article 139.2 of the EC Treaty stipulates that agreements *shall* be implemented by a Council decision.[513] It seems very odd that exactly the same wording in exactly the same article constitutes an obligation on the part of national social partners, while it does not on the Community institutions.

511 See A.T.J.M. Jacobs, *European Social Concertation*, page 380.

512 Unless such agreement that is not to be implemented does not qualify as an "agreement" referred to in article 139 of the EC Treaty. See also section 5 above.

513 See also Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities*, page 1062 who are very clear about this. They state: "(…) an agreement between the social partners cannot restrict the independent freedom of discretion which the Commission and the Council have under the EC Treaty. Both Institutions are, it is submitted, free to form their own views as to whether, and, if so, to what extent they wish to 'grandfather' a particular agreement concluded by the social partners."

Given the above, it should be concluded that article 139.2 of the EC Treaty most likely imposes no obligation on the national social partners to implement European collective agreements.[514]

Whether an agreement imposes contractual obligations on the members of the European social partners and, if so, to what extent, is a question that should be answered in a two-step approach. First, from the collective agreement reached by the European social partners it should be derived whether it has the goal of imposing obligations on the European social partners' members. Whether this is the case, depends on the text of the agreement in combination with the law applicable to the agreement. Second, should the agreement contain such obligations, it should be assessed whether these obligations are binding upon the members. Whether this is the case, depends on whether a member has been correctly represented by its European social partner, *i.e.* whether this European social partner has acted within the power of attorney given to it by its member. This question needs to be answered in accordance with the law that applies to the principal-agent relation between the individual member and its European social partner. What law governs that relation again depends on the private international law rules that apply in the country of which the court

514 See also F. Dorssemont, *Some Reflections on the Origin, Problems and Perspectives of the European Social Dialogue*, page 27. See also J. Rojot, A. Le Flanchec and C. Voynett-Fourboul, *European Collective Bargaining, new Prospects or much Ado about Little*, The International Journal Of Comparative Labour Law And Industrial Relations, volume 17, issue 3, 2001, page 353, in which they state: "No obligation to see that this application [to implement on a national level by collective bargaining; author] is carried out weights on the Member States and the representative bodies having signed (…) have no power to see that it is either enforced or adopted in a national framework by their national constituents." This text implies that the national members of the European social partners are not forced to implement an agreement. See furthermore C. Barnard, *EC Employment law*, page 90, who states: "in case of an EC-level agreement, there is no obligation to bargain on these matters at national level nor to ensure that it applies to all workers". The same view is expressed by Betten, Sciarra and Lyon-Caen, as referred to in J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, pages 140 and 142. Franssen stated: "At present I see no other option than that the European organisations use their power of persuasion to influence each other and their national affiliates because EU legislation does not provide any solution to these problems." See E. Franssen, *Implementation of European Collective Agreements: Some Troublesome Issues*, Maastricht Journal of Comparative Law, 1998, volume 5, page 62.

is competent.[515] In any case, the Rome Convention does not apply. Article 1.2 under f of the Rome Convention explicitly excludes the question whether an agent is able to bind a principal to a third party from its material scope.[516] In some countries, the Convention on the Law Applicable to Agency will be used.[517] Pursuant to article 5 of this Convention the internal law chosen by the principal and the agent shall govern the agency relationship between them. If no law has been chosen, as a general rule, the law of the state where the agent has its business establishment applies (article 5 of the Convention).[518] If the competent court is situated outside a state in which said Convention is in force, it will depend on that state's private international law rules which law applies to the relation between the principal and the agent.

As a rule, the relation between the European social partner and its members is subject to some sort of constitution.[519] The material rules of the relation of the aforementioned parties are normally arranged therein. If, pursuant to (i) that constitution, (ii) possible other/further agreement between said parties and (iii) the applicable law governing their relation the European social partners had a sufficient and binding power of attorney from their members, these

515 According to Franssen Belgian private international law should be used to assess what law applies to the principal – agent relation: E. Franssen; *Legal aspects of the European Social Dialogue*, page 132. This seems incorrect. It depends on the private international law rules of the country in which the court that deals with the conflict at hand resides.

516 Given this provision, I do not agree with Franssen's view that the law applicable to the internal relation of the European organisations is to be determined by the Rome Convention; E. Franssen, *Legal aspects of the European Social Dialogue*, page 133, footnote 91. The law applicable to an important part of this relation – is the European social partner entitled to bind its members, the national social partners? – cannot be determined by the Rome Convention. The same applies to Rome I (point g of article 1.2).

517 The Convention on the Law Applicable to Agency is concluded on 14 March 1978 and entered into force on 1 May 1992. This Convention is in force in Argentina, France, the Netherlands and Portugal.

518 Franssen argues that agency rules are not relevant for the relationship between the European organisation and its own affiliates "since agency is not about the relationship between the agent and his principal"; E. Franssen, *Legal aspects of the European Social Dialogue*, page 133. Franssen, however, apparently uses a (too) narrow definition of agency. The Convention on the Law Applicable to Agency explicitly deals with the law applicable to the relationship between the principal and its agent in article 5. Moreover, the explanatory report drafted by I.G.F. Karsten accompanying said Convention explicitly states on page 10 that agency involves three separate relationships, being the relation between (i) the principal and the agent, (ii) the principal and the third party and (iii) the agent and the third party. The rules of agency thus very well apply to the relation principal – agent.

519 E. Franssen, *Legal aspects of the European Social Dialogue*, page 131.

members are bound to the relevant part (*i.e.* the part that applies to them) of the collective agreement. That relevant part could, for example, oblige them to implement the collective agreement nationally.[520]

7.3.2.3 The individual employers and employees

As mentioned in section 7.3.1 above, article 139.2 of the EC Treaty does not have the effect that individual employees and employers are directly bound to the European collective agreement. Once the agreement has been implemented nationally, it can obviously bind said parties, in so far as, and to the extent that national rules arrange for that binding effect. If the agreement is not implemented, the individual employees and employers cannot be subject to rights or obligations arising from there on the basis of the EC Treaty.

The only manner upon which individual employees and employers could contractually be bound to a European collective agreement is through agency. All European trade unions consist of national trade unions, as opposed to individual employees, the latter which are therefore not directly represented by the European social partners. As a rule, the same is the case with regard to European employers' organisations. Jacobs and Ojeda – Aviles consider this as a chain of mandates, in effect binding the individual employer and employers.[521] The individual employees/employers are represented by the national trade unions/employers' organisations that in their turn are represented by the European trade unions/European employers' organisations. An agreement reached by these European organisations therefore binds individual employees and employees. This opinion is, in my view, not entirely convincing for several reasons.

First, it is questionable whether an individual (be it an employee or employer) who joined a social partner consented to their being represented at European

520 In deviation of Franssen and Jacobs, in my opinion the mere joining of a European social partner by a national social partner does not in itself oblige the latter to implement a European agreement reached (E. Franssen, *Legal aspects of the European Social Dialogue*, page 132; and A.T.J.M. Jacobs, *European Social Concertation*, page 380). There must in my view be an arrangement between both parties to that effect (either implicit or explicit). Self-evidently, in most if not all cases such arrangement will be in place. Blanpain seems to take the same position. R. Blanpain, *Europese raamovereenkomsten, de toekomst van het Europees Arbeidsrecht*, page 9.

521 A.T.J.M. Jacobs and A. Ojeda-Aviles, *The European social dialogue – Some legal issues*, page 67.

level. I assume that the mandate will in many cases prove insufficient.[522] Even if a mandate is in place, it is still questionable whether the individual involved is aware of the consequences of his mandate. For example, in some jurisdictions, members of social partners may vote on draft collective agreements. The outcome of this voting is often decisive for the acceptance or refusal of the agreement. This is not, however, always the case on European level. If, for example, a national trade union refuses a European agreement (after having heard its members), this agreement may very well still be accepted on European level. After all, the ETUC uses a 2/3 majority rule for the acceptance or non-acceptance of a European agreement. The votes cast on a national level are therefore not automatically decisive at European level. It would very much surprise me if employees on national level that gave their mandate know that the majority of national members of trade unions can under circumstances not prevent a European collective agreement from being entered into.[523]

Second, the express goal of articles 138 and 139 of the EC Treaty is to enter into an agreement that is subsequently *implemented* by the national social partners (or by a Council decision). The agreement is therefore directed at the national social partners (who should implement) and not to individual employers and employees. Logically, individuals cannot derive rights from an agreement that is not meant for them; it was never the intention of the contracting parties to conclude an agreement directly for the individual employers and employees.

Third, the system of "chain of mandates" is at odds with many national collective law systems. In these countries, specific rules are drafted that regulate the normative effect of collective agreements. That rules would be superfluous if the chain of mandates system would suffice. These rules furthermore often give additional requirements to an agreement prior to this agreement having effect.[524] In such jurisdictions, the "chain of mandates theory" simply does not

522 With "mandate" I mean that the individual concerned knows and (implicitly) agrees upon joining a national association that his employment conditions may be (indirectly) determined by a European association.

523 The paragraph remains somewhat speculative as I was unable to find any research on this topic. I have checked the articles of association of the largest trade union in the Netherlands (FNV). Although it refers to international participation of the FNV, it does not state anything about potential consequences. The FNV website also mentions such international participation and has a link to ETUC, but again no references to potential consequences of the European participation.

524 For example, many Member States require a collective labour agreement to be registered in order to have effect. See chapter 13, section 5.1.

work. Given the above, European collective agreements offer neither direct rights nor obligations to individual employers and employees.[525] [526] [527]

7.3.2.4 The Member States

Article 139.2 of the EC Treaty imposes no obligations on the Member States, as no such thing is mentioned in that article. Moreover, this clearly follows on from the Declaration, which, among other things, says that the arrangement of national implementation of agreements "implies no obligation 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". Although, as already mentioned above, the legal status of this Declaration is unclear, the content seems accurate.[528] Since Member States are not a party to the European collective agreements, nor are

525 This could in my opinion only be different if, at *national* level, the law would permit European collective labour agreements to apply directly, or would recognise that the European agreement contain third party rights that can be accepted and subsequently applied by the individual employers or employees. This, however, is an issue purely at national level and should be viewed separately from the European effects of a European agreement.

526 I agree with the remarks of Hellsten on the chain of mandates theory: "The attempt of Jacobs and Ojeda-Aviles is certainly the most respectable. Still, it would mean such a step that one has to doubt whether national courts would apply such a doctrine without a clear message of the European Court of Justice." J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, page 143. Jacobs himself also expresses some doubts on his own theory. In a fairly recent contribution he stated: "(…) there are no real guarantees that the Euro-Agreements will be fully and erga omnes implemented via the 'procedures and practices specific to management and labour and the Member States'." A.T.J.M. Jacobs, *European Social Concertation*, page 382.

527 See also F. Franssen, *De Europese sociale dialoog*, page 25.

528 E. Franssen, *Legal aspects of the European Social Dialogue*, page 151. See also Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities*, page 1062, who state: "It is obvious that agreements concluded at national level (…) cannot (…) oblige the Member States to amend existing national legislation to facilitate the implementation of those agreements." See furthermore C. Barnard, *EC Employment law*, page 90 and F. Dorssemont, *Contractual governance by management and labour in EC labour law*, pages 293.

they being represented, there are no contractual obligations on the Member States arising from the agreement.[529]

7.4 Does article 139.2 of the EC Treaty allow European social partners to draft a framework agreement enabling the direct applicability of subsequent European agreements?

The above explains the legal effects of an agreement concluded by the European social partners that is subsequently implemented in accordance with procedures and practices specific to management and labour and the Member States. The bottom line is that such an agreement should or even must be implemented by national affiliates of the European social partners in each Member State. However, Schiek argues that article 139.2 of the EC Treaty empowers the European social partners to enter into a European Basic Social Partner Agreement that allows them to conclude subsequent agreements that have direct effects on individual employment agreements situated in the EU.[530]

According to Schiek, collective labour agreements in all Member States have a dual function: they regulate the relationship between the contracting parties

529 Jacobs expresses some doubts as to the question whether the Member States are obliged to implement agreements. He argues: "the words 'shall' and 'and' in this article [article 139.2 of the EC Treaty; author], read together, could well lead to the conclusion, that the Member States are in fact obliged to take measures to adapt the legal toolbox of their industrial relations systems in order to improve the implementation of Euro-Agreements via the voluntary road". A.T.J.M. Jacobs, *European Social Concertation*, page 382. The same doubts are expresses by Bercusson in: B. Bercusson, *European Labour Law*, page 569. I am not convinced. As argued in section 7.3.2.2 above, the word "shall" seems not to be taken literally. Furthermore, the words "and Member States" in my view (although very unclearly) express that the article refers to national social partners, as opposed to European social partners. Moreover, Jacobs does not make evident exactly what Member States have to do should his interpretation of article 139.2 of the EC Treaty be correct. He states that the Member States must adapt their legislation in order to improve the implementation of Euro-agreements. Apparently, the Member States must only improve implementation, but do not have to implement themselves. But how should they improve that implementation? Should they adopt an act stating that national affiliates of European social partners may implement at national level a European agreement? What sort of power should such implemented agreement have? Fact is that Member States have not acted in the way Jacobs suggests. Furthermore, should the European legislator indeed have wanted the Member States to assist with the implementation of European agreements, it should have given these Member States at least some guidance in this respect.

530 D. Schiek, *Autonomous Collective Agreements as a Regulatory Device in European Labour Law: How to read Article 139 EC*.

on the one hand and individual employment agreements on the other. In some Member States, such as Denmark, Italy and the United Kingdom, collective labour agreements have that dual function even in (partial) absence of state legislation. In Denmark the legal status of a collective labour agreement is based on an agreement between both sides of the industry dating back to 1899. It is argued that, because of said agreement, in Denmark (i) members of the contracting parties to a collective labour agreement are partakers of that collective labour agreement, (ii) as a consequence whereof they are directly contractually bound by that collective labour agreement, while (iii) there is a contractual obligation between the individual employer and employee to abide to the applicable collective labour agreement.[531] Given this Danish example, Schiek argues that it is possible to have a system on collective labour agreements without having legislation to that effect, provided that the social partners themselves arrange for the relevant legal framework. She continues by stating that the introduction of the current article 139.2 of the EC Treaty must have meant the introduction of a method of implementation of European agreements not already available to the European social partners. It reads that European agreements shall be implemented in accordance with procedures and practices specific to management and labour and the Member States. The words "management and labour" in that context refer to the European social partners, not to their national affiliates. Therefore, European social partners must be able to implement these European agreements.[532] Their agreements are absorbed by article 139.2 of the EC Treaty and are given legal relevance

531 D. Schiek, *Autonomous Collective Agreements as a Regulatory Device in European Labour Law: How to read Article 139 EC*, page 37.

532 This interpretation would render the words "and Member States" useless. If the European social partners would be entitled to directly implement their agreements in accordance with their own procedures and practices, what would be the role of the Member States? Schiek explains that these words are to make clear that the implementation method of the European social partners may not violate the national practices of one or more Member States (see pages 52 and 53). This, however, would place the European social partners in an extremely difficult position, as the national implementation techniques differ considerable from Member State to Member State. There simply does not seem to be an implementation technique that would fit in the current laws of all Member States. A solution for that problem would be to follow Deinert's aforementioned "model of parallel status of effect". This would make it possible to implement an agreement in each Member State. This solution is rejected by Schiek. She rightly claims that Deinert's model is in fact a model for national implementation, and not for European implementation (see page 51). This leaves the problem that European implementation is in fact impossible. Schiek tries to solve that problem by stating that the European agreements have, as EU law, supremacy over national law. This, however, would lead to enormous problems with regard to legitimacy. I refer to the explanation in the main text.

as an element of Community law.[533] This would, according to Schiek, also be consistent with the right to collective bargaining. Article 139.2 of the EC Treaty thus "enables the European social partners to establish their own procedures and practices concerning the effect that European social partner agreements will have on individual employment relationships as well as on industrial relations. A basic contract would replace statutory regulation of this matter, for which the EU does as yet have no competence (Article 137(6) EC)".[534] The agreements entered into between the European social partners and implemented in accordance with their own procedures and practices would, according to Schiek, have to be considered Community law. The principle of supremacy of EU law applies to these agreements and the "European basic Social Partner Agreement". Consequently, Member States would be barred from disabling the legal effects of the European social partner agreements.[535]

The above theory does not convince me. Its basis is shaky, as the system is built on the Danish model. This Danish model is an exception in Europe. Nearly all Member States have extensive legislation in the field of collective labour law, especially intended to arrange the legal effects of collective labour agreements. It seems odd to make the Danish exception rule in Europe. This exception is made rule on the assumption that article 139.2 of the EC Treaty must have meant the introduction of a method of implementation of European agreements not already available to the European social partners. This assumption is shaky as well. It has (in my opinion: rightfully) been argued that article 139.2 of the EC Treaty must merely be seen as a political statement.[536] And even if it were assumed that the European social partners have the power to autonomously implement their European agreements, I cannot see any indication that article 139.2 of the EC Treaty entitles them to do so as a part of Community law. On the contrary, article 139.2 of the EC Treaty would in such a case prescribe that national laws have to be obliged, making clear that national laws are higher in hierarchy than European collective labour agreements implemented autonomously. If that would be any different, this would lead to serious legitimacy problems. There are no formal checks on representativity of the European social partners when they conclude a European agreement that is to be implemented autonomously. What would the legitimacy be of such an agreement assuming the status of

533 D. Schiek, *Autonomous Collective Agreements as a Regulatory Device in European Labour Law: How to read Article 139 EC*, pages 53 and 54.

534 D. Schiek, *Autonomous Collective Agreements as a Regulatory Device in European Labour Law: How to read Article 139 EC*, page 54.

535 D. Schiek, *Autonomous Collective Agreements as a Regulatory Device in European Labour Law: How to read Article 139 EC*, page 55.

536 Reference is made to chapter 6, section 4.1.

Community law? There would be none.[537] It would furthermore violate the national traditions of Member States. As will be explained in part II of this thesis, some collective labour agreements may gain an *erga omnes* effect, but only if strict requirements have been met. These requirements are lacking when it comes to European agreements implemented autonomously. To sum up, the suggestion of Schiek seems to lack (sufficient) legal basis.[538]

8. Summary

Pursuant to article 138.2 of the EC Treaty, the Commission must consult (i) the social partners before submitting proposals in (ii) the social policy field.

The social partners that are consulted must meet three criteria. They must: (i) be cross-industry or relate to specific sectors or categories and be organised at European level, (ii) consist of organisations which are themselves an integral and recognised part of Member State social partner structures and with the capacity to negotiate agreements, and which are representative of all Member States, as far as possible and (iii) have adequate structures to ensure their effective participation in the consultation process. Based on these criteria, the Commission has drafted a list of organisations that are to be consulted. This list has been reviewed on several occasions over time. Currently, there are about 50 organisations that are consulted.

The Commission broadly defines the concept "social policy field". Not only the proposals pertaining to issues laid out in the articles 137 and 140 of the EC Treaty fall hereunder, but all Community initiatives and proposals which have a social or socio-economic significance.

Said consultation process comprises of two stages. In the first stage, the Commission sends the relevant social partners a letter concerning the direction Community action in the social policy field might go to. The social partners may reply, either individually or collectively, in principle, within a 6

537 Smismans argues as well that attributing direct normative effect to European agreements would raise important questions of legitimacy. S. Smismans, *The European social dialogue between constitutional and labour law*, page 361. Doing the same indirectly, via a "European basic Social Partner Agreement", would not change that.

538 A possible solution would be that an agreement concluded between the European social partners is subsequently implemented by a Council decision. This, however, is something that Schiek does not have in mind. Article 137.5 of the EC Treaty would, in Schiek's view, block Council implementation of such an agreement. For a further discussion on this subject, reference is made to chapter 14, section 2.

weeks' time period. The second stage starts if, after the first stage is finished, the Commission considers Community action advisable. In such a case, the Commission consults the social partners on the content of the envisaged proposal, upon which these social partners can forward their opinion or even recommendations (article 138.3 of the EC Treaty). The duration of this second stage should also not exceed 6 weeks.

On the occasion of the consultation, the social partners are entitled to inform the Commission of their wish to enter into a collective agreement. This negotiation process may take up to 9 months and can be extended upon joint agreement between the social partners involved and the Commission (article 138.4 of the EC Treaty). The social partners that can participate in the negotiations have, according to the ruling of the Court of First Instance in the UEAPME case, to be (a) among those parties consulted by the Commission and (b) admitted to the negotiation table by the other social partners involved. Alternatively, the social partners may enter into negotiations without prior consultation being required. The same social partners, as defined by the Court of First Instance, are entitled to participate in the negotiations leading to article 139 agreements.

Pursuant to article 139.1 of the EC Treaty, the European social partners may enter into contractual relations, including agreements. Apparently, although disputable, a difference exists between the two forms. It is important to distinguish between contractual relations, not being agreements and agreements, because only agreements can be implemented in the manner as set out in article 139.2 of the EC Treaty. Given the important consequences of this distinction, it is odd that no definition of agreement is given. Contractual relations could be divided into four categories: (i) agreements implemented in accordance with article 139.2 of the EC Treaty, (ii) process-oriented texts, (iii) joint opinions and tools, and (iv) procedural texts. The term "agreement" could best be described as a form of collective agreement.

If the social partners have reached an agreement they can (i) either request that it be implemented by a Council decision or (ii) implement it themselves in accordance with the procedures and practices specific to management and labour, and to the Member States.

Should the social partners choose the first option, they must jointly request that the agreement be implemented by a Council decision on a proposal from the Commission (article 139.2 of the EC Treaty). In such a case, the agreement must meet seven conditions:

1. the agreement must concern matters covered by article 137 of the EC Treaty;
2. the contracting parties must have a sufficiently representative status;
3. the contracting parties must have a mandate of their members;
4. the content of the agreement may not contravene Community law (legality);
5. the agreement must avoid imposing administrative, financial and legal constraints that holds back the creation and development of small and medium-sized undertakings;
6. the agreement must pass a general (political) test on its content; and
7. the objectives of the proposed implementation must not sufficiently be achieved by the Member States and should therefore be achieved by the Community, and the action should not go beyond what is necessary to achieve the objectives of the EC Treaty (principle of subsidiarity and proportionality).

If these conditions are met and the agreement is forwarded for implementation, the Commission will not alter the agreement. The Commission does not allow the Council to amend the agreement either. The Council decides on the proposal by qualified majority, except where the agreement in question contains one or more provisions relating to one of the areas for which unanimity is required based on article 137.2 of the EC Treaty, in which case the Council shall act unanimously. The European Parliament does not play an official role in this procedure, but is informed of the proposed implementation of the agreement. The choice of legal instrument (directive, regulation or decision) for the implementation depends on the content of the agreement at hand. To date, all agreements have been implemented through a directive.

The social partners could also choose to implement the agreement in accordance with the procedures and practices specific to management and labour and the Member States. The content of the European collective agreement is, in such a case, transposed, by means of national procedures, in each Member State. The formal rules of implementation at national level thus depend on the national law of each Member State. The European collective agreement has no direct normative effect. That does not mean that the agreement cannot have any effect on the (possible) parties involved: (i) the European social partners, (ii) their members, (iii) the individual employers and employees and (iv) the Member States.

The agreement does not have institutional effects on the European social partners (with the possible exception that, once an agreement has been reached, they should urge their members to implement that agreement), but

may have contractual, obligatory effects. The latter has to be assessed by the terms of the contract interpreted by the law that applies to the agreement.

In all likelihood, the agreement poses no institutional obligation on the part of the national social partners to implement European collective agreements. On the contractual side this depends on (i) the convention that possible regulates the relation between the European social partner and its members, (ii) possible other/further agreement between said parties and (iii) the applicable law governing their relation.

Given the lack of a direct normative effect of the agreement, it does not impose any institutional obligations on the employers and employees. This is, in principle, also the case concerning the contractual side of the agreement.

The agreements neither impose any institutional nor contractual obligations on the Member States.

CHAPTER 6

A CRITICAL VIEW ON (INSTITUTIONALISED) TRANSNATIONAL COLLECTIVE BARGAINING

1. Introduction

In the previous chapters, the institutional framework of the European social dialogue, the dialogue's history as well as the achievements of the European social partners have been set out. Given the only brief history of the European social dialogue when compared to collective employment law known in the individual Member States, it is clear that the both are not easily compared. As will be discussed below in section 2, the "setting" of the European social dialogue laid out in articles 136 – 139 of the EC Treaty is quite unique. It will be argued that, in deviation from national laws, in European context supportive laws stimulating European collective bargaining have preceded the actual collective bargaining itself. The conclusion will be that the "real" function of the European social dialogue as set out in said articles is not so much promoting the possibilities and interests of the European social partners, but rather promoting the goals of the Community institutions. This section relies on the persuasive book "Regulating Social Europe: Reality and Myth of Collective Bargaining in the EC Legal Order" of A. Lo Faro. The ideas, concepts and conclusions in this section derive from that book.

The aforementioned setting and function of the current institutionalised European social dialogue may very well be responsible for the European collective bargaining system suffering from important flaws and limitations when compared to "normal" collective bargaining practiced in individual Member States.[539] These flaws and limitations will be put forward in a general part, relating to the current system as a whole (section 3), and parts specifically concerning the implementation of agreements in accordance with mechanisms

539 I emphasise that the bargaining system existing within the European social dialogue is set off against the normal, free bargaining systems normally in force in Member States. Therefore, I can very well criticise requirements applicable to the bargaining system in place within the European social dialogue, which requirements make perfect sense from the point of view of that dialogue, but not from the point of view of free bargaining in the various Member States.

and practices specific to Member States (section 4) and by a Council decision (section 5).

Given the inadequacies of the current system, section 6 concerns the potential possibilities of the European social partners entering into collective agreements on European level, outside the scope of articles 138 – 139 of the EC Treaty. It will be concluded that parties who qualify as "labour" and "management", as referred to in articles 138 and 139 of the EC Treaty, automatically act within the scope of these articles. This imposes no limitations on these parties, it "merely" gives them additional rights, which they can chose to use or not. Parties that do not qualify as "labour" and "management" can also conclude transnational collective labour agreements, but these agreements lack Community relevance. Finally, section 7 summarises the content of this chapter.

2. The setting of articles 136 – 139 of the EC Treaty and their goal

As set out in chapter 3, in section 2.2, the European social partners did not play a "real" role within Europe until the mid-eighties. It was then that CEEP, UNICE and ETUC agreed upon furthering the European social dialogue on an informal and voluntary basis. It was a fragile beginning and ETUC even left the bargaining scene from 1987 until 1989. The actual "breakthrough" came in Maastricht, during the Intergovernmental Conference held in 1992. At that conference the Protocol on Social Policy was drafted, which forms the basis of the current articles 136 – 139 of the EC Treaty.

Given (i) the relatively brief period of time between the first "real" role of the European social partners (mid-eighties) and the moment legislation promoting the European social dialogue was enacted (1992) and (ii) the serious starting problems driving ETUC away from negotiations for 2 years, already at first glance it seems unlikely that the Protocol on Social Policy furthered an existing and a more or less vivid interaction between the European social partners. It is said that, in deviation from the "standard" situation in the different Member States, in supranational context legislation supporting collective bargaining has preceded the actual collective bargaining itself.[540] For that reason scholars argue that, without the institutionalised structure, European collective bargaining would not have attracted as much attention as

540 Caruso, 1997, page 332, as referred to in A. Lo Faro, *Regulating Social Europe: reality and myth of collective bargaining*, page 58.

it has today.[541] The aforementioned "reversal of action" and its consequences are described by Lo Faro as follows:[542]

> (a) the reversal of the historically entrenched sequence between a *prius* which is the social formation of collective autonomy and a *posterius* which is intervention by state legislation; and
> (b) as a necessary consequence, a reversal of the traditional analytical approach to bargaining dynamics, consisting in attributing to the legislative intervention "anticipating" Community collective autonomy (the ASP) an importance which at this stage seems inevitably pre-eminent.
>
> (…) It is often said that the functioning of a self-contained bargaining system at Community level is hindered by a number of "missing elements" which prejudice its full operation as a regime: the fact that there are no clear rules on representation, no fully representative actors, no defined Community collective interest and no clear rules on the normative effect of collective agreements. In short, an absence of many of the fundamental elements characteristic of, or crucial to the very existence of, any bargaining system worthy of the name.

Given the above, European collective bargaining is radically different to national collective bargaining.[543] [544] This difference could be explained when scrutinising the function of the European social dialogue within the European system as a whole. According to Lo Faro, this function is not so much promoting the European social partners' interests, but rather is "no more than one of providing support for Community regulation and legitimacy".[545] The current institutionalised European Social Dialogue must accordingly be

541 A. Lo Faro, *Regulating Social Europe: reality and myth of collective bargaining*, page 57.

542 A. Lo Faro, *Regulating Social Europe: reality and myth of collective bargaining*, page 59.

543 A. Lo Faro, *Regulating Social Europe: reality and myth of collective bargaining*, page 61.

544 Lo Faro did ask himself the question whether said differences between national collective bargaining and European collective bargaining could be explained by the fact that the latter is younger and thus less mature. This, however, did not seem to be the case. When European collective bargaining is analysed through collective autonomy and pluralism, one should conclude, according to Lo Faro, that both are unsuitable for European collective bargaining. Reference is made to: A. Lo Faro, *Regulating Social Europe: reality and myth of collective bargaining*, page 61 and chapter 4.

545 A. Lo Faro, *Regulating Social Europe: reality and myth of collective bargaining*, page 161.

seen as a mere regulatory technique. This might explain some of the flaws in the current European system.

3. Some general critical remarks concerning collective bargaining in the context of articles 136 – 139 of the EC Treaty

No system is flawless. This is certainly true when it comes to the current institutionalised collective bargaining system. A lot of critical remarks can be made regarding the European social dialogue. I will limit myself to remarks concerning (i) the absence of important constitutional rights (freedom of association, right to collective bargaining and the right to strike), (ii) the participants of the European social dialogue (who are "management and labour", are they representative and do they have full autonomy) and (iii) the lack of direct normative effect of the European agreements reached, which leads to the lack of uniform applicability of European collective agreements.[546]

3.1 The absence of the constitutional rights of freedom of association, right to collective bargaining and the right to strike

Although it was and to some extent still is debatable whether the right to strike, the right to collective bargaining[547] and the freedom of association are lacking from Community collective bargaining in general,[548] it is certain that these rights are not constitutional rights. Quite on the contrary, the freedom of association and the right to strike are explicitly excluded from the scope of the EC Treaty, given article 137.5 of the EC Treaty.[549] Without doubt, these rights are crucial to any collective bargaining system and should thus be

546 For a general overview of the flaws relating to the European social dialogue, reference is made to R. Kowanz, *Europäische Kolektivvertragsordnung, Bestandsaufnahme und Entwicklungsperspektieven* [*European Collective Agreements, inventory and future perspectives*], Nomos Verlagsgesellschaft, Baden-Baden, 1999, pages 220 – 256.

547 At least the right to collective bargaining for management and labour is stipulated in article 139 of the EC Treaty.

548 Reference is made to chapter 8 hereof.

549 As will be discussed in section 5.1 below, as well as in chapter 14, section 2, the exact scope of this provision was unclear.

awarded a constitutional place.[550] Buda describes the current situation in this respect rather strikingly:[551]

> No European right of association or right to collective action (strike) exists as yet and the Agreement expressly excludes this area from European legislation. This gives rise to a contradictory situation in which the Commission has the task of promoting dialogue between the social partners, including with a view to concluding agreements, but, on the other hand, has no powers to lay down binding legal and institutional conditions which might be conducive to a possible system of European labour relations.

One might believe that the aforementioned rights are excluded from Community law due to abstention, which might be understood as a profound respect for these rights. However, these rights need active protection by public authority; a *laissez-faire* attitude does not suffice.[552] In fact, the Committee on Employment and Social affairs, on the request of the President of the European Parliament, advised to enshrine these fundamental rights in European legislation, and to rescind article 137.5 of the EC Treaty.[553] This advice, however, has never been implemented.

3.2 Definition of management and labour

The EC Treaty attributes important rights concerning the European social dialogue to "management and labour", among which the right to enter into collective agreements. Exactly which parties qualify as "management and

550 The following authors belong to the ones that stressed the importance of these rights: A. Lo Faro, *Regulating Social Europe: reality and myth of collective bargaining*, page 102 and 153, E. Franssen, *Legal aspects of the European Social Dialogue*, page 8 and further and F. Dorssemont, *Some Reflections on the Origin, Problems and Perspectives of the European Social Dialogue*, page 9.

551 D. Buda, *On course for European labour relations? The prospects for the social dialogue in the European Union*, in W. E. Lecher and H. W. Platzer, *European Union – European Industrial Relations? Global challenges, national developments and transnational dynamics*, Routledge, London, 1998, page 33.

552 F. Dorssemont, *Some Reflections on the Origin, Problems and Perspectives of the European Social Dialogue*, page 14. See also S. Sciarra, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; Draft General Report*, page 12. The report can be found on: http://www.unifi.it/polo-universitario-europeo/ricerche/collective_bargaining.html, and K. Boonstra, *Government Responsibility and Bargaining Scope within Article 4 of ILO Convention 98*, The International Journal of Comparative Labour Law and Industrial Relations, Autumn 2004, page 457.

553 Committee on Employment and Social Affairs, *Report on transnational trade union rights in the European Union*, PE 223.118/final, 20 March 1998.

labour" is a legal question that ultimately has to be decided by the European Court of Justice.[554] A difficulty in that respect is that the EC Treaty is silent about any demands concerning the European social partners. Consequently, the Commission tried to fill this gap. It put forth that management and labour are organisations that should (i) be cross-industry or relate to specific sectors or categories and be organised at European level, (ii) consist of organisations which are themselves an integral and recognised part of Member State social partner structures and with the capacity to negotiate agreements, and which are representative of all Member States, as far as possible, and (iii) have adequate structures to ensure their effective participation in the consultation process.[555] These organisations may, given the ruling of the Court of First Instance in the UEAPME case, enter into collective bargaining if admitted to the negotiation table by the other social partners involved.

It is logical that the Commission sets criteria that must be met by parties in order to qualify as "management and labour".[556] After all, these parties gain important (consultation and negotiation) rights which need legitimating.[557] This was rightly pointed out in the report of Reding for the European Parliament (although the statement related to agreements implemented by a Council decision):[558]

> The possibility of agreements between the social partners, ratified by the Council, opens up a promising new avenue and brings decision making procedures closer to the people. This provision will, of course, have to be applied with proper care; only organisations which are truly representative should be recognised as 'social partners' and the institutional balance established by the Treaty must not be disrupted.

554 R. Blanpain, *Sociale partners en de Europese Unie; taak en legitimatie*, page 297.

555 Chapter 5, section 2.2.

556 Although it is less logical that these criteria do not follow from the EC Treaty. As things are now, it is, in fact, the Commission who can to a great extent decide who is involved in collective bargaining. The Commission selects these parties and only the parties involved in the consultation process may enter into collective bargaining on the topic concerned, should the agreement be implemented by a Council decision. This is peculiar. See also S. Smismans, *The European social dialogue between constitutional and labour law*, page 350.

557 R. Blanpain, *Sociale partners en de Europese Unie; taak en legitimatie*, page 285.

558 Report of the Committee on Social Affairs, Employment and the Working Environment, on the application of the Agreement on Social Policy, 20 April 1994, PE 207.928/final, page 9.

The legitimacy of the participation of the social partners involved in the European social dialogue therefore lies in their representativity;[559] they are close to the people and must be considered to represent these people, at least the European employers and employees.[560] The social partners need to prevent that there is a "social democratic deficit" in the European social dialogue.[561] The three criteria applied by the Commission in order to define "management and labour" must be set against this backdrop.

That organisations must be cross-industry or relate to specific sectors or categories is fine (although it is not always easy to define cross-industry).[562] This includes as many parties as possible. However, the subsequent requirement – they need to be organised at European level – excludes a number of parties. In any case, in order to involve as many social partners as possible, with an aim to raise the level of representativity, it is not necessary to only involve *European* organisations.[563] This is particularly true as (representative) national social partners are sometimes excluded from membership of European organisations.[564] Moreover, should an agreement be especially relevant for a number of countries and not throughout the entire European Union (agreements on ports are, for example, in particular relevant for coastal states), the requirement of a European organisation level is out of

559 Although, again, the EC Treaty itself does not (explicitly) demand representativity, as is rightly pointed out by Bercusson. See B. Bercusson, *European Labour Law*, page 558.

560 L. Betten, *The Democratic Deficit of Participatory Democracy in Community Social Policy*, pages 34 and 35. See also European Commission, Directorate-General for Employment and Social Affairs, *Recent developments in the European Sectoral Social Dialogue*, page 5, in which it is stated: "The sectoral organisations listed in the report can all lay claim to their representativeness (…). This, together with their social mandate, gives them the authority to negotiate and, where it is appropriate, to reach agreements".

561 R. Blanpain, *Sociale partners en de Europese Unie; taak en legitimatie*, page 296. See also E. Franssen and A.T.J.M. Jacobs, *The question of representativity in the European social dialogue*, page 1305.

562 The term cross-industry caused problems at the *Institut des Sciences du Travail*, which institute had to conduct the research "on the representativeness of European Social Partner Organisations". See for examples page 3 of their report: Report on the representativeness of European Social Partner Organisations, Part I, September 1999.

563 R. Blanpain, *Sociale partners en de Europese Unie; taak en legitimatie*, page 295.

564 For example, the French trade union *Confédération Générale du Travail* was refused for years from ETUC membership. Reference is made to R. Blanpain, *Sociale partners en de Europese Unie; taak en legitimatie*, page 295. The *Confédération Générale du Travail* joined ETUC only in March 1999. See C. Degryse, *European social dialogue: a mixed picture*, page 7.

place.[565] Such a requirement also does not sit well with the European tradition of pluralism.[566] Of course the Commission does have a legitimate interest to keep the number of participating social partners as low as possible in order to strive towards a highest level of efficiency as possible. However, efficiency and the national members delegate their "representativity" – their power to represent and, depending on the jurisdiction, bind employers and employees - to the European social partners may not be confused.[567] [568]

The second criterion, the "social partners should consist of organisations which are themselves an integral and recognised part of Member State social partner structures and with the capacity to negotiate agreements, and which are representative of all Member States, as far as possible", gives further rise for discussion. The first part of this second criterion is logical. As said, the national members delegate their "representativity" to the European social partners. In order to do so, they should be a recognised part of Member State social partner structures and able to negotiate agreements. Furthermore, they should be able to implement the European agreement reached in the several Member States, which can be done if the members meet the aforementioned requirements. The second part is much more open for discussion. As already stated, the fact that members of the European social partners should be representative makes sense. However, it is still not clear precisely when a European social partner

565 Also Bercusson deems it important to verify representativity in relation to the geographical area the agreement must cover. He states: "Collective agreements among social partners in a group of Member States could also satisfy the requirement of 'sufficient collective representativity' if the geographical scope of the agreement was clearly circumscribed". B. Bercusson, *Democratic Legitimacy and European Labour Law*, page 168.

566 E. Franssen and A.T.J.M. Jacobs, *The question of representativity in the European social dialogue*, page 1309. The enlargement of the European Union has not reduced this tradition. I refer to the report of S. Sciarra, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; Draft General Report*, page 6, in which it is stated: "(…) we can highlight that especially in new Member States emphasis is put on pluralism among collective actors and on the increased number of unions".

567 R. Blanpain, *Sociale partners en de Europese Unie; taak en legitimatie*, page 296.

568 The Commission is keen on combating exclusion in social law. See for example the Communication from the Commission on the Social Agenda, COM (2005) 33, final. Classical labour law often strengthens the position of the "insiders", the people that are already introduced in the social systems, to the detriment of the "outsiders". This should give the Commission sufficient reason to promote plurality, in order to protect the outsiders as much as possible. See also F. Dorssemont, *Green Paper Modernising Labour Law to meet the Challenges of the 21st Century, 'Collectief Arbeidsrecht, waer bestu bleven?'* [*Green Paper Modernising Labour Law to meet the Challenges of the 21st Century, 'Collective Labour Law, where are thou?'*], Arbeid Integraal 2007/1, page 152.

is considered representative. This is an issue that will be discussed separately in the section below. What I do mention already is that the European social partners should, given the second criterion, be representative in "all Member States, *as far as possible*". This again excludes national social partners and limits the representativity of the parties involved.

Closely related to this second criterion, at least at Community level,[569] is the requirement proposed by the European Parliament: the European social partners should have a mandate from their members to represent them in the context of the Community social dialogue. This requirement appears to make sense, given the aforementioned consideration that the national members delegate their "representativity" to the European social partners. Nevertheless, the Commission did not adopt this requirement.[570] In my opinion this is a flaw. After all, European social partners ultimately represent the European people, or at least the European employers and employees. The distance between these ultimate consumers of the European collective agreements and the European social partners is substantial. It is possible, for example, that a national trade union confederation is a member of the ETUC. That national confederation represents national trade unions, which in turn represent the employees (who are member). It must indeed be clear that the European social partners actually serve the interests of the remote consumers, which can be made clear by having proper mandates. Although some scholars state that verifying the mandate violates the autonomy of the social partners and should therefore not take place,[571] I disagree. The mere fact that European social partners represent a great number of representative national members, entitles them to participate in the European social dialogue. This should, therefore, be verifiable.[572]

The third criterion – that the European social partners should have adequate structures to ensure their effective participation in the consultation process – makes sense. There should be a certain level of efficiency in the consultation

569 See the footnotes in chapter 5, section 6.2.2.2.

570 Although the Commission in fact verifies the existence of a proper mandate in case an agreement is implemented by a Council decision. Reference is made to chapter 5, section 6.2.2.2.

571 B. Bercusson, *Democratic Legitimacy and European Labour Law*, page 162.

572 See also J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, page 133.

process, provided, of course, that this efficiency is not confused with democracy.[573]

3.3 Social partners and representativity

As stated in the above section, the legitimacy of the participation of the social partners involved in the European social dialogue lies in their representativity. The three criteria introduced by the Commission to define "management and labour" must single out these representative parties in order to allow them to participate in the European social dialogue. Singling out the representative the social partners, however, is a troublesome task. Franssen and Jacobs rightly described representativity of the European social partners as "one of the thorniest issues of the European social dialogue".[574]

In the context of the European social dialogue, representativity of the European social partners concerns the relation between the social partners and the people of the EU. The European social partners draft agreements that can influence these people's rights and obligations – most of the times, in particular, that of the employers and employees. The European social partners should therefore be considered a trustworthy spokesperson for these people, and, again, most of the times mainly for the European employers and employees.[575]

The Economic and Social Committee rightly stated that representativity in the European social dialogue can be shaped two ways: taking, as a starting point, national representativity criteria when selecting social partners or selecting these as "having regard to the nature of the process and the outcome of the EC social dialogue".[576] In the latter case, according to the Economic and Social Committee, transnational criteria are linked to national social partners, and organisational capacity. After an extensive study of European

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573 In other words: the aim towards efficiency may not entail that otherwise suitable social partners are excluded from the consultation process for mere efficiency reasons, endangering the democratic legitimacy of the European social dialogue. R. Blanpain, *Sociale partners en de Europese Unie; taak en legitimatie*, page 296.

574 E. Franssen and A.T.J.M. Jacobs, *The question of representativity in the European social dialogue*, page 1297.

575 Dorssemont calls this "representativity in the sociological sense". See, including references, F. Dorssemont, *Over de 'representativiteit' van 'sociale partners' in de Europese Sociale Dialoog*, page 143.

576 Opinion of the Economic and Social Committee on the Communication concerning the application of the Agreement on Social Policy presented by the Commission to the Council and to the European Parliament, paragraph 2.1.9.

employers' and workers' organisations, it proved impossible to replicate a single national model as to representativeness at European level.[577] The Commission therefore drafted the aforementioned three transnational criteria that are linked to national social partners.

The difficulty of these criteria when it concerns representativity – are the social partners involved trustworthy spokespersons for the group of people they claim to represent? – is that these criteria are purely formal. They relate to the organisational structure of the European social partners, but do not touch on the topic of whether the agreement concluded by the European social partners adequately addresses the interests of the people the agreement affects and which interests the social partners supposedly represent.[578] Undeniably, the members of the European social partners need, pursuant to the second criterion, to be "an integral and recognised part of Member State social partner structures and with the capacity to negotiate agreements" and need even to be "representative of all Member States, as far as possible", but the criteria for being representative and the consequences of that differ considerably from country to country. These national criteria do not "guarantee" that the European social partners, comprised of a number of these representative national social partners, are representative for the people of the EU. The *Institut des Sciences du Travail*, which conducted the research on the representativness of the European social partners' organisations, was clear about that. It stated that it only examined the "the institutional consequences which arise depending on whether or not the affiliate members of the European organisation are recognised as representative".[579] It continued by stating that representativeness – which was understood as the recognition of the "legitimacy of an organisation of social partners to negotiate collective agreements or to participate in developing social policies" – can be interpreted in a variety of ways, ways which differ in the light of various national traditions in this area.[580] The *Institut des Sciences du Travail* thus only verifies the national representativeness of the different members of the European social partners, which differs from country to country, but does not verify whether as a whole the European organisation is actually representative, *i.e.* is to be considered a trustworthy spokesperson for the group of people whose interests it claims

577 Reference is made to annex 3 of COM (1993), 600 final.

578 M. Schmidt, *Representativity – A Claim Not Satisfied: The Social Partners' role in the EC law-Making Procedure for Social Policy*, The International Journal Of Comparative Labour Law And Industrial Relations, Autumn 1999, page 264.

579 *Institut des Sciences du Travail*, *Report on the representativeness of European Social Partner Organisations, Part I*, page 5.

580 *Institut des Sciences du Travail*, *Report on the representativeness of European Social Partner Organisations, Part I*, page 5.

to represent. That raises the question of whether European social partners recognised by the Commission can be considered truly representative.

The above question was answered in a negative manner in the past by a number of organisations. On the employers' side, UNICE (BUSINESSEUROPE) claims to represent the interests of all private business, including small and medium-sized enterprises, a claim which has been challenged by UEAPME. CEEP represents public enterprises, but it does not represent all public enterprises, such as the civil service.[581] On the employees' side, ETUC represents the majority of trade unions, but other European trade unions whish to be involved in negotiations as well.[582] As already mentioned above, some national organisations wish to be represented at European level as well.

But there is also other, more fundamental, critique on the European social partners' representativity. The fact is that the big umbrella organisations UNICE, CEEP and ETUC are traditionally involved in the cross-industry collective bargaining.[583] However, these parties do not represent *all categories* of employers and employees for several reasons.[584] After all, not all trade unions and employers' organisations are affiliated to these umbrella organisations. Moreover, the decision-making process of these organisations is not always based on unanimity, setting aside a minority view.[585] Furthermore, only a small number of employers and employees are actually organised at national level, a number which seems to be even dropping further among employees.[586] In that respect is should also be noted that not all groups of employees are evenly unionised. Typically, it is the elderly male full-time worker (working in the public sector) who is unionised, leaving underrepresented part-time workers,

581 E. Franssen and A.T.J.M. Jacobs, *The question of representativity in the European social dialogue*, page 1299.

582 Such as the *Confédération Européenne des Syndicats Indépendants* and the *Confédération Européenne des Cadres*. Reference is made to E. Franssen and A.T.J.M. Jacobs, *The question of representativity in the European social dialogue*, page 1299. The latter organisation has since 2000, given the cooperation agreement concluded with ETUC and EUROCADRE, gained influence in the European social dialogue. Reference is made to chapter 2, section 4.2.

583 See chapter 3, section 5.

584 M. Schmidt, *Representativity – A Claim Not Satisfied: The Social Partners' role in the EC law-Making Procedure for Social Policy*, page 265.

585 See chapter 2, section 4.

586 See chapter 13, section 2.2.1.

temporary workers, younger workers and women.[587] It is their interests that the European employees' organisations typically represent, and not so much the interests of the people of the EU as a whole.[588]

Betten particularly emphasises the already mentioned fact that only a limited number of employees and employers are represented by social partners. She poses the rhetorical questions of whether it is not important that "if not all, then at least a majority of workers and employers are represented" and whether it does not go "against the grain of a democratic society, to the principles of which all Member States subscribe, not to respect the majority rule".[589] Betten apparently views representativity of the European social partners as a matter of "representative democracy" (emphasising the counting of numbers of individuals involved; hereafter also to be referred to as *factual* representativity), rather than a matter of "participatory democracy"[590] (emphasising the role of the social partners).[591] [592] I do not subscribe to that point of view: representativity of the social partners should not be placed in a model requiring a majority participation of all individuals concerned. If such a demand would be extrapolated to democratic states, it should be concluded that democratically chosen institutions could not function without being

587 Reference is made to M. Schmidt, *Representativity – A Claim Not Satisfied: The Social Partners' role in the EC law-Making Procedure for Social Policy*, page 265. See also the trade union membership Survey 1993–2003, which states that the average female/male ratio in unions in the 26 European Countries that have been investigated is 41,5% against 58,5%; M. Carley, *Trade union membership 1993–2003*, 21 May 2005, EIRO, page 10. The ratio of female trade union members, however, is moving closer to that of men. For an analysis of the "typical" trade union member, reference is made to J. Visser, *Union membership statistics in 24 countries*, Monthly Labor Review, January 2006, pages 46 and 47.

588 L. Betten, *The Democratic Deficit of Participatory Democracy in Community Social Policy*, page 35.

589 L. Betten, *The Democratic Deficit of Participatory Democracy in Community Social Policy*, page 32.

590 Barnard states the following about the participatory model of democracy: "At the hart of this model lies the idea that decisions are taken as close to the citizens as possible on subject matters of interest and relevance to the citizens." C. Barnard, *EC Employment law*, page 101.

591 For the difference between representative democracy" and "participating democracy" reference is made to F. Dorssemont, *Over de 'representativiteit' van 'sociale partners' in de Europese Sociale Dialoog*, page 147. See also T. Novitz, *International and European Protection of the Right to Strike: A Comparative Study of Standards Set by the International Labour Organization, the Council of Europe and the European Union,* Oxford University Press, 2003, pages 15 – 22.

592 Or is there a form of "associative democracy", because the participation of the people is assured via democratically organised associations? See S. Smismans, *The European social dialogue between constitutional and labour law*, page 348.

chosen by at least 50% of the people who were entitled to vote. It is not unique that in some elections the turnout is lower than 50%.[593] Still, the legitimacy of decision-making of that democratic institution is not challenged.[594] Why should this be radically different when social partners are concerned? [595] Moreover, members of social partners have to contribute time, money and energy for their membership, which is not the case in "normal" democratic elections. The members of the social partners are therefore quite likely to be more involved (at least they sacrificed more) and possibly better informed than voters in normal democratic elections. Consequently, the outcome of a process which is agreed upon after obtaining the consent of a trade union with a density of, for example, 30% among the relevant group of employees could sometimes be considered "better" than the outcome of a process which is agreed upon after a general election within that group, with a turn-out of for example 35%.

Here, it is also useful to keep in mind the European Constitution. Although not ratified, it has clear ideas about the democratic life of the Union. The Union was not only to be founded on the principle of representative democracy, but also on the principle of participatory democracy, in which social partners had an important role to play. Reducing the role of social partners to "representative democracy" would do their position little justice. Although admittedly less explicit, also the Treaty of Lisbon emphasises the importance of the European social partners, while equally stressing the importance of both the principle of representative democracy and the principle of participatory democracy. I refer to chapter 3, section 7.

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593 For the 2004 European Parliament elections the turnout ranged from 90.8% in Belgium to a low of 17.0% in Sweden. The average turnout in the European Community amounted to 45.6%. Reference is made to F. Amtenbrink, *Continuation or Reorientation? What Future for European Integration?*, Boom, The Hague, 2007, page 40.

594 F. Dorssemont, *Over de 'representativiteit' van 'sociale partners' in de Europese Sociale Dialoog*, page 147.

595 The only difference is that governments can easier be held accountable for unpopular policies than social partners, as governments can lose votes in the next election. Still, that does not explain why social partners having a density among the people/companies of over 50% may be considered representative, while social partners with a lower density rate may not, as they both suffer from the same potential accountability problems. See also: T. Novitz, *International and European Protection of the Right to Strike: A Comparative Study of Standards Set by the International Labour Organization, the Council of Europe and the European Union*, page 19.

Notwithstanding these last remarks, the above demonstrates that serious questions can be placed concerning the true representativity of the European social partners. An additional problem constitutes the fact that the Commission never formulated clear and unambiguous material rules on the representativity of the social partners.[596] These rules are therefore not sufficiently clear, transparent and drafted in advance, which is demanded by the ILO in respect to collective bargaining.[597] Although the ILO standards do not (directly) apply to the Community, it makes perfect sense that the European citizens, as possible ultimate consumers of agreements drafted by the European social partners, exactly know which parties may directly participate in the European social dialogue. Equally, the European employers' and employees' organisations, as possible participants in the European social dialogue, are also entitled to know in advance exactly when they may participate in the European social dialogue (and therefore what they should do to meet the relevant standards, if they do not participate yet).

3.4 Lack of direct normative / uniform effect

European collective agreements do not directly affect the individual employers and employees. In any case, prior to binding said individuals, these agreements must either be implemented in each Member State in accordance with that state's and social partners' normal rules and procedures, or must be implemented by a Council decision. Either way, in order to reach binding effects on individuals, third parties have to take appropriate action. In other words, the European agreements have no direct normative effect, but rather a possible indirect effect depending upon third party's cooperation. This implementation process may very well jeopardise the uniformity of the agreement.

Should the European collective labour agreement be implemented in accordance with national procedures, the status of the implemented collective labour agreement will differ from state to state. The implementation methods

596 See, for instance, Bercusson who states: "The Commission's criteria ignore the problems that bedevil the use of 'representativeness' as a criterion. (…) The Commission has effectively opted for administrative decision as the short term solution to the problem of selecting which organisations fall within the scope of labour and management in the Agreement." See B. Bercusson, *European Labour Law*, page 560.

597 J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, page 126 and R. Blanpain, *Sociale partners en de Europese Unie; taak en legitimatie*, page 294.

may very well not be the same. Some countries may use guidelines to implement, other collective labour agreements or tripartite arrangements. But even if every Member State would implement the European collective labour agreement in the same way, for example by a national collective labour agreement, the legal effects would still differ. The legal effects of a collective labour agreement are simple not the same in the various Member States, as will be demonstrated in part II of this thesis. Moreover, during the national implementation procedure the content of the European collective labour agreements may change. The national social partners are under no institutional obligation to "copy-paste" the European agreement upon implementation. They may, for example, add other rights and obligations to the agreement in the implementation process.[598]

Should the European agreement be implemented by a Council decision, history learns that this is normally done by a directive.[599] This directive must subsequently be implemented in the different Member States. Although the legal status of the implemented directive is more or less the same in each Member State – the implementation must be clear and legally certain in each Member State[600] – the content of the European agreement may very well change along the way. The Member State may, as it wishes, add other rights and obligations to the European agreement during the national implementation process. All in all, it is not surprising that Keller stated on the (lack of) uniform effect of implementation of European collective agreements:[601]

> The instruments for implementation are not part of community law but rather remain wholly within the competence – and are hence at the discretion – of

598 As the proof of the pudding is in the eating, if should be remarked that the implementation of the first autonomous framework agreement on telework indeed led to great diversity from country to country, as can be derived from the following quote from S. Weiler, *Diversity in implementation of telework agreement across the EU*, 9 January 2007, to be found on the Eurofound website: "Member organisations of the agreement's signatory parties agreed on instruments and procedures that reflect a huge disparity both in the implementation and in the development of innovative social dialogue practices. In this regard, the European social partners consider that the difficulties met are due to the lack of experience among member organisations in implementing a European framework agreement, the novelty of the issue and the diversity of industrial relations systems in the various Member States." See also F. Franssen, *De Europese sociale dialoog*, page 25.

599 Reference is made to chapter 5, section 6.1.

600 Reference is made to chapter 2 section 3.3.

601 B. Keller, *National industrial relations and the prospects for European collective bargaining – The view from a German standpoint*, page 53.

> national decision-making bodies. Given the lack of any supranational law on collective bargaining and collective agreements, it is impossible to ensure even a reasonable uniform degree of implementation of the substance of European collective agreements (…).

This lack of uniform effect of the European collective labour agreement in each Member State is an important flaw, since uniform applicability leading to the elimination of social competition is "the quintessence" of collective agreements.[602] [603]

3.5 Lack of European social partners' autonomy

As a consequence of the aforementioned lack of direct normative effect of the agreements concluded, and the consequent European social partners' dependability on third parties to implement the agreement, the European social partners have a less evolved autonomy when compared to the social partners' typical situation in Member States.[604] This can be noticed on different levels.

First, the European social partners are never certain whether their agreement will acquire normative effect when entering into such an agreement. Although from the literal wording used in article 139 of the EC treaty it appears that

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602 F. Dorssemont, *Some Reflections on the Origin, Problems and Perspectives of the European Social Dialogue*, page 7. See also E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, page 15.

603 To a certain extent this argument needs to be differentiated. The European agreements should arrange for certain minimum standards. These minimum standards should eliminate downward social competition. The fact that Member States or national social partners add more rights to this minimum standard is in itself not a problem in order to achieve these minimum standards. However, minimum standards can only be achieved if the legal status of the national collective agreement (should the agreement be implemented in accordance with national procedures) is always binding upon all parties involved, which is not the case as will be set out in part II hereof. Moreover, minimum arrangements seem sometimes "lost in translation", as appears from the following quote with regard to the framework agreement on telework: "The lack of translations of the European agreement into different languages should be reviewed as it cannot be the objective that the national colleagues have to start 're-negotiating' the European agreement. In any case, the translation exercise should not be used to downgrade the EU text! The EU text is the minimum!" ETUI-REHS, *Benchmarking Working Europe 2007*, page 118.

604 E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, page 15.

the Community institutions have no choice but to implement the agreement presented to them by the European social partners, in fact they assess the agreement and subsequently decide whether or not to implement. For this process I refer to chapter 5, section 6 hereof. Furthermore, a *right* for the signatories to have the agreement implemented in accordance with the practices specific to the social partners and the Member States seems to be lacking, as is discussed in chapter 5, section 7. This seems to be at odds with full social partners' autonomy.

Second, even when implemented, the implementation procedures can – as mentioned in the previous section – materially change the contents of the agreement, prior to it having normative effect within the Member States. As a consequence, the implementation process may potentially jeopardise the content of the agreement, which in turn may jeopardise the often delicate balance of the agreement and its (international) uniform application. This uncertainty about the final wording of the implemented agreement seems at odds with the social partners' autonomy.

Third, the European social partners lose to a certain extent control over their "product" once it has been implemented. After national implementation, the agreement becomes a national product and is difficult to control from an international perspective. Not only is it difficult to be fully informed of national implementation details,[605] but it may also be difficult to force the national social partners to alter the agreement should that deem necessary to the European social partners. Once an agreement is implemented by a Council decision, the European social partners more or less lose all their control, since the agreement is then "transferred" into Community legislation.[606] This leaves the European social partners empty-handed should a Member State implement the directive in a manner not desired by them.[607]

Although a lot can be said on the European social partners' autonomy and some more will be said further on in this thesis, a final remark in this respect concerns the role of the Commission in the collective bargaining process and its potential infringement in the social partners' autonomy. The brief history of the European social dialogue clearly shows that the trade unions (have) had considerable difficulties entering into meaningful negotiation with the

605 Reference is made to section 4.3.4 hereof.

606 See also F. Dorssemont, *Contractual governance by management and labour in EC labour law*, page 305.

607 A. Lo Faro, *Regulating Social Europe: reality and myth of collective bargaining*, page 120. See also: E. Franssen, *Implementation of European Collective Agreements: Some Troublesome Issues*, page 60.

European employers' organisations. The fact that agreements have been concluded in the past, does not seem to derive from the latter's willingness to freely negotiate, but rather from the pressure put on it by the Commission, who has clearly stated that without an agreement the legislative initiative will return to the Commission which would lead, at least for the employers, to inferior results.[608] It would take legal measures if no collective agreement was to be concluded. Bercusson accurately described this as: "bargaining in the shadow of the law".[609]

This pressure from the Commission could be regarded as an infringement on the autonomy of the European social partners.[610] A more natural response of the European trade unions, or at least a response more befitting an autonomous collective bargaining process, would be for them to start a strike or threaten to start one, should the employers' organisations refuse to enter into negotiation (which brings us back to the first mentioned subject, being the lack of a constitutional right to strike).[611] [612]

4. Some critical remarks concerning agreements implemented autonomously

After these general remarks, let us scrutinise a specific form of implementation, the implementation of agreements "in accordance with the procedures and practices specific to management and labour and the Member States" (article 139.2 of the EC Treaty).

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608 C. Barnard, *EC Employment law*, page 102.

609 B. Bercusson, *Maastricht: a Fundamental Change in European Labour Law*, 1992, Industrial Law Journal, page 185.

610 Or at the minimum it caused the European social partners to enter into agreements of which they did not choose the subject themselves. As Caruso puts it, the risk exists that collective bargaining is turned into an "instrument for the consensual attainment of objectives which have not been selected autonomously but imposed from outside", Caruso, 1997, page 331, as mentioned in A. Lo Faro, *Regulating Social Europe: reality and myth of collective bargaining*, page 133.

611 Schiek argues that autonomy presupposes the absence of public intervention as well as private domination. D. Schiek, *Autonomous Collective Agreements as a Regulatory Device in European Labour Law: How to read Article 139 EC*, page 26. Both elements are lacking on a European level.

612 It is reminded that the European social partners (thus including the employers' organisations) have decided in their Laeken declaration to develop a more autonomous social dialogue. This might bring forth that Commission pressure stimulating collective bargaining may not be necessary anymore in the future. Reference is made to chapter 3, section 5 of this thesis.

There is a lot that can be said on this subject. A basic question is whether the underlying stipulation in the EC Treaty introduced a new right or simply confirmed an already existing entitlement. This is a matter that will be discussed in section 4.1. Another (and for the goal of this thesis relevant) question is whether the first part of article 139.2 of the EC Treaty is of relevance for European collective bargaining. As will also be set out in section 4.2, agreements implemented in this manner have been called "weak" and "inconsequential". Finally, section 4.3 sets out the specific disadvantages concerning the underlying method of implementation.

4.1 Did article 139.2 of the EC-Treaty introduce new rights with regard to the conclusion and national implementation of collective agreements?

There is a discussion among scholars whether article 139.1 in combination with the first part of article 139.2 of the EC Treaty (the European social partners (i) may enter into agreements which subsequently (ii) can[613] be implemented by national mechanisms and practices) added anything to the already existing rights of the European social partners.

Some say this is not the case.[614] They view that, within the Community, all parties enjoy the freedom of negotiation. This freedom also suggests that European social partners may enter into agreements with each other. Moreover, they are allowed to do so on behalf of their members, whom they represent. The European social partners have therefore always been entitled to enter into agreement with each other, also when this leads to obligations on the part of their members (should these members have properly instructed their "agents", the European social partners, to do so).[615] The national social partners, in their turn, already had the right to implement certain agreements, in accordance with their own (national) procedures and practices.

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613 Article 139.2 of the EC Treaty actually stipulates that agreements reached "shall" be implemented. As is set out in chapter 5, section 7.3.2, however, there is (most likely) neither an institutional obligation on the national social partners nor on the Member States to implement the agreement, as a consequence whereof the word "can" describes the situation more accurately.

614 Reference is made, for example, to A. Lo Faro, *Regulating Social Europe: reality and myth of collective bargaining*, page 92, who also refers to other scholars.

615 Clear on this was Hellsten, who stated about the possibility that social partners could conclude European collective agreements: "(…) while the social partners certainly had their competence under private international law without any EC clause". J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, page 32.

A fine example of that "theory", although the case did not relate to the underlying matter, constitutes the opinion of Advocate-General A. Jacobs in the Albany case.[616] He noted that the collective bargaining process is protected by the general principle of freedom of contract. For that reason he concluded that the collective bargaining process is sufficiently protected at European level. From Jacobs' argument Franssen derived a Community right to freedom of collective bargaining.[617] In her view, this freedom already existed through the "freedom of contract" and needed therefore no formal implementation in the EC Treaty.[618] Franssen seems thus to agree with other scholars that article 139.1 and the first part of article 139.2 of the EC Treaty do not constitute a new right. Dorssemont, however, refutes Franssen's opinion.[619] He argues that freedom of contract does not automatically contain freedom of collective bargaining. A different view would do injustice to the own peculiarities of collective bargaining. It would make the distinction between obligatory and normative effects of stipulations very difficult. Agents have no obligations towards their counterparties and merely bind their principal(s), while employees' and employers' organisations do have obligations of their own. This was exactly the reason for many countries (such as the Netherlands, France and Germany) to draft legislation on collective bargaining.

I tend to (partially) agree with Dorssemont's objections. The mere freedom of contract does not automatically constitute the freedom of collective bargaining, provided that the freedom of collective bargaining is deemed to include the (direct) normative effects that collective agreements may have. Freedom of contract alone insufficiently deals with the *normative effect* collective agreements have in many jurisdictions.[620] These objections, however, do not lead to the conclusion that the combination of article 139.1 with the first part of article 139.2 of the EC Treaty introduced a new right. In the end,

616 Case C-67/96, *Albany International BV / Stichting Bedrijfspensioenfonds Textielindustrie*, 21 September 1999.

617 E. Franssen, *Legal aspects of the European Social Dialogue*, page 22. The subject "freedom of collective bargaining" will be dealt with in depth in part II of this thesis.

618 E. Franssen, *Legal aspects of the European Social Dialogue*, page 23.

619 F. Dorssemont, review of E. Franssen's *Legal aspects of the European Social Dialogue*, page 278.

620 In my opinion, collective labour law is an atypical form of contract law because of the normative effect (*i.e.* the direct binding effect between the employer and employee) clauses in a collective agreement have in many jurisdictions. The mere fact that the agent can bind its principal(s) and itself, I do not consider overly odd, in deviation from Dorssemont's opinion. Although an agent's role is to bind its principal, a contract may very well have a mixed content, in which the "agent" not exclusively acts as an agent, but also represents itself in certain specific clauses.

what do these articles really stipulate? No more and no less than (i) European social partners may enter into agreements which (ii) can be implemented nationally. The fact that the European social partners were entitled to enter into agreements was already covered by the freedom of contract (see Jacobs above), as was the fact that European social partners may act as agents for their members (it depends on the rules of private international law exactly which national law covers this agency agreement). The item that separates collective bargaining from "normal" contract law, being the normative effect the agreements may have, does not derive from the EC Treaty, but from the national laws of the Member States, to which article 139.2 of the EC Treaty refers. It is thus not the EC Treaty, but the national laws that arrange the normative effect of the agreement, national laws which were already in place prior to article 139.2 of the EC Treaty. Consequently, article 139.1 in combination with the first part of article 139.2 of the EC Treaty did not introduce anything new and must, as Lyon-Caen puts it, be seen as a merely political statement.[621]

4.2 What is the relevance in Community context of agreements implemented nationally through article 139.2 of the EC-Treaty?

Closely related to the aforementioned is the question whether agreements entered into at European level that are subsequently implemented in accordance with the procedures and practices specific to management and labour and the Member States, have Community relevance. This is debatable.

On the one side, Lo Faro claims that agreements implemented in the manner stated above are "weak" and "inconsequential" with regard to the Community legal order.[622] In essence, he argues that agreements that are to be implemented nationally lack a normative status in the Community. Agreements implemented by a Council decision ("strong" agreements) obviously have such normative status; that clearly follows from the EC Treaty itself. Also Betten and Sciarra view autonomous agreements not relevant within EC Law.[623] On the other side would Deinert obviously not label European collective agreements

621 According to A. Lyon-Caen, the aforementioned provisions concerned "à première vue inutile … demeure avant tout politique". Reference is made to A. Lo Faro, *Regulating Social Europe: reality and myth of collective bargaining*, page 92, footnote 3, in which Lyon-Caen was quoted.

622 A. Lo Faro, *Regulating Social Europe: reality and myth of collective bargaining*, page 91.

623 Their opinions are summarised in: J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, page 140.

implemented in accordance with national systems weak or inconsequential, since, as already mentioned, he takes the opinion that such agreements have normative effect. The same applies to Schiek, who argues that agreements entered into between the European social partners and implemented in accordance with their own procedures and practices would have to be considered Community law. As argued in section 7.3.1 and 7.4 of chapter 5 respectively, their arguments are not convincing. Other authors opt for a more nuanced approach. Bercusson, for example, defends that autonomous European agreements should have "some" binding effect and, consequently, some effect in European law.[624] Jacobs and Ojeda-Aviles, as stated, try to obtain such an effect through a chain of mandates.[625] Although Franssen observed that European collective agreements lack normative effect,[626] she seems to be in favour of the aforementioned chain of mandates theory.[627]

What can be concluded from the above? It must be noted that there is a high level of consensus that European collective agreements lack normative effect, as a consequence whereof these have first to be implemented nationally in order to gain such an effect. Consequently, the agreements have no real impact on the Community itself, but "merely" on the individual Member States. The bargaining of the agreement and its implementation must, after all, occur within the rules of regulations of the national state involved. The enforcement of the agreement – which by then is a national arrangement – is also mainly a national matter; from a European perspective it is difficult and sometimes even impossible to demand specific performance of the European collective agreement.[628] This "national reach" of agreements implemented in accordance with the procedures and practices specific to management and labour and the Member States also appears from the 1993 Communication, in which the Commission states:[629]

> In the event of negotiations resulting in an agreement that the social partners decide to implement via the voluntary route, the terms of this agreement will bind

624 His view is summarised in: J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, page 139.

625 Reference is made chapter 5, section 7.3.2.3.

626 E. Franssen, *Legal aspects of the European Social Dialogue*, page 139.

627 E. Franssen, *Implementation of European Collective Agreements: Some Troublesome Issues*, pages 64 and 65.

628 I refer to sections 4.3.3 and 4.3.4 hereinafter.

629 COM (1993) 600 final, page 28.

their members and will affect only them and only in accordance with the practices and procedures specific to them in their respective Member States.

These considerations bring forth that European collective agreements not implemented by a Council decision, lack real Community relevance and are mainly relevant at national level. After all, the Community is not to be reduced to the sum of all Member States together and has a system of its own.[630] This has to be nuanced to some extent. Obviously, the European agreement reached also binds the organisations that concluded it and thus not only their national members. Moreover, to a certain extent the agreement is relevant for the Community as well. Should the social partners enter into negotiations after being consulted by the Commission in accordance with article 138 of the EC Treaty, this negotiation process will normally suspend the legislative process for in principle a period up to 9 months.[631] Moreover, the Commission will publish and monitor the agreement reached to assess the extent to which the agreement has contributed to the achievement of the Community's objectives. Should the Commission decide that the agreement insufficiently meet these objectives, it will consider, in so far as necessary, to exercise its right of initiative and forward a proposal for a legislative act.[632] Nevertheless, to summarise, agreements implemented in accordance with the procedures and practices specific to management and labour and the Member States have only little Community relevance.

Does the above make European bargaining with the aim of implementing its fruit nationally irrelevant for this thesis? In my opinion, partly it does. At base, these agreements are, if their effect is concerned, national agreements and can be compared to "national" transnational collective labour agreements as referred to in chapter 1, section 2.1. This thesis focuses on "European" transnational collective agreements; agreements that are equally recognised and applied in the jurisdictions of all or some Member States. The focus of this thesis thus lies elsewhere. That is not to say, however, that collective agreements implemented in accordance with national procedures and practices are entirely irrelevant, since they do give useful insights in a more autonomous way of bargaining when compared to collective agreements implemented by

630 Reference is made to the ruling of the European Court of Justice in *Van Gend & Loos vs. the Netherlands*, 5 February 1963, case number 26/62, in which the Court ruled: "(…) the Community constitutes a *new legal order* of international law (…)" (emphasis added by author). This ruling has been confirmed several times.

631 For this time frame reference is made to section 3.1 of chapter 5.

632 COM (2004) 557, page 10. The Commission may also do so at any point in time, including during the implementation period, should it conclude that either management or labour are delaying the pursuit of Community objectives.

a Council decision, autonomy which is desirable, as will be set out in this thesis.

4.3 Disadvantages attached to the underlying system

The underlying implementation system suffers from a number of disadvantages. The following come to mind: (i) there is an unclear binding effect of the agreement reached, (ii) there are insufficient rules with regard to the requirements the European social partners have to meet, (iii) potential difficulties exist with regard to the implementation of the agreement and (iv) difficulties are in place concerning the effects, follow-up and enforcement of the agreement.

4.3.1 No clear binding effect

As set out in chapter 5, agreements that are to be implemented nationally lack a direct normative effect. The binding effects that such agreements do have are rather unclear and complicated.[633] This is clearly an important flaw in the current system.

4.3.2 Insufficient rules with regard to the requirements the social partners have to meet

The EC Treaty is silent about any demands concerning the European social partners. Article 139.1 of the EC Treaty simply puts that "management" and "labour" may enter into agreements. These agreements shall, given article 139.2, first part, be implemented nationally.

As set out in chapter 5, not all parties qualify as management and labour as referred to in article 139 of the EC Treaty. There are certain general criteria an organisation must meet in order to be viewed as management or labour. These organisations must be (i) among those organisations consulted by the Commission and (ii) admitted to the negotiation table by the other social partners involved.[634] The organisations that can be consulted on the basis of article 138 EC Treaty should (i) be cross-industry or relate to specific sectors or categories and be organised at European level, (ii) consist of organisations which are themselves an integral and recognised part of Member State social partner structures and with the capacity to negotiate agreements, and which are representative of all Member States, as far as possible, and (iii) have

633 Chapter 5, section 7.3.

634 Chapter 5, section 3.2.

adequate structures to ensure their effective participation in the consultation process.[635]

The Commission has set further criteria for European social partners who wish to enter into agreements that are subsequently implemented by a Council decision. Among others, these social partners must (a) show that they have had ample mandate from their national members to negotiate and (b) are sufficiently representative.[636] These or other criteria are simply not in place with regard to European social partners who chose to implement their agreement nationally.

It is true that it more or less logically flows from the "core criteria" set for the European social partners – they must consist of organisations which are themselves an integral and recognised part of Member State social partner structures – that European social partners should have sufficient mandate. This furthermore is a logical consequence from the fact that the national social partners must implement the agreement reached – something that would be very difficult to achieve if the European social partners were to conclude agreements without any mandate from their national members. This, however, is not the case when it comes to representativity.

As will be set out in part II of this thesis, a number of Member States require a certain level of representativity of the social partners in order for them to enter into legally binding (national) collective labour agreements. Does the fact that these demands are lacking at European level possibly conflicts with the rules of the countries which have such requirements on national level? According to Franssen, this is not the case. At least, she is not inclined to demand any representativity requirements for European social partners, if the agreement reached is not implemented into Community law.[637] She considers that "very small organisations of workers and employers may also conclude valid collective agreements, because the agreements will only apply to the members of the concluding parties". This statement is not entirely convincing. In many jurisdictions a collective labour agreement must be applied to *all* employees of a company (the collective agreements have *erga omnes* effects), should that company be bound to the collective labour agreement, regardless of whether its employees are member of the contracting trade unions or not. I refer to part II of this thesis. If, within these jurisdictions, the legislator demands certain requirements concerning representativity in order to reach

635 Chapter 5, section 2.2.

636 Chapter 5, section 6.2.

637 E. Franssen, *Legal aspects of the European Social Dialogue*, page 106.

legally binding collective labour agreements, it seems illogical *not* to demand this at European level.[638]

4.3.3 Potential difficulties concerning the implementation

The above paragraph brings us to another difficulty, which concerns the national implementation of European collective agreements. As stated above, a Member State may require the social partners to meet certain (representativity) demands in order to reach a binding national collective labour agreement, or may demand other formalities to be satisfied. As facts are now, nothing will stop European social partners to enter into agreements which should be implemented nationally, without the European social partners being sufficiently representative (from a national Member State's point of view), or having complied with other necessary formalities. This may very well stand in the way of national implementation of the agreement. This is particularly the case, since the Protocol on Social Policy clearly states that Member States are neither under an obligation to work out rules for the transposition of the agreements, nor to amend national legislation in force to facilitate their implementation. The Member States can thus stick to their rules effectively blocking national implementation of European agreements. The problem, simply put, is that the systems and structures of national law has to be put in use to implement collective agreements concluded at European level, while these national systems and structures were never intended to deal with a "new hierarchy of EC-level obligations".[639]

Another problem with regard to implementation is that, according to the general criteria set for European social partners, they must *i.a.* consist of organisations which are part of Member State social partner structures and with the capacity to negotiate agreements, and which are representative of all Member States*, as far as possible* (emphasis added).[640] Consequently, it seems possible for the European social partners to conclude agreements without involving national social partners of one or a few Member States, if their involvement appeared not possible. If the national social partners of one or a few Member States were not involved in the negotiation process leading to an agreement on European level, how can that agreement be implemented in said Member State(s)? There is, in such a case, no contractual obligation on

638 This is for instance the rule in Belgium. Reference is made to chapter 11.

639 C. Barnard, *EC Employment law*, page 90, with reference to Hepple.

640 With regard to the sectoral social dialogue the geographical dimension of the organisations participating in the European (sectoral) social dialogue is even weaker, as they have to be *representative of several Member States*. Reference is made to chapter 5, section 2.2.

the national social partner to implement the agreement. This constitutes a potential problem.

The above two paragraphs deal with the "impossibility" to implement at national level a European agreement. Another issue is that a national member of the European organisation simply refuses to implement the agreement, for example because it voted against the agreement, but was outvoted.[641] Such a member is most likely not under an institutional obligation to implement.[642] It then depends on the European social partner to urge its member to implement the agreement .[643] Another angle of approach is to force the national member on contractual grounds to implement the agreement. This is not an easy route to take. In the end, a decision to force your own member on contractual grounds to implement an agreement is not a decision that will be taken lightly. Moreover, from a legal point of view this step is also not easy and effective. This was rightly put by Hellsten as follows:[644]

> Leaving independent European Agreements subject only to national law and/ or private international law would make their execution liable to excessive legal and technical constraints. There would be an obvious risk of damaging their effectiveness as legal provisions.

4.3.4 The effects, follow-up and enforcement of implemented European collective agreements

The quote above brings us to the issue of *effective* implementation. Once a European agreement is implemented, it should have a "real" impact within the jurisdiction of the Member States. This is not automatically the case. It depends on the implementation method used what the impact of an implemented agreement is. As already mentioned, the implementation methods used with

641 This is not a purely theoretical situation. The autonomous agreement on telework was simply not implemented in all Member States at the moment it should have been implemented. See: S. Weiler, *Diversity in implementation of telework agreement across the EU*.

642 Reference is made to chapter 5, section 7.3.2.2.

643 This was nicely put by Franssen: "At present I see no other option than that the European organisations use their power of persuasion to influence each other and their national affiliates because EU legislation does not provide any solution to these problems." E. Franssen, *Implementation of European Collective Agreements: Some Troublesome Issues*, pages 62.

644 J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, page 9.

regard to the framework agreements on telework differed considerably.[645] But even when the European agreement is implemented by a collective labour agreement, a real impact is not guaranteed. A particular difficulty in that respect is the status of collective agreements in certain jurisdictions. For instance, in the United Kingdom collective labour agreements do not bind by law. Consequently, the content of a European agreement may very well be implemented nationally, but individual parties in some Member States can easily deviate from this collective agreement, while the same parties in other jurisdictions are fully bound to this content. But apart from the status of a collective labour agreement, also subjects like the existence of *erga omnes* effects of the implemented European collective agreement, the possibility to extend it and sanctions on non-compliance of said collective agreement differ greatly from country to country.[646] To summarise, the effects of the implemented European collective agreement may vary considerably per jurisdiction.[647]

Another, related, issue is whether all national members of the European organisations have the required technical capacities to effectively implement a European collective agreement. This is an issue that worries the Commission.[648] According to the Commission, data on the coverage rate of collective agreements in Member States suggests that in several states effective implementation may be problematic.[649] For successful and uniform implementation of a European agreement in each and every Member State, all national affiliates should be properly informed and follow-up mechanisms (monitoring the implementation) should be in place. The existence of both elements has been deemed crucial by the Commission for years now.[650] In particular, the lack of a proper follow-up is in the Commission's view worrisome. According to the Commission, many texts of agreements reached by the European social partners contain "imprecise and vague follow-up

645 Reference is made to section 3.4 above.

646 E. Franssen, *Implementation of European Collective Agreements: Some Troublesome Issues*, pages 62.

647 Blanpain argues that the implementation of European collective labour agreements takes place at "different speeds" due to the differing national implementation procedures. R. Blanpain, *Europese raamovereenkomsten, de toekomst van het Europees Arbeidsrecht*, pages 9 and 10.

648 But also ETUI-REHS referred to the problem of weaknesses in social dialogue (structures) in new Member States. It even noted that some countries did not have the structures to implement the framework agreement on telework. See: ETUI-REHS, *Benchmarking Working Europe 2007*, page 118.

649 COM (2004) 557, page 6.

650 COM (1998) 322, page 15.

provisions".[651] For that reason, the Commission has called upon the European social partners in its 2002 Communication "to strengthen substantially the procedures for on-the-spot monitoring and to prepare regular reports on implementation of agreements signed".[652] In its 2004 Communication, the Commission encouraged the social partners to improve the clarity of their texts and to include detailed follow-up provisions.[653] According to the proposed "drafting checklist for new generation social partner texts" an agreement should, amongst others, contain provisions that (i) indicate the deadline by which the provisions should be implemented, (ii) indicate clearly how the text will be implemented and promoted at national level, including whether or not it should be implemented in a binding fashion in all cases, (iii) indicate clearly through which structures the monitoring/reporting will be undertaken, and the purpose of the reports at different stages, (iv) indicate when and/or at which intervals monitoring/reporting will take place, (v) specify the procedures to be followed for dispute settlement and (vi) indicate the members of the signatory parties at whom the text is directed.[654]

The above makes clear that, to date, no sufficient follow-up/monitoring system is in place. This automatically makes enforcement of European agreements problematic: if it is not established whether agreements are executed, how can they be enforced? If we put this besides the remarks made in the section above on the difficulties surrounding effective implementation, it is clear that enforcement of collective agreements that are to be implemented in accordance with the procedures and practices specific to management and labour and the Member States is difficult.

5. Some critical remarks concerning agreements implemented by a Council decision

As has been argued above, there are a number of disadvantages attached to agreements reached by the European social partners that are subsequently implemented nationally. Perhaps the most important drawback with respect to this thesis is the fact that agreements implemented in such a manner lack transnational effects: their scope is limited to the specific jurisdiction in which they are implemented.

651 COM (2004) 557, page 6.

652 COM (2002) 341, page 19. These reports should outline progress on the content of the implementation of agreements and their coverage.

653 COM (2004) 557, page 7.

654 COM (2004) 557, page 20.

Obviously, this is different with regard to agreements that are implemented by a Council decision, the second implementation method of article 139.2 of the EC Treaty. Once implemented, they acquire "Community status". The fact that these agreements will have to be implemented in the Member States' jurisdiction anyway after their Community implementation, which will normally be the case since all agreements to date have been implemented by means of a directive, does not affect that Community status (although, as mentioned above, it might affect the agreements' content). As previously explained, the implementation of a directive must be clear and legally certain, and can be tested by the Commission and ultimately the European Court of Justice.[655] That is why special attention should be given to agreements implemented by a Council decision.

An important question, and one that is already introduced in section 3.5 above, is whether this implementation method enables the European social partners to fully and freely use their bargaining capacity. At first glance, an implementation system through which the agreement acquires legal standing within the Community seems pretty solid and favourable to the European social partners. A closer look, however, shows that this mechanism significantly limits the European social partners. These limitations can be divided into two categories: (i) (possible) limitations concerning the content of the agreement and (ii) limitations imposed on the agreement by the implementation procedure.

5.1 Limitations concerning the content of the agreement

As set out in chapter 5, section 6.2.1 of this thesis, the EC Treaty itself imposes important limitations on contents to agreements that are to be implemented by a Council decision. The agreements must concern matters covered by article 137 of the EC Treaty, being the fields in which the Community shall support the activities of the Member States. The collective bargaining topics are therefore limited. This is definitely the case, since article 137.5 of the EC Treaty explicitly excludes pay, the right of association, the right to strike and the right to impose lock-outs from the contents of article 137 of the EC Treaty.[656] All these issues can be key issues in a typical national collective agreement.

655 Reference is made to chapter 2, sections 2 and 3 of this thesis.

656 See for this stipulation for example: European Court of Justice, 1 December 2005, C-14/04, *Dellas/Premier Ministre*.

It was, however, not beyond dispute whether the social partners are, in fact, hindered by the limited number of topics of article 137 of the EC Treaty, and more in particular the limitations of the fifth paragraph. A study of Hellsten established that there were two means of shaping the position and consequences of article 137.5 of the EC Treaty.[657] First, there was the constitutional approach. In that approach the Council must block Community legislation in the fields of said article. The rationale behind this position is that matters of article 137.5 of the EC Treaty are simply excluded from, or at least not covered by, article 137 of the EC Treaty, while article 139 of the EC Treaty demands that the content of an agreement concluded by the social partners that is to be implemented by a Council decision is to concern matters covered by article 137. This approach had many supporters.[658] The second approach was based on contractual freedom. The rationale behind this thinking was that the social protocol of articles 136 – 139 of the EC Treaty contains programmes on how legislation is to be enacted, and that the limitations of article 137 of the EC Treaty concern the first programme, being the drafting of legislation on the basis of article 137 of the EC Treaty. The limitations of article 137.5 of the EC Treaty do not concern the other programmes, such as the second programme of implementing Community legislation, being the implementation of a European agreement concluded on the basis of article

657 J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, pages 40 *ff*.

658 The following are mentioned by Hellsten: Blanpain & Engels, Sciarra, Weiss, Treu, Venturini, Degimbe and the Commission. J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, page 40. Also Lo Faro argues that the matters excluded by article 137.5 of the EC Treaty are not to be inserted in agreements concluded by the social partners that are to be implemented by a Council decision; Lo Faro, *regulating Social Europe*, pages 104 and 105. Furthermore, the Legal Service of the Commission affirmed on a question of the European social partners while they were negotiating on a framework agreement on temporary agency in an oral statement that no European framework agreement could explicitly mention the right to strike or regulate its modalities. See S. Clauwaert, *International / transnational primary and secondary collective action, an overview of international, European and national legislation*, 2002, DWP 2002.01.01 (E), page 10.

139 of the EC Treaty. This approach also had its share of supporters.[659] In a joint position, a number of scholars simply stated that it was unclear whether article 137.5 of the EC Treaty limits the scope of agreements concluded at Community level under article 139.[660] Hellsten subscribed to this point of view and stated:[661]

> In sum, Article 137(5) creates some problems of interpretation regarding pay but otherwise, too. These problems cannot be solved by mere reinterpretation but only by amending the Treaty, hence by repealing article 137(5) EC as a whole.

Recently, the Court of Justice clarified the scope of article 137.5 of the EC Treaty in two separate cases.[662] In these cases the Court needed to answer several questions on Directive 1999/70/EC, implementing the framework agreement on fixed-term work,[663] including the questions whether the "employment conditions" as referred to in clause 4 of the framework agreement include length-of-service allowance (*Del Cerro Alonso* case), and whether they include conditions of an employment contract relating to remuneration and pension (*Impact* case).[664] In order to answer these questions, it was relevant to establish whether article 137.5 of the EC Treaty would prevent that framework agreement to deal with allowances, remuneration and pension.

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659 Hellsten states that this line of thinking is at least supported by Bercusson. However, A. Lyon-Caen and Simitis also take the opinion that the social protocol in fact is a programme. J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, pages 40 and 41. Furthermore, Franssen views that the social partners can conclude an agreement and subsequently choose to have it implemented by a Council Decision on matters mentioned in article 137.5 of the EC Treaty. E. Franssen, *Legal Aspects of the European Social Dialogue*, pages 185 and 186.

660 The scholars are: Bercusson, Blanke, Bruun, Jacobs, Ojeda-Aviles and Veneziani. See J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, page 41.

661 J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, page 99.

662 European Court of Justice, 13 September 2007, C-307/05, *Del Cerro Alonso* and European Court of Justice, 15 April 2008, C-268/06, *Impact/Minister*.

663 See Chapter 4, section 5.3.

664 Clause 4.1 reads: "In respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds."

Advocate-General Poiares Maduro clearly stated in his opinion in the *Del Cerro Alonso* case that clause 4 of the framework agreement cannot refer to allowances, due to article 137.5 of the EC Treaty.[665] Advocate-General Kokott arrived at the opposite conclusion relating to remuneration and pension, in the conclusion in the *Impact* case.[666]

The Court of Justice stated in both cases that, since article 137.5 of the EC Treaty derogates from paragraph 1 and 4 of that article, the matters reserved by that paragraph must be interpreted strictly. The Court continued that the exception relating to pay set out in article 137.5 of the EC Treaty is explained by the fact that fixing the level of pay falls within the contractual freedom of the social partners at a national level and within the relevant competence of Member States. For these reasons, it was considered appropriate to exclude determination of the level of wages from harmonisation under articles 136 *ff* of the EC Treaty. Therefore, the exception of article 137.5 must, according to the Court of Justice in the *Impact* case, on the one hand be interpreted as covering measures – such as the equivalence of all or some of the constituent parts of pay and/or the level of pay in the Member States, or the setting of a minimum guaranteed Community wage – which amount to direct interference by Community law in the determination of pay within the Community. However, that exception cannot, on the other hand, be extended to any question involving any sort of link with pay, as that would deprive some areas of article 137.1 of the EC Treaty of much of their substance. Consequently, the derogation in article 137.5 of the EC Treaty does not preclude the interpretation of clause 4 of the framework agreement as imposing on the Member States the obligation to ensure that fixed-term workers are guaranteed the application of the non-discrimination principle in relation to pay.[667]

The above makes clear that questions involving pay may be dealt with at Community level, but that the level of pay falls outside the Community scope, also when it concerns the implementation by a Council decision of an agreement reached by the European social partners in the European social dialogue. Does that mean, as to the cases at hand, that national authorities remain free to set the level of pay differently for permanent and fixed-term employees? The answer to this question is negative, as the Court of Justice

665 Opinion of Advocate-General Poiares Maduro, 10 January 2007, C-307/05, *Del Cerro Alonso*.

666 Opinion of Advocate-General Kokott, 9 January 2008, C-268/06, *Impact/Minister*.

667 The Court also noted that this observation does not contravene its judgement in the aforementioned *Dellas* case (European Court of Justice, 1 December 2005, C-14/04). See in particular paragraphs 38 and 39 of the *Dellas* case and paragraphs 43 – 45 of the *Del Cerro Alonso* case.

made evident. The national authorities remain authorised to set the level of pay, but must nevertheless exercise that authority consistently with Community law – such as clause 4 of the framework agreement – in the areas in which the Community has competence. This has also been ruled by the European Court of Justice in relation with the right to strike.[668]

Given the above, it should be concluded that article 137.5 of the EC Treaty applies to agreements concluded by the social partners and implemented by a Council decision. These agreements may concern issues linked to the matters set out in that paragraph. The agreements may, however, not set out specific rules on levels of pay. It seems to logically follow from the aforementioned cases that these agreements may not harmonise the conditions when or how to exercise the right of association, the right to strike and the right to impose lock-outs too. This poses a limitation on the bargaining freedom of the European social partners, in case they wish to apply their agreement internationally (through a Council decision). In such a case, it should also be acknowledged that the European social partners lack full collective autonomy. This lack of autonomy is disturbing against the background of a remark of Caruso: "The possibility of regulating and determining an autonomous level of transnational bargaining relations necessarily involves the capacity and will of the European social partners to define, *in complete autonomy*, the boundaries of the collective interests that can be protected at that level."[669] It is also disturbing against the backdrop of article 152 of the Treaty on the functioning of the European Union, as introduced by the Treaty of Lisbon, which states that the Union shall respect the European social partners' autonomy.

5.2 Limitations imposed in the implementation procedure

As stated in chapter 5, section 6.2.2, the Commission assesses the agreement presented to it by the European social partners and verifies whether it meets 6 separate conditions, being (i) the representative status of the contracting parties, (ii) their mandate, (iii) the legality of each clause in the collective agreement in relation to Community law, (iv) the provisions regarding small and medium-sized undertakings, (v) a general approval and (vi) the principle of subsidiarity. Some of these conditions further limit the European social

668 See the European Court of Justice, 11 December 2007, C-438/05, *Viking*, paragraph 40 and the European Court of Justice, 18 December 2007, C-341/05, *LavalSvenska Byggnadsarbetareförbundet*, paragraph 87. These cases will be discussed in depth in chapter 8, sections 6.3.1.2 and 6.3.3.

669 Caruso, 1997, page 332, as mentioned in A. Lo Faro, *Regulating Social Europe: reality and myth of collective bargaining*, page 106.

partners' free bargaining process when compared to collective bargaining at national level.

5.2.1 The representative status of the contracting parties

Although all social partners involved in the European social dialogue must be representative, the test is stricter in case agreements are to be implemented by a Council decision. After all, the signatories to the agreement that is to be implemented by a Council decision must be sufficiently representative according to the Court of First Instance. This representativity test is of relevance since the European Parliament does not participate in the procedure leading to the implementation of such agreements, and the principle of democracy on which the Union is founded requires that the participation of the people be otherwise assured, in this instance through the parties representative of management and labour who concluded the agreement. The Court of First Instance ruled that the Commission, the Council and ultimately the European Court should verify whether these signatory parties are sufficiently representative.

Neither the Court of First Instance, nor the Commission formulated "hard and fast rules" as to when social partners can be considered sufficiently representative. This is not only in violation of ILO requirements,[670] but it also limits the autonomy of the social partners. In any case, three institutions (the Commission, the Council and ultimately the European Court) may test the representativity of the social partner and may nullify the result (implementation of the agreement by a Council decision) intended by the signatories. The Commission may, according to Bercusson, even effectively force the participation of certain parties required for the sufficient collective representativity needed to achieve democratic legitimacy.[671]

5.2.2 The mandate of the European Social Partners

The condition that the European social partners must show they have acted on behalf of their members does not likely impose a limitation on their collective bargaining capabilities. "Mandate" is a logical precondition for collective bargaining at European level, as already set out in section 3.2 above.

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670 Although the ILO standards do not directly apply to the Community, the content thereof is still of relevance. See section 3.3 above.

671 B. Bercusson, *Democratic Legitimacy and European Labour Law*, page 160.

5.2.3 The legality of the agreement

The fact that agreements must not contravene Community law in itself does not limit the European social partners free bargaining capacity in a non-justified manner. This condition is a "normal" condition with regard to collective bargaining, as will be pointed out in part II of this thesis. What is odd, however, is that the Commission verifies this aspect and not the European Court of Justice, an institution which is, for obvious reasons, better equipped for such a verification.[672] Because the judgement of a non-judicial institution can block the implementation of a collective agreement, this condition poses a limitation on the European social partners in the context of European collective bargaining.

5.2.4 Small and medium-sized undertakings

Any directive aimed at supporting and complementing the activities of the small and medium-sized undertakings, must avoid imposing administrative, financial and legal constraints in a way which holds back the creation and development of these undertakings (article 137.2 under (b) of the EC Treaty). The European social partners must, therefore, take these undertakings into account, should they wish their agreement be implemented by a Council decision (directive).

Although this condition makes sense from a Community legislative perspective – the small and medium-sized undertakings are generally protected to a large extent within the Community – this condition makes less sense when applied only to the social partners and is, as a matter of fact, nowhere to be found in the laws of the individual Member States that I have researched in part II of this thesis. Moreover, there can be valid reasons for the European social partners to (also) focus on small and medium-sized undertakings and impose obligations on them, given that these undertakings operate in areas of economic activities in which "the most blatant situations of failure to apply labour law standards are found".[673] As a consequence, this condition also puts restraints on the European social partners' freedom to collective bargaining.

672 A. Lo Faro, *Regulating Social Europe: reality and myth of collective bargaining*, page 108.

673 A. Lo Faro, *Regulating Social Europe: reality and myth of collective bargaining*, page 113.

5.2.5 General approval of the agreement

This condition, in which the Commission examines the (political) merits of the agreement, is an obvious limitation of the freedom to collective bargaining of the European social partners. In the end, the collective autonomy puts forward that the social partners are free to determine the working conditions themselves and consequently without "political" intervention on the merits by the Commission or any other Community institution.[674]

5.2.6 The principle of subsidiarity

All agreements implemented by a Council decision must pass the subsidiarity test. Although this test is sensible when it comes to Community legislation, this is less the case in relation to the European social partners seq (if their fruits are not to be considered as substitutes of European legislation). On balance, given the collective autonomy of the European social partners, it should be up to them, and not to the Commission, to decide whether certain measures might be taken at international level or at national level. Consequently, this condition also imposes limitations to the European social partners' autonomy.

5.3 Conclusion

From the above-mentioned, it can be derived that agreements implemented by a Council decision impose important restrictions on the European social partners. These restrictions concern the content of the agreement and the conditions that the agreements must meet in order to be implemented in said manner. In relation to this second restriction, especially the criteria on representativity, small and medium-sized undertakings, the political general approval and subsidiarity limit the social partners in their collective autonomy. These limitations make sense, should the European social dialogue be viewed as a regulatory technique, but not if it is to be considered a proper collective bargaining system.

674 Clear on this is Boonstra, who stated the following: "autonomy implies that the social partners must be allowed to choose an appropriate procedure and that they should not be pressurised or forced to bargain in the shadow of state intervention". K. Boonstra, *Government Responsibility and Bargaining Scope within Article 4 of ILO Convention 98*, page 461.

6. Collective agreements outside the scope of articles 138 – 139 of the EC Treaty

On 24 July 1997, GEOPA/COPA (representing management) and EFA/ETUC (representing labour) entered into the Recommendation Framework Agreement on the Improvement of Paid Employment in Agriculture. Franssen interviewed a spokesperson from both sides of the industry about the legal status of this agreement. According to EFA/ETUC, the agreement did not fall within the scope of articles 138 – 139 of the EC Treaty, while GEOPA/COPA did not *a priori* excluded that possibility.[675] Apparently, the European social partners themselves are of the opinion that they can conclude collective agreements outside the scope of articles 138 – 139 of the EC Treaty. Three questions arise in that respect. First, does it really matter whether an agreement is concluded inside or outside the European social dialogue for parties that qualify as "management and labour", as referred to in the provisions on the European social dialogue? Second, what are the legal consequences of a transnational collective labour agreement concluded outside the scope of the European social dialogue? And, last, do transnational collective labour agreements concluded outside the scope of the European social dialogue offer the same potential advantages as the European transnational collective labour agreement proposed in this thesis?

6.1 Collective agreements concluded inside or outside the European social dialogue

As argued in chapter 5, parties that qualify as "management and labour" can reach an agreement even without being consulted by the Commission. It is therefore hardly surprising that an agreement can be concluded outside the scope of consultation of article 138 of the EC Treaty. This is not as evident with regard to article 139.1 of the EC Treaty. This article says nothing more and nothing less than, may management and labour so desire, they may enter into contractual relations. This is exactly what the above-mentioned organisations did. Given the fact that (i) GEOPA/COPA and EFA/ETUC qualify as "labour" and "management" as referred to in article 139 of the EC Treaty and (ii) they concluded an agreement, they logically acted within the scope of article 139.1 of the EC Treaty. They simple fulfilled that article's criteria. The above-mentioned opinion of GEOPA/COPA and EFA/ETUC that they acted outside the scope of articles 138 – 139 of the EC Treaty

675 E. Franssen, *Legal aspects of the European Social Dialogue*, page 113.

therefore seems incorrect.[676] A more interesting question is whether this is of relevance for them.

6.2 Consequences of a transnational collective labour agreement concluded outside the European social dialogue

There are two obvious disadvantages attached to working outside the scope of articles 138 – 139 of the EC Treaty. First, the organisations working outside the scope of article 138 of the EC Treaty will not be consulted by the Commission. Second, they cannot have their agreements reached implemented by a Council decision. For organisations that qualify as "labour" and "management" as referred to in articles 138 and 139 of the EC Treaty, this can hardly be called a disadvantage. These parties apparently chose not to be consulted and not to implement an agreement reached by a Council decision; they refrain from using certain rights.[677] There are, in my opinion, no real advantages attached to working outside the scope of articles 138 – 139 of the EC Treaty, since these articles do not limit the European social partners in any way (they "merely" give additional entitlements, *i.e.* the right to be consulted and the right to have agreements implemented by a Council decision).

Obviously, organisations that are not considered "labour" and "management" as referred to in articles 138 and 139 of the EC Treaty cannot apply the provisions of the European social dialogue. Nevertheless, organisations that do not meet that qualification but are recognised as social partners or consist of national social partners as members, are still entitled to enter into an agreement that subsequently is implemented in accordance with national law. This entitlement is protected by the European freedom of contract in combination with national law.[678] They are only not entitled to be consulted by the Commission and they lack the right to have their agreement implemented by a Council decision. Apart from that, their position is not very different when compared to management and labour above.

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676 They may have meant that they concluded the agreement outside the scope of the *combination* of articles 138 and 139 of the EC Treaty, since they were not consulted by the Commission. If that was what they meant, the conclusion that they acted outside the combination of these articles is obviously correct.

677 For this reason it is, in my opinion, impossible for these organisations to fall outside the scope of articles 138 - 139 of the EC Treaty. They fall inside that scope, but chose not to use the rights attached thereto.

678 Reference is made to section 4.1 hereof. See also clearly L. Betten, *The Democratic Deficit of Participatory Democracy in Community Social Policy*, pages 29.

6.3 Analysis of transnational collective labour agreements concluded outside the scope of the European social dialogue

An obvious advantage of transnational collective labour agreements concluded outside the scope of the European social dialogue is that multiple parties can potentially participate, as these parties do not have to meet the criteria set for "labour" and "management". As already set out in chapter 4 section 3, multinational companies (that do not qualify as "management") have already entered into transnational collective bargaining. Then again, these transnational collective labour agreements are far from flawless.

The transnational collective labour agreements, as stated in the paragraph above, must be considered "national" transnational collective labour agreements as referred to in chapter 1, section 2.1. They are nothing more and nothing less than agreements governed by national law or laws, having effect in different countries. They have no Community relevance and do not qualify as European transnational collective labour agreements which are the research subject of this thesis.

These national transnational collective agreements furthermore give rise to a number of (partially) additional difficulties. There are no specific rules on subjects like the procedure, the negotiating agents and the binding powers of a transnational collective labour agreement:[679] a transnational collective labour agreement simply has no specific legal status, and certainly no Community status. Its actual (national) status and effects must, in consequence, be determined by national law on a case-by-case scenario, in accordance with the principles of private international law.[680] This may prove troublesome. The status of such "national" transnational collective labour agreement, for example, does not necessarily have to be the same in all the jurisdictions in which it has force. The definition and criteria of a collective labour agreement may very well be different in each jurisdiction, as a result whereof an agreement that qualifies as a collective labour agreement in the country in which it was concluded, may very well not qualify as such in another jurisdiction to which it applies. Its status can, therefore, vary from country to country. But even if the national transnational collective labour agreement would be recognised as such in each jurisdiction it has force, its *effects* would still differ from country to country. For example, some countries adhere to the rule that collective labour

679 E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, report for the European Commission, February 2006, page 27.

680 E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, page 21.

agreements apply to *all* employees (falling within the scope of applicability of the collective labour agreement) employed by the employer that is bound by the collective labour agreement, while other countries prescribe that collective labour agreements only directly apply to such employees who are a member of the trade union(s) that concluded the collective labour agreement concerned.[681] These differences in status and effects of the national transnational collective labour agreement do not improve its legal certainty. Another problem a national transnational collective labour agreement faces regards applicable law. It is difficult to establish which law applies to the national transnational collective labour agreement. That is also the case with regard to the provisions that aim to regulate the employment conditions of individual employees. It is very well possible, if not likely, that the employment conditions of the employees working in the different countries in which the agreement has force are subject to different national laws. Pursuant to article 6.2 of the Rome Convention, the employment agreement is normally governed by the law of the country in which the employee habitually works. Even chosen law can, given article 6.1 of the Rome Convention, in principle not deviate from the mandatory provisions of the law of the country in which the employee habitually works. If the national transnational collective labour agreement is subject to the law of one country, its incorporation into the employment agreement of an employee working in another country may lead to a situation that to one and the same employment agreement two sets of law apply: the law of the country in which the employee is working, and the law of the country applicable to the collective labour agreement. This leads to complicated legal questions and certainly to uncertainty.

In practice, multinational companies concluding (national) transnational collective agreements with sectoral European trade unions try to work around these difficulties by transposing an international framework agreement into a national collective labour agreement submitted to the legislation of the country in which it is to apply.[682] Consequently, the implemented collective labour agreements acquire the status and effects as determined in the country of implementation. The law of that country applies as well. However, as a consequence the original transnational collective labour agreement has little meaning anymore, as the legal effects derive from the implemented national collective labour agreements. These agreements do not have a uniform effect, one of the typical aims of collective labour agreements. Moreover, this

681 Reference is made to chapter 13, section 8.3.

682 E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, page 27. See also chapter 4, section 3 of this thesis.

system can hardly be considered effective. In fact, all flaws accompanying the implementation of agreements "in accordance with the procedures and practices specific to management and labour and the Member States" apply *mutatis mutandis* to this situation. This working around the above-mentioned difficulties is, in sum, a second best option. It would be much more effective to be able to conclude European transnational collective labour agreements, which is the aim of this thesis.

7. Summary

The setting of articles 136 – 139 of the EC Treaty seems to strongly deviate from the more or less standard situation in the Member States concerning collective employment law. It is said that in supranational context legislation supporting collective bargaining has preceded the actual collective bargaining itself. This "reversal of action" seems to suggest that European collective bargaining is radically different to national collective bargaining. This difference could be explained when scrutinising the function of the European social dialogue which is, according to Lo Faro, not so much promoting the European social partners' interests, but "no more than one of providing support for Community regulation and legitimacy". The current institutionalised European Social Dialogue must accordingly be seen as a regulatory technique. This might explain some flaws in the current European system. I have divided these flaws into three categories: flaws relating to the articles 136 – 139 in general, those relating to agreements implemented by national mechanisms and practices, and those relating to agreements implemented by a Council decision.

The general remarks relate to (i) the absence of important constitutional rights (freedom of association, right to collective bargaining and the right to strike), (ii) the participants of the European social dialogue (who are "management and labour", are they representative and do they have full autonomy) and (iii) the lack of direct normative effect of the European agreements reached, which leads to the lack of uniform applicability of the European collective labour agreements.

Regarding implementation of agreements by national mechanisms and practices, it must be concluded that this introduces nothing new. Moreover, it can be argued that this manner of implementation is "weak" and even "inconsequential" as it has very little Community relevance. Partly as a consequence hereof, there are a number of important flaws attached to this implementation method. The following are mentioned above: (i) there is an unclear binding effect of the agreement reached, (ii) there are insufficient rules concerning the requirements that the European social partners have

to meet, (iii) potential difficulties exist with regard to the implementation of the agreement and (iv) difficulties exist concerning the effects, follow-up and enforcement of the agreement.

Obviously, implementation of agreements by a Council decision is something that did not exist prior to its institutional introduction. Although this method of implementation has Community relevance, there are still disadvantages. Basically, these disadvantages can be divided into (i) limitations concerning the content of the agreement and (ii) limitations imposed on the agreement by the implementation procedure. The content of the agreement must be covered by article 137 of the EC Treaty and is subject to the exception of article 137.5 of the EC Treaty, which limits the European social partners' autonomy. Furthermore, the criteria on representativity, small and medium-sized undertakings, the political general approval and subsidiarity limit the social partners in their collective autonomy. The implementation process by a Council decision seems to not really be meant as an instrument to assist the European social partners to enter into collective labour agreements on an autonomous basis, but should rather be considered as a regulatory technique.

To opt for concluding agreements "outside" articles 138-139 of the EC Treaty is not helpful; the distinction between concluding agreements "within" or "outside" the scope of these articles seems artificial for organisations that qualify as "labour" and "management" as referred to in articles 138 and 139 of the EC Treaty. In the end, collective labour agreement concluded by these organisations simply fall within the scope of these articles, which merely gives them additional rights which they are free to use or not. If organisations do not meet said qualification, they can still enter into agreements that are subsequently implemented by themselves or their members in jurisdictions in accordance with the rules of those jurisdictions. These organisations are, however, not entitled to the additional rights set forth in articles 138 and 139 of the EC Treaty. They do face the same difficulties as management and labour face with regard to the European social dialogue, and wich are mentioned above. All flaws accompanying the implementation of agreements "in accordance with the procedures and practices specific to management and labour and the Member States" apply *mutatis mutandis* to this situation. Transnational collective labour agreements concluded "outside" articles 138-139 of the EC Treaty have no Community legal status; they are "national" transnational collective labour agreements. They are agreements governed by national law, having effects in other countries, depending on the applicable law to that agreement *and* the national law of the countries in which they should have an effect. These types of transnational collective labour

agreements outside the scope of the European social dialogue in fact fully lack Community relevance.

CHAPTER 7

POSSIBLE ADVANTAGES OF TRANSNATIONAL COLLECTIVE BARGAINING; TOWARDS A NEW SYSTEM?

1. Introduction

Chapter 6 shows that there are important flaws in today's transnational collective bargaining. If that bargaining occurs within the European social dialogue there are many flaws relating to the articles 136 – 139 of the EC Treaty in general, those relating to agreements implemented by national mechanisms and practices, and those relating to agreements implemented by a Council decision. If transnational collective bargaining occurs outside the European social dialogue many of the same and other flaws arise as well. Furthermore, such transnational collective agreements fully lack Community relevance, as they simply do not exist in Community law. These flaws are undesirable if it is concluded that there are existing and potential advantages attached to transnational collective bargaining, which in fact there are. Some of these advantages have been mentioned in previous chapters, others are yet to be outlined. The advantages can be divided into institutional advantages (section 2) and advantages for the parties involved and their members (section 3). Section 4 sets out the possible disadvantages connected to a new system of transnational collective bargaining. The position of the potential participants of transnational collective bargaining will be discussed in section 5.

Section 6 subsequently attempts to answer both preliminary questions posed: (i) is there a need or demand for transnational collective labour agreements and, if so, (ii) should a new system on transnational collective bargaining be developed? In this section it will also be noted that both the Commission and the European Economic and Social Committee are keen on developing such a new system. Section 7 discusses the report "Transnational Collective Bargaining: Past, Present and Future", which was drafted by a group of experts and discusses among others the possible way to proceed in transnational collective bargaining. This group wishes to establish joint negotiating bodies within which transnational collective labour agreements can be concluded. Section 8 discusses the receipt of said report by the parties concerned, while section 9 evaluates the report. Section 9 sets out that the

proposals outlined in the aforementioned report are too closely related to institutionalised collective bargaining within the European social dialogue. Consequently, it suffers from many of the same flaws as bargaining within the European social dialogue does. It is argued in section 9 that a new system of transnational collective bargaining should not be based on a new form of the European social dialogue but instead on "classical" collective bargaining as in place in the Member States. This thesis will focus on such a form of transnational collective bargaining. In section 10 the question whether there are suitable alternatives for Community legislation on transnational collective bargaining will be addressed. Subsequently, transnational European collective bargaining will be put in its proper perspective in section 11, after which section 12 summarises this chapter.

2. Institutional advantages

On an institutional level, European collective bargaining has a number of advantages, which made it popular with the Community institutions. At least five such advantages can be distinguished. European collective bargaining may: (i) prove useful in case Community institutions are unable to make decisions; (ii) help to overcome regulatory shortcomings; (iii) help to overcome the democratic deficit; (iv) prove to be an important tool for proper European Governance; and (v) be a proper method for horizontal subsidiarity.

2.1 European collective bargaining may prove useful when Community institutions are unable to make decisions

An important goal of the European Community is to abolish barriers between Member States in order to establish a fully unified internal market (reference is made to article 2 of the EC Treaty). The European Community used to thoroughly believe that such harmonisation would be best achieved by directives. This confidence appears clearly from the 1985 White Paper on completing the internal market[683] and the 1987 Single European Act. Scholars refer to this principle as the "harmonisation by directive" or the "integration through law" model. An important and immediately recognised risk endangering this model was the fact that it could lead to over-regulation.[684] The Commission mainly doubted whether it would be possible to achieve the adoption of sufficient directives in order to harmonise Europe, since at that time (1985)

683 COM (1985) 310 final.

684 COM (1985) 310, page 20.

the requirement of unanimity in Council decisions was still in full force.[685] Although nowadays the aforementioned "harmonisation by directive" model is much in decline, the thought that Community institutions are not always able to make all necessary decisions remains vivid. Here, European collective bargaining could play a role. The European social partners may very well be capable of reaching agreements where the Community institutions cannot. This may be considered an advantage of European collective bargaining.

2.2 European collective bargaining may help to overcome regulatory shortcomings

As just mentioned, the "harmonisation by directive" model is in decline, which started around the mid-nineties of the previous century. The Commission noted that implementation and enforcement of directives in the Member States were not always effective. In its 1992 Communication "the operation of the Community internal market", the Commission pledged to monitor "not only the situation as regards the decision-making process but also the transposition and implementation problems in the Member States".[686] The Commission apparently doubted the effectiveness of directives and therefore advocated the principle of "doing less but doing it better".[687] The 1996 Government Progress Report added to this: "the diversity of jurisdictions in which rules must be applied and the lack of a strong executive capacity on the part of the Commission (…) have led it already to develop methods which can better deal with this gap and to some extent this has led to a transformation of the ways in which rules are formulated and implemented".[688] The aforementioned problem relating to implementing and enforcing directives is normally referred to as "regulatory deficiency".

Taking the above into consideration, the Commission searched for other techniques than legislation to harmonise Europe. It turned, for example,

685 A. Lo Faro, *Regulating Social Europe: reality and myth of collective bargaining*, page 8.

686 Communication of the Commission to the Council and Parliament, SEC (92), 2277 final, *The Operation of the Community Internal Market*, page 3.

687 Resolution on the implementation of the legislative programme and other activities in 1995, and the Commission's Work Programme for 1996, OJ C 17, 22 January 1996, page 169, remark 3.

688 Reference is made to the *Governance Progress Report*, CdP (96) 2216, European Commission, Forward Studies Unit, December 1996, as quoted in: Lo Faro, *Regulating Social Europe: reality and myth of collective bargaining*, page 36.

to mutual recognition, regulatory competition and standardisation.[689] This list can be further amplified with collective bargaining: European collective bargaining might help overcome the regulatory deficit within the European social community. In his already oft-mentioned study, Lo Faro argued in a persuasive manner that this is the main function of collective bargaining in the European social dialogue. He states that European collective bargaining "is mainly intended – in the overall context of a general redefinition of Community strategies – as one of the Community's potential remedies to its decision-making bottlenecks and implementation problems in the field of labour law and social policy".[690] Although this should neither be the sole role, nor main reason, for transnational collective bargaining, it is a positive side-effect that constitutes, in my opinion, a valid reason to further support transnational collective bargaining.

2.3 European collective bargaining may help to overcome the "democratic deficit"

It is argued that European legislation, at least to a certain extent, suffers from a democratic deficit. Although an awful lot has been written on "democratic deficit", and several definitions have been introduced, the EU glossary provides for a quite clear and, for the current purpose, useful description of the term:[691]

> The democratic deficit is a concept invoked principally in the argument that the European Union and its various bodies suffer from a lack of democracy and seem inaccessible to the ordinary citizen because their method of operating is so complex. The view is that the Community institutional set-up is dominated

689 A. Lo Faro, *Regulating Social Europe: reality and myth of collective bargaining*, pages 38 *ff*. It should be added that the Commission nowadays especially aims for little regulation. Reference is made to ETUI-REHS, *Benchmarking Working Europe 2007*, pages 128 and 129.

690 A. Lo Faro, *Regulating Social Europe: reality and myth of collective bargaining*, page 52. Smismans argued that the European social dialogue has a modest outcome as an alternative regulatory technique. S. Smismans, *The European Social Dialogue in the Shadow of Hierarchy*, page 170.

691 EU Glossary, www.eu.int/scadplus/glossary/dempcratic_deficit_en.htm. I realise that referring to the EU Glossary on a topic that has received much attention by scholars may be perceived as odd and "little scientific" by some. However, I simply cannot see the point in (over)complicating matters by referring to an overabundance of literature on this topic, while a perfectly suitable definition is given in the EU Glossary, making clear where the problems are. For the readers who are interested in knowing more about the "democratic deficit", I gladly refer to Craig and De Búrca, *EU Law, Text, Cases and Materials*, pages 167 – 173, and the list of literature mentioned by them in footnote 107 on page 167.

by an institution combining legislative and government powers (the Council of the European Union) and an institution that lacks democratic legitimacy (the European Commission).

It is therefore important to investigate alternatives which could give a more democratic foundation to the decision-making process in Europe. Recently, Amtenbrink plead for a greater involvement of the European citizens in order to enhance the democratic level of the European Community. Their involvement would aid the European integration process. He argued that the citizens should be the owners of European policy and decision-making. Today's institutional framework does not suffice in his view.[692] In line with Amtenbrink's plea of a greater involvement of citizens in order to further democracy in Europe, but also in line with the principle of participatory democracy outlined in the European Constitution and the Treaty of Lisbon,[693] the European social partners may play a role in Europe's policy-making, since they are considered representatives of "labour and management" (and therefore ultimately of a large group of European citizens). This is recognised by the Court of First Instance in the UEAPME case.[694] The European Social Partners therefore may, *i.a.* through collective bargaining, contribute to a more democratic European society.[695]

2.4 European collective bargaining may prove to be an important tool for proper European Governance

As set out in chapter 3, section 3.1.2 of this thesis, another problem facing the European Community is European Governance. In the White Paper on "European Governance", the Commission observes that, on the one hand, Europeans want political leaders to find solutions for major problems, while on the other, they increasingly distrust institutions and politics, or are not interested in them.[696] The Commission subsequently assesses the way in which the Union uses the powers given by its citizens and proposes opening up the policy-making process. To reach that goal, the Commission advises the use of a better combination of policy making tools, including the social dialogue. Trade Unions and employers' organisations should also be more involved in

692 F. Amtenbrink, *Continuation or Reorientation? What Future for European Integration?*.

693 See chapter 3, section 7.

694 Consideration 89 of the UEAPME case.

695 A. Lo Faro, *Regulating Social Europe: reality and myth of collective bargaining*, page 145.

696 COM (2001) 428, page 3.

shaping and implementing EU policy.[697] European collective bargaining can thus play a role in proper European Governance.[698]

2.5 European collective bargaining is a proper method for horizontal subsidiarity

As discussed in chapter 2, section 3.1 of this thesis, the concept of horizontal subsidiarity may imply that it is best that the European social partners take appropriate action regarding an international issue, instead of Community institutions. European collective bargaining therefore forms an important tool for the principle of subsidiarity.[699]

2.6 Analysing these institutional advantages

These institutional advantages have led the Commission to actively stimulate collective bargaining in the European social dialogue. This is also the reason that Lo Faro argues that current European collective bargaining seems primarily aimed at providing support to Community regulation and legitimacy.[700] Although collective bargaining in the European social dialogue suffers from multiple flaws that, at least partially, can be traced back to said aim of current European collective bargaining, the above-mentioned advantages are real and existing. These advantages can, at least to a certain extent, still be achieved in a more autonomous system of transnational collective bargaining, which I will propose. These advantages give reason to further develop a European system on transnational collective bargaining.

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697 Reinforcing the dialogue between stakeholders (including social partners) and all regulators at the EU and national levels is one of the three key actions under the EU's "Better Regulation Strategy". Reference is made to ec.europa.eu/governance/better_regulation/index_en.htm. Although dialogue does not equate bargaining, the role of the (European) social partners in better governance at EU level is clearly recognised.

698 Smismans, for one, views transnational collective bargaining as a concept of (European) Governance. S. Smismans, *Transnational private governance in the EU: When social partners bargain beyond borders*, in: A. Nolke and J.C. Graz (eds.), *Transnational Private Governance and its limits,* Routledge, Abingdon, 2007.

699 Sovzak, for example, argued that International Framework Agreements reflect the principle of subsidiarity. See A. Sobczak, *Legal dimensions of international framework agreements in the field of corporate social responsibility*, page 121.

700 See chapter 6, section 2.

3. Advantages for the parties involved and their members

There are not only institutional advantages relating to (European) transnational collective bargaining. The social partners themselves, and ultimately the employers and employees, can benefit from transnational collective bargaining as well. Some of the benefits are of a general nature, whilst others specifically relate to trade unions and their members on the one hand, or employers' organisations and individual employers on the other. Hereunder, a list if advantages that transnational collective bargaining might offer is given, in no particular sequence.

3.1 Europeanisation and internationalisation of markets

The European Single Market was officially completed on 1 January 1993. Amongst others, it guaranteed the freedom of movement of goods, capital, services and labour. The goal of this "one market" was to take away internal frontiers. This has indeed been the case with regard to capital: cross-border cooperation between companies and cross-border mergers and acquisitions are "business as usual" at present. Capital and companies simply do not restrict themselves to national borders. Labour, however, does not seem to have the same international drive.[701] Therefore, an optimal usage of the freedoms granted in the European Community is lacking. Transnational collective agreements could establish the right conditions, making international labour more attractive, and thus making better use of the European labour resources.[702] Ellerkmann, former General Secretary of CEEP, stated in that respect:[703]

> Employee mobility would be an initial case (…). Existing obstacles to mobility should be removed as swiftly as possible – a prospect which both social partners could regard as opportune.

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701 W. E. Lecher and H. W. Platzer, *Global trends and the European context*, in W. E. Lecher and H. W. Platzer, *European Union – European Industrial Relations? Global challenges, national developments and transnational dynamics*, Routledge, London, 1998, page 12. See also the opinion of Advocate General P. Poiares Maduro, 23 May 2007, in case C-438/05, *Viking*, paragraph 70.

702 W. E. Lecher and H. W. Platzer, *Global trends and the European context*, page 12. See also the last footnote of section 2.3 of chapter 16, and the suggestion in chapter 17, section 6.

703 W. Ellerkmann, *The European Centre of Public Enterprises (CEEP)*, in W. E. Lecher and H. W. Platzer, *European Union – European Industrial Relations? Global challenges, national developments and transnational dynamics*, Routledge, London, 1998, page 190.

Ellerkmann expects that the consequences of the Single Market, especially after a growing economic integration, will lead to transnational negotiations.[704] These transnational negotiations must be considered especially key for the trade unions. As capital crosses the borders of the European Single Market easier than labour does, enabling employers to open a branch in another European country, trade unions run the risk of lagging behind.

But this is not the only effect of the Single Market. The Single Market, combined with (i) technical revolutions such as data-processing technologies and telecommunications and (ii) international and even global economical links, also leads to an "unprecedented importance in the competition between sites to attract economic activity".[705] This competition exceeds national borders. As a result of this, the social partners should take into consideration that setting employment conditions is not a purely national exercise. On a macro-regional level, these developments could even lead to the "European Social State" competing with the rest of the world.[706] The European social partners working together, which could also be by concluding transnational collective agreements, could strengthen the competitive position of Europe. To some extent, this is also the role that is given to the European social partners in the light of the Lisbon Strategy.[707]

3.2 Preventing social dumping / maintaining a social Europe

In order to maintain a social Europe, which is pursuant to article 2 of the EC Treaty one of the objectives of the European Community, social dumping must be prevented. Maintaining minimum social standards at European level is a common interest of all European trade unions.[708] The European trade unions should define a European policy hereon, and could very well enter into a transnational agreement on this issue. Preventing social dumping may also appeal to employers and employers' organisations. Employers can

704 W. Ellerkmann, *The European Centre of Public Enterprises (CEEP)*, page 190. The Committee on Employment and Social Affairs also expressed its view to strengthen fundamental transnational trade union rights "in order to fully implement the European single market". See Committee on Employment and Social Affairs, *Report on transnational trade union rights in the European Union*, recital J.

705 W. E. Lecher and H. W. Platzer, *Global trends and the European context*, page 2.

706 W. E. Lecher and H. W. Platzer, *Global trends and the European context*, page 2.

707 Chapter 3, section 3.1.1.

708 D. Buda, *On course for European labour relations? The prospects for the social dialogue in the European Union*, page 35.

have an interest in operating in a European market that sets fair minimum employment conditions. Obviously, this creates a level playing field.[709]

This concept of a social Europe with a level playing field can also be found in directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services ("Posted Workers Directive").[710] The Posted Workers Directive aims to coordinate the laws of the Member States in order to lay down "a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers to perform temporary work in the territory of a Member State where the services are provided".[711] This mandatory protection is partly provided for by national collective labour agreements that are declared generally applicable. Why not offer such minimum protection to cross-border employees in a transnational collective agreement that has equal force in each relevant Member State?[712] This could aid a social Europe.[713] Many authors are of the opinion that a "social Europe" does indeed lie in the hands of European-wide action. A good example of this is Lea, who stated:[714]

> In an integrated European market, with the growth of transnational capital and a convergence of attitudes between most national governments, social protection will increasingly be advanced through action at European level. Indeed, given the pressures generated by the globalisation of the world economy, it is more vital than ever that the European project succeeds.

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709 The importance of a level playing field for employers (in the maritime sector) is stressed by Lillie. Lillie states that a number of transnational employers' organisations were keen on entering into transnational collective agreements in order to level the playing field with low-standard operators. N. Lillie, *The ILO Maritime Labour Convention, 2006: A new paradigm for global labour rights implementation*, in: K. Papadakis, *Cross-Border Social Dialogue and Agreements: An emerging global industrial relations framework?*, International Labour Organisation, Geneva, 2008, page 193.

710 OJ L 18, 21 January 1997, pages 1 – 6.

711 Consideration 13 of the Posted Workers Directive.

712 E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, page 32.

713 Reference is made to A. Ojeda-Avilés, *European Collective Bargaining and Posted Workers – Comments on Directive 96/71/EC*, The International Journal Of Comparative Labour Law And Industrial Relations, Summer 1997, page 130.

714 D. Lea, *European Social Dialogue and Industrial Relations – The view of the TUC*, in W. E. Lecher and H. W. Platzer, *European Union – European Industrial Relations? Global challenges, national developments and transnational dynamics*, Routledge, London, 1998, page 138.

A similar conclusion is drawn in the recent study of the social impact of globalisation in the EU. The study's key message is that the EU as a whole will gain from globalisation, but that the benefits will not be uniformly distributed across individuals and countries. Moreover, the gains of globalisation will not accrue automatically, but will instead depend on successful adaptation and appropriate policy responses. According to the study, the EU needs to implement policies that smooth the adjustment process and offer protection to those who are vulnerable to the changes and uncertainties that globalisation will bring.[715] Given the nature of the actions to be taken, the European social partners seem in my view to be very suitable candidates to address these issues.

Equally De Ly argues, although relating to harmonisation in the EU in general, that equal or similar rules and regulations prevent unfair competition. Participants in the relevant markets, after (partial) harmonisation, do not have to focus on rules and regulations to make their decisions, but instead on other factor to reach an optimum economic allocation and therefore efficiency.[716] Schiek as well views that collective labour law can enhance Europe. She states that labour law regulatory models may develop an adequate regulatory environment for work in a knowledge and information society.[717]

3.3 The introduction of the European Monetary Union

Before the EMU, economic and monetary policies were closely related and exercised at the same constitutional level. Pay setting was, to a relatively large extent, the responsibility of the national social partners.[718] This system ensured balance. In the case of a regional fall of income, economic measures could bring stability, such as providing people with adequate social insurance. If the social partners agreed on salary levels exceeding the levels that could reasonably be supported by the country's economic situation, national currency exchange rates could be used to cushion the effects.

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715 I. Begg, J. Draxler and J. Mortensen, I*s Social Europe Fit for Globalisation? A study of the social impact of globalisation in the European Union,* report for the European Commission, March 2008.

716 F. De Ly, *Europese Gemeenschap en Privaatrecht* [*European Community and Private Law*], W.E.J. Tjeenk Willink, Zwolle, 1993, page 26.

717 D. Schiek, *Autonomous Collective Agreements as a Regulatory Device in European Labour Law: How to read Article 139 EC*, page 27.

718 M. Coen, *The European dimension to collective bargaining post-Maastricht*, in W. E. Lecher and H. W. Platzer, *European Union – European Industrial Relations? Global challenges, national developments and transnational dynamics*, Routledge, London, 1998, page 66.

This all changed with the EMU. Economic policy remained a predominantly national affair, if only for the reason that the European Community lacks sufficient funding to take adequate economical measures in case of a regional fall of income. By contrast, monetary policy shifted from national to European level within the Community. The European Central Bank introduced a stability-oriented policy: major adjustments in the Euro exchange rates are unlikely. The economic and monetary policies are thus not exercised at the same level anymore. Their material link, however, remained. Reference is made to the President of the Central Bank of the Land of North Rhine/Westphalia, Jochimsen, who claimed that "any structure in which only monetary policy, but nothing else, is integrated will be built on sand". He added that it was therefore necessary to coordinate pay, financial and social policies.[719]

Since exchange rates can no longer protect national competitiveness and employment, collective bargaining plays a more important role in promoting economic stability in the Member States than it used to do. Proper collective bargaining is therefore more economically important than ever. To some extent this can even be placed in a legal key. Pursuant to article 99 of the EC Treaty, Member States must regard their economic policies as a matter of common concern. They also have to conduct their economic policies "with a view to attributing to the achievements of the objectives of the Community" (article 98 of the EC Treaty), which *i.a.* are (i) a balanced and sustainable development of economic activities and (ii) a high degree of competitiveness and convergence of economic performance (article 2 of the EC Treaty). The Member States are therefore under the obligation, given the stability-oriented policy of the Central European Bank, to influence, as far as possible, well balanced pay settings.[720]

The above considerations have important consequences for collective bargaining, after all: "once the ability to vary nominal exchange rates has been removed, labour market flexibility, and in particular pay flexibility, is the most important instrument of [economic] adjustment".[721] Pay setting is done in advance, while adapting the economic situation through exchange rates adjustments is something that is done after the consequences of a certain salary level are known. This suggests that the social partners in the EMU must very carefully set the level of pay; posterior reparations in the

719 R. Jochimsen, in Handelsblatt, 4/5, June 1993, as quoted in M. Coen, *The European dimension to collective bargaining post-Maastricht*, page 68.

720 M. Coen, *The European dimension to collective bargaining post-Maastricht*, pages 67 and 68.

721 M. Coen, *The European dimension to collective bargaining post-Maastricht*, page 69.

economic situation are not possible anymore. This also means that the social partners must, more than ever, refrain from disrupting the sustainability of macro-economic relationships, "in order to minimise any pre- or post-pay-increase passing on of costs". This, together with the avoidance of growing distributional conflicts between differently developed regions, is, according to Coen, the reason why European bargaining is necessary. He states:[722]

> It is improbable that Europeanising all spheres of policy will exclude a European harmonisation of collective bargaining – that is, it will involve more than mere traditional and international cooperation but rather a convergence of bargaining forms, claims and the establishment of forms for the European regulation of labour costs, even if regional and sectoral pay differentials must become the central regulative process of the integration in order to even out differences in real productivity.

Coen is not the only one who is convinced that the introduction of the EMU will lead to transnational collective bargaining. Equally certain about that are Lecher and Platzer who state that "EMU will not only place growing pressures on the parties to collective bargaining (…); it will itself generate a need for cross-border collective bargaining because of the need to establish some general framework conditions at EU level."[723] The introduction of the EMU seems therefore a good reason to, in due time,[724] introduce a form of (European) transnational collective bargaining.[725] In any case, it was one of the reasons the Doorn Group got together the first time.[726]

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722 M. Coen, *The European dimension to collective bargaining post-Maastricht*, pages 69 and 70.

723 W. E. Lecher and H. W. Platzer, *Global trends and the European context*, pages 7 and 8.

724 The words "in due time" are of relevance. E. Traversa, for example, stated (emphasis added): "Given these factors (lack of geographical mobility, major disparities in productivity and labour costs and in tax and social security systems), the social partners are still, *and in the foreseeable future will continue to be*, responsible for collective agreements on the level and content of *wages* at *national* level." The author did observe, however, Europeanisation of collective bargaining. E. Traversa, *The consequences of European Monetary Union on Collective bargaining and the National Social Security Systems*, The International Journal Of Comparative Labour Law And Industrial Relations, Spring 2000, page 48.

725 See also D. Buda, who states: "Undoubtedly, coordination or centralisation of policy on collective agreements in a full EMU would be all the more necessary but also considerably more difficult to achieve due to the imbalances involved", in D. Buda, *On course for European labour relations? The prospects for the social dialogue in the European Union*, page 37.

726 Chapter 3, section 2.2.

3.4 Tackling "common" problems at the appropriate level

Certain problems in the European Community are "common" problems, in other words problems that all social partners face. These problems would best be tackled at a transnational or even European level.[727] Some common problems are purely sectoral, such as fair competition in road transport (companies should not be able to charge cheaper rates due to violation of necessary but expensive safety measures) and a minimum level of training for sailors in the maritime sector (preventing price competition due to using ill-trained sailors who might be a safety hazard).[728] Other problems are of a broader, cross-industry nature, such as demographic trends (ageing, declining birth rates and immigration), changes in the labour market (a new balance between family, work and education), health and safety, working times etc.[729] These problems can best be tackled at European level, in order to create a solution that is broadly based.

More in general, transnational or even European level, may prove the most appropriate level to conclude agreements. In any case, article 28 of the Charter of Fundamental Rights of the European Union[730] stipulates that collective bargaining should be carried out on the *appropriate* level.[731] Article 11 of

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727 H.W. Platzer, *Industrial Relations and European Integration*, in W. E. Lecher and H. W. Platzer, *European Union – European Industrial Relations? Global challenges, national developments and transnational dynamics*, Routledge, London, 1998, page 97.

728 It should be noted that maritime organisations are considering entering into a European collective labour agreement on the inland shipping trade. An important reason for this development is that many companies "flag out" to countries with lower social premiums. As a consequence, national trade unions are losing grip in this sector. Reference is made to the article: *Sector-cao binnenvaart op de klippen* [*Sectoral collective labour agreement on the inland shipping trade on the rocks*], as published in the magazine "de SleepBinnenkrant" of the Dutch trade union FNV, December 2005, pages 4 *ff*.

729 See chapter 3, section 3.1.3.

730 OJ C 364, 18 December 2000, page 1.

731 Veneziani states about "appropriate level" as referred to in article 28 of the Charter of Fundamental Rights of the European Union the following: "The principle of the collective autonomy of the social partners means the reference to "appropriate levels" leaves it to the unfettered discretion to the parties to the bargaining process to decide which is the most appropriate level to undertake collective bargaining. This may be European, national territorial, interconfederal, sectoral, national or international group of enterprises or plant level." B. Veneziani, in B. Bercusson (ed.), *European Labour Law and the EU Charter of Fundamental Rights – summary version* - , ETUI, Brussels, 2002, page 57.

the Directive on Equal Treatment Irrespective of Race or Ethic Origins[732] and article 13 of the Directive on Equal Treatment in Employment and Occupation[733] refer to the social partners' ability to conclude anti-discrimination agreements on the *appropriate* level as well. This appropriate level may very well be a transnational or even European level.[734]

3.5 Possible advantages for European multinationals

There are a number of potential advantages for European multinationals with regard to transnational collective agreements, such as:[735]

- creating corporate identity / image;
- tailor-made solutions for problems at company-level;
- international familiar structures;
- equal level of health and safety protection;
- simplifying transnational restructuring processes;
- consistent and equal regime;
- introducing binding European Manuals;
- confidence-building / motivating employees.

This may encourage employers to enter into transnational collective agreements. As set out in chapter 4, section 3, European multinational companies already are, to a certain extent, engaged in transnational collective bargaining, primarily focusing on corporate social responsibility and restructuring.

732 Council Directive 2000/43/EC, OJ L 180, 19 July 2000, page 22.

733 Council Directive 2000/78/EC, OJ L 303, 2 December 2000, page 16.

734 E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, page 32. See also B. Veneziani, who states in relation to article 28 of the of Fundamental Rights of the European Union: "One thing is arguably clear: it must be appropriate to negotiate some matters at European level." B. Veneziani, in B. Bercusson (ed.), *European Labour Law and the EU Charter of Fundamental Rights – summary version* - , page 58.

735 Some of the items mentioned in the list derive from (i) D. Buda, *On course for European labour relations? The prospects for the social dialogue in the European Union*, page 39 and (ii) A. Klak, *European Industrial Relations: an employer's viewpoint*, in W. E. Lecher and H. W. Platzer, *European Union – European Industrial Relations? Global challenges, national developments and transnational dynamics*, Routledge, London, 1998, page 152.

3.6 Taking matters in own hands

An important reason for the European social partners (especially the employers' organisations) to enter into an agreement, and subsequently ask the Commission to arrange implementation of that agreement, is to take matters into their own hands. It is not uncommon for the Commission to warn the European social partners that, if they fail to reach an agreement on a specific subject, the Commission will propose legislation itself. In order to prevent this and to remain in control as to the content of such legislation, the social partners have, on occasions, been eager to conclude agreements themselves. A good example of this is UNICE concluding the Joint Agreement on 31 October 1991, because it (rightly) expected that the Intergovernmental Conference in Maastricht in 1992 would lead to decision-making in the field of social policy by a qualified majority of votes, instead of maintaining the rule of unanimity.[736] If the social partners are able to conclude transnational collective agreements resulting in fewer social problems than there are now, chances are that the social partners are confronted less frequently with proposals from the Commission for legislation on the field of social policy.[737]

3.7 Creating power equilibrium

It is often argued that trade unions are somewhat lacking behind employers and employers' organisations, especially at transnational (European) level. Employers have, as a rule, better resources, can substitute capital for labour and have a greater mobility (capital has, as set out above, a greater mobility than labour).[738] This employers' advantage could be countered by the trade unions through a well-oiled international network.[739] This could also increase trade unions' capacity to pressurise the employers or employers' organisation(s). Creating a transnational counterpower against multinational employers is

736 Reference is made to the first footnote of section 2.3.1 of chapter 3.

737 Reference is made to in D. Buda, *On course for European labour relations? The prospects for the social dialogue in the European Union*, page 32. See also E. Franssen, *Legal aspects of the European Social Dialogue*, page 8.

738 H.W. Platzer, *Industrial Relations and European Integration*, page 95.

739 See also E. Franssen, *Legal aspects of the European Social Dialogue*, page 7.

often regarded as the most important reason for trade unions to engage in transnational collective bargaining.[740]

3.8 Conclusion

All in all, it seems that there are quite a number of advantages attached to concluding transnational (or even European-wide) collective labour agreements.

4. Disadvantages connected to European collective bargaining

A lot can be said in favour of (European) transnational collective bargaining and some is said above. That may not distract us from the counterarguments that certainly can be forwarded as well. These counterarguments can be divided into three categories: (i) fundamental arguments against collective bargaining in general, (ii) fundamental arguments against (European) transnational collective bargaining and (iii) practical arguments against (European) transnational collective bargaining.

4.1 Fundamental arguments against collective bargaining in general

From an economical point of view, scholars have argued that "unions and collective bargaining diminish efficiency and hinder economic development, and in the process undermine the very purpose they aim to achieve: worker protection through high employment levels".[741] According to these scholars, collective bargaining keeps wages artificially high, leading to a diminishing demand for labour and higher costs for goods and services, resulting in less

740 See, for instance, D. Gallin, *International framework agreements: A reassessment*, in: K. Papadakis, *Cross-Border Social Dialogue and Agreements: An emerging global industrial relations framework?*, International Labour Organisation, Geneva, 2008, pages 16 and 25. See also K. Papadakis, *Introduction*, pages 1, 4 and 5. In order to overcome the mismatch in powers between the multinational employers on one hand and of the trade unions on the other, it has been argued that the Commission needs to be actively involved in transnational collective bargaining. See S. Smismans, *The European social dialogue between constitutional and labour law*, pages 356 and 357.

741 M. de Vos, *Collective Labour Agreements and European Competition Law: an Inherent Contradiction?*, page 55, in: M. de Vos (ed.), *A Decade Beyond Maastricht: The European Social Dialogue Revisited*, Kluwer Law International, The Hague, 2003.

consumption, which affects production and its demand for labour. These scholars tend to favour a fully free market.[742]

It is beyond the scope of this thesis – and outside my field of expertise, being a lawyer and not an economist – to deal with this matter. I refer to chapter 1, section 4. For the moment, I simply observe that, within the different Member States of the EU, there is (although different in nature and intensity) an industrial relations' system that includes collective bargaining. Apparently, this system works, or at least is chosen over other systems. It must, given this European-wide practice, be assumed for the sake of this thesis that collective bargaining in general has advantages outweighing its disadvantages. I am strengthened in this view by the 2006 Industrial Relations in Europe report, which shows that cooperation between employers and trade unions plays an increasing role in the European workplace and can help create the right conditions for growth.[743]

Another potential fundamental objection against collective bargaining in general, which problem may even be clearer at transnational level than at national level, is the declining representativity level of the social partners. If (trade union) membership density continues to decline and drops under a critical level upon which the social partners cannot be considered representative anymore for the employers and the employees they are supposed to represent, or if for any other reason the same happens, collective bargaining as we know it will fail, both at national and transnational level. The social partners cannot become separated from the people and the business, as the latter justify the powers of the social partners. In other words: if there are too few social partners' members, these social partners lack legitimation to bind employers and employees.[744] It is therefore imperative, when drafting a system on collective bargaining, to ascertain that there is an important material link between the social partners and the employers and employees they represent (representativity demands). Therefore, representativity will continue to be an

742 M. de Vos, *Collective Labour Agreements and European Competition Law: an Inherent Contradiction?*, page 55.

743 European Commission, *Industrial Relations in Europe 2006*, chapter 8. Reference is also made to the press release of this report of 8 December 2006 (IP/06/1714), which states: "High quality industrial relations make a significant contribution to economic performance, from company-level to the economy as a whole."

744 Bruun rightly argued that a mismatch between union density and coverage "cannot in the long run be a sustainable situation. Such arrangements might lend stability to the system, but the legitimacy of such a system might be vulnerable in a crisis situation". N. Bruun, *The Autonomy of Collective Agreement*, page 11, as can be found on www.juridicum.su.se/stockholmcongress2002/bruun_english.pdf.

important subject in this thesis, including in the proposal for a system on transnational bargaining.

4.2 Fundamental arguments against (European) transnational collective bargaining

To a certain extent some of the above-mentioned arguments are used to challenge European collective bargaining as well. It is argued that European collective bargaining adversely affects competition in Europe, leading to a weakened economy and thus creating fewer jobs. This point of view is clearly set out by Reid, who argued:[745]

> Seeing EC-level collective bargaining which will ultimately lead to common conditions throughout the EC as a goal is a dangerous illusion. It will hamper decision-making, remove competition, introduce rigidities and ultimately destroy jobs. It is the success of the market, or rather our success in competing in it, that has provided the living standards we now have in the EC. That has been achieved because of, not despite, diversity.

In my opinion, this argument is based on a false assumption. The goal of EC-level collective bargaining should not be fully levelling out employment conditions throughout Europe. It should, instead, recognise the differences in Europe and only interfere where needed. It should not be forgotten that ETUC wishes to maintain diversity. Two of ETUC's representatives were very clear on that:[746]

> The aim of European collective bargaining should not be to standardise all employment or social provisions in Europe. The issue is not one of a crude levelling, as is sometimes claimed polemically by the employers, and neither is it a matter of centralising negotiations at European level. And finally, it is not an objective of the ETUC to standardise wages from Palermo to Copenhagen. The aim must be to set about a harmonization of living and working conditions throughout Europe. This will involve more rapid progress for those countries were standards are presently lower, without obstructing social advance in countries with higher

745 P. Reid, *Collective bargaining at European level – A sectoral employer's viewpoint*, in W. E. Lecher and H. W. Platzer, *European Union – European Industrial Relations? Global challenges, national developments and transnational dynamics*, Routledge, London, 1998, page 125.

746 W. Buschak and V. Kallenbach, *The European Trades Union Confederation*, in W. E. Lecher and H. W. Platzer, *European Union – European Industrial Relations? Global challenges, national developments and transnational dynamics*, Routledge, London, 1998, page 175.

standards. This is the only method for achieving a step-by-step narrowing of the gulf between Portugal and Denmark – and between Greece and Portugal.

Although, on occasion, transnational collective bargaining may include the laying of a "minimum foundation" of employment conditions, in order to establish a socially acceptable minimum in countries where that otherwise would be absent, crudely harmonising all employment conditions in the EU is simply not the aim. Therefore, the fundamental argument against European collective bargaining posed above does, in my view, not fly.

4.3 Practical arguments against (European) transnational collective bargaining

There are many practical arguments that can be raised against (European) transnational collective bargaining. Some of these arguments are more convincing than others. Examples of these arguments are:[747]

- differences in the organization, ideology and interests of Europe's national trade unions;
- limits of international solidarity of workers if strikes are needed;
- trade unions weaknesses to establish an autonomous transnational system of industrial relations;
- a lack of interests of employers and employers' organisations;
- the risks and costs of coming to European collective bargaining; and
- differences in the legal systems of the different countries.

Although (some of) these disadvantages are real and not at all easily overcome, they do not fundamentally obstruct (European) transnational collective bargaining. All of these disadvantages are of a practical nature and are therefore potentially temporary. Especially when trade union membership remains on acceptable levels, the practical issues facing transnational collective bargaining can be tackled. Meaningful transnational collective bargaining may even give a boost to trade union membership, which could lead to stronger trade unions and more employees' solidarity when needed. Differences in legal systems in different countries could be resolved by new legislation. Employers and employers' organisations may recognise in time the potential benefits of transnational collective bargaining, or might be forced

747 These disadvantages derive to a large extent from H.W. Platzer, *Industrial Relations and European Integration*, page 86 and J. Rojot, A. Le Flanchec and C. Voynett-Fourboul, *European Collective Bargaining, new Prospects or much Ado about Little*, The International Journal Of Comparative Labour Law And Industrial Relations, Autumn 2001, page 346.

to start bargaining by the trade unions. In other words, the disadvantages can change over time, and possibly could change faster when European legislation enabling real transnational collective bargaining enters into force.

4.4 Conclusion

Given the above, including the assumption on the possible economic hurdles, there are no convincing fundamental arguments against (European) transnational collective bargaining, provided that representativity of the social partners remains within acceptable levels. There are practical arguments against transnational collective bargaining, but these arguments can change in time, possibly faster once European legislation on transnational collective bargaining enters into force.

5. The position of the possible participants on transnational collective bargaining in general

As can be derived from chapter 4, at least some participants in transnational collective bargaining recognise advantages of such a method of bargaining, as they choose to practice it. Apparently, there is a market for transnational collective bargaining. In this respect, Deinert assessed the position of possible participants of (European) transnational collective bargaining in more detail. He found that European employees' organisations, including ETUC,[748] seem to be in favour of a transnational bargaining system. They would not opt to bargain on pay, but rather on topics like the prevention of social dumping, working time, employee representation, and more in general, topics that are relevant in the European social dialogue. European employees' organisations see as problematic their lack of power at European level (in order to engage in collective actions) and the lacking rules on transnational collective bargaining. Deinert concludes that, in summary, European employees' organisations view European collective bargaining as an important tool to solve specific problems and are willing to promote such bargaining.[749] The same level of enthusiasm

748 ETUC reaffirmed its positive stance towards European collective bargaining in December 2005, although it also expressed it concerns on centralising European collective bargaining, including that the right to sign transnational agreements should be confined to trade unions and that European Works Councils are not appropriate bodies for negotiations. See EIRO website, *Key EU industrial relations initiative in prospect*, February 2006.

749 O. Deinert, *Der europäische Kollektivvertrag* [*The European collective labour agreement*], Nomos Verlagsgesellschaft, Baden-Baden, 1999, pages 108 – 118.

on transnational collective bargaining was found by national trade unions.[750] [751]

Things are different when the European employers' organisations are involved. These organisations, including UNICE,[752] seem not interested in developing a system of transnational collective bargaining at all. They either wish to focus on the European social dialogue, or view collective bargaining as a pure national affair. They consider transnational collective bargaining difficult and potentially hazardous. They are afraid that labour would try to bargain on pay, after which it will focus on the most favourable provisions in a transnational collective labour agreement, making that a standard ("cherry picking"). They furthermore consider that the particular points of interests where to bargain on will differ widely between all participants, that the organisational structure of trade unions in particular will make transnational collective bargaining very difficult, that transnational bargaining is insufficiently legitimised and that, within multinational companies, it will prove difficult to apply a transnational collective agreement to all subsidiaries, as some of these subsidiaries are already "taken" by national trade unions. Finally, they point out that rules on transnational collective bargaining are lacking.[753] This position is particularly true when it involves large European employers' organisations. Deinert also assessed another European employers' organisation, national employers' organisations and multinational companies. They showed more interest in the possibility of transnational bargaining. One out of two European employers'

750 O. Deinert, *Der europäische Kollektivvertrag*, page 130, table 1.

751 A cautious positive approach towards a transnational social dialogue can be found at the International Confederation of Free Trade Unions (ICFTU), an organisation that was set up in 1949 and has 241 affiliated organisations (national trade union centres) in 156 countries and territories, with a membership of 155 million. ICFTU maintains close links with the ETUC. ICFTU stresses that the employees must be represented by trade unions and that the transnational social dialogue may not undermine collective bargaining at other levels. On balance, however, ICFTU supports the conclusion of global framework agreements and the international social dialogue at the enterprise and sectoral level. See the final resolution of the International Confederation of Free Trade Unions, *The Social Responsibilities of Business in a Global Economy*, International Confederation of Free Trade Unions Eighteenth World Congress, Miyazaki, 5 – 10 December 2004. The resolution is available at: http://congress.icftu.org/displaydocument.asp?Index =991220321&Language=EN. See also D. Bé, *A report on the European Commission initiative for a European framework for transnational collective bargaining*, pages 233 and 234.

752 UNICE reaffirmed its negative stance towards European collective bargaining in the beginning of 2006. See EIRO website, *Key EU industrial relations initiative in prospect*, February 2006.

753 O. Deinert, *Der europäische Kollektivvertrag*, pages 120 -124.

organisations, three out of thirteen national employers' organisations and all three multinational companies participating in Deinert's research showed such an interest.[754]

Recently, the International Organisation of Employers (IOE) took a stance on international framework agreements.[755] The IOE was created in 1920 and represents the interests of business in the labour and social policy fields at an international level. It consists of 146 national employer organisations from 138 countries from all over the world. The IOE takes a cautious approach when it comes to international framework agreements.[756] It acknowledges the development of such agreements at company level, but it is concerned about a possible mismatch in expectations of companies on the one hand and trade unions on the other. Companies may view concluding transnational agreements as a mere deepening of dialogue, while trade unions may see it as an industrial relations exercise.[757] The IOE is furthermore concerned about the national impact of transnational agreements and considers that the legal status of international framework agreements is unclear.

The situation described above is confirmed by DeGryse in his research on the European social dialogue. He observes that the European employees' organisations are keen on a vivid European social dialogue, while in particular the cross-industry European employers' organisations are not. This is, however, different when it concerns a number of sectoral European employers' organisations. These organisations are showing a growing willingness to actively participate in the (sectoral) European social dialogue.[758]

According to the participants of Deinert's research, the perceived advantages of European bargaining include, in order of importance, the following: prevention of border disputes, tackling common problems, preventing social dumping and improving competitiveness of the European Union. The perceived disadvantages of transnational bargaining, deriving from the same

754 O. Deinert, *Der europäische Kollektivvertrag*, page 130, table 1.

755 International organisation of employers, *International industrial relations*, 20 January 2008, available at: http://www.ioe-emp.org/en/policy-areas/international-industrial-relations/index.html.

756 See also D. Bé, *A report on the European Commission initiative for a European framework for transnational collective bargaining*, pages 231 and 232.

757 A similar view has been forwarded by the Council of European Employers of the Metal, Engineering and Technology-Based Industries (CEEMET), in its position paper of 19 December 2006. This position paper is available at: http://www.wem.org/positiondocs/CEEMET%20position%20-%20December%202006.doc.

758 C. DeGryse, *European social dialogie: a mixed picture*, pages 5, 14 and 17.

sources and in the same sequence, include: influencing the free market by equalising employment conditions, potential disagreements between the social partners, differing national legal systems and the lack of rules on transnational collective labour agreements. Over 50% of all participants consider drafting of rules on transnational collective labour agreements as "inevitable" when transnational collective bargaining is pursued, while another group states that the need for such rules is very probable.[759]

To summarise, on the side of labour there is a very positive stance towards transnational collective bargaining. European and national trade unions seem to be enthusiastic about the concept. On the employers' side there is a much more negative stance, although it varies to a certain extent. A minority of national employers' organisations and all participating multinational companies were, given Deinert's research, positive about transnational collective bargaining. By far most of the participants of Deinert's research noted that, should transnational collective bargaining be promoted, proper rules on transnational collective bargaining will have to be introduced.

6. Answering the preliminary questions

This chapter, combined with the previous chapters, leads to the following observations with regard to the preliminary questions:

6.1 Is there a need or demand for transnational collective agreements?

First, it is noted that since 2000 both the challenges for and the role of the social partners within the EU have changed significantly. The European social partners (i) are to play an important role in the year 2000 Lisbon Strategy, (ii) can contribute to proper European Governance, (iii) may "smooth" the enlargement process of the EU, and (iv) are faced with the "new" challenges globalisation, economic and monetary union, technological change and the transition to a knowledge based economy, changing employment and labour markets, demographic change and new balances between family, work and education. In the light hereof, the cross-industry European social partners announced to reposition their role and decided, among other things, to pursue a more autonomous social dialogue. Said developments apparently

759 O. Deinert, *Der europäische Kollektivvertrag*, pages 125 – 151.

contributed to a demand for collective bargaining at a European level.[760] Second, Europeanisation of collective bargaining (and negotiations) can be observed both at national level and at European level. Transnational collective agreements are already concluded. Especially labour is enthusiastic about transnational collective bargaining while management is not, with the notable exception of some national employers' organisations, possibly a number of sectoral European employers' organisations and more in particular multinational companies. In any event, for some parties, cross-border collective bargaining apparently seems to fulfil a certain need. Third, as set out above, transnational collective bargaining in Europe seems to offer important advantages, outweighing the (potential and real) disadvantages. This should lead to a(n) (increasing) need or demand for transnational collective agreements. All in all, the first preliminary question should be answered with: yes.

6.2 Should a new system on transnational collective bargaining be developed?

The aforementioned answer legitimises answering the question of whether the current system of European social dialogue, as set out in the articles 136 – 139 of the EC Treaty, suffices. This does not seem to be the case. Institutionalised collective bargaining, including its implementation techniques, seems to suffer from a number of flaws. General flaws relate to (i) the absence of important constitutional rights (freedom of association, right to collective bargaining and the right to strike), (ii) the participants of the European social dialogue (who are "management and labour", are they representative and do they have full autonomy) and (iii) the lack of direct normative effect of the European agreements reached, leading to the lack of uniform applicability of the European collective labour agreements. Implementation of agreements by national mechanisms and practices can be viewed "weak" and "inconsequential" as it has little Community relevance. It furthermore suffers from the following flaws: (i) there is an unclear binding effect of the agreement reached, (ii) there are insufficient rules regarding the requirements the European social partners have to meet, (iii) potential difficulties exist with regard to the implementation of the agreement and (iv) difficulties are

760 The cross-industry social partners already concluded a joint analysis on how to deal with key challenges facing European labour markets. The results of this joint analysis will guide and influence future initiatives of the cross-industry European social partners. See ETUC/CES, BUSINESSEUROPE, UEAPME, CEEP, *Key challenges facing European labour markets: a joint analysis of European social partners*, October 2007 and ETUI-REHS, *Benchmarking Working Europe 2007*, page 116.

in place concerning the effects, follow-up and enforcement of the agreement. Although implementation of agreements by a Council decision certainly has Community relevance, it also suffers from a number of flaws. These can be divided into (i) limitations concerning the content of the agreement and (ii) limitations imposed on the agreement by the implementation procedure. The implementation process by a Council decision seems to not really be meant as an instrument to assist the European social partners in entering into collective labour agreements on an autonomous basis, but should rather be considered as a regulatory technique.

To opt for concluding agreements "outside" articles 138-139 of the EC Treaty is not helpful; the distinction between concluding agreements "inside" or "outside" the scope of these articles 139 seems artificial for organisations that qualify as "labour" and "management" as referred to in articles 138 and 139 of the EC Treaty. Collective labour agreements concluded by these organisations simply fall within the scope of these articles, which merely gives them additional rights which they are entitled to use or not. If organisations do not meet that qualification, they can still enter into agreements that are subsequently implemented by themselves or their members in jurisdictions in accordance with the rules of those jurisdictions. These organisations are, however, not entitled to the additional rights set forth in articles 138 and 139 of the EC Treaty. Apart from that, their position is not very different when compared to management and labour above. All flaws accompanying the implementation of agreements "in accordance with the procedures and practices specific to management and labour and the Member States" apply *mutatis mutandis* to this situation. Transnational collective labour agreements concluded between multinational companies and trade unions have no specific legal status; they simply do not exist in international law. They are agreements governed by national law, having effects in other countries, depending on the applicable law to that agreement *and* the national law of the countries in which they should have an effect. Transnational collective labour agreements outside the scope of the European social dialogue in fact lack Community relevance.

The above leads to the conclusion that a new system enabling genuine transnational collective bargaining is necessary, when such transnational bargaining indeed is pursued. This also appeared from the responses from the possible participants of transnational collective bargaining set out in section

5 above, but is equally recognised in the legal literature,[761] and nicely put by Blanpain, who criticises the lack of proper principles on which (European) transnational collective bargaining could be based: "There is no doubt that there are insufficient European general principles of law to deal satisfactorily with the legal problems that accompany European collective agreements."[762] Consequently, the second preliminary question should be answered with: yes.

6.3 Towards a European system of transnational collective bargaining

The conclusion that a new system enabling transnational collective bargaining should be developed is shared by the Commission. In its 2002 and its 2005 Communications it stated respectively:

> Looking ahead and in the medium term, the development of the European social dialogue raises the question of **European collective agreements** as sources of law. The discussions on the forthcoming reform of the Treaty should take this into consideration. [763]

> Providing an optional framework for transnational collective bargaining at either enterprise level or sectoral level could support companies and sectors to handle challenges dealing with issues such as work organisation, employment, working conditions, training. [764]

But it is not only the Commission that is keen on further developing transnational bargaining. This idea is also positively received by the European Economic and Social Committee. The Committee "supports the objective set out by the Commission of promoting the social dialogue at enterprise and

761 See for example: M. Blank, *Collective Bargaining in the European Union – The standpoint of IG Metall*, in W. E. Lecher and H. W. Platzer, *European Union – European Industrial Relations? Global challenges, national developments and transnational dynamics*, Routledge, London, 1998, pages 166 – 167; W. E. Lecher and H. W. Platzer, *Global trends and the European context*, pages 7 and 8; F. Franssen, *De Europese sociale dialoog*, page 19; and A. Sobczak, *Legal dimensions of international framework agreements in the field of corporate social responsibility*, in: K. Papadakis, *Cross-Border Social Dialogue and Agreements: An emerging global industrial relations framework?*, International Labour Organisation, Geneva, 2008, pages 127 and 128.

762 R. Blanpain, *European Labour law*, page 572.

763 Communication "The European social dialogue, a force for innovation and change", COM (2002) 341, page 19.

764 Communication from the Commission on the Social Agenda, COM (2005) 33, page 8.

sectoral level, whilst taking greater account than has hitherto been the case of the fact that enterprises operate on a cross-frontier basis, with the result that voluntary agreements accordingly assume a cross-border importance". The Committee also urges the Commission to discuss its proposed framework provisions with the European social partners.[765] As a consequence of these developments, a group of experts led by Ales won a tender to draft a report on, amongst other things, the future of transnational collective bargaining. This report, "Transnational Collective Bargaining: Past, Present and Future" ("the Report"), was completed in February 2006.

7. The report "Transnational Collective Bargaining: Past, Present and Future"

Drafting the Report was a far from easy task. It had to try to stay away from difficult questions relating to private international law, in order to design a workable system. But more importantly, the Report had to reconcile the interests of many parties, including the parties currently involved in the European social dialogue and the European Works Council. That in itself was a tremendous challenge. The Report is divided in two parts. The first part appraises the existing transnational tools in Europe; the second part defines the reasons and means to develop an optional framework for transnational collective bargaining at EU level.

7.1 The first part of the Report

In the first part, the authors of the Report start to focus on the successes of the Sectoral Social Dialogue (SSD) Committees. They attribute these successes to (i) the active presence of the EU institutions, (ii) the dialogue's further development on a voluntary basis and (iii) the establishment of a structured and representative bipartite body. However, they also observe that the effects of agreements concluded within the SSD Committees (in the context of the European sectoral social dialogue) depend either on the initiative of European institutions or on social partners' action at national level. According to the authors, these conditions can hinder the further development of the European sectoral social dialogue in the view of: (i) assuming an autonomous relevance from national collective bargaining or EU institutions, (ii) guaranteeing a direct and homogeneous impact of agreements on working conditions, and (iii) introducing in SSD Committees bargaining agendas on hard topics. This

765 Opinion of the European Economic and Social Committee on the Communication from the Commission on the Social Agenda COM (2005) 33 final, SOC/200, 13 July 2005, paragraph 4.3.2.

is not advantageous, especially since the social partners themselves seem keen on concluding agreements with transnational effects, as they have requested the Commission on occasion to propose to the Council to implement these agreements by a Council decision.[766]

Subsequently, the authors focus on company-level bargaining. They discuss the European Company and the European Works Council. They observe that the directives on these bodies may be an inspiring model for transnational collective bargaining. Strong points of these directives are: (i) the definition of a transnational dimension of collective negotiation leading to the establishment of a transnational contractual relation between the company and the Special Negotiating Body, (ii) the conclusion of an agreement which has a transnational dimension and whose scope of application goes beyond the signatory parties, and (iii) the establishment of transnational representative bodies on the side of the employees. Weak points, however, are that: (i) the negotiation process and the agreement itself is limited to the establishment of an employees' representative body and (ii) the composition of the European Works Council is likely to produce consequences on (a) the legitimacy to go beyond information and consultation and to go to negotiation with the company and (b) the relation between the European Works Council and the trade unions.[767] The authors furthermore discuss framework agreements concluded between companies on the one hand and European Works Councils, international trade unions and/or national trade unions on the other. They observe that experience of transnational collective negotiations at company level show a need for a general legal framework in order to clarify: (i) the procedure, (ii) negotiating agents, and (iii) conditions for the binding effect of concluded agreements.[768] Transnational collective bargaining could, according to the authors of the Report, be very useful with regard to transnational restructurings.[769] Finally, EC directives may promote the use of transnational collective bargaining, principally with regard to restructuring, working time, equal treatment and information and consultation.[770]

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766 E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, pages 8 – 15.

767 E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, pages 16 – 20.

768 E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, pages 21 – 27.

769 E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, pages 28 – 30.

770 E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, pages 31 and 32.

7.2 The second part of the Report

The second part of the Report begins with specifying the reasons for engaging in transnational collective bargaining. The authors state three *general* reasons. First, there is a lack of a specific and comprehensive legal framework with regard to transnational collective bargaining as far as (i) the procedure, (ii) the negotiating agents, and (iii) the conditions for the binding effect of concluded agreements. This lacuna is likely to hamper further developments of the transnational dimension in the view of: (a) the autonomous role of the social partners and (b) the direct and homogeneous impact of agreements signed at transnational level which may also stimulate the parties to introduce more normative topics in the transnational bargaining agenda. Second, the transnational level may likely be the most appropriate level for collective bargaining. Third, transnational collective bargaining may prevent competition on labour standards (social dumping).[771] Subsequently, the authors discuss *specific* reasons for engaging in transnational collective bargaining. Basically, these specific reasons address the weaknesses of current, existing tools concerning transnational collective bargaining. First, there is a lack of rules concerning the legal status of a transnational collective agreement; such an agreement simply does not exist in international law. Furthermore, the international sources on which transnational collective bargaining is sometimes based are aimed at developing information and consultation rights through procedures or ad hoc bodies (SSD Committees and European Works Councils) rather than on transnational collective bargaining. Three, there is a variety of negotiating agents which all intend to play their role in transnational collective bargaining (SSD Committees, European Works Councils, European social partners and multinational companies). European social partners lack the disposal of legally binding and thus effective instruments, while European Works Councils lack the formal legitimacy to engage in (transnational) collective bargaining. Moreover, given the multitude of potential transnational collective bargaining agents, there is an unclear relationship among levels of decision making which will lead to overlapping agreements, and potentially even to competition or conflict. Five, the existing transnational tools have not established a legally binding system of transnational regulation (which could be repaired by an optional legal framework establishing a transnational collective bargaining system). And last, transnational collective bargaining cannot rely on self-regulation, as all social partners involved need either EU

771 E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, pages 33 and 34.

institution intervention or national transposition in order to create a direct binding effect of their collective agreement.[772]

7.3 The proposals on a legal framework on transnational collective bargaining

The authors of the Report propose to create joint negotiating bodies within which transnational collective labour agreements can be concluded. The agreements themselves would not have a legally binding effect, but acquire such an effect through implementation by managerial decision adopted by all national companies in the relevant sector. The system should be set out in a directive providing for an optional framework for transnational collective bargaining on the basis of article 94 of the EC Treaty. The authors state that transnational collective bargaining must be complementary to national collective bargaining and that the bargaining agents must be clearly mentioned in the directive.

At sectoral-level, the initiative to set up a joint negotiating body activating transnational collective bargaining can be taken *jointly* by the European social partners that are considered representative in terms of the European social dialogue and that are representing both sides of the industry, either or not on the request of (i) national organisations, (ii) a European Works Council (or representative body in the case of a European Company) and the management of a multinational company on subjects submitted to information and consultation, or (iii) a European Works Council for the insertion in the bargaining agenda of subjects submitted to information and consultation. The European (sectoral and cross-industry) social partners must negotiate on the framework agreement for the constitution of a joint negotiating body at sectoral level, composed of said social partners. The agreement must be drafted in writing and must at least define the functioning of the body and its decision making procedure. The joint negotiating body should precisely define the bargaining agents and the bargaining procedures. In case the initiative to set up a joint negotiating body at sectoral-level derived from the European Works Council with or without the management of a multinational company, the body may integrate a role for a delegation of the European Works Council or the management in the joint negotiating body's procedures. Once established, transnational sectoral collective agreements may be concluded within the joint negotiating body at sectoral-level.

772 E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, pages 34 – 36.

At company-level, the initiative to set up a joint negotiating body activating transnational collective bargaining can be taken *unilaterally* by the European employees' organisations on the request of (i) a European Works Council (or representative body in the case of a European Company) and the management of a multinational company on subjects submitted to information and consultation, or (ii) the management of the multinational company or a group of such companies. The European (sectoral and cross-industry) employees organisations must negotiate with the management of the multinational company involved on the framework agreement for the constitution of a joint negotiating body at company-level. This body is composed of (i) said employees organisations, said management and the European Works Council in a mere consultative role in the case the European Works Council was involved in the request of setting up the body, or of (ii) said employees organisations and said management without the European Works Council in case the European Works Council was not involved in the request of setting up the body. The agreement must be drafted in writing and must at least define the functioning of the body and its decision making procedure. The joint negotiating body should precisely define the bargaining agents and the bargaining procedures. Once established, transnational company collective agreements may be concluded within the joint negotiating body at company-level.

At both levels, the procedures of the joint negotiating bodies must make clear how the transnational collective agreements can be transposed into "as many managerial decisions (binding according to the national laws or practices) as the companies of the sector adhering to employers' Sectoral or Multi-sectoral Organisations represented within the joint negotiating bodies at sectoral-level or as the companies of the group represented within the joint negotiating bodies at company-level".[773] These procedures must also provide for a specific bipartite control system. Within the system of transnational collective bargaining a voluntary and bipartite transnational collective disputes resolution system (on rights) must be in place and provisions on adequate enforcement procedures in the case of non-compliance. All collective agreements must be concluded in writing. A copy of each collective agreement should be available to the parties that can activate the optional framework. For that purpose, copies of the agreements must be transmitted to the Commission which, in turn, has to publish these on a designated website.[774]

773 E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, page 40.

774 E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, pages 37 – 41.

8. Receipt of the Report by BUSINESSEUROPE and ETUC

The Report is received quite differently by BUSINESSEUROPE on the one hand and ETUC on the other.[775] BUSINESSEUROPE formulated 6 reasons as to why the proposals outlined in the Report should not be adopted. First, it sees no need for an optional framework for transnational collective bargaining, as the European social dialogue already permits transnational collective bargaining. In connection, BUSINESSEUROPE denies the existence of problems when implementing transnational texts, as the parties involved can rely on national procedures and rules for implementation. Second, it states that the current transnational social dialogue taking place in multinational enterprises does not constitute genuine bargaining and that the results reached are really no agreements at all. Furthermore, BUSINESSEUROPE argues that the European level is not the appropriate level to tackle common problems, as these problems are global rather than European. Besides, the EC Treaty would not provide for a legal basis to base an optional framework for transnational collective bargaining on. Fourth, according to BUSINESSEUROPE, introducing an optional framework on transnational collective bargaining would hinder the bargaining process, as the absence of regulations provides the parties involved with the room needed to develop this process. That room should not be restricted. Fifth, BUSINESSEUROPE fears that the introduction of a framework agreement for transnational collective bargaining will interfere with national industrial relations. Last, Community priority should in BUSINESSEUROPE's view rather be focussed on implementing social and employment policies than on debating a new framework that is not needed.[776]

These arguments are in my opinion not overly convincing, and to some extent even inconsistent: on the one hand BUSINESSEUROPE denies the existence of transnational bargaining, while on the other it argues that the introduction of a framework agreement for transnational collective bargaining would hinder the further development of such bargaining.[777] Both the Report and the recent ILO research establish a clear increase in transnational agreements

775 This section is based on the article of D. Bé, *A report on the European Commission initiative for a European framework for transnational collective bargaining*, pages 221 – 235.

776 A similar negative response on the Report can be found in the *Position on discussions on an optional European framework for transnational collective bargaining*, as published by the German Bundesvereinigung der Deutschen Arbeitgebersverbände.

777 D. Bé, *A report on the European Commission initiative for a European framework for transnational collective bargaining*, page 231.

concluded between multinational enterprises and (transnational) trade unions as of about the year 2000. Consequently, some kind of transnational collective bargaining apparently exists.[778] Although it is true that the agreements reached in this process are not quite like national collective labour agreements, they are nonetheless considered relevant for the companies and the employees by the parties involved, and undeniably the result of bargaining or negotiating leading to an agreement. Furthermore, relying on national laws for implementation, as suggested by BUSINESSEUROPE, complicates matters severely, as is substantiated in the preceding part of this thesis. That makes the arguments one, two and six raised by BUSINESSEUROPE little convincing. That the introduction of a framework agreement for transnational collective bargaining will hinder the further development of transnational bargaining obviously depends on the content of that framework (it should give ample room to the parties involved) and is, apart from that, highly debatable. In fact, it has been argued that the *absence* of a framework hinders the development of transnational collective bargaining.[779] BUSINESSEUROPE's fourth argument is therefore not overly strong. The same goes for the third argument. Although it may be true that the common problems facing the social partners are global rather than European in nature, but why not start in Europe to find a solution?[780] With regard to the discussion on an appropriate European legal basis for a framework agreement for transnational collective bargaining, I refer to chapter 14, section 2. The fifth argument of BUSINESSEUROPE against the proposals in the Report – transnational collective bargaining should not interfere with national industrial relations – is an argument that should be taken seriously, although BUSINESSEUROPE fails to substantiate why there would be any of such unallowable interference when the proposals

778 Chapter 4, section 3.

779 Gallin, for instance, stated: "International collective bargaining is only different in so far as there is no international framework, such as exists in most countries at national level, to provide a guaranteed legal status to any labour/management agreement reached at international level. Since such agreements are therefore entirely voluntary, they depend even more on the balance of power between the contracting parties at the time they are concluded. This is why there are strong and weak IFAs [international framework agreements; author], *and this is also why there are so few of them*" (emphasis added by author). D. Gallin, *International framework agreements: A reassessment*, page 26.

780 See Sobczak, who argues: "To guarantee greater legal certainty than at present, a legal framework for transnational collective bargaining is necessary. Ideally, it should be adopted at international level, but European-wide may constitute a first step and this seems more attainable in the medium term." A. Sobczak, *Legal dimensions of international framework agreements in the field of corporate social responsibility*, page 128.

in the Report were to be implemented. I, for one, do not see a real reason why such interference is to be expected.

ETUC supports the proposal for a framework on transnational collective bargaining. It should, according to ETUC, complement the existing framework for European social dialogue at inter-professional and sectoral level. ETUC views the framework on transnational collective bargaining as an initiative that meets an "unquestionable need".[781] ETUC did have a number of technical comments on the proposals set out in the Report, such as on the binding character of the legal framework, the possible sanctions and means of recourse and actions intended to deal with potential conflicts of interests during bargaining.[782]

Given the mixed responses on the proposal for a framework on transnational collective bargaining, it is unlikely that the Commission proceeds at this point in time with the proposal. In is expected that the Commission takes stock of the situation, and indicates further steps in a communication.[783]

9. Evaluation of the Report and the way to proceed

In my view, the Report is very useful and gives a valuable analysis on transnational collective bargaining. As already follows from this and the previous chapters of this thesis, I agree with the analysis in the Report when it comes to transnational collective bargaining, as set out in sections 7.1 and 7.2 above. Many of the findings in the Report have already been mentioned in this thesis. I therefore subscribe to the point of view that a new system on transnational collective bargaining should be pursued. I also agree that current tools are insufficient when it comes to developing proper transnational collective bargaining and that a new system should be introduced by the European legislator. The arguments of the authors forwarded on that subject are convincing. I do, however, have doubts on the proposals on a legal framework on transnational collective bargaining forwarded in the Report. I would not favour a system of transnational bargaining that – like the provisions on the European social dialogue – provides for an institutionalised collective

781 European Trade Union Confederation, *The coordination of collective bargaining 2007*, resolution adopted in the meeting on 7 and 8 December 2006, paragraph 5.1. The document is available at: http://www.etuc.org/a/3170.

782 D. Bé, *A report on the European Commission initiative for a European framework for transnational collective bargaining*, pages 232 and 233.

783 D. Bé, *A report on the European Commission initiative for a European framework for transnational collective bargaining*, page 234.

bargaining system, not based on national industrial relations' traditions of the Member States.

In my opinion, the proposals "copy" many of the flaws of institutionalised collective bargaining into the new system of bargaining in joint negotiating bodies. The joint negotiating bodies are comprised of the same European social partners that are active in the European social dialogue. All the comments I forwarded in chapter 6, sections 3.2 and 3.3 on the position of "management and labour" in collective bargaining within the European social dialogue therefore apply *mutatis mutandis* to the transnational collective bargaining system as proposed by the authors of the Report. This choice is therefore, in my opinion, unfortunate (although understandable from the position of the authors of the Report, who needed to reconcile the interests of all parties currently involved in the European social dialogue). This is especially the case as all representativity issues that have arisen in the European social dialogue are even more "painfully" present in the proposed system than in the bargaining system within the European social dialogue.[784] After all, in the European social dialogue the legitimacy of the collective agreements is partially founded on the fact that either (i) the Commission or the Council can deny implementation of a European collective agreement after running a series of tests, or (ii) the national social partners implement the European collective labour agreement in accordance with the procedures and practices specific to management and labour and the Member States, meeting each State's specific representativity requirements. In the first case, part of the legitimacy of the European social dialogue is gained by the fact that two European institutions verify the agreement, in the second case, because the agreement is implemented in the same manner as national collective labour agreements. In the proposed system this additional legitimisation is not in place, as the transnational collective agreement is implemented by managerial decision. The entire legitimacy should therefore be derived from the representativity of the social partners, which seems not to be an overly solid foundation given the many critiques on that particular topic. Moreover, the facts that (i) the collective agreements concluded within the joint negotiating bodies have to be

784 And all these representativity issues are fully in place in the proposed system, as the authors argue that the European employers' and employees' organisations in the proposed system must satisfy the representativity test according to the UEAPME case. E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, page 37.

implemented by managerial decision[785] and (ii) they lack uniform effect as they are binding "according to the national laws or practices", which differ from country to country, are somewhat at odds with "typical" national collective bargaining practices. In fact, they are not easy to reconcile with one of the principles that the authors of the Report (rightfully) hold so dear: a direct and homogeneous impact of agreements.[786] This is the same flaw that can be found in collective bargaining within the European social dialogue (chapter 6, section 3.4).

The reason that these flaws are copied in is, in my view, because the authors of the Report wished to stick as closely to the European social dialogue as possible: the same parties (besides individual employers) can conclude collective labour agreements as in the European social dialogue, and bargaining in the proposed transnational bargaining system occurs in a similar surrounding as already existing in the sectoral European social dialogue (the joint negotiating body versus the SSD Committee). This is, in my view, an unfortunate choice. A new system of transnational collective bargaining should in my opinion not be based on a new form of the European social dialogue but should instead be more comparable to "classical" collective bargaining as is in place in the Member States.[787]

Neither collective bargaining within the European social dialogue, nor transnational collective bargaining in the proposed new system resembles national collective bargaining. This is rather clear with regard to the European social dialogue: "Neither the Maastricht Treaty, nor its successor negotiated in Amsterdam in June 1997, offers any legal basis for collective bargaining in the 'classical' sense at European level."[788] But this is also clear with regard to the proposed new system, as the Report neither touched on national laws, nor on the three classical rights recognised in national laws of the Member States: the freedom of association, the right to collective bargaining and the right to strike. Because of the gap between the current European collective

785 Implementing collective labour agreements by managerial decision is in itself rather peculiar. Why should management have the sole power to implement a collective agreement which is the fruit of bargaining between two parties? To some extent, it negates the collective element of the agreement reached. The probable reason for this system is to circumvent private international law aspects.

786 E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, pages 15 and 34.

787 I also refer to chapter 1, section 3, in which the importance of taking into account national legislation when drafting European legislation on transnational collective bargaining is emphasised.

788 W. E. Lecher and H. W. Platzer, *Global trends and the European context*, page 8.

bargaining system (within the European social dialogue) and the proposed new system on transnational collective bargaining on the one hand, and a new system somewhat comparable to the systems that exist in the Member States on the other, collective bargaining cannot fully offer all its advantages as set out above.[789] That is not to say that the current system is of no relevance to "genuine" European collective bargaining, since it is. It may be considered as a first step to a more classical manner of collective bargaining, or, as Platzer puts it:[790]

> Even if the mode of regulation provided for in the Social Protocol cannot currently be interpreted as offering a path towards European collective bargaining in its classical sense (among other things, because there is no appropriate European law laying down a corresponding autonomous norm-setting power), these processes of interaction and decision-making may be regarded as a 'playing ground' (Lechner 1996: 36ff) for further social and economic concertation and – in the longer term – for framework collective agreements.

Platzer thus pleads for a bargaining system that is comparable to national bargaining ("collective bargaining in its classical sense"), which is another system than is proposed in the Report. Equally, Blank is in favour of a transnational collective bargaining system based on the classical rights and procedures in place in Member States like Germany:[791]

> If one looks at the more long-term prospect of cross-border European collective bargaining with the aim of cross-border agreements, it is evident that one indispensable precondition is the anchoring of collective rights at European level. This includes freedom of association, the right to collective bargaining and the right to strike, along with a legal framework – comparable with the German Collective Agreements Act (Tarifsvertragsgesetz) – to establish the way in which collective agreements are to be implemented.

Also Bercusson calls for European collective bargaining closer akin to the traditions of the Member States. He argues that the European social dialogue was developed as a consequence of the failure of the legislative process in developing EC labour law. Therefore, collective bargaining in the

789 Or, as Lo Faro puts it with regard to the European social dialogue: "(…) the actual rules originally laid down by the ASP do not provide the conditions for fully developed bargaining activity by the social partners." A. Lo Faro, *Regulating Social Europe: reality and myth of collective bargaining*, page 134.

790 H.W. Platzer, *Industrial Relations and European Integration*, page 85.

791 M. Blank, *Collective Bargaining in the European Union – The standpoint of IG Metall*, pages 166 and 167.

European social dialogue is placed in a legislative perspective, rather than in the traditional perspective of industrial relations. He takes the opinion that such legislative perspective is erroneousness: "European labour law cannot afford to abandon national labour law systems, traditionally rooted also in an industrial relations model."[792] I have to agree with these opinions: a European collective bargaining model based on national traditions should be developed. That is the only way to tackle the problems surrounding collective bargaining within the European social dialogue, flaws which are also, at least partially, "copied in" in the proposals of the authors of the Report.[793]

10. Are there any suitable alternatives for Community legislation on transnational collective bargaining?

The above fully focuses on the introduction of European legislation on transnational collective bargaining in response of the current – in my view unsatisfactory – situation. Another way to proceed would be to look at alternatives for Community legislation. Are there any other appropriate means to support transnational collective bargaining without introducing Community legislation? In my view there are no such suitable alternatives. Below, I will discuss three possible alternatives, being the open method of coordination, mutual recognition and regulatory competition.

The open method of coordination, advocated during the Lisbon Summit in 2000 in order to facilitate the EU's strategic goals, does not provide for a real alternative for legislation on transnational collective bargaining. This method spreads best practice and helps to achieve greater convergence towards specific goals. The open method of coordination, according to the Crest report on its application,[794] involves: (i) fixing guidelines for the Union combined with specific timetables for achieving the goals, (ii) establishing, where appropriate, indicators and benchmarks against the best in the world and tailored to the needs of the different Member States and sectors as a means of comparing best practice, (iii) translating these European guidelines into national and regional policies by setting specific targets and adopting measures, taking

792 B. Bercusson, *Democratic Legitimacy and European Labour Law*, pages 164 and 165.

793 In order to avoid possible misunderstanding, the aforementioned does not mean that the Report is "without value", because, on the contrary, it is highly valuable and will be used on several occasions in the chapters to come.

794 Scientific and Technical Research Committee of the European Union, *CREST report on the application of the open method of coordination in favour of the Barcelona research investment objective*, Council doc. 1206/04, 1 October 2004, page 7.

into account national and regional differences and (iv) periodic monitoring, evaluation and peer review organised as mutual learning processes. Although applying the open method of coordination in the social policy field has attracted the interest of many,[795] it is all about guidelines and best practice. It therefore fails to introduce a legally binding framework. As appears from the preceding sections, such a framework is required when transnational collective bargaining is concerned in order to embed transnational collective labour agreements. Consequently, reverting to the open method of coordination is not a suitable option.

Another solution may be mutual recognition, possibly combined with, or leading to, regulatory competition. Mutual recognition as a principle is introduced by the European Court of Justice in the well-known *Cassis de Dijon* case.[796] Under the principle of mutual recognition Member States must allow goods that are legally sold in another Member State to be sold within their own territory. Member States are only allowed to derogate from this principle if they adopt their own national technical rules which are proportionate and which are justified by the EC Treaty or by overriding requirements of public interest.[797] Briefly put, based on mutual recognition, Member States need to mutually recognise each other's regulations.[798] It must concern *equivalent* regulations. Member States retain their right to invoke their own legislation if the foreign regulation concerned is not an equivalent of their own regulation. If, for instance, a product deriving from a third country is imported in one Member State that has no authorisation or registration requirements in place in relation to that product, and is subsequently to be transported to another Member State that does have such requirements, those requirements can be applied. [799] In such a case there is no room for mutual recognition, because there are no equal regulations in place.[800] The rationale of mutual recognition is that, within the Community, the opinions on topics such as what is safe,

795 See for instance: P. Pochet, *The Open Method of Co-ordination and the Construction of Social Europe. A Historical Perspective*, in: J. Zeitlin and P. Pochet (eds.), *The Open Method of Co-ordination in Action. The European Employment and Social Inclusion Strategies*, PIE-Peter Lang, Brussels, 2005, chapter 3.

796 European Court of Justice, 20 February 1979, C-120/78, *Cassis de Dijon*.

797 See on this principle for example: J.S. Watson, *Wederzijdse erkenning binnen de interne markt: een nieuwe impuls* [*Mutual recognition within the Community: a new impulse*], Nederlands Tijdschrift voor Europees recht, number 3, 2000, pages 41 *ff*.

798 S.K. Schmidt, *Governance through Mutual Recognition*, NewGov, Winter 2007/2008, policy brief number 10, page 1.

799 European Court of Justice, 15 July 2004, C-443/02, *Schreiber*.

800 Y. Hofhuis, *Minimumharmonisatie in het Europees recht* [*minimum harmonisation in European law*], Kluwer, Deventer, 2006, page 20.

healthy or environmental friendly do not differ that much. The goal of reaching these objectives is therefore more or less the same in all Member states. The methods for reaching these objectives, however, may differ, but that is considered inconsequential.[801] Mutual recognition is strongly based on the trust that Member States have in each other's regulatory regimes.[802] This also implies that mutual regulation "is bound to work better under conditions of homogeneity than under conditions of heterogeneity"; [803] it is easier to accept other state's rules if they are similar to your own rules. Mutual recognition had originally just been applied to the free movement of goods, but today this principle is applied widely, including to the free movement of services, the freedom of establishment and the free movement of employees.[804] Perhaps, it may also be applied to transnational collective bargaining. Regulatory competition can be defined as "the process where regulators deliberately set out to provide a more favourable regulatory environment, in order either to promote the competitiveness of domestic industries or to attract more business activity from abroad". [805] It occurs in the presence of different geographical areas between which goods, services and factors move easily and in which rules and regulations are selected with a mind to the relative attractiveness for investors and residents.[806] Regulatory competition is often used in relation to company mobility,[807] and is based on a number of important rulings of the European Court of Justice.[808] A question that is frequently asked in relation to regulatory competition is whether it will lead to a race to the bottom (states compete with each other as each tries to underbid the others) or to a race to the top (competition leads to the progressive improvement of the subject – in this instance: the law on collective labour agreements – concerned).

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801 See for instance: Y. Hofhuis, *Minimumharmonisatie in het Europees recht*, page 19.

802 S.K. Schmidt, *Governance through Mutual Recognition*, page 2.

803 S.K. Schmidt, *Governance through Mutual Recognition*, page 2.

804 J.S. Watson, *Wederzijdse erkenning binnen de interne markt: een nieuwe impuls*, page 41.

805 K. Gatsios and P. Holmes, *Regulatory Competition and International Harmonisation*, Global Economic Institutions Working paper, number 36, August 1997, page 2.

806 K. Gatsios and P. Holmes, *Regulatory Competition and International Harmonisation*, page 2.

807 E.M. Kieninger, *The Legal Framework of Regulatory Competition Based on Company Mobility: EU and US Compared*, German Law Journal, 2004, volume 6, number 4, pages 741 *ff*.

808 European Court of Justice, 9 March 1999, C-212/97, *Centros*; European Court of Justice, 5 November 2002, C-208/00, *Überseering*; and European Court of Justice, 30 September 2003, C-167/01, *Inspire Art*.

In contrast to the open method of coordination, mutual recognition provides for a (national) legal framework. Member States may be obliged to recognise transnational collective labour agreements concluded in other Member States. Here, there are two options. The Member States may either be obliged to "solely" recognise the transnational collective labour agreement as a proper collective labour agreement, by having to apply their own national rules on collective labour agreements to that agreement, or they should be obliged to recognise the entire transnational collective labour agreement, including the law applicable to that agreement deriving from the Member State in which the agreement is concluded. This may lead to regulatory competition, resulting in the conclusion of transnational collective labour agreements in that Member State which laws fit the purpose of the transnational collective labour agreement at hand best.

Mutual recognition of transnational collective labour agreements would, in my view, be troublesome. If the first option set out above would be chosen, one of the important goals of (transnational) collective labour agreements is not achieved, being uniform applicability. As explained in section 3.4 of chapter 6, uniform applicability leading to the elimination of social competition is "the quintessence" of collective agreements. Moreover, it would lead to serious legitimacy problems. As will be explained in part II of this thesis, the laws of the various Member States on collective bargaining differ considerably. In some countries a collective labour agreement has an *erga omnes* effect, binding all employees falling within the scope of that agreement. In these countries, the trade unions must normally meet strict representativity requirements in order to justify the strong effects of the collective labour agreement. In other countries, collective labour agreements only bind those employees who are member of the contracting trade unions. In these countries, trade unions normally have fewer requirements to meet with regard to representativity. This opens the possibility of a transnational collective labour agreement being concluded in a country with few (or even none) representativity requirements, which agreement subsequently needs to be recognised in another Member State which, by law, has to attribute *erga omnes* effects to that collective labour agreement. The results of this would, in my view, be unacceptable. The Member States cannot "trust" each other's regulatory regimes in this respect, as they differ too much, which trust is a prerequisite for mutual recognition. It can even be argued that in this situation there cannot be "true" mutual recognition, because there are no equivalent regulations in place between the different Member States. If the second option set out above would be applied, the aforementioned legitimacy issues would only partially be addressed. The trade unions that concluded the transnational collective labour agreement may have been representative in the Member State in which they entered

into that agreement, but they do not necessarily have to be representative in other Member States where the transnational collective labour agreement is to apply as well. Consequently, a collective labour agreement with "strong" effects, concluded in a Member State in which the contracting parties were clearly representative, would have the same strong effects in another Member State were it is to have force, but where the contracting parties may not be as representative. Furthermore, merely recognising the laws of the Member State in which the transnational collective labour agreement is concluded is not possible, or at least far from practical, as it would likely lead to two sets of laws applying to the employment agreement: one of the country in which the transnational collective labour agreement is concluded, and (in the "normal" situation) one of the country in which the employee habitually works. Mutual recognition would also fail to address issues such as the relation between the transnational collective labour agreement and a possible local collective labour agreement that may apply as well. In other words, in this scenario harmonisation is still needed, diminishing many of the possible advantages of mutual recognition. Besides, mutual recognition of specific laws of other Member States in the field of social policy has proven a difficult tool, as the history of the Service Directive reveals.[809] The original draft of this Directive opted for the applicability of the so-called "country of origin principle", entailing that providers of services were subject only to the national provisions of their Member State on topics that would fall in specific coordinated fields. These national provisions needed to be recognised by the Member State in which the services were to be provided (the host country). The country of origin principle would not apply with regard to posted workers, in order to prevent possible social dumping, but the host country was not to impose burdensome requirements on the service provider and the posted worker. This original proposal led to fierce opposition by labour in many Member States. The country of origin principle and the rules on posted workers were feared to lead to social dumping. The proposal needed to be watered down. This shows that mutual recognition of national employment regulations is feared to lead to social dumping.[810] If that fear has led the Community institutions to water down the Service Directive, which Directive has less of a direct impact on employment in the Member States than a (possibly) direct applicable transnational collective labour agreement, mutual recognition on transnational collective agreements will most likely not be achievable.

809 The Service Directive and its history will be set out in further detail in chapter 8, section 6.3.3.

810 See also S.K. Schmidt, *Governance through Mutual Recognition*, page 2.

As the applicability of collective labour agreements as a general rule stop at the country's border, introducing the possibility of regulatory competition alone will not work. There is simply no cross-border geographical area in which collective labour agreements move easily. In combination with mutual recognition, however, regulatory competition could work. Regulatory competition may lead to a race to the bottom, or to a race to the top. Given the fear of social dumping as set out above, a race to the bottom is possible and, in any event, feared.[811] This is in particular the case, because at this moment there is an imbalance in power between multinational companies and trade unions, as set out in section 3.7 above. Multinational companies seem in a better position to bargain on a transnational collective labour agreement than trade unions. Such an unequal distribution of power would increase the chances of a race to the bottom, *i.e.* to social dumping.

The above establishes that mutual recognition will not work with regard to transnational collective labour agreements, mainly because the differences in national laws on collective labour agreements are too great. Regulatory competition is not feasible, as there is no cross-border geographical area in which collective labour agreements move easily. Because, as said, also the open method of coordination is not a suitable option in order to deal with transnational collective labour agreements, there are, in my opinion, no suitable alternatives for Community legislation on transnational collective bargaining.

11. Towards a European system of transnational collective bargaining

The observations of this and previous chapters lead to the conclusion that a proper system, enabling genuine transnational collective bargaining, may very well be worthwhile to pursue. As explained above, European legislation on transnational collective bargaining would be best based on national industrial relations traditions of the Member States. This thesis tries to give a modest start to research on such a system.

Notwithstanding the opportunities transnational collective bargaining can offer, the advantages it can bring etc., it is good to touch base again for a while. It must be admitted that it is, at this moment, very unlikely that intense collective bargaining will occur at transnational (let alone European) level,

811 Ironically, one of goals of a collective labour agreement is to prevent a race to the bottom. M.S. Wirtz, *Collisie tussen CAO's en mededingsingsrecht* [*Collision between CLA's and competition law*]. Kluwer, Deventer, 2006, page 2.

even if legislation accommodating this was in place. There are many obstacles to surmount prior to vivid transnational bargaining being a reality. I refer to sections 4.3, 5 and 8 above. The time is not (yet) ripe to expect that much. Moreover, it should be duly noted that (European) transnational collective bargaining is not the "Holy Grail" in employment law,[812] instantly overcoming all of Europe's social problems. It is an element that could assist Europe, and particularly its employers and employees, in the mid-term, though. If the goals are realistic and the participants are not too impatient, it could, in my view, do well. A logical step that could be taken now is to consider supporting legislation in order to make genuine transnational collective bargaining possible in time.

12. Summary

Transnational collective bargaining offers certain advantages, which can be divided into (i) institutional advantages and (ii) advantages for the parties and their members involved.

On an institutional level, it has at least five advantages. (European) transnational collective bargaining may: (i) prove useful in case Community institutions are unable to make decisions; (ii) help to overcome regulatory shortcomings; (iii) help to overcome the democratic deficit; (iv) prove to be an important tool for proper European Governance; and (v) be a proper method for horizontal subsidiarity.

Apart from these institutional advantages, transnational collective bargaining may also benefit the social partners themselves, and ultimately the employers and employees. Transnational collective bargaining may *i.a.*:

- be a proper response to the Europeanisation and internationalisation of markets, simplifying cross-border labour and enabling the "European Social State" better to compete with the rest of the world;
- prevent social dumping and be a proper tool for maintaining a social Europe;
- prove a necessity in order to cope with the consequences of the EMU;
- form a good, broad basis to deal witch common problems at the appropriate level;
- have specific advantages for European multinationals;

812 Nor is it a "miracle drug", as rightly stated by Buschak and Kallenbach. W. Buschak and V. Kallenbach, *The European Trades Union Confederation*, page 177.

- enable the European social partners to take matters in their own hands instead of leaving it up to the European legislator;
- help creating a power equilibrium between trade unions on the one hand and employers and employers' organisations on the other.

Naturally, there are also (potential and real) disadvantages attached to (European) transnational collective bargaining. These can be divided into three categories: (i) fundamental arguments against collective bargaining in general, (ii) fundamental arguments against (European) transnational collective bargaining and (iii) practical arguments against (European) transnational collective bargaining.

First, from an economical point of view, scholars have argued that trade unions and collective bargaining hinder economic development and lead to higher unemployment. These scholars favour a fully free market. They fundamentally object to any kind of collective bargaining. Since assessing these arguments in depth is beyond the scope of this thesis, it is simply assumed that, given the European-wide practice of collective bargaining, collective bargaining in general has advantages outweighing its disadvantages. Another potential fundamental objection against collective bargaining is the declining representativity level of the social partners. If (trade union) membership density continues to decline and drops under a critical level, upon which the social partners cannot be considered representative anymore for the employers and the employees they are supposed to represent, or if for any other reason the same happens, collective bargaining as we know it will fail, both at national and transnational level. Therefore, representativity must continue to be of great importance in any proposal for a system on transnational bargaining.

Second, some authors consider that *European* collective bargaining has inherent, fundamental disadvantages. They argue that European collective bargaining adversely affects competition in Europe, since it leads to common employment conditions throughout Europe, resulting in a weakened economy that creates fewer jobs. This argument is based on a false assumption, since the goal of European-level collective bargaining is not fully levelling out employment conditions throughout Europe. Instead, it recognises the differences in Europe and only interferes where needed.

Last, there are many practical arguments raised against transnational (European) collective bargaining, such as:

- differences in the organisation, ideology and interests of Europe's national trade unions;
- limits of international solidarity of workers if strikes are needed;
- trade unions weaknesses to establish an autonomous transnational system of industrial relations;
- a lack of interests of employers and employers' organisations;
- the risks and costs of coming to European collective bargaining; and
- differences in the legal systems of the different countries.

Although (some of) these disadvantages are real and not easily overcome, they do not fundamentally obstruct transnational collective bargaining. All of these disadvantages are of a practical nature and are therefore potentially temporary. These disadvantages can change over time, and possibly change faster when legislation enabling real transnational collective bargaining enters into force.

Deinert assessed the position of possible participants of transnational (European) collective bargaining on such bargaining. He found that, on the side of labour, there is a positive stance towards transnational collective bargaining: European and national trade unions seem to be enthusiastic about the concept. On the employers' side, there is a much more negative stance, although it varies to a certain extent. A minority of national employers' organisations and all participating multinational companies were positive about transnational collective bargaining. By far most of the participants of Deinert's research noted that, should transnational collective bargaining be promoted, proper rules on transnational collective bargaining will have to be introduced.

The observations of this (and previous) chapter(s) lead to the following conclusions with regard to the preliminary questions.

As from 2000 both the challenges for and the role of the social partners within the EU have changed significantly, causing them to reposition and to pursue a more autonomous social dialogue. Apparently, these developments contributed to a demand for collective bargaining at a European level. In fact, Europeanisation of collective bargaining can be observed both at national level and at European level. Consequently, for some parties, cross-border collective bargaining apparently seems to fulfil a certain need. Finally, transnational collective bargaining in Europe seems to offer important advantages, outweighing the (potential and real) disadvantages. This should lead to a(n) (increasing) need or demand for transnational collective agreements. All in all, there seems to be a need or demand for transnational collective agreements.

The current system of European social dialogue, as laid down in the articles 136 – 139 of the EC Treaty, seems not to suffice. Institutionalised collective bargaining, including its implementation techniques, seems to suffer from a number of flaws. To opt for concluding agreements "outside" articles 138-139 of the EC Treaty is not helpful. All flaws accompanying the implementation of agreements "in accordance with the procedures and practices specific to management and labour and the Member States" apply *mutatis mutandis* to collective bargaining outside these articles. Furthermore, transnational collective labour agreements concluded between multinational companies and trade unions have no specific legal status and lack Community relevance. This leads to the conclusion that a new system enabling genuine transnational collective bargaining is necessary, when such transnational bargaining indeed is pursued.

These above conclusions are shared by the Commission, the European Economic and Social Committee and a group of experts led by Ales who drafted the Report on, among other things, the future of transnational collective bargaining.

This group of experts proposed to create joint negotiating bodies within which transnational collective labour agreements can be concluded. The agreements themselves would not have a legally binding effect, but acquire such an effect through implementation by managerial decision adopted by all national companies in the relevant sector (or the national company involved in company-level collective bargaining). The system should be set out in a directive providing for an optional framework for transnational collective bargaining.

The proposal is received quite differently by the social partners. I myself highly value the Report, but have doubts on this content of the proposal. The proposal "copies" many of the flaws of institutionalised collective bargaining into the new system of bargaining in joint negotiating bodies. The joint negotiating bodies are comprised of the same European social partners that are active in the European social dialogue. All the comments I forwarded on the position of "management and labour" in collective bargaining within the European social dialogue therefore apply *mutatis mutandis* to the proposed transnational collective bargaining system. Moreover, the facts that (i) the collective agreement concluded within the joint negotiating bodies has to be implemented by managerial decision and (ii) lacks uniform effect as it is binding "according to the national laws or practices", which differ from country to country, are somewhat peculiar and to some extent at odds with one of the principles of the authors of the Report: a direct and homogeneous

impact of agreements. The reason that these flaws are copied in is because the authors of the Report wished to stick as close to the European social dialogue as possible. A new system of transnational collective bargaining should, however, not be based on a new form of the European social dialogue but should instead be more comparable to "classical" collective bargaining as is in place in the Member States.

Coomunity legislation on transnational collective bargaining seems the best way to proceed, as there are in my view no suitable alternatives.

To summarise, the observations of this and previous chapters lead to the conclusion that a proper European system enabling genuine transnational collective bargaining may very well be worthwhile to pursue. European legislation on transnational collective bargaining should best be based on national industrial relations' traditions of the Member States. This thesis tries to give a modest start to research on such a system. This is not to say that, at this moment, it is likely that intense collective bargaining would occur at transnational (let alone European) level even if legislation accommodating this would be in force. There are many obstacles to surmount before vivid (European) transnational bargaining will become reality. Moreover, transnational collective bargaining should not be considered the "Holy Grail" in employment law, instantly overcoming all of Europe's social problems. It is "merely" an element that could assist Europe, and its employers and employees in particular, in the mid-term.

PART II

ESSENTIAL SUPRANATIONAL LEGAL CONCEPTS ON COLLECTIVE BARGAINING AND NATIONAL LAWS

CHAPTER 8

IN SEARCH OF A NEW SYSTEM ON TRANSNATIONAL COLLECTIVE BARGAINING

1. Introduction

In the first part of this thesis it was concluded that it may be worthwhile to investigate the possibilities of drafting European legislation on transnational collective bargaining, based on national industrial relations' traditions of the Member States. There are many ways to start research on suggesting possible criteria for realising European legislation on transnational collective bargaining. As argued in chapter 1, and as appears from the basis on which a system of transnational collective bargaining should rest (national traditions), comparative law is a useful tool in this respect. Part II will therefore focus on national collective bargaining systems. As also explained in chapter 1, the systems of the Netherlands, Germany, Belgium and Britain will be scrutinised. Section 7 of this chapter outlines exactly which parts of the collective bargaining systems of these countries will be subject to research. Reading the chapters on these countries is not a necessity to understand the subsequent steps made in this thesis, although it will make it easier to follow the line of reasoning. In any event, chapter 13 will bring the chapters on the national systems together. It analyses and compares the aforementioned four different legal systems, but it also gives a broader view on collective labour agreements in Europe, including other Member States. Reading chapter 13 is imperative for a proper understanding of part III of this thesis.

Before analysing the national systems, the three classical rights that are deemed crucial in the collective bargaining process will be discussed from a European point of view. It obviously concerns (i) the freedom of association, (ii) the right to collective bargaining and (iii) the right to strike. These rights will be scrutined. During the writing process, matters have changed considerably in respect of the protection of these (and other) rights in the EU. Therefore, there will be a division in time or, phrased more accurately, in legal source. In sections 2, 3 and 4 the aforementioned three classical rights will be discussed, without taking into consideration the European Constitution, the Treaty of Lisbon and the enactment of the Charter of Fundamental Right of the

European Union. The (possible) changes resulting from the adoption of (part of) these sources will be discussed in section 5. Section 6 touches on the subject of the reach of the social partners in EU perspective. Within Europe, there are a number of rights, freedoms and prohibitions that could possibly limit the "free" exercise of collective labour law, such as rules on (i) competition (ii), equal treatment, and (iii) market freedoms. Section 8 summarises this chapter.

2. The freedom of association

The freedom of association is held by the ILO as "*the most basic of all principles underlying the work of ILO and the activities of those who toil for social justice"*.[813] A general definition of freedom of association is "a general capacity for the citizens to join without interference by the State in associations in order to attain various ends".[814] When applied to employment law, the freedom of association encompasses in its core the right of all employees and employers to form and join organisations of their own choosing without prior (state) authorisation. This is often referred to as the positive freedom of association. The negative freedom of association entails the right to refrain from joining or to withdraw from such associations. In a broader employment law related definition, freedom of association also encompasses free collective bargaining and autonomy of the parties involved.[815] These aspects of freedom of association will be discussed separately in section 4.

The freedom of association is extensively protected by several international instruments, some of which will be set out hereunder. These instruments primarily bind individual states and not so much the EU as such. Whether freedom of association exists on a European level will be discussed in section 2.2.

2.1 International instruments protecting the freedom of association

There are many treaties that aim to protect the freedom of association. However, when discussing this topic, the Council of Europe and the ILO come to mind first.

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813 http://www.ilo.org/public/english/standards/norm/whatare/fundam/foa.htm.

814 See the Commission decision in the context of the European Convention on Human Rights of 6 July 1977, *Association X/Sweden*. All the case law in this context can be found on: http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/.

815 R. Blanpain, *European Labour law*, page 571.

The Council of Europe is a political organisation, founded in 1949. Its goal is to defend the principles of democracy, human rights and the rule of law. Membership is open to all European states which undertake to abide by the Council's principles. Two documents of the Council of Europe are particularly relevant for the subject at hand, being the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the European Social Charter ("ESC").

The ILO is the United Nation's specialised agency which seeks to promote social justice and internationally recognised human and labour rights. The ILO's Social Dialogue Sector's operational objectives are to (i) promote social dialogue, (ii) strengthen institutions, machinery and processes of social dialogue, and (iii) strengthen representation, capacity and services of the parties to social dialogue. An important function of the ILO is to adopt by the tripartite International Labour Conference (comprised of both sides of the industry[816] and the government) Conventions and Recommendations, setting out international standards. Important ILO Conventions with regard to the freedom of association are the Freedom of Association and Protection of the Right to Organise Convention from 1948, Convention number 87 ("C87") and the Right to Organise and Collective Bargaining Convention of 1949, Convention number 98 ("C98"). An important ILO Recommendation is the Collective Bargaining Recommendation of 1981, Recommendation number 163 ("R163").[817]

Besides the ILO, the United Nations themselves also drafted general instruments protecting the freedom of association. In that respect, the United Nations' Covenant on Political and Civil Rights (the "Covenant"), the United Nations' International Covenant on Economic, Social and Cultural Rights ("Ecosoc") and the Universal Declaration of Human Rights (the "Declaration") come to mind.

Of course, (the combined countries of) the European Community (have) has also directed attention to the subject freedom of association. In that respect, the Community Charter of the Fundamental Social Rights of Workers ("Community Charter") and the Charter of Fundamental Rights of the European Union ("EU Charter") are of relevance.

816 The role of the social partners is not only important when drafting ILO standards, but also when it comes to the enforcing these standards. See N. Valticos, *De invloed van internationale arbeidsverdragen en –aanbevelingen van de internationale arbeidsorganisatie* [*The Impact of International Labour Conventions and Recommendations*], Kluwer, Deventer, 1979, page 74 (translation).

817 The Conventions and Recommendations are accessible on www.ilo.org.

2.1.1 Convention for the Protection of Human Rights and Fundamental Freedoms

Upon establishment, one of the first actions of the Council of Europe was to draft and execute the Convention in 1950, as amended from time to time. The Convention aims to protect fundamental rights and freedoms. Parties to the Convention undertake the securing of these rights and freedoms for everyone within their jurisdiction.

The Convention has international enforcement machinery. Two organs of the Council of Europe play an important role therein. First, there is the Committee of Ministers, the Council of Europe's decision-making body. It comprises the Foreign Affairs Ministers of all the contracting states, or their permanent diplomatic representatives in Strasbourg. Second, there is the European Court of Human Rights in Strasbourg. This Court has, pursuant to article 19 of the Convention, been set up to ensure the observance of the engagements undertaken by the contracting states. The Court deals not only with applications from a contracting state on alleged breaches of the provisions of the Convention by another contracting state, article 33 of the Convention, but also with applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the contracting states of the rights set forth in the Convention (article 34). The contracting state must, given article 46.1 of the Convention, abide by the final judgement of the Court in any case to which it is a party. The final judgement of the Court shall, on the basis of article 46.2 of the Convention, be transmitted to the Committee of Ministers, which shall supervise its execution. Pursuant to article 47 of the Convention, the Court may also give advisory opinions concerning the interpretation of the Convention and the protocols thereto.

The Convention is of relevance with regard to the freedom of association. Article 11 of the most recent version of the Convention protects this freedom and reads as follows:

> 1 Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2 No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on

> the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Although not explicitly stated, this right not only regards the (positive) freedom to establish and join associations, but also the negative aspect of that freedom, being the right to refrain from joining or to withdraw from such associations. The European Court of Human Rights in Strasbourg acknowledged this "negative freedom" on several occasions.[818]

2.1.2 European Social Charter

The Council of Europe complemented the Convention in 1961 with the ESC. The ESC sets out rights and freedoms and establishes a supervisory mechanism guaranteeing their respect by the contracting states.[819]

The European Committee of Social Rights ("the Committee") ascertains whether the contracting states abide by the provisions as set out in the ESC. The Committee comprises fifteen independent, impartial members which are elected by the Committee of Ministers.[820] The Committee determines whether or not national law and practice in the contracting states conform to the ESC (article 24 of the ESC). This monitoring procedure is pursuant to article 21 of the ESC based on national reports, which the contracting states should submit to the Committee each year. These reports indicate how the contracting states have implemented the ESC in law and in practice. The Committee examines these reports and decides whether or not the situations in the countries concerned conform to the ESC. Its decisions, referred to as "conclusions", are published on an annual basis. Under the 1995 Additional Protocol to the European Social Charter providing for a system of Collective Complaints, the Committee may also receive complaints on alleged violations of the provisions

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818 See for example European Court of Human Rights, 30 June 1993, *Sigurjonnson/Iceland*; European Court of Human Rights, 25 April 1996, *Gustafsson/Sweden*; and European Court of Human Rights, 11 January 2006, *Sorensen and Rasmussen/Denmark*. See also: J. Hendy and K.D. Ewing, *Trade Unions, Human Rights and the BNP*, Industrial Law Journal, 2005, volume 34, number 3, page 206. See furthermore: T. Novitz, *International and European Protection of the Right to Strike: A Comparative Study of Standards Set by the International Labour Organization, the Council of Europe and the European Union*, pages 232 – 237.

819 The ESC is normally deemed rather important as can be derived from the fact that the Community and Member States should, pursuant to article 136 of the EC Treaty, have the fundamental social rights of the ESC in mind.

820 Reference is made to the: *Digest of the case law of the ESCR*, prepared by the Secretariat of the Council of Europe, December 2006, page 7. The Digest is available at: http://www.coe.int/t/e/human_rights/esc/7_Resources/Digest_en.pdf.

of the ESC by specific parties, including ETUC and UNICE. If the complaint is admissible, a procedure is set in motion, at the end of which the Committee makes a decision on the merits of the complaint. This decision is forwarded to the parties concerned and the Committee of Ministers in a report, which is made public within four months of its being forwarded. If a contracting state takes no action on a Committee decision, to the effect that it does not comply with the ESC, the Committee of Ministers addresses a recommendation to that state, asking it to change the situation in law and/or in practice.

The ESC also deals with the freedom of association. The revised version states in article 5 the following:

> With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations.

This article basically guarantees the right of workers and employers to organise. Trade unions and employer's organisations must be free to form without prior authorisation.[821] Besides this positive obligation, directed at the contracting states, to ensure the freedom to associate, article 5 of the ESC also entails the negative freedom of association: no employee may be compelled to join or remain in a trade union.[822]

2.1.3 International Labour Organisation

The ILO, as mentioned above, adopted by the tripartite International Labour Conference Conventions and Recommendations, setting out international standards. Through ratification by the ILO's member states, the Conventions create binding obligations to implement their provisions, whilst the

821 Secretariat of the Council of Europe, *Digest of the case law of the ESCR*, page 64.

822 On the negative freedom of association, in particular in connection with trade union security clauses and practices (notably the closed shop), reference is made to: L. Samuel, *Fundamental Social Rights*, Council of Europe, 1997, pages 116 *ff*. See also the Secretariat of the Council of Europe, *Digest of the case law of the ESCR*, page 65.

Recommendations provide guidance on policy, legislation and practice.[823] All the EU Member States have ratified the ILO Conventions C87 and C91, and should therefore apply these.

Article 5 of C87 states the following with regard to the freedom of association:

> Workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers.

According to the Freedom of Association Committee of the Governing Body of the ILO, the right of workers to establish and join organisations of their own choosing "cannot be said to exist unless such freedom is fully established and respected in law and in fact".[824] Article 5 is especially relevant, as it also confirms the right for trade unions and employers' organisations to affiliate with international organisations, such as the European social partners.[825] In addition to this provision, article 2 of C98 is relevant as well, as it aims to guarantee fully independent organisations, in particular trade unions. This article states:

1. Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.
2. In particular, acts which are designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object

823 For a more detailed explanation of the difference between Conventions and Recommendations, reference is made to N. Valticos, *De invloed van internationale arbeidsverdragen en -aanbevelingen van de internationale arbeidsorganisatie*, pages 7 and 8.

824 Freedom of Association, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, International Labour Office, Geneva, fourth (revised) edition, paragraph 271.

825 According to Freedom of Association Committee of the Governing Body of the ILO: "International trade union solidarity constitutes one of the fundamental objectives of any trade union movement and underlies the principle laid down in Article 5 of the Convention No. 87 that any organization, federation or confederation shall have the right to affiliate with international organizations of workers and employers." See: Freedom of Association, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, paragraph 622.

> of placing such organisations under the control of employers or employers' organisations, shall be deemed to constitute acts of interference within the meaning of this Article.

The Conventions C87 and C98 are considered important in Europe. The Committee on Social Affairs, Employment and the Working Environment advised that both Conventions should be applied at Community level.[826] Besides these Conventions, ILO Recommendation R163 urges states to (actively) facilitate "the establishment and growth, on a voluntary basis, of free, independent and representative employers' and workers' organisations" (article 2.1).

2.1.4 The UN's instruments

The Covenant, Ecosoc and the Declaration all protect the freedom of association as well. Article 22 of the Covenant protects the positive freedom of association. It furthermore prohibits restrictions on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. Article 8 Ecosoc undertakes, among others, to ensure (i) the right to form and join trade unions, (ii) the right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organisations, and (iii) the right of trade unions to function freely subject to no limitations. Article 20 of the Declaration recognises everyone's right to freedom of peaceful assembly and association and states that no one may be compelled to belong to an association. Given the content of these different instruments, it is easy to conclude that the freedom of association is considered very valuable by the United Nations.

2.1.5 Community Charter of the Fundamental Social Rights of Workers

The combined countries of the European Community have also given attention to fundamental social rights. In the light of the European Single Market, highlighting economic aspects, the social aspects of Europe were also to be affirmed. The introduction of the Community Charter, adopted by the

826 Report of Committee on Employment and Social Affairs, *Report on transnational trade union rights in the European Union*, page 5, paragraph 2.

Heads of State or Government on 9 December 1989, was part thereof.[827] The UK originally opted out, but in 1998 it also signed the Community Charter.

The legal status of the Community Charter is a merely political one, as can be derived from its preamble.[828] This is affirmed by Advocate-General Jacobs in his opinion in the joint cases *Albany, Brentjens* and *Drijvende Bokken*, in which he stated: "the Charter has very limited legal effects. It is not a legal act of the Community but a solemn political declaration adopted by Heads of State or Government of 11 of the then 12 Member States, and it has not been published in the Official Journal."[829] This recently has been re-affirmed by Advocate-General Mengozzi.[830] This mere political status notwithstanding, the Community Charter has at least some Community significance, as article 136 of the EC Treaty provides that the Community and the Member States should have in mind fundamental social rights such as those set out in the Community Charter.[831] In any case, the Community Charter refers to the (positive and negative) freedom of association. Article 11 hereof states the following:

> Employers and workers of the European Community shall have the right of association in order to constitute professional organisations or trade unions of their choice for the defence of their economic and social interests.
>
> Every employer and every worker shall have the freedom to join or not to join such organisations without any personal or occupational damage being thereby suffered by him.

827 B. Bercusson, *European Labour Law*, page 599.

828 This is generally accepted by scholars. See, for instance, T. Blanke, *The Viking Case 1*, ARA 2006/2, page 45; B. Bercusson (ed.), *European Labour Law and the EU Charter of Fundamental Rights – summary version* - , ETUI, Brussels, 2002, page 13; and M. Fuchs, *The Bottom Line of European Labour Law (Part I)*, The International Journal of Comparative Labour Law and Industrial Relations, Summer 2004, page 168.

829 Opinion of 28 January 1999 in the joined cases C-115/97 to C-117/97, paragraph 137.

830 Opinion of 23 May 2007 in the case C-341/05, *Laval*, paragraph 66.

831 The (indirect) relevance of the Community Charter can be witnessed at two levels: it has a function of catalyst for Community lawmaking in the field of European labour law and it is an instrument for interpretation, in particular applied by the European Court of Justice. See M. Fuchs, *The Bottom Line of European Labour Law (Part I)*, page 169.

2.1.6 Charter of Fundamental Rights of the European Union

The Community Charter is not the sole "European initiative". The EU Charter, as signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the European Council meeting in Nice on 7 December 2000, also sets out a range of civil, political, economic and social rights of European citizens and all persons resident in the EU. Article 12.1 hereof guarantees the freedom of association as follows:

> Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.

The original goal of the EU Charter was to make the fundamental rights more visible. This goal can be derived from the preamble of the EU Charter, which states: "it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter". The EU Charter was therefore – at least until recently, as will be explained further in section 5 – a mere political declaration, without legal force.[832]

2.2 Freedom of association within a European context

The above instruments were directed at the Member States (and other countries), as opposed to the European Community itself. This raises the question whether the freedom of association is protected at a European level.

2.2.1 General remarks with regard to fundamental social rights within the European Union

Without any doubt, the Community values fundamental rights. After all, article 136 of the EC Treaty states that the Community shall have in mind "fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community

832 B. Bercusson (ed.), *European Labour Law and the EU Charter of Fundamental Rights – summary version* - , page 13; and M. Fuchs, *The Bottom Line of European Labour Law (Part I)*, page 170. See also the opinion of Mengozzi of 23 May 2007 in the case C-341/05, *Laval*, paragraph 68.

Charter of the Fundamental Social Rights of Workers". Having these rights in mind, however, does not equate *guaranteeing* them.[833]

Article 6.2 of the Treaty on European Union states that the Union shall respect fundamental rights as guaranteed by the Convention as general principles of Community law. The Convention therefore seems to play an important role in Community law. Does that mean that the EU (and with it the European Community) is bound by the Convention? The answer to this question is: no.[834] Both the Commission of Human Rights and the Court of Human Rights have held that, since the European Communities are not a party to the Convention, any application directed against the European Communities lies outside their jurisdiction.[835] Moreover, the European Court of Justice and the Court of First Instance also take the opinion that the European Communities are not bound by the Convention. The Court of First Instance ruled:[836]

> It must be emphasised at the outset that the Court of First Instance has no jurisdiction to apply the Convention (…) inasmuch as the Convention as such is not part of Community law (…).
>
> (…) the applicant cannot directly invoke the Convention before the Community courts.

The fact that the European Communities are not bound by the Convention has raised the question whether the Communities should accede to the Convention. As negotiations on this subject failed within the European Community,[837] the

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833 Which also can be derived from the report of the Committee on Social Affairs, Employment and the Working Environment, in which it was advised to enshrine fundamental trade union rights in the EC Treaty. See the report of the Committee on Employment and Social Affairs, *Report on transnational trade union rights in the European Union*.

834 Novitz considers this article in combination with article 7 of the Treaty on European Union "symbolic". T. Novitz, *International and European Protection of the Right to Strike: A Comparative Study of Standards Set by the International Labour Organization, the Council of Europe and the European Union*, page 162.

835 See for the first time: European Commission of Human Rights, 10 July 1978, *Confédération Française Démocratique du Travail/European Communities*. For subsequent case law with the same content see: R.A. Lawson, *Het EVRM en de Europese Gemeenschappen* [*The Convention and the European Communities*], Kluwer, Deventer, 1999, pages 49 *ff*.

836 Court of First Instance, 20 February 2001, T-112/98, *Mannesmannröhren-Werke / Commission*, paragraphs 59 and 75.

837 Reference is made to R.A. Lawson, *Het EVRM en de Europese Gemeenschappen*, pages 21 and 22.

Court of Justice was asked to render its opinion whether such an accession would be compatible with the EC Treaty. The Court answered the question negatively: the EC Treaty gives no basis for such an accession.[838]

That is not to say that the Convention is entirely irrelevant for the European Community (and has gained further importance recently, as will be set out in section 5 below). The European Court can uphold certain rights as fundamental within the Community's legal order. The Convention plays an important role in that respect.[839] This principle is confirmed in article 6.2 of the Treaty on European Union.

2.2.2 Freedom of association as such within the European Union

It should be noted that the EC Treaty itself does not formally acknowledge the freedom of association.[840] Quite on the contrary, this right is explicitly excluded from the scope of (article 137 of) the EC Treaty given article 137.5 of it.[841] However, this is not necessarily to say that the freedom of association is not recognised as such, as article 137.5 must be interpreted narrowly in order to leave room for the EU protection of the freedom of association.[842]

Lo Faro explicitly denies the principle of freedom of association in the Community context.[843] It should be noted, however, that his definition of freedom of association is a very broad one. He includes in the freedom of association the right to collective bargaining and the capability of collective

838 European Court of Justice, 28 March 1996, Opinion 2/94.

839 See for example: European Court of Justice, 18 June 1991, C-260/89, *Tiléorassi e.a. / Pliroforissis*, paragraph 41 and European Court of Justice, 18 December 1997, C-309/96, *Annibaldi / Sindaco del Comune di Guidonia and Presidente Regione Lazio*, paragraph 12. The European Court also referred to the ESC and the Community Charter in the past. See the opinion of Mengozzi in the case C-341/05, *Laval*, paragraph 66, including notes 17 and 18 of that opinion.

840 See in this respect also E. Franssen, *Legal aspects of the European Social Dialogue*, pages 18 and 27.

841 The Committee on Social Affairs, Employment and the Working Environment advised to repeal this provision. See the Report of the Committee on Employment and Social Affairs, *Report on transnational trade union rights in the European Union*, page 6, paragraph 13.

842 This was suggested already by Bercusson for some time. See B. Bercusson (ed.), *European Labour Law and the EU Charter of Fundamental Rights – summary version* - , page 27. As set out in chapter 6, section 5.1, this is recently confirmed by the European Court of Justice.

843 A. Lo Faro, *Regulating Social Europe: reality and myth of collective bargaining*, pages 92 *ff*.

labour agreements to have direct normative effects.[844] Given this wide definition, Lo Faro's denial of a Community's principle of freedom of association is hardly shocking. Other scholars do recognise the freedom of association at European level.[845] Deinert derives this freedom from case law from the European Court of Justice, international treaties, and the recognition of it in the different Member States.[846] His definition of freedom of association, however, is much narrower than that of Lo Faro and mainly focuses on the individual freedom to form, join and remain in organisations.[847] Franssen also takes the view that the freedom of association is recognised at Community level. She relies on case law from the European Court of Justice and on an opinion of Advocate-General Jacobs in that respect. [848] Franssen also seems to focus on the right to form and join trade union and employers' organisations.[849] Given the apparent importance of the case law of the European Court of Justice in this respect, let us now turn thereto.

In its 1974 decision in the case *Union Syndicale*, the European Court of Justice recognised the freedom of association as a "general principle of labour law".[850] This point of view was affirmed in the 1990 *Maurissen* decision (a staff case).[851] In the 1995 *Bosman* decision, the European Court of Justice even went a step beyond as it considered:[852]

844 A. Lo Faro, *Regulating Social Europe: reality and myth of collective bargaining*, page 100.

845 See for example T. Blanke, *The Viking Case 1*, ARA 2006/2, page 45. See also C. Barnard, *EC Employment law*, pages 753 *ff*.

846 O. Deinert, *Der europäische Kollektivvertrag*, pages 256 *ff*.

847 O. Deinert, *Der europäische Kollektivvertrag*, page 426.

848 E. Franssen, *De uitoefening van collectieve werknemersrechten door het individu op basis van het Handvest van de grondrechten van de Europese Unie*, pages 6 – 8.

849 E. Franssen, *De uitoefening van collectieve werknemersrechten door het individu op basis van het Handvest van de grondrechten van de Europese Unie*, page 8.

850 European Court of Justice, 8 October 1974, C-175/73, *Union Syndicale e.a./ Commission*.

851 European Court of Justice, 18 January 1990, C-193/87 and C-194/87, *Maurissen/ Court of auditors*. As said, this decision concerned a so-called "staff case" and therefore regards a complaint brought before the Court by an EU official who claims that there has been a breach of the "Staff Regulations" which form the basis of that official's employment contract. It is therefore not necessarily a rule of Community law. See on this and on the difference between staff cases and "fundamental rights jurisprudence" T. Novitz, *International and European Protection of the Right to Strike: A Comparative Study of Standards Set by the International Labour Organization, the Council of Europe and the European Union*, pages 245, 250 and 256.

852 European Court of Justice, 15 December 1995, C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL/Bosman*, paragraph 79.

> As regards the arguments based on the principle of freedom of association, it must be recognized that this principle, enshrined in Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and resulting from the constitutional traditions common to the Member States, is one of the fundamental rights which, as the Court has consistently held and as is reaffirmed in the preamble to the Single European Act and in Article F(2) of the Treaty on European Union, are protected in the Community legal order.

Advocate-General A. Jacobs also takes the view that freedom of association is recognised in the Community legal order: "the Community legal order protects the right to form and join trade unions and employers' associations which is at the heart of freedom of association".[853] Advocate-General Poiares Maduro affirmed this point of view in the *Viking* case, as he maintained that "the rights to associate (…) are of a fundamental character within the Community legal order".[854]

Relatively recently, the European Court of Justice also ruled that the negative freedom of association is protected in the Community legal order, with reference to article 6.2 of the Treaty on European Union. It ruled:[855]

> Freedom of association, which also includes the right not to join an association or union (…) is enshrined in Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and is one of the fundamental rights which, in accordance with the Court's settled case-law, are protected in the Community legal order (…) as is restated in Article 6(2) EU.

In summary, the European Court of Justice recognises the (positive and negative) freedom of association and considers it a fundamental right that is protected in the Community legal order. It is obvious that this definition of freedom of association is much narrower than the one that Lo Faro used.

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853 Paragraph 158.

854 Opinion of Advocate-General Poiares Maduro, 23 May 2007, in case C-438/05, *International Transport Workers' Federation and Finnish Seamen's union / Viking Line*, paragraph 60.

855 European Court of Justice, 9 March 2006, C-499/04, *Werhof/Freeway Traffic*, paragraph 33.

2.3 Conclusion

It can be derived from the above that many international treaties acknowledge and promote the freedom of association. This freedom includes the right of workers and employers to organise themselves free of intervention, as well as the right not being forced to join or to remain in such an association. These treaties do not have a formal legal status in the European Community. There is no formal acknowledgement of the freedom of association at European level; at least not set out in any of the Community treaties, and the freedom of association is even (to some extent) excluded from the scope of the EC Treaty given article 137.5. This notwithstanding, the European Court of Justice recognises the (positive and negative) freedom of association and considers it a fundamental right which is protected in the Community legal order.

3. The right to collective bargaining

The right to collective bargaining should at a minimum encompass the freedom of the social partners to enter into negotiations in order to reach a binding agreement on employment topics. A broader interpretation of this right would include the obligatory and normative effects a collective agreement may have, and possibly even the direct normative effects of the agreement.[856] As already mentioned in section 2 above, the right to collective bargaining is often seen as a part of the freedom of association. The same applies to collective autonomy,[857] a topic that will be discussed in section 3.3 below.[858]

As is the case with the aforementioned freedom of association, the right to collective bargaining (in its "narrow" and sometimes even in its "broad" sense), is protected by international instruments, which bind individual states. These instruments will be discussed below. Whether the right to collective bargaining exists on a European level will be scrutinised as well.

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856 An even broader definition would include all processes of interest accommodations, such as tripartite consultation. For the difficulties concerning a proper definition of collective bargaining, reference is made to J. Rojot, *The Right to Bargain Collectively: an International Perspective on its Extent and Relevance*.

857 K. Boonstra, *Government Responsibility and Bargaining Scope within Article 4 of ILO Convention 98*, page 455.

858 Although Deinert takes the view that collective autonomy does not derive from the freedom of association. O. Deinert, *Der europäische Kollektivvertrag*, page 431.

3.1 International instruments protecting the right to collective bargaining

Many of the instruments outlined in section 2 above are relevant with regard to the right to collective bargaining as well. This list is, however, to be amplified with ILO Recommendation R91 (on collective agreements).

3.1.1 Convention for the Protection of Human Rights and Fundamental Freedoms

The Convention does not refer to the right to collective bargaining. Case law from the European Court of Human Rights, however, recognises specific aspects of the right to collective bargaining as a part of the freedom of association (article 11 of the Convention). According to this case law, trade unions have the right to be heard and to represent the occupational interests of their members.[859]

The European Court of Human Rights' case law furthermore emphasises the *voluntary* nature of collective bargaining and the conclusion of collective agreements; article 11 of the Convention does not provide for an actual right to have any such agreement actually concluded.[860] On the other side of the coin, said article does not guarantee a right *not* to enter into a collective agreement either; trade unions may legitimately exercise ample pressure on an individual employer in order to persuade it to enter into a collective labour agreement.[861] Free collective bargaining includes in the view of the European Court of Human Rights a prohibition of employers to use financial incentives to induce employees to surrender important union rights.[862]

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859 See, for example, European Court of Human Rights, 27 October 1975, *National Union of Belgian Police/Belgium*. See also European Court of Human Rights, 6 February 1976, *Swedish Engine Drivers/Sweden* and European Court of Human Rights, 2 July 2002, *Wilson and National Union of journalists and others/UK*.

860 European Court of Human Rights, 6 February 1976, *Swedish Engine Drivers/ Sweden.*

861 European Court of Human Rights, 25 April 1996, *Gustafsson/Sweden*.

862 European Court of Human Rights, 2 July 2002, *Wilson and National Union of journalists and others/UK*. In this decision, briefly put, the employer offered the employees individual employment contracts with the option to denounce union representation or to accept a slower salary increase. This was held to violate article 11 of the Convention.

Notwithstanding these rulings, the European Court of Human Rights seems very reluctant to recognise a general *right* to collective bargaining.[863] All of the aforementioned rulings were placed in the key of article 11 of the Convention, recognising the freedom of association, but not the right to collective bargaining. It may even be argued that the European Court of Human Rights goes to great lengths not to touch upon the subject whether this latter right exists.[864]

3.1.2 European Social Charter

The ESC does explicitly recognise the right to collective bargaining. Article 6.2 hereof reads as follows:

> With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake (…) to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

On the basis of this provision, domestic law should not only recognise that employers' and employees' organisations may regulate the terms and conditions of employment by collective labour agreements, but positive measures should be taken to facilitate and encourage collective bargaining as well.[865] This does not exclude that states may demand a certain level of representativity from the social partners in the collective bargaining process, as long as these requirements are not excessive. These requirements should "be prescribed by law, should be objective and reasonable and subject to judicial review which offers appropriate protection against arbitrary refusals".[866] It should furthermore be noted that article 6.2 ESC refers to the normative effects of the collective labour agreements ("with a view to the regulation of terms

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863 F. Dorssemont, *De vakverenigingsvrijheid ex artikel 11 EVRM, méér dan een sequeel van de vrijheid van vereniging?* [*The freedom of association of article 11 of the Convention of the Ptotection of Human Rights and Fundamental Freedoms, more than a consequence of the freedom of association?*], ARA 2006/2, pages 22 *ff*. See also K.D. Ewing, *the Implications of Wilson and Palmer*, Industrial Law Journal, 2003, volume 32, number 1, page 3.

864 See, convincingly, Advocate-General A. Jacobs in his opinion in the joined cases C-115/97 to C-117/97. See also T. Novitz, *International and European Protection of the Right to Strike: A Comparative Study of Standards Set by the International Labour Organization, the Council of Europe and the European Union*, page 225.

865 L. Samuel, *Fundamental Social Rights*, Council of Europe, page 148.

866 Secretariat of the Council of Europe, *Digest of the case law of the ESCR*, page 69.

and conditions of employment by means of collective agreements"), without dealing with the topic of possible direct normative effects of the collective labour agreements. Finally, collective bargaining as protected by article 6.2 ESC must be free and voluntary.[867]

3.1.3 International Labour Organisation

Also the ILO deals with the issue "right to collective bargaining" in the aforementioned Convention C98. This convention states the following in article 4:

> Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

It should be noted that this article "merely" obliges that the contracting states encourage and promote collective bargaining, while no right as such is granted.[868] According to the Freedom of Association Committee of the Governing Body of the ILO, however, the right for trade unions to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association. Trade unions have the right, through collective bargaining or other means, to improve the living and working conditions of those whom the trade unions represent.[869] Besides Convention C98, the 1981 Convention C154 concerning the Promotion of Collective Bargaining also promotes collective bargaining, as article 5.1 thereof states that "measures adapted to national conditions shall be taken to promote collective bargaining". The same promotion can be read in Recommendation R163.

The above-mentioned Conventions and Recommendation do not deal with the possible direct normative effects a collective labour agreement may have. This is, however, arranged in ILO Recommendation R91 (a Recommendation which also arranges the so-called "principle of favour"). Article 3 thereof stipulates:

867 Secretariat of the Council of Europe, *Digest of the case law of the ESCR*, page 69.

868 See the opinion of Advocate-General Jacobs in the joined cases C-115/97 to C-117/97. See also E. Franssen, *Legal aspects of the European Social Dialogue*, page 22.

869 Freedom of Association, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, paragraph 782.

(1) Collective agreements should bind the signatories thereto and those on whose behalf the agreement is concluded. Employers and workers bound by a collective agreement should not be able to include in contracts of employment stipulations contrary to those contained in the collective agreement.
(2) Stipulations in such contracts of employment which are contrary to a collective agreement should be regarded as null and void and automatically replaced by the corresponding stipulations of the collective agreement.
(3) Stipulations in contracts of employment which are more favourable to the workers than those prescribed by a collective agreement should not be regarded as contrary to the collective agreement. (…)

As this Recommendation is logically merely a recommendation, it does not lay down any rights concerning these direct normative effects of collective labour agreements.[870]

3.1.4 The UN's instruments

The Covenant, Ecosoc and the Declaration do not mention the right to collective bargaining.

3.1.5 Community Charter of the Fundamental Social Rights of Workers

The Community Charter specifically refers to the right to negotiate and conclude collective labour agreements. Article 12 states:

> Employers or employers' organisations, on the one hand, and workers' organisations, on the other, shall have the right to negotiate and conclude collective labour agreements under the conditions set out by national legislation and practice.
>
> The dialogue between the two sides of industry at European level which must be developed, may, if the parties deem it desirable, result in contractual relations, in particular at inter-occupational and sectoral level.

This provision merely entails the right to negotiate and conclude agreements; nothing more, nothing less. It does not refer to any (direct) normative effects of the collective labour agreements. It does arrange, however, for the right to negotiate and enter into collective labour agreements at European level. The

870 Although Recommendations also influence the laws of the various states. See N. Valticos, *De invloed van internationale arbeidsverdragen en -aanbevelingen van de internationale arbeidsorganisatie*, pages 77 *ff*.

wording of this right is comparable to the wording of article 139.1 of the EC Treaty.

3.1.6 Charter of Fundamental Rights of the European Union

The EU Charter does not add a lot to the aforementioned provision of the Community Charter when it concerns the right to collective bargaining. Article 28 hereof stipulates:

> Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

Although article 28 of the EU Charter recognises the steps to come to a collective labour agreement (from initiating negotiations, to actual negotiation, to the conclusion of the collective labour agreement), it does not include topics like the binding nature of the agreement, the internal structure (normative and obligatory provisions) and possible *erga omnes* effects the agreement may have.[871] What strikes as odd in article 28 is that it actually gives *workers* the right to collective bargaining. In all other international instruments discussed above, this right is, on the side of labour, solely attributed to workers' *organisations*.[872]

3.2 Right to collective bargaining within a European context

As is the case with regard to the freedom of association, the aforementioned instruments are directed at the Member States (and other countries), and not to the European Community itself. Is the right to collective bargaining existent at a European level as well? Here, the EC Treaty is not silent.

As set out in chapter 3 hereof, from a European perspective frequent reference is made to collective bargaining. In 1987, article 118B if the EC Treaty acknowledged that – at European level – the two sides of industry may enter into agreements. This entitlement was further enhanced in the 1992 Protocol

871 B. Veneziani, in B. Bercusson (ed.), *European Labour Law and the EU Charter of Fundamental Rights – summary version* - , page 57.

872 With the exception of ILO Recommendation R91. The definition of a collective labour agreement which derives from that Recommendation also attributes the right to conclude collective labour agreements to "the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations" in case of the absence of representative workers' organisations.

on Social Policy, and enshrined in the EC Treaty in 1997 at the summit in Amsterdam. At present, article 138.4 of the EC Treaty permits management and labour to initiate negotiations on the occasion of consultation. This dialogue may, on the grounds of article 139 of the EC Treaty, lead to contractual relations, including agreements, which can either be implemented by a Council decision or in accordance with procedures and practices specific to management and labour and the Member States.

As noted in chapter 6, section 4.1 of this thesis, the aforementioned provisions "merely" set out that (i) European social partners may enter into agreements which (ii) can be implemented nationally or through European legislation. It therefore in fact only constitutes the recognition of these parties to enter into negotiation and to conclude contracts. It does not deal with the normative and obligatory effects of collective labour agreements, let alone with possible direct normative effects. On the contrary: the effects of the collective agreements should either be obtained through specific European legislation or specific national legislation (after national implementation). Article 139 of the EC Treaty simply does not arrange for any binding effects.

In a "narrow" sense of the definition of collective bargaining – social partners are free in European context to conclude agreements on employment topics – this right is, given the above, guaranteed in the EC Treaty. In a broader sense – including the obligatory and normative effects a collective agreement may have, and possibly even the direct normative effects – this right is not guaranteed in the EC Treaty.

But what about the jurisprudence of the European Court of Justice? This Court never recognised nor denied the right to collective bargaining. Advocate-General Jacobs did consider this subject and held that "it cannot be said that there is sufficient convergence of national legal orders and international legal instruments on the recognition of a specific fundamental right to bargain collectively". He continued, however, that "the collective bargaining process, like any other negotiation between economic actors, is (…) sufficiently protected by the general principle of freedom of contract. Therefore, a more specific fundamental right to protection is not needed".[873] Franssen agrees with this point of view and derives here from that "the freedom to bargain collectively and conclude collective labour agreements is thus protected by

873 Opinion in the joined cases C-115/97 to C-117/97, paragraph 161.

private law and it is therefore not necessary to have it explicitly protected by Community law".[874]

This entire exercise puzzles me. If the point of view is followed that the EC Treaty does not guarantee the right to bargain at a European level, one automatically has to take the view that the right to collective bargaining encompasses more than the right to negotiate and conclude agreements alone. In the end, these latter rights *are* protected in the EC Treaty for European social partners; the specific effects of the collective agreements are not protected. It is conflicting to subsequently argue that the right to collective bargaining is sufficiently protected by the general principle of freedom of contract, as that freedom only arranges for the freedom to negotiate and to conclude contracts, which is already arranged in the EC Treaty.

Still, the freedom of contract has a role to perform in connection with the freedom of collective bargaining. The right to negotiate and to enter into agreements as set forth in the EC Treaty only applies to the European social partners that are entitled to participate in the article 139 EC Treaty collective bargaining process.[875] It therefore does not apply to other (European) social partners or employers. Here, the freedom of contract comes into play. These parties are – as Jacobs and Franssen rightly point out – also free to negotiate and conclude contracts on employment topics. These parties are, on the same foot as the European social partners that can participate in the article 139 EC Treaty collective bargaining process, free to enter into collective bargaining and conclude collective labour agreements.[876]

There are no indications – as Jacobs and Franssen also rightly point out – that there is any recognition of a fundamental right to collective bargaining that goes beyond a mere freedom of contract, *i.e.* a right that includes the normative and obligatory effects of the collective labour agreement, or perhaps even a direct normative effect.[877]

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874 E. Franssen, *Legal aspects of the European Social Dialogue*, page 23.

875 Reference is made to section 3.2 of chapter 5.

876 For which reason it was concluded in section 4.1 of chapter 6 that article 139.1 in combination with the first part of article 139.2 of the EC Treaty did not add anything to the already existing rights of the European social partners.

877 As already mentioned in chapter 5, section 7.3.1, Deinert would not subscribe to this point of view as he takes the opinion that European collective labour agreements have direct normative effect. As set out in the same section, I do not agree with Deinert on this.

3.3 The right to collective autonomy

Collective autonomy entails the social partners' power to autonomously determine working conditions and terms and conditions of employment.[878] If merely the *possibility* for the social partners to negotiate and to conclude agreements with each other is at stake, both article 139 of the EC Treaty and the freedom of contract give the social partners' room to deal with matters of their liking in freedom. Deinert also takes the view that collective autonomy is recognised at Community level.[879] In any event, all Member states are in favour of an autonomous organisation of trade unions, thus stressing the importance of autonomous positions of social partners.[880] If, however, the *effects* of European collective agreements concluded within the European social dialogue are scrutinised, the autonomy of the European social partners falls short. As a consequence of the lack of direct normative effect of the European agreements concluded, and the consequent European social partners' dependability on third parties to implement the agreement, the European Social Partners have a less evolved autonomy when compared to the social partners' typical situation in Member States.[881] The European social partners' autonomy is especially limited should they wish to have their agreement implemented by a Council decision. In such a case, their agreements must concern matters covered by article 137 of the EC Treaty, and may, to some extent, not deal with pay, the right of association, the right to strike and the right to impose lock-outs.[882] Obviously, this is quite the opposite of a right to collective autonomy.

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878 A useful definition of collective autonomy is the "power of autonomous determination of working conditions and terms and conditions of employment, the exercise of which is the typical and fundamental, though not exclusive, function of the trade union organisation". See: *European Employment Industrial Relations Glossary: Italy*, Sweet&Maxwell/Office for Official Publications of the European Communities, London/Luxembourg, 1991, as mentioned in A. Lo Faro, *Regulating Social Europe: reality and myth of collective bargaining*, page 75. See also: O. Deinert, *Der europäische Kollektivvertrag*, page 430. A more general definition of autonomy of collective bargaining that applies to most Member States is "the development of collective agreements as sources for the free definition of wage policies and working conditions". See: European Commission, *Industrial Relations in Europe 2006*, page 41.

879 O. Deinert, *Der europäische Kollektivvertrag*, page 430.

880 B. Bercusson (ed.), *European Labour Law and the EU Charter of Fundamental Rights – summary version* - , page 26.

881 Reference is made to chapter 6, section 3.5.

882 Reference is made to chapter 6, section 5.1.

3.4 Conclusion

The right to enter into negotiations and to conclude collective labour agreements is recognised in many international instruments. These treaties do not have a formal legal status in the European Community. However, articles 138.4 and 139 of the EC Treaty also award these rights to a specific group of European social partners. The freedom of contract seems to protect exactly the same rights to other (European) social partners and employers as well. This part of collective bargaining – a narrow sense of collective bargaining – is therefore protected at a European level. In this narrow sense the social partners also have a right to collective autonomy.

Some of the international instruments also arrange for the (normative and obligatory) effects of the collective labour agreement. ILO Recommendation R91 even arranges for the direct normative effects of a collective labour agreement. There are no indications that these parts of the right to collective bargaining – in its broad sense – are recognised at European level. Collective autonomy is definitely not recognised in this broad sense. On the contrary, since European agreements lack direct normative effect and the European social partners depend on third parties to implement these agreements, their autonomy is less evolved than that of the national social partners in the Member States. The European social partners' autonomy is limited by law should they wish to have their agreement implemented by a Council decision.

4. The right to strike

Strike itself is normally considered as being a (very important) *specius* of the *genus* collective actions. Black's Law Dictionary defines strike as "an organised cessation or slowdown of work by employees to compel the employer to meet the employees' demands; a concerted refusal by employees to work for their employer, or to work at their customary rate of speed, until the employer grants the concessions that they seek".[883] The right to strike is, as will be shown below, sometimes considered as being a part of the freedom of association.[884] It is widely held as "one of the essential means through which

883 B.A. Garner (ed.), *Black's Law Dictionary*, 8th edition 2004.

884 In any event, the right to strike may in some cases be considered to be inextricably linked to the conclusion of collective labour agreements. See European Court of Justice, 11 December 2007, C-438/05, *Viking*, paragraph 36.

workers and their organisations may promote and defend their economic and social interests".[885]

4.1 International instruments protecting the right to strike

The right to strike is protected by various instruments already mentioned above.

4.1.1 Convention for the Protection of Human Rights and Fundamental Freedoms

The Convention does not arrange for the right to strike as such. The European Court of Human Rights, however, did have to establish whether article 11 ECHR (the protection of freedom of association) contains a right to strike as well. In the *Schmidt & Dahlström* case the applicants argued that the right to strike is an "organic right" included in article 11 of the European Convention.[886] The Court considered that the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action. It is at the individual state's discretion to choose the means to be used to this end. According to the Court, the grant of a right to strike represents the most important of these means, but it considers that there are other means as well. The right to strike is not expressly enshrined in article 11 and may be subject, under national law, to regulation of a kind that limits its exercise in certain instances. The Court's considerations seem to imply that limitations on the right to strike do not normally limit the freedom of association protected by article 11 of the Convention. The trade unions basically seem to have to rely on "other means" to safeguard the occupational interests of their members, safeguarding which is, in itself, protected by article 11 of the Convention.

The European Court of Human Rights seemed to nuance its opinion in the 2002 decision in the *Unison* case.[887] This case related to the transfer of activities from a state run hospital to a private consortium. The trade union wished to protect its members' employment upon transfer. It requested the state hospital to demand from the transferees to guarantee specific minimum employment conditions for 30 years upon transfer. The hospital refused this request. The trade union subsequently intended to call for a strike forcing the hospital to

885 Quote from ILO, as referred to in: P. Gemanotta and T. Novitz, *Globalisation and the right to strike: The Case for European-Level Protection of Secondary Action*, The International Journal of Comparative Labour Law and Industrial Relations, Volume 18, Issue 1, 2002, page 68.

886 European Court of Human Rights, 6 February 1976, *Schmidt & Dahlström/Sweden*.

887 European Court of Human Rights, 10 January 2002, *Unison/United Kingdom*.

grant the request. This strike, however, was prohibited by the UK High Court, as the strike did not concern a "dispute wholly or mainly related to current terms and conditions but instead a dispute about future terms and conditions with an unidentified future employer,"[888] as is prescribed in the Trade Union and Labour Relations (Consolidation) Act 1992. The trade union argued that this decision disproportionately interfered with its right under article 11 to take effective action to protect its members' interests. The UK Government denied that article 11 was relevant at all, as that strike did not concern the occupational interests of the trade union's members but merely concerned protection of yet unidentified individuals to be employed by yet unidentified transferee companies. The Court noted that the members of the trade union could be affected by the transfers of activities. The guarantee, if obtained by the union, could benefit these members. The proposed strike was therefore to be regarded as concerning the occupational interests of the trade union's members and was covered by article 11 of the Convention. Consequently, the right to strike formed a part of article 11 of the Convention. This can be considered as a turnaround in the European Court's case law.[889] What the European Court of Human Rights gave on the one hand, however, it took on the other. The Court examined whether the restriction imposed by the UK High Court was in compliance with the requirements of article 11.2 of the Convention. In other words, it assessed whether the restriction was "prescribed by law", pursued one or more legitimate aims under paragraph 2 and was "necessary in a democratic society" for the achievement of those aims. Clearly, the restriction was prescribed by the Trade Union and Labour Relations (Consolidation) Act 1992. The restriction furthermore protected the right of a third party, being the state hospital. In that respect it was argued that the state hospital could claim that its ability to carry out its functions effectively, including the securing of contracts with other bodies, might be adversely affected by the actions of the trade union. Lastly, the prohibition on the trade union's ability to strike can be regarded as a proportionate measure given the state hospital's financial position and the trade union's possibility to revert to other methods than strike. At first glance, this seems to be a fairly light justification of the prohibition to strike.[890] The aforementioned line

888 Consideration on page 3 of this ruling.

889 F. Dorssemont, *De vakverenigingsvrijheid ex artikel 11 EVRM, méér dan een sequeel van de vrijheid van vereniging?*, page 28. See also K.D. Ewing, *the Implications of Wilson and Palmer*, Industrial Law Journal, page 5.

890 See also F. Dorssemont, *De vakverenigingsvrijheid ex artikel 11 EVRM, méér dan een sequeel van de vrijheid van vereniging?*, page 29.

of arguing was affirmed in the *Federation of offshore workers' trade unions* case.[891]

Also in another case the European Court of Justice seems to acknowledge that, at least in some circumstances, article 11 of the Convention guarantees a right to strike:[892]

> The grant of the right to strike, while it may be subject to regulation, represents one of the most important of the means by which the State may secure a trade union's freedom to protect its members' occupational interests (…). The Court agrees with the [UK] Government that the essence of a voluntary system of collective bargaining is that it must be possible for a trade union which is not recognised by an employer to take steps including, if necessary, organising industrial action, with a view to persuading the employer to enter into collective bargaining with it on those issues which the union believes are important for its members' interests.

These statements come, to say the least, "close to the European Court of Human Rights recognising the right to strike".[893] To sum up, article 11 of the Convention seems to protect the right to strike at least to a certain extent, but the right can fairly easy be restricted by individual states on the basis of paragraph 2 of that article.[894]

4.1.2 European Social Charter

The ESC explicitly recognises the right to strike. Article 6.4 hereof states the following:

> With a view to ensuring the effective exercise of the right to bargain collectively, the Parties recognise the right of workers and employers to collective action in

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891 European Court of Human Rights, 27 June 2002, *Federation of offshore workers' trade unions/Norway.*

892 European Court of Human Rights, 2 July 2002, *Wilson, National Union of Journalists and Others / United Kingdom*. See also European Court of Human Rights, 17 July 2007, *Affaire Satilmis et autres / Turquie.*

893 C. Barnard, *EC Employment law*, page 771. Novitz refers to a "partial recognition of a right to strike"; T. Novitz, *International and European Protection of the Right to Strike: A Comparative Study of Standards Set by the International Labour Organization, the Council of Europe and the European Union*, pages 229 – 232.

894 Advocate-General Mengozzi, however, takes the opinion that article 11 of the Convention does not imply a right to strike. See the opinion of Mengozzi in case C-341/05, *Laval*, paragraph 72.

cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.

The right to strike can be restricted on the basis of article G of the revised ESC (article 31 of the original ESC). This article stipulates:

1 The rights and principles (…) shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.

2 The restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed.

The above makes clear that the right to strike is recognised, but limited. Article 6.4 itself provides for a double limitation by referring to the right to take collective action "in cases of conflicts of interest" and "subject to obligations that might arise out of collective agreements previously entered into".[895] Article G (31) limits the right even further if, briefly put, such a limitation is prescribed by law and necessary in a democratic society. The right to strike may, on the basis of the ESC, not be reduced by state courts in such a manner that it becomes ineffective though. Limiting the right to strike to trade unions that are (most) representative is considered excessive.[896] As will be set out in the following chapters, the ESC was of importance for the development of the right to strike in specific European countries.

4.1.3 International Labour Organisation

The ILO Conventions and recommendations themselves do not directly protect the right to strike. However, the right to strike is regarded as a universal right and is tacitly inferred from the freedom of association and the

895 See S. Clauwaert, *International / transnational primary and secondary collective action, an overview of international, European and national legislation*, page 9. See also L. Samuel, *Fundamental Social Rights*, Council of Europe, pages 162 and 172.

896 Secretariat of the Council of Europe, *Digest of the case law of the ESCR*, page 70.

ILO Constitution.[897] It never was explicitly set out in any ILO Convention not because the right as such was not recognised, but mainly because it proved very difficult to agree on the limitations of said right.[898]

4.1.4 The UN's instruments

The Covenant and the Declaration remain silent on the right to strike. Article 8 Ecosoc, however, does deal with this right as it stipulates:

> The States Parties to the present Covenant undertake to ensure: (…) the right to strike, provided that it is exercised in conformity with the laws of the particular country.

This gives an international basis to the right of strike, although it equally makes clear that countries may limit this right (which article 4 Ecosoc does as well). This obviously limits the potential of the right to strike, as no restrictions are set for an individual state's limitation of the right to strike.

4.1.5 Community Charter of the Fundamental Social Rights of Workers

The Community Charter also protects the right to strike. Article 13 hereof stipulates:

> The right to resort to collective action in the event of a conflict of interests shall include the right to strike, subject to the obligations arising under national regulations and collective agreements.
> In order to facilitate the settlement of industrial disputes the establishment and utilisation at the appropriate levels of conciliation, mediation and arbitration procedures should be encouraged in accordance with national practice.

This article confirms the rights to strike, but also permits national legislation (and collective labour agreements) to limit this right, without imposing restrictions on such a limitation. Besides this, article 13 of the Community

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897 Reference is made to R. Ben-Israel, *International labour Standards: The case of freedom to strike*, Kluwer, 1988, page 70. Also Veneziani states that the right to strike has been affirmed in the case law developed by the ILO's Freedom of Association Committee, interpreting Convention C87. B. Veneziani, in B. Bercusson (ed.), *European Labour Law and the EU Charter of Fundamental Rights – summary version* - , page 58.

898 R. Ben-Israel, *International labour Standards: The case of freedom to strike*, page 46.

Charter encourages states to arrange for alternative dispute resolution in order to settle industrial disputes.

4.1.6 Charter of Fundamental Rights of the European Union

Article 28 of the EU Charter concerns the "right of collective bargaining and action" and stipulates:

> Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

This right to collective action can be limited on the basis of article 52 of the EU Charter if provided for by law and if this limitation respects the essence of the right to strike.

4.2 Right to strike within a European context

Is the right to strike protected at a European level? The EC Treaty does not acknowledge the right to strike. This right is explicitly excluded from the scope of the EC Treaty given article 137.5. From this, as is the case with regard to the freedom of association, it cannot be concluded that the right to strike is not recognised.

Until recently, the European Court of Justice never ruled whether a Community right to strike is in place. Advocate-general Jacobs concluded in his already frequently mentioned opinion in the *Albany* case that such a Community right to strike is in place. He considered that "the right to take collective action in order to protect occupational interests in so far as it is indispensable for the enjoyment of freedom of association is also protected by Community law".[899] He seems to deduce this right from the freedom of association, as, when substantiating the right to strike, he refers to the same court decisions as mentioned with regard to the freedom of association and which are further discussed below.

The European Court of Justice first ruled in a number of staff cases on issues concerning the right to strike. As previously mentioned, staff cases concern actions taken by EU officials against their employers, EU institutions. Staff cases need to be distinguished from jurisprudence of the European Court of

899 Paragraph 159.

justice concerning fundamental rights.[900] The first relevant staff case is the 1973 ruling in the case *Union Syndicale*, in which the European Court of Justice had to decide on a claim of this union, representing the interests of certain staff members of the Council of European Communities.[901] A topic that was reviewed by the European Court of Justice was whether this union could institute legal proceedings following a decision from the Council of European Communities. In that context the Court ruled the following:

> Under the general principles of labour law, the freedom of trade union activity recognized under article 24A of the Staff Regulations means not only that officials and servants have the right without hindrance to form associations of their own choosing, but also that these associations are free to do anything lawful to protect the interests of their members as employees.
>
> The right of action is one of the means available for use by these associations.
>
> Under the Community legal system, however, the exerciser of this right is subject to the conditions determined by the system of forms of action provided for under the treaties establishing the Communities.

In the *Maurissen* decision – also a staff case – the Court of Auditors of the European Communities refused to grant trade union members the possibility to use an internal messenger system in order to convey trade union information to other employees. The question arose whether this was permitted given the freedom of association. The European Court of Justice affirmed that the freedom of trade union activity is recognised, which means "not only that officials and servants have the right without hindrance to form associations of their own choosing but also that such associations are free to do anything lawful to protect the interests of their members as employees".[902] The court ruled that the trade union freedom, however, does not entail a right to use the internal messenger system, where other options for communication were available as well. In the already mentioned *Bosman* case, not being a staff case, the European Court of Justice also emphasised the Community right to freedom of association, without mentioning the right to strike.

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900 See T. Novitz, *International and European Protection of the Right to Strike: A Comparative Study of Standards Set by the International Labour Organization, the Council of Europe and the European Union*, page 245.

901 European Court of Justice, 8 October 1974, C 175/73, *Union Syndicale/Council of European Communities*, paragraphs 14 – 16.

902 Paragraph 13.

These rulings led advocate-general Jacobs to conclude that there is a collective right to strike.[903] He continued by stressing that the European court of Human Rights views that the freedom of association includes rights that are inherent elements of the freedom of association. He noted that, according to the European Court of Human Rights, the freedom of association safeguards "the freedom to protect the occupational interest of the trade union members by trade union action".[904] Jacobs also noted, given the already mentioned *Schmidt & Dahlström* case, that article 11 of the Convention not necessarily implies a right to strike, since the trade union can further the interests of its members by other means.[905]

Franssen refutes Jacobs opinion. She takes the view that, where the European Court of Justice used the term "right to action" in the case *Union Syndicale*, the Court referred to its right to institute legal actions, and not so much other actions, such as strike. Moreover, she states that the right to strike was not explicitly mentioned in the *Maurissen* and *Bosman* decisions. Franssen therefore concluded that there is no Community right to strike.[906]

Franssen is, in my view, right that the case *Union Syndicale* primarily concerned the right to institute legal proceedings, for which reason the "right to action" as used in that case specifically related to these legal proceedings. However, I doubt whether the term "right to action" was limited to these legal proceedings. After all, if this was the case, why should the court refer to the right to action at all, and not simply limit itself to the right to institute proceedings? Moreover, the European Court of Justice stated in the *Maurissen* case that the freedom of trade union activity not only entails the right without hindrance to form associations, but *also* the right for the union to do anything lawful to protect the interests of their members as employees. The court definitely did not limit this latter right to the right to institute legal proceedings. Apparently, the court takes the view that the freedom of association is a broad right, a freedom which should, given the *Bosman* case, be taken seriously. I therefore understand Jacobs' opinion to view the right to strike as a part of the broader freedom of association. That was, in my opinion, also the reason why Jacobs referred to the European Court of Human Right's case law on the freedom of association, which also showed a broad definition of the freedom of association. At the time of Jacobs' opinion in the Albany

903 Paragraph 139.

904 Paragraph 144.

905 Paragraph 145.

906 E. Franssen, *De uitoefening van collectieve werknemersrechten door het individu op basis van het Handvest van de grondrechten van de Europese Unie*, pages 9 and 10.

case, this Court had not yet ruled that the freedom of association of article 11 of the Convention indeed (at least partially) incorporated the right to strike, as it ruled in the above-mentioned *Unison* case. It therefore seems plausible to me that the European Court of Justice would recognise, at least to some extent, a Community right to strike. This view, which was already forwarded by Dorssemont in the past,[907] is again refuted by Franssen. She claims that if the right to strike is a part of another all-embracing right, it should be the right to collective bargaining.[908] This is in contrast with standing practice of the ILO and the European Court of Human Rights, as mentioned above, and the common opinion in the legal doctrine.[909]

Also Barnard views that there is a right to strike. She considers this a fundamental right which serves to limit the activities of the Community institutions when legislating.[910] The same view is expressed by Advocate-General Poiares Maduro in his opinion in the *Viking* case, as he stated that "the rights (…) to collective action are of a fundamental character within the Community legal order".[911] Advocate-General Megozzi also took this stance in the *Laval* case where he argued that "the right to resort to collective action to defend trade union members' interests is a fundamental right (…) a general principle of Community law".[912]

Recently, the European Court of Justice ended this insecurity. In the *Viking* case, which will be discussed in depth in section 6.3.1.2., it ruled that the right to take collective action, including the right to strike, must be recognised as "*a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures (…)*".[913] Shortly thereafter this ruling was confirmed in the *Laval* case, which will be discussed

907 See F. Dorssemont, *'Met de vlam in de pijp…'. Vrijheid van vergadering en meningsuiting, recht op collectieve actie versus vrij verkeer: primaat of belangenafweging* [*'Met de vlam in de pijp…'. Freedom of association and speech, right to collective action versus free movement: primate or balancing of interests?*], ARA 2004/1, page 90.

908 E. Franssen, *De uitoefening van collectieve werknemersrechten door het individu op basis van het Handvest van de grondrechten van de Europese Unie*, page 10.

909 Jacobs already stated in 1986 that it is a common view among scholars that the freedom of association encompasses to a certain extent the right to collective bargaining and the right to strike. Reference is made to A.T.J.M. Jacobs, *Het recht op collectief onderhandelen in rechtsvergelijkend en Europees perspectief*, page 66.

910 C. Barnard, *EC Employment law*, page 774.

911 Opinion of Advocate-General Poiares Maduro, 23 May 2007, in case C-438/05, *Viking*, paragraph 60.

912 Opinion of 23 May 2007 in the case C-341/05, *Laval*, paragraph 78.

913 European Court of Justice, 11 December 2007, C-438/05, *Viking*, paragraph 44.

in section 6.3.2.[914] The right to strike is therefore protected on European level.

4.3 Conclusion

The right to strike is recognised in many international instruments. These instruments do not have a formal legal status in the European Community. The right to strike is to some extent explicitly excluded from the scope of the EC Treaty given article 137.5. This, however, does not entail that the right as such cannot be protected on European level. Case law of the European court of Justice, in combination with case law of the European Court of Human Rights, already for some time gave ground to argue that the right to strike should be regarded as a part of the freedom of association. This latter right is recognised on Community level. In the *Viking* case the European Court of Justice indeed confirmed that the right to strike forms an integral part of the general principles of Community law the observance of which the Court ensures.

5. Recent changes in the protection of fundamental rights at EU level

The above shows that the three classical rights are at least partially recognised at EU level. This recognition did not flow from treaties directly binding the European Community. However, there have been a number of developments that (aim(ed) to) change that.

At first there was the Treaty establishing a Constitution for Europe. The EU Charter was to be incorporated into the European Constitution. As a consequence, (i) article II-72 of the European Constitution guaranteed the freedom of association in equal wording as article 12.1 of the EU Charter does, (ii) article II-88 arranged the right to collective bargaining in the same wording as article 28 of the EU Charter, and (iii) articles II-88 and II-112 of the European Constitution dealt with the right to collective action the same way as articles 28 and 52 of the EU Charter do. As is known, the European Constitution was not ratified by France and the Netherlands due to the "no" votes of their citizens. During the meeting of the European Council of 21 and

914 European Court of Justice, 18 December 2007, C-341/05, *LavalSvenska Byggnadsarbetareförbundet*, paragraph 91.

22 June 2007 in Brussels, it became clear that the European Constitution will not be ratified.[915]

This, however, was not the end of the legislative implementation of fundamental rights at EU level. Instead of the ratification of the European Constitution, the Member States seemed inclined to recognise fundamental freedoms in another way during the aforementioned Brussels meeting. They agreed on a precise mandate for an Intergovernmental Conference to finalise a Reform Treaty, aiming to change parts of the Treaty on European Union and the EC Treaty. These changes were indeed agreed on during the Lisbon informal European Council of 18 and 19 October 2007. The Treaty of Lisbon was subsequently signed on 13 December 2007.[916]

The Treaty of Lisbon formally introduces fundamental rights and freedoms in Community law.[917] With that in mind, the EU Charter was executed by the Commission, the European Parliament, and the Council on 12 December 2007 in order to give it legally binding force.[918] The EU Charter will have the same value as the Treaties. Furthermore, the Union shall accede to the Convention. This is all set out in the new article 6 of the Treaty on European Union, which can be found in the Treaty of Lisbon:[919]

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

   The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

   The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing

915 Presidency Conclusions to the Brussels European Council 21/22 June 2007 (11177/07), page 15.

916 For the chronological order of events, reference is made to www.euramis.net/ institutional_reform /chronology/ index_en.htm.

917 Although the Treaty of Lisbon does not refer to the word "constitution", it is in fact very close to one. See R. Barents, *De Europese Gronwet is dood – Leve de Europese Grondwet*, [*The European Constitution is dead – Long live the European Constitution*], Nederlands Tijdschrift voor Europees Recht, 2007/9, pages 174 – 184.

918 OJ C 303, 14 December 2007, pages 1 – 16.

919 OJ C 306, 17 December 2007, pages 1 – 271.

its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

The consequence of the above is that the institutions of the Union must respect the rights established in the Charter and the Convention. That also means that the freedom of association, the right to collective bargaining and the right to strike become Community rights. The same obligations will be incumbent upon the Member States when they implement the Union's legislation.[920] The Court of Justice would, in turn, ensure that the EU Charter and Convention are applied correctly.[921] This sounds good for European fundamental rights, perhaps even too good to be true. And so it seems.

The protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom (in the consolidated version protocol 30) restricts the above analysis with regard to Poland and the United Kingdom. Pursuant to articles 1 and 2 of said Protocol, the Charter does not extend the ability of the European Court of Justice, or any court or tribunal of Poland or of the United Kingdom in fact, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that are reaffirmed in the Charter. In particular nothing in Title IV of the Charter (which title includes the right to collective bargaining and to collective action) creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law. To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that

920 Which follows from article 51 of the EU Charter and established case law, as set out in Craig and De Búrca, *EU Law, Text, Cases and Materials*, pages 337 – 349.

921 Reference is made to: Questions and Answers on the Treaty of Lisbon, as can be found on http://europa.eu/lisbon_treaty/faq/index_en.htm.

it contains are recognised in the law or practices of Poland or of the United Kingdom.

This protocol was to be expected following the Presidency Conclusions to the Brussels European Council. At that time, two delegations – Ireland and Poland – reserved their right to join the then proposed changes.[922] The United Kingdom also made clear it was not willing to fully cope with the suggested change. The United Kingdom, in particular, fears the recognition of the right to strike.[923] Poland and the United Kingdom, therefore, insisted on the conclusion of the protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.

But even without this protocol, the impact of the EU Charter, in particular in respect of the right to strike, remains somewhat limited. Besides the EU Charter itself, explanations relating to the Charter of Fundamental Rights have been published at EU level.[924] The EU Charter recognises the right to strike, but at the same time permits the restriction of this right "in accordance with Community law and national laws and practices". Depending on the interpretation of this restriction, it may give the Member States ample of room to limit the right to strike. That this restriction is to be interpreted broadly, was made clear in the explanatory notes accompanying the EU Charter: "the modalities and limits for the exercise of collective action, including strike action, come under national laws and practices, including the question of whether it may be carried out in parallel in Several Member States".[925]

This apparently was not comfort enough for some Member States. An official declaration concerning the Charter of Fundamental Rights of the European Union made clear that, although the Charter has legally binding force, it "does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined by the Treaties".[926]

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922 Presidency Conclusions to the Brussels European Council 21/22 June 2007, page 25, footnotes 17 and 20, and the article "Ireland and Poland get 'opt-out' on EU rights Charter", as published on the EUobserver on 26 June 2007.

923 See the above-mentioned article "Ireland and Poland get 'opt-out' on EU rights Charter".

924 OJ C 303, 14 December 2007, pages 17 - 35.

925 Explanatory notes regarding article 28 of the EU Charter.

926 Declarations concerning provisions of the Treaties, OJ C 115, 9 May 2008, page 337.

In addition to the above, the ratification of the Treaty of Lisbon – and with that, the accession to the Convention – is uncertain. In order to enter into force, the Treaty of Lisbon has to be ratified by all twenty-seven Member States. Each individual Member State has to decide whether, according to its own constitutional rules, ratification will be through a referendum or through a parliamentary vote. The original goal was that the Treaty, once ratified, would come into force by 1 January 2009, to allow its provisions to apply before the European Parliament elections in June 2009. Ireland opted for a referendum on the question whether or not to ratify the Treaty of Lisbon. The outcome of the referendum was negative. Consequently, it is at this moment far from clear whether the Treaty of Lisbon will be ratified and enter into force (without amendments being made) in the end. The European Council needed time to analyse the situation.[927]

In summary, the current status is that the EU Charter is executed at EU level, respecting the three classical rights with regard to the conclusion of collective labour agreements. The EU institutions must therefore abide by these classical rights. The same obligations will apply to the Member States when they implement the Union's legislation, with the notable exception of the United Kingdom and Poland due to the protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom. The explanations relating to the Charter of Fundamental Rights make clear that the right to strike can be limited rather extensively by laws and practices at national level. Whether the EU will in fact accede to the Convention remains to be seen, as the Treaty of Lisbon is not yet ratified.

6. The reach of the social partners in Community perspective

Within national laws, social partners are confined to specific national boundaries such as mandatory law, equal treatment rules etc. Social partners are therefore, as any participant in legal interaction, limited by the law. Within Europe, there are a number of rights, freedoms and prohibitions that could possibly limit the "free" exercise of collective labour law. The European court already had to rule on the position of collective labour law in the light of competition (section 6.1), equal treatment (section 6.2) and the market freedoms (section 6.3). Without aiming to be complete, these possible restrictions on the social partners when exercising their collective rights in the Community will be discussed.

927 Reference is made to the Presidency Conclusions of the Brussels European Council, 19/20 June 2008, 11018/08, page 1.

6.1 Collective labour law versus free competition

An inherent part, if not an explicit goal, of collective bargaining is to limit competition between the different companies that participate in that agreement. Collective labour agreements set minimum and sometimes even maximum standards. This elimination of a part of the free competition has even more impact if the collective labour agreements are extended, which is practice in many Member States.[928] It is therefore not surprising that the content of a collective labour agreement can clash with the Community rules on free competition. In the end, the Community strives pursuant to article 3.1 under g of the EC Treaty for a system ensuring that the competition in the internal market is not distorted. Furthermore, article 81.1 of the EC Treaty prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may effect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.[929]

It therefore makes sense that the European Court of Justice had to decide on the validity of extended collective labour agreements in specific branches, which it did for the first time in three separate cases.[930] These extended collective labour agreements obliged all employers falling within its scope of applicability (being all employers active in a specific sector) to participate in a sectoral, compulsory pension scheme. The three companies opposing these collective labour agreements argued that the extension of these agreements violated the Community's rules on freedom of competition.

The European Court of Justice noted that the activities of the Community not only included a "system ensuring that competition in the internal market is not distorted" (article 3.1 under g of the EC Treaty) but also "a policy in the social sphere" (article 3.1 under j of the EC Treaty).[931] The importance of a high level of employment and social protection was stressed by the Court. It subsequently noted that certain restrictions of competition are inherent in collective agreements. The social policy objectives that are pursued by such agreements would be undermined if the social partners were subject to the

928 See chapter 13, section 9.

929 See on this M.S. Wirtz, *Collisie tussen CAO's en mededingsingsrecht*.

930 The three decisions of the European Court of Justice on 21 September 1999, in the cases C-67/96, *Albany*, joined cases C-115/97, C-116/97 and C-117/97, *Brentjens* and C-219/97, *Drijvende Bokken*. Hereinafter, I will only quote from the *Albany* case, as that was the first case brought before the European Court of Justice. The other two cases are materially the same.

931 Paragraph 54 of the *Albany* case.

norms of article 81 of the EC Treaty, should they seek to improve working and employment conditions in a collective labour agreement.[932] The European Court of Justice concluded:[933]

> It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of article 85(1) [the current article 81.1; author] of the Treaty.

In other words, the social partners have considerable room to manoeuvre when negotiating a collective labour agreement in pursuit of social policy objectives.[934] They are in such case not hindered by European competition rules.[935]

6.2 Collective labour law versus equal treatment

European law plays an important role when it comes to equal treatment legislation. Or, as Barnard puts it: "the quest for equality – and in particular sex equality – has been the central and most highly developed pillar of the European Union's social policy".[936] Many European instruments prohibit different forms of discrimination.

The traditional core stipulation on equality law is set out in the current article 141 of the EC Treaty. This article aims to ensure that the principle of equal pay for male and female workers for equal work is applied. The same holds true for article 3.2 of the EC Treaty. The impact of the principle of equal pay showed clearly in the cases *Defrenne*.

The European Court of Justice held in the second *Defrenne* case[937] that article 119 (the current article 141) of the EC Treaty has a double aim: undertakings in a Member State that already had implemented equal treatment laws should

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932 Paragraph 59 of the *Albany* case.

933 Paragraph 60 of the *Albany* case.

934 See on this ruling and its implications: M.S. Wirtz, *Collisie tussen CAO's en mededingsingsrecht*, pages 188 *ff*.

935 This rule has been confirmed later on in, for example, European Court of Justice, 12 September 2000, joined cases C-180/98 – C184/98, *Pavlov* and European Court of Justice, 21 September 2000, C-222/98, *Van der Woude*.

936 C. Barnard, *EC Employment law*, page 297.

937 European Court of Justice, 8 April 1976, C-43/75, *Defrenne/Sabena*.

on the one hand not suffer a competitive disadvantage when compared with undertakings in Member States that had not implemented such laws and on the other hand this provision forms part of the social objectives of the Community. This double aim shows, according to the Court, that the principle of equal pay forms part of the foundations of the Community.[938] Moreover, the Court ruled that article 119 of the EC Treaty has a direct, horizontal effect. Consequently, this article directly affects (collective) labour agreements. The court summarised this as follows:[939]

> (…) the principle of equal pay contained in article 119 may be relied upon before the national courts and that these courts have a duty to ensure the protection of the rights which this provision vests in individuals, in particular as regards those types of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which men an women receive unequal pay for equal work which is carried out in the same establishment of service, whether private or public.

In the third *Defrenne* case the Court even ruled that the elimination of discrimination based on sex forms a fundamental human right.[940] The European social partners should therefore abide this principle, which is set out in more detail in multiple directives.[941] Besides sex discrimination, article 13 of the EC Treaty entitles the Council to take appropriate action to combat discrimination based on racial or ethnic origin, religion or belief, disability, age or sexual orientation. This article is used as a basis for a number of anti-discrimination directives.[942]

As a mere example of the relevance of equal treatment law in relation to collective labour agreements, reference is made to the ruling of the European

938 Paragraph 12.

939 Paragraph 40.

940 European Court of Justice, 15 June 1978, C-149/77, *Defrenne*/*Sabena*, paragraphs 26 and 27.

941 To name a few: Directive 75/111/EEC on equal pay for male and female workers, OJ 1975 L 45, pages 19 and 20; Directive 76/207/EEC on equal treatment with regard to access to employment, vocational training, promotion and working conditions, OJ 1976 L 39, pages 40 – 42; and Directive 79/7/EEC on the progressive implementation of equal treatment with regard to statutory social security schemes, OJ 1979, L 6, pages 24 and 25.

942 See for example: Directive 2000/43/EC on equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180, pages 22 – 26; and Directive 2000/78/EC on equal treatment in employment and occupation, OJ 2000 L 303, pages 16 – 22.

Court of Justice in the case *Krüger*.[943] Ms Krüger was employed full-time by a German Hospital as a nurse. Her employment relationship was governed by a collective agreement for public sector employees. The collective agreement arranged, among other things, for an end-of-year bonus. At one stage, Ms Krüger switched from her full-time employment into a small part-time employment ("minor employment"). Subsequently, she lost her entitlement to the bonus, as minor employment workers did not fall within the scope of applicability of the collective agreement. Ms Krüger took the opinion that this constituted indirect sex discrimination. The European Court of Justice ruled as follows:[944]

> The exclusion of persons in minor employment from a collective agreement providing for the grant of a special annual bonus constitutes treatment which is different from that for full-time workers. If the national court, which alone has jurisdiction to assess the facts, were to find that that exclusion, although it applies independently of the sex of the worker, actually affects a considerably higher percentage of women than men, it would have to conclude that the collective agreement concerned constitutes indirect discrimination within the meaning of Article 119 of the Treaty.

Given the above, collective labour agreements may very well clash with European equality law.

6.3 Collective labour law versus market freedoms

Free movement of goods, persons, capital and services – the so-called market freedoms – are corner-stones of the European Community.[945] They have enhanced the European integration to quite an extent. One of their effects is that they make it easier for companies to move from one part of the EU to another, while still providing services throughout the entire Union.

The market freedoms are directly effective. In other words: these rights may directly be enforced by individuals vis-à-vis the Member States.[946] This was first held with regard to the free movement of persons, as set out in article 39 of the EC Treaty. The European Court of Justice ruled in the beginning

943 European Court of Justice, 9 September 1999, C-281/97, *Krüger/Kreiskrankenhaus*.

944 Paragraph 26.

945 T. Blanke, *The Viking Case 1*, page 36.

946 Direct effect of articles of the EC Treaty was recognised for the first time in: European Court of Justice, 5 February 1963, C-26/62, *Van Gend & Loos/ Netherlands Inland Revenue*.

of 1974 that the first two subparagraphs of this article imposed a sufficiently precise obligation to confer direct effect.[947] Later that year the European Court of Justice also recognised the direct effect of the right of establishment (article 43 of the EC Treaty)[948] and the freedom to provide services (article 49 of the EC Treaty).[949] In 1977 the European Court of Justice ruled that the free movement of goods (articles 28 and 29 EC Treaty) also has direct effect.[950]

Besides having direct effect as against the state (vertical direct effect), at least some freedoms have direct effect against private bodies as well (horizontal direct effect). The European Court of Justice already ruled on 12 December 1974 that not only states, but also non-public actors must abide by the rules of equal treatment with regard to nationality when regulating in a collective manner gainful employment and the provisions of services. According to the European Court of Justice, the abolition between Member States of obstacles to freedom of movement for persons and to freedom to provide services would be compromised if the abolition of barriers of national origin could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations which do not come under public law.[951] Articles 39 and 49 of the current EC Treaty thus also apply to private associations or organisations that collectively regulate employment and the provisions of services. The same applies to article 43 of the EC Treaty, as will be discussed separately in section 6.3.1.2. It also became apparent that individual employees may call upon article 39 of the EC Treaty directly vis-à-vis their employer (not being an association or organisation collectively drafting regulations).[952] It is not certain whether horizontal direct effect applies to all freedoms.[953]

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947 European Court of Justice, 4 April 1974, C-167/73, *Commission/France*, as confirmed in European Court of Justice, 4 December 1974, C-41/74, *Van Duyn/Home Office*.

948 European Court of Justice, 21 June 1974, C-2/74, *Reyners/Belgian State*.

949 European Court of Justice, 3 December 1974, C-33/74, *Van Binsbergen/Bestuur van de Bedrijfsvereniging voor de metaalnijverheid*.

950 European Court of Justice, 22 March 1977, C-74/76, *Iannelli/Meroni*, as confirmed in European Court of Justice, 5 April 1984, C-177/82, *Van de Haar*.

951 European Court of Justice, 12 December 1974, C-36/74, *Walrave and Koch*.

952 European Court of Justice, 6 June 2000, C-281/98, *Angonese/Cassa di Risparmio di Bolzano*.

953 C. Barnard, *EC Employment law*, page 180. Advocate-General Poiares Maduro is inclined to award a limited horizontal effect to the freedom of movement. See his opinion of 23 May 2007, in case C-438/05, *Viking*, paragraphs 31 *ff*. This line of reasoning, although less detailed, has been followed by the European Court of Justice in the *Viking* case paragraphs 33 – 37.

Just like the rules on free competition, the market freedoms have a potential to clash with (collective) employment law.[954] As will be set out below, this already happened in the past.

6.3.1 Free movement of persons

Free movement of persons encompasses (i) the freedom of movement of workers and (ii) the right of establishment.

6.3.1.1 Freedom of movement of workers[955]

Article 39 of the EC Treaty guarantees the freedom of movement for workers within the Community. That freedom entails the abolition of any discrimination based on nationality between workers of the Member States as regards to employment, remuneration and other conditions of work and employment. Pursuant to article 39.3, this freedom entails the right, subject to limitations justified on grounds of public policy, public security or public health: (a) to accept offers of employment actually made; (b) to move freely within the territory of Member States for this purpose; (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State set out by law, regulation or administrative action; and (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations. Article 39 does, pursuant to subparagraph 4, not apply to employment in the public service.

This freedom of movement of workers has been called upon on several occasions in the past with regard to employment. It has been ruled, for example, that employees deriving from one Member State may not be hindered within the territory of another Member State to pick up an activity as an employed person.[956] Such a hindrance may also derive from a collective labour agreement, as the following case shows. A clause in a German collective

954 This is since long recognised. See for example S. Clauwaert, *International / transnational primary and secondary collective action, an overview of international, European and national legislation*, page 14, on the relation between right to strike and the freedom of movement.

955 For a general overview of the freedom of movement of workers, reference is made to Craig and De Búrca, *EU Law, Text, Cases and Materials*, chapter 17; and Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities*, part 5 of chapter VII.

956 See European Court of Justice, 15 December 1995, C-415/93, *Union royale belge des sociétés de football association/Bosman*.

agreement providing for a salary rise on grounds of seniority for employees of that service after a certain period of employment without taking any account of previous periods of comparable employment completed in the public service of another Member State was held to manifestly work to the detriment of migrant workers who have spent part of their careers in the public service of another Member State.[957] This clause violated article 39 of the EC Treaty.

The 2004 Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, further establishes, among other things, the freedom of movement of EU citizens.[958] These EU citizens, who are also workers, are pursuant to article 7.1 free to reside in any Member State for a period longer than three months. This right also extends to family members.

6.3.1.2 The right of establishment[959]

Article 43 of the EC Treaty prohibits restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State. Establishment is defined as "the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period".[960] The aforementioned prohibition also applies to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. The freedom of establishment includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings under the conditions set out for its own nationals by the law of the country where such an establishment is effected. This article 43 of the EC Treaty does not only prohibit the host country to restrict the establishment of non-nationals and non-national undertakings, but equally prohibits the Member State of origin to prevent its nationals and undertakings from establishing themselves in another Member State.[961]

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957 European Court of Justice, 15 January 1998, C-15/96, *Kalliope Schöning-Kougebetopoulou/ Freie und Hansestadt Hamburg*.

958 Directive 2004/38/EC, OJ L 158, 30 April 2004, pages 77 - 123.

959 For a general overview of the freedom of establishment, reference is made to Craig and De Búrca, *EU Law, Text, Cases and Materials*, chapter 18; and Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities*, part 6 of chapter VII.

960 European Court of Justice, 25 July 1991, C-221/89, *The Queen / Secretary of State for Transport*, paragraph 20.

961 European Court of Justice, 27 September 1988, C-81/87, *The Queen / H. M. Treasury and Commissioners of Inland Revenue*.

The right of establishment has played a relatively marginal role in the past in relation to employment law. It was invoked, for example, to counter an Italian law stipulating that only private security firms holding Italian nationality were allowed to carry out private security work in respect of movable property and buildings. This law was held to (also) violate article 43 of the EC Treaty.[962] Recently, this stipulation played an important role in the *Viking* case.[963] This is the first decision of the European Court of Justice that dealt on the relation between the right to strike and the market freedoms.[964]

Viking Line, a Finnish passenger shipping company, operates a ferry named *Rosella* between Finland and Estonia. *Rosella* sails the Finnish flag and has a predominantly Finnish crew. A collective labour agreement concluded with the Finnish Seamen's Union (FSU) applies to this crew. The *Rosella* has been operating at a loss, being in competition with Estonia-flagged vessels on the same route between Finland and Estonia. Viking Line intended to re-flag the *Rosella* and register the vessel in Estonia, with an aim of entering into a (cheaper) collective labour agreement with an Estonian trade union and applying Estonian law on the employment agreements of the crew working on the *Rosella*. The FSU was opposed to the proposal to re-flag the *Rosella*. The FSU asked the assistance of the International Transport Workers' Federation (ITF), a federation of 600 transport workers' unions in 140 countries. The ITF has a policy of coordinating the national unions so as to promote a certain level of rights for seafarers. In this matter, the ITF issued a circular, in which it called upon its members not to enter into negotiations with Viking Line, in result precluding Viking Line to circumvent the FSU and deal directly with an Estonian union. The FSU forced Viking Line into concluding a subsequent collective labour agreement by threatening industrial action, an agreement in which Viking Line agreed not to commence re-flagging. The collective labour agreement expired in February 2008. In the meantime the ITF did not withdraw its circular. Viking Line started proceedings in England against ITF (having its head quarters in London) and FSU, in order to prevent these organisations from taking any action to stop the re-flagging of the *Rosella*. In the first instance, the claims of Viking Line were granted. The Court of Appeal, however, referred 10 questions to the European Court of Justice. In essence, these questions relate to the right to collective actions versus the right of freedom of establishment. The first question seeks to clarify whether collective actions fall within the scope of reach of article 43 of the EC Treaty

962 European Court of Justice, 31 May 2001, C-283/99, *Commission/Italy*.

963 European Court of Justice, C-438/05, *International Transport Workers' Federation and Finnish Seamen's union / Viking Line*.

964 T. Blanke, *The Viking Case 1*, page 46.

(right of establishment), or whether such actions are exempted from that reach (by analogy of the European Court of Justice's reasoning in the *Albany* case). The second, related, question is whether this right of establishment has a horizontal direct effect, as a consequence whereof it would apply between private undertakings. The third, fourth and fifth questions basically try to establish whether the policy and actions applied by the trade unions in this case violate article 43 of the EC Treaty. The sixth question intends, among other things, to establish whether the threatened or actual collective actions undertaken by a trade union or association of trade unions violate the freedom to provide services.[965] The last questions basically concern – should the collective actions not be exempted from the aforementioned market freedoms – the possible justification of the violation of these freedoms. In other words, can the right to collective action prevail over these freedoms?

The first question

There are reasons to argue that collective actions have to be exempted from the reach of article 43 of the EC Treaty, just as collective labour agreements have been exempted from the reach of competition law in the *Albany* case. Collective actions may be the trigger for companies to enter into collective labour agreements. Collective actions and collective labour agreements are therefore closely linked to each other. Not exempting collective actions from the reach of the market freedoms could deprive the ruling given in the *Albany* case some of its effects, because limiting the right to collective action limits the possibilities to enter into collective labour agreements.[966] The European Court, following Advocate-General Poiares Maduro's opinion, ruled differently. It stated that the right to collective action, including the right to strike, must be recognised as a fundamental right which forms an integral part of the general principles of Community law. Still, the exercise of this right may be subject to restrictions. It does not fall outside the scope of the provisions of the EC Treaty. This matter cannot be compared to the *Albany* case, as restrictions in competition are inherent in collective labour agreements, whereas restrictions

965 The European Court of Justice ruled that this question can only arise after the re-flagging of the *Rosalla*. Therefore, as on the date on which the questions were referred to the Court this vessel had not yet been re-flagged, the question was hypothetical. Consequently, the question was inadmissible. European Court of Justice, paragraph 30.

966 F. Dorssemont, *(25 jaar) Belgisch Stakingsrecht, (Enkele) Europese Perspectieven* [*(25 years of) Belgian Law on Strikes, (Some) European perspectives*], in: C. DeVos and P. Humblet, *Arbeid vs. Kapitaal, een kwart eeuw stakingsrecht* [*Labour vs. Capital, a quarter of a century of law on strikes*], Academia Press, Gent, 2007, page 170.

in freedom of establishment are not inherent in the right to strike. Moreover, the Court already ruled in previous cases that the exercise of fundamental rights does not fall outside the scope of the EC Treaty. It considered that such exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality. This is evidenced by the *Schmidberger* case and the *Omega* case.[967] Finally the Court noted that the submission that the Community has no competence in the field of strike due to article 137.5 of the EC Treaty, for which reason the right to strike is solely a national affair, does not change this. Even if that submission would hold true, Member States must, according to the Court, still comply with Community law. In summary, the fundamental nature of the right to take collective action is not such as to render article 43 of the EC Treaty inapplicable to the collective action at issue.

The second question

With regard to the possible horizontal effects of market freedoms, the Court already ruled in the past that "non-State actors" may distort the proper functioning of the common market (see the cases *Commission/France* and *Schmidberger*, which will be discussed in section 6.3.2 below). The question is whether this also applies to the FSU and the ITF in relation to article 43 of the EC Treaty. It took Poiares Maduro several steps to conclude that the actions of the FSU and the ITF, taken together, are capable of effectively restricting the exercise of the right to freedom of establishment of an undertaking such as Viking, for which reason article 43 of the EC Treaty applies to this matter. The European Court arrived at the same conclusion with fewer words. The fact that certain provisions of the EC Treaty are formally addressed to the Member States does, according to the Court, not prevent rights from being conferred at the same time to any individual who has an interest in compliance with the obligations thus laid down. Furthermore, the prohibition on prejudicing a fundamental freedom laid down in a mandatory provision of the EC Treaty applies in particular to all agreements intended to regulate paid labour collectively. The collective action taken by FSU and ITF is aimed at the conclusion of an agreement which is meant to regulate the work of Viking's employees collectively. It follows that article 43 of the EC Treaty must be interpreted as meaning that, in circumstances such as those in this

967 Which will be discussed in section 6.3.2 below.

matter, it may be relied on by a private undertaking against a trade union or an association of trade unions.[968]

The third to tenth questions

After it had ruled that article 43 of the EC Treaty applies directly to the case at hand, the European Court had to establish whether there is any existence of a restriction of freedom of establishment. According to the Court, (i) it cannot be disputed that collective action such as that envisaged by FSU has the effect of interfering with Viking's exercise of its right to freedom of establishment, while (ii) the collective action taken in order to implement ITF's policy of combating the use of flags of convenience, which seeks to prevent shipowners from registering their vessels in a State other than that of which the beneficial owners of those vessels are nationals, must be considered to be at least liable to restrict Viking's exercise of its right of freedom of establishment.

But is there any justification for limiting Viking's right? The Court noted that a restriction on freedom of establishment can be justified by overriding reasons of public interest, provided that it is established that the restriction is suitable for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain that objective. The right to take collective action for the protection of workers is such a legitimate interest.

With regard to the action of FSU, the Court stated that, at first sight, it can reasonably be regarded as to protect the workers. However, this view would no longer be tenable if it were established that the jobs or conditions of employment at issue were not jeopardised or under serious threat. The latter would be the case if (the parent company of) Viking would have promised in a legally binding fashion that the reflagging will not lead to the loss of jobs or to the deterioration of employment conditions. Whether that has been done, is something for the national court to establish. If the action is protecting jobs or employment conditions that are threatened, it must be ascertained whether the collective action initiated by FSU is suitable for ensuring the achievement of the objective pursued and does not go beyond what is necessary to attain that objective. Again, this is for the national court to decide. Poiares Maduro also considered that alleviating adverse consequences that the re-flagging of

968 These considerations have been criticised. FSU wanted to enter into a collective labour agreement with Viking that would only bind Viking (and not any others). Is that truly a regulation that collectively arranges pay that is relevant for the enjoyment of the freedom of establishment? Van Peijpe, for one, argues it is not. T. van Peijpe, *De arresten Laval en Viking en hun gevolgen* [*The cases Laval and Viking and their consequences*], Sociaal Maandblad Arbeid 2008-4, page 178.

the *Rosella* will have on its current crew, is a legitimate restriction of the right of establishment of an undertaking.

With regard to the collective action of ITF, seeking to ensure the implementation of its aforementioned policy of combating the use of flags of convenience, the Court ruled as follows. To the extent that said policy results in shipowners being prevented from registering their vessels in a State other than that of which the beneficial owners of those vessels are nationals, the restrictions on freedom of establishment resulting from such action cannot be objectively justified. Nevertheless, the objective of that policy is also to protect and improve seafarers' terms and conditions of employment. However, ITF is required to automatically initiate solidarity action against the beneficial owner of a vessel which is registered in a State other than that of which that owner is a national, irrespective of whether or not that owner's exercise of its right of freedom of establishment is liable to have a harmful effect on the work or conditions of employment of its employees. Therefore, the policy of reserving the right of collective negotiations to trade unions of the State of which the beneficial owner of a vessel is a national is also applicable where the vessel is registered in a State which guarantees workers a higher level of social protection than they would enjoy in the first State. Would the ITF in such a case still enter into a collective action, this action would be unlawful.

With regard to the above, Poiares Maduro noted that, if ITF's policy is operated on the basis of an obligation imposed on all national unions to support collective action by any of their fellow unions, it could lead to abuse and in effect violate Community law. If, by contrast, national unions were free to choose in a given situation whether or not to participate in collective action, then the danger of discriminatory abuse of a coordinated policy would be prevented, and Community law would in principle not be violated.

Conclusions

The above gives rise to the following conclusions. The right to collective action is a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures. This right may even justify a restriction of the obligations imposed by Community law, even under the fundamental right of establishment. The right to collective action, however, is not excluded from the scope of article 43 of the EC Treaty, an article that is capable of conferring rights on a private undertaking which may be relied on against a trade union or an association of trade unions. The exercise of the right to collective action which seeks to induce a private undertaking (whose registered office is in a Member State) to enter into a

collective agreement with a trade union established in that State and to apply the terms set out in that agreement to the employees of a subsidiary of that undertaking established in another Member State, constitutes a restriction of article 43 of the EC Treaty. That restriction may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective.[969]

6.3.2 Free movement of goods[970]

Free movement of goods is set out in articles 23 *ff* of the EC Treaty. Given article 23, the Community is based upon a customs union which covers all trade in goods and which involves the prohibition between Member States of customs duties on imports and exports (and of all charges having equivalent effect). Articles 28 and 29 of the EC Treaty prohibit quantitative restrictions on imports and exports between Member States.

The fact that free movement of goods may clash with other rights or interests is not new. Past clashes that made it to the European Court of Justice concerned fundamental rights that were not connected with collective employment law, but very well could have been. Two cases are are a good example hereof.

The first case concerned acts committed by French individuals and action groups against fruits and vegetables from other Member States.[971] These fruits and vegetables were destroyed by French Farmers during transport into France, and even when they were at display in shops in France. The French farmers concerned insisted on French agricultural products in the shops and on fixed minimum prices. The French government hardly intervened. The Commission took the view that the French authorities, by failing to take adequate measures in order to prevent the free movement of agricultural

969 See on these conclusions B. Bercusson, *Implementation and monitoring of cross-border agreements: The potential role of cross-border collective industrial action*, in: K. Papadakis, *Cross-Border Social Dialogue and Agreements: An emerging global industrial relations framework?*, International Labour Organisation, Geneva, 2008, pages 151 *ff*.

970 For a general overview of the free movement of goods, reference is made to Craig and De Búrca, *EU Law, Text, Cases and Materials*, chapters 14 and 15; and Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities*, parts 2 and 3 of chapter VII.

971 European Court of Justice, 9 December 1997, C-265/95, *Commission/French Republic*.

products being obstructed, had failed to comply with its obligations under the common organisations of the markets in agricultural products and the then article 30 of the EC Treaty (the current article 28 of the EC Treaty). The European Court of Justice subscribed to this point of view and held France in violation.

The second case concerned a demonstration by environmentalists in Austria, blocking the Brenner motorway for 30 consecutive hours.[972] This demonstration was carefully planned and executed with the proper governmental permits. The government did not want to withhold its consent, as that would, in its opinion, violate the protesters' freedom of expression and freedom of assembly. As a result of the demonstration (and other restrictions of national legislation on heavy traffic on bank holidays and during weekends) the German transport company Schmidberger claimed that five of its lorries were unable to use the Brenner motorway for 4 consecutive days. As the Brenner motorway is needed for overland transportation of goods between Germany and Italy, Schmidberger claimed that the Austrian government violated the free movement of goods by allowing the demonstration to take place. The European Court of Justice ruled that not banning a demonstration resulting in a complete closure of a major transit route such as the Brenner motorway is capable of restricting intra-Community trade in goods and is therefore incompatible with the Community law obligations on free movement of goods, unless the failure to ban can be objectively justified. [973] In that regard the Court noted that the reason not to ban the demonstration was inspired by the aforementioned fundamental rights of the demonstrators. That raises the question whether the principle of free movement of goods prevails over these fundamental rights. The Court noted that fundamental rights form an integral part of the general principles of law which observance the Court ensures. The Court draws inspiration from the constitutional traditions common in the Member States and from guidelines supplied by international human rights treaties, particularly from guidelines from the Convention.[974] Measures that are incompatible with observance of the human rights recognised by the European

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972 European Court of Justice, 12 June 2003, C-112/00, *Schmidberger*. The decision was confirmed by European Court of Justice, 14 October 2004, C-36/02, *OMEGA/ Bonn*.

973 Paragraph 64 of the *Schmidberger* case.

974 Paragraph 71 of the *Schmidberger* case.

Court of Justice, are not acceptable in the Community.[975] The human rights can, in principle, justify a restriction of the fundamental freedoms of the EC Treaty. As neither the freedom of expression nor the freedom of assembly are absolute and must always be viewed in relation to their social purposes, these rights should be balanced against the freedom of movement of goods. Given (i) the authorisation of the demonstration, (ii) the fact it concerned a single demonstration on one route, (iii) the indisputable exercise of fundamental rights of the demonstrators, (iv) the measures that were taken to limit the disruption, (v) the lack of a general climate of insecurity accompanying the action, and (vi) the impossibility to impose stricter rules on the demonstrators while not losing the effect of the demonstration, the Austrian government had not violated (the then applicable) articles 30 and 34, in conjunction with article 5 of the EC Treaty.[976]

It is clear that these cases are not related to collective employment law. Still, the actions as described in these cases could, to some extent, have been a part of collective actions. In other words, this "freedom" of the European Community could clash with the right to collective action. This possibility was explicitly taken into account when drafting the Regulation on the functioning of the internal market in relation to the free movement of goods among the Member States.[977] Article 2 and recital 4 hereof state: "this regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike". This line of arguing – the right or freedom to strike is exempted from the scope of the regulation – is closely connected to the *Albany* case, in which collective bargaining was exempted from competition law. It is not so much

975 This seems to imply that human rights prevail over fundamental Community rights. However, the European Court of Justice subsequently balances the rights. Apparently, there is no automatic prevailence of human rights over fundamental Community freedoms. See F. Dorssemont, *'Met de vlam in de pijp…'. Vrijheid van vergadering en meningsuiting, recht op collectieve actie versus vrij verkeer: primaat of belangenafweging*, page 82. One can even argue that fundamental Community freedoms in principle prevail over human rights. In the *Viking* and *Laval* cases, for instance, the Community freedoms are taken as a basis and the Court subsequently assessed whether these freedoms may be restricted by human rights. The test could also have been performed the other away around, taking the human rights as a basis and subsequently assessing whether these rights may be restricted by Community freedoms. The European Court of Justice did not do the latter, therefore ranking the Community freedoms higher than the human rights. T. van Peijpe, *De arresten Laval en Viking en hun gevolgen*, page 185.

976 See on this case also: B.J. Drijber, *Botsende vrijheden op de Brenner* [*Colliding freedoms on the Brenner*], Nederlands Tijdschrift voor Europees Recht, 2003/9, pages 229 *ff*.

977 Regulation 2679/98, OJ L 337, 12 December 1998, pages 8 and 9.

in line with the *Schmidberger* case, which balanced the freedom of expression and freedom of assembly on one hand with the free movement of goods on the other.

6.3.3 Free movement of capital and services[978]

The free movement of capital and services can be discussed together. Both freedoms make it possible for employers to perform cross-jurisdiction work within the EU. Article 56 of the EC Treaty prohibits all restrictions on the movement of capital and on payments between Member States and between Member States and third countries. Article 49 of the EC Treaty prohibits restrictions on freedom to provide services within the Community in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended. Services shall, pursuant to article 50 of the EC Treaty, be considered to be "services" within the meaning of the Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. They include: (a) activities of an industrial character; (b) activities of a commercial character; (c) activities of craftsmen; and (d) activities of the professions. The person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals. Principally the freedom of services has given rise to case law in the field of employment law.[979] Two examples that made it to the European Court of Justice will be discussed.

A landmark ruling in this respect was the 1990 ruling in the case *Rush Portuguesa*.[980] The Portuguese company Rush Portuguesa entered into a subcontract with a French undertaking for the carrying out of works for the construction of a railway line in France. For these activities it brought its Portuguese employees from Portugal. However, the French Labour Code stipulated that only the Office national d' immigration was entitled to recruit

978 For a general overview of the free movement of capital and services, reference is made to Craig and De Búrca, *EU Law, Text, Cases and Materials*, chapters 16 and 18; and Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities*, parts 7 and 8 of chapter VII.

979 See on this M.S. Houwerzijl, *De Detacheringsrichtlijn. Over de achtergrond, inhoud en implementatie van Richtlijn 96/71/EG* [*The Posted Workers Directive. About the background, contents and implementation of Directive 96/71/EC*], Kluwer, Deventer, 2005.

980 European Court of Justice, 27 March 1990, C-113/89, *Rush Portuguesa/Office national d'immigration.*

in France nationals of third countries.[981] Because of the breach of this Code the Director of the Office national d' immigration notified Rush Portuguesa of a decision by which he required payment of a special contribution. Rush Portuguesa sought to annul this decision and submitted that it had freedom to provide services within the Community and that accordingly, the provisions of articles 49 and 50 of the EC Treaty precluded the application of national legislation having the effect of prohibiting its staff from working in France. The European Court of Justice subsequently ruled that these articles:[982]

> preclude a Member State from prohibiting a person providing services established in another Member State from moving freely on its territory *with all his staff* and preclude that Member State from making the movement of staff in question subject to restrictions such as a condition as to engagement in situ or an obligation to obtain a work permit. To impose such conditions on the person providing services established in another Member State discriminates against that person in relation to his competitors established in the host country who are able to use their own staff without restrictions, and moreover affects his ability to provide the service.

Not much later, the European Court of Justice maintained that the same rule applied to an undertaking situated in a Member State, lawfully and habitually employing employees with a nationality of a non-Member State (Morocco), an undertaking which provides services with these employees in another Member State.[983]

To summarise, the European Court allows companies from one Member State to render services in another Member State with "cheaper" labour costs. This raised the concern of countries with a relatively developed but expensive social system to be flooded by cheap migrant labour. These concerns were recognised in *the Rush Portuguesa* ruling, as the Court noted:[984]

> Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in

981 Portugal had just acceded to the European Community. The workers from Portugal were subject to transitional provisions as a result whereof they were considered workers from a non-member country as regards the freedom of movement for workers. Reference is made to paragraph 4 of the *Rush Portuguesa* case.

982 Paragraph 12, emphasis added.

983 European Court of Justice, 9 August 1994, C-43/93, *Van der Elst/Office de Migration Internationales*.

984 Paragraph 18.

> which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means.

The threat of social dumping could consequently be prevented by Member States, either through legislation or through collective labour agreements. These two aspects (free movement of services and the prevention of social dumping) have, after the *Rush Portuguesa* case, been developed further by the European Court of Justice. Basically, the Court follows a four-step approach. The Court establishes (i) whether the requirements imposed by the host state on the undertaking that provides services restricts the freedom to provide services. If this is the case, the Court subsequently examines (ii) whether the requirement can be justified by overriding requirements relating to the public interest, most notably on the grounds of protection of the posted worker.[985] If so, the court will verify (iii) whether this protection is already granted in the state of establishment and (iv) whether the steps that are taken are proportionate.[986] These steps can be clearly recognised in the case *Mazzolini*.[987]

The French based company Surveillance Assistance SARL (ISA) operated a security firm on the border between France and Belgium. Some of its employees worked (partially) in Belgium. In Belgium, a collective labour agreement was extended covering all security firms. This collective labour agreement arranged for a higher minimum wage than ISA paid to its employees. ISA took the view that the collective labour agreement hindered the free movement of services. It submitted that it did not have to apply this collective labour agreement and merely had to comply with French legislation providing for minimum wages. ISA noted that although the wages paid to its employees were lower than the wages set forth in the collective labour agreement, the net amount received by these employees was in fact higher due to a less burdensome tax and social security regime that applied in France.

The European Court of Justice noted (i) that the application of the collective labour agreement to service providers was liable to "prohibit, impede or render less attractive the provision of services to the extent that it involves expenses and additional administrative and economic burdens". The collective labour agreement thus restricted the freedom to provide services. The Court then (ii) remarked that this freedom might be restricted by rules

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985 See for example European Court of Justice, 23 November 1999, joined cases C-369/96 and C-376/96, *Arblade and Leloup*.

986 C. Barnard, *EC Employment law*, page 278.

987 European Court of Justice, 15 March 2001, C-165/98, *Mazzolini/Guillaume*.

justified by overriding requirements relating to the public interest, such as the protection of workers. However, the application of the national rules of a Member State to providers of services established in other Member States must (iii) be appropriate for securing the attainment of the objective which they pursue and must (iv) not go beyond what is necessary in order to attain it. Belgium's objective of ensuring the same level of welfare protection in its territory for the employees working in the security sector may, according to the Court, be regarded as attained if all the workers concerned enjoy an equivalent position overall in relation to remuneration, taxation and social security contributions in the host Member State and in the Member State of establishment. Furthermore, the application of the collective labour agreement may prove to be disproportionate where the workers involved are employees of an undertaking established in a frontier region who are required to carry out, on a part-time basis and for brief periods, a part of their work in the territory of one, or even several, Member States other than that in which the undertaking is established. The European Court of Justice left it to the competent authorities of the host Member State to establish whether, and if so to what extent, application of national rules imposing a minimum wage on such an undertaking is necessary and proportionate in order to ensure the protection of the workers concerned.

The above shows that on one hand, the freedom to provide services sets limits on employment law and collective labour agreements. On the other, national legislation and collective labour agreements may prevent social dumping. The importance of the collective labour agreements in that respect was also recognised in the Posted Workers Directive,[988] which is closely related to the cases just discussed. Given its recitals, the Posted Workers Directive aims at both the abolition between Member States of obstacles to the free movement of persons and services and a climate of fair competition and measures guaranteeing respect for the rights of workers.[989] Basically, the Directive ensures that a "hard core" of clearly defined protective rules of the host country have to be observed by the provider of transnational services, regardless of the duration of the worker's posting. These protective rules are set out by law, regulation or administrative provision of that host country. However, they can also be set out by that country's collective agreements or arbitration awards which have been declared universally applicable, in as far it concerns construction related services (article 3 in conjunction with article 8 and the annex of the Posted Workers Directive). Pursuant to article 3.10

988 OJ L 18, 21 January 1997, pages 1 – 6.

989 See also M.S. Houwerzijl, *De Detacheringsrichtlijn. Over de achtergrond, inhoud en implementatie van Richtlijn 96/71/EG*, pages 86 *ff*.

of the Directive Member States may opt to additionally apply generally binding collective agreements or arbitration awards to sectors other than just the construction sector. Employment terms other than the above-mentioned "hard core" terms may only be made applicable to posted workers in the case of public policy provisions (article 3.10 of the Directive).

The introduction of the Posted Workers Directive did not bring about the end of collective employment rights clashing with free movement of services, as appears from the recent *Laval* case.[990] In this case, the European Court needed to give its decision on the relation between the right to strike on the one hand and the Posted Workers Directive and article 49 of the EC Treaty on the other. The Latvian company Laval posted workers from Latvia to work on a Swedish building site. The works were undertaken by a subsidiary company (Baltic Bygg) and involved construction work. A Swedish trade union wanted to start negotiations with Laval and Baltic Bygg in order to conclude a so-called tie-in agreement to the collective agreement for the building sector. By signing a tie-in agreement, the employer undertakes to comply with the collective agreements generally applied in the sector to which it belongs. This tie-in agreement is basically a substitute for extension of collective labour agreements, as extension as such is not possible in Sweden. Laval, Baltic Bygg and the Swedish trade union were unable to reach agreement on the tie-in agreement. Instead, Laval signed two collective agreements with the building sector's trade union in Latvia. Collective action by the Swedish union followed and other Swedish trade unions joined in to express solidarity.[991] The collective action was "successful", Baltic Bygg became subject of liquidation proceedings and the Latvian workers posted by Laval to Sweden returned to Latvia. Laval subsequently commenced proceedings in Swedish court seeking, among other things, a declaration as to the illegality of the collective action. The Swedish court concluded that its examination of such legality raised questions of interpretation of Community law and referred these questions to the European Court of Justice. In essence, the Swedish court wished to ascertain whether, in circumstances where a Member State cannot extend collective agreements, the Posted Workers Directive and article 49 of the EC Treaty must be interpreted as preventing trade unions of a Member State from taking, in accordance with the domestic law of that State, collective action designed to compel a service provider of another Member State to subscribe, by means of a tie-in agreement, to a collective agreement for the

990 European Court of Justice, 18 December 2007, C-341/05, *LavalSvenska Byggnadsarbetareförbundet*.

991 Boycotts are not uncommon in Sweden "to persuade" an employer to enter into a collective labour agreement. Reference is made to T. van Peijpe, *De arresten Laval en Viking en hun gevolgen*, page 176.

benefit of workers posted temporarily by that provider to the territory of the first Member State, including cases where that provider is already bound by a collective agreement entered into in the Member State where it is established.

The European Court of Justice applied a two step approach. First it analysed whether the collective action undertaken by the Swedish trade union complied with the Posted Workers Directive. When that appeared not to be the case, the Court subsequently established whether the action was in violation of article 49 of the EC Treaty.[992]

With regard to the Posted Workers Directive the European Court had to assess, phrased in the words of Advocate-General Mengozzi, whether the Directive precludes that terms and conditions are determined by a collective agreement that (i) is applicable in practice to domestic undertakings operating in the Swedish building sector, (ii) is "extended" through a tie-in agreement to a foreign service provider that temporarily posts workers in that sector, (iii) a tie-in agreement which is concluded as a result of the exercise of collective action, while (iv) the provider of services is already bound by a collective agreement concluded in the Member State of establishment. The Court observed that the "hard core" employment terms as referred to in the Posted Workers Directive, save for minimum rates of pay, were laid down in Swedish legislation. There was therefore no need to impose on Baltic Bygg the minimum "hard core" employment terms set out in the collective agreement for the building sector. That collective agreement furthermore did not apply to Baltic Bygg on the basis of the (implementation) of the Posted Workers Directive, as the collective agreement was not extended in the manner as prescribed in that Directive. Swedish legislation did, as said, not arrange for statutory minimum wages. Consequently, it was according to the European Court of Justice in principle allowed to fall back on other mechanisms setting out minimum wages – even mechanisms not mentioned in the Posted Workers Directive – possibly including collective labour agreements such as the collective agreement for the building sector that was not extended in the manner as required in the Posted Workers Directive. Nevertheless, the collective agreement for the building sector arranged for collective bargaining on a case-by-case basis in

992 The Court did not make clear what the exact relation is between the Posted Workers Directive and article 49 of the EC Treaty. The mere fact that the Court first analysed whether the collective action is permitted under the Posted Workers Directive, and only after having established that it is not, continued to assess the action against article 49 of the EC Treaty, seems to imply that the host country may limit the freedom to provide services further than prescribed in the Posted Workers Directive. That also follows from paragraph 68 of the Court's ruling. Reference is made to T. van Peijpe, *De arresten Laval en Viking en hun gevolgen*, page 185.

order to set out minimum wages. Minimum wages established by case-by-case bargaining cannot be considered minimum wages as referred to in the Posted Workers Directive.[993] In consequence, the Posted Workers Directive did not condone the collective action undertaken by the Swedish trade union with regard to the "hard core" employment terms, including pay. The same applies to the other employment terms. These other terms may be imposed on the service provider on the basis of article 3.10 of the Posted Workers Directive, provided that these terms are public policy provisions. That, however, was not the case according to the European Court of Justice. Terms that are agreed on by the social partners cannot be considered public policy provisions, because these provisions need to be generated by bodies governed by public law.[994] Consequently, the Posted Workers Directive does not allow the collective action undertaken by the Swedish trade union.

Subsequently, the European Court of Justice analysed article 49 of the EC Treaty. It first recognised, in line with the *Viking* case, the right to take collective action as a fundamental right, which exercise may be subject to restrictions. The protection of a fundamental right may, according to the Court, under circumstances justify a restriction of the obligations imposed by Community law: the exercise of fundamental rights needs to be reconciled with the requirements relating to rights protected under the EC Treaty. The European Court of Justice subsequently established that individuals may invoke article 49 of the EC Treaty against associations or organisations not governed by public law that obstruct the freedom to provide services. In this case, Swedish trade unions restricted Laval's freedom to provide services. This is normally in violation of article 49 of the EC Treaty. A restriction on the freedom to provide services is, however, allowed if it pursues a legitimate objective compatible with the EC Treaty and is justified by overriding reasons of public interest. If that is the case, it must be suitable for securing the attainment of the objective it pursues and not go beyond what is necessary in order to attain it. According to the European Court of Justice, preventing possible social dumping may constitute such an overriding reason of public

993 Mengozzi took another opinion on the "hard core" employment terms as provided for in the first subparagraph of article 3.1 of the Posted Workers Directive (most notably pay). Mengozzi argued that the Posted Workers Directive does not preclude that these terms are determined in accordance with a collective agreement made applicable through a tie-in agreement.

994 Here again Mengozzi took another approach. Mengozzi too stated that, where it concerns other employment terms than the aforementioned "hard core" employment terms, these terms can only be applied if they are public policy provisions. He, however, did not take the formal approach that these provisions need to be generated by bodies governed by public law, as the European Court of Justice did.

interest. Blockading action by a trade union of the host Member State aimed at ensuring that workers posted on the basis of a transnational provision of services have their employment conditions fixed at a certain level falls within the objective of protecting workers. However, actions with an aim of having Baltic Bygg sign the tie-in agreement cannot be justified by this objective, according to the Court of Justice. The content of the collective agreement for the building sector goes beyond the "hard core" employment terms as referred to in the Posted Workers Directive. It furthermore forces Baltic Bygg to negotiate on pay, not setting out fixed minimum wages. Article 49 of the EC Treaty therefore precludes the collective action undertaken by the Swedish trade union.

It is interesting to note that Mengozzi arrived at a different conclusion. Just like the European Court, he argued that the collective action at stake restricted the freedom of services. This restriction is allowable if the collective action is justified by overriding requirements relating to the public interest, provided that (i) that interest is not safeguarded by the rules of the Member State in which the service provider is established and (ii) the collective action is appropriate for securing attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it. But then Mengozzi gave the trade unions some room to manoeuvre. When assessing the above, it should according to Mengozzi be borne in mind that article 49 of the EC Treaty cannot impose obligations on trade unions which might impair the very substance of the right to take collective action. The goal of the collective action in the case at hand was the protection of workers and the fight against social dumping, which in itself is a legitimate goal relating to the public interest. Where the collective action was intended to impose on the service provider the *rate of pay* (a "hard core" employment term) determined in accordance with a collective agreement that is applicable in practice to domestic undertakings operating in the Swedish building sector, that action is allowed unless the service provider already had to pay identical or essentially similar wages to its employees on the basis of regulations applicable in the Member State of establishment. Where the collective action was intended to impose on the service provider *other employment terms*, these terms should be governed by public policy provisions in Sweden within the meaning of Article 3.10 of the Posted Workers Directive, and the subjection of Laval to those conditions should not go further than was necessary to attain the objectives pursued by the collective action concerned. Finally, where the collective action was intended to impose on the service provider *terms other than those relating to employment* these terms should involve a real advantage making a significant contribution to the social protection of posted workers, and should not duplicate any identical or essentially similar protection offered

to them by the legislation and/or collective agreement applicable to Laval in the Member State in which it is established.[995] Mengozzi finally argued that a number of conditions of the collective agreement that is applicable in practice to domestic undertakings operating in the Swedish building sector relate to mandatory contributions. These mandatory contributions did not all display connection with the protection of workers or offered any real advantage significantly contributing to the social protection of posted workers, and collective action with a view of imposing these conditions was therefore not permissible.

In summary, the *Laval* case established that article 49 of the EC Treaty and the Posted Workers Directive preclude a trade union, in a Member State in which the terms and conditions of employment covering the "hard core" employment terms as provided for in article 3 of the Posted Workers Directive are contained in legislative provisions, save for minimum rates of pay, from attempting, by means of collective action in the form of a blockade of sites, to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 of the directive.

The *Laval* case makes clear that article 49 of the EC Treaty and the Posted Workers Directive are to be taken seriously. Recently, this was confirmed again by the European Court of Justice in the *Rüffert* case.[996] Following a public invitation to tender, Land Niedersachsen awarded the company Objekt und Bauregie a contract for the building of a prison. The contract contained a clause stipulating that the collective labour agreement as in force at the place where the service is to be provided had to be observed, and that all employees working on the building site had to be paid a minimum wage in accordance with that collective labour agreement. The same obligation was incumbent on possible subcontractors. Violation of the aforementioned clause would lead to payment of penalties. This clause was the result of a national act, which aimed, among other things, to prevent the use of cheap labour. The contractor, Objekt und Bauregie, used a subcontractor when building the prison, a Polish company. That subcontractor did not pay its employees working on the site the minimum wages as laid down in the collective labour agreement. As a consequence, Land Niedersachsen terminated the agreement

995 Opinion, paragraphs 220 – 284.

996 European Court of Justice, 3 April 2008, C-346/06, *Rüffert/Land Niedersachsen*.

and claimed payment of penalties. That gave rise to the question whether a public contracting authority violates article 49 of the EC Treaty if it demands, when lodging a tender, that contractors undertake to pay their employees at least the remuneration prescribed by the collective agreement in force at the place where those services are to be performed.

The European Court ruled that the national act, obliging public contracting authorities to demand the contractor to apply a collective labour agreement, is not an act fixing minimum rates of pay and other "hard core" employment terms as referred to in the Posted Workers Directive. It is merely an act *referring* to the collective labour agreement in force at the place where activities needed to be performed. Furthermore, the collective labour agreement that had to be applied by the contractor and its subcontractors was not declared universally applicable within the meaning of German collective labour law. In other words, apart from the obligation in the contract to observe the collective labour agreement, there was no legal obligation to apply the terms of that collective labour agreement. Therefore, the Posted Workers Directive did not entitle the public contracting authority to impose on undertakings established in another Member State a rate of pay set out in the aforementioned collective labour agreement.

By requiring undertakings performing public works contracts and their subcontractors to apply the minimum wages set out in the above-mentioned collective labour agreement, a law such as the national law at stake may, according to the Court, impose on service providers established in another Member State where minimum rates of pay are lower an additional economic burden that may prohibit, impede or render less attractive the provision of the services in the host Member State. Therefore, the measure is capable of constituting a restriction within the meaning of article 49 of the EC Treaty. According to the Court, this restriction cannot be justified by the objective of ensuring the protection of workers. The rate of pay fixed by the collective labour agreement only applies to public works and is not universally applicable. There is no evidence to support the conclusion that the protection resulting from such a rate of pay is necessary for a construction sector worker only when he is employed in the context of a public works contract, but not when he is employed in the context of a private contract. Other justifications did not convince the European Court of Justice. As a result, the national law concerned violated the Posted Workers Directive, interpreted in the light of article 49 of the EC Treaty.

6.3.4 Reconciliation of (collective) employment law and market freedoms: the Service Directive

The above makes clear that the market freedoms may clash with (collective) labour law. The delicate balance between the European social model and the market freedoms – specifically the right to establish and the freedom of service – also appeared in full force during the long period before the Service Directive was adopted on 12 December 2006.[997] The Service Directive aims at providing a legal framework that intends to eliminate obstacles to the freedom of establishment for service providers and the free movement of services between Member States.

The original proposal of March 2003 basically proposed the following matters on the *freedom of establishment for service providers* to be introduced:[998]

- An administrative simplification for establishment. This would include the recognition of documents from the country of origin and the establishment of a "single point of contact". This single point of contact would be the contact for the completion of procedures and formalities in relation to the rendering of service, and would be the most important source of information. Procedures and formalities were to be completed by electronic means.
- The prohibition of making access to a service activity subject to an authorisation scheme, unless specific conditions were satisfied.
- The prohibition of a number of restrictive legal requirements that are in force in some Member States, such as discriminatory requirements based directly or indirectly on nationality or the location of the registered office.

The original proposal basically proposed the following matters on the *free movement of services* to be introduced:

- The applicability of the country of origin principle. That would entail that providers of services were subject only to the national provisions of their Member State on topics that would fall in the coordinated fields. This would cover provisions relating to access to and the exercise of a service activity, in particular requirements governing the behaviour of

997 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27 December 2006, pages 36 - 68.

998 COM (2004) 2 final, *Proposal for a Directive of the European Parliament and of the Council on services in the internal market*, page 3.

the provider, the quality or content of the service, advertising, contracts and the provider's liability. The country of origin would also be responsible for supervision and enforcement. The country of origin principle was to be accompanied by a number of derogations.

- The prohibition of a number of restrictive legal requirements that are in force in some host Member States, such as the obligation of the provider to have an establishment or representative in that Member State, to obtain authorisation to provide the services and the obligation to comply with requirements relating to the exercise of a service activity applicable in the territory of the Member State.
- The exclusion of the applicability of the country of origin principle with regard to posted workers. These posted workers would remain to fall within the scope of the Posted Workers Directive. The host country, however, was not to impose burdensome requirements on the service provider and the posted worker, such as registration of the posted worker and having a representative present.

This original proposal was based on far-reaching recognition by the host state of the rules of the country of origin.[999] That basic principle led to fierce opposition. The country of origin principle and the rules on posted workers were feared to lead to social dumping.[1000] The European Parliament watered the proposal down and the Commission drafted a new proposal.[1001] This new proposal, although marginally adapted again by the European Parliament, was, as said, adopted on 12 December 2006. The final version did not contain the country of origin principle anymore, which was replaced by an arrangement providing for the freedom to provide services. Article 16 of the Service Directive now stipulates that Member States will respect the right of providers to provide services in a Member State other than that in which they are established. Furthermore, the Member State in which the service is provided has to ensure free access to, and free exercise of, a service activity within its territory. The articles on posted workers were withdrawn altogether. It was stressed that the Service Directive would not affect labour law (article 1.6 of the Service Directive). It was even noted that the Directive neither affects the exercise of fundamental rights as recognised in the Member States and by

999 B.J. Drijber, *Van democratie en bureaucratie: de Dienstenrichtlijn is er door*, [*From democracy to bureaucracy: The Services Directive pulled through*], Nederlands Tijdschrift voor Europees Recht, 2007/1-2, page 1.

1000 Whether it indeed would lead to social dumping is questioned by many. See for instance: R. Blanpain, *Bolkestein: Sociale dumping? Fabel of Waarheid?*, Arbeid Integraal, 2005/2, pages 99 and 100.

1001 COM (2006) 160, *amended proposal for a Directive of the European Parliament and of the Council on services in the internal market*.

Community law, nor the right "to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect Community law" (article 1.7 of the Service Directive). Whether the Service Directive truly leaves the fundamental (employment) rights unimpaired, remains to be seen.[1002] In any event, the above illustrates the delicate balance between the market freedoms and (collective) labour law.

7. Framework for the topics of the research of the national collective bargaining systems

So far, this chapter has focused on transnational collective bargaining instruments and topics. The following 4 chapters will focus on the laws on collective bargaining in the Netherlands, Germany, Belgium and Britain respectively. In order to be able to compare the findings of that research, the same topics will be subject to research in each of these countries. Although I will try to research each topic with the same level of scrutiny in each of these 4 countries, some topics will nevertheless receive more attention in one country when compared with another country. After all, certain topics may be considered more troublesome in one country than in another country. Consequently, these topics may have received more attention in the first country when compared with the second.[1003]

The first section of each of the following four chapters sets out a general overview of the industrial relations of that country, including key-figures on the importance of collective labour agreements and high-level information on specific trends. It will furthermore discuss the level at which collective bargaining takes place (company, sectoral, inter-professional). Thereafter, the national history of collective bargaining will be set out in section 2. As this second section will not be used as a tool for comparing the different systems, but is "merely" useful to understand the national laws on collective bargaining

1002 The Regulation on the functioning of the internal market in relation to the free movement of goods among the Member States also states that it does not affect the right to strike. Reference is made to section 6.3.2 above. Still, some scholars expressed doubt whether this statement would prove to be correct, as they feared that market integration would actually limit the right to collective action, the aforementioned comforting statement notwithstanding. See T. Novitz, *International and European Protection of the Right to Strike: A Comparative Study of Standards Set by the International Labour Organization, the Council of Europe and the European Union*, page 162. The same doubt may be expressed in relation to the Service Directive.

1003 And, to be perfectly honest, occasionally I may dwell a bit more on collective labour law in the Netherlands. As a Dutch lawyer, I may not always find it easy to restrain myself when it comes to Dutch law, for which I apologise in advance.

better, the topics discussed in that section may very well differ from country to country.

Section 3 deals with the classical rights that are deemed crucial in collective bargaining, and which are discussed above in a European context: (i) the freedom of association, (ii) the right to collective bargaining, and (iii) the right to strike.

Section 4 explains the definition of a collective labour agreement, where appropriate the different sorts of collective labour agreements, and the different sorts of provisions they can contain. Thereafter, section 5 scrutinises the parties involved in the collective bargaining process. Subsequently, the bargaining process itself, possibly leading to the conclusion of a collective labour agreement, will be set out in section 6.

Section 7 is the core section of each chapter, as it sets out the effects of the collective labour agreement, once concluded, on all parties involved. This section discusses which parties are bound by the collective labour agreement, which legal effects this agreement has on these parties and how the agreement can be enforced. This will be done with regard to 4 different positions, also referred to as scenarios, being the position between:

1. the contracting parties. It depends on the national legislation at hand exactly which parties are concerned, but broadly speaking this relates to, on the one hand, one or more employers or associations of employers and on the other, one or more employees' organisations.
2. on the one hand the employer who is either bound by the collective labour agreement due to his membership of the contracting employers' association, or due to it signing that agreement itself ("the bound employer") towards, on the other hand, the individual employee employed by that employer who is a member of a contracting employees' organisation ("the bound employee").
3. the bound employer towards the individual employee employed by that employer who is not a member of a contracting employees' organisation. In this same scenario the position *vice versa* (the employer is not bound by the collective labour agreement while the individual employee employed by that employer is bound) will be discussed.
4. the members (and under some national systems even certain non-members) of the contracting associations towards "collectivities". This concerns in particular (i) the position of the bound employer towards its entire personnel and (ii) the position of the bound employer and its employees towards other collective entities.

Section 7 deals with the term and termination of the collective labour agreement, its possible after-effects and the role of alternative dispute resolution in collective bargaining. Section 8 sets out the possibility to extend a collective labour agreement. It discusses which (provisions of) collective labour agreements can be extended, which legal effects they have and how they are enforced. It also deals with the term and termination of the extended collective labour agreement, as well as its possible after-effects.

The reach of the social partners when concluding collective labour agreements will be set out in section 9. This section, named after the thesis of A. Stege,[1004] focuses on three specific aspects of the reach of the social partners, in relation to the conclusion of collective labour agreements: (i) what can the social partners regulate in a collective labour agreement, (ii) are they in any way limited by representativity demands, and (iii) are there any limitations with regard to independence? Representativity is a term that can have different meanings, as will be set out in more detail in chapter 15, section 3. Unless stipulated otherwise, representativity demands, as discussed in the chapters 9 though 13, relate to requirements that the social partners involved in collective bargaining should satisfy, with regard to minimum size (including a minimum number of members), a certain level of power or a specific status (apart from independence of the social partners, as that topic is discussed separately).[1005] Finally, section 10 summarises each chapter.

8. Summary

Three classical rights are often deemed crucial for the development of collective bargaining: (1) the freedom of association, (2) the right to collective bargaining and (3) the right to strike. These rights should therefore be further explored.

Many international treaties acknowledge and promote the freedom of association. This freedom includes the right of workers and employers to organise themselves free of intervention, as well as the right not being forced to join or to remain in such an association. These treaties did, until recently, not have a formal legal status in the European Community. There was no formal acknowledgement of the freedom of association for the European

1004 A. Stege, *De CAO en het regelingsbereik van de sociale partners* [*The collective labour agreement and the reach of the social partners*], Kluwer, 2004.

1005 This is not to say that these topics are the only topics relevant for representativity, but these are the topics that can be traced back to many Member States as will be shown in the following chapters. Other topics relevant for representativity will be set out in chapter 15, section 3.4.

Community; at least not set out in any of the Community treaties, and the freedom of association is (at least to a certain extent) even excluded from the scope of the EC Treaty given article 137.5. This notwithstanding, the European Court of Justice recognises the (positive and negative) freedom of association and considers it a fundamental right which is protected in the Community legal order.

The right to collective bargaining is difficult to define. In any event it encompasses the freedom for the social partners to enter into negotiations in order to reach a binding agreement on employment topics. A broader defenition of this concept would include the obligatory and normative effects a collective agreement may have, and possibly even the direct normative effects of the agreement. The mere right to enter into negotiations and to conclude collective labour agreements is recognised in many international instruments. These treaties did, until recently, not have a formal legal status in the European Community. However, article 138.4 and 139 of the EC Treaty also award these rights to a specific group of European social partners. The freedom of contract seems to protect exactly the same rights to other (European) social partners and employers as well. This part of collective bargaining – a narrow sense of collective bargaining – is therefore protected at a European level. In this narrow sense the social partners also have a right to collective autonomy. Some of the international instruments also arrange for the (normative and obligatory) effects of the collective labour agreement. ILO Recommendation R91 even arranges for the direct normative effects of a collective labour agreement. There are no indications that these parts of the right to collective bargaining – in its broad sense – are recognised on a European level. Collective autonomy is also not fully recognised in this broad sense. On the contrary, since European agreements lack direct normative effect and the European social partners depend on third parties to implement these agreements, their autonomy is less evolved than that of the national social partners in the Member States. The European social partners' autonomy is (at least to a certain extent) limited by law, should they wish to have their agreement implemented by a Council decision.

The right to strike is also recognised in many international instruments. These treaties dit, until recently, not have a formal legal status in the European Community. The right to strike is (at least to a certain extent) explicitly excluded from the scope of the EC Treaty given article 137.5. This notwithstanding, the European Court of Justice confirmed that the right to strike forms an integral part of the general principles of Community law the observance of which the Court ensures.

The three classical rights are, given the above, at least partially recognised at EU level. Recently, there have been a number of developments that (aim to) further enhance these rights. The EU charter has recently been given legally binding force. Should the Treaty of Lisbon be ratified and enter into force, the Union shall accede to the Convention. In consequence, the institutions of the Union must respect the rights written into the Charter and the Convention, including the right on the freedom of association, the right to collective bargaining and the right to strike, which become Community rights. The same obligations will be incumbent upon the Member States when they implement the Union's legislation. Unfortunately, a protocol exempts Poland and the United Kingdom from important obligations deriving from the EU Charter.

Within Europe, there are a number of rights, freedoms and prohibitions that could possibly limit the "free" exercise of collective labour law. The European court already had to rule on the position of collective labour law in the light of (1) competition, (2) equal treatment and (3) market freedoms.

Collective labour agreements limit competition between the different companies that (have to) participate. In any case, collective labour agreements set minimum and sometimes even maximum standards. Therefore, the content of a collective labour agreement can clash with the Community rules on competition. The European Court of Justice had to decide on the validity of extended collective labour agreements in specific branches, obliging all employers falling within its scope of applicability to participate in a compulsory pension scheme. The companies opposing these collective labour agreements argued that the extension of these agreements violated the Community's rules on freedom of competition. However, the European Court of Justice, referring to the social policy objectives that are pursued by collective labour agreements, ruled that collective labour agreements concluded in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of European competition law.

Collective labour agreements might also violate the highly developed European equal treatment legislation. The EC Treaty directly prohibits discrimination on the ground of pay for male and female workers. The EC Treaty furthermore entitles the Council to take appropriate action to combat discrimination based on racial or ethnic origin, religion or belief, disability, age or sexual orientation. The European Court of Justice has held several stipulations in collective labour agreements to contravene European equality law.

Free of movement of goods, persons, capital and services – the market freedoms – may also limit collective labour law.

Free movement of persons encompasses both the freedom of movement of workers and the right of establishment. Employees deriving from one Member State may not be hindered within the territory of another Member State to pick up an activity as an employed person. This prohibition also affects collective labour agreements. The right of establishment blocks protective stipulations prohibiting foreign companies to deploy certain activities and may, in specific circumstances, even limit the right to strike.

Free movement of goods has not (yet) clashed with fundamental employment rights, but very well could have. The free movement of goods has clashed with the freedom of expression and freedom of assembly. The European Court of Justice subsequently balanced the rights involved. It is easy to imagine a situation in which collective actions could be at odds with the free movement of goods, for example due to road blocks. This possibility was explicitly taken into account when drafting the Regulation on the functioning of the internal market in relation to the free movement of goods among the Member States, which states that the Regulation may not be interpreted as affecting the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike.

The free movement of capital and in particular of services may be on bad terms with collective labour law. Service providers may temporarily pursue their activities in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals. Restrictive conditions of the host state are not allowed, unless these conditions can be justified by overriding requirements relating to the public interest, most notably on the grounds of protection of the posted worker. If that is the case, the European Court of Justice will verify whether this protection already is granted in the state of establishment and whether the steps that are taken are proportionate. The freedom to provide services may even limit the right to strike.

Free movement of services involves the danger of social dumping. These two topics – the abolition between Member States of obstacles to the free movement of persons and services and a climate of fair competition and measures guaranteeing respect for the rights of workers – have led to the adoption of the Posted Workers Directive. The potential clash between on the one hand these market freedoms and on the other the European social model led to heated discussions in relation to the Service Directive. The Service Directive has been adapted in such a manner that all interests are served as much as possible.

The following 4 chapters deal with the collective bargaining systems of the Netherlands, Germany, Belgium and Britain respectively. In order to be able to compare the findings of that research, the same topics, as described in the section above, will be subject to research in each of these countries.

CHAPTER 9

COLLECTIVE LABOUR AGREEMENTS IN THE NETHERLANDS

1. Industrial relations in the Netherlands in a nutshell

In this chapter the collective labour agreements (*collectieve arbeidsovereenkomsten*) in the Netherlands will be discussed, applying the framework set out in section 7 of chapter 8.

1.1 The Dutch consultation model

Industrial relations play an important role in the Netherlands. Consultation is considered key and the Dutch consultation model (*Poldermodel*) is well known. This consultation takes place on different levels and normally in a rather harmonious atmosphere. Good examples of the consultation model are the roles of the Labour Foundation (*Stichting van de Arbeid*) and the Social and Economic Council (*Sociaal-Economische Raad*).

The Labour Foundation is a national consultative body organised under private law. Its members are the three largest trade unions and the three largest employers' confederations in the Netherlands (which will be introduced in section 6). The Foundation provides a forum in which its members discuss relevant issues in the field of labour and industrial relations. Some of these discussions result in memorandums, statements or other documents in which the Foundation recommends courses of action for the employers and trade unions that negotiate collective labour agreements in a specific industry or within individual companies. Upon request, the Foundation also advises the government on labour-related topics.[1006]

The Social and Economic Council is the main advisory body to the Dutch government and the parliament on national and international social and economic policy. The Council is financed by industry and is wholly independent from the government. It represents the interests of trade unions

1006 Reference is made to the website of the Labour foundation: www.stvda.nl.

and industry, advising the government (upon request or at its own initiative) on all major social and economic issues. The Social and Economic Council consists of three groups, a composition which reflects social and economic relations in the Netherlands. The first group consists of members representing employers, the second of members representing trade unions, and the third of independent or "Crown" members appointed by the Dutch government.[1007]

The Dutch government relies, to a certain extent, on the opinion of both institutions. This enabled the Dutch social partners to play an important role in the decision making process in the field of social and economic policy.

One of the best examples of the willingness of labour and management to cooperate harmoniously dates back to 1982. In that year, both sides of the industry, represented in the Labour Foundation, reached an important agreement, generally referred to as the "Wassenaar Agreement". Faced with increasing unemployment, the parties agreed on wage restraint in return for working hours' reduction. It is believed by many that this policy has enhanced the Dutch economy over the years, and it is even considered by some to be "historic".[1008]

In recent years, the consultation model is somewhat losing its predominance and has received critique. Notwithstanding this, consultation is still a precious commodity in the Netherlands.

1.2 Statistics

The number of collective labour agreements concluded in the Netherlands rose steadily from 81 in 1911, to 984 in 1920 and 1544 in 1940, to drop again to 1200 in 2002.[1009] The number of employees covered by collective labour agreements has risen in these years from 23,000, to 273,000, to 350,000, to 5,000,000. The numbers for the years 1920 and 2002 represent respectively about 15% and about 72% of the total working population in the Netherlands.[1010] According

1007 Reference is made to the website of the Social and Economic Council: www.ser.nl.

1008 E. Verhulp, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Netherlands*, page 27. The report can be found on: http://www.unifi.it/polo-universitario-europeo/ricerche/collective_bargaining.html.

1009 W.J.P.M. Fase and J. van Drongelen, *CAO-recht. Het recht met betrekking tot CAO's en de verbindendverklaring en onverbindendverklaring ervan* [*CLA law. The law concerning CLA's and the declaring binding and unbinding thereof*], Kluwer, Deventer, 2004, page 22.

1010 W.J.P.M. Fase and J. van Drongelen, *CAO-recht. Het recht met betrekking tot CAO's en de verbindendverklaring en onverbindendverklaring ervan*, page 22.

to the Minister of Social Affairs and Employment (*Minister van Sociale Zaken en Werkgelegenheid*, "the Minister"), this last number is even higher; and he states that in the year 2000 about 85% of all employees in the Netherlands were bound by a collective labour agreement.[1011] Approximately 9% of the employees are bound to a collective labour agreement merely due to it being declared generally applicable.[1012]

In contrast to the increasing number of employees covered by a collective labour agreement, there is a declining rate of membership of trade unions amongst the Dutch working population. Whilst in 1978 36% of the working population was member of a trade union, this number dropped to 28% in 1986 and even to 26% in 2002.[1013] There are no numbers known on the organisation rate of employers in the Netherlands.[1014] However, in general it is assumed that this organisation rate is well over 50% in virtually all sectors, and its total is around 85%.[1015]

1.3 Trends

There is a small focus shift in the Netherlands from sectoral towards enterprise level collective labour agreements.[1016] Furthermore, when compared to the past, collective labour agreements leave more room to fill in general clauses and concepts at enterprise level. This leads to decentralisation of the shaping of employment conditions. Likewise, collective labour agreements leave more

1011 Reference is made to the letter of the Minister of Social affairs and Employment (W.A. Vermeend) to the member of the Lower House Mr. Wilders dated 8 February 2001. The same figure is used in C.J. Loonstra and W.A. Zondag, *Arbeidsrechtelijke themata*, [*Employment law themes*], Boom, Den Haag, 2006, page 501.

1012 E. Verhulp, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Netherlands*, page 39.

1013 Reference is made to the 2004 Social and Cultural Report [*Sociaal en Cultureel rapport*] of the Dutch Social and Cultural Planning Board [*Sociaal and Cultureel Planbureau*], page 193. According to the Minister of Social affairs and Employment the number of trade union membership was 27% in 2000. See the letter of the Minister of Social affairs and Employment (W.A. Vermeend) to the member of the Lower House Mr. Wilders dated 8 February 2001.

1014 Reference is made to the letter of the Minister of Social affairs and Employment (W.A. Vermeend) to the member of the Lower House Mr. Wilders dated 8 February 2001.

1015 E. Verhulp, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Netherlands*, page 25.

1016 Reference is made to the report of the Labour Foundation, *De CAO: Wat en hoe* [*The CLA: What and how?*], 2004, page 11.

room for employers and employees to choose a package of applicable clauses in the collective labour agreement that fits their situation best ("à la carte" provisions).[1017] Company level agreements increasingly tend to leave room for Works Councils to further shape employment conditions by means of allocation of specific tasks.[1018] Finally, more non-affiliated unions, representing the interests of specific groups of employees, make their entrance in the field of industrial relations.[1019]

1.4 Bargaining levels

In the Netherlands, collective bargaining takes place at several levels. Three levels can be distinguished (although it can be disputed whether on the highest level "real" collective bargaining takes place).[1020]

The first and highest level of collective bargaining in the Netherlands is national level. As noted above, the Labour Foundation recommends courses of action for the employers and trade unions that negotiate collective labour agreements. These recommendations are often set out in central agreements. These central agreements remain mere recommendations and not "real" collective labour agreements, as defined in section 4.1 below. Still, the social partners tend to follow these recommendations to a certain extent in collective bargaining.[1021] Therefore, these recommendations could be regarded as the highest bargaining level in the Netherlands. The second bargaining level, where employers' associations and trade unions meet in order to conclude collective bargaining, is sectoral level. These sectoral agreements apply to an entire industry or branche. The last level is enterprise level and concerns collective labour agreements that merely apply to a specific employer.[1022]

1017 Labour Foundation, *De CAO: Wat en hoe*, page 17.

1018 E. Verhulp, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Netherlands*, page 38.

1019 A.Ph.C.M. Jaspers, *'Gele bonden' in Nederland* [*'Yellow unions' in the Netherlands*], Sociaal Recht, 2004-1, page 3.

1020 E. Verhulp, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Netherlands*, pages 34 *ff*.

1021 E. Verhulp, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Netherlands*, page 34.

1022 C.J. Loonstra and W.A. Zondag, *Arbeidsrechtelijke themata*, page 504.

2. A brief history of collective bargaining in the Netherlands

As a result of the French occupation of the Netherlands, Dutch law prohibited, since 1811, coalitions of employers and employees to use their collective powers to, amongst others, adjust wages. This prohibition hindered (the formation of) trade unions significantly.[1023] Its abolishment in 1872 opened the way to trade unions and, as a consequence, to collective labour agreements. It was in 1894 that the first collective labour agreement was concluded in the Amsterdam construction sector. More collective labour agreements followed shortly after.[1024]

Dutch scholars experienced difficulties in placing collective labour agreements in a proper legal setting (what is their status?) and determining their legal effects. Opinions on these subjects varied widely. By means of example, the differing opinions of two scholars – Van Zanten and Eyssel – on these subjects are set out in sections 3.1 and 3.2. Section 3.3 briefly describes the route from factual collective bargaining without specific statutory back-up towards acts on collective labour agreements.

2.1 The status of the collective labour agreement

Pioneering work was done by Van Zanten. In his opinion, collective labour agreements could not be understood through the concept of mandate. After all, trade unions concluded the collective labour agreements on their own account and not on behalf of their members. Moreover, even if it was assumed that they concluded the collective labour agreement on behalf of their members, the agreement itself would be impossible to define as it neither constituted an employment agreement nor an agreement preceding an employment agreement (*voorovereenkomst*). The collective labour agreement could, according to Van Zanten, also not be understood as an agreement setting out third-party clauses. This would not only be peculiar – as in such a case the core elements of the agreement were to be considered third-party clauses – but it would also lead to legal difficulties should a member of the contracting parties fail to comply with the clauses of the collective agreement. Van Zanten pointed out that the employer, as a member of a contracting employers' organisation, first had to hire an employee, in order for that employee to call upon a possible third-party clause. Therefore, it depended

1023 L.G. Kortenhorst and Mac. M.J. van Rooy, *De collectieve arbeidsovereenkomst* [*The collective labour agreement*], Tjeenk Willink, Zwolle, 1939, page 10.

1024 For an overview of these first collective labour agreements reference is made to J.H. van Zanten, *De zoogenaamde collectieve arbeidsovereenkomst* [*The so-called collective labour agreement*], Rechtgeleerd Magazijn, 1903, pages 450 *ff*.

on the free will of the employer whether or not an employee would be able to call upon a third-party clause, which was, according to Van Zanten, at odds with the Dutch statutory provisions on third-party clauses. According to Van Zanten, a collective labour agreement had a *sui generis* character, but was an agreement nonetheless. The uniqueness of the collective labour agreement particularly followed the circumstance that the execution of the agreement is mainly left to the members of the contracting parties, while the contracting parties were responsible (and liable) for the proper execution of the agreement.[1025]

Eyssel puts forward a compleyely different opinion. In his view, the collective labour agreement was not even an agreement. According to Eyssel, a collective labour agreement concluded between a collectivity of employees on the one side and one employer or a collectivity of employers on the other did not arrange for obligations between the contracting parties themselves, but merely for the *members* of the collectivity of employees vis-à-vis the employers. An agreement, however, should arrange the obligations between the contracting parties themselves.[1026] An agreement merely laying down rights for third parties (the members of the collectivity or collectivities) lacks sufficient ground and can therefore not be considered an agreement.[1027] The collective labour agreement should, in the view of Eyssel, be considered a social/economical phenomenon as opposed to a legal institution.

Eyssel remained relatively isolated in his opinion. Many scholars agreed to the position that the collective labour agreement should be considered a "proper" agreement.[1028] Some scholars even went a step further arguing that a collective agreement was not a mere obligatory agreement, but a mutual act stipulating objective law.[1029]

1025 J.H. van Zanten, *De zoogenaamde collectieve arbeidsovereenkomst*, pages 461 *ff*.

1026 A.P. Th. Eyssel, *De "collectieve arbeidsovereenkomst": regtsinstituut of sociaal verschijnsel* [*The "collective labour agreement": legal institute or social phenomenon*], Themis, 1905, pages 82 *ff*.

1027 A.P. Th. Eyssel, *De "collectieve arbeidsovereenkomst": regtsinstituut of sociaal verschijnsel*, page 91.

1028 For a list of these scholars reference is made to W.J.P.M. Fase and J. van Drongelen, *CAO-recht. Het recht met betrekking tot CAO's en de verbindend-verklaring en onverbindendverklaring ervan*, page 23. See also C.J. Loonstra and W.A. Zondag, *Arbeidsrechtelijke themata*, page 498.

1029 For an overview of the scholars taking this view reference is made to W.J.P.M. Fase and J. van Drongelen, *CAO-recht. Het recht met betrekking tot CAO's en de verbindendverklaring en onverbindendverklaring ervan*, page 23.

2.2 The effects of a collective labour agreement

Not only did the opinions on the status of the collective labour agreement differ, the same was the case with regard to its possible effects.

Van Zanten summarised the effects of a collective labour agreement as follows:[1030]

1. A collective labour agreement, concluded between a "collectivity of employees" on the one hand and one employer or a "collectivity of employers" on the other, is only valid as a *collective* agreement, if the collectivity of employees has legal personality. Should this not be the case, only multiple *individual* agreements between on the one side the employer or a "collectivity of employers" and on the other the members of the collectivity of employees have been concluded, setting out the conditions of the employment agreement, under the condition precedent that an employment agreement will exist. In this scenario there are no collective rights, which obviously does not coincide with the goal of the contracting parties.
2. Should both contracting parties have legal personality, the legal effects of the collective labour agreement are as follows:
   a. the contracting parties are liable for the correct execution of the collective labour agreement;
   b. if the members of the contracting parties have not arranged specific topics in their employment agreement that are arranged in the collective labour agreement, these latter arrangements apply to the employment agreement;
   c. the members of the contracting parties are, just as the contracting parties themselves, obliged to execute the collective labour agreement, but such an obligation merely exists towards their own collectivity. Should a member agree on provisions deviating from the content of the collective labour agreement in an individual employment agreement, the collectivity of this member is liable, but that collectivity can recover its damages from that member. That latter can, however, escape performance under the collective agreement, provided that it terminates its membership of the collectivity.

Not surprisingly, Eyssel countered the above. According to him, even if a collective agreement were to be an agreement, it would not have the consequences expressed by Van Zanten. His view on the consequences of

1030 J.H. van Zanten, *De zoogenaamde collectieve arbeidsovereenkomst*, pages 470 *ff*.

the collective labour agreement compared to the effects this agreement has, according to Van Zanten, is the following:

2. Should both contracting parties have legal personality and should the collective labour agreement be a valid agreement, the legal effects of this agreement are as follows:
   a. the collective agreement sets out the rights between the *members* of the collectivity of employees vis-à-vis the employers and does not lead to any obligations between the contracting parties. The contracting parties are therefore not liable for the correct execution of the collective labour agreement.[1031]
   b. if the members of the contracting parties have not arranged specific subjects in their employment agreement that are arranged in the collective labour agreement, these latter arrangements do not, in principle, apply. The members of the contracting parties cannot derive any rights from the collective labour agreement, as the agreement only has effect between the contracting parties and not third parties, such as the members of the contracting parties.[1032]
   c. should a member of the contracting parties in the individual employment agreements agree on provisions deviating from the content of the collective labour agreement, the collectivity of this member is – as said under a – not liable. Not only does the collective labour agreement itself give insufficient basis for such liability, but it should also be noted that members of both sides have agreed on a deviating employment agreement. If, however, there would be any liability, there is no escape possible by simply terminating the membership of the collectivity.[1033]

2.3 Towards acts on collective labour agreements

Although the publications on the legal status and consequences of collective labour agreements in the early years of the 20th century diverged on many occasions, most scholars did acknowledge that collective labour agreements should receive their place in the Dutch Civil Code (*Burgerlijk Wetboek*;

1031 A.P. Th. Eyssel, *De "collectieve arbeidsovereenkomst": regtsinstituut of sociaal verschijnsel*, pages 83 *ff*.

1032 A.P. Th. Eyssel, *De "collectieve arbeidsovereenkomst": regtsinstituut of sociaal verschijnsel*, pages 107 *ff*.

1033 A.P. Th. Eyssel, *De "collectieve arbeidsovereenkomst": regtsinstituut of sociaal verschijnsel*, pages 110 *ff*.

"DCC"), but that no part of the DCC could cope with the peculiarities of these agreements.[1034]

2.3.1 Article 1637n DCC

The Dutch legislator responded to this in 1907 by introducing a provision in the DCC on collective labour agreements: article 1637n. This provision introduced a definition of a collective labour agreement and (only) one consequence of violation of the collective labour agreement in the individual employment relation:[1035]

> Any stipulation between the employer and the employee, in violation of a collective labour agreement, which binds both, shall upon demand of any of the parties to the collective labour agreement with the exception of the employer itself, be declared void. A collective labour agreement is an arrangement, concluded between one or more employers or associations of employers having legal personality, and one or more associations of employees having legal personality, concerning the terms of employment to be observed when concluding individual employment agreements.

2.3.2 Act on the Collective Labour Agreement

It does not take a visionary to predict that this provision alone would not suffice to completely clear all the fog surrounding the (effects of a) collective labour agreement: too many matters were left untouched.[1036] There was a call for a better, more inclusive statutory arrangement of the subject at hand.[1037] Notwithstanding this, it took the legislator until 1927 to repeal article 1637n DCC and replace it with a proper act: the Act on the Collective Labour Agreement (*Wet op de Collectieve Arbeidsovereenkomst*; "ACLA").[1038] Basically, this act describes the private law aspects on concluding collective labour agreements and its consequences, as will be set out in detail in section 8 below. The reason for drafting this Act was, according to the legislator, the development of the collective labour agreement to an important institute. This institute needed further regulation on its conclusion, its legal consequences,

1034 L.G. Kortenhorst and Mac. M.J. van Rooy, *De collectieve arbeidsovereenkomst*, page 55.

1035 This is an informal translation only.

1036 See for problems arising from article 1637n DCC C.J. Loonstra and W.A. Zondag, *Arbeidsrechtelijke themata*, pages 499 *ff*.

1037 L.G. Kortenhorst and Mac. M.J. van Rooy, *De collectieve arbeidsovereenkomst*, pages 18 *ff*.

1038 Act of 24 December 1927, Bulletin of Acts and Decrees (*Staatsblad*; "Stb.") 1927, 415. The act entered into force on 1 September 1928.

its term and its termination. More importantly, it should be further clarified which parties were bound by the collective labour agreement.[1039]

2.3.3 Act on declaring binding and not binding of provisions of Collective Labour Agreements

Already before and during the introduction of the ACLA, there was a vivid discussion on the necessity of an instrument extending the scope of application of collective labour agreements. In the explanatory memorandum of the ACLA, the legislator simply noted that it had not yet defined its position on this matter.[1040] It would take the legislator years to finally make up its mind. Only in December 1936 did the legislator publish its proposal of what has become the Act on declaring binding and not binding of provisions of Collective Labour Agreements (*Wet op het algemeen verbindend en onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten*; "Extension Act").[1041] This act enabled the Minister, under specific conditions, to declare collective labour agreements binding within specific sectors.

In the legal history of the Extension Act the legislator extensively explained the reasons for this Act. The legislator praised the benefits the ACLA has brought for the Netherlands, most notably its positive effects on the order and rest in the Dutch trade and industry. However, it also noted that employers and employees could easily evade collective labour agreements by simply not joining the agreement, or terminating their memberships of the contracting employers' or employees' associations. According to the legislator, this evasion undermined the further development of collective bargaining and led to severe competition on employment conditions. As the legislator deemed this undesirable, it intended to implement an act enabling the relevant parties to extend the scope of application of a collective labour agreement to employers and employees who would otherwise not be bound by this agreement, consequently preventing the aforementioned competition on employment conditions.[1042]

The original driving forces behind the Extension Act were therefore (i) the support of collective bargaining and (ii) the prevention of competition on

1039 Explanatory Memorandum (*Memorie van Toelichting*; "MvT") ACLA, exhibits to the official report II, 1926/1927, 246, page 3.

1040 MvT ACLA, exhibits to the official report II, 1926/1927, 246, page 3.

1041 Act of 25 May 1937, Stb. 1937, 801 and Stb. 1937, 892. The act entered into force on 1 October 1937.

1042 MvT Extension Act, exhibits to the official report II, 1936/1937, 274, page 3.

employment conditions. Another advantage of the Extension Act, which has been emphasised after the Act itself came into force, is (iii) the possibility of decentralising employment legislation, by permitting the social partners to draft pseudo-legislation in a specific sector via binding collective labour agreements.[1043] Although the Extension Act has been criticised on many occasions, it still forms, combined with the ACLA, the heart of the Dutch collective bargaining system.

3. The classical rights concerning collective bargaining

Dutch law acknowledges the three rights deemed crucial for the conclusion of collective agreements: (i) the freedom of association, (ii) the right to collective bargaining, and (iii) the right to strike.

Article 8 of the Dutch Constitution (*Grondwet*) guarantees the right of association. This right includes the freedom to establish trade unions.[1044]

The right to collective bargaining is not embedded in the Constitution, but the *entitlement* to bargain derives from the ACLA. In the end, the mere fact that the legislator drafted this Act enabling the social partners in a statutory fashion to conclude collective labour agreements, sufficiently establishes this entitlement in the Netherlands. A right to collective bargaining, within the meaning that one party can always oblige another party to enter into such bargaining, is not accepted in the Netherlands as such.[1045]

The right to collective action (or the right to strike for that matter) is not embedded in any statute or in the Constitution. This right, nevertheless, exists in the Netherlands and is judge-made. The Supreme Court derived the right to strike from article 6.4 of the European Social Charter,[1046] a stipulation which, according to the Supreme Court, has direct effect through our monistic regime

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1043 M.M. Olbers, '*Wet op het algemeen verbindend en onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten*' [*Act on declaring binding and not binding provisions of collective labour agreements*], in: '*Arbeidsovereenkomst'* [*Employment Agreement*], Kluwer, volume 3, *Considerans* [*preamble*], comment 2.

1044 A.T.J.M. Jacobs, *Collectief Arbeidsrecht* [*Collective employment law*], Kluwer, Deventer, 2005, page 32.

1045 A.T.J.M. Jacobs, *Collectief Arbeidsrecht*, page 176. However, in some situations case law entitles a trade union a place at the negotiation table, even if that trade union was not invited, in fact awarding a right to collective bargaining to that member. Reference is made to section 7.

1046 Dutch Bulletin of Treaties (*Tractatenblad*; "Trb.") 1963, 90.

set out in articles 93 and 94[1047] of the Constitution.[1048] Many scholars consider the right to strike a "fundamental right", albeit not embedded in the Dutch constitution.[1049] The Supreme Court has affirmed this point of view.[1050]

4. Collective labour agreements

Before discussing the collective bargaining process in the Netherlands, it should be defined exactly what constitutes a collective labour agreement (section 4.1). Thereafter, the different types of provisions of collective labour agreements will be discussed (section 4.2).

4.1 What constitutes a collective labour agreement?

Pursuant to article 1.1 ACLA, a collective labour agreement is (i) an agreement concluded between (ii) one or more employers, or associations of employers, and one or more trade unions, (iii) principally or exclusively setting out the terms of employment applicable to individual employment agreements. This definition shows that at least three elements are of relevance.

First, there must be an agreement. Pursuant to article 3 ACLA, this agreement must be set out in an authentic deed or written contract. This same demand applies to alterations and extensions of terms of collective labour agreements (article 5 ACLA). In practice, collective labour agreements and their amendments and extensions are written agreements duly executed by all contracting parties.[1051]

Furthermore, it should be noted that not every party is capable of concluding collective labour agreements. The contracting parties should, on the one hand, be one or more employers or associations of employers, and on the other, one or more trade unions. These associations must meet specific demands. For a further discussion of the parties involved reference is made to section 6.

1047 Some claim that the Dutch monistic system does not derive from the Constitution but from case law (Supreme Court, 3 March 1919, NJ 1919, page 371). This, however, does not change the fact that the monistic regime applies in the Netherlands.

1048 Supreme Court, 11 November 1994, NJ 1995/152, *Havenstaking*. See also Supreme Court, 30 May 1986, NJ 1986/688, *NS*.

1049 L.A.J. Schut, *Internationale normen in het Nederlandse stakingsrecht* [*International norms in the Dutch right to strike*], SDU, Den Haag, 1996, page 34.

1050 Supreme Court, 28 January 2000, NJ 2000/292, *Douwe Egberts*.

1051 C.J. Loonstra and W.A. Zondag, *Arbeidsrechtelijke themata*, page 514.

The third demand requires the collective labour agreement to principally or exclusively set out the terms of employment applicable to employment agreements. This requirement should be interpreted broadly. According to the Dutch Supreme Court (*Hoge Raad*), an agreement that merely contains provisions that are not employment conditions as such, but provisions which do *relate* to employment agreements, still meets this requirement.[1052] Such an agreement can therefore be considered a collective labour agreement (provided, of course, that the other demands are satisfied as well).

A further requirement, which cannot be found in the ACLA, is that a collective labour agreement should be reported to the Minister (article 4 of the Act on Wage Formation (*Wet op de Loonvorming*)).[1053] Although this requirement is imposed for administrative reasons only,[1054] without such a notification an agreement cannot be considered a collective labour agreement.[1055]

4.2 Different types of provisions

The above explains, from a formal point of view, what constitutes a collective labour agreement. It does not distinguish between the different types of provisions a collective labour agreement can contain. In the Netherlands, it is common to differentiate between obligatory, normative and collective normative provisions.[1056] One should bear in mind that this systemisation, although useful to better understand collective labour law, is not statutory and has no direct legal consequences.

So-called obligatory provisions lay down the rights and obligations between the parties concluding the collective employment agreement. Examples of statutory obligatory provisions are the obligation for the contracting associations to inform their members of the conclusion and content of the collective labour agreement (article 4 ACLA) and their obligation to take those reasonable measures that are conducive for their members to perform under the collective labour agreement (article 8 ACLA). Examples of contractual obligatory provisions are the manner of termination of the

1052 Supreme Court, 30 January 1987, NJ 1987/936, *Van Velden*.

1053 Stb. 1970, 69.

1054 E. Verhulp, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Netherlands*, pages 5.

1055 Supreme Court, 13 April 2001, JAR 2001/82, *Duzgun*.

1056 F. Koning, *De obligatoire, diagonale en normatieve bepalingen van de CAO* [*The obligatory, diagonal and normative provisions of the collective labour agreement*], Sociaal Maandblad Arbeid 1988-3, pages 174 *ff*.

collective labour agreement, possible obligations to consult the counterparty in specific circumstances and a possible peace obligation.[1057]

Normative (also known as horizontal) provisions create rights and obligations between the contracting parties to an individual labour agreement (the employers and employees) that fall within the scope of application of the collective labour agreement. These provisions are the quintessence of collective labour agreements. Examples of such provisions are stipulations that regulate the type and amount of remuneration, allowances related to qualifications, rates for payment by results, working time, holiday, conditions and provisions governing termination of the employment relationship etc.

The collective normative[1058] (also known as diagonal) provisions set out the rights and obligations of the employers and employees towards "collectivities", being (i) the parties to the collective labour agreement[1059] or (ii) other collective entities.[1060] Examples of the first mentioned collective normative provisions are the obligation for the employer to pay a contribution to the contracting trade union and (although uncommon) the obligation of the employee to refrain from entering into service with an employer who is not bound by the collective labour agreement. An important example of the latter collective normative provision is the establishment of funds, usually paid for by the individual employers.

5. The players in the collective bargaining process

The parties who take part in the Dutch bargaining system are the government, the employers' confederations and trade union confederations, separate employers' associations, trade unions and individual employers.

The government has little direct involvement in the bargaining process anymore. In the period from 1945 until 1982 the government did intervene in

1057 This is a stipulation that prohibits collective actions aimed at (changing) a collective labour agreement that still is in force. A.Ph.C.M. Jaspers, *Nederlands stakingsrecht op een nieuw spoor?* [*Dutch law on strike on a new track?*], Kluwer, Deventer, 2004, page 50.

1058 R. Blanpain, *European Labour law*, page 688.

1059 It should be noted that an enterprise level agreement does not have a collectivity at the employer's side.

1060 W.J.P.M. Fase and J. van Drongelen, *CAO-recht. Het recht met betrekking tot CAO's en de verbindendverklaring en onverbindendverklaring ervan*, page 76.

the results of collective bargaining by making wage moderation decisions.[1061] Since the aforementioned Wassenaar Agreement, the government intervention was moderated significantly. Today, the government is involved in the Labour Foundation and the Social and Economic Council to further government's interests, but this is only indirect involvement in collective bargaining. Its further involvement is restricted to enact legislation on collective agreements and, when it comes to extending collective labour agreements, making this possible.

The confederations have hardly any direct influence on the collective bargaining process either. The main confederations on the side of the employees are the *Federatie Nederlandse Vakverenigingen*, the *Christelijk Nationaal Vakverbond* and the *Vakcentrale voor middengroepen en hoger personeel*. They are umbrella organisations, a cooperative of trade unions. It is these trade unions that enter into collective labour agreements and conduct the prior negotiations. The trade union confederations "merely" coordinate this process. The main confederations on the side of the employers are *VNO-NCW*, *MKB-Nederland* and *LTO-Nederland*. VNO-NCW and MKB-Nederland coordinate the negotiating process, but are not a contracting party. The actual contracting is the task of their members. LTO-Nederland does enter directly into collective labour agreements.

The trade unions and employers' organisations are the most interesting parties in the collective bargaining process, as they, besides the employers themselves, are the ones that actually conclude collective labour agreements. The trade unions and employers' organisations typically operate in their own specific field, such as manufacturing, construction, transport, health care or education. Trade unions in particular are still divided on the basis of ideology.[1062] Neither trade unions nor employers' organisations have strong connections with political parties. Trade unions and employers' organisations must, by law, meet two specific requirements in order to be able to conclude collective labour agreements.

First, organisations should, pursuant to article 1.1 ACLA, be associations which have legal personality. When drafting the "old" article 1637n DCC (reference is made to section 2.3 above), there was a vivid discussion whether it was necessary to demand legal personality. When drafting the ACLA,

1061 E. Verhulp, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Netherlands*, page 31.

1062 E. Verhulp, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Netherlands*, page 17.

the legislator considered this indispensable. The legislator argued that the collective labour agreement also entails rights and obligations for the contracting parties. Only entities that have legal personality are capable of carrying these rights and obligations themselves.[1063]

Second, the articles of association of these associations must specifically stipulate their power to conclude collective labour agreements (article 2 ACLA). The reason for this requirement is (i) to ensure that the association really commits itself to collective bargaining and (ii) to emphasise to aspirant members that the association can bind its members by a collective labour agreement.[1064]

The associations do not have to meet specific statutory requirements concerning representativity or independence when concluding collective labour agreements. The possible role these topics play will be discussed in section 9.

6. The negotiation process / conclusion of a collective labour agreement

The ACLA is rather silent about the collective bargaining process. Consequently, this process is governed by general concepts of law, most notably the law of contract. This entails, amongst other things, that the parties involved are free to choose whether they wish to enter into a collective labour agreement and, if so, with whom.[1065]

The freedom to choose whether or not to enter into a collective labour agreement does not include the "right to be left alone". One party may obviously try to persuade the other party to start negotiations. Trade unions, for example, may exercise pressure on the employer through collective actions in order to force the latter to enter into a collective labour agreement.[1066] Furthermore, in rare cases the freedom to freely choose the negotiation partner is limited. Once an employer or employers' association has started negotiations with one or more

1063 MvT ACLA, exhibits to the official report II, 1926/1927, 246, page 4.

1064 M.M. Olbers, *Wet op de collectieve arbeidsovereenkomst*, in: *Arbeidsovereenkomst*, Kluwer, volume 3, article 2, comment 1.

1065 C.J. Loonstra and W.A. Zondag, *Arbeidsrechtelijke themata*, page 507.

1066 Only incidentally special statutes oblige the employer to consult trade unions. This is, for example, the matter in case of collective dismissals and some types of mergers, Reference is made to the Collective Dismissal Act (*Wet Melding Collectief Ontslag*) and the Social and Economic Council Merger Code (*SER-Besluit Fusiegedragsregels*).

trade unions, another (sufficiently or even evidently representative)[1067] trade union may, in specific circumstances, demand a place at the negotiation table as well.[1068]

Once the negotiations turned out successful, the parties can conclude the collective labour agreement. In practice, the trade unions will first give their members the opportunity to either accept or deny the outcome of the negotiations, prior to making the agreement final.[1069] This final approval, however, is not a statutory requirement.

7. The effects of the collective labour agreement

Sections 7.1 through 7.4 will analyse, applying the 4 standard scenarios, (i) to whom the collective labour agreement applies, (ii) the effects which such an application has, and (iii) how the parties involved can enforce their rights. Section 7.5 sets out which other enforcement methods are in place in case of a breach of the collective labour agreement. Section 7.6 describes a "special" consequence that the collective labour agreement has, regarding provisions of so-called ¾ mandatory law. Section 7.7 will subsequently focus on the term and termination of the collective labour agreements. Section 7.8 will discuss the collective labour agreement's possible after-effects. Finally, section 7.9 sets out the role of alternative dispute resolution in collective bargaining.

7.1 Scenario 1

The contracting parties – that is, one or more employers or associations of employers and one or more trade unions – are bound to each other by the (obligatory provisions of the) collective labour agreement, upon conclusion of that agreement. This is, according to the legislator, self-evident. A specific provision in the ACLA to this effect was even deemed superfluous.[1070] Although the collective labour agreement may be a special type of agreement; it is an agreement (under private law) nonetheless. The signatory parties

1067 Depending on the court, sometimes "sufficient representativeness" is required and other times "evident representativeness".

1068 See for example the Court of Appeal in Arnhem, 14 March 1995, JAR 1995/96, *RCC*. See also District Court in Utrecht, 31 December 1986 and 4 November 1987, NJ 1988/676, *NCHP*. See furthermore Supreme Court, 8 June 2007, JAR 2007/162, *AbvaKabo*.

1069 A. Stege, *De CAO en het regelingsbereik van de sociale partners*, page 240.

1070 Memorandum of Reply (*Memorie van Antwoord*; "MvA") ACLA, exhibits to the official report II, 1926/1927, 246, page 22.

are therefore bound by the agreement like any other contracting party.[1071] Consequently, these parties need, by law, to perform under the contract; taking into consideration the reasonableness and fairness that all contracting parties should take into account (article 6:248 DCC).[1072]

Should a contracting party breach an obligatory provision of the collective labour agreement, the counterparty may instigate proceedings against that party.[1073] The counterparty may resort to the "usual" remedies following a breach of contract.[1074] This normally leads to claims on damages or specific performance (articles 6:74 *ff* DCC). The aggrieved party may even dissolve the collective labour agreement (article 6:265 DCC), although that recourse will normally, given its far-reaching consequences, be used reticently.[1075]

Another matter is whether the contracting parties, should they be associations, are liable for the non-performance of their members under the collective labour agreement. In other words: are these associations liable if their members fail to perform under the collective labour agreement? Article 8.1 ACLA opts for a nuanced approach in this respect. The contracting association is obliged to promote that its members fulfil the obligations arising from the collective labour agreement. The association must therefore attempt, to the best of its abilities, to make sure that its members follow the collective labour agreement; though it does not have to guarantee this. The contracting parties may, however, pursuant to article 8.2 ACLA, stipulate that the association has to guarantee the proper performance of its members of the collective labour agreement. This exception is only rarely applied.[1076]

7.2 Scenario 2

The position of the individual employer and employee towards each other is what matters most in collective labour law. Pursuant to article 9.1 ACLA, the

1071 MvT ACLA, exhibits to the official report II, 1926/1927, 246, pages 4 and 5.

1072 MvA ACLA, exhibits to the official report II, 1926/1927, 246, page 16.

1073 Should the obligatory provision have sufficient normative elements, the party or parties that are aggrieved by this non-performance – being the individual employers and/or employees – may also instigate proceedings themselves. Reference is made to the Court of Appeal in Amsterdam, 31 October 1996, JAR 1996/246, *Grot/KLM*.

1074 The counterparty may also invoke article 15 ACLA, which will be discussed in section 7.5, but that article is not frequently used in such a situation as it adds nothing to the already existing remedies specified in the DCC.

1075 M.M. Olbers, *Wet op de collectieve arbeidsovereenkomst*, article 9, comment 4.

1076 M.M. Olbers, *Handhaving van de CAO* [*Enforcement of the collective labour agreement*], Sociaal Maandblad Arbeid 1988-3, page 217.

collective labour agreement should be applied to the employers and employees that (i) are both bound by and (ii) fall within the scope of application of that agreement.

7.2.1 Which employers and employees are bound by the collective labour agreement?

The employer who either is a member of an employers' association that is a party to the collective labour agreement, or entered into the collective labour agreement itself, is bound by that agreement. The employee who is a member of a trade union that is a party to the collective labour agreement is bound by that agreement as well (article 9 ACLA).

This binding power is strong. It not only applies if the employer/employee is a member of a contracting association at the moment of concluding the agreement, but also if he becomes a member during the term of the collective labour agreement (articles 9.1 and 7.2 ACLA). Furthermore, termination of this membership has no effect on the binding power of the collective labour agreement on that member, up to the date that the collective labour agreement is either adapted or extended (article 10 ACLA). Even the dissolution of a contracting association has, given article 11 ACLA, no impact on the rights and obligations arising from the collective labour agreement. The association must, during its liquidation, continue to fulfil the collective labour agreement's obligations until the date that such an agreement is either adapted or extended.[1077]

7.2.2 Which employers and employees fall within the collective labour agreement's scope of application?

The collective labour agreement provides for its own scope of application.[1078] When determining this scope, four aspects should be taken into consideration:

i. the group of employees falling under the collective labour agreement;
ii. the employer or group of employers falling under the collective labour agreement;
iii. the geographical territory; and
iv. the duration.

1077 M.M. Olbers, *Wet op de collectieve arbeidsovereenkomst*, article 11, comment 1.

1078 E. Verhulp, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Netherlands*, page 7.

Many collective labour agreements only apply to certain groups of employees or exclude certain groups of employees (often higher level employees). If an employee is bound by the collective labour agreement (through his membership of a contracting trade union), but is excluded from the scope of application of the agreement by the agreement itself, the collective labour agreement does not apply to the employment agreement of that employee.

The employer or group of employers should also fall within the scope of application of the collective labour agreement. This demand can raise questions if a collective labour agreement is extended. Unless the collective labour agreement itself stipulates otherwise, the core business of the employer is decisive when determining which collective labour agreement applies to the employer.[1079]

Although this is uncommon in practice,[1080] it should be noted that the collective labour agreement may be limited in geographical territory. A collective labour agreement could, for example, apply solely to employees working in the harbour of Rotterdam. Moreover, the collective labour agreement is limited in time. Matters on term and termination of the collective labour agreement will be set out in section 7.8.

7.2.3 What are the legal consequences?

An applicable collective labour agreement has, pursuant to the ACLA, two main consequences for the individual employment agreement: (i) every provision in the individual employment agreement deviating from the collective labour agreement is null and void and is replaced by the corresponding provision in the collective labour agreement (article 12 ACLA) and (ii) any provision arranged for in the collective labour agreement, but not in the individual employment agreement, automatically applies (article 13 ACLA). In other words, the normative provisions in the collective labour agreement have a self-executing (direct normative) effect on the individual employment agreement.

The nullity as mentioned in article 12 ACLA is absolute: the provision in the individual employment agreement deviating from the content of the collective labour agreement will be considered not to exist.[1081] Consequently, nobody has to invoke the nullity in order for it to have effect. This also means that every

1079 Supreme Court, 6 January 1995, NJ 1995, 549, *Derksen/Iselmar*.

1080 A.T.J.M. Jacobs, *Labour law & social security in the Netherlands, an introduction*, BookWorks Publications, 1997, p. 25.

1081 MvT ACLA, exhibits to the official report II, 1926/1927, 246, page 6.

interested party may call upon the nullity should it wish so. This entitlement is explicitly set out in article 12.2 ACLA for the contracting parties. As a result, these parties may request a court to declare for law that a provision in an employment agreement is null and void, as it deviates from the collective labour agreement, without substantiating their interest in this claim.[1082]

Article 13 ACLA completes article 12 ACLA. The employer cannot escape from the provisions of the collective labour agreement by simply not arranging anything in the individual employment agreement, as these provisions of the collective labour agreement apply, pursuant to article 13, in such a situation as well.

7.2.4 Deviation from the collective labour agreement in the individual employment agreement

It should be noted that not every provision in an individual employment agreement that is different from the corresponding provision in the collective labour agreement always deviates from the collective labour agreement. In that respect three different sorts of normative provisions that could be found in a collective labour agreement should be distinguished: provisions can be "standard", "minimum", or even "maximum". If a provision is standard, any variation of that provision in individual employment contracts, falling within the scope of that collective labour agreement, will be null and void. Whether a provision is standard can be inferred from (the wording of) the text.[1083] Most provisions (and entire collective labour agreements) in the Netherlands are, however, minimum provisions, which allow departure from the provision in individual contracts in favour of the employee. Maximum provisions in collective labour agreements may not be exceeded in individual employment agreements. A single collective labour agreement may contain minimum, maximum and standard provisions.[1084]

When comparing provisions, each individual provision of the individual employment agreement needs to be assessed against each individual provision in the collective labour agreement in order to establish whether the first provision is more favourable.[1085] A package comparison – *i.e.* the entire individual employment agreement is compared with the entire collective

1082 W.J.P.M. Fase and J. van Drongelen, *CAO-recht. Het recht met betrekking tot CAO's en de verbindendverklaring en onverbindendverklaring ervan*, page 87.

1083 C.J. Loonstra and W.A. Zondag, *Arbeidsrechtelijke themata*, pages 515 and 516.

1084 A.T.J.M. Jacobs, *Collectief Arbeidsrecht*, page 116.

1085 Supreme Court 14 January 2000, JAR 2000/43, *Boonen/Quicken*.

labour agreement – is not allowed, unless the collective labour agreement specifically permits this.

7.2.5 Enforcement

As already mentioned, the normative provisions of the collective labour agreement have a self-executing effect: they "automatically" adapt the individual employment agreement. As a consequence, the individual employer or employee, who does not oblige the normative provisions of the collective labour agreement, is in breach of the individual employment contract. The aggrieved party can subsequently claim specific performance and/or damages following this breach of contract. This party cannot claim the dissolution of the collective labour agreement, as such an action is only available to the contracting parties.[1086]

7.3 Scenario 3

The above-mentioned only applies if both the employee and the employer are bound by the collective labour agreement (and fall within the scope of application of that agreement). But what if (i) the employer is (neither through membership of a contracting association nor through executing the contract itself) not bound by the collective labour agreement while the employee (through membership of the contracting trade union) is and (ii) vice versa?

In the first situation the collective labour agreement does not apply to the employment agreement.[1087] Should this have been different, the employee could, according to the legislator, become isolated. After all, in such a situation the employer could opt to only hire employees that are not a contracting trade union's member in order to be able to determine the employment conditions itself, without collective labour law interference.[1088]

The second situation is governed by article 14 ACLA. Pursuant to this article, the employer (who is bound by the collective labour agreement) is, during the term of the collective labour agreement, obliged to apply the employment conditions set out in the collective labour agreement to employees who are not

1086 MvA ACLA, exhibits to the official report II, 1926/1927, 246, page 22.

1087 This is different if the employer agreed on the applicability of the collective labour agreement with the employee. See Supreme Court 20 December 2002, JAR 2003/19, *Bollemeijer/TPG*.

1088 MvT ACLA, exhibits to the official report II, 1926/1927, 246, page 7.

bound by the collective labour agreement (so-called article 14 employees[1089]). This obligation does not apply should the collective labour agreement stipulate so. The reason for this construction is that the legislator wished to prevent the employer who is bound by the collective labour agreement to escape from the content of that agreement, by simply not hiring employees who are members of the contracting trade union.[1090] This construction is not intended to protect article 14 employees.[1091]

7.3.1 Article 14 ACLA

It should be noted that article 14 ACLA does *not* automatically bind the article 14 employee; it "merely" obliges the employer to apply the relevant employment conditions[1092] stipulated in the collective labour agreement to the article 14 employee. In basic terms, article 14 ACLA means that the employer should (i) only hire new employees on the basis of the aforementioned employment conditions and (ii) offer the article 14 employees that were already employed by him the same employment conditions.[1093]

If the employer (i) refuses to apply the employment conditions of the collective labour agreement to its (current or new) article 14 employees or (ii) if a (current) employee does not accept the employer's offer to apply these employment conditions, the collective labour agreement's employment conditions do not apply and the (already) agreed on individual employment conditions (remain) are in force. In other words, the collective labour agreement's employment

1089 Article 14 employees are either employees who are not member of any trade union or who are member of a trade union that is not a party to the collective labour agreement. M.M. Olbers, '*Wet op de collectieve arbeidsovereenkomst*', article 14, comment 1. When the position of the article 14 employee is discussed hereinafter, it should be presumed that the employer of that employee is bound by the collective labour agreement, unless specifically stipulated otherwise.

1090 MvT ACLA, exhibits to the official report II, 1926/1927, 246, page 7.

1091 E. Verhulp, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Netherlands*, page 6.

1092 Whether these employment conditions include collective normative provisions will be discussed in section 7.4.

1093 The exact wording of article 14 ACLA seems to suggest that the employer is only obliged to apply the employment conditions set out in the collective labour agreement to newly hired employees (not bound by the collective labour agreement) during the term of the collective labour agreement. However, most scholars and lower courts argue that the employer should apply these employment conditions to all (current and new) employees that are not bound by the collective labour agreement. This is also common practice in the Netherlands. Reference is made to A.T.J.M. Jacobs, *Collectief Arbeidsrecht*, page 124. See also M.M. Olbers, '*Wet op de collectieve arbeidsovereenkomst*', article 14, comment 4.

conditions do not prevail over the individual employment conditions of article 14 employees (it has no direct effect); articles 12 and 13 ACLA do not apply. In these situations the employer nonetheless violates article 14 ACLA.[1094]

The article 14 employee cannot, according to the Supreme Court, oblige the employer to apply the collective labour agreement to his employment agreement himself.[1095] The reason for this originates from the legal history of the ACLA: the legislator did not intend to grant the article 14 employee entitlements arising from the collective labour agreement, entitlements which were established without participation of that employee's trade union. The legislator merely wished to prevent the situation that the employer would escape from the content of the applicable collective labour agreement by simply not hiring employees who are a member of the contracting trade union. If the article 14 employee would have the same benefits as the employees who are member of the contracting trade unions, there would not be any incentive for the article 14 employees to join the contracting trade union.[1096] Should the article 14 employee wish the collective labour agreement's employment conditions to apply, he could become a member of a contracting trade union, after which the second of the above scenarios applies. The Supreme Court therefore saw no reason to grant the article 14 employee the right to enforce article 14 ACLA.[1097]

7.3.2 Acceptance of collective labour agreement / incorporation clause

Of course, an article 14 employee could also accept the employer's offer to apply the collective labour agreement's employment conditions. Should this be the case, these conditions apply (and the employer complies with article 14 ACLA). In practice, the employer does not want to depend on the article 14 employee's cooperation to accept the conditions of the collective labour agreement. For that reason, many employers explicitly stipulate in the employment agreement that a specific collective employment agreement

1094 Although it is disputable whether the employer truly violates article 14 ACLA in the second situation (the employer offers to the article 14 employee the employment conditions set out in the applicable collective labour agreement, but the employee refuses to accept this). If it should be accepted that article 14 ACLA applies to both current and newly hired employees, the employer does in such an event violate the exact wording of article 14 ACLA, but he cannot really be blamed. See W.J.P.M. Fase and J. van Drongelen, *CAO-recht. Het recht met betrekking tot CAO's en de verbindendverklaring en onverbindendverklaring ervan*, page 94.

1095 Supreme Court 7 June 1957, NJ 1957/527, *Suk/Brittania*.

1096 A.T.J.M. Jacobs, *Collectief Arbeidsrecht*, page 125.

1097 That this construction is somewhat peculiar will be set out in section 9.2.

applies. Such a stipulation is usually referred to as an "incorporation clause" (*incorperatiebeding*). In such an event the employer does not have to depend on the decision of the article 14 employee whether or not to accept the employment conditions of the new collective labour agreement; this employee is bound by the new collective labour agreement by contract.[1098]

If the article 14 employee is bound by the collective labour agreement – through acceptance or through an incorporation clause[1099] – his situation is very similar to scenario 2.[1100] The collective labour agreement's employment conditions apply, "adapting" the already existing employment conditions if necessary. Both parties may also enforce these employment conditions upon each other, as they agreed on the applicability thereof.

7.4 Scenario 4

Employers and employees who are both bound by the collective labour agreement (see scenario 2 above) are, if provided for in the collective labour agreement, also bound to collectivities by the (collective normative provisions of) this agreement. These collectivities can be the contracting parties and third entities, most notably funds.

In case the employer is also the contracting party, he has no "collective normative" obligation towards the contracting parties; any such obligation is obligatory. This employer can, nonetheless, still have collective normative obligations towards third entities. It is rather self-evident that this employer is bound to this third entity, as he committed to the contract. It is, however, less evident that the members of the contracting associations are bound via the collective labour agreement vis-à-vis the collectivities (both the contracting parties and third collective entities), as agreements usually arrange rights and obligations between the signatory parties themselves.

1098 The incorporation clause is also practical for other reasons. As a general rule, the employer does not know which of his employees are member of the contracting trade unions as article 16 of the Data Protection Act (*Wet Bescherming Persoonsgegevens*) prohibits the employer to process sensitive data, including data on trade union memberships. An incorporation clause can save the employer quite some difficulties in this situation, because this mere stipulation normally suffices to bind all of the employees.

1099 These are the most important manners for an article 14 employee to be bound by the collective labour agreement. However, they could also be bound by usage, reasonableness and fairness and other manners. Reference is made to A.T.J.M. Jacobs, *Collectief Arbeidsrecht*, pages 132 and 133.

1100 W.J.P.M. Fase and J. van Drongelen, *CAO-recht. Het recht met betrekking tot CAO's en de verbindendverklaring en onverbindendverklaring ervan*, page 97.

Here article 9.2 ACLA comes into play. This article stipulates that each member of a contracting association is obliged to fulfil the collective labour agreement's obligations that concern that member towards each contracting party of the collective labour agreement, as if that member itself were party to the collective labour agreement. This provision makes it clear that the members (employer and employees) are bound to the contracting associations. Article 9.2 ACLA makes less clear that these members are also bound to third collective entities; still, they are. The Supreme Court decided that this article also regulates the relation between the members vis-à-vis funds.[1101] This relation should be considered a contractual one.[1102]

If a member of a contracting organisation fails to comply with a collective normative obligation, the collectivities (both the contracting parties and third collective entities) can claim damages and/or specific performance on the basis of article 9.2 ACLA. This article is that broadly put, that the contracting association can even oblige its own members to fulfil collective normative obligations on this basis.

The above applies to employees and employers that are bound by the collective labour agreement. But what about the article 14 employee? Is the employer obliged by law to ensure that the article 14 employee also fulfils collective normative provisions? Article 14 ACLA refers only to the normative provisions of the collective labour agreement. However, most scholars argue that article 14 ACLA also concerns (most) collective normative provisions of the collective labour agreement.[1103] In any case, the Supreme Court ruled that collective normative obligations should surely be applied to article 14 employees who are bound by a collective labour agreement through an incorporation clause.[1104]

7.5 Other statutory means of enforcement

The above-mentioned scenarios discuss, amongst other things, whether or not the parties whose rights are concerned are entitled to enforce these rights. The ACLA and other acts also have specific clauses enabling the enforcement

1101 Supreme Court 30 January 1987, NJ 1987/936, *Van Velden*. See also R.A.A. Duk, *De Hoge Raad en fondsenbepalingen* [*The Supreme Court and provisions on funds*], Sociaal Maandblad Arbeid 1988-3, pages 198 *ff*.

1102 M.M. Olbers, *Wet op de collectieve arbeidsovereenkomst*, article 9, comment 4.

1103 A.T.J.M. Jacobs, *Collectief Arbeidsrecht*, page 123, and W.J.P.M. Fase and J. van Drongelen, *CAO-recht. Het recht met betrekking tot CAO's en de verbindendverklaring en onverbindendverklaring ervan*, pages 95 – 96.

1104 Supreme Court 17 January 2003, JAR 2003/40, *ABN/Teisman*.

of collective labour agreements. These will be discussed below, after which the enforcement methods of obligatory, normative and collective normative provisions will be summarised.

7.5.1 General means of enforcement

The ACLA has, as said, specific clauses enabling the enforcement of collective labour agreements. Some of them have already been mentioned (articles 8, 9 and 12 ACLA), others will be discussed below (articles 15 up to and including 17 ACLA).

Pursuant to article 15 ACLA, a contracting association may, should any of the other contracting parties or their members contravene the collective labour agreement, demand payment of damages suffered by it, but also suffered by its own members. This article's original aim was to assist the contracting associations to enforce collective normative clauses. If, for example, an employer would not fulfil a collective normative provision, for instance an obligation to have at least a x-percentage of women in its workforce, the members of, rather than the contracting association itself, suffer damages due to this breach. Consequently, the contracting associations are unable to claim damages on the grounds of article 9.2 ACLA from that employer. Under article 15 ACLA, however, they can claim such damages, as they are entitled to claim damages suffered by themselves and by their members. The contracting association cannot, given the wording of article 15 ACLA, claim specific performance on the basis of this article.[1105] This original aim notwithstanding, the legislator drafted article 15 ACLA that broad that it also enables contracting associations to claim damages relating to breaches of normative and obligatory provisions.

If the above-mentioned damages are other than merely financial losses, these losses will, pursuant to article 16 ACLA, be fixed on the principles of reasonableness. This article is mainly used by trade unions to claim losses from employers who do not comply with (the normative provisions of) the collective labour agreement. These trade unions argue that such non-compliance leads to the trade union's loss of prestige and capability to attract new members.[1106] Finally, article 17 ACLA allows the contracting parties to stipulate in the collective labour agreement different rules with regard to damages/losses than provided for in the articles 15 and 16 ACLA.

1105 W.J.P.M. Fase and J. van Drongelen, *CAO-recht. Het recht met betrekking tot CAO's en de verbindendverklaring en onverbindendverklaring ervan*, page 118.

1106 M.M. Olbers, *Wet op de collectieve arbeidsovereenkomst*, article 16, comment 2.

Besides the ACLA, the Works Council Act (*Wet op de Ondernemingsraden*) may be of relevance as well. Based on article 28.1 of this Act, the Works Council (if established) should promote the observance of employment conditions and of norms in the field of health and safety applicable to the company. These conditions and norms may derive form applicable collective labour agreements. As a consequence, the Works Council may play a role in the observance of collective labour agreements.

7.5.2 Enforcement of obligatory provisions

The aggrieved party may, following a breach of an obligatory provision, revert to the general provisions of the DCC, which are already set out in scenario 1 above, but may also resort to article 15 ACLA. This is, however, not common practice, as article 15 ACLA is more limiting than the general provisions of the DCC (it only entitles the aggrieved party to payment of damages and not to specific performance or dissolution of the collective labour agreement).

7.5.3 Enforcement of (individual) normative provisions

When it comes to the enforcement of normative provisions, the position of (i) the employer and employee who are both bound by the collective labour agreement and (ii) the article 14 employee should be distinguished.

Should both the employer and the employee be bound by the collective labour agreement, both parties can enforce their rights through claims based on the individual employment agreement.[1107] Reference is made to scenario 2 above.

The contracting parties are also entitled to establish the nullity of a provision in the individual employment agreement, without having to establish their interest in such an action (article 12.2 ACLA). The contracting parties may also, on the basis of article 9.2 ACLA, demand specific performance and/or payment of damages from both their own members and the members of the other contracting parties, should such members breach the (normative) obligations applicable to them under the collective labour agreement.[1108] It should be noted that the contracting parties have their own right to do so. In other words, if, for example, a contracting trade union demands specific performance from an employer bound by the collective labour agreement, that trade union is under no obligation whatsoever to establish that he acts

1107 Or even directly on the collective labour agreement. See for example: Supreme Court, 19 March 1976, NJ 1976/407, *Kip*.

1108 M.M. Olbers, *Wet op de collectieve arbeidsovereenkomst*, article 9, comment 4.

on behalf of its members.[1109] The contracting parties may also revert to article 15 ACLA to demand payment of damages/losses suffered by themselves or their members from the members of the other contracting parties, should these latter be in breach of the (normative) provisions of the collective labour agreement.

The Supreme Court even allowed a trade union that was not a party to the collective labour agreement to demand specific performance (but not payment of damages) from the employer who breached the normative provisions of the collective labour agreement.[1110] The trade union was allowed legal standing in court on the basis of article 3:305a DCC, which entitles associations to serve the interests of a group of persons, provided that their articles of association stipulate so. In this matter the trade union successfully argued that the provisions in the individual employment agreements of the employees deviated from the provisions in the applicable collective labour agreement, and were therefore null and void, given article 12 ACLA.

The position of the article 14 employee differs somewhat from the above-mentioned situation. Such an employee is not entitled to enforce the normative provisions of the applicable collective labour agreement himself, unless the collective labour agreement forms a part of his employment agreement (most notably through an incorporation clause). Should the latter be the case, the topic of enforcement is dealt with along similar lines as is mentioned above. Should the employer, however, refuse to apply the (normative) provisions of the collective labour agreement to the article 14 employee, whilst this collective labour agreement does not form a part of the employment agreement, no one can resort to article 12 ACLA, as this article does not apply in such a situation (reference is made to scenario 3). Apart from that, the same parties (not being the employee) as mentioned above may demand specific performance and/or payment of damages on the same grounds as mentioned above.

7.5.4 Enforcement of collective normative provisions

Collective normative provisions can, as already explained in scenario 4, be enforced by the signatory parties on the basis of article 9.2 ACLA. Third collective entities, such as funds, may also enforce collective normative provisions relating to themselves on the same ground. The contracting association may, pursuant to article 15 ACLA, demand payment of damages from the other contracting parties should they breach the (collective normative)

1109 Supreme Court, 19 December 1997, JAR 1998/39, *CNV/Pennwalt Holland*.

1110 Supreme Court 27 March 1998, JAR 1998/99, *FNV/Kuypers*.

provisions. The same applies to the contracting association towards the other contracting associations' members, should they violate the (collective normative) provisions. These claims can relate to damages/losses suffered by the plaintiff and/or its members.

7.6 Special legal consequences of a collective labour agreement: ¾ mandatory law

The collective labour agreement has another legal effect, not set out in the ACLA and not yet mentioned. To explain this effect it is important to understand that most systems of law have at least two types of statutory provisions, being provisions of directory and of mandatory law.[1111] Parties to an agreement may deviate, by agreement, from provisions of directory law; this type of law only applies if said parties have not arranged anything else.[1112] Mandatory law is law from which parties cannot derogate at all (neither by oral agreement nor by contract).

Since 1953, so-called provisions of ¾ mandatory law have been introduced in the Netherlands:[1113] the employers and employees may only deviate from specific statutory provisions if, as far as relevant for this thesis, an applicable collective labour agreement specifically permits them to do so. In other words, collective labour agreements can allow employers and employees to arrange specific matters in an individual employment contract that could not be arranged without that collective labour agreement. Provisions of ¾ mandatory law relate to, amongst others, the obligation to continue paying wages, the probationary period, and the notice period.[1114]

Clearly, the aforementioned arrangement on ¾ mandatory law applies to the employer and employee that are both bound by the collective labour agreement. For many years it was questionable whether it also applied to the article 14 employee. In 2002 the Supreme Court ruled that this is the case.[1115]

1111 The Rome Convention, for example, clearly differentiates between directory law and mandatory law. Reference is made to article 3.3 of the Rome Convention.

1112 Here, a further distinction can be made. Some of these provisions parties can be deviated from by any agreement – even an oral agreement – while other provisions can only be deviated from by contract (semi mandatory law). Reference is made to C.J. Loonstra and W.A. Zondag, *Arbeidsrechtelijke themata*, page 35.

1113 C.J. Loonstra and W.A. Zondag, *Arbeidsrechtelijke themata*, page 35.

1114 E. Verhulp, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Netherlands*, page 15.

1115 Supreme Court 20 December 2002, JAR 2003/19, *Bollemeijer/TPG*.

7.7 Term and termination

As collective labour agreements are private law agreements, it is primarily at the contracting parties' discretion to establish the term of the agreement, including the date upon which the agreement comes into force. Still, the legislator arranged certain topics as well. Hereinafter, the date upon which it comes into force, the term and termination of collective labour agreements will be discussed.

7.7.1 The date of coming into force

Parties to the collective labour agreement can arrange when the agreement comes into force. Should they have omitted to do so, the agreement comes into force starting the 15th day after its conclusion (article 7.1 ACLA). In this respect I recall that the collective labour agreement must be reported to the Minister (see section 4.1 above). Without this notification, the collective labour agreement does not qualify as such, but merely as a "normal" agreement. Only from the day after the Minister has sent an acknowledgement of the notification to the contracting parties, a collective labour agreement can be qualified as such (article 4.3. of the Wage Formation Act). If such a notification is sent after the 15th day following the conclusion of the collective labour agreement, the day after sending the notification is the date on which the agreement comes into force. These acts, however, do not preclude the collective labour agreement's possible retro-effect, if specifically arranged by the contracting parties in the agreement.[1116]

7.7.2 Term

The contracting parties may also stipulate the term of the collective labour agreement. This term, however, may not exceed five years (article 18 ACLA). Should the contracting parties agree on a term exceeding five years, this term is automatically converted into five years.[1117] Should the parties have not stipulated the term of the collective labour agreement at all, this term is pursuant to article 19.2 ACLA fixed on one year.

The legislator deliberately chose only to allow collective labour agreements for a fixed period of time. It argued that collective labour agreements arrange future situations, while it is only possible to foresee the near future. Collective labour agreements of indefinite duration would therefore be undesirable – they would still apply in times that had changed in an unforeseeable

1116 Supreme Court 27 March 1998, JAR 1998/99, *FNV/Kuypers*.

1117 MvT ACLA, exhibits to the official report II, 1926/1927, 246, page 7.

manner - unless the parties involved could terminate these agreements. If the contracting parties would not arrange provisions on the termination of the agreement themselves, the court should be able to dissolve the collective labour agreement. This legislator did not want to introduce such an option, as (i) it would be rather difficult for the court to decide whether the collective labour agreement should be dissolved and (ii) the contracting parties would, in such a case, have the opportunity to consistently try to dissolve the collective labour agreement, which would interrupt the stability that the collective labour agreement was intended to bring.[1118]

7.7.3 Termination

The collective labour agreement, unless stipulated otherwise, does not terminate by operation of law. Pursuant to article 19.1 ACLA, an agreement is to be considered (tacitly) renewed after termination of its original term for the same term, but not exceeding one year. The agreement will not be renewed once it is terminated by notice. The notice term is 1/12 of the collective labour agreement's total term, unless stipulated otherwise in the agreement.

Article 19.1 ACLA does not make clear whether this termination only concerns termination by notice at the end of the collective labour agreement's term, or that it also concerns interim termination. Strangely enough, neither the legal history of the ACLA nor the Dutch literature has awarded attention to this issue. It seems logical that the collective labour agreement cannot be terminated prematurely for at least two reasons. First, a fixed term continuing performance contract can, as a general rule, not be terminated prematurely by notice, unless specifically stipulated otherwise by the contracting parties.[1119] Second, in the legal history of the ACLA it was discussed whether a provision should be introduced in the ACLA enabling the contracting parties to request the court to dissolve the collective labour agreement due to changed circumstances. The legislator deemed such an article unwanted, as it feared, as just set out above, that the signatory parties would frequently use the article, which would lead to instability in the sector concerned.[1120] This entire discussion would obviously have been theoretical should the parties be able to terminate the collective labour agreement prematurely by notice. After all, why go to court to dissolve a collective labour agreement, if that agreement might as well be terminated by notice? Consequently, the signatory parties are only entitled to terminate the collective labour agreement by notice at the

1118 MvT ACLA, exhibits to the official report II, 1926/1927, 246, page 7.

1119 Supreme Court, 21 October 1988, NJ 1990/439, *Mondia/Calanda*.

1120 MvT ACLA, exhibits to the official report II, 1926/1927, 246, page 7.

end of its term. Given the contracting parties' freedom of contract, this will be different if the collective labour agreement permits interim termination by notice.[1121]

Apart from termination by notice, the collective labour agreement can be dissolved upon breach of the obligatory provisions (see scenario 1). It can also be terminated at any time by mutual consent of the contracting parties involved.

7.8 After-effects

It used to be unclear whether the collective labour agreement remained to have effect once it had expired. To phrase the question differently, does the collective labour agreement have any after-effects (*nawerking*)?

This is not the case with regard to obligatory and collective normative provisions. After expiration of the collective labour agreements, these provisions have lost their force.[1122] This is different with regard to normative provisions. After all, should both the employer and employee be bound by the collective labour agreement, the individual employment agreement is automatically converted by the collective labour agreement through articles 12 and 13 ACLA. Or, in other words, the employment contract has simply been altered by the collective labour agreement. This alteration does not end at the moment the collective labour agreement has expired;[1123] the stipulations of the collective labour agreement that were incorporated in the individual employment agreement remain in force. Obviously, these stipulations can be adapted by a new arrangement between the employer and employee (after all, the stipulations concerned are after the expiration of the collective labour agreement "merely" contractual obligations) and after a new collective labour agreement entered into force. These after-effects are also in place with regard to article 14 employees who have agreed upon the applicability of the collective labour agreement; the stipulations of that collective labour agreement have become part of the individual employment agreement due to

1121 This notice should be given either by letter sent by registered mail or by a bailiff's notification (article 20 ACLA). Pursuant to article 21 ACLA, the collective labour agreement's termination by notice by one party automatically involves that the agreement terminates for all parties involved, unless specifically stipulated otherwise.

1122 W.J.P.M. Fase and J. van Drongelen, *CAO-recht. Het recht met betrekking tot CAO's en de verbindendverklaring en onverbindendverklaring ervan*, pages 106 and 107.

1123 Supreme Court, 19 June 1987, NJ 1988/70, *Aruba*.

the acceptance of the collective labour agreement. This effect is not nullified due to the expiration of the collective labour agreement itself.

7.9 The role of alternative dispute resolution in collective bargaining

Many collective labour agreements have introduced some sort of alternative dispute resolution mechanism upon breach of the agreement.[1124] These methods are primarily intended for individual conflicts and their range differs considerably. Some collective labour agreements merely urge the employer, the employee and the contracting parties to solve their disputes as much in good harmony as possible. Other collective labour agreements have a detailed mechanism, obliging these parties to bring their disputes to a commission empowered to make binding decisions.[1125] In general, conciliation, mediation and (although rare) arbitration are used as alternative dispute resolution mechanisms.[1126]

8. Extending collective labour agreements

Basically, the Extension Act is an instrument that enables the Minister, by decree, to declare an existing collective labour agreement,[1127] which already applies to an *important majority* of the employees within a specific industrial sector, binding upon *all* employers and employees within that sector. This decree constitutes a material act of law,[1128] extending, in a mandatory fashion, private collective labour agreements.

The extension process is surrounded by a number of important demands and safeguards. These can be divided in (i) demands concerning (the provisions of) the collective labour agreements that are to de declared binding, (ii) procedural

1124 It is estimated that about 25% of the collective labour agreements provide for a dispute resolution mechanism. See R. van het Kaar, *EIRO Thematic Feature on Collective dispute Resolutions in an enlarged European Union – case of the Netherlands*. This report can be found on the EIRO-website.

1125 M.M. Olbers, *Handhaving van de CAO*, pages 220 and 221.

1126 R. van het Kaar, *EIRO Thematic Feature on Collective dispute Resolutions in an enlarged European Union – case of the Netherlands*.

1127 To be more precise, not the entire collective labour is declared binding, but merely *provisions* thereof (see section 8.1.1). Normally, by far most provisions of the collective labour agreement are extended, for which reason it is common in the Netherlands to simply refer to extending a collective labour agreement instead of extending provisions of a collective labour agreement. On occasion, although admittedly not entirely correct from a legal perspective, I also simply refer to extending a collective labour agreement.

1128 Supreme Court, 16 March 1962, NJ 1963, 222, *Bakker/Grafische Industrie*.

demands and safeguards and (iii) statutory limitations on the duration of the binding collective labour agreement. These demands and safeguards will be discussed in section 8.1. Moreover, there are specific grounds upon which the Minister can refuse the application for extension of the collective labour agreement (section 8.2). In both sections, frequent reference is made to the so-called Framework for assessing declaring binding provisions of a collective labour agreement (*Toestsingskader algemeen verbindend verklaring CAO-bepalingen*; "the Extension Framework").[1129] This Framework lays down the Minister's policy in the extension process.

Once declared binding, the collective labour agreement has important consequences for all parties that fall within the scope of the (by then, binding) agreement. These consequences will be discussed in section 8.3. Some employers that fall within the scope of application of the binding collective labour agreement would rather be exempted from this application. The grounds on which these companies can be exempted from the application of the binding collective labour agreement will be set out in section 8.4. Finally, section 8.5 deals with the enforcement of binding collective labour agreements.

8.1 The demands and safeguards surrounding the Extension Act

8.1.1 Demands concerning (the provisions of) the collective labour agreement

Neither all collective labour agreements, nor all provisions thereof can be declared binding. Once the Minister receives a request to extend a collective labour agreement, he will first verify whether the agreement in fact is a proper collective labour agreement. The criteria of a collective labour agreement are a bit stricter in the Extension Act than in the ACLA. The collective labour agreement (a) should be concluded between employers, or associations of employers, and one or more trade unions, and (b) must principally or exclusively concern the terms of employment applicable to individual employment agreements. The articles of association of the associations of employers and employees must (c) entitle these parties to conclude collective labour agreements and (d) they must have at least one member that falls within the scope of application of the collective labour agreement.[1130] The contracting employers or the association(s) of employers on the one side and the trade union(s) on the other must (e) be independent from each other. In other words, they must be free of each other's intervention with regard to

1129 Governmental Gazette (*Staatscourant*; "Stcrt.") 1998, 240, as amended from time to time.

1130 This demand is not in place in the ACLA, as will be set out in section 9 below.

the establishment, the performance of tasks and the administration of their organisations.[1131]

Subsequently, the Minister has to assess whether the collective labour agreement applies to an *important majority* of employees working in an industry (in fact: an industrial sector)[1132] in the Netherlands or in a part thereof. Only those collective labour agreements can pursuant to article 2.1 of the Extension Act be declared binding. The reason for this "important majority rule" is that, according to the legislator, only a majority can bind a minority.[1133]

Exactly what constitutes an "important majority" is set out in the 1998 Extension Framework. This Framework makes clear – following a ruling of the Supreme Court[1134] – that *all employees* to whom the collective labour agreement is applied, including employees who are "merely" bound by the collective labour agreement through article 14 ACLA, are to be considered when assessing the important majority rule.[1135] The Framework Agreement explains that the number of employees to which the collective labour agreement applies is to be set off against the total number of employees that fall within the scope of application of the collective labour agreement. As a result of this test the "representativity" of a collective labour agreement is placed in a specific percentage.[1136] If this representativity percentage is:[1137]

- 60% or more, the important majority rule is automatically complied with;

1131 Extension Framework, section 4.2.

1132 A.T.J.M. Jacobs, *Collectief Arbeidsrecht*, page 179.

1133 MvT and MvA Extension Act, exhibits to the official report II, 1936/1937, 274, pages 4 and 16.

1134 Supreme Court 10 June 1983, NJ 1984/147, *Fabricom*.

1135 In other words, not only the number of employees that are bound by the collective labour agreement through their membership of the contracting trade union(s) are to be taken into consideration when determining whether an important majority exists.

1136 An example makes this clear. In a specific sector 1,000 employers are, through their membership of a contracting employers' organisation, bound by a collective labour agreement. These employers employ in total 10,000 employees. The collective labour agreement could, considering its scope of application, apply to a total of 2,000 employers employing together 15,000 employees. The percentage of employees bound by the collective labour agreement in this example (the representativity of this collective labour agreement) is therefore 10,000 : 15,000 = 66.7%.

1137 Extension Framework, section 4.1.

- 55% up to (and not including) 60%, the important majority rule is complied with, unless the collective labour agreement's public support is insufficient or if this majority is not equally divided over the entire scope of application of the agreement (which, for example, could be the case if there is an important difference in applicability between big and small companies);
- over 50% but under 55%, the important majority rule is not complied with, unless there are in the opinion of the Minister special circumstances bringing forth that this rule is still complied with;
- 50% or less, there is not a majority let alone an important majority.

When requesting the Minister to extend a collective labour agreement, the requesting party, or parties, must submit information on (i) the number of employers and employees actually bound by the collective labour agreement and (ii) the total number of employers and employees who fall within the scope of application of the collective labour agreement. This party, or these parties, must also explain how these numbers are fixed.[1138]

Third, it is a common misunderstanding in the Netherlands that an *entire* collective labour agreement can be declared binding. The Minister is, in fact, only empowered to extend certain provisions of the agreement. Most importantly, normative provisions can be extended. This follows from the wording of article 2.1 of the Extension Act. Collective normative provisions can be extended as well.[1139] Obligatory provisions can, as a general rule, not be extended. This makes sense, as these provisions are intended to "merely" arrange the mutual rights and obligations of the contracting parties.[1140] Some provisions cannot, by law, be declared binding. Pursuant to article 2.5 of the Extension Act this applies to provisions restricting the competence of the courts, exerting pressure on individuals to join trade unions, which brings

1138 Reference is made to the Decree notification of collective labour agreements and requesting an extension declaration [*Besluit aanmelding collectieve arbeidsovereenkomst en het aanvragen van algemeen verbindend verklaring*], stcrt. 1998, 240, most recently changed on 23 August 2004, Stcrt. 2004, 166.

1139 See for example Supreme Court 10 June 1983, NJ 1984, 147, *Fabricom*. See also W.J.P.M. Fase and J. van Drongelen, *CAO-recht. Het recht met betrekking tot CAO's en de verbindendverklaring en onverbindendverklaring ervan*, page 142.

1140 Framework Agreement, section 4.3. However, exceptions to this rule exist. Obligatory provisions that do not arrange the relation between the contracting parties themselves can be declared binding. An example hereof is the obligation for the contracting social partners to establish and maintain a commission that can exempt employers and employees from specific normative obligations. See W.J.P.M. Fase and J. van Drongelen, *CAO-recht. Het recht met betrekking tot CAO's en de verbindendverklaring en onverbindendverklaring ervan*, pages 142 and 143.

forth unequal treatment of union and non-union members, and involves employees in keeping price arrangements.

Fourth, it is of importance that the provisions on the scope of application of the collective labour agreement that is to be declared binding are clear and unambiguous. The Supreme Court ruled that these provisions determine the scope of application of the binding collective labour agreement.[1141] Given the wording of article 2.1 of the Extension Act, the Minister is not entitled to change the scope of application of the collective labour agreement that is to be declared binding. This is a matter that is at the contracting parties' discretion.[1142] However, if the provisions on the scope of application of the collective labour agreement are unclear, or if this scope coincides in whole or in part with the scope of another (binding) sectoral collective labour agreement, the Minister normally refuses to declare the collective labour agreement binding.[1143] Subsequently, it is up to the contracting parties whether or not to change the scope of application of the collective labour agreement.

8.1.2 Procedural demands and safeguards

The Minister may not declare a collective labour agreement binding on his own initiative. Pursuant to article 4.1 of the Extension Act, at least one of the contracting parties must request such an extension. It is common practice that one of the contracting parties, most frequently being the employers' organisation, requests the extension on behalf of all contracting parties.[1144]

This request is subsequently published in the Government Gazette (article 4.3 of the Extension Act). Every party affected by the requested declaration is entitled to raise objections, as a rule within a 3 weeks' term following the publication.[1145] The objections are forwarded to the contracting parties with

1141 Supreme Court, 6 January 1995, NJ 1995/549, *Derksen/Iselmar*.

1142 He is, however, entitled to declare a collective labour agreement binding for only a part of the Netherlands, even if the parties applying for extension wish it to cover the entire Netherlands, if only in that part of the Netherlands the "important majority rule" is met. See W.J.P.M. Fase and J. van Drongelen, *CAO-recht. Het recht met betrekking tot CAO's en de verbindendverklaring en onverbindendverklaring ervan*, page 152.

1143 Framework Agreement, section 6.2. Reference is made to section 8.2 hereof.

1144 M.M. Olbers, '*Wet op het algemeen verbindend en onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten*', in: '*Arbeidsovereenkomst*', Kluwer, volume 3, article 4, comment 1.

1145 Extension Framework, section 3.

the request to respond. Only after this response, which is not limited by any term, the Minister can decide on these objections.

Pursuant to article 4.4 the Minister can, in this process, consult the Labour Foundation. The Minister will normally do so should he have received material objections against the requested extension, or if the scope of application of the collective labour agreement (partially) coincides with the scope of another collective labour agreement (in which case the Labour Foundation could decide whether its intervention is desirable).[1146]

If all formalities are complied with, all material demands are met and the Minister sees no reason to refuse the application, he should publish his decree making binding the collective labour agreement in the Government Gazette (article 5.2 of the Extension Act). This decree includes, given article 5.1 of the Extension Act, (a) a statement which provisions are declared binding, (b) the period in which these provisions are binding, and (c) if necessary, a description of the territory and type of business to which the binding provisions apply.

8.1.3 Statutory limitations in duration of the declaration

With regard to the term of the binding collective labour agreement, it should be noted that it may not have any retro-effect (article 2.3 of the Extension Act). This serves the legal certainty of the system.[1147] Furthermore, the decree must be limited in duration. Pursuant to article 2.2 of the Extension Act, the extension decree (a) may not exceed the term of the collective labour agreement itself and (b) has a maximum duration of 2 years, with the exception of provisions on funds.[1148] These provisions have, according to said stipulation, a more permanent character. As collective labour agreements cannot have a duration exceeding 5 years (article 18 ACLA), provisions on funds can ultimately be declared binding for that period.

If the contracting parties prematurely end their collective labour agreement, these parties should notify the Minister thereof on grounds of article 4.1 of the Act on Wage Formation. If that collective labour agreement was extended, the Minister will withdraw the extension decree upon said notification.[1149]

1146 Extension Framework, section 3.

1147 MvT Extension Act, exhibits to the official report II, 1936/1937, 274, page 6.

1148 Such as funds on travelling expenses, education etc.

1149 Extension Framework, section 4.4.

8.2 Grounds for refusal of the application for extension of the collective labour agreement

Article 2.1 of the Extension Act stipulates that the Minister *can* (as opposed to shall) declare binding a collective labour agreement that meets the relevant requirements. The Minister has therefore a discretionary power whether or not to declare such collective labour agreement binding. Given the Act's legal history[1150] and the Extension Framework,[1151] there are at least three valid reasons to turn down the request to declare the collective labour agreement binding.

First, the provisions of the collective labour agreement that are to be declared binding may not contravene Dutch law. These provisions are assessed against four criteria. The provisions may (i) not violate Dutch mandatory rules and regulations, including minimum wages, health and safety norms and statutory entitlements, such as the powers of a Works Council.[1152] Furthermore, (ii) the Minister can refuse provisions to be declared binding that contravene general concepts of law. Provisions that are unclear or provide insufficient safeguards for the parties involved are, for instance, not to be extended. Provisions at odds with (iii) constitutional rights – such as the right on privacy, or the right to collective actions (strike) – are also not extended. Finally, (iv) the same applies to provisions that put forward unequal treatment, such as provisions promoting unequal treatment on the basis of religion, sex, nationality, age etc.

Second, the provisions of the collective labour agreement may not contravene Dutch public interests. Obviously, this is a notion that is difficult to define. The Extension Framework allows the Minister to deny the extension declaration to provisions that, given social and economical developments, contravene the Dutch public interest.[1153]

Last, the Minister may refuse to declare a provision of a collective labour agreement binding if it insufficiently takes into account the valid interests of third parties. Third parties are employers and employees that fall within the scope of application of the collective labour agreement but are not bound by it, and "external" third parties whose interests are at stake. The

1150 MvT Extension Act, exhibits to the official report II, 1936/1937, 274, page 6.

1151 Extension Framework, section 6.

1152 Extension Framework, section 5.1.

1153 Extension Framework, section 6.1.

Extension Framework gives three examples on how the Minister may use this ground:[1154]

- the collective labour agreement that is to be declared binding may not have an unclear scope of application, nor may this scope coincide in whole or in part with the scope of another (binding) sectoral collective labour agreement. Third employers and employees are preferably not to be bound by two collective labour agreements;
- if the provisions directly or indirectly block or hinder, in a disproportionate manner, an effective entrance into a specific sector for bona fide companies, the Minister normally refuses to declare these provisions binding. Examples of such provisions are those that stipulate the exclusivity of certain insurance companies or training institutes, or provisions prohibiting a company to hire external employees;
- provisions on paying mandatory contributions to funds must meet a number of specific and detailed demands in order to be eligible to be extended.

8.3 The consequences of a binding collective labour agreement

With regard to the consequences of a binding collective labour agreement, articles 2.1 and 3 of the Extension Act are relevant.

Pursuant to article 2.1 of the Extension Act, the provisions of a binding collective labour agreement apply to all employment agreements concluded or to be concluded within the term of the extension decree that fall within the scope of the binding collective labour agreement. As already mentioned, the scope of a binding collective labour agreement is primarily arranged by the provisions of the collective labour agreement itself (although the Minister's declaration may be limited to only a part of the Netherlands, in which case only in that part are the provisions binding).[1155]

Every arrangement agreed on between the employer and employee that is in violation of a provision of an applicable binding collective labour agreement is void, and is automatically replaced by said provision (article 3.1 of the Extension Act). An applicable binding collective labour agreement also prevails over another applicable, non-binding, collective labour agreement.[1156] In this

1154 Extension Framework, section 6.2.

1155 MvT Extension Act, exhibits to the official report II, 1936/1937, 274, page 5.

1156 W.J.P.M. Fase and J. van Drongelen, *CAO-recht. Het recht met betrekking tot CAO's en de verbindendverklaring en onverbindendverklaring ervan*, page 162.

respect, it should be noted that most (binding) collective labour agreements are collective labour agreements containing minimum provisions.[1157] An arrangement applying to the employment agreement that differs from a minimum provision in an applicable binding collective labour agreement, in a manner that is favourable to the employee, does not violate that provision and is therefore not void.

In the case that the employment agreement between the employer and employee does not arrange subjects that are arranged in provisions of an applicable binding collective labour agreement, these provisions automatically apply to that employment agreement on grounds of article 3.3 of the Extension Act.

Consequently, the collective labour agreement limits the individual and collective contractual freedom of the parties concerned. These parties are not, after all, entitled to agree on stipulations that violate provisions of a binding collective labour agreement. When it comes to minimum collective labour agreements this limitation is only partial. In such an event, the employers and employees (individually), and employers, associations of employers, and one or more trade unions may (collectively), agree on employment conditions that are more favourable to the employees.

As opposed to the provisions of "normal" collective labour agreements, the provisions of the binding collective labour agreements do not have after-effects on the employers and employees that are solely bound by these provisions due to the extension decree.[1158] The employment conditions that applied before extending the collective labour agreement "revive" again after the binding collective labour agreement has ceased to have effect. This is different for employers and employees that are not only bound by these provisions due to that declaration, but also due to the ACLA (the employers had to apply the collective labour agreement anyway). For them, the provisions do have after-effects on the basis of the rules set out in section 7.8 above.

8.4 Exemptions granted to individual employers

As set out above, the consequences of being governed by a binding collective labour agreement are far-reaching. This makes some employers seek

1157 See section 7.2.4 above.

1158 Supreme Court 18 January 1980, NJ 1980/384, *Hop/Hom*. This rule has been nuanced a bit, especially with regard to acquired rights with limited duration, such as rights to receive supplementary payment when ill for a specific period of time. See for example Supreme Court 28 January 1994, NJ 1994/420, *Beenen/Vanduho* and Supreme Court 7 June 2002, NJ 2003/175, *Luitjens/J.B.*

possibilities for exemption from the extension decree. Employers that (i) are already bound by a non-binding collective labour agreement and (ii) who raise objections against the request to extend a collective labour agreement that would also apply to them, could receive a dispensation from the Minister.[1159] Dispensation in such a situation is only granted if (a) the employer involved cannot, in all reasonableness, follow the binding collective labour agreement and (b) the collective labour agreement that already applies to this employer is concluded with an independent trade union.[1160]

Apart from the above dispensation possibility, many (about 75%) of binding collective labour agreements introduce a possibility for third companies that fall within the scope of application to request a dispensation from a special committee.[1161] This is another method of being exempted from the binding collective labour agreement.

8.5 Enforcement of the binding collective labour agreement

The enforcement of binding provisions of a collective labour agreement resembles the enforcement of "normal" (non-binding) collective labour agreements.

Although the extension decree is itself an act of public law, it should be noted that the enforcement of binding collective labour agreements is a private matter. According to the legislator, the extension decree and the collective labour agreements envisage governing individual employment agreements, and are therefore part of private law. Consequently, violating provisions of applicable binding collective labour agreements should result in civil actions, as opposed to public sanctions.[1162]

1159 Prior to 1 January 2007, it was very easy to receive dispensation. Employers that were bound by another collective labour agreement would more or less automatically receive a dispensation from the Minister from the extended collective labour agreement. According to many, this lead to abuse: employers entered into a collective labour agreement with a trade union that could not be considered to actually represent the relevant employees, or even with yellow trade unions, in order to escape binding collective labour agreements. See for example F.B.J. Grapperhaus, *Dispensatie van algemeenverbindendverklaring* [*dispensation of extention*], Sociaal Maandblad Arbeid 2006-5, pages 193 *ff*. This was reason to change the Extension Framework as per 1 January 2007.

1160 Extension Framerwork, section 7.

1161 Labour Foundation, *De CAO*: Wat en hoe, page 18.

1162 MvT Extension Act, exhibits to the official report II, 1936/1937, 274, page 5.

As set out in section 8.3 above, every provision of an applicable binding collective labour agreement automatically applies to the individual employment agreement (where necessary this replaces a deviating provision in an employment agreement). This entitles the individual employers and employees to directly call upon the binding collective labour agreement, and, if needed, enforce their claims by starting litigation demanding specific performance and/or payment of losses.[1163]

The Extension Act also has a specific arrangement for collective claims. Pursuant to article 3.2 of the Extension Act, associations of employees and employers, having members that are party to an individual employment agreement, falling within the scope of application of the binding collective labour agreement, may demand the nullity of provisions in these individual employment agreements that violate the binding collective labour agreement. These associations do not have to be contracting parties to the binding collective labour agreement: it could also be other associations, which could have been party to the collective labour agreement, as long as they have members that are party to an individual employment agreement falling within the scope of application of the binding collective labour agreement.[1164] These associations are, pursuant to article 3.4 of the Extension Act, also entitled to claim damages suffered by the associations themselves or their members from employers or employees who violate the binding collective labour agreement, as well as specific performance of the binding collective labour agreement.

Although, as mentioned above, the enforcement of binding collective labour agreement is a private matter, some public intervention is still possible due to article 10 of the Extension Act. Should one of the parties that requested the extension of the collective labour agreement have reasonable suspicion that a company does not comply with the binding collective labour agreement and should it consider bringing the matter to court, it can request that the Minister investigate said company on such a compliance. This can assist the party's furnishing of proof.

1163 W.J.P.M. Fase and J. van Drongelen, *CAO-recht. Het recht met betrekking tot CAO's en de verbindendverklaring en onverbindendverklaring ervan*, page 180.

1164 W.J.P.M. Fase and J. van Drongelen, *CAO-recht. Het recht met betrekking tot CAO's en de verbindendverklaring en onverbindendverklaring ervan*, page 181.

9. The collective labour agreement and the reach of the social partners

9.1 What can the social partners regulate in a collective labour agreement?

As collective labour agreements are private agreements, the social partners enjoy contractual freedom. This contractual freedom is limited in the sense, that, as has already been noted, collective labour agreements should relate to employment conditions. Although, as explained, social partners are entitled to deviate from ¾ mandatory law, they may not contravene mandatory law, including mandatory international law, such as EU regulations. Collective labour agreements may furthermore not contravene public policy, nor may they violate good morals (article 3:40 DCC).

9.2 Collective labour agreements and representativity demands

The representativity of social partners is considered a delicate issue in the Netherlands. Representativity demands are drafted in connection with the question of which organisations (including social partners) are entitled to join specific public boards.[1165] These requirements are, however, only relevant concerning the right of the social partners to participate in public boards. They do *not* apply to the entitlement to conclude collective labour agreements. In fact, there are no statutory respresentativity requirements social partners should meet in order to be entitled to conclude collective labour agreements.[1166] The legislator considered these requirements unnecessary, as collective labour agreements would only bind the members of the contracting parties.[1167] The legislator apparently never anticipated that the role of the article 14 employees would be as relevant as it is today. Practice shows that collective labour agreements are applied to nearly all employees, primarily through the use of incorporation clauses.[1168] This is evidenced by the fact that, in 2002, only 26% of the working population was a member of a trade union, whilst between 72% and 85% (depending on which figures are used) of the total working population in the Netherlands fell under a collective labour agreement (see

1165 See the Social and Economic Council's "decree on the establishment of representativity of organisations of employers and employees with regard to the composition of public boards". This decree can be found on: www.ser.nl.

1166 Reference is made to S. Sagel, *Representativiteit van vakbonden en gebondenheid van werknemers aan cao's* [*Representativity of trade unions and the binding power of collective labour agreements towards employees*], ArbeidsRecht 2006- 8/9, pages 24 *ff*.

1167 MvA ACLA, exhibits to the official report II, 1926/1927, 246, page 12.

1168 A.T.J.M. Jacobs, *Collectief Arbeidsrecht*, page 125.

section 1.2). The argumentation of the legislator has been caught up by practice.[1169]

The lack of representativity requirements on the side of employers is not worrisome. The employers only have to apply the collective labour agreement should they be bound by it. Given article 14 ACLA, this is different on the employees' side. A lot can be said for introducing specific representativity requirements for trade unions in order for them to conclude collective labour agreements, especially when these are standard or maximum agreements deviating from the individual employment agreements, to the detriment of the employees.[1170] Some scholars have already argued this.[1171] Others emphasise the contractual nature of the collective labour agreements.[1172] Representativity demands would be at odds with this nature.

Courts have struggled with the (lack of) representativity demands as well. The County Court in Hilversum, for example, ruled that an article 14 employee could not be bound by a collective labour agreement concluded with a small trade union, notwithstanding an incorporation clause in the employee's individual employment agreement.[1173] The President of the District Court in Amsterdam had to rule on the validity of a collective labour agreement.[1174] In this case, the employer normally concluded two collective labour agreements: one for higher and one for lower personnel. The first collective labour agreement was to be concluded with a specific trade union (VHP), serving the interests of higher personnel only. Lower level employees could not become members of this trade union. The second collective labour agreement was to be concluded with two large trade unions (FNV and CNV), serving the interests of the lower level employees. FNV and CNV refused to accept the employer's final offer.

1169 I refer to chapter 7, section 4.1 and again to Bruun. He argued, as said, that a mismatch between union density and coverage "cannot in the long run be a sustainable situation. Such arrangements might lend stability to the system, but the legitimacy of such a system might be vulnerable in a crisis situation." N. Bruun, *The Autonomy of Collective Agreement*, page 11.

1170 A.T.J.M. Jacobs, *Collectief Arbeidsrecht*, page 120.

1171 See for example F.B.J. Grapperhaus, *De wenselijkheid van een nieuwe regeling voor de verhouding van niet-gebonden werknemers tot een CAO* [*The desirability of new legislation on the relation of employees not bound by a CLA to a CLA*], Sociaal Recht 2002-6, pages 184 *ff*. See also C.J. Loonstra and W.A. Zondag, *Arbeidsrechtelijke themata*, page 544.

1172 W.J.P.M. Fase and J. van Drongelen, *CAO-recht. Het recht met betrekking tot CAO's en de verbindendverklaring en onverbindendverklaring ervan*, pages 209 *ff*.

1173 County Court Hilversum, 1 February 2006, JAR 2006/57, *Ataya/Castellum*.

1174 President of the District Court in Amsterdam, 29 December 2005, JAR 2006/27, *FNV/Hema*.

VHP, however, did accept this last offer, not only for the higher personnel, but also for the lower personnel. FNV and CNV commenced proceedings against the employer, claiming that the collective labour agreement for lower personnel was invalid. The President ruled that a trade union is supposed to represent its members that it – according to its articles of association – is entitled to represent. This does not automatically mean that the trade union should have sufficient members in the sector concerned in order to be entitled to conclude collective labour agreements. The sheer possibility to represent a specific group of employees entitles this trade union to do so, regardless of whether employees of this group are in fact members. In other words, the employee's possibility to become a member of a trade union, entitles such a trade union to represent that employee in collective bargaining. This President refers to this concept as "fictitious representation". In the underlying case there was no (fictitious) representation: VHP represented employees (the lower level employees) that could not become its member. This is in violation of article 2 ACLA. The collective labour agreement for lower personnel is therefore invalid.[1175]

The entire discussion on representativity and the entitlement of trade unions to conclude collective labour agreements for employees, who are not their members, is obviously closely related to article 14 ACLA. It must be admitted that this article is rather peculiar. This is caused by conflicting aims of the legislator: it did not want to entitle the article 14 employees with any rights that they did not "deserve" (they did not contribute to the collective labour agreement as they had not joined the contracting trade union), whilst it also wished to prevent employers from being able to escape from the provisions of the collective labour agreement by only hiring non-members as employees (in fact pushing aside the contracting trade union's members). These conflicting aims have led to a strange consequence: on the one hand the ACLA does not bind the article 14 employees, whilst on the other the employer is obliged to apply the collective labour agreement to these employees.

Given the above, it is not difficult to imagine that article 14 ACLA has been a source of legal uncertainty. For example: do collective labour agreement's provisions have to be applied to all (current and new) article 14 employees or only to those (new) employees who enter into service of the employer who is bound by the collective labour agreement? And do only the normative provisions have to be applied, or the collective normative provisions as well?

1175 See on this case and similar cases A.Ph.C.M. Jaspers, *Representativiteit: representeren of vertegenwoordigen?*, pages 4 *ff*.

But regardless of this legal uncertainty, there are other consequences that article 14 ACLA has. This article makes the article 14 employees "free riders", as they enjoy the collective labour agreements without making any sacrifices.[1176] And when the collective labour agreements are unfavourable to them, they have much more chance of challenging the applicability of the collective labour agreements than employees that are directly bound by the collective labour agreement.[1177] It may very well be argued, in fact, that article 14 ACLA actually encourages employees not to join a trade union.[1178]

All in all, many scholars have argued to simply get rid of article 14 ACLA. They favour a more or less institutional model, applying collective labour agreements equally to all employees.[1179] Some of these scholars wish to add representativity demands to a collective labour agreement with such binding power,[1180] others whish to add such demands only to standard collective labour agreements,[1181] and even others do not want to add any representativity demands at all.[1182] Other scholars wish to maintain the current, contractual model.[1183]

1176 F.B.J. Grapperhaus, *De wenselijkheid van een nieuwe regeling voor de verhouding van niet-gebonden werknemers tot een CAO*, page 187.

1177 See for example County Court in Den Bosch, 27 April 2006, JAR 2006/128, [*no names*].

1178 A. Stege, *De CAO en het regelingsbereik van de sociale partners*, page 508.

1179 Grapperhaus, *De wenselijkheid van een nieuwe regeling voor de verhouding van niet-gebonden werknemers tot een CAO*, pages 188 and 189; A.T.J.M. Jacobs, *Collectief Arbeidsrecht*, page 126; E. Verhulp, Maatwerk in het arbeidsrecht? [Tailor made employment law?], inaugural speech 2003, page 19.; and F. Koning, *Het systeem van het collectieve arbeidsvoorwaardenrecht* [*The system of the law on collective employment conditions*], Kluwer, Deventer, 1987, pages 128 ff.

1180 F.B.J. Grapperhaus, *De wenselijkheid van een nieuwe regeling voor de verhouding van niet-gebonden werknemers tot een CAO*, page 188.

1181 A.T.J.M. Jacobs, *Collectief Arbeidsrecht*, page 120. He deems representativity demands not necessary with regard to minimum collective labour agreements, as these do not really hurt the employees.

1182 E. Verhulp, Maatwerk in het arbeidsrecht?, pages 19 and 20 and F. Koning, *Het systeem van het collectieve arbeidsvoorwaardenrecht*, pages 144 and 145.

1183 W.J.P.M. Fase and J. van Drongelen, *CAO-recht. Het recht met betrekking tot CAO's en de verbindendverklaring en onverbindendverklaring ervan*, pages 216 *ff*. See also L.H. van den Heuvel, *CAO-binding en representativiteit* [*CLA-binding and representativity*], Arbeid Integraal 2001-6, pages 219 *ff*.

9.3 Collective labour agreements and independence of trade unions

As is the case with representativity, there are no statutory demands on the level of independence trade unions require (from the employer or other parties) in order to conclude legally valid collective labour agreements. In fact, in the past collective labour agreements were concluded with trade unions that were not independent from the employer. These collective labour agreements are commonly held valid.[1184] However, as mentioned above, these collective labour agreements concluded with "yellow unions" (*i.e.* trade unions that are not independent from management) cannot exempt an employer anymore from the applicability of an extended collective labour agreement. The fact that the Minister actually had to draft rules in order to reach this result seems to confirm that the collective labour agreements concluded with yellow unions are indeed valid. Should these agreements not be considered valid collective labour agreements, supplementary rules would not have been necessary to filter out these agreements. Notwithstanding the above, a County Court in Utrecht has ruled in the past that collective labour agreements concluded with trade unions that were dependent from the employer, could not be regarded as proper and valid collective labour agreements.[1185] Such agreements violate, in the County Court's view, Dutch employment law and ILO Convention C98.[1186] All in all, it appears that the common view is that these collective labour agreements are undesirable and should be stopped.[1187]

10. Summary

10.1 Industrial relations: past and present

Industrial relations and collective bargaining play an important role in the Netherlands. Nowadays, between 72% and 85% of the total working population is bound by a collective labour agreement, depending on which figures are used. In contrast, only about a quarter of this population is a trade union member. Collective bargaining takes place at three levels: national, sectoral and company-level (although it can be disputed whether, on national level, "real" collective bargaining takes place).

1184 A.T.J.M. Jacobs, *Collectief Arbeidsrecht*, pages 188 and 189.

1185 County Court in Utrecht, 3 November 1994, JAR 1995/39, *Gaggenau*.

1186 Also Fase and Van Drongelen deem such collective labour agreements invalid. W.J.P.M. Fase and J. van Drongelen, *CAO-recht. Het recht met betrekking tot CAO's en de verbindendverklaring en onverbindendverklaring ervan*, page 212.

1187 Jacobs, for example proposes to change the law in order to prevent these kinds of collective labour agreements. A.T.J.M. Jacobs, *Collectief Arbeidsrecht*, page 215.

In 1894 the first collective labour agreement was concluded; more collective labour agreements followed thereafter. Dutch scholars experienced difficulties in placing collective labour agreements in a proper legal setting and determining their legal effects. Opinions on these subjects differed widely. Most scholars in the early years of the 20th century did argue that collective labour agreements deserve a place in the DCC, but no part of the DCC could cope with the peculiarities of these agreements.

The legislator responded to this in 1907 by introducing a provision in the DCC on collective labour agreements. This provision introduced a definition of a collective labour agreement and only one consequence of violation of the collective labour agreement. This provision did not suffice: too many matters were left untouched. It took the legislator until 1927 to introduce the ACLA, an act that describes the private law aspects of concluding collective labour agreements and its consequences. In 1937 the Extension Act entered into force, an act which enables the Minister to declare collective labour agreements binding within specific sectors.

10.2 The collective labour agreement

A collective labour agreement is an agreement concluded between one or more employers, or associations of employers, and one or more trade unions, principally or exclusively setting out the terms of employment applicable to individual employment agreements. Trade unions and associations of employers should have legal personality and their articles of association must specifically stipulate their power to conclude collective labour agreements. There are no other statutory requirements that these organisations should meet in order to conclude valid collective labour agreements.

A collective labour agreement can contain obligatory, normative and collective normative provisions. Obligatory provisions set out the rights and obligations between the parties concluding the collective employment agreement. Normative provisions create rights and obligations between the employers and employees. Collective normative provisions set out the rights and obligations of the employers and employees towards "collectivities", being the parties to the collective labour agreement or other collective entities.

The collective bargaining process is governed by the law of contract. This states that the parties involved are free to choose whether they wish to enter into a collective labour agreement and, if so, with whom. This latter freedom is not unlimited. Once an employer or employers' association has started collective bargaining, a non participating trade union may, in specific circumstances,

demand a place at the negotiation table as well. That trade union should be sufficiently or evidently representative in the company or sector concerned.

10.3 The consequences of a collective labour agreement

Once a collective labour agreement is concluded, it should be established to whom it applies, what its consequences are and how the rights arising from it can be enforced.

10.3.1 The contracting parties

The contracting parties are bound by the collective labour agreement. Consequently, these parties need, by law, to perform under the contract. Should a contracting party breach an obligatory provision of the collective labour agreement, the counterparty may instigate proceedings against that party, leading to claims on damages or specific performance, or even dissolution of the collective labour agreement. The contracting associations should also urge their members to fulfil the obligations arising from the collective labour agreement.

10.3.2 The members of the contracting associations

The collective labour agreement applies to the members of the contracting parties (employers and employees) that are both bound by *and* fall within the scope of application of that agreement. The employer who is either a member of an employers' association that is a party to the collective labour agreement, or entered into the collective labour agreement itself, is bound by that agreement. The employee who is a member of a trade union that is a party to the collective labour agreement is also bound by that agreement. The collective labour agreement provides for its own scope of application. It should be derived from that agreement whether the employer and employee fall within that scope. If not, the collective labour agreement does not apply.

An applicable collective labour agreement has two consequences on the individual employment agreement: (i) every provision in the individual employment agreement deviating from the collective labour agreement is null and void and is replaced by the corresponding provision of the collective labour agreement and (ii) any provision arranged for in the collective labour agreement, but not in the individual employment agreement, automatically applies. Due to this self-executing effect of the collective labour agreement, the individual employment agreement is automatically adapted. Not every provision in an individual employment agreement that is different from the

corresponding provision in the collective labour agreement always deviates from the collective labour agreement; this depends on whether the provisions in the collective labour agreement are of a "standard", "minimum" or "maximum" nature. As a consequence of the aforementioned direct normative effect, the individual employer and employee who do not oblige the individual normative provisions of the collective labour agreement, are in breach of the individual employment contract. The aggrieved party can subsequently claim specific performance and/or damages.

10.3.3 Members vs. non-members

The above-mentioned only applies if both the employee and the employer are bound by the collective labour agreement. If the employer is not bound by the collective labour agreement whilst the employee is, the collective labour agreement does not apply. Should it be the other way around, article 14 ACLA comes into play. Pursuant to this article, the employer (who is bound by the collective labour agreement) is, during the term of the collective labour agreement, obliged to apply the employment conditions set out in the collective labour agreement to employees who are not bound by the collective labour agreement, the article 14 employees. This article does *not* bind the article 14 employee but it merely obliges the employer to apply the collective labour agreement's employment conditions to the article 14 employee; the employer should only hire new employees on the basis of the aforementioned employment conditions and offer the article 14 employees who were already employed by him the same employment conditions.

If the employer refuses to apply the aforementioned employment conditions to its (current or new) article 14 employees or if his (current) employee does not accept the employer's offer to apply these employment conditions, the collective labour agreement's employment conditions do not apply and the individual employment conditions remain in force. If the article 14 employee accepts the employer's offer, whether or not as a result of an incorporation clause, the collective labour agreement's employment conditions apply. The article 14 employee cannot oblige the employer to apply the collective labour agreement to his employment agreement himself, unless he has either accepted the aforementioned offer, or has an incorporation clause. In these latter circumstances, the employee has a contractual entitlement to the application of the collective labour agreement's employment conditions.

10.3.4 The collectivities

Employers and employees who are bound by the collective labour agreement are also bound to collectivities, being the contracting parties and third entities. In the case that the employer is also the contracting party, it is rather self-evident that he is bound to the other contracting parties and third entities, as he committed hereto by contract. This is, however, less evident with regard to the *members* of the contracting associations. These members are, by law, bound by collective normative provisions; the ACLA stipulates that each member is obliged to fulfil the collective labour agreement's obligations towards each contracting party of the collective labour agreement, as if that member itself were party to the collective labour agreement. This provision binds that member to both the contracting parties and third collective entities. If a member fails to comply with a collective normative obligation, the collectivities can claim damages and/or specific performance. Most scholars argue that this regime also applies to article 14 employees who are bound by the collective labour agreement. In any event, collective normative obligations should be applied to article 14 employees who are bound by a collective labour agreement through an incorporation clause.

10.3.5 Special means of enforcement

A contracting association may, should any of the other contracting parties or their members contravene the collective labour agreement, demand payment of damages suffered by it, but also suffered by its own members. If these damages are other than merely financial losses, these losses will be fixed on the principles of reasonableness.

10.3.6 ¾ Mandatory law

In the Netherlands provisions of ¾ mandatory law exist. On this basis, the parties of an individual employment agreement may deviate from specific statutory provisions if, as far as is relevant for this thesis, an applicable collective labour agreement permits them to do so. This arrangement applies to the bound employer in his relation to both the employee who is directly bound by the collective labour agreement and to the article 14 employee.

10.3.7 Term and termination

The contracting parties may determine the date on which their collective labour agreement becomes effective. Should they have omitted to do so, the agreement enters into force on the 15th day after its conclusion, or the day

after the Minister sends an acknowledgement of his receipt of the notification reporting the conclusion of the collective labour agreement, if this day is later than that 15th day. The contracting parties may also stipulate the term of the collective labour agreement. This term, however, may not exceed five years. Should the parties not have stipulated the term of the collective labour agreement, this term is fixed on one year. The collective labour agreement, unless stipulated otherwise, does not terminate by operation of law; it is considered to be (tacitly) renewed after termination of its original term for the same term, but not exceeding one year. The agreement will not be renewed once it is terminated by notice upon the end of the original term. The notice term is 1/12 of the collective labour agreement's total term, unless stipulated otherwise in the agreement.

10.3.8 After-effects

After expiration of the collective labour agreement, the obligatory and collective normative provisions have lost their force. The normative provisions, however, remain applicable as they have been incorporated into the employment agreement. These stipulations can be adapted by new arrangements between the employer and employee and after a new collective labour agreement entered into force. These after-effects also occur in the employment relation with an article 14 employee who has agreed on the applicability of the collective labour agreement.

10.3.9 The role of alternative dispute resolution in collective bargaining

Many collective labour agreements have introduced some sort of alternative dispute resolution mechanism upon breach of the agreement. In general, conciliation, mediation and (although rare) arbitration are used as alternative dispute resolution mechanisms.

10.4 Extending collective labour agreements

The Extension Act enables the Minister to declare an existing collective labour agreement, which applies to an important majority of the employees within a specific industrial sector, binding upon all employers and employees within that sector. The extension process is surrounded by a number of important demands and safeguards, being: (i) demands concerning (the provisions of) the collective labour agreements that are to de declared binding, (ii) procedural demands and safeguards, and (iii) statutory limitations on the duration of the binding collective labour agreement.

The Minister should (a) establish whether the agreement that is to be declared binding, in fact is a proper collective labour agreement. This collective labour agreement should (b) apply to an important majority of the employees in the relevant industrial sector. Basically, a collective labour agreement that applies to 60% or more employees in the relevant sector automatically complies with this demand. Furthermore, (c) only specific provisions of the collective labour agreement can be declared binding, most notably normative and collective normative provisions. Special attention should be given to (d) the scope of application of the collective labour agreement; this scope must be clear and unambiguous.

Besides these demands, many formalities must be observed. There should be (e) a formal request to extend the collective labour agreement, (f) a request which is to be published, (g) upon which third parties can raise objections against this request, which in turn must be addressed by the contracting parties of the collective labour agreement. The Minister may (h) ask the Labour Foundation's advice on the request and, if applicable, on any objections raised. If all formalities are complied with, all material demands are met and the Minister sees no reason to refuse the request, the Minister's decree extending the collective labour agreement must (i) be published in order to have effect.

Finally, the extension (j) may not have retro-effect and (k) should have a limited duration: the extension decree may not exceed the term of the collective labour agreement itself and has a maximum duration of 2 years, with the exception of provisions on funds.

Even if all of the above demands and safeguards are met and complied with, the Minister can refuse the extension application; he has a discretionary power whether or not to extend. There are at least three valid reasons to turn down the request to declare the collective labour agreement binding. First, the provisions of the collective labour agreement that are to be declared binding may not contravene Dutch law. Second, they may, given social and economic developments, not contravene the Dutch public interests. Last, the Minister may refuse to declare a (provision of a) collective labour agreement binding if it insufficiently takes into account the valid interests of third parties.

Once declared binding, the collective labour agreement has important consequences. The provisions of such a collective labour agreement apply to all employment agreements concluded or to be concluded within the term of the extension decree that fall within the scope of the binding agreement. Every arrangement between the employer and employee that is in violation of a provision of an applicable binding collective labour agreement is void, and

is automatically replaced by said provision. An applicable binding collective labour agreement also prevails over another applicable, non-binding collective labour agreement. In case the employment agreement between the employer and employee does not arrange subjects that are arranged in provisions of an applicable binding collective labour agreement, these provisions automatically apply to that employment agreement. As opposed to the provisions of "normal" collective labour agreements, the provisions of the binding collective labour agreements do not, in principle, have after-effects.

Given these consequences, some employers would rather be exempted from the application of a binding collective labour agreement. An employer that is already bound by a non-binding collective labour agreement and raises objections against the request to extend a collective labour agreement that would also apply to him, is granted dispensation from the Minister if (a) it cannot, in all reasonableness, follow the binding collective labour agreement and (b) the collective labour agreement that already applies to this employer is concluded with an independent trade union. As a consequence, this employer is exempted from the binding agreement. Apart from this dispensation possibility, many binding collective labour agreements stipulate that a third company falling within the scope of application of that agreement can request a special committee a dispensation.

The enforcement of binding provisions of a collective labour agreement resembles the enforcement of normal, non-binding collective labour agreements. As every provision of an applicable binding collective labour agreement automatically applies to the individual employment agreement, the individual employers and employees are entitled to directly call upon the binding collective labour agreement, and, if needed, enforce their claims by starting litigation demanding specific performance and/or payment of damages. Moreover, associations of employees and employers, having members that are party to an individual employment agreement falling within the scope of application of the binding collective labour agreement, may demand the nullity of provisions in these individual employment agreements that violate the binding agreement. These associations can also claim damages suffered by themselves or their members from employers or employees who violate the binding collective labour agreement, as well as specific performance of the binding collective labour agreement. The Extension Act also contains a more or less public enforcement method. Should one of the parties that requested the extension of the collective labour agreement have reasonable suspicion that a company does not comply with the binding collective labour agreement and should it consider bringing the matter to court, it can request that the Minister investigate that company on such compliance.

10.5 The reach of the social partners

As collective labour agreements are private agreements, the social partners enjoy contractual freedom, limited by the statutory demand that these agreements should relate to employment conditions. Moreover, social partners are obviously not entitled to deviate from mandatory (international) law, to contravene public policy, or to violate good morals.

There are no statutory representativity demands social partners should meet in order to be entitled to conclude collective labour agreements. The legislator considered these demands not necessary, as collective labour agreements only bind the members of the contracting parties. The legislator apparently never anticipated that the role of the article 14 employees would be as relevant as it is today. Its argumentation seems to be caught up by practice.

The lack of representativity demands, on the side of employers, is not worrisome; the employers only have to apply the collective labour agreement should they be bound by it. Given article 14 ACLA, this is different on the employees' side. A lot can be said to introduce specific representativity requirements for trade unions in order for them to conclude collective labour agreements, especially when these are standard agreements deviating from the individual employment agreements to the detriment of the employees.

The discussion on representativity is closely related to article 14 ACLA. This article is rather peculiar, as the legislator's aims were conflicting: it did not want to entitle the article 14 employees to any rights that it did not deserve, whilst it also wished to prevent that employers would be able to escape from the provisions of the collective labour agreement by only hiring non-members as employees. These conflicting aims have led to the strange consequence that on the one hand, the ACLA does not bind the article 14 employees, whilst on the other the employer is obliged to apply the collective labour agreement to these employees. This article makes the article 14 employees "free riders", as they enjoy the collective labour agreements without making any sacrifices. And when the collective labour agreements are unfavourable to them, they have a better chance of challenging the applicability of the collective labour agreements than employees that are directly bound by the collective labour agreement. It may be argued that article 14 ACLA encourages employees not to join a trade union. All in all, many scholars have argued that to simply get rid of article 14 ACLA. They favour a more or less institutional model, applying collective labour agreements equally to all employees.

As is the case with representativity, there are no statutory demands on the level of independence trade unions require from the employer in order to conclude legally valid collective labour agreements. Collective labour agreements have been concluded with trade unions that were not independent. These collective labour agreements are commonly held valid. Notwithstanding this, a County Court ruled that collective labour agreements concluded with trade unions that were independent from the employer, could not be regarded as proper and valid collective labour agreements. Such agreements, in the County Court's view, violate Dutch employment law and ILO Convention C98. It appears that the common view is that these collective labour agreements are undesirable and should be stopped.

CHAPTER 10

COLLECTIVE LABOUR AGREEMENTS IN GERMANY

1. Industrial relations in Germany in a nutshell

In this chapter the collective labour agreements (*Tarifsverträge*) in Germany will be discussed, applying the framework set out in section 7 of chapter 8.

1.1 The three pillars of the German industrial relations

German industrial relations rely heavily on three pillars: (i) a dual structure, (ii) a "high degree of juridification" and (iii) centralisation.[1188]

The dual structure refers to the two institutions that play a role in the representation of employees, the trade unions on the one hand, and the Works Councils on the other. Both of them have a strong legal basis and a good opportunity to influence management decisions.[1189] They have their own, separate roles. Trade unions, unlike the Works Councils, are capable of collective bargaining and, consequently, of defining wage levels and structures.[1190] The main focus in this chapter will be on them.

German industrial relations are "juridificied" extensively; that is, the law on industrial relations is set out in detail in specific acts. This is the case, in particular, with regard to Works Councils. Their position and role are scrutinised in the Works Constitution Act (*Betriebsverfassungsgesetz*). Although not as inclusive as with regard to the Works Council, the position and role of the trade unions in the collective bargaining process are also outlined

1188 T. Blanke and E. Rose, *Erosion or renewal? The crisis of collective wage formation in Germany*, in R. Blanpain (ed.), *Collective bargaining and Wages in Comparative Perspective*, Kluwer, Den Haag, 2005, pages 5 and 6.

1189 T. Blanke and E. Rose, *Erosion or renewal? The crisis of collective wage formation in Germany*, page 6.

1190 Although the Works Council still has some influence herein on the basis of article 87.10 and 87.11 of the Works Constitution Act (*Betriebsverfassungsgesatz*) and on the basis of so-called opening clauses.

in acts. This is mainly done in the German Constitution (*Grundgesetz*) and the Collective Agreement Act (*Tarifvertragsgesetz*).

German industrial relations have been fairly centralised, although in recent years this has been somewhat in decline, as will be explained in section 1.3 below. Three circumstances cause this level of centralisation. First, most employment relations are arranged for on sectoral level, as opposed to enterprise level. Second, there is only very little "trade union competition", since 90% of all unionised employees are member of sectoral organisations which fall under the umbrella of the German Trade union Confederation (*Deutscher Gewerkschaftsbund*; "DGB").[1191] Lastly, there is a high degree of coordination in collective bargaining between the regions in specific industries. It is not unusual to agree upon a collective labour agreement in a specific region, which is subsequently used as a model for other collective labour agreements in other regions or other sectors.

1.2 Statistics

In 2004, 61,772 collective labour agreements were in place in Germany.[1192] A study shows that in that year collective labour agreements fully or substantially govern the employment agreements of approximately 84% of all German employees.[1193] Approximately 2.5% of the German employees are bound by a so-called Pay Agreement (see section 4.2 below) merely due to the extension of that collective labour agreement.[1194] Not much "old data" is available about the coverage of collective labour agreements, but traditional estimations from the 1960s indicate that around 80% of all companies and 90% of all employees are covered by collective bargaining, although recent voices say that these numbers may be somewhat overestimated.[1195] In Germany, about 24% of the workforce was unionised (in 2002).[1196] German trade unions are

1191 T. Blanke and E. Rose, *Erosion or renewal? The crisis of collective wage formation in Germany*, page 9.

1192 Bundesministerium für Wirtschaft und Arbeit, *Tarifvertragliche Arbeitsbedingungen im Jahr 2004* [*Employment conditions in collective labour agreements in 2004*], February 2005, page 6.

1193 Bundesministerium für Wirtschaft und Arbeit, *Tarifvertragliche Arbeitsbedingungen im Jahr 2004*, page 12.

1194 T. Blanke and E. Rose, *Erosion or renewal? The crisis of collective wage formation in Germany*, page 21.

1195 S. Zagelmeyer, *Collective bargaining coverage in Western Germany*, 28 December 1997, EIRO, page 1.

1196 T. Blanke and E. Rose, *Erosion or renewal? The crisis of collective wage formation in Germany*, page 18.

struggling to keep as many members as possible. There has been a decline of union membership in recent years (trade union density was estimated around 40% in 1990[1197]), which seems to be stabilising or at least slowing down in 2005.[1198] On the employers' side the organisation rate is substantial. The most important employers' organisation, the Confederation of German Employers' Associations (*Bundesvereinigung der Deutschen Arbeitgeberverbände*; "BDA") comprises approximately 2 million undertakings which employ around 70 – 80% of the entire German workforce.[1199] This rate is under pressure, as small and medium sized enterprises in particular tend to terminate their membership with employers' organisations.[1200]

1.3 Trends

There is a clear trend towards decentralisation in German collective bargaining. First, there is an important shift from sectoral collective labour agreements towards enterprise level collective labour agreements.[1201] Second, sectoral level agreements tend to leave more room for arranging matters at enterprise level, most notably by using opening clauses. Opening clauses allow companies (under certain conditions and to a certain extent) to modify or to diverge from collectively agreed standards. These modifications are normally agreed with either the trade unions or the Works Council.[1202] Third, to a considerable extent, employers and Works Councils have concluded works agreements that deviate from multi-employer collective labour agreements (and that in fact contravene the Works Constitution Act).[1203]

1197 M. Fuchs, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Germany*, page 16. The report can be found on: http://www.unifi.it/polo-universitario-europeo/ricerche/collective_bargaining.html.

1198 Institute of Economic and Social Research, *Union membership decline slows down*, 16 May 2006, EIRO.

1199 M. Fuchs, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Germany*, page 23.

1200 M. Fuchs, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Germany*, page 22.

1201 S. Zagelmeyer, *Company-level bargaining gains importance*, 28 March 1998, EIRO.

1202 T. Schulten, *Opening clauses increase in branch-level collective agreements*, 28 September 1997, EIRO.

1203 M. Fuchs, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Germany*, page 30.

1.4 Bargaining levels

Germany has, just like the Netherlands, several levels of collective bargaining. At the highest, national level, the social partners agree on social pacts with the German government. Important is the 1996 establishment of the alliance for work (*Bündnis für Arbeit und Standortsicherung*). However, the agreements concluded by this alliance are not binding by law and can therefore not be considered real collective labour agreements, as discussed in section 4.1 below. Nonetheless, the participating social partners do exert influence on their organisations and members to comply with these agreements.[1204] The second level is the sectoral level in which trade unions and employers' associations conclude collective labour agreements that apply to an industry or sector (*Verbandstarifvertrag*).[1205] These are proper, binding collective labour agreements. These agreements may apply nationwide, although that is exceptional. Most frequently their scope is limited to a state (*Land*) in the federation or to a part thereof (a district).[1206] As previously stated, such sectoral collective labour agreements may contain opening clauses, making tailor-made adjustments at enterprise-level possible. This brings us to the last level, the company or enterprise-level. Also in Germany there are collective labour agreements that merely apply to one specific employer, the enterprise level agreement (*Firmentarifvertrag*).

2. A brief history of collective bargaining in Germany

The *Loi le Chapelier* of 1791 prohibited the formation of coalitions of employers and employees, as such a formation would constitute an attack on "freedom and humanity".[1207] This prohibition was abolished in 1869 by the Trade Resolution (*Gewerbeordnung*) of the North German Federation. Although this abolishment by no means introduced a complete freedom of association, it did, in a moderate manner, pave the way to collective bargaining. The first important collective labour agreement was subsequently concluded

1204 M. Fuchs, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Germany*, page 30.

1205 Bundesministerium fur Wirtschaft und Arbeit, *Tarifvertragliche Arbeitsbedingungen im Jahr 2004*, page 6.

1206 M. Fuchs, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Germany*, pages 8 and 31.

1207 R. Richardi and O. Wlotzke e.a, *Münchener Handbuch zum Arbeitsrecht* [*Munich Handbook on Employment Law*], part 3 collective labour law, Verlag C.H. Beck, München, 2000, page 42.

in 1873 in the book printing industry.[1208] More collective labour agreements followed shortly thereafter.

Due to the aforementioned abolishment of the prohibition on forming coalitions, the coalitions were tolerated, but still restricted. The coalitions needed, for example, permits for their establishment. Besides these restrictions, many employers, particularly those in the core industrial areas such as mining, heavy industries and chemicals, strongly opposed collective labour agreements. In their view, these agreements were at odds with their managerial powers.[1209] Some employees even challenged the collective labour agreements. The orthodox socialistic employees considered collective bargaining as an unwanted collaboration with management.[1210] The First World War, however, urged management and employees to work together. This resulted in the Act on Patriotic Services (*Gesetz über den vaterlandischen Hilfsdienst*) of December 1916. As this Act formally recognised trade unions for the first time, it entailed a step from mere tolerance to a genuine freedom of association.

But it was not only the lack of full freedom of association that hindered the collective bargaining process. Collective labour agreements suffered from one particular weakness, pointed out by many German scholars: the collective labour agreements that were concluded had merely obligatory effects. As a consequence, they only bound the contracting parties involved, and did not directly apply to the individual employment agreements (in other words, the collective labour agreements lacked direct normative effect). Although the collective labour agreement contained third-party clauses for the benefit of the individual employees, these employees and their trade unions could only enforce these rights vis-à-vis the contracting employers' organisation and not vis-à-vis the actual employer. This hindered collective labour agreements reaching their actual goal: arranging the individual employment agreements.[1211]

The next steps in overcoming this weakness, to guarantee the freedom of association and, more in general, to acknowledge and regulate collective bargaining were taken in 1918, following that year's November Revolution. The central organisations of both management and labour entered into an important agreement, establishing a Central Employment Organisation

1208 R. Richardi and O. Wlotzke e.a, *Münchener Handbuch zum Arbeitsrecht,* page 231.

1209 T. Schulten, *Collective Agreement Act celebrates its 50th anniversary*, 28 May 1999, EIRO, page 1.

1210 R. Richardi and O. Wlotzke e.a, *Münchener Handbuch zum Arbeitsrecht,* page 231.

1211 R. Richardi and O. Wlotzke e.a, *Münchener Handbuch zum Arbeitsrecht,* page 233.

(*Zentralarbeitsgemeinschaft*) comprising both sides of the industry. In this agreement, the trade unions were acknowledged again, limitations to trade unions were stated as invalid, and collective labour agreements were recognised.[1212] This agreement was basically repeated in the Collective Agreement Ordinance (*Tarifvertragsverordnung*) of the same year, setting out the principle of collective bargaining autonomy, which entitled the social partners to determine their own working conditions, free of state interference.[1213] Moreover, the Ordinance stipulated that the collective labour agreements had a direct and mandatory effect (*Unmittelbare und Zwingende Wirkung*) to an individual employment agreement governed by that collective labour agreement (direct normative effect). The Ordinance also enabled the Minister of Labour (*Reichsarbeitsminister*) to extend a collective labour agreement.[1214] Shortly after, in 1919, the freedom of association was embedded in the Constitution of the Weimar Republic (*Weimarer Reichsverfassung*).[1215]

In 1923, however, the Ordinance on Arbitration (*Verordnung über das Slichtungswesen*) was passed, which enabled the state to use compulsory arbitration in specific "collective" situations, in fact limiting the social partners' collective bargaining autonomy. With the rise of National Socialism, the trade unions and employers' organisations were dissolved in 1933, obviously terminating the free collective bargaining process entirely. A governmental central organisation substituted the social partners in 1934, which, on the basis of the Act on the Regulation of National Labour (*Gesetz zur Ordnung der nationalen Arbeit*), replaced freely negotiated collective agreements with governmental ordinances.

After the Second World War, the military government that was set up by the Allies froze the wages in the Federal Republic of Germany (West Germany). In the meantime, trade unions and employers' organisations were founded again in West Germany. National states started to introduce the freedom of association in their constitutions. Once the aforementioned wage freeze was lifted in 1948, the social partners could enter into collective bargaining again.[1216] The government stimulated this, as in 1949 it introduced article 9 of the German Constitution, setting out the freedom of association. In the same year, the Collective Agreement Act was introduced. This Act did change over

1212 R. Richardi and O. Wlotzke e.a, *Münchener Handbuch zum Arbeitsrecht,* page 43.

1213 T. Schulten, *Collective Agreement Act celebrates its 50th anniversary*, page 2.

1214 R. Richardi and O. Wlotzke e.a, *Münchener Handbuch zum Arbeitsrecht,* page 233.

1215 R. Richardi and O. Wlotzke e.a, *Münchener Handbuch zum Arbeitsrecht,* page 43.

1216 T. Schulten, *Collective Agreement Act celebrates its 50th anniversary*, page 2.

time, but its basic elements, which will be discussed shortly, remain unaltered to date.

In the entire period following the Second World War, the development of "free labour law" in the German Democratic Republic (East Germany) was severely hindered by the Communist regime. The German unification in 1990, however, brought about that the West German "system", including the Collective Agreement Act, was extended to the former East Germany, and was now applied to the unified Germany.[1217]

3. The classical rights concerning collective bargaining

The classical triptych of rights - the freedom of association, the right to collective bargaining, and the right to strike – is protected in Germany.

Article 9.3 of the German Constitution guarantees the right of association. Pursuant to this article, associations that protect and advance employment and economic conditions may be established, without state or other parties' interference. Every individual is free to establish such an association and/or to join it. Equally, this article guarantees the individual's right not to join such an association.[1218]

The entitlement to collective bargaining obviously derives from the Collective Agreement Act. But apart from that, this right is also (implicitly) embedded in article 9.3 of the German Constitution. The Federal Constitutional Court (*Bundesverfassungsgericht*) ruled that the state is obliged to establish a core arrangement on collective bargaining for private employees (as opposed to civil servants).[1219] This right to collective bargaining, however, does not entail an *obligation* to bargain. A party is free to refuse to bargain.[1220] Of course, a trade union can "persuade" an employer into bargaining through collective actions.[1221]

1217 T. Schulten, *Collective Agreement Act celebrates its 50th anniversary*, page 2.

1218 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz* [*Collective Agreement Act*],Verlag Franz Vahlen, München, 2004, page 12.

1219 Federal Constitutional Court, 18 November 1954, Arbeidsrechtlige Praxis ("AP") no. 1 to art. 9 German Constitution.

1220 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, pages 22 and 24.

1221 In exceptional circumstances case law awards a trade union an entitlement to bargain. This exception will be discussed in section 6 below.

The right to collective action (the right to strike) is embedded in article 9.3 of the German Constitution. In order to be legal, the strike must meet formal requirements and pursue a legitimate purpose. The latter requirement states that a strike should be aimed at altering working conditions. This puts forward the view that a strike during the term of a collective labour agreement is held illegal, as in this period the working conditions have already been arranged (*Friedenspflicht*).[1222]

4. Collective labour agreements

Before discussing in detail the consequences of a collective labour agreement, section 4.1 first establishes how such an agreement is defined in Germany. Section 4.2 will introduce different types of collective labour agreements and different types of provisions therein.

4.1 What constitutes a collective labour agreement?

Pursuant to article 1.1 of the Collective Agreement Act, a collective labour agreement governs the rights and obligations of the contracting parties and contains legal norms on the content, the commencement and the termination of employment agreements and on matters pertaining to the operation of works and legal aspects of the works' constitution (*Betriebsverfassung*).

First, it derives from this article that a collective labour agreement can cover different legal relations. As a rule, German scholars distinguish between the obligatory part of the collective labour agreement, arranging the relation between the contracting parties, and the normative part, setting out the relation between the employer and employee as well as organisational and co-determination matters.[1223] This difference will be set out in more detail in section 4.2 below.

1222 S. Lingemann, R. von Steinau-Steinrück and A. Mengel, *Employment & Labor Law in Germany*, Verlag C.H. Beck and Ant. N. Sakkoulas, Athens, 2003, page 58.

1223 H.C.G. Schaub and M. Franzen, *Tarifvertragsgesetz* [*Collective Agreement Act*], in T. Dieterich, R. Müller-Glöge, U. Preis and H.C.G. Schaub, *Erfurter Kommentar zum Arbeitsrecht* [*Erfurter Commentary on Employment Law*], Verlag C.H. Beck, München, 2006, page 2597.

Second, the definition makes it clear that the social partners' freedom to regulate the aforementioned *normative* part is only limited.[1224] Regarding the relation between the employer and employee, the collective labour agreement may arrange the content, the commencement and the termination of employment agreements. As far as the content is concerned, the collective labour agreement may arrange the same topics that can be arranged in the individual employment agreement.[1225] Arrangements on the commencement of employment agreements concern the conclusion of the employment agreement with new and former employees and the continuation of lapsed employment agreements.[1226] Arrangements on termination of the employment agreement relate to the entitlements of the parties to terminate the employment agreement (is termination allowed and, if so, under which conditions?).[1227]

The collective labour agreement may also arrange the relation between the employer and its "entire personnel" (*Belegschaft*). After all, it may contain legal norms on matters pertaining to the operation of works and legal aspects of the works' constitution. Works are, briefly put, "organisational labour units".[1228] The company forms the economical unit and can be comprised of several works. In practice, it is not always easy to define the exact reach of the social partners in this respect. It is evident that the arrangement should deal with collective, as opposed to individual, norms. These arrangements should involve matters that can only be applied in a uniform manner.[1229] Such matters could include security checks at the company's entrance, a prohibition to smoke in the company's premises, dress codes, and closure of the business on a specific date. The collective labour agreement can also deal with the Works Council's co-determination rights, provided that the Works Constitution Act permits these arrangements.

1224 With regard to the obligatory provisions, the contracting parties enjoy freedom of contract and are therefore – obviously within the limits of the law – free to decide what they want to arrange. H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 162.

1225 Federal Labour Court (*Bundesarbeitsgericht*), 16 September 1986, AP no. 17 to article 77 of the 1972 Works Constitution Act. This case concerned an agreement concluded with the Works Council, but the Court also referred to collective labour agreements.

1226 H.C.G. Schaub and M. Franzen, *Tarifvertragsgesetz*, page 2602.

1227 H.C.G. Schaub and M. Franzen, *Tarifvertragsgesetz*, page 2602.

1228 S. Lingemann, R. von Steinau-Steinrück and A. Mengel, *Employment & Labor Law in Germany*, page 44. See also article 4.1 of the Works Constitution Act.

1229 Federal Labour Court, 17 June 1997, AP no. 2 to article 3 of the Collective Agreement Act, *Betriebsnormen*.

Third, it should be noted that the collective labour agreement is an agreement, to which the common German rules, pertaining to agreements, apply.[1230] Article 1.2 of the Collective Agreement Act prescribes that the agreement has to be set out in writing. The same rule applies to alterations of the collective labour agreement. Furthermore, the agreement should be duly executed by the contracting parties.[1231]

Fourth, not every party is entitled to conclude collective employment agreements. The contracting parties should be, on the one hand, one or more employers or associations of employers, and on the other, one or more trade unions (article 2.1 of the Collective Agreement Act).[1232] Also central organisations (*Spitzenorganisationen*), being federations of trade unions and of associations of employers, are capable of entering into collective labour agreements, either on behalf of their members, or on their own account (article 2.2 and 2.3 of the Collective Agreement Act respectively). The contracting parties should meet specific demands, which are to be discussed in section 5.

A last requirement is that a collective labour agreement should be registered at the Federal Ministry for Economy and Labour (*Bundesministerium für Wirtschaft und Arbeit*; "the Ministry") on the basis of articles 6 and 7 of the Collective Agreement Act. Without such a notification, the contracting parties risk payment of a fine (article 7.2).

4.2 Different types of collective labour agreements and of provisions

It is not unusual in Germany to distinguish between different types of collective labour agreements which mirror the content of that agreement.[1233] Some collective labour agreements only arrange the primary employment conditions, the so-called Pay Agreements (*Entgelttarifverträge* or *Vergütungstarifverträge*). These collective labour agreements set out the amount of remuneration (wage, wage increase, and other sorts of compensation). Other collective labour agreements only deal with general employment conditions, the so-called

1230 H.C.G. Schaub and M. Franzen, *Tarifvertragsgesetz*, page 2597. See also H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz* , page 175.

1231 H.C.G. Schaub and M. Franzen, *Tarifvertragsgesetz*, page 2599.

1232 It is clear that on both sides (labour and management) multiple parties can enter into the collective labour agreement. It is not as clear whether such an agreement should be regarded as one agreement, or as multiple agreements with the same content between the different contracting parties. Reference is made to H.C.G. Schaub and M. Franzen, *Tarifvertragsgesetz*, page 2598.

1233 M. Fuchs, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Germany*, page 37.

Framework Agreements (*Manteltarifverträge*). These agreements arrange topics like hiring and firing policies, working hours, working overtime, holidays, payment during illness, notice periods, classification of employees etc.[1234] Of course, some collective labour agreements are mixes of these two. Lastly, there is a relative new type of collective labour agreement, the collective labour agreement "on special issues". Such an agreement only covers a single topic, such as working time, part-time work for the elderly, vocational training and restructuring.[1235]

Besides the above distinction, it is also common in Germany to differentiate between obligatory and normative provisions in a collective labour agreement. Unlike the Netherlands, the distinction between "individual" and "collective" normative provisions is not often made, although it does exist in practice.

Article 1.1 of the Collective Agreement Act already makes clear that obligatory provisions exist. It states: "a collective labour agreement arranges the rights and obligations of the contracting parties". For instance, an employer is obliged, by law, to make the content of an applicable collective labour agreement known to its personnel (article 8 of the Collective Agreement Act). Another example of an obligatory provision is the mandatory peace obligation; the social partners may not revert to collective actions during the term of the collective labour agreement and should promote that their members refrain from such actions as well.[1236] The social partners are furthermore under the obligation to take adequate means to ensure that their members abide by the collective labour agreement (*Einwerkungspflicht*).[1237] Obviously, the social partners are also free to agree on (other) contractual obligatory provisions.

Article 1.1 of the Collective Agreement Act makes equally clear that collective labour agreements can contain individual normative provisions as it also stipulates: "a collective labour agreement (…) contains regulations on the content, the conclusion and the termination of employment agreements". The

1234 Bundesministerium fur Wirtschaft und Arbeit, *Tarifvertragliche Arbeitsbedingungen im Jahr 2004*, page 8.

1235 M. Fuchs, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Germany*, page 38.

1236 Federal Labour Court, 8 February 1957, AP no. 1 to article 1 Collective Agreement Act, *Friedenspflicht*; Federal Labour Court, 21 December 1982, AP no. 76 to article 9 German Constitution, *Arbeitskampf*; and Federal Labour Court, 12 September 1984, AP no. 81 to article 9 German Constitution, *Arbeitskampf*.

1237 Federal Labour Court, 9 June 1982, AP no. 1 to article 1 Collective Agreement Act, *Durchführungspflicht* and Federal Labour Court, 29 April 1992, AP no. 3 to article 1 Collective Agreement Act, *Durchführungspflicht*.

collective labour agreement can thus create norms between the employers and employees that fall within the scope of application of the collective labour agreement.

The collective labour agreement may, given the aforementioned article 1.1, also contain collective normative provisions. After all, pursuant to this article, a collective labour agreement "contains regulations (…) on matters pertaining to the operation of works and legal aspects of the works' constitution". These collective normative provisions may set out rights and obligations of the employers and employees towards "collectivities", such as funds (article 4.2 of the Collective Agreement Act) or the works (article 1.1 of the Collective Agreement Act).

5. The players in the collective bargaining process

There are a number of parties in Germany that are relevant for the collective bargaining system: the government, the employers' confederations and trade union confederations, separate employers' associations, trade unions and individual employers.

The government's involvement in the collective bargaining process is mainly indirect, although it does play a part in the aforementioned social pacts which are tripartite. One of the government's important indirect roles is obviously to enact legislation on collective labour agreements. It furthermore makes the extension of collective labour agreements possible, as will be set out in section 8 below.

The confederations, referred to as central organisations, can have a direct influence on the collective bargaining process. Pursuant to article 12 of the Collective Agreement Act, central organisations are such federations of trade unions or of employers' associations that are of major importance for the representation of employees' and employers' interests in gainful activities in the Federal Republic. Article 2.2 of the Collective Agreement Act entitles these organisations to conclude collective labour agreements on behalf of their members, should they be empowered to do so. Article 2.3 of the Collective Agreement Act even allows the central organisations to conclude collective labour agreement on their own account, should their articles of association allow them to do so.

By far the most important central organisation on the side of the employees is the aforementioned DGB, established in 1949. It is a trade union umbrella organisation comprising 8 trade unions, including the powerful *IG Metall* and *ver.di*. DGB represents German trade unions in dealings with the government, political parties, employers' organisations and other groups in society. It also coordinates joint demands, themes and campaigns for its members. DGB itself does not conclude collective labour agreements. As mentioned, almost 90% of all unionised employees are member of sectoral trade unions under the umbrella of DGB.[1238]

There are a number of German employers' organisations, with more or less similar tasks (but in their case serving the interests of employers) and a similar organisational structure as DGB. The most important organisation on the side of the employers is the aforementioned BDA. It represents the interests of German employers in the social policy field and is the spokesman of German employers in this field vis-à-vis the government, parliament, trade unions, public and international organisations. BDA's main tasks are rendering services to its members (information, advice, coordination) and influencing the policy-makers. BDA is a central organisation within the meaning of article 12 of the Collective Agreement Act, but does not conclude collective labour agreements itself. It does coordinate the joint demands of its members.[1239]

The trade unions and employers' organisations are the most interesting parties in the collective bargaining process, as they, besides the employers themselves, in fact conclude the collective labour agreements. The trade unions and employers' organisations typically operate in their own specific field, such as manufacturing, construction, services or metal. Some trade unions do not organise themselves down the line of different fields, but rather of different occupations (pilots, civil servants, engine-drivers etc.).[1240] Trade unions typically organise themselves on a multi-level basis; on national, state and district level.[1241] The trade unions and employers' organisations must meet specific requirements in order to be able to conclude collective labour

1238 Reference is made to www.dgb.de.

1239 Reference is made to www.bda-online.de.

1240 H.C.G. Schaub and M. Franzen, *Tarifvertragsgesetz*, page 2622.

1241 M. Fuchs, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Germany*, page 17.

agreements (they must be: *tariffähig*).These requirements are not statutory, but developed in case law,[1242] and this will be discussed below.

Article 9.3 of the German Constitution states that organisations active in collective bargaining (i) should be associations (*Vereinigungen*) that protect and advance employment and economic conditions. Exactly how this association is shaped from a legal point of view falls under the freedom of association, although the organisations should be stable (and not ad-hoc coalitions).[1243] Trade unions tend to be associations not having legal personality, whilst employers' organisations tend to be associations that have legal personality.[1244] Both types of associations have legal standing in German labour courts (article 10 Labour Court Act (*Arbeitsgerichtgesetz*)). Article 9.3 of the German Constitution also entails that the association is to be (ii) voluntarily established,[1245] and (iii) independent from its social counterparty[1246] and from state, church and political parties.[1247] The association should furthermore (iv) surpass company level.[1248]

1242 Although a Protocol concluded between former East and former West Germany on 18 May 1990 did stipulate which requirements trade unions and employers' organisations should meet in order to be eligible to conclude collective labour agreements. Under the heading "social union" this Protocol stipulated (freely translated): "Trade unions and employers' organisations that are capable of concluding collective labour agreements should be freely established, their organisations should surpass company level, they should be independent and they should acknowledge positive collective labour law; furthermore, they should be in a position to pursue the conclusion of an agreement by pressuring their counterparty."

1243 M. Fuchs, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Germany*, page 5.

1244 R. Richardi and O. Wlotzke e.a, *Münchener Handbuch zum Arbeitsrecht*, page 210.

1245 See for example Federal Labour Court, 15 November 1963, AP no. 14 to article 2 Collective Agreement Act.

1246 Federal Constitutional Court, 18 November 1954, AP no. 1 to article 9 German Constitution.

1247 See for example Federal Labour Court, 15 November 1963, AP no. 14 to article 2 Collective Agreement Act.

1248 Federal Labour Court, 15 November 1963, AP no. 14 to article 2 Collective Agreement Act and Federal Labour Court, 25 November 1986, AP no. 36 to article 2 Collective Agreement Act.

Moreover, the association should (v) have a democratic organisation.[1249] This includes the entitlement of an individual member to have "a voice" in the association. The association should also (vi) possess real powers (*Mächtigkeit*).[1250] In other words, the association should be able to "persuade" the counterparty to enter into negotiations; it should be capable of coping with a genuine labour struggle and it should be willing, if necessary, to take industrial action.[1251] The trade unions should be, briefly put, a counterparty that is to be taken seriously. More in general, it is demanded from the association that it (vii) is sufficiently prepared to enter into collective bargaining, meaning that it should have adequate financial and organisational resources to be an effective party in the bargaining process.[1252]

The association should also (viii) be committed to entering into a collective labour agreement, and its articles of association should specifically stipulate its power to conclude these agreements.[1253] The articles of association of the trade unions and the employers' organisation should establish whose interests are served. This demand is of importance with regard to the competence of the association to conclude a specific collective labour agreement, as will be discussed in section 6 below. Finally, (ix) the association should acknowledge the German laws on collective bargaining and collective action.[1254]

It should be noted that, according to the Federal Labour Court, the above demands only fully apply to trade unions and not to employers' organisations.[1255] More in particular, this applies to the requirement that an

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1249 Federal Labour Court, 15 November 1963, AP no. 14 to article 2 Collective Agreement Act and Federal Labour Court, 25 November 1986, AP no. 36 to article 2 Collective Agreement Act. Löwisch and Rieble see this as a real demand in relation to *Tariffähigkeit*, H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 329. Schaub and Franzen acknowledge its importance, although state that having a democratic organisation *may* be a demand in that respect. H.C.G. Schaub and M. Franzen, *Tarifvertragsgesetz*, page 2617.

1250 Federal Labour Court, 16 November 1982, AP no. 32 to article 2 Collective Agreement Act; and Federal Labour Court, 25 November 1986, AP no. 36 to article 2 Collective Agreement Act.

1251 M. Fuchs, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Germany*, page 6.

1252 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz* , page 337.

1253 Federal Labour Court, 25 November 1986, AP Nos. 34 and 36 to article 2 Collective Agreement Act.

1254 Federal Labour Court, 25 November 1986, AP Nos. 34 and 36 to article 2 Collective Agreement Act.

1255 See also: M. Fuchs, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Germany*, page 6.

association should have real powers to persuade the counterparty to conclude a collective labour agreement.[1256] It would be, according to this Court, illogical to fully apply this demand to an employers' association, as the same demand does not apply to individual employers (who are also entitled to enter into collective labour agreements). This ruling is challenged by some.[1257]

As appears from the above, German law has no real representativity demands in order for an association (trade union) to be eligible to collective bargaining. A trade union merely requires one member in a company, in order to be eligible to start bargaining with that company.[1258] With regard to representativity, reference is made to section 9.2 below.

6. The negotiation process / conclusion of a collective labour agreement

As set out above, not every party may conclude collective labour agreements. The contracting parties should, on the one hand, be one or more employers or associations of employers, and on the other, one or more trade unions. The central organisations may also conclude collective labour agreements. Section 5 explains which demands these parties must satisfy in order to be capable concluding collective labour agreements. But merely being capable of concluding collective labour agreements *in general* (as mentioned: *Tariffähigkeit*) does not suffice in order to be entitled to conclude a *specific* collective labour agreement. The contracting parties involved should also be competent to enter into that specific collective labour agreement (*Tarifzuständigkeit*). Without *Tariffähigkeit* combined with *Tarifzuständigkeit*, no valid collective labour agreements can be concluded.[1259] It is therefore of the utmost importance that the correct party negotiates with the correct counterparty. But whom to choose? Or to phrase the question differently, which party is competent to conclude a specific collective labour agreement, which party is *tarifzuständig*?

1256 Federal Labour Court, 20 November 1990, AP no. 40 to article 2 Collective Agreement Act.

1257 See for example, with further references, H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 340.

1258 W.L. Keller, *International Labor and Employment Laws*, Bureau of national Affairs, Washington D.C., 1999, page 4-22.

1259 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, pages 379 - 381.

6.1 The competence to conclude a specific collective labour agreement

In order to asses the competence of the parties to enter into a specific collective labour agreement, it should be noted that every party has its own field of interest. As mentioned, the articles of association of trade unions and of employers' organisations establish whose interests they serve. Trade unions are normally either organised along the lines of field of activity (branch) or occupation, and they serve the interests of their members working in that branch or occupation. The members of the employers' organisations are normally also active in one particular branch and their interests are served by the organisations. The central organisations serve the interests of their members (the trade unions and the employers' organisations).

The trade unions, the employers' organisations and the central organisations are only competent to conclude collective labour agreements within their own field of interest, as specified in their articles of association.[1260] Every employer is, by law, able to conclude specific collective labour agreements pertaining to its own operation (article 2.1 of the Collective Agreement Act).[1261] Consequently, a trade union serving, for instance, the interests of employees working in the metal industry may only conclude a collective labour agreement with an employers' association or an individual employer in the metal industry. The mutual part of the field of interest of both sides of the contracting parties gives the actual area within which they may validly conclude a collective labour agreement.[1262]

It is therefore very important that a party starts bargaining with a "matching" counterparty. To facilitate this process, DGB has drafted a register setting out which of its trade unions is entitled to conclude a collective labour agreement with which companies, given the nature of activities of such companies.[1263]

1260 Federal Labour Court, 25 September 1996, AP no. 10 to article 2 Collective Agreement Act, *Tarifzüstandigkeit*; Federal Labour Court, 12 November 1996, AP no. 11 to article 2 Collective Agreement Act, *Tarifzüstandigkeit*; and Federal Labour Court, 14 December 1999, AP no. 14 to article 2 Collective Agreement Act, *Tarifzüstandigkeit*.

1261 A holding company, however, is in itself neither capable nor competent to conclude a collective labour agreement covering its subsidiaries, as these subsidiarities are all different employers. Reference is made to H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 369.

1262 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 502.

1263 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, pages 351 *ff*.

6.2 The bargaining process itself

The Collective Agreement Act does not describe the actual bargaining process. This process is primarily governed by general rules on concluding agreements, including rules on offer and acceptance.

As already mentioned, there is a constitutional *right* to collective bargaining, not being an *obligation* to bargain. In other words, the party on the one side depends on the willingness of the party on the other side to accept the invitation to bargain (an invitation which can naturally be enhanced with collective actions). The Federal Labour Court in fact refused to oblige a party to participate in bargaining.[1264] It ruled that such an obligation would be an empty formality, because article 9 of the German Constitution would obstruct a material obligation to bargain in order to try and reach an agreement. This decision is, however, disputed by some.[1265] Only in exceptional circumstances, such as the termination of an existing collective labour agreement for material reasons while the consequences need to be addressed in a new collective labour agreement, are German courts willing to oblige a party to participate in bargaining.[1266]

6.3 The conclusion of the collective labour agreement

Once the bargaining turned out successful, the parties involved can conclude the collective labour agreement. In practice, the parties involved often agree on a period in which the outcome of the negotiations are offered to a special (internal) commission (*Tarifkommission*) for its approval or refusal, prior to making the agreement final.[1267] This final approval, however, is not a statutory requirement.

As already mentioned, the collective labour agreement should after its conclusion be registered at the Ministry on the basis of article 6 of the Collective Agreement Act. The Ministry keeps a register of collective labour agreements concluded, altered, terminated and extended.

1264 Federal Labour Court, 14 July 1981, AP no. 1 to article 1 Collective Agreement Act, *Verhandlungspflicht*.

1265 H.C.G. Schaub and M. Franzen, *Tarifvertragsgesetz*, page 2598.

1266 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 93.

1267 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 176.

7. The effects of the collective labour agreement; the Collective Agreement Act

Once able and competent parties have concluded a (valid) collective labour agreement, its consequences should be assessed. It is key to establish (i) to whom the collective labour agreement applies, (ii) which effects such an application has, and (iii) how the parties involved can enforce their rights. Sections 7.1 through 7.4 will apply these questions to the standard 4 scenarios. Section 7.5 sets out which other means of enforcement are in place in case of a breach of the collective labour agreement. Section 7.6 describes a "special" consequence the collective labour agreement has: it may set aside specific statutory provisions. Section 7.7 focuses on the term and termination of the collective labour agreements. The collective labour agreement's possible after-effects will be discussed in section 7.8. Finally, section 7.9 focuses on the role of alternative dispute resolution in German collective bargaining.

7.1 Scenario 1

The contracting parties are, upon conclusion of the collective labour agreement, bound to each other by the (obligatory provisions of the) agreement. This more or less automatically follows from article 1.1 of the Collective Agreement Act, which states that a collective labour agreement governs the rights and obligations of the contracting parties. As a consequence hereof, the contracting parties need, by law, to perform under the contract, and may not endanger or harm the goals and consequences of the agreement (articles 275 *ff* German Civil Code (*Bürgerliches Gesetzbuch*; "GCC")). The contracting parties should furthermore act reasonable and fair towards each other in the execution of the collective labour agreement (article 241.2 GCC), but also in the bargaining process (article 311.2 GCC).

Should a contracting party breach an obligatory provision of the collective labour agreement, the counterparty may instigate proceedings against the party in breach (article 2.1.1 Labour Court Act). This counterparty may resort to the "usual" remedies following a breach of contract. This normally leads to claims on damages and/or specific performance (articles 280 *ff* GCC). The aggrieved party may, however, not suspend its obligations (articles 320 and 326.1 GCC) or step back from the collective labour agreement (articles 323 *ff* GCC).[1268]

1268 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 169.

Just like a peace-obligation is immanent to a collective labour agreement in Germany, so is the so-called "obligation to influence" (*Durchführungspflicht* combined with *Einwirkungspflicht*): this obligation automatically applies to each collective labour agreement. This obligation obliges the contracting association to ensure that its members fulfil the obligations arising from the collective labour agreement. Consequently, the association has to act to the best of its abilities to pledge that its members follow the collective labour agreement; it does, however, not have to guarantee this.[1269] From this, it automatically follows that the obligation to influence is only of relevance on the management side when it concerns a sectoral level agreement.

The association has a rather far-reaching discretion as to how it fulfils its obligation to influence.[1270] As a rule, the association obliges its members, through its articles of association, to comply with all obligations arising from the collective labour agreement.[1271] It can take disciplinary measures against a member who is not willing to apply the collective labour agreement, including the threat to remove that member from the association.[1272] The aforementioned discretion notwithstanding, the counterparty may demand specific performance from the association of the obligation to influence, if the latter refuses to act on this obligation.[1273]

Should the central organisations have concluded the collective labour agreement – either on behalf of their members or on their own account – both the central organisations and their members are bound by the mutual obligations arising from the collective labour agreement on the basis of article 2.4 of the Collective Agreement Act.

7.2 Scenario 2

On the basis of article 3.1 of the Collective Agreement Act, the legal norms of the collective labour agreement should be applied to those employers and employees who (i) are both bound by and (ii) fall within the scope of application of that agreement. In other words, a collective labour agreement applies to the individual employment agreements of employees and employers

1269 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 170.

1270 H.C.G. Schaub and M. Franzen, *Tarifvertragsgesetz*, page 2611.

1271 R. Richardi and O. Wlotzke e.a, *Münchener Handbuch zum Arbeitsrecht*, part 3 collective labour law, pages 220, 221 and 224.

1272 H.C.G. Schaub and M. Franzen, *Tarifvertragsgesetz*, page 2611.

1273 Federal Labour court, 29 April 1992, AP no. 3 to article 1 Collective Agreement Act, *Durchführungspflicht*.

who are both bound by the collective labour agreement and both fall within its scope of application.[1274]

7.2.1 Which employers and employees are bound by the collective labour agreement?

Article 3.1 of the Collective Agreement Act makes it clear that members of the parties to a collective labour agreement, and the employer who is himself a party thereto, are bound by the collective labour agreement. This binding power starts at the moment the individual joins the association. This demand does not prevent a collective labour agreement from having retro-effect to a date on which the individual had not joined the association just yet; it suffices that the individual is a member on the date the collective labour agreement is concluded.[1275] This binding power of the collective labour agreement is rather strong, as termination of the membership does not free an individual from the consequences of that agreement up to the date that the collective labour agreement has expired or is terminated (article 3.3 of the Collective Agreement Act).

7.2.2 Which employers and employees fall within the collective labour agreement's scope of application?

The social partners themselves determine the scope of application of the collective labour agreement.[1276] It is not entirely clear what the consequences are should the social partners fail to arrange for this scope of application. Some scholars argue that in such a case the collective labour agreement applies to all employees and employers that are bound by the agreement and fall within the mutual scope of competence of the contractual parties,[1277] others

1274 There are different opinions in Germany on the mechanism that grants direct and horizontal effect to the normative provisions of a collective labour agreement upon the parties that are bound by that agreement. On the one hand it is argued that collective bargaining is an expression of private autonomy collectively exercised. On the other hand it is argued that collective bargaining leading to the conclusion of collective labour agreements relies on the delegation of the state on the social partners the power to conclude agreements with a normative effect. This second position is dominant. See M. Fuchs, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Germany*, page 9.

1275 H.C.G. Schaub and M. Franzen, *Tarifvertragsgesetz*, page 2626.

1276 Federal Labour Court 19 November 1985, AP no. 4 to article 2 Collective Agreement Act, *Tarifzüstandigkeit*.

1277 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 502.

take the view that this collective labour agreement is subject to interpretation or is even void.[1278]

When determining the scope of application that has been agreed on in the collective labour agreement, five aspects should be taken into consideration:
i. the group of employees falling within the scope of the collective labour agreement;
ii. the employer or group of employers falling within the scope of the collective labour agreement;
iii. the geographical territory;
iv. the organisational territory; and
v. the duration.

As in the Netherlands, it is not uncommon in Germany to exempt specific groups of employees, most notably higher personnel, from the applicability of the collective labour agreement.[1279] If an employee is bound by the collective labour agreement (through his membership of a contracting trade union), but is excluded from the scope of application of the agreement by the agreement itself, the collective labour agreement does not apply to the employment agreement of that employee.

The employer or group of employers should also fall within the scope of application of the collective labour agreement (*Fachlicher Geltungsbereich*). The scope of application of sectoral-level collective labour agreements is normally based on the profession or industry of the companies concerned. As a rule, side-activities of a company sufficiently connected to that company (for example, the company's "own" cafeteria or administration department) follow the primary activity of that company.[1280] The company level collective labour agreement obviously only applies to the company concerned. Sometimes, the applicability of collective labour agreements is made dependent on the size of the company; it is not uncommon that small companies are exempted from the scope of application of (parts of) the collective labour agreement.[1281]

A collective labour agreement may be limited in geographical territory. A collective labour agreement could apply to the entire German federation, a

1278 H.C.G. Schaub and M. Franzen, *Tarifvertragsgesetz*, page 2633.

1279 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 509.

1280 Federal Labour Court 31 March 1955, AP no. 1 to article 4 Collective Agreement Act, *Geltungsbereich* and Federal Labour Court 3 February 1965, AP no. 11 to article 2 Collective Agreement Act , *Geltungsbereich*.

1281 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 507.

specific state, a district or even an individual city. It is rather common that a sectoral collective labour agreement only applies to a specific state.[1282]

The social partners sometimes specifically stipulate that the collective labour agreement only applies to members of the contracting parties. This may appear somewhat odd at first glance, since this is already the case on the basis of the Collective Agreement Act. Still, sometimes it makes the scope of applicability clearer, as the collective labour agreement may stipulate that it only applies to "full or ordinary members", as opposed to, for example, members on trial or extraordinary members.[1283] Furthermore, the social partners may choose that only current members fall within the scope of application of the collective labour agreement and that members who cease their membership immediately lose any rights and obligations arising from the agreement.

Matters on term and termination of the collective labour agreement will be set out in section 7.7 below.

7.2.3 What are the legal consequences?

We now know that a collective labour agreement applies should both the employer and the employee be bound by that agreement and fall within its scope of application. But what are the consequences of an applicable collective labour agreement? Here, article 4.1 of the Collective Agreement Act is of relevance. Pursuant to that article, the legal norms set forth in an applicable collective labour agreement regulating the content, commencement and termination of the individual employment agreement shall apply directly and with mandatory effect to that individual employment agreement. This means that every (individual) normative provision of the collective labour agreement automatically applies to the individual employment agreement, modelling the individual employment agreement and setting aside from the collective labour agreement deviating provisions.[1284] In other words, in Germany the individual normative provisions in the collective labour agreement also have a self-executing (direct normative) effect on the individual employment agreement.

After the employment agreement has been remodelled by the collective labour agreement and during the term of that agreement, it is not possible to deviate from the content of the collective labour agreement or to waive the rights set

1282 Bundesministerium für Wirtschaft und Arbeit, *Tarifvertragliche Arbeitsbedingungen im Jahr 2004*, page 6.

1283 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 511.

1284 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 490.

forth within it. Moreover, it is not permitted to agree that rights can only be enforced in a certain period of time, unless the collective labour agreement specifically permits this. A waiver of rights arising from the collective labour agreement is, pursuant to article 4.4 of the Collective Agreement Act, only permissible in the case that the contracting parties to the collective labour agreement have agreed to it.

7.2.4 Deviation from the collective labour agreement in the individual employment agreement

It should be noted that not every provision in an individual employment agreement that is different from the corresponding provision in the collective labour agreement deviates from the collective labour agreement. Article 4.3 of the Collective Agreement Act stipulates that arrangements in the individual employment agreement may differ from the corresponding provisions of the collective labour agreement (i) should that be permitted by the collective labour agreement itself or (ii) should such a departure be advantageous to the employee (*Günstigkeitsprinzip*).

This principle of favour is an important rule, not permitting the deterioration of provisions in the employment agreement. It applies to both individual arrangements agreed on before and after the collective labour agreement entered into force.[1285] Moreover, it is of mandatory law: any provision in the collective labour agreement prohibiting more favourable individual arrangements is void.[1286] As a consequence, unlike the Netherlands, Germany does not distinguish between "standard", "minimum" and "maximum" provisions of a collective labour agreement, since *all* normative provisions of the collective labour agreements are minimum agreements. An exception to this principle of favour can follow from specific acts which can allow collective labour agreements to deviate from legal standards (see also the first part of article 4.3 of the Collective Agreement Act). This is discussed in section 7.6 below.

1285 Federal Labour Court, 7 November 1989, AP no. 46 to article 77 of the 1972 Works Constitution Act. Although this ruling concerned an agreement concluded with the Works Council, it is likely to apply to collective labour agreements as well. See also H.C.G. Schaub and M. Franzen, *Tarifvertragsgesetz*, page 2638.

1286 See for example Federal Labour Court, 15 December 1960, AP nos. 2 and 3 to article 4 Collective Agreement Act, *Angleichungsrecht*.

7.2.5 Enforcement

Since the normative provisions of the collective labour agreement have a self-executing effect, the individual employer and employee who do not abide by these normative provisions are in breach of the individual employment contract. The aggrieved party can subsequently claim specific performance and/or damages following this breach of contract (article 280 *ff* GCC). This party cannot claim the dissolution of the collective labour agreement, as the contracting parties did not breach the collective labour agreement, but "merely" the employer or employee in their mutual relation.[1287]

7.3 Scenario 3

The above-mentioned only applies if both the employee and the employer are bound by the collective labour agreement and fall within the scope of application of that agreement. But what if either the employer or the employee is not bound by the collective labour agreement (although they both fall within the scope of application of that agreement)?

In that situation the individual normative provisions of collective labour agreements do not apply to the employment agreement. The social partners lack competency and legitimacy to draft normative rules and regulations for the entire labour market; the social partners represent their members and are not entitled to draft normative provisions that apply between the employer and employee, of which one or both is/are unorganised.[1288]

The aforementioned does not mean that the content of the collective labour agreement is at all times irrelevant for the employer and employee of which one or both is/are unorganised. On the contrary: the content or part of the content of the collective labour agreement may very well apply to their employment agreement.

It is rather common in Germany to apply the legal norms of a collective labour agreement, even if not both parties are bound by the collective labour agreement. Many employment agreements stipulate that (a part of) a specific collective labour agreement applies. Such a stipulation is usually referred to as a "reference clause" (*Bezugnahmeklausel*). As a rule, an employer who is bound by a collective labour agreement uses such a reference clause to bind all of its

1287 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 175.

1288 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 9.

employees (organised and unorganised) to the collective labour agreement.[1289] This enables the employer to apply the same employment conditions to all of its employees, regardless of whether they are a contracting trade union's member. This is especially relevant, as the employer generally does not know whether the individual employee is a trade union member, as he is not entitled to ask the employee whether he is.[1290]

The reference clause does not bind both parties to the collective labour agreement on the basis of the Collective Agreement Act, but it ensures that the normative provisions of the collective labour agreement apply as a part of the employment agreement.[1291] If the employee who is not bound by the collective labour agreement has accepted a reference clause, his position is very comparable to the position of the employee in scenario 2.[1292] The individual normative part of the collective labour agreement applies to the individual employment agreement. The collective normative provisions, however, do not apply (reference is made to section 7.4).[1293] Both the employer and the employee may enforce the (individual normative) employment conditions towards each other, as they agreed on the applicability thereof.

7.4 Scenario 4

Employers and employees who are bound by and fall within the scope of applicability of the collective labour agreement (see scenario 2 above) are, if provided for in the collective labour agreement, also bound vis-à-vis collectivities by (the collective normative provisions of) this agreement. There are statutory provisions arranging for the rights and obligations between (i) the employer and the works and (ii) the employer and employee on the one hand and jointly established organisations on the other.

First, article 3.2 of the Collective Agreement Act stipulates that the legal norms set forth in a collective labour agreement which regulate matters pertaining to (a) the operation of works and (b) the legal aspects of the works constitution apply to all works of which the *employer* is bound by the collective labour

1289 Bundesministerium für Wirtschaft und Arbeit, *Tarifvertragliche Arbeitsbedingungen im Jahr 2004*, page 11.

1290 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 427.

1291 Federal Labour Court, 7 December 1977, AP no. 9 to article 4 Collective Agreement Act, *Nachwirkung*.

1292 H.C.G. Schaub and M. Franzen, *Tarifvertragsgesetz*, pages 2628, 2630 and 2631. See also H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 454.

1293 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 463.

agreement. Whether or not employees working for this bound employer are member of the contracting trade union is, given this provision, not relevant. Pursuant to article 4.1 of the Collective Agreement Act, the legal norms contained in a collective labour agreement regarding the operation of works and legal aspects of the works constitution apply, just like the individual normative provisions, directly and with mandatory effect.

The aforementioned provisions govern the relation between (a) the employer and its "entire personnel" (the works, in the end, being a labour unit) and (b) the employer and its Works Council. As the works/entire personnel is not a separate entity, the Works Council has to serve their interests.[1294] If there is no Works Council installed, the individual employees may call on these collective normative provisions, if they are ultimately addressed by these provisions.[1295]

Second, a collective labour agreement can provide for the joint establishment of institutions (collectivities) by the contracting parties. Such institutions could include wage equalisation funds, vacation funds and institutions for vocational training. Setting up these institutions has become particularly common in the construction sector in Germany. Pursuant to article 4.2 of the Collective Agreement Act, the provisions on the establishment of these institutions shall apply directly and mandatory to the articles of association of these institutions and to the relation between these institutions on the one hand on the employers and employees bound by the collective labour agreement on the other.

The joint institutions may directly collect the contributions from the (bound) employers and the (bound) employees have a direct entitlement towards the institutions.[1296] By way of exception, the contracting parties to the collective labour agreement are also entitled to collect the contributions from the bound employers and enforce the performance of the joint institution for the benefit of the bound employee.[1297] As already mentioned in section 7.3 above, the employees who are not bound by a collective labour agreement, but whose employment agreement refers to the applicability of the collective labour agreement, have no entitlements towards the joint institution.

Unlike the ACLA in the Netherlands, the German Collective Agreement Act does not arrange for provisions in the collective labour agreement setting

1294 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 488.

1295 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 488.

1296 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, pages 536 *ff*.

1297 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 495.

out obligations for the employers and employees towards the contracting parties. The rights and obligations between the trade unions and employers' organisations vis-à-vis their own members are arranged by the general principles governing associations and their articles of association.

7.5 Other statutory means of enforcement

The above-mentioned scenarios discuss, amongst others, whether or not the parties whose rights are concerned are entitled to enforce these rights. However, more parties play a role in the enforcement of the collective labour agreements, as will be set out hereunder. Furthermore, the Collective Agreement Act has a specific provision on the effects of the collective labour agreement, which may be of relevance with regard to enforcement as well.

7.5.1 Article 9 of the Collective Agreement Act

As mentioned above, collective labour agreements are invalid in the case that the contracting parties lack the capacity or the competence to conclude these agreements. The existence or non-existence of the collective labour agreement can therefore be an issue. In order to streamline litigation and prevent conflicting rulings in this respect, article 9 of the Collective Agreement Act introduces a special arrangement. Pursuant to this article, a final decision taken by labour courts in proceedings between the contracting parties to a collective labour agreement concerning matters arising from this agreement or its mere existence or non-existence, is also binding in litigation upon the members of these parties in their mutual relation as well as their relation towards third parties. This article furthermore makes clear that only the contracting parties themselves may start litigation in order to establish for law the existence or non-existence of the collective labour agreement.[1298]

7.5.2 Enforcement of obligatory provisions

The aggrieved party may, following a breach of an obligatory provision, revert to the general provisions of the DCC, which are already set out in scenario 1 above. If the obligatory provisions in fact establish rights for third parties – such as employers and employees – these third parties may directly enforce these rights on the basis of article 328 GCC.[1299]

1298 Federal Labour Court, 10 May 1989, AP no. 6 to article 2 Collective Agreement Act, *Tarifzüstandigkeit*.

1299 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 30.

Some obligatory provisions may relate to the bound employer and/or bound employee. Examples of this are obligatory provisions setting out that the employers should create new jobs or should take environment friendly measures. It is disputable whether trade unions may enforce these *obligatory* provisions against members of the contracting employers' organisation on the basis of the so-called Burda-ruling, which will be discussed below.[1300]

7.5.3 Enforcement of (individual) normative provisions

The employer and the employee who are both bound by and fall within the scope of applicability of the collective labour agreement can enforce their rights set out in the individual normative provisions of the collective labour agreement through claims based on the individual employment agreement. Reference is made to scenario 2 above. The Federal Labour Court also allows the request of a declaratory judgement, should such a judgement solve multiple individual matters. This can be especially useful when it comes to establishing whether specific employment agreements are governed by a collective labour agreement and, if so, by which collective labour agreement.[1301]

The Works Council can also play a role in the enforcement of normative provisions.[1302] One of the tasks of the Works Council is to ensure that the employer applies the applicable collective labour agreement (article 80.1.1 of the Works Constitution Act). An individual employee may revert to the Works Council should he feel that the employer breaches an applicable normative provision. If the Works Council subscribes to the employee's point of view, it should revert this issue to the employer, in order to find a solution (article 85.1 of the Works Constitution Act). The Works Council, however, cannot enforce the alleged individual right in court. It can merely withhold its consent to specific intended decisions of the employer on the basis of article 99 of the Works Constitution Act, should such an intended decision violate the content of an applicable collective labour agreement.

1300 According to Löwisch and Rieble the Burda-ruling only applies to normative provisions and not to obligatory provisions. Reference is made to H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 167. Schaub and Franzen seem to take the opinion that the aforementioned ruling can also apply to obligatory provisions. Reference is made to H.C.G. Schaub and M. Franzen, *Tarifvertragsgesetz*, page 2611.

1301 See for example Federal Labour Court, 25 September 2002, AP no. 26 to article 1 Collective Agreement Act, *Bezugnahme auf Tarifvertrag*.

1302 In fact, this applies to different "Works Councils", not only being the *Betriebsrat*, but also the *Sprecherausschuss* and the *Bundespersonalvertretung*. I will only focus on the role of the *Betriebsrat*, referred to as Works Council.

A contracting party to the collective labour agreement may demand from its counterparty to incite this latter party's members to fulfil the obligations arising from the collective labour agreement (the aforementioned obligation to influence). It is, however, as a rule not entitled to claim damages or to demand specific performance from the *individual employer or employee* who is in breach of the normative provisions of the collective labour agreement.[1303] Two important exceptions apply to this rule. First, a contracting trade union may instigate legal actions against an employer who does not fulfil the normative provisions of an enterprise level collective labour agreement. After all, this employer is in violation of an agreement he himself directly entered into with that trade union.[1304] The other exception is based on a negligence claim (*Unterlassungsanspruch*; article 1004 GCC) and was firstly recognised by the Federal Labour Court in the Burda-ruling.[1305] This Court allowed a contracting trade union to commence litigation against and demand to refrain the violation of the collective labour agreement from the employer bound by a sectoral-level collective labour agreement, which employer had introduced a generally applicable company arrangement deviating from the normative provisions of the applicable collective labour agreement. The Federal Labour Court would not permit this employer to fully set aside the norm setting power of the collective labour agreement, consequently depriving this agreement of its central function. It should be noted, however, that this enforcement method can only be used in specific circumstances, involving amongst others a serious breach of the collective labour agreement, at least one employee who is bound by the collective labour agreement, and an employer who is aware of this (or these) bound employee(s).[1306]

The German state does not have a general obligation to ensure that the normative provisions of the collective labour agreement are fulfilled.[1307]

7.5.4 Enforcement of collective normative provisions

The collectivities themselves (the Works Council and the joint institutions), addressed by the collective normative provisions of the collective labour agreement, are entitled to enforce these provisions. By way of exception, the contractual parties to the collective labour agreement are also entitled

1303 H.C.G. Schaub and M. Franzen, *Tarifvertragsgesetz*, page 2636.

1304 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 494.

1305 Federal Labour Court, 20 April 1999, AP no. 89 to article 9 German Constitution.

1306 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 497. See also H.C.G. Schaub and M. Franzen, *Tarifvertragsgesetz*, pages 2611 and 2612.

1307 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 499.

to collect the contributions from the bound employers and to enforce the performance of the joint institution for the benefit of the bound employees. Reference is made to scenario 4 above.

7.6 Special legal consequences of a collective labour agreement: Tarifdispositives Gesetzesrecht

Like the Netherlands, Germany also has statutory provisions of directory and mandatory law. When applied to an employment agreement, the employer may deviate in favour, and to the detriment of the employee from directory law. Obviously neither party may deviate from mandatory law at all. There are also statutory provisions that are only partially mandatory and allow departure only in favour of the employee (*Einseitig zwingendem Gesetzesrecht*). Also, like in the Netherlands (¾ mandatory law), German law contains provisions that can only be set aside by a collective labour agreement (*Tarifdispositives Gesetzesrecht*).[1308] The rationale of this law is in the assumption that social partners of a specific sector are best equipped to draft regulations that the sector or enterprise concerned actually needs.[1309] Examples of fields in which derogation (also to the detriment of the employees) of the law, by means of collective labour agreements, is allowed are: working time, fixed-term contracts and temporary work.[1310] Not only the parties of an individual employment agreement that are both bound by the collective labour agreement are free to use this entitlement. The same is the case with regard to the parties that apply a collective labour agreement through a reference clause.[1311]

7.7 Term and termination

The collective labour agreement is a private law agreement, involving the signatories' freedom of contract. Consequently, the contracting parties may freely establish the collective labour agreement's date of entrance into force and its term; the Collective Agreement Act does not play a role in this. This freedom includes the contracting parties' right to award retro-effect to the legal norms of the collective labour agreement.[1312]

1308 H.C.G. Schaub and M. Franzen, *Tarifvertragsgesetz*, pages 2595 and 2596.

1309 M. Fuchs, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Germany*, page 12.

1310 M. Fuchs, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Germany*, page 13.

1311 H.C.G. Schaub and M. Franzen, *Tarifvertragsgesetz*, page 2630.

1312 H.C.G. Schaub and M. Franzen, *Tarifvertragsgesetz*, pages 2634, 2635 and 2641.

Collective labour agreements can, as any "normal" agreement, be concluded for a fixed or an indefinite period of time. In practice, Pay Agreements tend to have durations of one or two years, while Framework Agreements last longer. In any case, the social partners have a responsibility to their members not to bind them for "overly long" periods of time.[1313] This also means that, should a collective labour agreement have an indefinite duration, it should be possible to terminate such an agreement within a reasonable period of time.

Agreements for a fixed period of time end, by operation of law, at the end of their term. They cannot be prematurely terminated by notice, unless specifically agreed otherwise.[1314] A collective labour agreement can also be concluded under the subsequent condition that it terminates on the occurrence of a special event. It is not unusual, for example, for the social partners to agree that the collective labour agreement will terminate automatically once a new collective labour agreement has been concluded. The occurrence of these events, however, should easily be established for them to have effect.[1315]

The collective labour agreement with indefinite duration can be terminated by notice. Sometimes the contracting parties have agreed that notice should be served within a specific timeframe. This is, however, not necessary: the parties can even arrange that the agreement can be terminated at any given time with or without a notice period. Should the contracting parties have failed to arrange for a notice period, it is argued to link the applicable notice period to the statutory notice period in place for another collective agreement, the so-called company agreement (*Betriebsvereinbarungen*) concluded between the company and its Works Council.[1316] This notice period is set on three months (article 77.5 of the Works Constitution Act).

The collective labour agreement can furthermore be terminated upon occurrence of an important event, upon which it cannot reasonably be expected that the party continues the collective labour agreement (article 314 GCC). This method of termination should be restrictively applied. Whether a collective labour agreement also terminates if the foundation to conclude the collective labour agreement (*Geschäftsgrundlage*) has disappeared, is

1313 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 93.

1314 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 182.

1315 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 180.

1316 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 182. See also H.C.G. Schaub and M. Franzen, *Tarifvertragsgesetz*, page 2600.

disputed.[1317] This matter is, however, purely academic, as it would constitute an important event upon which termination as permitted anyway.

The collective labour agreement can also be terminated at any time by mutual consent of the contracting parties involved. If the contracting parties conclude a new collective labour agreement with the same scope of application as the prior collective labour agreement, this prior collective labour agreement will lose force (*Ablösung*).[1318] Finally, the collective labour agreement will terminate after one of the contracting parties lost its capacity to conclude collective labour agreements.[1319]

7.8 After-effects

As is the case in the Netherlands, in Germany possible after-effects (*Nachwirkung*) of a collective labour agreement are also of importance.[1320] The obligatory provisions of the collective labour agreement have no after-effects: at the expiration of the collective labour agreements, these provisions lose their force.[1321] This is different with regard to normative and collective normative provisions. Pursuant to article 4.5 of the Collective Agreement Act, the legal norms put forward in the collective labour agreement continue to apply after the agreement's expiration, until they are replaced by another arrangement. These after-effects can be prevented, if the social partners specifically arrange so in the collective labour agreement.[1322] The original

1317 H.C.G. Schaub and M. Franzen, *Tarifvertragsgesetz*, page 2601.

1318 See for example Federal Labour Court, 20 March 2002, AP no. 12 to article 1 of the Collective Agreement Act, *Tarifverträge: Gebaudereinigung*.

1319 H.C.G. Schaub and M. Franzen, *Tarifvertragsgesetz*, page 2600. The authors mention as one of the examples hereof Federal Labour Court, 28 May 1997 AP no. 26 to article 4 Collective Agreement Act, *Nachwirkung*, in which they view the Court decided that the collective labour agreement ended after the employers' organisation was wounded-up. It is, however, questionable whether this indeed can be derived from that ruling. See the note below said ruling from T. Kania.

1320 The after-effects concern the period after the collective labour agreement has lapsed, and should be distinguished from the position described in article 3.3 of the Collective Agreement Act, which stipulates that termination of his membership does not free an individual of the consequences of a collective labour agreement up to the date that such an agreement has expired or is terminated. In this latter scenario, the (former) member is fully bound by the collective labour agreement during its term, and not "merely" bound by after-effects.

1321 H.C.G. Schaub and M. Franzen, *Tarifvertragsgesetz*, page 2601.

1322 Federal Labour Court, 3 September 1986, AP no. 12 to article 4 Collective Agreement Act, *Nachwirkung*; and Federal Labour Court, 16 August 1990, AP no. 19 to article 4 Collective Agreement Act, *Nachwirkung*.

goal of this article was to regulate the period after expiration of a collective labour agreement, but before the entering into force of a new collective labour agreement.[1323] Another goal was to ensure that the employee is not confronted with employment conditions that change to his detriment upon expiration of the collective labour agreement.[1324]

The after-effects only apply to employment agreements that were already in force during the term of the collective labour agreement and were governed by that collective labour agreement; they do not apply to employment agreements entered into after the collective labour agreement has already lapsed.[1325] The after-effects have effect until the employer and employee agreed on other arrangements, or until a new collective labour agreements entered into force.[1326] The norms that have after-effects therefore resemble directory law. In the case whereby a collective labour agreement applies to an individual employment contract merely due to a reference clause, the norms of the collective labour agreement also remain to apply after this agreement has lapsed, on the basis of German general contract law.[1327]

The after-effects equally apply to the legal norms set out for the benefit for the works, the works' constitution and the joint organisations.

7.9 The role of alternative dispute resolution in collective bargaining

In Germany, many collective labour agreements have introduced some sort of alternative dispute resolution mechanism.[1328] Although such mechanisms are not mandatory, they are of importance, as during the term of the collective labour agreement the trade unions cannot revert to collective actions as a means of solving conflicts given the immanent peace obligation. The scope

1323 H.C.G. Schaub and M. Franzen, *Tarifvertragsgesetz*, page 2641.

1324 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 588.

1325 Federal Labour Court, 6 June 1958, AP no. 1 to article 4 Collective Agreement Act, *Nachwirkung*; and Federal Labour Court, 29 January 1975, AP no. 8 to article 4 Collective Agreement Act, *Nachwirkung*.

1326 The termination of after-effects once a new collective labour agreement applies is of importance for the German system. Should this be different, the German system would be static as subsequent collective labour agreements would be unable to change the normative provisions of the previous collective labour agreement to the detriment of the employees, as such a change would be incompatible with the principle of favour. See also chapter 13, section 8.8 and chapter 16, section 5.

1327 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 442.

1328 See H. Dribbusch and O. Stettes, *EIRO Thematic Feature on Collective dispute Resolutions in an enlarged European Union – case of Germany*. This report can be found on the EIRO-website.

of these mechanisms differs considerably, ranging from mere voluntary mediation to mandatory conflict resolution systems.[1329]

8. Extending collective labour agreements

German law also has an instrument which enables the Ministry to extend a collective labour agreement in such a fashion that it applies to *all* employers and employees that fall within the scope of application of that agreement. The extension decision constitutes a material act of law (*Verwaltungsakt* or *Rechtssetzungsakt*).[1330]

The extension process is surrounded by several demands and safeguards, which will be discussed in section 8.1. The Ministry's discretionary power regarding whether or not to extend will be discussed in this section as well. Once declared binding, the collective labour agreement has important consequences for all parties that fall within its scope. These consequences will be discussed in section 8.2, as well as the means of enforcement of this extended collective labour agreement.

8.1 Demands and safeguards surrounding the extension / the Ministry's discretionary power

Neither all collective labour agreements, nor all provisions of them can be declared binding. The collective labour agreement should meet several demands and safeguards, which can be divided into (i) demands concerning (the provisions of) the collective labour agreements that are to de declared binding, (ii) procedural demands and safeguards, and (iii) limitations on the duration of the binding collective labour agreement. If the applicable demands are met, it is up to the judgement of the Ministry whether or not to extend the collective labour agreement.

8.1.1 Demands concerning (the provisions of) the collective labour agreement

The extension process presumes (i) the existence of a valid collective labour agreement. An invalid collective labour agreement cannot become valid merely because of the extension.[1331]

1329 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, pages 159 *ff*.

1330 H.C.G. Schaub and M. Franzen, *Tarifvertragsgesetz*, page 2652.

1331 H.C.G. Schaub and M. Franzen, *Tarifvertragsgesetz*, page 2650.

Pursuant to article 5.1 of the Collective Agreement Act, a collective labour agreement can only be extended if (ii) the employers bound by the agreement employ not less than 50% of the total number of employees working within the scope of application of the collective labour agreement and if (iii) the extension serves the public interests. The Ministry is entitled to deviate from these demands in response to a social emergency.

From this second demand, it can be derived that only the employers that are bound by the collective labour agreement are of relevance when establishing the number of employees that fall within the scope of application of the collective labour agreement; the number of employees that are bound by the collective labour agreement is irrelevant. The requirement of a sufficient number of bound employers is in place to ascertain a balance in the market between organised and unorganised employers;[1332] a minority should not be able to model the working conditions of a majority.[1333] Obviously, it is rather difficult for the Ministry to establish whether the bound employers employ at least 50% of the total number of employees falling within the collective labour agreement's scope of applicability. The Ministry should make an estimation of the number of employees employed by the bound employers and the number of total employees that fall within the scope of application of the collective labour agreement. When making this estimation, the Ministry should take all relevant sources available into account, including information of the different chambers of commerce.[1334]

The extension should, given the aforementioned third demand, serve the public interest. Whether or not the public interest is served with the extension, should be established by the Ministry, balancing the interests of all parties involved, most particularly those of the employers and employees. This balancing process is obviously closely related with the Ministry's discretionary power as to whether or not to extend a collective labour agreement, and will be discussed further in section 8.1.4 below. The importance of the public interest is further emphasised by article 5.5 of the Collective Agreement Act, which states that the Ministry may revoke its extension decision should the public interest warrant this.

1332 H.C.G. Schaub and M. Franzen, *Tarifvertragsgesetz*, page 2650.

1333 M. Fuchs, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Germany*, page 10.

1334 Federal Labour Court 11 June 1975, AP no. 29 to article 2 Collective Agreement Act; and Federal Labour Court, 24 January 1979, AP no. 16 to article 5 Collective Agreement Act.

In case of a social emergency, the Ministry is, on the basis of article 5.1 of the Collective Agreement Act, entitled to depart from the above-mentioned (ii and iii) demands. This, in fact, only plays a role in respect to the "50% demand" (on balance, if an extension is necessary due to a social emergency, that extension would surely serve the public interest).

It should be noted that (iv) not all provisions of the collective labour agreement can or have to be extended. Article 5.4 of the Collective Agreement Act makes it clear that the normative and collective normative provisions of a collective labour agreement can be extended, as opposed to the obligatory provisions. This entails, amongst others, that the (obligatory) peace obligation cannot be extended. Some non-obligatory provisions cannot, by law, be declared binding as well, which is, for example, the case if such a provision contravenes the German Constitution. A provision restricting the competence of the state courts can, for instance, not be extended as the admittance to a state court is protected by the Constitution. Finally, a collective labour agreement should not necessarily be extended in full; a partial extension (extending a mere part of the collective labour agreement) is permitted as well.

Moreover, (v) the provisions of the collective labour agreement that are to be extended, including the provisions on the scope of application, should be fully clear.[1335] This is especially important if only a part of the collective labour agreement is extended; partial extension can impair the clarity. With regard to the scope of application, it should be noted that the Ministry is not entitled to broaden this scope. It is, however, entitled to only extend the collective labour agreement in a part of Germany, even if the agreement's original territorial scope covers Germany entirely. The Ministry may furthermore stipulate that the extended collective labour agreement only applies to companies and their employees who are not yet bound by another collective labour agreement, or it may exclude specific companies from the extension.[1336]

8.1.2 Procedural demands and safeguards

The Ministry may not declare a collective labour agreement binding on its own initiative, but is dependent on (vi) the request of the signatory parties. Pursuant to article 5.1 of the Collective Agreement Act, either labour or management may request for the extension. If there are multiple parties at one side (management or labour), these parties should jointly request the

1335 Federal Labour Court, 14 October 1987, AP no. 88 to article 1 Collective Agreement Act, *Tarifverträge: Bau*.

1336 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, pages 611 and 612.

extension.[1337] Apart from the contracting parties to the collective labour agreement, no other party is entitled to request the extension.

This request is subsequently (vii) published in the Federal Gazette (*Bundesanzeiger*) pursuant to article 4.1 of the Implementation Ordinance (*Durchführungsverordnung*). Parties affected by the requested declaration are entitled (viii) to raise objections, as a rule within a 3 weeks' term following the publication.[1338] These affected parties are the employers and employees falling within the scope of application of the collective labour agreement involved, the trade unions and employers' organisations interested in the extension procedure and the Supreme Labour Authorities (*obersten Arbeitsbehörden*) of the federal states in whose area the collective labour agreement applies (article 5.2 of the Collective Agreement Act). These parties may express their view in writing and also state their case in a public hearing. Should the aforementioned Supreme Labour Authorities object to the extension of the collective labour agreement, the Ministry requires the approval of the federal government in order to still be able to extend the agreement (article 5.3 of the Collective Agreement Act).

Pursuant to article 5.1 if the Collective Agreement Act, the Ministry should (ix) obtain the approval of a special committee (*Ausschuss*) prior to its decision to extend a collective labour agreement. This committee is comprised of three representatives of the central organisations on the labour side and three representatives of the central organisations on the management side. Voting in this committee is based on simple majority, which in fact means that either side of the industry is (jointly) capable of preventing the extension of a collective labour agreement.[1339]

If all formalities are complied with, all material demands are met and the Ministry decides to extend the collective labour agreement, it should (x) publish such a decision (article 5.7 of the Collective Agreement Act). The same applies if the Ministry withdraws such a decision. The extension should also be registered on the basis of article 6 of the Collective Agreement Act in the Ministry's register of collective labour agreements.

1337 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 621.

1338 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 621.

1339 M. Fuchs, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Germany*, page 10.

8.1.3 Limitations in duration of the declaration

The binding collective labour agreement may (xi) not have "real" retro-effect. As a rule, the extension may only enter into force from the moment of its publication.[1340] In the case whereby the publication of the *application* to extend a collective labour agreement already noted that the extension, if granted, would have retro-effect, the binding collective labour agreement may have effect from the date of the publication of said application.[1341] In that case everyone concerned could have anticipated the retro-effect. If it concerns an extended collective labour agreement that changes an already existing extended collective labour agreement, or follows-up an expired collective labour agreement, this agreement may have retro-effect.[1342]

Furthermore, (xii) the extension decision is limited in time, as the extension may not outlast the duration of the collective labour agreement itself, but it may be shorter;[1343] the extension of a collective labour agreements ends at the moment the underlying collective labour agreement has been terminated or changed (without extending this changed collective labour agreement).[1344]

8.1.4 The discretionary power of the Ministry / public interest

Pursuant to article 5.1 of the Collective Agreement Act, the Ministry *can* (as opposed to shall) declare binding a collective labour agreement that satisfies the relevant requirements. The Ministry therefore has a discretionary power whether or not to declare such a collective labour agreement binding.[1345] Closely related to this discretionary power is the Ministry's opinion whether or not the public interest is served with the extension.

In order to answer this last question the Ministry should, as already mentioned above, balance all interests involved. This balancing should be done on a case-by-case scenario; the German government cannot, for example, rule that all collective labour agreements furthering a particular (political) goal will be

1340 Federal Labour Court, 3 November 1982, AP no. 18 to article 5 Collective Agreement Act.

1341 Federal Labour Court, 3 November 1982, AP no. 18 to article 5 Collective Agreement Act.

1342 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 618.

1343 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 613.

1344 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, pages 613 and 614.

1345 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 628.

extended.[1346] The specific advantages of each collective labour agreement should be balanced against its specific disadvantages. Normally the most obvious disadvantage is the influence that the collective labour agreement has on employers that are not already bound by it. As the collective labour agreement sets minimum norms, they can be confronted with a raise of costs. As a rule the most obvious advantage of the extension of a collective labour agreement lies in the protection of the employees.

In general, the public interest is served if the extension averts an imminent real disadvantage for a sufficient number of employees.[1347] According to the German Courts, this is the case should the extension (a) prevent an erroneous trend in the labour market by setting equal minimum employment conditions,[1348] (b) be necessary for the proper functioning of a joint organisation,[1349] and (c) strengthen a statutory goal.[1350] In this respect, it should be noted that the court only marginally assesses whether or not the Ministry balanced all interests correctly.[1351]

8.2 The consequences of a binding collective labour agreement / enforcement

Pursuant to article 5.4 of the Collective Agreement Act, the legal norms of the collective labour agreement that is extended also apply to the employers and employees that fall within the scope of application of the agreement and who were not already bound by the agreement. The extension is therefore an additional way to bind employers and employees by the collective labour agreement.[1352] The scope of application of the collective labour agreement is set out in the provisions of the collective labour agreement itself (although, as previously stated, the Ministry's declaration may be limited to only a part of Germany, in which case only in that part the provisions will be binding).[1353]

1346 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 629.

1347 H.C.G. Schaub and M. Franzen, *Tarifvertragsgesetz*, page 2650.

1348 Federal Constitutional Court, 24 May 1977, NJW 1977, page 2255.

1349 Federal Labour Court, 24 January 1979, AP no. 16 to article 5 Collective Agreement Act, which ruling dealt with the (collective) payment of holidays.

1350 Federal Labour Court, 28 March 1990, AP no. 25 to article 5 Collective Agreement Act.

1351 See for example Federal Constitutional Court, 10 September 1991, AP no. 27 to article 5 Collective Agreement Act. See also Federal Labour Court, 24 January 1979, AP no. 16 to article 5 Collective Agreement Act.

1352 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 608.

1353 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 611.

The above-mentioned brings forth that the legal position of the employers and employees falling within the scope of application of the extended collective labour agreement is the same as the legal position of the employers and employees who already were bound by that agreement regardless of the extension. For the legal position of (i) these employers and employees towards each other and (ii) towards "collectivities" reference is made to the above-mentioned scenarios 2 and 4 respectively. With regard to the possibility to enforce rights, reference is made to said scenarios and section 7.5.

The after-effects of the provisions of the binding collective labour agreements are also the same as those of "normal" (non-binding) collective labour agreements. These after-effects obviously apply to all employers and employees falling within the scope of applicability of the collective labour agreement (thus regardless of whether these employers and employees are solely bound by these provisions due to the extension decree).[1354] The Ministry, however, may stipulate in its extension decree that the extension has no after-effects.[1355]

9. The collective labour agreement and the reach of the social partners

9.1 What can the social partners regulate in a collective labour agreement?

The German social partners enjoy contractual freedom. Consequently, the social partners are free to arrange those matters in the collective labour agreement they choose, provided that the goal of the collective labour agreement is the protection and advancement of employment and economic conditions (article 9.3 of the German Constitution) and the normative provisions are in line with article 1.1 of the Collective Agreement Act (see section 4.1 above). Some collective employment issues are by law (primarily) the task of other parties than the social partners, such as social plans, which, as a rule, should be concluded between the employer and its Works Council (article 112 Works Constitution Act).

The social partners are entitled to deviate from *Tarifdispositives Gesetzesrecht*, but not from national and international mandatory law. National law includes the laws of the individual states, such as state constitutions, state acts and other legislative measures from the states.[1356] The social partners may

1354 Federal Labour Court, 25 October 2000, AP no. 38 to article 4 Collective Agreement Act, *Nachwirkung*.

1355 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, pages 612 and 613.

1356 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 102.

furthermore not contravene German federal constitutional law,[1357] although it is not beyond dispute whether this regards the entire Constitution or only those parts that private individuals should oblige.[1358] The Social State Principle brings forth that the social partners should abide by elementary social entitlements. A collective labour agreement may, for instance, not contain a disaccord between performance on the one hand and payment on the other; a collective labour agreement must abide by elementary claims of fairness (*Gerechtigkeitsanforderungen*).[1359]

9.2 Collective labour agreements and representativity demands

Representativity of social partners is of relevance in Germany when it comes to extending a collective labour agreement (in that situation the employers bound by the collective labour agreement should employ sufficient employees). However, representativity within the meaning of having a minimum number of members active in the sector or company in which the collective labour agreement is to be concluded, is not an issue for the validity of collective labour agreements. No real representativity demands in that sense apply in Germany; as said, a trade union just requires one member in a company, in order to be entitled to conclude a collective labour agreement with that company.[1360]

This lack of said representativity demands does not cause as many problems in Germany as it does in the Netherlands. In Germany, the collective labour agreement only applies to the employment agreements of bound employers and bound employees, whilst the employer is not obliged to apply the collective labour agreement to the employment agreements of employees who are not bound. Moreover, the competency demands (*Tarifzuständigkeit*) make sure that the employees' and employers' organisations only conclude collective labour agreements for companies or sectors that lie within their own field of interest. This has two relevant consequences. First, it makes the competition for a trade unions to conclude a collective labour agreement considerably smaller when compared with the Netherlands (a trade union serving, for instance, the interests of miners cannot conclude a collective labour agreement for civil servants). This is definitely the case since DGB – which is by far the most important central organisation on the side of the employees – arranges which of its members (trade unions) is entitled to

1357 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 19.

1358 H.C.G. Schaub and M. Franzen, *Tarifvertragsgesetz*, page 2595.

1359 Federal Labour Court, 24 March 2004, AP no. 59 of article 138 GCC.

1360 W.L. Keller, *International Labor and Employment Laws*, page 4-22.

conclude collective labour agreements with which employers (or employers' organisations). The situation that a small trade union from another branch suddenly enters into a collective labour agreement is therefore less likely to occur in Germany than in the Netherlands.[1361] Second, it makes certain that the social partners only conclude collective labour agreements within the sector they actually comprehend. The social partners can truly focus on the sector they call their own and gain as much expertise as possible. These competency demands may be viewed as a mild form of representativity: the social partners can at least be viewed as "representative" – within the meaning of being well-introduced and consequently better able to do their job – within the sector they are competent. The same value may be attached to the requirement that the social partners must satisfy with regard to "surpassing company level". Should a trade union or employers' organisation enter into a sectoral collective labour agreement, it can only begin to be representative in that sector, if it has members in more than just one company. A final mild condition that is related to representativity and that applies to employees' organisations is the demand that these associations should possess real powers; a trade union should be a counterparty that is to be taken seriously. Without any doubt, a trade union will better be able to "persuade" its counterparty to conclude a "good" collective labour agreement when it can count many employees of that counterparty (or of that counterparty's members) as its own members.

In any case, demands on representativity, within the meaning of having a minimum number of members active in the sector or company in which the collective labour agreement is to be concluded, are not deemed overly important. To quote, freely translated, Löwisch and Rieble with regard to the possible organisational function of collective labour agreements:[1362]

> The contracting parties to a collective labour agreement are not legitimised to set norms for the entire labour market, they are restricted to serve the interests of their members and especially lack competence to regulate the entire labour market including the unorganised employees and employers. (*Für eine normierung des ganzen Arbeidstmarktes fehlt es den Tarifsvertragsparteien an der Legimation, sie sind auf die Interessenwahrnemung inhrer Mitglieder beschränkt und haben*

1361 This is not to say that the employer cannot be bound by more than just one collective labour agreement. An employer can, for example, be bound by multiple collective labour agreements should it be member of several employers' organisations or should besides the "normal" collective labour agreement also a binding (extended) collective labour agreement apply (*Tarifpluralität*). See H.C.G. Schaub and M. Franzen, *Tarifvertragsgesetz*, page 2647.

1362 H.C.M. Löwisch and V. Rieble, *Tarifvertragsgesetz*, page 9.

inbesondere keine Kompetenz, den Arbeitsmarkt als Ganzes und damit auch die nichtorganisierten Arbeitnehmer und Arbeitgeber zu regulieren).

Notwithstanding the above, it should be noted that, although the social partners may not directly regulate the employment conditions of the unorganised, indirectly they still do. After all, as mentioned in section 1.2 above, in 2002 collective labour agreements fully or substantially governed the employment agreements of approximately 84% of all German employees. The traditional estimations from the 1960s indicate that around 80% of all companies and 90% of all employees are covered by collective bargaining. In contrast, only about ¼ of the German workforce in unionised. Therefore the social partners do more or less regulate the entire labour market, mainly due to reference clauses.

9.3 Collective labour agreements and independence of trade unions

The independence of trade unions is arranged by article 9.3 of the German Constitution, combined with case law. As stated in section 5 above, trade unions have to be independent from their social counter parties and from state, church and political parties in order to be able to conclude collective labour agreements.

10. Summary

10.1 Industrial relations: past and present

Industrial relations and collective bargaining play an important role in Germany. Between 80% and 90% of the total working population is bound by a collective labour agreement. In contrast, only about a quarter of this population is a trade union member. The organisation rate on the employers' side, however, is very substantial. Collective bargaining takes place at three levels: national, sectoral and company-level (although it can be disputed whether on national level "real" collective bargaining takes place).

In 1894 the first collective labour agreement was concluded; more collective labour agreements followed thereafter. The collective labour agreements had merely obligatory effects; they bound the contracting parties involved, but did not directly apply to the individual employment agreements. The employees and their trade unions could only enforce their rights vis-à-vis the contracting employers' organisation and not vis-à-vis the actual employer. This was considered a weakness in the system.

The central agreement of 1918 between both sides of the industry and the subsequent Collective Agreement Ordinance acknowledged the trade unions, invalidated limitations to trade unions and recognised collective labour agreements. The Ordinance awarded direct and mandatory effect to collective labour agreements on individual employment agreements governed by that collective labour agreement. It also enabled the Minister of Labour to extend a collective labour agreement. The freedom of association was embedded in the Constitution of the Weimar Republic in 1919.

National Socialism halted the collective bargaining process in 1933, after which it re-emerged in 1948. In 1949, the Federal Republic of Germany embedded the freedom of association in the Federal Constitution and the Collective Agreement Act was introduced. This Act applies to the united Germany since 1990.

10.2 The collective labour agreement

A collective labour agreement governs the rights and obligations of the contracting parties and contains legal norms on the content, the commencement and the termination of employment agreements and on matters pertaining to the operation of works and legal aspects of the works' constitution. Pay Agreements arrange the primary employment conditions, while Framework Agreements only deal with general employment conditions, and collective labour agreement "on special issues" merely cover a single topic. As in the Netherlands, German collective labour agreements can contain obligatory, normative and collective normative provisions.

The contracting parties to a collective labour agreement should, on the one hand, be one or more employers or associations of employers and, on the other, one or more trade unions. Also central organisations are capable of entering into collective labour agreements, either on behalf of their members, or on their own account. In order to be capable of concluding collective labour agreements, trade unions should: (i) protect and advance employment and economic conditions; (ii) be voluntarily established; (iii) be independent from their social counterparties and from state, church and political parties; (iv) surpass company level; (v) have a democratic organisation; (vi) posses real powers; (vii) be sufficiently prepared to enter into collective bargaining; (viii) be committed to enter into collective labour agreements and the articles of association should stipulate their power to conclude these agreements; and (ix) acknowledge the German laws on collective labour law and collective action. These demands only fully apply to trade unions and not to employers' associations, most notably the requirement of possessing real powers.

Besides these general demands on capacity, the contracting parties should also be competent to conclude a specific collective labour agreement. The parties concerned may only conclude collective labour agreements within their own field of interest; a trade union serving the interests of employees working in the metal industry may therefore only conclude a collective labour agreement with an employers' association or an individual employer in that field of industry.

The bargaining process is primarily governed by general rules on concluding agreements. In Germany, there is a constitutional *right* to collective bargaining, not being an *obligation* to bargain. Consequently, a party may refuse to enter into negotiations. Only in very exceptional circumstances will German courts oblige a party's participation in negotiations.

10.3 The consequences of a collective labour agreement

Once a collective labour agreement is concluded, it should be established to whom it applies, what its consequences are and how the rights arising from it can be enforced.

10.3.1 The contracting parties

The contracting parties are bound to each other by the (obligatory provisions of the) agreement. As a consequence of this, they need, by law, to perform under the contract. Should a contracting party breach an obligatory provision of the collective labour agreement, the counterparty may instigate proceedings against that party claiming damages and/or specific performance. The aggrieved party may not suspend its obligations or step back from the collective labour agreement. The contracting parties have, by law, to abide by a peace-obligation and an "obligation to influence". On the basis of this latter obligation, the contracting association is obliged to promote that its members fulfil the obligations arising from the collective labour agreement.

10.3.2 The members of the contracting associations

The legal norms of the collective labour agreement should be applied to those employers and employees who both (i) are bound by and (ii) fall within the scope of application of said agreement. Members of the parties to a collective labour agreement and the employer who is himself a party thereto are bound by that agreement. The social partners themselves determine the scope of application of the collective labour agreement in that agreement.

The legal norms in an applicable collective labour agreement regulating the content, commencement and termination of the individual employment agreement apply directly and in a mandatory fashion to that individual employment agreement. This means that every normative provision of the collective labour agreement automatically applies to the individual employment agreement, modelling the individual employment agreement and setting aside from the collective labour agreement deviating provisions. After the employment agreement has been remodelled by the collective labour agreement, and during the term of that agreement, it is not possible to deviate from the content of the collective labour agreement or to waive the rights set forth within it. Not every provision in an individual employment agreement that differs from the corresponding provision in the collective labour agreement deviates from the collective labour agreement: arrangements in the employment agreement may differ from the corresponding provisions in the collective labour agreement, should that be permitted by the collective labour agreement, or should such a departure be advantageous to the employee. As a consequence of the latter rule, the distinction between "standard" and "minimum" provisions in collective labour agreements is non-existent in Germany as all collective labour agreements are, by law, minimum agreements. The individual employer and employee who do not oblige these normative provisions are in breach of the individual employment contract. The aggrieved party can claim specific performance and/or damages.

10.3.3 Members vs. non-members

The above-mentioned only applies if both the employee and the employer are bound by the collective labour agreement (and fall within the scope of application of that agreement). If either the employer or the employee is not bound by the collective labour agreement, the normative provisions of the collective labour agreement do not apply to the employment agreement. This does not mean that the content of the collective labour agreement is at all times irrelevant in such a situation, as (a part of) a collective labour agreement may apply anyway due to a "reference clause" in the employment agreement. The reference clause ensures that the normative provisions of the collective labour agreement apply as a part of the employment agreement. If the employee who is not bound by the collective labour agreement has accepted a reference clause, his position is very comparable to the position of the employee in scenario 2: the normative part of the collective labour agreement applies to the individual employment agreement. Both the employer and the employee may enforce these employment conditions towards each other. The reference clause does not bring about the applicability of collective normative provisions.

10.3.4 The collectivities

Employers and employees who are bound by the collective labour agreement are, if provided for in the collective labour agreement, also bound to collectivities by the (collective normative provisions of) this agreement. The legal norms in a collective labour agreement which regulate (a) the operation of works and (b) the legal aspects of the works constitution apply to all works of which the employer is bound by the collective labour agreement. These legal norms apply directly and with mandatory effect. The Works Council may enforce these rights. A collective labour agreement can also provide for the joint establishment of institutions by the contracting parties. The provisions on the establishment of these institutions apply directly and are mandatory to the articles of association of these institutions and to the relation between these institutions on the one hand and to the employers and employees bound by the collective labour agreement on the other. The joint institutions may directly collect the contributions from the (bound) employers, and the (bound) employees have a direct entitlement to the institutions. By way of exception, the contractual parties to the collective labour agreement are entitled to collect the contributions from the bound employers and enforce the performance of the joint institution for the benefit of the bound employees.

10.3.5 Special means of enforcement

The Works Council can play a role in the enforcement of normative provisions. One of its tasks is to ensure that the employer applies the applicable collective labour agreement. An individual employee may revert to the Works Council should he feel that the employer breaches an applicable normative provision, after which the Works Council should raise this issue with the employer in order to find a solution.

A contracting party to the collective labour agreement may demand that its counterparty incites its members to fulfil the obligations arising from the collective labour agreement. It is, however, as a rule, not entitled to claim damages or to demand specific performance from the *individual employer or employee* who is in breach of the normative provisions of the collective labour agreement. Two important exceptions apply to this rule. First, a contracting trade union may instigate legal actions against an employer who does not fulfil the normative provisions of an enterprise level collective labour agreement. The other exception derives from the Burda-ruling, in which the Federal Labour Court allowed a contracting trade union to commence litigation against, and demand to refrain the violation of the collective labour agreement from, the employer bound by a branch level collective labour agreement, who

had introduced a generally applicable company arrangement deviating from the normative provisions of the applicable collective labour agreement.

10.3.6 Tarifdispositives Gesetzesrecht

German law contains provisions that can only be set aside by a collective labour agreement. It is not only the parties to an individual employment agreement that are bound by the collective labour agreement who are entitled to use this entitlement, the same applies to the parties that apply a collective labour agreement through a reference clause.

10.3.7 Term and termination

The contracting parties may establish the date that the collective labour agreement comes into force and its term. They may also award retro-effect to the legal norms of the collective labour agreement. Collective labour agreements can be concluded for a fixed or an indefinite period of time. Agreements for a fixed period of time end, by operation of law, at the end of their term. A collective labour agreement for indefinite duration can be terminated by notice. The collective labour agreement can also be terminated at any time by mutual consent of the contracting parties. It can furthermore be terminated on occurrence of an important event, upon which it cannot reasonably be expected from a party to continue the collective labour agreement. Finally, the collective labour agreement will terminate after one of the contracting parties has lost its capacity to conclude collective labour agreements.

10.3.8 After-effects

After expiration of the collective labour agreement, the obligatory provisions have lost their force. This is different when it comes to normative and collective normative provisions; they continue to apply after the agreement's expiration, until they are replaced by another arrangement. In the case whereby a collective labour agreement applies due to a reference clause, the norms of that agreement also remain to apply after it has lapsed.

10.3.9 The role of alternative dispute resolution in collective bargaining

Many collective labour agreements have introduced some sort of alternative dispute resolution mechanism upon breach of the agreement. This is particularly important as during the term of the collective labour agreement the trade unions cannot revert to collective actions as a means of solving conflicts given the immanent peace obligation.

10.4 Extending collective labour agreements

The Ministry is entitled to declare an existing collective labour agreement binding for all employers and employees that fall within the scope of application of that agreement. The extension process is surrounded by a number of important demands and safeguards, being: (i) demands concerning (the provisions of) the collective labour agreements that are to be declared binding, (ii) procedural demands and safeguards, and (iii) statutory limitations on the duration of the binding collective labour agreement.

The extension process presumes (a) the existence of a valid collective labour agreement. An invalid collective labour agreement cannot become valid merely due to the extension. This collective labour agreement can only be extended if (b) the employers bound by the agreement employ not less than 50% of the total number of employees working within the scope of application of the collective labour agreement and if (c) the extension serves the public interest. The Ministry is entitled to deviate from these demands in response to a social emergency. Furthermore, (d) only specific provisions of the collective labour agreement can be declared binding, most notably normative and collective normative provisions. Moreover, (e) the provisions of the collective labour agreement that it is to be extended, including the provisions on the scope of application, should be fully clear.

Besides these demands, many formalities must be observed. There should be (f) a formal request of the parties concerned to extend the collective labour agreement, (g) a request which is to be published, (h) upon which third parties can raise objections against this request. The Ministry should (i) obtain the approval of a special committee prior to its decision to extend a collective labour agreement. If all formalities are complied with, all material demands are met and the Ministry sees no reason to refuse the request, the Ministry's decree extending the collective labour agreement must (j) be published.

Finally, the extension (k) may not have "real" retro-effect and (l) may not outlast the duration of the collective labour agreement itself, but it may be shorter.

Even if all of the above demands and safeguards are met and complied with, the Ministry can refuse the extension application; it has a discretionary power as to whether or not to extend. Closely related to this discretionary power is the Ministry's opinion whether or not the public interest is served with the extension. In order to answer this last question the Ministry should, on a case-by-case scenario, balance all interests involved; the specific advantages

of each collective labour agreement should be balanced against its specific disadvantages.

The legal norms of the collective labour agreement that is extended apply to all employers and employees who fall within the scope of application of the agreement and who were not already bound by the agreement. The legal position of these employers and employees is the same as that of the employers and employees who were already bound by the collective labour agreement regardless of the extension. In addition, the after-effects of the provisions of the binding collective labour agreements are the same as those of "normal" collective labour agreements.

10.5 The reach of the social partners

As collective labour agreements are private agreements, the social partners enjoy contractual freedom, provided that the normative provisions are in line with the Collective Agreement Act. Some collective employment issues are by law (primarily) the task of other parties than the social partners. The social partners are entitled to deviate from *Tarifdispositives Gesetzesrecht*, but not from national and international mandatory law. The social partners should furthermore abide by elementary social entitlements.

In Germany there are no representativity demands, within the meaning of having a minimum number of members active in the sector or company in which the collective labour agreement is to be concluded, when it comes to the validity of collective labour agreements. A trade union only requires one member in a company in order to conclude a collective labour agreement with that company. "Mild representativity demands" can be found in the competency demands, the demand that the association should surpass company-level and the demand that a trade union should possess real powers. The lack of the first mentioned representativity demands is not perceived as worrisome, as the collective labour agreement only applies to the employment agreements of bound employers and bound employees, whilst the employer is not obliged to apply that agreement to the employment agreements of employees who are not bound. Still, although the social partners may not directly regulate the employment conditions of the unorganised, indirectly they do, as collective labour agreements fully or substantially govern the employment agreements of a large majority of all German employees, whilst only about ¼ of the German workforce in unionised.

The independence of trade unions is arranged by article 9.3 of the German Constitution, combined with case law. Trade unions have to be independent

from their social counterparties and from state, church and political parties in order to be able to conclude collective labour agreements.

CHAPTER 11

COLLECTIVE LABOUR AGREEMENTS IN BELGIUM

1. Industrial relations in Belgium in a nutshell

This chapter focuses on collective labour agreements (*collectieve arbeidsovereenkomsten*) in Belgium, applying the framework set out in section 7 of chapter 8. It concerns the Belgian federal system of industrial relations, as opposed to regional systems.[1363]

1.1 The Belgian consultation model

Belgian industrial relations are, according to the scholars Humblet and Rigaux, typified by three characteristics: (i) the parties concerned are free to conclude collective labour agreements, (ii) the structures are embedded in a neo-corporatist public-law industrial regulatory body, and (iii) the relative importance of law and legal intervention in defining the content and form of industrial relations.[1364]

First, the Belgian social partners are free to voluntarily enter into collective labour agreements. As a rule, the Belgian government adheres to the subsidiarity principle. Consequently, it only intervenes in industrial relations if the social partners fail to act adequately themselves.

Second, collective bargaining takes place in different institutions, depending on the level of the collective labour agreement to be concluded. Inter-professional collective bargaining occurs within the so-called National Labour Council

1363 Belgium has three regions that are relevant in social and economic matters: the Flemish, the Walloon and the Brussels region. Moreover, there are three communities in Belgium: the Flemish, French and German speaking community. See F. Dorssemont, G. Cox and J. Rombouts, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Belgium*, page 2. The report can be found on: http://www.unifi.it/polo-universitario-europeo/ricerche/collective_bargaining.html.

1364 P. Humblet and M. Rigaux, *Belgian Industrial Relations Law*, Intersentia, Antwerpen – Oxford, 2005, pages 1 and 2.

(*Nationale Arbeidsraad*). Sectoral collective bargaining mainly takes place within joint committees (*Paritaire Comités*) or sub-committees. Enterprise level collective bargaining occurs outside these institutions (institutions which are jointly referred to as "joint bodies"). The most substantive part of the collective bargaining process is situated at sectoral level.[1365]

In connection with the above, it should be noted that representative employers' and employees' organisations have an oligopoly in collective bargaining; the legislator regards them as institutes acting in a system of institutional representativity. Due to this rule only (the members of) three major employees' organisations are entitled to conclude collective labour agreements, which has led to social stability, as there is little or no competition between them.[1366]

Third, the role of the law and courts is limited. The social partners are, to quite an extent, free to arrange their relations, free from intervention. Still, law and courts are crucial in the Belgian Industrial Relations system, because they define the limits of the voluntarism of the social partners.

1.2 Statistics

Collective labour agreements, as well as their adaptation and termination, must be registered (see section 4.1 below). The number of registrations rose from 3,134 in 1993, to 3,364 in 1997 and to 4,417 in 2001.[1367] In the year 2000, approximately 90% of all Belgian employees were covered by a collective labour agreement setting their wages.[1368]

The trade union density in Belgium is relatively high.[1369] In 1985 it was 51% of the total working population, a number which dropped to 48% in 1990, to

1365 J. van Ruysseveldt, *CAO-onderhandelingen in België en Nederland* [*Collective bargaining in Belgium and the Netherlands*], Tijdschrift voor Arbeidsvraagstukken 2002-18, no. 4, page 322.

1366 P. Humblet and M. Rigaux, *Belgian Industrial Relations Law*, page 91.

1367 Reference is made to www.fgov.be.

1368 A. Martens, G. van Gyes and P. van der Hallen, *De vakbond naar de 21ste eeuw* [*The trade union to the 21st century*], September 2001, page 1. I was not able to retrieve how many of these employees were covered due to the extension of the collective labour agreement.

1369 For an in depth analysis of the representativeness of employees' organisations, see F. Dorssemont, G. Cox and J. Rombouts, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Belgium*, pages 31 *ff*.

rise again to 53% 1995.[1370] In 2001 the number was estimated on "exceeding 50%."[1371] The organisation rate of employers in Belgium was, according to a year 2000 study, 82%.[1372]

1.3 Trends

There are not many relevant references to trends in Belgian collective bargaining. It was mentioned only sporadically that employers are increasingly calling for the conclusion of collective labour agreements at enterprise level.[1373] This seems to be confirmed by the figures set out by Petit, who states that ¾ of all collective labour agreements registered in 2001 are enterprise level agreements.[1374] That is consistent with the trends in Germany and in the Netherlands. Nonetheless, the system of collective bargaining, as well as the levels, have changed only marginally over time.[1375]

1.4 Bargaining levels

Belgium has enterprise, sectoral and (national) inter-professional collective labour agreements. This distinction is very strict, as the scope of applicability does not only differ, but also the level at which these agreements are concluded and, as is set out in section 9.1 hereafter, their hierarchy. There is an informal "division of labour" in Belgium between these three levels, a coordination of which topic is arranged on which level.[1376]

1370 A. Martens, G. van Gyes and P. van der Hallen, *De vakbond naar de 21ste eeuw*, page 4. The numbers as set out in the report of the European Commission, Directorate-General for employment and social affairs, *Industrial Relations in Europe 2004*, completed in 2004, are a bit higher. The density is supposed to be 53.9% in 1990 and 55.7% in 1995. See page 19 of said report.

1371 A. Martens, G. van Gyes and P. van der Hallen, *De vakbond naar de 21ste eeuw*, page 2. In the report of the Directorate-General for employment and social affairs, *Industrial Relations in Europe 2004*, page 19, the density number was set on 55.8% in 2001.

1372 J. van Ruysseveldt, *CAO-onderhandelingen in Belgie en Nederland*, page 325. The same study set the union density in Belgium at that time on 65%.

1373 P. Humblet and M. Rigaux, *Belgian Industrial Relations Law*, page 108.

1374 J. Petit, *De C.A.O.-Wet: een overzicht van rechtspraak en rechtsleer (1968 – 2002)* [*The Collective Labour Agreement Act: an overview of jurisprudence and literature (1968 – 2002)*], Tijdschrift voor Sociaal Recht [*Magazine on Social Law*; "T.S.R".], 2002, page 238.

1375 F. Dorssemont, G. Cox and J. Rombouts, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Belgium*, page 66.

1376 F. Dorssemont, G. Cox and J. Rombouts, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Belgium*, page 6.

The inter-professional collective labour agreement is concluded in the National Labour Council between the representative employees' organisations and the representative employers' organisations that have seat there. These inter-professional collective labour agreements should not to be confused with agreements concluded between employers' and employees' organisations outside the National Labour Council. The latter agreements are *not* collective labour agreements, but "merely" inter-professional agreements. This is not to say that these agreements are irrelevant: if possible these agreements are converted in the National Labour Council into "proper" collective labour agreements.[1377]

A sectoral collective labour agreement is concluded between, on one side, the representative employees' organisations, and on the other, representative employers' organisations having seat in a joint committee or sub-committee.[1378] As will be set out in further detail in sections 5 and 6 below, the National Labour Council is empowered to draft sectoral collective labour agreements for a sector not falling within the jurisdiction of any joint committee or sub-committee or for a sector where such a committee does not function.

An enterprise level collective labour agreement is concluded between, on the one side one or more representative employees' organisations, and on the other, one or more employers or representative employers' organisations.

2. A brief history of collective bargaining in Belgium

Employees and employers in the sheet industry concluded, in September 1789, an agreement which was probably the first collective labour agreement in Belgium. This agreement set out wages and other employment conditions.[1379] The follow-up to this early start of collective bargaining was meagre: only 19 collective labour agreements were concluded up to World War I.[1380] This, however, is not that surprising because in Belgium, like many other European

1377 P. Humblet and M. Rigaux, *Belgian Industrial Relations Law*, page 34.

1378 This wording also makes clear that it is not the joint committee or sub-committee entering into the collective labour agreement, but it is the organisations having seat therein that do. See also: J. Petit, *De C.A.O.-Wet: een overzicht van rechtspraak en rechtsleer (1968 – 2002)*, page 147.

1379 W. van Eeckhoutte, *Sociaal Compendium '03-'04, Arbeidsrecht met fiscale notities* [*Social Compendium '03-'04, Employment law with fiscal notes*], volume I, Kluwer, 2003, page 3.

1380 P. Humblet, R. Janvier, W. Rauws and M. Rigaux, *Synopsis van het Belgisch Arbeidsrecht* [*Synopsis of Belgian Employment Law*], Intersentia Rechtswetenschappen, Antwerpen – Groningen, 1999, page 382.

countries, the so-called coalition prohibition (*coalitieverbod*) applied, set out in the Penal Code of Napoleon of 1810, which fully limited the freedom of association. These penal provisions were a consequence of the *Loi Le Chapelier* dating back to 1791, prohibiting associations of citizens with an equal profession. The Penal Code did not allow employers to conspire with an aim of lowering wages either. In turn, the employees were not entitled to cease their work; collective actions were prohibited.[1381]

After the French annexation of Belgium ended, many obstructions to the freedom of association were lifted. In 1831, article 20 (the current article 27) of the Belgian Constitution (*Grondwet*) recognised the freedom to unite, without prior state intervention. In contrast to this development, the legislator did not revoke the aforementioned (and by then unconstitutional) penal provisions. Trade union freedom was therefore still not in place. Apparently, this freedom was not highly ranked on the political agenda, as opposed to, for example, political freedom.[1382]

In the second half of the 19th century, the Belgian legislator paved the way, step by step, for the recognition of trade unions. In 1866 it revoked the aforementioned penal provisions.[1383] This opened the way for employees to unite. The legislator, however, simultaneously introduced a new penal provision, article 310 of the Penal Code, which continued to prohibit collective actions. Trade unions could therefore be formed, but were lacking power. The next step in the recognition of trade unions was the 1898 launch of the Act on the Professional Associations (*Wet op de Beroepsverenigingen*).[1384] Trade unions could be formally recognised, but had to pay a high price in return, as they had to accept a specific statute. This statute included the obligation for the unions to publish a list of their members and enabled the court, in specific circumstances, to dissolve the trade unions. At the end of the day, not a single trade union accepted this statute.[1385]

In 1906, following a notorious lock-out in the city of Verviers, the parties of the Belgian industrial relations acknowledged the concept of a collective

1381 P. Humblet, R. Janvier, W. Rauws and M. Rigaux, *Synopsis van het Belgisch Arbeidsrecht*, page 289.

1382 P. Humblet, R. Janvier, W. Rauws and M. Rigaux, *Synopsis van het Belgisch Arbeidsrecht*, page 289.

1383 Belgian Bulletin of Acts and Decrees (*Belgisch Staatsblad*; "B.S.") 11 June 1866.

1384 B.S. 8 April 1898.

1385 P. Humblet, R. Janvier, W. Rauws and M. Rigaux, *Synopsis van het Belgisch Arbeidsrecht*, page 290.

labour agreement and agreed that wages and other employment conditions could be arranged collectively.[1386] This did not mean, however, that both sides of the industry co-operated in harmony. Employers refused, on a large scale, to enter into negotiations with organisations of employees and they preferred individual wage setting.[1387] Moreover, multiple collective actions infested Belgium in 1919, spreading over different sectors of the trade and industry. The government tried to solve these collective conflicts through mandatory arbitration. As this did not (sufficiently) work, the government established joint committees (committees comprising both sides of the industry), first in the two industries that were suffering the most from the collective actions, the mining and metal industry. The joint committees were to assess the possibility of a working hours reduction. The joint committees proved to be successful, and grew in number from 3 at the end of 1919 to 56 in 1936.[1388]

In the period between World War I and World War II, the Belgian legislator tried hard to enact legislation on collective labour agreements. Unfortunately, it failed time and time again. In contrast, it did succeed on 24 May 1921 in revoking the aforementioned article 310 of the Penal Code (prohibiting collective actions).[1389] On the same day the Act on Freedom of Association (*Wet tot Waarborging der vrijheid van Vereniging*) was introduced, recognising, in full, the freedom of association.[1390] This finally enabled the trade unions to do their work freely.

World War II drew employers and employees together. During this war, a draft agreement was concluded, the Draft Agreement regarding Social Solidarity (*Ontwerp van Overeenkomst tot Sociale Solidariteit*). This draft formed the blueprint for the social relations after liberation. One of the principles of this draft was to establish joint committees on national, sectoral and enterprise level.[1391] It also stated that the employers would recognise trade unions as equal parties.[1392]

1386 W. van Eeckhoutte, *Sociaal Compendium '03-'04*, page 4.

1387 W. van Eeckhoutte, *Arbeidsrecht* [*Employment Law*], Kluwer Rechtswetenschappen, Belgium, 1998, page 43.

1388 W. van Eeckhoutte, *Sociaal Compendium '03-'04*, page 4.

1389 B.S. 28 mei 1921.

1390 B.S. 28 mei 1921.

1391 P. Humblet, R. Janvier, W. Rauws and M. Rigaux, *Synopsis van het Belgisch Arbeidsrecht*, page 311.

1392 Reference is made to the brochure of the Secretary of the Central Economic Council, *De Centrale Raad voor het Bedrijfsleven* [*The Central Economic Council*], page 4, as published on: www.ccerb.fgov.be.

The plans, as formulated in the draft agreement, were indeed executed after World War II. In 1945 the Act on Joint Committees (*Besluitwet Paritaire Comités*) was enacted,[1393] establishing a legal statute for the joint committees. This Act also made it possible to extend, by Royal Decree (*Koninklijk Besluit*), collective labour agreements reached by the joint committees, at their request or at that of representative organisations. In 1947 the Statute on Trade Union Representation (*Statuut van de Vakbondsafvaardiging*) was drafted. In 1948, the Act on the Organisation of the Trade and Industry (*Wet houdende Organisatie van het Bedrijfsleven*) arranged for the Central Economic Council (*Centrale Raad voor het Bedrijfsleven*), the Councils for Trade and Industry (*Bedrijfsraden*) and the Works Councils (*Ondernemingsraden*). The National Labour Council was set up in 1952. All these organisations and acts promote the consultation of both sides of the industry.

Within the joint committees, and later on, as from 1960, also on the highest level between the Federation of Enterprises in Belgium (*Verbond van Belgische Ondernemingen*; "VBO") and the representative trade unions, multiple collective labour agreements were concluded.[1394] A major difficulty in these days with regard to the collective agreements was that their normative effects were uncertain. If a collective labour agreement was extended on the basis of the Act on Joint Committees, the (normative) content of the agreement applied *erga omnes*. Whether this was also the case if the collective agreement was not extended was far from clear. Case law since 1945 has varied greatly in this respect.[1395] The Court of Cassation *(Hof van Cassatie)* even ruled in 1950 that a collective labour agreement could only bind those parties that had explicitly agreed to the agreement.[1396] This meant an important invalidation of the collective labour agreements.[1397] As a response, acts on 4 and 11 March 1954 strengthened the collective labour agreements. These acts stipulated that the collective labour agreements would have supplementary powers in case parties to an employment agreement had not arranged for subjects that were

1393 B.S. 5 July 1945.

1394 P. Humblet, R. Janvier, W. Rauws and M. Rigaux, *Synopsis van het Belgisch Arbeidsrecht*, page 311. It should be noted that the agreements concluded between VBO and the representative trade unions can formally not be considered proper collective labour agreements in Belgium. Reference is made to section 1.4 above.

1395 P. Humblet, R. Janvier, W. Rauws and M. Rigaux, *Synopsis van het Belgisch Arbeidsrecht*, page 383.

1396 Court of Cassation (*Hof van Cassatie*), 21 December 1950, Arresten van het Hof van Cassatie [*Rulings of the Court of Cassation*; ".A.C."] 1951, page 221.

1397 See H. Lennaerts, *Inleiding tot het Sociaal Recht* [*Introduction to Social Law]*, Kluwer, Belgium, 1995, page 336.

provided for in the collective labour agreement.[1398] But this supplementary power did not satisfy the needs of the contracting parties, as they aimed for full binding power of the collective labour agreements.[1399]

It was apparent that the above period should end. In 1963 the Belgian government proposed an act on collective labour agreements and submitted this draft to the National Labour Council. The employers' organisations had no real objection to this proposed act. The trade unions, however, felt that the draft would limit their freedom to collective action. The draft was subsequently altered to quite an extent, and on 5 December 1968 the Act on collective labour agreements and Joint Committees (*Wet betreffende de collectieve arbeidsovereenkomsten en de paritaire comités*; "BACLA") was finalised.[1400] Since then, the BACLA forms the heart of Belgian industrial relations' law.

3. The classical rights concerning collective bargaining

Belgium protects (i) the freedom of association, (ii) the right to collective bargaining, and (iii) the right to strike.

Article 27 of the current Belgian Constitution guarantees the freedom of association. This freedom applies to all societal activities, provided that these activities do not violate public policy or good morals. This right includes the freedom to establish trade unions.[1401] The aforementioned Act on Freedom of Association also protects the freedom of association and arranges the consequences of joining an association. Although this Act is not restricted to trade unions, it was primarily aimed at trade unions when drafted.[1402] The Act guarantees the positive and the negative freedom of association. Forcing an individual to join an association or to withdraw from one is penalised in this Act.

The Belgian Constitution also *refers* to the freedom to collective bargaining. Article 23 of said Constitution stipulates that everyone has the right to, amongst others, employment and the freedom of profession in the context of an employment policy aimed at *i.a.* the constitutional right to information,

1398 W. van Eeckhoutte, *Sociaal Compendium '03-'04*, page 5.

1399 See H. Lennaerts, *Inleiding tot het Sociaal Recht*, page 337.

1400 B.S. 15 January 1969.

1401 P. Humblet and M. Rigaux, *Belgian Industrial Relations Law*, page 7.

1402 P. Humblet, R. Janvier, W. Rauws and M. Rigaux, *Synopsis van het Belgisch Arbeidsrecht*, page 292.

consultation and collective bargaining.[1403] Some authors take the view that the constitutional freedom of association also contains the (in that case: constitutional) right to collective bargaining.[1404] Besides these arrangements in the constitution, the entitlement to bargain derives from the BACLA. The mere fact that the legislator drafted this Act enabling the social partners in a statutory fashion to conclude collective labour agreements, sufficiently establishes this right in Belgium.

The right to collective action (or the right to strike for that matter) is not embedded in any statute or in the Constitution. This right, nevertheless, is recognised in Belgium. The Court of Cassation stated in a 1981 ruling that (i) employees have a right not to perform their work due to a strike, (ii) taking part in a strike does not constitute an illegal act as such, and (iii) there is no legal provision forbidding employees from participating in a strike not organised by an official trade union.[1405] Moreover, the European Social Charter has been ratified by Belgium in 1990.[1406] Article 6 acknowledges the right to collective action. It is generally accepted in Belgium that the Charter has direct effect, therefore guaranteeing the right to collective actions further.[1407]

4. Collective labour agreements

It should now be explained what constitutes a collective labour agreement in Belgium (section 4.1). Afterwards, the different types of provisions in a collective labour agreement (section 4.2) will be discussed.

4.1 What constitutes a collective labour agreement?

Pursuant to article 5 BACLA, a collective labour agreement is (i) an agreement concluded between (ii) one or more employees' organisations and one or more employers' organisations or one or more employers, (iii) in which individual and collective relations between employers and employees in enterprises or in a sector are set out, and rights and obligations between the contracting

1403 See also F. Dorssemont, G. Cox and J. Rombouts, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Belgium*, page 9.

1404 P. Humblet and M. Rigaux, *Belgian Industrial Relations Law*, page 9.

1405 Court of Cassation, 21 December 1981, in: W. van Eeckhoutte, *De grote arresten van het Hof van Cassatie in sociale zaken* [*The major cases of the Court of Cassation in social matters*], Antwerpen - Apeldoorn, Maklu, 1996, no. 19.

1406 B.S. 28 December 1990.

1407 P. Humblet and M. Rigaux, *Belgian Industrial Relations Law*, page 118.

parties are arranged. This definition shows that at least three elements are of relevance.

First, there should be an agreement that, as with all agreements in Belgium, has to comply with the general rules on agreements.[1408] This agreement has to be set out in writing[1409] and should be drafted in the Dutch *and* French language (article 13 BACLA). However, the agreement can exclusively be drafted in the Dutch, French or German language, should the agreement solely apply to such a language area. The agreement should be executed by the persons who agree to it on behalf of their organisation or on their own account. It is worthwhile to note that the representatives of organisations are by virtue of article 12 BACLA being considered to duly represent their organisation, a presumption which is *not* disprovable. Under specific circumstances outlined in article 14 BACLA, the signatures of the aforementioned persons may be replaced by, briefly put, the signature of the person who brought the negotiating parties together and affirms that the agreement between these parties was reached.

Article 16 BACLA summarises the minimum content of the collective labour agreement. The agreement should include:

a. the names of the signatory organisations;
b. the name of the joint body should the agreement be concluded therein;[1410]
c. the identity of the persons concluding the agreement and, if it is concluded outside the joint body, the capacity in which these persons act and possibly the position they hold in their organisation;
d. the persons, the sector or the enterprise for, and the geographic territory in which the agreement applies, unless it applies to all employers and

1408 The parties involved should agree on something, the persons should be empowered to represent their organisation (see, however, article 12 BACLA), the agreement must concern a permitted subject, and there must be a valid reason to conclude the agreement. Reference is made to the brochure of the Federal Governmental Agency Employment, Labour and Social Consultation [*Federale Overheidsdienst Werkgelegenheid, Arbeid en Sociaal Overleg*], *Wegwijs in de collectieve arbeidsovereenkomst* [*Knowing your way in the collective labour agreement*], December 2004, pages 11 and 12. See also B. Mergits, *De geldigheids- en vormvereisten van de CAO* [*The validity and formality demands of the collective labour agreement*], in M. Rigaux, *Actuele problemen van het Arbeidsrecht 3*, Kluwer Rechtswetenschappen, Antwerpen, 1990, pages 1 *ff*.

1409 This means that the actual agreement of all parties involved must be set out in writing; a mere letter of a trade union secretary directed at the employer does not suffice. See Court of Cassation, 4 May 1981, in: W. van Eeckhoutte, *De grote arresten van het Hof van cassatie in Sociale Zaken*, no. 3.

1410 The term "joint body" includes (i) the joint committee, (ii) the joint sub-committee, and (iii) the National Labour Council. Reference is made to article 1.3 BACLA.

employees that fall under the jurisdiction of the joint body in which the agreement is concluded;

e. the term of the agreement, if it is concluded for a fixed period of time, or the manner in which the agreement can be terminated, including the notice period, if it concerns an agreements concluded for an indefinite period of time or for a definite period of time containing a (tacitly) renewal clause;
f. the date of entrance into force, in case the agreement does not enter into force on the date it is concluded;
g. the date of conclusion of the agreement;
h. the signature of the persons that are entitled to execute the agreement.

Second, the agreement must be concluded between specific parties. Pursuant to article 6 BACLA, the collective labour agreement can be concluded (i) within the joint body (as opposed to *by* the joint body)[1411] between one or more employees' organisations and one or more employers' organisations[1412] and (ii) outside this joint body, between one or more employees' organisations and one or more employers' organisations or one or more employers. In any event, the aforementioned employees' and employers' organisations must be *representative* (article 2.4 BACLA). An introduction of these representative organisations will be given in section 5 below.

Third, collective labour agreements should deal with the relation between employers and employees on the one hand, and on rights and obligations of the contracting parties on the other (although a collective labour agreement is still valid should this latter relation not be arranged).[1413] This enables the contracting parties, with regard to the provisions concerning the relation between the employer and the employees, to arrange subjects in all domains of social law,[1414] or, to phrase it in the wording of a governmental agency, "they can agree on anything that falls within 'the universe' of the individual and collective relations of employers and employees".[1415]

1411 F. Dorssemont, G. Cox and J. Rombouts, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Belgium*, page 15.

1412 To be more precise, within the joint body, a collective labour agreement may only be concluded between *all* representative employees' and employers' organisations having seat within that body (article 24 BACLA).

1413 F. Dorssemont, G. Cox and J. Rombouts, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Belgium*, page 20.

1414 J. Petit, *De C.A.O.-Wet: een overzicht van rechtspraak en rechtsleer (1968 – 2002)*, page 149.

1415 Federal Governmental Agency Employment, Labour and Social Consultation, *Wegwijs in de collectieve arbeidsovereenkomst*, page 12.

A further requirement is that a collective labour agreement should, on the basis of article 18 BACLA, be registered at the Ministry for Work and Employment (*Ministerie van Tewerkstelling en Arbeid*). Without this notification, the agreement will not be considered a collective labour agreement, and therefore lacks the power attributed to a collective labour agreement; it will only bind the signatory parties.[1416] The registration is thus an essential formal requirement. This registration will be refused if the collective labour agreement does not meet the demands of articles 13, 14 and 16 BACLA (articles which concern demands on language, on correct execution and on content; as already mentioned above). Everyone is entitled to receive a copy of the collective labour agreement upon payment of a reasonable price. Collective labour agreements concluded within a joint body are published on the internet.[1417]

A collective labour agreement concluded within a joint body should, given article 25 BACLA, also be published in the Belgium Bulletin of Acts and Decrees (*Belgisch Staatsblad*). This publication includes the collective labour agreement's subject, date, duration, scope of applicability, and its place of registration.

4.2 Different types of provisions

In Belgium, individual normative, collective normative and obligatory provisions can be distinguished.[1418] This follows directly from the definition of collective labour agreement set out in article 5 BACLA. In the end, it stipulates that "a collective labour agreement is an agreement (…) in which (i) individual and (ii) collective relations between employers and employees in enterprises or in a sector are set out, and (iii) rights and obligations between the contracting parties are arranged".

The individual normative obligations relate to the individual employment relation between the employer and the employee. As a rule, the individual normative provisions concern working hours, working place and organisation of labour, and also the classification of positions, wage scales, education and wage indexation.[1419]

1416 Court of Cassation, 30 May 1988, in: W. van Eeckhoutte, *De grote arresten van het Hof van cassatie in Sociale Zaken*, no. 5.

1417 www.meta.fgov.be.

1418 Federal Governmental Agency Employment, Labour and Social Consultation, *Wegwijs in de collectieve arbeidsovereenkomst*, page 7.

1419 Federal Governmental Agency Employment, Labour and Social Consultation, *Wegwijs in de collectieve arbeidsovereenkomst*, page 7.

Collective normative provisions relate to collective employment relations within the company.[1420] It concerns provisions concerning the employer(s) and the collectivity of employees, such as safety norms, reconciliation procedures on company level, the statute of union delegation (*vakbondsafvaardiging*), provisions with regard to the functioning and competence of the Works Council and the Committees for prevention and protection on the Job (*Comités voor preventie en bescherming op het werk*), and arrangements for funds.[1421]

It should be noted that in practice it can be rather difficult to distinguish between individual and collective normative provisions. A specific provision may, for example, very well be both individual and collective normative in nature.[1422] There are, however, important legal differences between individual and collective normative provisions. Individual normative provisions (and, as will be set out, collective normative provisions having individual effects) have a stronger binding power than collective normative provisions.[1423] As opposed to collective normative provisions, individual normative provisions remain to apply once the contracting organisation to a collective labour agreement is dissolved (article 22 BACLA) and once the collective labour agreement has ended (article 23 BACLA). These subjects will be discussed in sections 7.3 and 7.9 respectively. Furthermore, individual normative provisions have a supplementary power (article 26 BACLA) that collective normative provisions do not have. Reference is made to section 7.1 below.

Obligatory provisions outline the mutual rights and obligations of the signatory parties. These provisions specifically relate to the "contractual" part of the collective labour agreement, while the normative provisions relate to the "regulatory" part thereof.[1424] As a rule, obligatory provisions aim at

1420 See W. Rauws, *De binding van de normatieve bepalingen* [*The binding power of normative provisions*], in: M. Rigaux, *Actuele problemen van het Arbeidsrecht 3*, Kluwer Rechtswetenschappen, Antwerpen, 1990, page 35.

1421 Federal Governmental Agency Employment, Labour and Social Consultation, *Wegwijs in de collectieve arbeidsovereenkomst*, page 7.

1422 G. Cox, *De juridische binding en afdwingbaarheid van obligatoire C.A.O.-bepalingen* [*The legal binding power and enforceability of obligatory provisions in the collective labour agreement*], in M. Rigaux, *Actuele problemen van het Arbeidsrecht 3*, Kluwer Rechtswetenschappen, Antwerpen, 1990, page 121.

1423 W. Rauws, *De binding van de normatieve bepalingen*, page 34.

1424 Collective labour agreements are dualistic legal constructions: the collective labour agreement is essentially an agreement, but its normative provisions contain standards that are regulatory. P. Humblet and M. Rigaux, *Belgian Industrial Relations Law*, page 96.

enhancing the normative provisions of a collective labour agreement.[1425] Obligatory provisions can be divided in express and implied provisions.[1426] Express obligatory provisions are explicitly agreed on. Examples of this are clauses on the modalities of the collective labour agreement, the renewal and the termination thereof, dispute resolution mechanisms etc. Implied obligatory provisions apply "automatically", without having to be explicitly arranged. These provisions are regarded to be inherent to all collective labour agreements. This concerns the "peace obligation" (*vredesplicht*) and the principle of "good faith" (*beïnvloedingsplicht*), which will be discussed further in section 7.2 below.

5. The players in the collective bargaining process

There are multiple parties who take part in the complex Belgian collective bargaining system. At the very least the following parties need to be distinguished: (i) the government, (ii) trade union confederations and trade unions, (iii) employers' confederations and separate employers' associations, (iv) *representative* employers' and employees' organisations, (v) the "Belgian House of the Social Partners" (The National Labour Council and the Central Economic Council), (vi) joint committees, and (vii) individual employers.

5.1 The government

The government has marginal involvement in the bargaining process. Its main involvement is enacting legislation on collective labour agreements, providing for an institutional structure and, where appropriate, extending collective labour agreements. There is no real, formal tripartite social dialogue in Belgium.[1427] However, there is a vivid informal tripartite dialogue.[1428] On occasion the government attempts to persuade the social partners to take appropriate action on a specific topic.[1429]

1425 G. Cox, *De juridische binding en afdwingbaarheid van obligatoire C.A.O.-bepalingen*, page 121.

1426 P. Humblet and M. Rigaux, *Belgian Industrial Relations Law*, page 94.

1427 F. Dorssemont, G. Cox and J. Rombouts, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Belgium*, page 10.

1428 F. Dorssemont, G. Cox and J. Rombouts, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Belgium*, pages 3 and 4.

1429 W. van Eeckhoutte, *Arbeidsrecht*, page 56.

5.2 Trade union confederations and trade unions

In Belgium, there are three main trade unions/trade union confederations, jointly referred to as employees' organisations. First, there is the *Algemeen Belgisch Vakverbond* (ABVV). The ABVV is a confederation, representing nearly 1,400,000 members, and acting to defend the rights of all workers. It is comprised of 7 trade unions, all active in different fields of trade and industry. It considers itself a socialistic confederation.[1430] Second, there is the *Algemene Centrale der Liberale Vakbonden van België* (ACLVB), representing the interests of 220,000 members. The ACLVB is a trade union, bringing together employees of different professions and industries in one union. As can be inferred from its name, the ACLVB is a liberal union.[1431] Finally, there is the *Algemeen Christelijk Vakbond* (ACV). The ACV is a confederation comprised of 16 trade unions, representing the interests of 1,700,000 members. The ACV is a Christian confederation.[1432]

The employees' organisations all refused to organise themselves in such a manner that they have legal personality.[1433] The reason for this is rather simple: not having legal personality implies both not being liable as an organisation towards any party and not having to comply with supervisory measures automatically applicable to legal entities.[1434] The employees' organisations are "factual" organisations.[1435] The handicap of not having legal personality is, of course, not being able to participate in usual legal activities, such as concluding agreements and obtaining capital. This handicap is lifted to quite an extent due to the so-called functional legal personality (*functionele rechtspersoonlijkheid*) employees' organisations have. This means that they are subject to rights that are explicitly granted to them in specific acts; it does *not*

1430 Reference is made to www.fgtb.be.

1431 Reference is made to www.aclvb.be.

1432 Reference is made to www.acv-online.be.

1433 P. Humblet, R. Janvier, W. Rauws and M. Rigaux, *Synopsis van het Belgisch Arbeidsrecht*, pages 300 and 303.

1434 W. van Eeckhoutte, *Arbeidsrecht*, page 47.

1435 For an extensive research on the legal position of Belgian factual (representative) employees' organisations, reference is made to F. Dorssemont, *Rechtspositie en Syndicale Actievrijheid van representatieve werknemersorganisaties* [*Legal position and Syndical action freedom of representative employees' organisations*], Die Keure, Brugge, 2002.

mean that the organisation can be held liable.[1436] The most important rights granted to representative[1437] (factual) employees' organisations are the right (i) to conclude agreements, (ii) to have legal standing in court, and (iii) to represent their members or even employees in general.[1438] These rights are obviously very useful, if not indispensable, in order to conclude collective labour agreements.

It should be noted that the lack of legal personality is rather controversial in Belgium. The scholar Blanpain, for example, noted that trade unions have a lot of power, but that they escape from the responsibility normally accompanying such power.[1439] He argued that trade unions should have legal personality. Several amendments to Belgian law have been filed by politicians to make legal personality mandatory for trade unions.[1440] These amendments have not (yet) led to a change in law.

5.3 Employers' confederations and separate employers' associations

There are a number of inter-professional employers' organisations. Only one of these organisations represents employers throughout the whole of Belgium, that being the already mentioned VBO (Federation of Enterprises in Belgium). It represents small, medium-sized and large companies. It has 33 full members, all of which are professional sectoral organisations, as well as a number of applicants and corresponding members. All in all, it represents over 30,000 businesses.[1441] In addition to the VBO, there are a number of local inter-professional employers' organisations, such as UCM and UNIZO.

1436 W. van Eeckhoutte, *Arbeidsrecht*, page 47. Only rarely can a factual organisation be brought before court. See for example Court of Cassation, 20 June 1988, Rechtskundig Weekblad [*Weekly Legal Magazine*; "R.W."] 1989-1990, page 1425, note A. van Oevelen.

1437 Exactly which employees' organisations are representative will be set out hereunder.

1438 P. Humblet, R. Janvier, W. Rauws and M. Rigaux, *Synopsis van het Belgisch Arbeidsrecht*, page 303.

1439 Reference is made to the quote of R. Blanpain in the article *Vakbonden en Rechtspersoonlijkheid* [*Trade Unions and Legal Personality*], by L. van Braekel, in the Brussels Journal dated 7 August 2005, as published on the website www.brussels.journal.com.

1440 See for a recent proposed amendment A. van de Casteele and others, *Proposition on the Act on legal personality of trade unions* [*Wetsvoorstel op de rechtspersoonlijkheid van vakorganisaties*], as filed on 14 June 2005 (no. 3-1244/1). The same proposal is introduced again by P. Vankrunkelsven and others on 12 November 2007 (no. 4-387/1).

1441 Reference is made to www.vbo-feb.be.

There are also a number of sectoral employers' organisations. Active in the agriculture sector are, for example, the *Fédération Wallonne de l'Agriculture* (FWA), *Boerenfront* and the *Boerenbond*. *Agoria* brings together the employers in the technological industry, *Febeltex* in the textile industry and *Fechimie* in the chemical industry.

Similar to the trade unions, a number of – but not all – employers' organisations (being both organisations and confederations) are functional legal persons, instead of organisations having full legal personality.[1442] The comments made before with regard to the trade unions equally apply to these employers' organisations having functional legal personality.[1443]

5.4 Representative organisations in Belgium

Not all employers' and employees' organisations play a (full) role in the Belgian social dialogue. The Belgian legislator chose to only award important entitlements to such organisations that have an important influence on the social and economic situation in Belgium, the *representative* organisations. In order for an organisation to be representative, it has to meet specific conditions. These conditions can, amongst others, be found in article 3 BACLA, which attributes the qualification "representative" to:

1. inter-professional organisations, established for the entire country, which are party to both (i) the Central Economic Council and (ii) the National Labour Council; employees' organisations should furthermore have at least 50,000 members;
2. trade unions which are associated to or a part of the above-mentioned inter-professional organisations;
3. employers' organisations that are recognised by the Crown (*i.e.* the federal government) on the advice of the National Labour Council, which are representative within a specific sector;
4. national organisations representing small and medium-sized businesses recognised as representative on the basis of the special Act of 6 March 1964 on the Organisation of the Small-firm Sector (*Wet Organisatie van de Middenstand*).[1444]

1442 P. Humblet, R. Janvier, W. Rauws and M. Rigaux, *Synopsis van het Belgisch Arbeidsrecht*, page 308.

1443 W. van Eeckhoutte, *Arbeidsrecht*, page 53.

1444 B.S. 17 March 1964.

In other acts similar "representativity provisions" can be found.[1445] These provisions introduce a form of *institutional* representativity, as opposed to *factual* representativity.[1446] Factual representativity demands are not in place in Belgium.[1447] An enterprise level collective labour agreement can, for example, be concluded with just one (institutional) representative organisation, even if that organisation only represents a minority of the employees in said enterprise.[1448]

The aforementioned representativity demands in Belgian acts put forward that, from an employees' perspective, only ACLVB, ABVV, ACV and the trade unions affiliated with these last two confederations are capable of concluding collective labour agreements.[1449] From an employers' perspective, only the VBO is a representative inter-professional organisation. However, a number of (approximately 60 in 2002) sectoral employers' organisations have also been qualified as representative on the basis of the last subparagraphs mentioned above.[1450] Some further remarks regarding these representativity demands and their strictness will be made in section 9.2.

5.5 The Belgian House of the Social Partners

The National Labour Council and the Central Economic Council are, as said, also known as the "Belgian House of the Social Partners".

The National Labour Council was introduced by the National Labour Council Act of 1952 and has the status of a public institution. Pursuant to article 1 of that Act, the National Labour Council's role is (i) to advise a Minister or the Houses of Parliament on its own initiative or at the request of these authorities, on general social issues concerning employers and employees and (ii) to issue opinions on jurisdictional disputes between joint committees. Article 7 BACLA extended the Council's role quite a bit by empowering it to conclude

1445 P. Humblet, R. Janvier, W. Rauws and M. Rigaux, *Synopsis van het Belgisch Arbeidsrecht*, page 304.

1446 P. Humblet and M. Rigaux, *Belgian Industrial Relations Law*, page 3.

1447 To some extent this statement needs to be nuanced. Factual representativity does play a role when deciding which organisations should have a seat in the joint committees. Reference is made to section 5.6 below.

1448 Raad van State [*Council of State*], 8 January 1986, Journal des Tribunaux de Travail [*Magazine of Labour Courts*; "J.T.T."] 1986, page 171; Arbeidshof Brussel [*Higher Employment Court*], 20 March 1987, J.T.T. 1987, page 238.

1449 P. Humblet, R. Janvier, W. Rauws and M. Rigaux, *Synopsis van het Belgisch Arbeidsrecht*, page 304.

1450 W. van Eeckhoutte, *Sociaal Compendium*, page 59.

collective labour agreements, which are binding on various branches of activity or all sectors of the economy. Moreover, a collective labour agreement may be concluded in the National Labour Council for a sector which does not fall within the competence of an established joint committee or where an established joint committee does not function. Besides these duties, the National Labour Council carries out advisory tasks under different social laws.

The National Labour Council is composed of 24 titular and 24 substitute members. The titular members are appointed by the Crown and their seats are equally divided between the most representative inter-professional employers' and employees' organisations. On the employees' side these are: ABVV, ACV and ACLVB. On the employers' side these are: VBO, the "middle classes" organisations UCM and UNIZO, and the agricultural organisations FWA and Boerenbond. By virtue of the Royal Decree of 7 April 1995, two associated members take part in the activities of the Council. Associated members are not given an equal status as titular or substitute members; their vote is non-decisive. The National Labour Council is chaired by one chairperson appointed by the Crown.[1451]

The Central Economic Council was established by the 1948 Act on the Organisation of the Trade and Industry.[1452] Pursuant to article 1 of that Act, the Central Economic Council's role is to advise a Minister or the Houses of Parliament on its own initiative or at the request of these authorities on general social issues concerning the national trade and industry. This includes the relation between employers and employees, aspects on production and trade, and social and economic policy on international, national and enterprise level.[1453] The powers of the Central Economic Council are purely advisory; the decision making power remains with the legislator. Besides this advisory function, the Central Economic Council acts as a forum in which the dialogue between the social partners is furthered and social and economic issues can be analysed.

The Central Economic Council is composed of a maximum of 50 titular members and an equal number of substitute members. The members are appointed by the Crown on a proposal of representative employers' and employees' organisations; both sides of the industry have an equal

1451 The content of the text on the National Labour Council mainly derives from www.cnt-nar.be.

1452 B.S. 27 – 28 September 1948.

1453 Reference is made to the brochure of the Secretary of the Central Economic Council, *De Centrale Raad voor het Bedrijfsleven*.

representation. The members appointed in this fashion may subsequently appoint 6 members that are known for their scientific or technical capacity. The Council is chaired by an independent chairperson, appointed by the Crown.[1454] On the employees' side parties to the Central Economic Council are: ABVV, ACV, and ACLVB. On the employers' side these are: VBO, UCM, UNIZO, FWA, Boerenbond, Boerenfront, the Royal Belgium Forestry (*Koninklijke Belgische Bosbouwmaatschappij*), the Federation of Belgian Co-operations (*Féderatie der Belgische Coöperaties*) and Arcofin.

Although the Central Economic Council is not directly involved in the collective bargaining process, it still holds an important position. After all, as was outlined above, inter-professional organisations can be considered representative if they are party to both the National Labour Council *and* the Central Economic Council.

5.6 The joint committees

There is no legal definition for the term "joint committees". They can be described as sectoral consultation bodies, in which representatives of both sides of the industry meet on equal terms, to discuss common problems.[1455] Their establishment, rights and obligations are set out in the BACLA.

Joint committees are established by Royal Decree on the basis of article 35 BACLA. The Crown can do so on its own initiative,[1456] or on the request of representative employers' and employees' organisations. The Crown should decide (i) which persons, sector or companies, and (ii) which geographical territory fall within the jurisdiction of each joint committee. Consequently,

1454 For the exact procedure regarding appointment reference is made to (i) the Act on the Organisation of the Trade and Industry, (ii) the Decree of 28 December 1948 on the determination of the number of members of the Central Economic Council and the fixation of the modelties of their nomination [*Besluit houdende vaststelling van het aantal leden van de Centrale Raad voor het Bedrijfsleven en bepaling der modaliteiten van hun voordracht*], B.S. 16 January 1949, and (iii) the brochure *De Centrale Raad voor het Bedrijfsleven*.

1455 P. Humblet, R. Janvier, W. Rauws and M. Rigaux, *Synopsis van het Belgisch Arbeidsrecht*, page 322. It should be noted that joint committees are not strictly a federal matter; regional governments can also set such committees up under specific statutes. See P. Humblet and M. Rigaux, *Belgian Industrial Relations Law*, pages 37 and 38. These regional joint committees will not be discussed in this thesis.

1456 Should a Minister – being the Minister to whose competence the labour belongs; article 1.2 BACLA – consider requesting the Crown to establish a new joint committee or to adapt its scope of application, he has to publish this intention pursuant to article 36 BACLA in the Belgian Bulletin of Acts and Decrees.

joint committees can be established for any sector, any profession, any group of employees (it should be noted that Belgium distinguishes between "white collar" and "blue collar" employees), and for any region of Belgium, including the whole of Belgium.[1457]

An already existing joint committee may request that the Crown establishes a joint sub-committee. If this request is granted, the Crown should determine, on the advice of the joint committee, which persons and which geographical territory fall within the resort of that joint sub-committee (article 37 BACLA). The Crown should also decide, again on the advice of the joint committee, whether the joint sub-committee is empowered to autonomously conclude collective labour agreements, or if it should obtain the joint committee's approval (article 8 BACLA).

Pursuant to article 38 BACLA, the joint (sub-)committee's tasks are:
1. to cause the represented organisations in the committee to conclude collective labour agreements;
2. to resolve conflicts between employers and employees;
3. to advise the government, the National Labour Council, the Central Economic Council or the Councils for Trade and Industry on its own initiative or at their request, on issues belonging to its (the joint (sub-) committee's) competence; and
4. to fulfil any other task assigned to it by law.

The joint committee is composed of one chairperson (and vice chairperson), an equal number of representatives of employers' and employees' organisations, and at least two secretaries (article 39 BACLA). It should be noted that the representatives of the employees' organisations have to be associated with the three representative employees' organisations,[1458] while the employers' organisations need to be representative as well. The Crown determines the number of members of the joint committees; the number of members and substitute members must be the same (article 41 BACLA). The chairperson and vice chairperson must, pursuant to article 40 BACLA, be competent in social matters and independent from the interests of the joint committees. The Crown also appoints the members and substitute members of the joint committees, as well as the secretaries (articles 41 and 44 BACLA respectively). The above equally applies to the joint sub-committees.

1457 P. Humblet, R. Janvier, W. Rauws and M. Rigaux, *Synopsis van het Belgisch Arbeidsrecht*, page 324.

1458 Federal Governmental Agency Employment, Labour and Social Consultation, *Wegwijs in de collectieve arbeidsovereenkomst*, page 10.

Organisations are asked whether they wish to be eligible for representation in the joint committee in a publication in the Belgian Bulletin of Acts and Decrees. The Minister concerned determines, given article 42 BACLA, which organisations are eligible for representation in the joint committees, and how many mandates these organisations will obtain. When determining this, the Minister should take into consideration the strength of the different trade unions in the sector concerned, or even a possible agreement concluded between these unions. The minister also establishes the representativity of the employers' organisations.[1459] The decision on the distribution of mandates will be announced to all organisations that asked for representation in the committee (article 42 BACLA). The selected organisations are requested to submit two candidates for each mandate they obtained. The mandate has a duration of 4 years and can be prolonged (article 43 BACLA).

5.7 The employers

The employers also play a role in the collective bargaining process, as they are entitled to conclude enterprise-level collective labour agreements.

6. The negotiation process / conclusion of a collective labour agreement

The negotiation process and manner in which collective labour agreements are concluded differ depending on the type of collective labour agreement that is to be concluded.

An inter-professional collective labour agreement is concluded within the National Labour Council. Pursuant to article 24 BACLA, a collective labour agreement can only be concluded by *all* organisations having seat in the National Labour Council; no organisation can be left out. The word "organisations" refers to *representative* employers' and employees' organisations (article 2.4 BACLA). Solely these organisations have decisive votes (article 47 BACLA). These organisations can only take valid decisions relating to the conclusion of collective labour agreements if at least half of the members representing the employers' organisations and half of the members representing the employees' organisations are present (article 47 BACLA). The decisions must be taken unanimously (article 47 BACLA).

1459 P. Humblet, R. Janvier, W. Rauws and M. Rigaux, *Synopsis van het Belgisch Arbeidsrecht*, page 323.

Sectoral collective labour agreements are normally concluded within the joint committees, or, as the case may be, in the joint sub-committees. Here, the same as was set out above applies. The collective labour agreement can only be concluded by *all* organisations having seat in the committees. These organisations are *representative* employers' and employees' organisations. They can only take valid decisions unanimously, if at least half of the members representing the employers' organisations and half of the members representing the employees' organisations are present. Should a specific sector not (yet) be covered by a joint committee, or should an established joint committee not function properly, the National Labour Council is, on the basis of article 7 BACLA, entitled to enter into a sectoral collective labour agreement for that sector.

An employer – regardless of whether it belongs to a representative employers' organisation – or a representative employers' organisation can conclude an enterprise-level collective labour agreement with one or more representative employers' organisations. There is no obligation under Belgian law to involve multiple representative employees' organisations in the collective bargaining process; one of such an organisation suffices for a collective labour agreement to have full effect.[1460] Having said this, it should be noted that in practice collective labour agreements concluded with only one employees' organisation are seldom found.[1461] At enterprise-level, the actual collective bargaining is done by the so-called union delegation.[1462] The union delegation was institutionalised for the first time in 1947, in a framework agreement between representative employers' and employees' organisations, and later in 1971 in a framework collective labour agreement concluded within the National Labour Council.[1463] Union delegates are individuals chosen from the personnel of the employer who represent to that employer both the trade union members amongst the employees, as well as the trade union itself.[1464] Although the union delegates bargain, the actual execution of the collective labour agreement has

1460 P. Humblet and M. Rigaux, *Belgian Industrial Relations Law*, page 108. See also section 5 above.

1461 W. van Eeckhoutte, *Arbeidsrecht*, page 90.

1462 F. Dorssemont, G. Cox and J. Rombouts, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Belgium*, page 12.

1463 Collective labour agreement on the statute of union delegation of the personnel of the enterprise (*collectieve arbeidsovereenkomst betreffende het statuut van de syndicale afvaardigingen van het personeel der ondernemingen*), 24 May 1971, no. 5.

1464 P. Humblet and M. Rigaux, *Belgian Industrial Relations Law*, page 86. A sectoral collective labour agreement may stipulate that the union representative represents the *entire* personnel (article 6 of the framework agreement).

to be done by the trade union secretary (and can only be done by the union delegate himself if he is properly mandated for that purpose).[1465]

It is common in Belgium for the trade unions to hold ballots on important decisions. The draft sectoral agreement reached between the central social partner organisations in January 2005 was, for example, rejected in a ballot by the ABVV.[1466]

As has already been mentioned, the collective labour agreement should, after its conclusion, be registered at the Ministry for Work and Employment on the basis of article 18 BACLA. This obligation does not only apply to new collective labour agreements concluded, but also to an accession of another party to the collective labour agreement and to the termination of the agreement concluded for an indefinite period of time or for a definite period of time containing a renewal clause. A collective labour agreement concluded within a joint body should be published in the Belgium Bulletin of Acts and Decrees (article 25 BACLA).

7. The effects of the collective labour agreement

Once the proper parties have concluded a (valid) collective labour agreement, its consequences should be assessed. As has been done in the previous chapters, it should be established for all 4 standard scenarios (i) to whom the collective labour agreement applies, (ii) what effects such an application has, and (iii) how the parties involved can enforce their rights. As in Belgium the answer to this first question is arranged to quite an extent in one article, this article will be discussed in advance in section 7.1, before sections 7.2 through 7.5 discuss the scenarios. In section 7.1 the "supplementary" binding power of collective labour agreements concluded within a joint body will be discussed as well. Section 7.6 sets out which other means of enforcement are in place in case of a breach of the collective labour agreement. Section 7.7 describes a "special" consequence that the collective labour agreement has: it may set aside specific statutory provisions. Section 7.8 focuses on the term and termination of collective labour agreements. The collective labour agreement's possible after-effects will be discussed in section 7.9. Finally, section 7.10 sets out the role of alternative dispute resolution in collective bargaining.

1465 F. Dorssemont, G. Cox and J. Rombouts, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Belgium*, page 12.

1466 A. Chaidron, *Sectoral bargaining continues*, 28 July 2005, EIRO.

7.1 Who is bound by the collective labour agreement?

Article 19 BACLA sets out which persons and organisations are bound by the collective labour agreement:

1. the organisations that have concluded the agreement and employers who are members of such organisations or have concluded such an agreement themselves, starting on the date on which the agreement becomes effective;
2. the organisations and employers accessing to the agreement and employers who are member of such organisations, starting on the date of accession;
3. the employers who become a member of an organisation bound by the agreement, starting on the date of joining;
4. all employees in the service of employers bound by the agreement.

These are the parties that are directly and fully bound by the collective labour agreement. This type of binding power will be discussed in the 4 scenarios below. However, besides these parties, the individual normative parts of collective labour agreements concluded within joint bodies are also, in a supplementary manner, binding on the employment agreement of the employer and its employees, not already bound by article 19. Should (i) the enterprise of that employer fall within the jurisdiction of the joint body that concluded the agreement, (ii) the individual employment agreement fall within the scope of applicability of the collective labour agreement, and (iii) the individual employment agreement not explicitly deviate in writing from the content of the individual normative provisions in that collective labour agreement, these individual normative provisions apply (article 26 BACLA). The same applies to collective normative provisions that not only have a collective normative nature, but also apply individually.[1467] This binding power starts after 15 days following the publication of the collective labour agreement in the Belgium Bulletin of Acts and Decrees. It cannot, therefore, have retro-effect.

The collective labour agreement concluded within the joint bodies has, given the above, a supplementary force for the employers (and their employees) that were not already bound by the agreement on the basis of article 19 BACLA. It can also have a direct mandatory force, should it be extended. Extending collective labour agreements will obviously fully bind more parties to the collective labour agreement than only the parties set out above. The extended collective labour agreement will be discussed in depth in section 8 below.

1467 W. Rauws, *De binding van de normatieve bepalingen*, page 47.

7.2 Scenario 1

The contracting parties – that is, one or more employers or representative organisations of employers and one or more representative organisations of employees – are bound to each other by the (obligatory provisions of the) collective labour agreement, upon concluding that agreement. This follows from the definition of collective labour agreement of article 5 BACLA, as it states that it "lays down the rights and obligations of the contracting parties". Moreover, article 19.1 BACLA as referred to above stipulates that the contracting organisations or the contracting employer(s) are bound by the agreement. The same applies to the organisation(s) and employer(s) who accede to the collective labour agreement. They are bound by the agreement as from the moment of accession on the basis of article 19.2 BACLA.

As already mentioned in section 4.2 above, obligatory provisions can be express or implied. Express obligations could, for instance, include clauses on the renewal and the termination of the agreement, dispute resolution mechanisms and specific sanctions upon breach of the collective labour agreement. Implied provisions are the "peace obligation" and the principle of "good faith".

The peace obligation means that the contracting parties will not engage in action to end or alter the provisions of the collective labour agreement. The implied peace obligation is not, however, absolute, in the sense that all collective actions are forbidden during the term of the collective labour agreement. Trade unions are allowed, for example, to resort to industrial action after the formulation of new demands and in order to force the other party to respect the collective labour agreement.[1468] It should be noted that the implied peace obligation may further be enhanced in the collective labour agreement, even making it an absolute obligation.

The implied principle of good faith means that (i) the employers' and employees' organisations should inform their members of the existence of the collective labour agreement, and that they (ii) should do their utmost to ensure that their members fulfil the obligations arising from that agreement. The organisation thus has to act to the best of its abilities to make sure that its members follow the collective labour agreement. It does, however, not have to guarantee this.[1469] Members that are in breach of the collective labour agreement are personally liable.

1468 P. Humblet and M. Rigaux, *Belgian Industrial Relations Law*, page 94.

1469 P. Humblet and M. Rigaux, *Belgian Industrial Relations Law*, page 95.

In connection with the above it should be noted that, although the contracting parties to a collective labour agreement are bound by the obligatory provisions of that agreement, it is not beyond dispute whether that binding power is of a *legal* or merely a *moral* nature.[1470] This difference is, without doubt, important, as only legally binding agreements can be enforced in court.[1471] As a rule, obligatory provisions tend to be regarded as legally binding.[1472]

In Belgium, a party is required, by law, to perform under a contract; the signatory parties should therefore abide by the (express and implied) obligatory provisions of the collective labour agreement. Each party should act reasonably and fairly towards its counterparty (article 1134 Belgian Civil Code (*Burgerlijk Wetboek*; "BCC")). Should a contracting party breach such an obligatory provision, the counterparty may instigate proceedings against that party. This may lead to an action for dissolution of the contract (article 1184 BCC), claims on damages (articles 1146 *ff* BCC) or specific performance (article 1144 BCC).[1473] Although organisations that have concluded the collective labour agreement may not always have legal personality, article 4 BACLA entitles them to start proceedings against their counterparty upon breach of provisions of the collective labour agreement anyway.

However, when enforcing these obligatory provisions, several problems arise. There is article 4.2 BACLA, stipulating that a failure to respect the obligations set out in the collective labour agreement may not lead to the obligation of organisations[1474] to pay damages, unless this is specifically agreed on in the collective labour agreement. In practice, however, stipulations permitting an obligation to pay damages are never agreed on.[1475] This leaves parties with "other" remedies only, such as seeking enforcement or dissolution of the

1470 J. Petit, *De C.A.O.-Wet: een overzicht van rechtspraak en rechtsleer (1968 – 2002)*, page 177.

1471 G. Cox, *De juridische binding en afdwingbaarheid van obligatoire C.A.O.-bepalingen*, page 126.

1472 G. Cox, *De juridische binding en afdwingbaarheid van obligatoire C.A.O.-bepalingen*, pages 119 *ff*; P. Humblet and M. Rigaux, *Belgian Industrial Relations Law*, page 104; and W. van Eeckhoutte, *Arbeidsrecht*, page 92.

1473 P. Humblet, R. Janvier, W. Rauws and M. Rigaux, *Synopsis van het Belgisch Arbeidsrecht*, pages 305 and 306.

1474 It should be noted that the article only refers to organisations. Employers who enter into collective labour agreements do not enjoy the protection of article 4.2 BACLA.

1475 See W. van Eeckhoutte, *Sociaal Compendium*, page 63.

collective labour agreement.[1476] But even these remedies can be problematic given the fact that most organisations (including *all* employees' organisations) do not have legal personality. It is extremely difficult to obtain, let alone enforce (a factual organisation has no funds of its own), a possible ruling against these factual organisations.[1477] In other words, enforceability of obligatory provisions is not, to say the least, without difficulties.[1478]

7.3 Scenario 2

A collective labour agreement should be applied to the individual employment agreement of (i) the employer and employee who are bound by that agreement on the basis of article 19 BACLA and who also (ii) fall within the scope of application of that agreement.[1479]

7.3.1 Which employers and employees are bound by the collective labour agreement?

The employer who is either a member of an employers' organisation that is a party to the collective labour agreement, or entered into the collective labour agreement itself, is, pursuant to article 19.1 BACLA, bound by that agreement. All employees in the service of an employer bound by the collective labour agreement – regardless of whether these employees are trade union members or not – are, given article 19.4 BACLA, automatically bound by that agreement as well. This last stipulation confirms on the one hand that representative employees' organisations are regarded to represent the interests of all employees (and not just of their members) and prevents on the other that employers would escape the applicability of the collective labour agreement by simply not hiring trade union members.[1480]

This binding power is strong. It not only applies if the employer is a contracting party or a member of a contracting organisation at the moment of concluding the agreement, but also if the employer or the organisation

1476 P. Humblet and M. Rigaux, *Belgian Industrial Relations Law*, page 20. See in more detail: G. Cox, *De juridische binding en afdwingbaarheid van obligatoire C.A.O.-bepalingen*, pages 133 and 134.

1477 W. van Eeckhoutte, *Arbeidsrecht*, page 51. See also G. Cox, *De juridische binding en afdwingbaarheid van obligatoire C.A.O.-bepalingen*, page 133.

1478 See also J. Petit, *De C.A.O.-Wet: een overzicht van rechtspraak en rechtsleer (1968 – 2002)*, page 179.

1479 See W. Rauws, *De binding van de normatieve bepalingen*, page 42.

1480 J. Petit, *De C.A.O.-Wet: een overzicht van rechtspraak en rechtsleer (1968 – 2002)*, page 180.

of which it is a member accedes to the agreement (article 19.2 BACLA). In this situation the collective labour agreement applies as from the moment of accession. Furthermore, termination of the employer's membership of the contracting organisation has no effect on the binding power of the collective labour agreement on that employer up to the date on which the terms of this collective labour agreement are altered, an alteration which has to significantly change the obligations arising from the agreement (article 21 BACLA). Such a significant alteration is, for instance, present should the term of the collective labour agreement have lapsed, should an agreement be terminated by notice, or should the collective labour agreement be replaced by a new, different collective labour agreement. A mere extension of a collective labour agreement does not qualify as a significant alteration.[1481]

The dissolution of a contracting association has, given article 22 BACLA, no impact on the rights and obligations arising from the collective labour agreement towards the members of that (dissolved) organisation. These rights and obligations cease on the date on which the terms of this collective labour agreement are altered, an alteration which significantly changed the obligations arising from the agreement. This article merely applies to individual normative provisions, and not to obligatory and collective normative provisions.[1482]

7.3.2 Which employers and employees fall within the collective labour agreement's scope of application?

It is at the contracting parties' discretion to determine the scope of applicability of the collective labour agreement. The collective labour agreement should contain a specific clause to that effect. After all, article 16.1 BACLA explicitly stipulates that the collective labour agreement should establish the persons, the sector or the enterprise for, and the geographic territory in which the agreement applies, unless it applies to all employers and employees that fall within the jurisdiction of the joint body in which the agreement is concluded. It should be noted that a collective labour agreement without a (clear) provision on its scope of application is refused registration at the Ministry for Work and Employment and consequently lacks the legal effects of a collective labour agreement.[1483]

1481 W. Rauws, *De binding van de normatieve bepalingen*, page 45.

1482 W. Rauws, *De binding van de normatieve bepalingen*, page 45.

1483 Federal Governmental Agency Employment, Labour and Social Consultation, *Wegwijs in de collectieve arbeidsovereenkomst*, page 17.

Discussions on whether an employer falls within the scope of jurisdiction of a specific joint committee are possible. In that respect it should be recalled that, given article 35 BACLA, the Crown has to determine when establishing a joint committee which (i) persons, sector or companies, and (ii) geographical territories fall within the jurisdiction of each joint committee. As a rule, the joint committee has jurisdiction over employees employed by an employer whose enterprise is active in the sector for which the joint committee is set up, regardless of the employee's work. In order to determine the activity of the enterprise, its main activity is normally taken into consideration.[1484] When establishing this main activity, only the activities of the enterprise *itself* are of relevance. In other words, activities performed not on the company's own account, but for example by a sub-contractor, are excluded when determining the company's activities. The activities performed by the sub-contractor may very well fall within the scope of jurisdiction of another joint committee than the one that has jurisdiction over the company.[1485] On occasion, joint committees are established that do not focus on the activities of the employer, but rather on a specific group of employees. An example hereof is Joint Committee No. 223, which governs employment conditions of professional sportsmen.[1486]

If two joint committees claim to have jurisdiction over a specific company, the National Labour Council has, pursuant to article 1 of the National Labour Council Act, the authority to issue an opinion on that jurisdictional dispute between the joint committees.[1487] The Ministry for Work and Employment may also advise an employer under which joint committee it resorts.[1488] It should be noted that an employer falls, as a general rule, within the jurisdiction of just one joint committee.[1489]

7.3.3 What are the legal consequences?

Pursuant to article 11 BACLA, provisions in an individual employment agreement that deviate from an applicable collective labour agreement are

1484 See Court of Cassation, 17 June 1996, *J.T.T.* 1996, page 365.

1485 Court of Cassation, 14 February 1984, *J.T.T.* 1984, page 132.

1486 P. Humblet and M. Rigaux, *Belgian Industrial Relations Law*, page 41.

1487 There are several ways to solve such a jurisdictional dispute. Reference is made to P. Humblet, R. Janvier, W. Rauws and M. Rigaux, *Synopsis van het Belgisch Arbeidsrecht*, pages 327 and 328.

1488 J. Petit, *De C.A.O.-Wet: een overzicht van rechtspraak en rechtsleer (1968 – 2002)*, page 206.

1489 J. Petit, *De C.A.O.-Wet: een overzicht van rechtspraak en rechtsleer (1968 – 2002)*, pages 200 *ff*.

null and void. These provisions are, in fact, automatically converted[1490] into the corresponding provision of the collective labour agreement. Provisions arranged for in the collective labour agreement but not in the individual employment agreement apply to the latter agreement as well.[1491] As is rightly stated in article 23 BACLA, the individual employment agreement is tacitly amended by the individual normative provisions of the collective labour agreement. The individual normative provisions in the collective labour agreement have, in short, a self-executing (direct normative) effect on the individual employment agreement.

7.3.4 Deviation from the collective labour agreement in the individual employment agreement

Although not arranged in statute, the normative provisions of a collective labour agreement can be of minimum, maximum or fixed nature.[1492] This nature sets out whether the provision allows any departure from its rule in any agreement lower in hierarchy (see section 9.1 hereafter). Departure from minimum provisions is only allowed if such a departure is in favour of the employee. Maximum provisions do not allow more favourable arrangements in a lower level agreement. Fixed provisions do not allow any departure in a lower level agreement at all. Most collective labour agreements in Belgium set out minimum norms.[1493]

Since there can be maximum and fixed provisions in a Belgian collective labour agreement, unlike the situation in Germany, it is possible that collective labour agreements alter the individual employment agreement to the detriment of the employee.[1494] The individual employment agreements are converted by the individual normative provisions of an applicable collective labour agreement, regardless of any opposition from the employees concerned against that collective labour agreement.[1495]

1490 Which differs to some extent from the pure nullity of the provision. See W. Rauws, *De binding van de normatieve bepalingen*, pages 56 and 57.

1491 See W. Rauws, *De binding van de normatieve bepalingen*, page 39.

1492 Reference is made to the Federal Governmental Agency Employment, Labour and Social Consultation, *Wegwijs in de collectieve arbeidsovereenkomst*, page 8.

1493 J. Petit, *De C.A.O.-Wet: een overzicht van rechtspraak en rechtsleer (1968 – 2002)*, pages 215.

1494 See for example Arbeidshof Antwerpen, 22 October 1975, R.W. 1975-1976, page 1775.

1495 Court of Cassation, 1 February 1993, J.T.T. 1993, page 327.

7.3.5 Enforcement

As the individual normative provisions of the collective labour agreement have a self-executing effect and therefore automatically adapt the individual employment agreement, the parties to that employment agreement should oblige these individual normative provisions. If they do not, they are in breach of the individual employment contract. The aggrieved party can subsequently claim specific performance and/or damages following this breach of contract.

7.4 Scenario 3

Article 19 BACLA makes clear that only the position of the employer is of relevance when it comes to determining whether the collective labour agreement applies directly to the relation between the employer and the employee. This means that a collective labour agreement does not apply to the employment agreement of an employer and employee, should the employer not have concluded that collective labour agreement or should he not be member of a contracting employers' organisation. It makes, in that situation, no difference whether or not the employee is a member of the contracting trade union.[1496] The other way around is different. Should the employer be bound (through membership of a contracting association or through executing the contract itself) by the collective labour agreement, while the employee is not a member of one of the contracting trade unions, the collective labour agreement does apply to the individual employment agreement between the two. This scenario does not differ from scenario 2 as set out above.

Reference clauses, *i.e.* clauses in the employment contract stipulating which collective labour agreement is applicable, to the effect of binding the employee to that collective labour agreement, play no real role in Belgium, as opposed to the situation in the Netherlands and Germany. After all, all employees of "bound" employers are by law bound by the collective labour agreement (on the basis of article 19.4 BACLA). This is not to say that an employer would never follow, for example, the wages determined in a collective labour agreement concluded within a joint committee by which the employer is not bound. The employer is free to do so, and the mere fact it is following those

1496 F. Dorssemont, G. Cox and J. Rombouts, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Belgium*, page 16.

wages does not bind him to that entire agreement or other collective labour agreements concluded within said joint committee.[1497]

7.5 Scenario 4

Collective normative provisions in Belgium bind the "collectivities".[1498] They do not bind the individual employees towards their employer (unless the provision concerned also qualifies as an individual normative provision).[1499] As a consequence, "pure" collective normative provisions do not alter the individual employment agreement.[1500]

A textbook example of a collective normative provision is the establishment of a Fund for Income (*Fonds voor Bestaandszekerheid*). These Funds are a creation of the social partners dating back to 1946.[1501] The goals of these Funds include (i) financing, granting and paying social benefits to a group of employees, (ii) financing and organising vocational training, and (iii) furthering employment.[1502] Employers finance these Funds. The employees have an entitlement to payment from these Funds in specific circumstances. In short, collective labour agreements establishing these Funds create rights and obligations between the employer and the Funds on the one hand and between the Funds and the employees on the other, but *not* between the employer and the employees. This is the principle of collective normative provisions.[1503] This principle is, with regard to Funds, affirmed in article 11 of the 1958 Act regarding Funds for Income (*Wet betreffende de Fondsen voor Bestaanszekerheid*).[1504] This article stipulates that employees who are entitled to payment from the Funds have a direct claim against these Funds, and such a payment may not be made dependent on whether or not their employer has paid the contributions due. Moreover, article 7 of that Act stipulates that the

1497 J. Petit, *De C.A.O.-Wet: een overzicht van rechtspraak en rechtsleer (1968 – 2002)*, page 181.

1498 See note M. Rigaux, under Arbeidshof Brussel, 24 November 1980, R.W. 1980/1981, page 2273.

1499 See for example Arbeidshof Antwerpen, 27 May 1988, J.T.T. 1988, page 357.

1500 Arbeidshof Brussel, 18 June 2001, J.T.T. 2001, 481.

1501 W. van Eeckhoutte, *Arbeidsrecht*, page 66.

1502 See for a list of goals article 1 of the collective labour agreement no. 66 of 4 November 1997, regarding the Funds for Income, as concluded within the National Labour Council.

1503 O. de Leye, *De C.A.O. en het Hof van Cassatie* [*The collective labour agreement and the Court of Cassation*], J.T.T. 1995, page 168.

1504 B.S. 7 February 1958.

Funds themselves are entitled to collect the contributions from the employers, although they may also leave this to the institutions for social security.

The second textbook example concerns the union delegation, as already discussed in section 6. As mentioned, union delegates are individuals chosen from the personnel of the employer who represent to that employer both the trade union members amongst the employees, as well as the trade union itself (both "collectivities"). The union delegation should comply with the collective normative obligations in a collective labour agreement, such as a reconciliation procedure.[1505] Should a union delegate not to do so, the employer may take appropriate action against him.[1506]

Given the above, and most explicitly the arrangements on Funds, collective normative provisions of a collective labour agreement may be enforced by and against the relevant collectivities.

7.6 Other statutory means of enforcement

The above-mentioned scenarios discuss, amongst others, whether or not the parties, whose rights are concerned, are entitled to enforce these rights. However, more parties can play a role in the enforcement of the collective labour agreements, as will be set out below.

7.6.1 General means of enforcement

The BACLA is, on the basis of articles 52 and 53, enforced by officers of the judicial police and civil servant appointed by the Crown. These officials can carry out inspections, investigations and surveys deemed necessary for the exercise of their duties.[1507] Violation of extended collective labour agreements is a criminal offence, as will be set out in further detail in section 8. Besides these means of enforcement, collective labour agreements may confer specific responsibilities to the joint committees or sub-committees, including the power to sanction offenders who do not abide by the rules set out in the

1505 See also J. Petit, *De C.A.O.-Wet: een overzicht van rechtspraak en rechtsleer (1968 – 2002)*, page 173, and the case law mentioned by him.

1506 See for example Arbeidshof Charleroi, 27 June 1983, Sociaal Rechtelijke Kronieken [*Chronicles of Social Law*; "S.R.K."] 1984, page 411. Rulings of this nature – affirming disciplinary actions against union representatives - have been criticised though. For cases and scholars "pro" and "con", reference is made to J. Petit, *De C.A.O.-Wet: een overzicht van rechtspraak en rechtsleer (1968 – 2002)*, pages 173 and 174.

1507 P. Humblet and M. Rigaux, *Belgian Industrial Relations Law*, page 108.

collective labour agreement.[1508] Moreover, the union delegation is empowered to verify whether the collective labour agreement is applied correctly (article 11 of the collective labour agreement on the statute of union delegation of the personnel of the enterprise).

7.6.2 Enforcement of obligatory provisions

In principle, the aggrieved party may, following a breach of an obligatory provision, revert to the general provisions of the BCC, within the limitations set out in article 4.2 BACLA, This party also has to surmount the further obstacle of lack of legal personality, if applicable. I refer to scenario 1 above.

7.6.3 Enforcement of individual normative provisions

The employer and the employee to whom the collective labour agreement applies can enforce their rights as set out in the individual normative provisions of the collective labour agreement through claims based on the individual employment agreement. Reference is made to scenario 2 above. However, the contracting organisations may also play a role in the enforcement of individual normative provisions. Article 4 BACLA allows them to initiate proceedings to defend the rights of their members arising from the collective labour agreement. The organisations may, on that ground, demand that the employer performs under the collective labour agreement.[1509] In order to pursue a claim, the organisations themselves do not necessarily have to have an *individual* right that is at stake; if suffices that they claim from the employer specific advantages awarded in the collective labour agreement to their members.[1510] However, the organisations are not entitled to claim *financial* losses on behalf of third parties that are not named as such in the proceedings, even if these third parties are members of those organisations and are working for the employer concerned, as this entitlement belongs to the employee himself.[1511] A ruling declaring it to be the law that the employer breached the collective labour agreement, on the other hand, could very well be obtained.[1512] Finally, it should be noted that the contracting organisations do not require a mandate from their members in order to start proceedings

1508 P. Humblet and M. Rigaux, *Belgian Industrial Relations Law*, page 41.

1509 Arbeidshof Gent, 12 april 1989, T.S.R. 1989, page 305 and Arbeidsrechtbank Namen [*Employment Court*], 16 September 1996, J.T.T. 1997, page 69.

1510 Arbeidsrechtbank Namen, 16 September 1996, J.T.T. 1997, page 69.

1511 Arbeidshof Gent, 12 april 1989, T.S.R. 1989, page 305.

1512 J. Petit, *De C.A.O.-Wet: een overzicht van rechtspraak en rechtsleer (1968 – 2002)*, page 229.

against an employer breaching normative provisions of an applicable collective labour agreement. The contracting organisations have a fully autonomous right to do so. If necessary, a contracting organisation may even start the aforementioned proceedings against the will of their members.[1513]

Besides the above, one of the union delegation's tasks is to assist individual employees who have a conflict with their employer (article 13 of the collective labour agreement on the statute of union delegation of the personnel of the enterprise). If that conflict relates to the individual normative provisions of an applicable collective labour agreement, the union delegation can play a role in the enforcement process as well.

7.6.4 Enforcement of collective normative provisions

As set out in section 7.5, collective normative provisions may be enforced by and against the relevant collectivities. Moreover, contracting organisations may also enforce collective normative provisions on the basis of article 4 BACLA.[1514]

7.7 Special legal consequences of a collective labour agreement

As in the Netherlands (¾ mandatory law) and Germany, specific Belgian Acts have introduced the possibility for the employers and employees to deviate from specific statutory provisions if an applicable collective labour agreement permits them to do so. This is the case in both the Working Act (*Arbeidswet*) and the Act of 1987 concerning the introduction of new working arrangements in enterprises.[1515] Collective labour agreements can allow employers and employees to arrange specific matters in an individual employment contract, which could not be arranged without that collective labour agreement.

7.8 Term and termination

Although the nature of a collective labour agreement gave rise to heated discussions, the BACLA makes it clear that the collective labour agreement is essentially a contract, but that the (individual and collective) normative provisions contain standards that apply to the employers bound by the

1513 J. Petit, *De C.A.O.-Wet: een overzicht van rechtspraak en rechtsleer (1968 – 2002)*, page 229 and his references to the legal history of the BACLA.

1514 G. Cox, *De juridische binding en afdwingbaarheid van obligatoire C.A.O.-bepalingen*, page 132.

1515 F. Dorssemont, G. Cox and J. Rombouts, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Belgium*, page 25.

agreement and the employees in their service.[1516] The contractual element puts forward that it is primarily at the contracting parties' discretion to establish the term of the agreement, including the date that it comes into force. The legislator's role in this is only limited. Hereinafter, the date that the agreement becomes effective, the term and the termination of the collective labour agreements will be discussed.

7.8.1 The date of entering into force

The parties to the collective labour agreement should arrange when the agreement enters into force. By law, they have to set out in writing in the collective labour agreement the date on which the agreement comes into force, in case the agreement does not enter into force on the date it is concluded (article 16.6 BACLA). The date of conclusion should also be inserted in the agreement (article 16.7 BACLA). As already noted, the Ministry for Work and Employment will refuse the registration of a collective labour agreement that does not meet the demands set forth in article 16 BACLA, upon which the agreement is, in fact, not a collective labour agreement.

Collective labour agreements can have retro-effect, if specifically provided for in the agreement itself.[1517] In certain circumstances, the collective labour agreement may even apply to the past whilst that is not explicitly arranged in the agreement itself.[1518]

7.8.2 Term and termination

The contracting parties may also determine the term of the collective labour agreement. Article 15 BACLA stipulates that collective labour agreements can be concluded for a fixed period of time, an indefinite period of time, or a fixed period of time combined with a renewal clause. The "type" of collective labour agreement should clearly follow on from the agreement itself, as article 16.5 BACLA stipulates that the collective labour agreement must contain a clause to this effect.

1516 P. Humblet and M. Rigaux, *Belgian Industrial Relations Law*, page 96.

1517 See, extensively, V. Pertry, *Retroactieve toepassing van C.A.O.-bepalingen* [*Retro-effect of provisions in a collective labour agreement*], in M. Rigaux, *Actuele problemen van het Arbeidsrecht 3*, Kluwer Rechtswetenschappen, Antwerpen, 1990, pages 83 *ff*.

1518 Arbeidshof Luik, 9 January 1992, S.R.K. 1993, page 212.

The collective labour agreement concluded for a fixed period of time terminates, by operation of law, at the end of that term.[1519] Collective labour agreements entered into for an indefinite period of time, or a fixed period of time combined with a renewal clause, may be terminated by notice on the basis of article 15 BACLA by each of the contracting parties,[1520] unless specifically stipulated otherwise in the agreement.[1521] Pursuant to article 16.5 BACLA, a collective labour agreement must, for the aforementioned types of agreements, contain a clause outlining the manner in which the agreement can be terminated, including the notice period. In all events, the termination has to be given in writing in order to have effect (article 15 BACLA). Partial termination is not permitted, unless the collective labour agreement specifically allows this. The termination should be registered at the Ministry for Work and Employment (article 18 BACLA).

Besides termination by notice, the collective labour agreement can be dissolved upon breach of the obligatory provisions (see scenario 1). It can also be terminated by mutual consent of the contracting parties involved.

7.9 After-effects

The individual normative parts, as well as the collective normative parts that also apply individually[1522] of the collective labour agreement normally still have effect once the agreement is terminated. Article 23 BACLA states that an individual employment agreement that has been tacitly modified by the collective labour agreement, remains unchanged after the collective labour agreement's end, unless specifically stated otherwise in the collective labour agreement. These after-effects do not apply to collective normative provisions,

1519 Federal Governmental Agency Employment, Labour and Social Consultation, *Wegwijs in de collectieve arbeidsovereenkomst*, page 19.

1520 A collective labour agreement for a fixed period of time that is tacitly renewed each time due to a specific clause to that effect, may only be terminated at the end of a term. Federal Governmental Agency Employment, Labour and Social Consultation, *Wegwijs in de collectieve arbeidsovereenkomst*, page 19.

1521 Some collective labour agreements stipulate that termination by notice is only possible in case all signatory parties agree thereto. This sometimes is considered useful when the collective labour agreement was concluded in an atmosphere of distrust, as it prevents the unilateral termination of the agreeement agreed on after lots of efforts. Reference is made to: Federal Governmental Agency Employment, Labour and Social Consultation, *Wegwijs in de collectieve arbeidsovereenkomst*, page 13.

1522 See W. Rauws, *De binding van de normatieve bepalingen*, page 43. See also J. Petit, *De C.A.O.-Wet: een overzicht van rechtspraak en rechtsleer (1968 – 2002)*, page 190.

which do not also apply individually.[1523] The employment agreement that is modified by the collective labour agreement may, in the "after-effect period", be altered by a new collective labour agreement or an agreement between the employer and the employee.[1524]

7.10 The role of alternative dispute resolution in collective bargaining

In Belgium the social partners are encouraged to use alternative dispute resolution in the case of a conflict.[1525] This normally involves either conciliation or mediation, and only rarely arbitration.[1526] Many of such alternative dispute resolution mechanisms are defined in collective labour agreements or in the operational procedures for the joint committees and their conciliation office.[1527] Social partners also actively participate in conciliation boards, chaired by conciliators/mediators appointed by the Ministry of Labour.[1528]

8. Extending collective labour agreements

As in the Netherlands and in Germany, in Belgium a collective labour agreement can also be extended in such a manner that it applies in a mandatory fashion to *all* employers and employees that fall within the scope of application of that agreement. This is even usual when it concerns collective labour agreements concluded within the National Labour Council.[1529] Such an extension takes place by Royal Decree. After extending a collective labour agreement, the normative provisions of this agreement are considered material law.[1530]

The extension process is surrounded by demands and safeguards as will be discussed in section 8.1. Once declared binding, the collective labour agreement has important consequences for all parties that fall within its scope. These

1523 See, for example, Arbeidshof Brussel, 18 June 2001, J.T.T. 2001, page 48.

1524 J. Petit, *De C.A.O.-Wet: een overzicht van rechtspraak en rechtsleer (1968 – 2002)*, page 189.

1525 F. Dorssemont, G. Cox and J. Rombouts, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Belgium*, page 8.

1526 See A. Chaidron, *EIRO Thematic Feature on Collective dispute Resolutions in an enlarged European Union – case of Belgium*, page 2. This report can be found on the EIRO-website.

1527 A. Chaidron, *EIRO Thematic Feature on Collective dispute Resolutions in an enlarged European Union – case of Belgium*, page 2.

1528 F. Dorssemont, G. Cox and J. Rombouts, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Belgium*, page 8.

1529 P. Humblet and M. Rigaux, *Belgian Industrial Relations Law*, page 34.

1530 Court of Cassation, 29 April 1996, J.T.T. 1996, page 367.

consequences will be discussed in section 8.2, as along with the means of enforcement.

8.1 Demands and safeguards surrounding the extension

Neither all collective labour agreements, nor all provisions thereof can be declared binding. The collective labour agreement should meet several demands and safeguards, which can be divided into (i) demands concerning (the provisions of) the collective labour agreements that are to de declared binding, (ii) procedural demands and safeguards, and (iii) limitations on the duration of the binding collective labour agreement. If these demands are met, the Crown (iv) may extend the collective labour agreement.

8.1.1 Demands concerning (the provisions of) the collective labour agreement

The extension process presumes the existence of a valid collective labour agreement. An invalid collective labour agreement cannot be declared binding.[1531] Moreover, neither all collective labour agreements nor all of their provisions can be extended. Pursuant to article 28 BACLA, only agreements concluded within the joint bodies can be extended. Enterprise level collective labour agreements are therefore excluded from extension. Furthermore, the extension only applies to (individual and collective) normative provisions of the collective labour agreement.[1532] Obligatory obligations are not subject to extension, as they merely bind the contracting parties.

8.1.2 Procedural demands and safeguards

The Crown may not declare a collective labour agreement binding on its own initiative, but is dependent on the request of the joint body in which the agreement is concluded, or of one of the organisations having seat therein (article 28 BACLA). The Minister[1533] may oppose to such a request and can subsequently refuse to forward the request to the Crown (article 29 BACLA).[1534] The Minister can do so should he consider the collective labour

1531 Arbeidsrechtbank Doornik, 21 September 2001, J.T.T. 2002, page 487.

1532 W. van Eeckhoutte, *Arbeidsrecht*, page 97.

1533 Being the Minister to whose competence the labour belongs; article 1.2 BACLA. This is normally the Minister of Labour. See F. Dorssemont, G. Cox and J. Rombouts, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Belgium*, page 18.

1534 J. Petit, *De C.A.O.-Wet: een overzicht van rechtspraak en rechtsleer (1968 – 2002)*, page 183.

agreement invalid, or contravening the public interest.[1535] He has to inform the joint body hereof. Such a refusal, however, rarely occurs.[1536] If the Crown decides to extend the collective labour agreement, it should publish the part of the collective labour agreement that is extended in the Belgian Bulletin of Acts and Decrees (article 30 BACLA).

8.1.3 Limitations in duration of the declaration

The Royal Decree extending the collective labour agreement has effect as from the moment the collective labour agreement has effect. However, a binding collective labour agreement cannot have a retro-effect exceeding one year prior to the agreement's publication (article 32 BACLA). Employers and employees bound by the binding collective labour agreement may therefore be held to apply specific stipulations over the past. The Court of Cassation limited this effect somewhat. If an employer had not met specific standards at the moment an employee was made redundant, standards which were introduced by a binding collective labour agreement with retro-effect after the termination of the employment agreement, this non-observance will not nullify the termination.[1537]

The Royal Decree extending a collective labour agreement concluded for a fixed period of time ends automatically once the applicable term has lapsed (article 33 BACLA). The extension of a collective labour agreement entered into for an indefinite period of time, or for a fixed period of time combined with a renewal clause, will be terminated by Royal Decree once the agreement itself is terminated by notice as from the moment that said agreement ends (article 33 BACLA).

In addition to the above, the Royal Decree extending a collective labour agreement may wholly or partially be discontinued should the agreement not conform anymore to the situation and conditions warranting its past extension. The Crown may, however, only do so with the consent of the joint body that concluded the collective labour agreement in the first place. The Royal Decree extending the collective labour agreement may also be discontinued if the agreement violates an instrument that is higher in hierarchy or arranges for

1535 W. van Eeckhoutte, *Arbeidsrecht*, page 97.

1536 J. Petit, *De C.A.O.-Wet: een overzicht van rechtspraak en rechtsleer (1968 – 2002)*, page 183.

1537 Court of Cassation, 7 December 1981, *De grote arresten van het Hof van Cassatie in Sociale Zaken*, no. 4.

mandatory arbitration (which is in violation of article 9 BACLA).[1538] In such a case the joint body that concluded the collective labour agreement will be notified.

8.1.4 The discretionary power of the Crown

Pursuant to article 28 BACLA, the Crown *can* (as opposed to shall) declare binding a collective labour agreement. The Crown therefore has a discretionary power whether or not to declare such a collective labour agreement binding. Scholars take different views on the reach of this discretionary power. It is clear that the Crown can refuse to extend the collective labour agreement if it is invalid or contravenes the public interests. Some scholars argue, however, that a refusal cannot be based on economic or political reasons.[1539] Others state that the Crown may take such interests into consideration and even may refuse the extension on these grounds.[1540] What is clear is that the extension is indivisible. In other words, the Crown cannot extend certain provisions of the collective labour agreement, whilst not extending other provisions.[1541]

8.2 The consequences of a binding collective labour agreement / enforcement

Article 31 BACLA stipulates that a binding collective labour agreement applies to all employers and employees resorting under the jurisdiction of the joint body and falling within the scope of application of the agreement. The legal position of the employers and employees falling within the scope of application of the binding collective labour agreement is the same as the legal position of the employers and employees who already were bound by that agreement, regardless of the extension. For the legal position of (i) these employers and employees towards each other and (ii) towards "collectivities" reference is made to the above-mentioned scenarios 2 and 4 respectively. With regard to the possibility to enforce, reference is made to said scenarios and section 7.6. The after-effects of the provisions of the binding collective labour agreements are also the same as those of "normal" (not-extended) collective labour agreements.

1538 In such a case, only the Royal Decree extending the collective labour agreement is discontinued. It does not discontinue the entire collective labour agreement itself. See Court of Cassation, 12 October 1992, J.T.T. 1992, page 478.

1539 P. Humblet, R. Janvier, W. Rauws and M. Rigaux, *Synopsis van het Belgisch Arbeidsrecht*, page 396.

1540 See H. Lennaerts, *Inleiding tot het Sociaal Recht*, p. 340.

1541 P. Humblet, R. Janvier, W. Rauws and M. Rigaux, *Synopsis van het Belgisch Arbeidsrecht*, page 396. See also H. Lennaerts, *Inleiding tot het Sociaal Recht*, p. 340.

It should be noted that violation of a binding collective labour agreement can be a criminal offence. Pursuant to article 56 BACLA, any employer who fails to comply with a binding collective labour agreement or obstructs inspections on the proper execution of that agreement risks being punished by a fine or even imprisonment.

9. The collective labour agreement and the reach of the social partners

9.1 What can the social partners regulate in a collective labour agreement?

As collective labour agreements are essentially private agreements, the social partners enjoy contractual freedom.[1542] Of course, given the definition of the collective labour agreement, the individual and collective normative parts of that agreement should concern the individual and collective relation between the employer and the employees. This still gives the social partners ample choice what to arrange in collective labour agreements.

Within these broad limitations, the social partners may conclude agreements. They should, however, observe the content of other instruments regulating employment relations, particularly those instruments that are higher in hierarchy. Hierarchy is very important with regard to collective labour agreements, as their hierarchy differs depending on which level the agreements were concluded and depending on their possible extension, as will be shown hereunder. The hierarchy of the sources of obligations in employment relations is arranged in article 51 BACLA and reads as follows:

1. mandatory provisions of the law;[1543] [1544]
2. collective labour agreements that are extended in the following sequence:
   a. collective labour agreements concluded within the National Labour Council;
   b. collective labour agreements concluded within a joint committee;
   c. collective labour agreements concluded within a joint sub-committee;

1542 Federal Governmental Agency Employment, Labour and Social Consultation, *Wegwijs in de collectieve arbeidsovereenkomst*, page 12.

1543 Here, it should be noted that international law precedes over national law. Reference is made to the Court of Cassation, 27 May 1971, A.C. 1971, as set out on date.

1544 This includes the demand that collective labour agreements may not contravene public policy nor violate good morals.

3. collective labour agreements that are not extended but that are either signed by the employer or by the representative organisation of which it is a member, in the following sequence:
   a. collective labour agreements concluded within the National Labour Council;
   b. collective labour agreements concluded within a joint committee;
   c. collective labour agreements concluded within a joint sub-committee.
   d. collective labour agreements concluded outside these joint bodies;
4. written individual employment agreements;
5. collective labour agreements that are not extended and that are concluded within a joint body, when the employer, although the agreement was neither signed by the employer nor by the representative organisation of which it is a member, falls within the jurisdiction of that joint body;
6. standing employment conditions (*arbeidsreglement*);
7. directory provisions of law;
8. oral agreements;
9. usage.

If provisions of the different sources of law deviate from each other, the provision of the lower ranked source will be set aside.[1545]

In addition to the above list, there are also articles 9, 10 and 11 BACLA that establish a hierarchy in norms. Article 9 BACLA stipulates that provisions of collective labour agreements that violate (i) mandatory (international) law or (ii) refer *individual* (as opposed to *collective*) conflicts to arbitration are null and void. Article 10 BACLA stipulates that the following provisions are also null and void:

(i) provisions in a collective labour agreement concluded within a joint committee that deviate from provisions in a collective labour agreement concluded within the National Labour Council;
(ii) provisions in a collective labour agreement concluded within a joint sub-committee that deviate from provisions in a collective labour agreement concluded within the National Labour Council or within the joint committee under which the sub-committee resorts;
(iii) provisions in a collective labour agreement concluded outside a joint body (enterprise level agreement) that deviate from provisions in a collective labour agreement concluded within a joint body under which the company resorts.

1545 Court of Cassation, 5 June 2000, A.C. 2000, as listed on date.

Moreover, as already discussed, article 11 BACLA sets out that provisions in an individual employment agreement that deviate from an applicable collective labour agreement are null and void.[1546]

Finally, it should be noted that not every *variation* of provisions is an actual *deviation*: a lower provision may very well vary from a higher provision, as long as the lower provision does not deviate from there. In order to establish whether the lower provision in fact deviates from the higher provision, it should be established whether that higher provision is a minimum, standard, or maximum provision. The lower provision should oblige that higher provision's nature. If, for example, the higher provision is a minimum provision, variations in instruments lower in ranking are allowed as long as they are in favour of the employee.[1547]

9.2 Collective labour agreements and representativity demands

It is obvious that "representativity" plays a crucial role in Belgian collective bargaining. This gives sufficient reason to have a closer look at the representativity demands set out in, amongst others, article 3 BACLA. These demands are rather peculiar.

Article 3 BACLA qualifies trade unions as representative, if they are (i) inter-professional, (ii) established throughout the whole of Belgium, (iii) participate in both the Central Economic Council *and* the National Labour Council and (iv) have at least 50,000 members. Trade unions that are associated to, or are a part of, these inter-professional organisations are representative as well. With the exception of the fourth demand, the same demands apply to the employers' organisations. However, the Crown and the special Act of 6 March 1964 on the Organisation of the Small-firm Sector may declare other (sectoral) employers' organisations representative as well. I refer to section 5 above.

These demands are strict. This is especially the case for trade unions, as they do not have the "escape" of having unions that do not meet the general demands appointed as "representative", that the (sectoral) employers' organisations have. As already noted, this escape is regularly used in practice (there were about 60 sectoral employers' organisations that qualified as representative

1546 The content of the three articles mentioned above is very similar to the hierarchy contained in article 51, but is not identical. This may lead to conflicting situations. See: P. Humblet and M. Rigaux, *Belgian Industrial Relations Law*, page 100.

1547 Federal Governmental Agency Employment, Labour and Social Consultation, *Wegwijs in de collectieve arbeidsovereenkomst*, pages 8 and 9.

in 2002, whilst only one inter-professional employers' organisation is representative).[1548] As a consequence, sectoral trade unions that are not affiliated to the three representative employees' organisations are completely left aside in the collective bargaining process. Moreover, the demands are not only strict, but also easy to manipulate. After all, there are no legal demands to be entitled to participate in the Central Economic Council and the National Labour Council;[1549] it is at the government's discretion who to admit and who not.[1550] In other words: it is up to the Belgian government to decide which organisations – and, given the above, which trade unions in particular – are representative. It has been said that the government actually used this entitlement to *choose* which trade unions are representative. In other words, the general rules are drafted in such a manner that they have enabled the government to pick and chose the three big trade unions as solely representative.[1551]

These representativity demands may be challenged. ILO institutions have held the current situation in violation of its Conventions on several occasions.[1552] One of the "highlights" in that respect was the Belgian government's refusal to grant the National Federation of Independent Trade Unions (*Nationale Unie van Onafhankelijke Syndycaten*; "UNSI") a seat in the National Labour Council. The UNSI filed a complaint in 1984 with the ILO Committee on Freedom of Association on the alleged infringement of Belgium of Conventions C87 and C98.[1553] The Committee observed that the refusal to grant a seat to UNSI on the National Labour Council made it impossible for that union to sit on the general negotiating committees for the public service. Subsequently, the Committee requested that the Belgian government indicate the *objective factors* that formed the basis for the refusal to grant such a seat to UNSI, so that it could reach a decision on this aspect of the case

1548 Reference is made to section 5.4 above.

1549 The National Labour Council does demand that the participating organisation is established throughout the whole of Belgium; this is, however, not an additional requirement the organisations must meet as the same requirement is set out in article 3 BACLA.

1550 W. van Eeckhoutte, *Arbeidsrecht*, page 48.

1551 See H. Lennaerts, *Inleiding tot het Sociaal Recht*, p. 389.

1552 P. Humblet, R. Janvier, W. Rauws and M. Rigaux, *Synopsis van het Belgisch Arbeidsrecht*, page 305.

1553 Report no. 241, case no. 1250 and document no. (ilolex): 0319852411250.

in full knowledge of the facts.[1554] The Committee furthermore requested the Belgian government to amend its legislation. This was to be done in order to prevent organisations that are not inter-occupational in nature, or which are not affiliated to an inter-occupational organisation established at the national level, from being able to sit on the National Labour Council. In the end, as a result of this, these organisations are denied a considerable number of trade union rights, including the right to bargain collectively in the economic sectors in which they exercise their activities. Belgium has never responded to any of the ILO's opinions or requests.[1555] [1556]

9.3 Collective labour agreements and independence of trade unions

As only representative trade unions may enter into collective labour agreements, and there are only three large, strong and independent trade unions, "yellow" trade unions concluding collective labour agreements are a non-issue in Belgium.

10. Summary

10.1 Industrial relations: past and present

Industrial relations and collective bargaining are important in Belgium. In the year 2000, approximately 90% of the Belgian employees were covered by a collective labour agreement setting their wages. Trade union density in Belgium is also high: in 2001 the number of trade union membership was estimated on "exceeding 50%" of the total working population. The organisation rate of employers in Belgium was, according to a year 2000 study, 82%. Collective

1554 This demand is challenged by some. It is stated that the Committee never demonstrated in what way "the rule of objective and pre-established criteria (…) can be derived from the freedom of collective bargaining and the freedom of union association". See F. Dorssemont, G. Cox and J. Rombouts, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Belgium*, page 14.

1555 P. Humblet, R. Janvier, W. Rauws and M. Rigaux, *Synopsis van het Belgisch Arbeidsrecht*, page 305.

1556 In the case brought before the European Court of Human Rights between the National Union of Belgian Police and Belgium, the Court ruled that Belgium's general policy of restricting the number of trade unions to be consulted is not incompatible with trade union freedom. See European Court of Human Rights, 27 October 1975, *National Union of Belgian Police/Belgium*. This is, however, a different issue than the one that is raised by the ILO institutions. They do not argue that Belgium violates ILO standards by selecting trade unions that may have a seat in the National Labour Council, but by not making clear which criteria are applied in this selection process.

bargaining takes place at three levels: (national) inter-professional, sectoral and company-level. An enterprise level collective labour agreement is concluded between one or more representative employees' organisations and one or more employers or representative employers' organisations. A sectoral collective labour agreement is concluded between representative employees' organisations and representative employers' organisations having seat in a joint committee or sub-committee (or sometimes the National Labour Council). The inter-professional collective labour agreement is concluded within the National Labour Council between the representative employees' organisations and the representative employers' organisations having seat therein.

In 1789 the first collective labour agreement was concluded. Only a few new collective labour agreements followed for a rather long period. The effects of the collective labour agreements were also limited. The Court of Cassation ruled in 1950 that a collective labour agreement could only bind those parties that had explicitly agreed to the agreement, in fact depriving a collective labour agreement from direct normative effect. This changed upon the introduction of the 1968 BACLA. This act forms the heart of Belgian industrial relations' law.

10.2 The collective labour agreement

A collective labour agreement is an agreement concluded between one or more employees' organisations and one or more employers' organisations or one or more employers, in which individual and collective relations between employers and employees in enterprises or in a sector are set out, and rights and obligations between the contracting parties are arranged.

A collective labour agreement should deal with the relations between employers and employees on the one hand and on rights and obligations of the contracting parties on the other. It has to contain a number of mandatory elements, summarised in the BACLA.

The collective labour agreement must furthermore be concluded between representative employers' organisations or employers on the one hand and representative employees' organisations on the other. Representative organisations are:

1. inter-professional organisations, established for the entire country, which are party to both (i) the Central Economic Council and (ii) the National Labour Council; employees' organisations should furthermore have at least 50,000 members;

2. trade unions which are associated to or a part of the above-mentioned inter-professional organisations;
3. employers' organisations that are recognised by the Crown on advice of the National Labour Council, which are representative within a specific sector;
4. national organisations representing small and medium-sized businesses recognised as representative on the basis of the special Act of 6 March 1964 on the Organisation of the Small-firm Sector.

These demands bring forth that, from an employees' perspective, only ACLVB, ABVV, ACV and the trade unions affiliated with these last two confederations are capable of concluding collective labour agreements. From an employers' perspective, only the VBO is a representative inter-professional organisation. However, a number of (approximately 60 in 2002) sectoral employers' organisations have also been qualified as representative on the basis of the last subparagraphs mentioned above.

In Belgium, it is common to distinguish between obligatory, individual normative and collective normative provisions of a collective labour agreement. The individual normative obligations relate to the individual employment relation between the employer and the employee. Collective normative provisions relate to collective employment relations within the company. Obligatory provisions outline the mutual rights and obligations of the signatory parties.

Inter-professional collective labour agreements are concluded within the National Labour Council by *all* organisations (that is: *representative* employers' and employees' organisations) having seat therein. Sectoral collective labour agreements are normally concluded by all representative employers' and employees' organisations within the joint committees, or, as the case may be, within the joint sub-committees. Rarely are sectoral collective labour agreements concluded by the National Labour Council. An employer or a representative employers' organisation can conclude enterprise-level collective labour agreements with one or more representative employers' organisations. The actual collective bargaining at this level is done by the so-called union delegation.

10.3 The consequences of a collective labour agreement

Once a collective labour agreement is concluded, it should be established to whom it applies, what its consequences are and how the rights arising from it can be enforced.

10.3.1 The contracting parties

The contracting parties are bound to each other by the (obligatory provisions of the) agreement. Most scholars take the view that these provisions are not only morally, but also legally binding. As a consequence hereof, the contracting parties must, by law, perform under the contract. Each party should act reasonable and fair towards its counterparty. Should a contracting party breach an obligatory provision the counterparty can dissolve the contract, and can sometimes claim damages or specific performance. Enforcing obligatory provisions is not without difficulties. A breach cannot lead to the obligation on organisations to pay damages, unless this is specifically agreed on in the collective labour agreement, which never happens. Other remedies, such as seeking specific performance of the party in breach of the collective labour agreement can also be problematic as most organisations (including all employees' organisations) do not have legal personality. The contracting parties have an implied "peace obligation" and must abide by the principle of "good faith".

10.3.2 The members of the contracting associations

A collective labour agreement should be applied to the individual employment agreement of (i) the employer and employee who are bound by that agreement and who also (ii) fall within the scope of application of that agreement. The employer who is either a member of an employers' organisation that is a party to the collective labour agreement, or entered into the collective labour agreement itself, is bound by that agreement. All employees in the service of an employer bound by the collective labour agreement – regardless of their possible trade union membership – are automatically bound by that agreement as well. The social partners themselves determine the scope of application of the collective labour agreement in that agreement. The individual normative provision of the collective labour agreement automatically apply to the individual employment agreement, modelling the individual employment agreement and setting aside possible from the collective labour agreement deviating provisions. This modelling can be done in favour but also to the detriment of the individual employee. Provisions in the collective labour agreement can be of a "standard", "minimum" or "maximum" nature. As a result of the direct normative effect of the collective labour agreement, the parties to that employment agreement can claim specific performance and/or damages following a possible breach of contract based on their employment contract.

10.3.3 Members vs. non-members

Merely the position of the employer is relevant when determining whether the collective labour agreement applies directly to the relation between the employer and the employee. A collective labour agreement does not apply to the employment agreement of an employer and employee, should the employer not have concluded that collective labour agreement or should he not be member of a contracting employers' organisation. The collective labour agreement does apply to such an employment agreement in the situation that the employer is bound by the collective labour agreement while the employee is not a member of one of the contracting trade unions.

10.3.4 The collectivities

Collective normative provisions create rights and obligations between the employer and the collectivity on the one hand and between the collectivity and the employees on the other, but *not* between the employer and the employees. Collective normative provisions of a collective labour agreement may be enforced by and against the relevant collectivities.

10.3.5 Special means of enforcement

The BACLA is enforced by officers of the judicial police and civil servants appointed by the Crown. Furthermore, collective labour agreements may confer specific responsibilities to the joint committees or sub-committees, including the power to sanction offenders who do not abide by the rules set out in the collective labour agreement. Moreover, the union delegation is empowered to verify whether the collective labour agreement is applied correctly. The contracting organisations may also play a role in the enforcement of collective labour agreements. The BACLA allows them to initiate proceedings to defend the rights of their members arising from the collective labour agreement.

10.3.6 Deviation by collective labour agreement

Specific Belgian Acts have introduced the possibility for the employers and employees to deviate from specific statutory provisions if an applicable collective labour agreement permits them to do so.

10.3.7 Term and termination

The contracting parties have to establish the collective labour agreement's date of entrance into force and its term. By law, they have to set this out

in writing in the collective labour agreement. They may also award retro-effect to the legal norms of the collective labour agreement. Collective labour agreements can be concluded for a fixed period of time, an indefinite period of time, or a fixed period of time combined with a renewal clause. The "type" of collective labour agreement should clearly follow on from the agreement itself. The collective labour agreement concluded for a fixed period of time terminates, by operation of law, at the end of that term. Collective labour agreements entered into for an indefinite period of time, or a fixed period of time combined with a renewal clause, may be terminated by notice from each of the contracting parties, unless specifically stipulated otherwise in the agreement. The termination has to be given in writing in order to have effect and partial termination is not permitted, unless the collective labour agreement specifically allows this.

10.3.8 After-effects

The individual normative parts, as well as the collective normative parts that also apply individually, of the collective labour agreement remain to have effect once the agreement is terminated, unless specifically stated otherwise in the collective labour agreement. These after-effects do not apply to purely collective normative provisions and to obligatory provisions.

10.3.9 The role of alternative dispute resolution in collective bargaining

Social partners in Belgium are encouraged to use alternative dispute resolution in the case of a conflict. Many alternative dispute resolution mechanisms are defined in collective labour agreements or in the operational procedures for the joint committees and their conciliation office.

10.4 Extending collective labour agreements

The Crown is entitled to declare an existing collective labour agreement binding upon all employers and employees that fall within the scope of application of that agreement. The extension process is surrounded by a number of important demands and safeguards, which are: (i) demands concerning (the provisions of) the collective labour agreements that are to be declared binding, (ii) procedural demands and safeguards and (iii) statutory limitations on the duration of the binding collective labour agreement.

The extension process presumes (a) the existence of a valid collective labour agreement. An invalid collective labour agreement cannot be declared binding. Only (b) agreements concluded within the joint bodies can be extended.

Furthermore, (c) the extension only applies to (individual and collective) normative provisions of these collective labour agreements.

In addition to these demands, a number of formalities must be observed. The Crown may not declare a collective labour agreement binding on its own initiative, but is dependent on (d) the request of the joint body in which the agreement is concluded, or of one of the organisations having seat there. The Minister may (e) oppose such a request and can subsequently refuse to pass on the request to the Crown, should he consider the collective labour agreement invalid, or contravening the public interests. If the Crown decides to extend the collective labour agreement, it should (f) publish the part of the collective labour agreement that is extended in the Belgian Bulletin of Acts and Decrees.

Finally, a binding collective labour agreement cannot (g) have retro-effect exceeding one year prior to the agreement's publication and (h) may not outlast the duration of the collective labour agreement itself. The Royal Decree extending a collective labour agreement may (i) wholly or partially be discontinued should the agreement not conform anymore to the situation and conditions warranting its past extension, or should it violate an instrument that is higher in hierarchy, or arrange for mandatory arbitration.

Even if all of the above demands and safeguards are met and complied with, the Crown can refuse the extension application; it has a discretionary power whether or not to extend. Scholars take different views on the reach of this discretionary power. It is clear that the Crown can refuse to extend the collective labour agreement if it is invalid or contravenes the public interests. Some scholars argue, however, that a refusal cannot be based on economic or political reasons. What is clear is that the extension is indivisible; the Crown cannot extend certain provisions of the collective labour agreement, whilst not extending other provisions.

The legal norms of the collective labour agreement that is extended apply to all employers and employees falling under the jurisdiction of the joint body and within the scope of application of the agreement. The legal position of these employers and employees is the same as that of the employers and employees who were already bound by the collective labour agreement regardless of the extension, with the exception that violation of a binding collective labour agreement can be a criminal offence. Also the after-effects of the provisions of the binding collective labour agreements are the same as those of "normal" collective labour agreements.

10.5 The reach of the social partners

As collective labour agreements are essentially private agreements, the social partners enjoy contractual freedom, provided that the individual and collective normative parts of that agreement concern the individual and collective relation between the employer and the employees. The social partners may even deviate from specific statutory provisions by a collective labour agreement. They should, however, observe the content of other instruments regulating employment relations, in particular those instruments that are higher in hierarchy, including mandatory provisions of the law and collective labour agreements higher in ranking. It should be noted that not every *variation* of provisions of an instrument higher in ranking is an actual *deviation*: a lower provision may very well vary from a higher provision, as long as the lower provision does not deviate from there. In order to establish whether the lower provision does in fact deviate from the higher provision, it should be established whether that higher provision is a minimum, standard, or maximum provision. The lower provision should oblige that higher provision's nature.

It is obvious that "representativity" plays a crucial role in Belgian collective bargaining. The representativity demands are strict. This is especially the case for trade unions, as they do not have the "escape" of having unions that do not meet the general demands appointed as "representative", as the (sectoral) employers' organisations do have. Moreover, the demands are also easy to manipulate. In any case, there are no legal demands to be entitled to participate in the Central Economic Council and the National Labour Council; it is at the government's discretion who to admit and who not. It has been said that the government actually used this entitlement to *choose* which trade unions are representative. These representativity demands may be challenged. ILO has held the current situation in violation of its Conventions on several occasions.

As only representative trade unions may enter into collective labour agreements, and there are only three large, strong and independent trade unions, "yellow" trade unions concluding collective labour agreements are a non-issue in Belgium.

CHAPTER 12

COLLECTIVE LABOUR AGREEMENTS IN THE UK

1. Industrial relations in Britain in a nutshell

This chapter focuses on collective labour agreements (often simply referred to as collective agreements) in the United Kingdom. To be more precise, the laws of England and Wales, and to a certain extent also Scotland (there are some minor differences in Scottish law) are scrutinised;[1557] Northern Ireland is excluded from this research. The countries researched will jointly be referred to as Great Britain, or simply Britain. The sequence in this chapter is in accordance with the framework set out in section 7 of chapter 8.

In this chapter I will use the term "employee" on many occasions. It should be noted that the relevant British statute differentiates between the broader group of "workers" and the more select group of "employees". A worker is an individual who normally works or seeks to work (i) under a contract of employment (the actual "employee"), or (ii) under any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his, or (iii) in employment under or for the purposes of a government department (save some exceptions) in so far as such employment does not fall within (i) and (ii) above.[1558] Hereinafter, I will usually simply use the word "employee", even if the relevant acts or other documents refer to "worker", unless the difference between the two terms is of relevance or if a text is quoted.

1557 See also: E.P. de Jong, *Een inleiding tot het denken over arbeidsconflictenrecht. Een vergelijkende studie van arbeidsconflicten in het recht en het systeem van arbeidsverhoudingen in Groot-Brittannië en Nederland* [*An introduction to thinking about the law on labour disputes. A comparative research of labour disputes in the law and the system of labour relations in Great Britain and the Netherlands*], Kluwer, Deventer 1975, page 2.

1558 Article 296 of the Trade Union and Labour (Consolidation) Act 1992.

1.1 The British industrial relation model

A warning is in place for the legal practitioners who wish to understand industrial relations in Britain. This warning is accurately described in *Harvey on Industrial Relations and employment Law*: "uncomfortable as it may be to lawyers brought up to believe in the impartiality of the law, much of our industrial relations law is, at the end of the day, explicable only in party political terms".[1559] This warning gives reason to focus in more detail on the history of collective bargaining in Britain when compared to the other countries described so far. Apart from this warning, other general remarks can be made on British industrial relations.

First it should be noted that, on the one hand, the British labour market is rather liberal and has relatively little legislative intervention; employment rights are to a certain extent centred around the common law of contract. On the other hand, there are certain parts of collective labour law that are described in detail in specific acts. There does not always seem to be that much logic in the topics that are set out in detail in the statute and the topics that are not. The aforementioned book *Harvey on Industrial Relations and employment Law* summarises the British industrial relation model quite strikingly when it states: "the law of industrial relations is a patchwork quilt, the result of the higgledy-piggledy development of the system of industrial relations in this country and also of the differing political and economic outlook of successive governments". [1560]

Second, it should be noted that although there is legislation in place in the field of collective labour law, the collective agreements themselves are rarely considered legally binding. This leaves much room for the individual employer and employee to arrange wage formation themselves. In fact, as opposed to the Netherlands, Germany and Belgium, the British wage formation is primarily individual and not collective.[1561]

Last, while sectoral collective bargaining is important in many continental countries, this is not the case in Britain. In Britain, collective bargaining is

1559 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division NI Labour Relations, Butterworths, UK, August 2006, Issue 181, page NI/14.

1560 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division NI Labour Relations, page NI/1.

1561 B. Bercusson and B. Ryan, *The British case: before and after the decline of collective wage formation*, in R. Blanpain (ed.), *Collective bargaining and Wages in Comparative Perspective*, Kluwer, Den Haag, 2005, page 68.

mainly focused on enterprise-level bargaining. It is therefore not as centralised as it is in many other countries.

1.2 Statistics

Collective bargaining used to play a very important role in British industrial relations through the 1950s, 1960s and the first half of the 1970s. It is estimated that during the 1950s and 1960s about 60% of the employees were covered by national collective labour agreements. The peak was to be found in the mid 1970s, with an estimated coverage of about 76-78%.[1562] The coverage rate declined to about 54% in 1990,[1563] only to drop further to about 34% in 2005.[1564] Trade union density has undergone a similar curb. The trade union density in Britain rose from 40.5% in 1965, to 46% in 1970, to reach its top in 1978 with 53%. It subsequently dropped to 40% in 1990 and to even as low as 29% in 2000.[1565]

These declining rates are probably the result of three major changes over time. First, there was the economic pressure on British industrial relations through the 1960s and 1970s. Second, there was a relatively "hostile" governmental approach towards collective bargaining under the conservative governments led by Thatcher (1979 – 1990) and subsequently by Major (1990 – 1997). Last, there is a change in social attitude: the British society seems to have less of a community sense and has become more individualistic and consumer-driven.[1566]

1.3 Trends

In addition to the clear drop in the percentage of employees covered by collective bargaining and the decreasing union density, there are a few other

1562 S. Milner, C*harting the coverage of collective pay setting institutions: 1895-1990*, Centre for Economic Performance, Discussion Paper no. 215, table 3.

1563 S. Milner, C*harting the coverage of collective pay setting institutions: 1895-1990*, table 3.

1564 A. Charlwood, T*he De-Collectivisation of Pay setting in Britain 1990-1998: Incidence, Determinants and Impact*, Centre for Economic Performance, Discussion Paper no. 705.

1565 B. Bercusson and B. Ryan, *The British case: before and after the decline of collective wage formation*, page 85.

1566 B. Bercusson and B. Ryan, *The British case: before and after the decline of collective wage formation*, pages 50 and 51.

trends in British collective bargaining. There is a decline in multi-unionism.[1567] In other words, increasingly there is only one union instead of several unions present at the negotiation table. In case multiple trade unions are involved, there is an increasing preference for single-table bargaining, which means that the trade unions jointly (as opposed to separately) negotiate with the employer.[1568] But not only are there more single trade unions bargaining, the same applies to employers, as multi-employer bargaining has dropped considerably as well. It has been said that "multi-employer bargaining has all but disappeared from the private sector".[1569] A preference for single-employer bargaining, regarding an enterprise or even just a site, is clearly detected.[1570] In other words, there is an important tendency towards decentralisation of collective bargaining, from multi-employer to single-employer bargaining. However, within the single-employer agreements group, bargaining is getting more and more centralised, moving from shop-floor-level agreements to plant- or company-level agreements.[1571]

1.4 Bargaining levels

In Britain there are three common bargaining levels: workplace (also called sub-company), organisation (also called company), and industry (also called sectoral) level. The workplace-level agreement is evidently the most specific agreement. This agreement can either be a shop-floor agreement (that is below the level of an individual plant) or a plant-level agreement (which covers the employees in an individual plant).[1572] Broader in scope is the organisational level collective agreement, which can be concluded where the workplace is part of a multi-site organisation. Such an agreement is a collective agreement at company, corporate or divisional level, covering all, or groups of, employees

1567 A. Bryson and D. Wilkinson, *Collective bargaining and workplace performance: An investigation using the Workplace Employee Relations Survey 1998*, Department of Trade and Industry, Employment Relations Research Series no. 12, page 3.

1568 A. Bryson and D. Wilkinson, *Collective bargaining and workplace performance: An investigation using the Workplace Employee Relations Survey 1998*, page 3.

1569 B. Bercusson and B. Ryan, *The British case: before and after the decline of collective wage formation*, page 52.

1570 W. Brown, S. Deakin, M. Hudson, C. Pratten and P. Ryan, *The individualisation of employment contracts in Britain*, Research Paper for the Department of Trade and Industry, June 1998, page 73.

1571 P. Davies and M. Freedland, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report United Kingdom*, pages 46 and 49. The report can be found on: http://www.unifi.it/polo-universitario-europeo/ricerche/collective_bargaining.html.

1572 P. Davies and M. Freedland, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report United Kingdom*, page 50.

in that organisation.[1573] Finally, there is the multi-employer level agreement, or sectoral or industry level agreement.[1574] These agreements can have a national reach or only a regional reach, although the latter is becoming increasingly rare.[1575] Bargaining at a fourth level, the level of the entire economy, is not a feature of the British industrial relations system.[1576] It should be noted that in Britain the focus lies very much on the first two levels. Sectoral level agreements have nearly disappeared from the private sector and are under pressure in the public sector.[1577]

2. A brief history of collective bargaining in Britain

At the end of the 18th and the beginning of the 19th century, Britain transformed from an agrarian, rural society into a more industrialised society. This industrial revolution, combined with a war against France (1793 – 1815), gave impetus to trade organisation. The legislator, however, did not want to cope with such a trade organisation and passed the so-called Combination Acts in 1799 and 1800.[1578] These acts prohibited workers to join together to press their employers for shorter hours or more pay. Basically, these acts made trade unions illegal. In 1824 the Combination Acts were repealed. This led to an outbreak of strikes and consequently the 1825 Combination Act was passed. This act narrowly defined the rights of trade unions as meeting to bargain over wages and conditions. Although this new act seriously restricted trade union action, trade unions rapidly emerged.[1579]

At the end of the 1840s and the beginning of the 1850s Britain's industry flowered. Trade unions became less radical. Negotiation and arbitration increasingly gained acceptance and strikes were cautiously used. In 1868 the

1573 P. Davies and M. Freedland, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report United Kingdom*, page 49.

1574 A. Bryson and D. Wilkinson, *Collective bargaining and workplace performance: An investigation using the Workplace Employee Relations Survey 1998*, page 5.

1575 P. Davies and M. Freedland, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report United Kingdom*, page 48.

1576 P. Davies and M. Freedland, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report United Kingdom*, page 46.

1577 B. Bercusson and B. Ryan, *The British case: before and after the decline of collective wage formation*, page 77.

1578 Reference is made to the research "*The Union Makes Us Strong: TUC History Online*", published on www.unionhistory.info. This information derives from the timeline 1815 – 1834, as drafted by M. Davis.

1579 *The Union Makes Us Strong: TUC History Online*, timeline 1815 – 1834, drafted by M. Davis.

important Trade Union Congress ("TUC") was founded, bringing together the different trade unions. Trade unions were recognised as legal entities by the 1871 Trade Union Act. The 1875 Conspiracy and Protection of Property Act decriminalised the work of trade unions. Under these acts, stopping at work and peaceful picketing during industrial disputes were allowed. Labour disputes became purely civil (as opposed to criminal) matters.[1580] The Trade Dispute Act of 1906 gave trade unions some immunity against new forms of tortious civil liability in relation to the organisation of industrial actions.[1581]

Between 1888 and 1918 trade unions grew fast. World War I (1914 – 1918) divided the labour movements into groups that supported and groups that opposed the war. This led to multiple, illegal, collective actions.[1582] The period between World War I and World War II showed a declined staple industry and high unemployment. Strikes were common and Britain faced the big "general strike" in May 1926.[1583] Although strikes and lockouts were banned during World War II (1939 – 1945), collective actions still occurred.[1584]

The traditional approach of British law on industrial relations was described in the 1950s by the scholar Kahn-Freund as "collective *laissez-faire*"; the forces of society had free play, without too much state intervention. Kahn-Freund argued that this collective laissez-faire contained three elements. First, there were neither regulations on wage setting and other employment conditions nor on the enforcement of individual contractual rights. Second, the legislation that was available on industrial relations solely lifted obstacles in common law hindering collective bargaining, rather than stating positive rights for collective bargaining. In other words, the role of statute merely enabled a voluntary system of industrial relations to operate without undue impediment. Last, there was, according to Kahn-Freund, no auxiliary law promoting collective bargaining. The result of this abstentionist approach was that "the existence, extent and outcome of bargaining relationships was entirely a matter for the collective parties to determine".[1585] In practice,

1580 *The Union Makes Us Strong: TUC History Online*, timeline 1850 – 1880, drafted by M. Davis.

1581 G.S. Morris and T.J. Archer, *Trade Unions, Employers and the Law*, Butterworths, London, Dublin, Edinburgh, second edition, 1993, page 2.

1582 *The Union Makes Us Strong: TUC History Online*, timeline 1914 – 1918, drafted by M. Davis.

1583 *The Union Makes Us Strong: TUC History Online*, timeline 1918 – 1939, drafted by M. Davis.

1584 *The Union Makes Us Strong: TUC History Online*, timeline 1939 – 1945, drafted by M. Davis.

1585 G.S. Morris and T.J. Archer, *Trade Unions, Employers and the Law*, page 2.

that meant that collective labour agreements generally bound the parties in honour, as most social partners rarely intended their agreements to be legally enforceable contracts.[1586]

Others have questioned the aforementioned third point raised by Kahn-Freund (there was no auxiliary law promoting collective bargaining). They refer to the Fair Wages Resolutions, which sought for a "fair wage mechanism" extending terms of collective labour agreements to employers and employees not covered by them. These mechanisms were particularly well used in the 1960s and are further described in section 8 below.[1587] Notwithstanding this, it became apparent in the late 1950s and the 1960s that the "gap in civil law" concerning collective bargaining should be filled. In this period the trade unions had a lot of power, but remained unaccountable. Closed shop agreements, for example, were common, as a consequence whereof individual freedom was limited.[1588] A Royal Commission on trade unions and employers' associations, chaired by Lord Donovan, was assigned the task of researching the conduct of industrial relations. In its 1968 report, the Commission did see a need to reform the system of industrial relations and even suggested a few adaptations, but did not envisage an effective role for the law in this respect and mostly favoured a voluntary system of change.[1589] The report still gave reason for the government in the second half of the 1960s to propose legislation in the field of collective labour law. These proposals, however, never made it to acts.[1590] The trade unions' opposition against changes was simply too strong.[1591]

1586 G.S. Morris and T.J. Archer, *Trade Unions, Employers and the Law*, page 2. It should be noted that before the Second World War collective labour agreements were regarded as contracts on the assumption that the parties involved were able to meet the requirements of contract formation including intention. See J. Gaymer, *The Employment Relationship*, Sweet & Maxwell, London, 2001, page 254.

1587 For a summary on the position of Kahn-Freund, including references, and a summary of counter arguments, including references, reference is made to B. Bercusson and B. Ryan, *The British case: before and after the decline of collective wage formation*, page 53.

1588 The 1964 House of Lords' decision against the closed shop in the case of *Rookes v. Bernard* temporarily outlawed the closed shop agreements. The decision was turned void by the 1965 Trade Dispute Act.

1589 Royal Commission on trade Unions and Employers' Associations 1965 – 1968, Report presented to Parliament by Command of Her Majesty June 1968, London.

1590 *The Union Makes Us Strong: TUC History Online*, timeline 1960 – 2000, part 2, drafted by N. Fishman.

1591 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division NI Labour Relations, page NI/5B.

The enactment of the Industrial Relations Act in 1971 radically changed this status quo and started an era of a much more interventional approach of British governments in industrial relations. This act introduced a legal framework for industrial relations. It gave the trade unions specific rights towards the employer, including the possibility to force the employer to start bargaining in good faith. It also included the presumption of legal enforceability of the collective labour agreements, unless stipulated otherwise in the agreement. However, most rights were only available for registered trade unions. These registered unions were limited in their right to industrial action. More "radical" action, including unofficial action and most secondary action, was fully denied.[1592] The Industrial Relations Act failed. Trade unions, led by TUC, refused to register in order to benefit from the act's protection and employers did not invoke the act either. Moreover, social partners stipulated, in nearly every collective labour agreement, that the agreement was not legally enforceable.[1593]

The new Labour government almost fully revoked the Industrial Relations Act in 1974. It agreed a policy of temporary wage restraint with TUC, in return for a programme of social and legal reforms.[1594] In 1974 the Trade Union and Labour Relations Act was enacted, amplified by an amendment act in 1976. This legislation introduced the presumption that collective labour agreements were not legally enforceable, unless stipulated otherwise. Trade unions were furthermore granted broad immunities from liability in tort and closed-shop arrangements could easily be enforced.[1595] In 1975 the Employment Protection Act was introduced. This act supported trade unions in collective bargaining. It protected individual employees that were member of independent trade unions from discrimination by employers and they could take time off for union work. It also arranged for a new legal framework for industrial relations, including a recognition procedure and a method to extend terms and conditions set out in a collective labour agreement to non-participant employers. From a statutory point of view, this act signified the peak of collective bargaining.[1596]

1592 B. Bercusson and B. Ryan, *The British case: before and after the decline of collective wage formation*, page 54.

1593 G.S. Morris and T.J. Archer, *Trade Unions, Employers and the Law*, page 3.

1594 G.S. Morris and T.J. Archer, *Trade Unions, Employers and the Law*, page 3.

1595 G.S. Morris and T.J. Archer, *Trade Unions, Employers and the Law*, page 4.

1596 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division NI Labour Relations, page NI/2.

The law on industrial relations changed drastically in the "conservative period" of Thatcher and Major (1979 – 1997). Basically, the conservative government changed this law in three steps (the so-called "step-by-step" approach).[1597] In the first stage, the worst excesses of militant trade unionism were repressed. The 1980 Employment Act outlawed secondary picketing and limited the legality of secondary action. This act furthermore repealed the statutory procedures for recognition of trade unions in the bargaining procedure, and the possibility to extend collective labour agreements. Closed-shop arrangements were limited. The second stage was to weaken the trade unions. The Employment Act 1982 further limited the scope of lawful industrial action and lifted a part of the immunity of trade unions from liability in tort. The rights of employees who were fired due to their participation in collective actions were also limited. Stipulations in contracts that required a party to use union-only labour were void and industrial action enforcing such practice was made illegal.[1598] The Trade Union Act 1984 imposed new obligations on trade unions. Trade unions were to hold secret ballots on a variety of topics, on pain of losing their immunity in liability in tort. [1599] In the last stage the conservative government tried to promote individualism over collectivism.[1600] This was done in the three Employment Acts that entered into force in the period 1988 – 1990. These acts arranged for further requirements on ballots. Trade unions were further limited in their power to discipline members and had to give their members the opportunity to inspect union accounting records. Trade union members could claim less paid time off from work for union activities. Nearly all secondary action was made unlawful. The range of persons for whose actions the trade union could be held liable was extended. Employees participating in an unofficial collective action lost protection against unfair dismissal. It became unlawful for an employer to refuse to employ a person because he refused to join a certain trade union.[1601]

1597 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division NI Labour Relations, page NI/9.

1598 G.S. Morris and T.J. Archer, *Trade Unions, Employers and the Law*, page 5.

1599 G.S. Morris and T.J. Archer, *Trade Unions, Employers and the Law*, pages 5 and 6.

1600 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division NI Labour Relations, page NI/9.

1601 G.S. Morris and T.J. Archer, *Trade Unions, Employers and the Law*, page 6.

The above conservative government's changes were consolidated in the 1992 Trade Union and Labour Relations Act (Consolidated) (TULRA). Shortly thereafter, the Trade Union Reform and Employment Rights Act 1993 introduced further changes. Based on this act, trade unions must follow complex procedures before they can engage in lawful industrial actions. Orders against such actions can, under this act, be requested by individuals not suffering losses from said actions. Trade union members may only be expelled from the trade unions in specific, statutory circumstances, limiting the trade union's autonomy.

In 1997 a labour government replaced the conservative government. This, however, did not mean that the clock was set back to 1970. Most of the "conservative legislation" remained in place, including the TULRA, but generally the tone was softened a bit.[1602] In 1999, the Employment Relations Act was introduced. This act, which is still in force today, introduced, amongst others, (i) the statutory right to recognition, (ii) the extension of rights of employees who are dismissed when on strike to claim unfair dismissal, and (iii) the possible extension of rights to "atypical" or "marginal" employees.[1603] The 2004 Employment Relations Act was partly a "tidying-up exercise", but also amended the law regarding trade union recognition.[1604]

The above makes clear that in the last decades the law on industrial relation changed significantly. Let us now focus on Britain's positive law on industrial relations.

3. The classical rights concerning collective bargaining

In strictly juridical terms, the three classical rights as such do not exist in Great Britain.[1605] Still, to quite an extent Britain acknowledges – albeit mainly

1602 B. Bercusson and B. Ryan, *The British case: before and after the decline of collective wage formation*, pages 55 and 57.

1603 N. Randall and I. Smith, *A guide to the Employment Relations Act 1999*, Butterworths, London, Edinburgh, Dublin, 1999, pages 2 and 3.

1604 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division NI Labour Relations, page NI/11.

1605 P. Davies and M. Freedland, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report United Kingdom*, page 10.

through statute, most explicitly through international instruments[1606] and not always in full – (i) the freedom of association, (ii) the right to collective bargaining, and, to a certain extent, (iii) the right to strike.

Common law itself does not recognise the freedom of association.[1607] A fairly recent reminder hereof was the 1994 High Court case *Boddington & another v Lawton & another*.[1608] In this case the Court reviewed the status of an association (the Prisoner Officers' Association), without the provisions of the Trade Union and Labour Relations Act 1974. This association assisted in an industrial action. The Court ruled that it was an organisation that restricted trade as it interfered in the operation of the free market. The association's restraint of trade was held unreasonable, as the methods used by it to achieve its purposes involved inducing members to breach their contract of employment. As a result of this the rules of the association were held unenforceable.

The above is the situation without relevant legislation. Legislation, however, protects the freedom of association in two ways. First, there is the freedom, as against the state, to form a trade union to protect one's interests. This freedom is guaranteed by the 1998 Human Rights Act. Article 1 of this act incorporates article 11 of the European Convention on Human Rights (the Convention), which protects the freedom of association.[1609] Everyone in Britain is therefore free to form and join trade unions, without state interference.[1610] Second, there is the freedom of an individual employee, as against his employer, to join a trade union.[1611] This freedom is guaranteed by a set of provisions contained in TULRA. The following articles are of relevance:

1606 And here lies an important weakness. There is a dualistic regime in Great Britain when it comes to national and international law. International law does not have effect in Great Britain, unless it is actively implemented in the national system by statute. See E.P. de Jong, *Een inleiding tot het denken over arbeidsconflictenrecht. Een vergelijkende studie van arbeidsconflicten in het recht en het systeem van arbeidsverhoudingen in Groot-Brittannië en Nederland*, page 39.

1607 Incomes Data Services Ltd., *Trade Unions*, London, December 2000, page 6.

1608 High Court, January and February 1994, Industrial Cases Reports ("ICR") 1994, pages 478 *ff*, *Boddington & another v Lawton & another*.

1609 Reference is made to chapter 8, section 2.1 of this thesis.

1610 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division M Trade Unions, page M/3.

1611 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division NI Labour Relations, page NI/39.

(i) article 137 TULRA guarantees that a prospective employee has a freedom to access to employment without discrimination on union membership or non-membership;
(ii) article 145A TULRA stipulates that an employee must not be offered inducements relating to union grounds as defined in this article (such as inducing him to become a trade union member or to cease membership);
(iii) article 145B TULRA states that an employee must not be offered inducements relating to collective bargaining (such as making him an offer with the result that his terms of employment will not be determined by a collective labour agreement);
(iv) article 146 TULRA stipulates that an employee may not be subject to any detriment on union grounds as defined in this article (such as deterring him to become a member of an independent trade union);
(v) article 152 TULRA stipulates that an employee may claim unfair dismissal if he is dismissed on union grounds as defined in this article (such as becoming a trade union member or participating in union activities at an appropriate time).

The *entitlement* to bargain derives from TULRA. This act gives a statutory framework for the conclusion of collective labour agreements. A *right* to collective bargaining, in the sense that one party can oblige the other party to enter into such bargaining, is not accepted in Britain. However, in specific circumstances, or upon specific topics, there may be a duty on the employer to inform and consult trade unions. Employers are also required to provide information to trade unions that are both independent and recognised by the employer for the purposes of collective bargaining.[1612] Furthermore, the mandatory recognition process, as set out in detail in section 5 below, can force the employer to agree on procedural aspects of collective bargaining.

In Britain, there is a freedom to collective action vis-à-vis the state. That is, industrial actions do not normally expose the participants to criminal sanctions. This is mainly the consequence of the aforementioned 1875 Conspiracy and Protection of Property Act.[1613] A more complex situation is whether and to which extent an employee is free towards his employer to engage in industrial action. From a common law point of view, participants in an industrial action will typically be held in breach of their contracts of employment and

1612 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division NI Labour Relations, page NI/375.

1613 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division NII Industrial Actions, page NII/11.

organisers will typically commit several torts.[1614] To summarise, there seems no positive right to strike under common law.[1615] However, statute – more specifically TULRA – gives immunity from legal liabilities in many cases. In brief, TULRA protects the organisers of industrial action from liability, provided that the organisers act "in contemplation or furtherance of a trade dispute". The participants are also given some statutory protection. They have a limited right to claim unfair dismissal should they be dismissed for or during industrial action.[1616] Or, to phrase Barnard in this respect:[1617]

> (…) in the UK the *right* to strike does not exist as such, but, subject to certain stringent conditions, trade unions are protected by immunities established by law when their members take certain forms of industrial action. These same immunities now do provide some protection for individual employees but they are likely to breach their individual employment contracts by taking any form of industrial action and can, in certain circumstances, be dismissed as a result.

Finally, it should be noted that Britain obliged itself to protect the above-mentioned rights in international perspective. After all, article 11 of the Convention is, as mentioned above, incorporated into the 1998 Human Rights Act. Article 11 of the Convention clearly protects the freedom of association, and to a certain extent the right to collective bargaining and the right to strike.[1618] Moreover, Britain ratified the ILO Convention C98 (on the right to Organise and Collective Bargaining), as well as the European Social Charter and the United Nations' International Covenant on Economic, Social and Cultural Rights. These instruments protect one or more of the classical rights as discussed here. These instruments – in particular the recognition of the Convention – may have changed the common law doctrine. It has been argued, for example, that the earlier common law doctrine on the (lack of) freedom of association has lost force and that nowadays trade unions are considered legal organisations, regardless of the TULRA.[1619]

1614 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division NII Industrial Actions, page NII/8.

1615 Incomes Data Services Ltd., *Industrial Action*, London, August 1999, page 2.

1616 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division NII Industrial Actions, page NII/8.

1617 C. Barnard, *EC Employment law*, page 773.

1618 Reference is made to chapter 8 of this thesis.

1619 Incomes Data Services Ltd., *Trade Unions*, page 8. B. Perrins, *Harvey on Industrial Relations and employment Law*, Division M Trade Unions, pages M/21B *ff*.

4. Collective labour agreements

Let us now turn to the definition of a collective labour agreement in Britain, and to the different types of collective labour agreements and different types of provisions therein.

4.1 What constitutes a collective labour agreement?

Article 178 TULRA defines a collective agreement, within that act's meaning, as follows:

> (…) "collective agreement" means any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers or employers' associations and relating to (…)
> (a) terms and conditions of employment, or the physical conditions in which any workers are required to work;
> (b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;
> (c) allocation of work or the duties of employment between workers or groups of workers;
> (d) matters of discipline;
> (e) a worker's membership or non-membership of a trade union;
> (f) facilities for officials of trade unions; and
> (g) machinery for negotiation or consultation, and other procedures, relating to any of the above matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in such negotiation or consultation or in the carrying out of such procedures.

As in the countries previously discussed, the following three elements are of importance:

First, there should be an agreement or arrangement. It is important to note that the term "agreement" as referred to in article 178.1 TULRA is not necessarily synonymous with the term "contract".[1620] After all, a contract is an agreement between parties that is intended to be legally binding, while, as will be discussed in section 7.1 below, this is normally not the case with a collective labour agreement. The agreement, as referred to in article 178.1 TULRA, can either be in writing or agreed on orally. An exchange of letters may, for example, be considered a collective labour agreement. The Employment Appeal Tribunal ruled in that connection that, at least, there

1620 Incomes Data Services Ltd., *Trade Unions*, page 239.

must be "a mutual intention on the part of the employers and employees' bargaining agents to enter into a collective bargain, the effect of which will be to modify the contracts of employment between employer and employee".[1621] It should be noted though that, in order for a collective agreement to be legally enforceable (which is rarely the case), it must, amongst other things, be agreed on in writing (article 179 TULRA).

Second, the agreement must be concluded between specific parties. The contracting parties should, on the one hand, be one or more employers or employers' associations and on the other, one or more trade unions. These associations must meet specific demands. For a further discussion of the parties involved reference is made to section 5 hereof.

Third, collective labour agreements should deal with the topics set out above, hereinafter referred to as "bargaining topics". The bargaining topics relate both to the relation between employers and employees as well as to the rights and obligations of the contracting parties.

There are no "registration" demands in Britain that should be satisfied in order for an agreement to be considered a collective labour agreement. However, possible terms of a collective agreement restricting employees' potential to strike are not part of the contract between the employee and his employer unless, among other things, that collective agreement is reasonably accessible at the employee's place of work and is available for him to consult during working hours. In such a case there is an obligation to "make available" a collective agreement (article 180.2 TULRA) in order for the aforementioned terms to have force. Reference is made to section 7.2 below.

4.2 Different types of collective labour agreements and of provisions

In Great Britain, it is common to distinguish procedural from substantive terms in collective labour agreements, or even entire substantive or procedural agreements.[1622] Procedural agreements concern both the relationship between the trade union and the employer, (such as the definition of the bargaining unit and the status of the unions and their representatives) and the treatment of individual employees (disciplinary procedures). Substantive agreements

1621 Employment Appeal Tribunal, February 1997, ICR 1997 pages 730 *ff*, Bu*rke v Royal Liverpool University Hospital NHS Trust*.

1622 E.P. de Jong, *Een inleiding tot het denken over arbeidsconflictenrecht. Een vergelijkende studie van arbeidsconflicten in het recht en het systeem van arbeidsverhoudingen in Groot-Brittannië en Nederland*, page 11.

relate to pay and other employment conditions, such as working hours and holidays.[1623]

When it comes to provisions in a collective labour agreement, British law distinguishes between terms that are of an individual nature and those that are of a collective nature.[1624] The reason for this distinction is that only the terms of an individual nature can be incorporated into an individual employment contract. These terms concern the relationship between the employer and the individual employees.[1625] Although the relevant authorities are not absolutely consistent in their division between individual and collective terms,[1626] the terms of an individual nature are quite comparable to terms that are described in other countries as normative provisions. These terms include pay, maternity or sick leave, holiday entitlement and weekly hours.[1627] Collective terms are intended to govern the relationship between the union and the employer.[1628] These are comparable to terms that are described in other countries as obligatory provisions. Some terms in a British collective labour agreement could be compared with collective normative provisions. This is, for example, the case if an employers' association agrees with the union that union officials are granted facilities at the individual employer's premises. However, provisions that are considered important collective normative provisions in, for example, the Netherlands and Belgium, being provisions on funds, are in principle not part of a collective labour agreement in Britain. In the case *Universe Tankships Inc. of Monrovia v International Transport Workers' Federation*, for example, the House of Lords maintained that an agreement between the employer and the union on which basis the employer was obliged to pay an amount of money to a union's welfare fund was not to be considered a collective labour agreement.[1629] This agreement did not, after all, relate to one of the statutory bargaining topics. To summarise, the only relevant distinction in English law is between terms in a collective labour agreement that are of an individual nature and those that are of a collective nature.

1623 P. Davies and M. Freedland, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report United Kingdom*, page 12.

1624 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division NI Labour Relations, page NI/455.

1625 Incomes Data Services Ltd., *Trade Unions*, page 244.

1626 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division NI Labour Relations, page NI/456.

1627 Incomes Data Services Ltd., *Trade Unions*, page 244.

1628 Incomes Data Services Ltd., *Trade Unions*, page 244.

1629 House of Lords, February – April 1982, ICR 1982 pages 262 *ff*, *Universe Tankships Inc. of Monrovia v International Transport Workers Federation*.

5. The players in the collective bargaining process

There are several parties involved in the British collective bargaining system. At least the following are of relevance: (i) the government, (ii) trade union confederations and trade unions, (iii) employers' confederations and separate employers' associations, and (iv) individual employers. In Great Britain, it is especially important to distinguish the different types of trade unions.

5.1 The government

The government's role in the bargaining process is only limited. Its main involvement is to enact legislation on collective labour agreements and to provide an institutional structure that enables bargaining. That is not to say that politics over years were not important for collective bargaining, as they were. As said in section 1, much of the British law of industrial relations is really only explicable in party political terms.

5.2 Trade union confederations and trade unions

British law is detailed when it comes to categorising trade unions. The rights trade unions enjoy depend on the category they are in. Only specific organisations can qualify as trade unions. These organisations can apply for listing. Trade unions and their right to be listed are discussed in section 5.2.1 below. Listed trade unions that are also independent may ask for a so-called certificate of independence. Which union can obtain such a certificate and what rights independent trade unions enjoy are discussed in section 5.2.2. Independent trade unions can, by law, if specific requirements are satisfied, be recognised vis-à-vis an employer for the purposes of collective bargaining. The recognition procedure and the accompanying rights are set out in section 5.2.3 below.

5.2.1 Trade unions and listing

"Trade union" as referred to in the TULRA means pursuant to article 1:

> an organisation (whether temporary or permanent) –
> (a) which consists wholly or mainly of workers of one or more descriptions and whose principal purposes include the regulation of relations between workers of that description or those descriptions and employers or employers' associations; or
> (b) which consists wholly or mainly of –

(i) constituent or affiliated organisations which fulfil the conditions in paragraph (a) (or themselves consist wholly or mainly of constituent or affiliated organisations which fulfil those conditions), or
(ii) representatives of such constituent or affiliated organisations,

and whose principal purposes include the regulation of relations between workers and employers or between workers and employers' associations, or the regulation of relations between its constituent or affiliated organisations.

This definition makes clear that both trade unions (under a) and trade union confederations (under b) are considered "trade unions" as referred to in TULRA. For that reason, from now on merely the term "trade union" will be used, which is deemed to include both trade unions and trade union confederations. This definition further makes it clear that, in order to be regarded a trade union, 3 requirements should be satisfied: (i) there should be an organisation, (ii) consisting wholly or mainly of workers which (iii) has as its principal purpose the regulation of relations between employers and employees.

In order to be qualified as an organisation, there should be at least some sort of form or structure. Elements that can give form or structure are a name, a constitution,[1630] rules, meetings, keeping minutes, offices, property or funds etc.[1631] The organisation can be temporary or permanent. This means that ad hoc committees could also qualify as trade unions.

The organisations should wholly or mainly consist of workers. The term "workers" includes employees (reference is made to section 1 above). The word "mainly" means that the organisation may also have a number of non-workers – such as retired people or honorary members – as a member without undermining the union's status.[1632]

Finally, the organisation should have, as one of its principal purposes, the regulation of relations between employees and employers. This requires on the one hand more than the simple orchestration of industrial action.[1633] On the other hand, it has a wider meaning than "collective bargaining".

1630 Although a written or formal constitution is not required. See Incomes Data Services Ltd., *Trade Unions*, page 2.

1631 See for example: National Industrial Relations Board, Industrial Relations Law Reports (IRLR) 1973 pages 216 *ff*, *Frost v Clarke & Smith Manufacturing Co Ltd & Others*.

1632 Incomes Data Services Ltd., *Trade Unions*, page 4.

1633 National Industrial Relations Board, July 1972, ICR 1972 pages 230 *ff*, *Midland Cold Storage Ltd v Turner and others*.

Consequently, an organisation can be a trade union even when it does not negotiate.[1634] The size of an organisation and its effectiveness do not matter – even a small union without much power can be considered a trade union if it meets the aforementioned three demands.[1635] It should be noted that the regulation of industrial relations must be *one of* the principal purposes. This implies that the union also may have other purposes.

A trade union is typically an unincorporated association.[1636] Under TULRA, the trade union has a quasi-corporate status: the union is not a judicial person – and may not be treated as if it were a body corporate[1637] - but is still invested with some of the most relevant attributes of legal personality. Article 10.1 TULRA arranges that a trade union (i) is capable of making contracts, (ii) is capable of suing and being sued in its own name, and (iii) can be subject to proceedings for an offence alleged to have been committed by it or on its behalf. The property of a trade union is vested in trustees in trust for the union (article 12.1 TULRA). A judgement, order or award made in proceedings brought against a trade union is enforceable against this property held in trust for it to the same extent and in the same manner as if it were a body corporate (article 12.2 TULRA).

A trade union can be listed. The so-called Certification Officer (CO) maintains a list of unions, a list which is open for public inspection free of charge (article 2 TULRA). Every union can be put on the list upon payment of a fee, provided of course that it qualifies as being a trade union, which is verified by the CO (article 3 TULRA). The fact that the name of a union is on this list constitutes evidence that an organisation is in fact a trade union (article 2.4 TULRA). There are several advantages of being a listed trade union,[1638] the most important being that only a listed trade union may apply to the CO for a certificate that it is independent (article 6.1 TULRA). Independent trade unions are discussed hereafter.

1634 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division M Trade Unions, page M/5B.

1635 Courts of Appeal, IRLR 1986 pages 497 *ff*, *British Association of Advisers and Lecturers in Physical Education v National Union of Teachers and others*. Note that there are about 40 trade unions with a membership of fewer than 100. B. Perrins, *Harvey on Industrial Relations and employment Law*, Division M Trade Unions, page M/1.

1636 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division M Trade Unions, page M/7B.

1637 Article 10.2 TULRA.

1638 Incomes Data Services Ltd., *Trade Unions*, page 12.

There are about 200 trade unions in existence in the United Kingdom today. About 60% of these trade unions have a membership fewer than 2,500. There are 15 large unions, each with a membership exceeding 100,000.[1639] Pluralism is an inherent feature of trade union structure in Great Britain. Some trade unions have a specific ideological background. Other trade unions are merely active within one sector and some are focused on blue- or white-collar employees. Cross-sectoral trade unions are also in place. A change that can clearly be seen is that many trade unions have restructured and merged in recent years, abandoning whatever organisation coherence they may once have had.[1640]

It is beyond the scope of this thesis to discuss all, or even most, trade unions. For that reason I solely mention the most important trade union confederation, the already mentioned TUC, as this confederation represents by far the most employees. It stands at 66 unions representing over six and a half million people in total.[1641] Still, its actual powers with regard to bargaining are weak. TUC has never been mandated by its members to bargain collectively; its role is mostly supportive.[1642] Moreover, TUC cannot call strikes, has no strike funds and cannot influence its affiliates in their formulation of collective bargaining strategies.[1643]

5.2.2 Independent trade unions

Many rights awarded to trade unions are made subject to unions being independent. The British legislator apparently has taken the view that yellow unions (*i.e.* unions that are not independent, that is unions to which management may belong or to whom they may provide funds) cannot sufficiently defend the interests of their members because of management's

1639 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division M Trade Unions, page M/1.

1640 P. Davies and M. Freedland, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report United Kingdom*, page 28.

1641 Reference is made to the website of TUC: www.tuc.org.uk.

1642 For an overview of the roles which TUC performs for its affiliates reference is made to: P. Davies and M. Freedland, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report United Kingdom*, page 23.

1643 P. Davies and M. Freedland, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report United Kingdom*, page 58.

control.[1644] Advantages independent trade unions (as opposed to trade unions that are not independent) enjoy include the following:[1645]

- the employee is protected in his right to join and participate in its affairs;
- it may negotiate an unfair dismissal procedure to take the place of a statutory scheme;
- it may bargain away the right to strike;
- it may derogate from the rights in Working Time Regulations and Maternity and Parental Leave Regulations;
- it may apply for statutory recognition (reference is made to section 5.2.3 below).

Moreover, most rights that recognised trade unions enjoy for the purposes of collective bargaining – which will be set out in section 5.2.3 – can only be enjoyed by independent trade unions.[1646]

That leaves us to the question of which trade unions are considered independent. Pursuant to article 5 TULRA, an "independent trade union" means a trade union which (i) is not under the domination or control of an employer, and (ii) is not liable to interference by an employer tending towards such control. The trade union must satisfy both requirements. When assessing whether or not the trade union involved is under domination or control of the employer, one should look beyond the form of the union's constitution and must consider whether, *in reality,* this trade union is independent. An organisation that was formerly controlled by the employer and had no negotiation rights since its formation in 1971 until just before its application for independence in 1976, and who adopted an own constitution and obtained negotiation rights in the beginning of 1976, had not substantially moved away from the employer's domination. It therefore did not satisfy even the first part of the statutory definition of independence.[1647] When assessing whether the trade union is liable to interference by an employer tending towards control, one should verify whether the trade union is *vulnerable* to such interference, rather than whether there is a *likelihood* of such interference. The Court of Appeal stated that when a union is overly dependent of the employer for facilities – such

1644 Incomes Data Services Ltd., *Trade Unions*, page 12.

1645 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division M Trade Unions, pages M/35A and M/35B.

1646 Incomes Data Services Ltd., *Trade Unions*, page 13.

1647 Employment Appeal Tribunal, November and December 1976, ICR 1977 pages 224 *ff*, *Blue Circle Staff Association v Certification Officer*.

as free office accommodation, stationary, telephone, photocopying, internal mail etc. – it is liable to interference by that employer, even if it is satisfied that the union is, at the moment of the ruling and in the past, not under the dominance or control of the management.[1648]

The most common manner for a trade union to show that it is independent is to present a so-called certificate of independence.[1649] Having this certificate is conclusive evidence that the trade union concerned is independent, while a refusal, withdrawal or cancellation of that certificate is conclusive evidence that a trade union is not independent (article 8.1 TULRA).

A listed trade union may apply for a certificate of independence to the CO. The CO will subsequently establish whether this trade union is independent or not. He shall, in that respect, make all enquiries as he sees fit and shall take into account any relevant information submitted to him by any person. The CO shall either issue a certificate of independence to an independent trade union, or he shall give a reasoned decision why the trade union involved is not independent (article 6.6 TULRA). All decisions are entered in a public record.

As said, the CO will verify whether the applicant falls within the aforementioned statutory definition of independence. The CO has set criteria that it uses in applying the statutory definition to individual cases. These criteria are set out in the booklet "Guidance for trade unions wishing to apply for a certificate of independence".[1650] The CO has always applied this booklet and the Employment Appeal Tribunal has approved the criteria set therein.[1651] The booklet's criteria are:[1652]

- History - The circumstance that in the recent past the union began with the support or on the initiative of the employer is an argument for the CO against the grant of a certificate.

1648 Court of Appeal, October 1978, ICR 1979 pages 235 *ff*, *Squibb United Kingdom Staff Association v Certification Officer*.

1649 Although a certificate of independence is not an absolute prerequisite for a trade union to qualify as "independent". Reference is made to B. Perrins, *Harvey on Industrial Relations and employment Law*, Division Q Statutes, page Q/486.

1650 This booklet can be found on the website of the CO: www.certoffice.org. I used the revised April 2005 version of the booklet.

1651 Employment Appeal Tribunal, November and December 1976, ICR 1977 pages 224 *ff, Blue Circle Staff Association v Certification Officer*.

1652 Paragraphs 18 – 25 of the CO's guidance booklet.

- Membership Base - A union whose membership is confined to the employees of one employer is according to the CO more vulnerable to employer interference than a broadly based union.

- Organisation and Structure - The CO examines the organisation and structure of the organisation, which should allow its members to fully participate in the decision-making process while it excludes employer involvement in its internal affairs.

- Finance - The CO regards a union with weak finances and inadequate reserves as more vulnerable to employer interference than one with a strong financial position.

- Employer-provided Facilities - The union should not be too dependent on facilities – such as premises, time off and office space – provided by the employer. The CO sets the costs of these facilities off against the financial state of the union. But not only the costs are relevant, but also the union's ease to cope on its own if the facilities were withdrawn. The greater the union's reliance on employer's facilities the more vulnerable it is to employer interference.

- Negotiating Record - Although a weak negotiating record does not itself indicate dependence, a strong record may outweigh other factors unfavourable to the union's independence assessment. A robust attitude in negotiation, for example, suggests independence.

The CO holds no single factor set out above as decisive by itself. Instead, it looks at "the whole nature and circumstances of the union" before it makes a decision about whether or not this union satisfies the statutory definition of independence.[1653] The CO may periodically review the trade union's independence and may withdraw the certificate of independence if he is in the opinion that the union is no longer independent (article 7.1 TULRA). The union may appeal to the Employment Appeal Tribunal from points of law against a decision of the CO refusing to give a certificate of independence or withdrawing such certificate (article 8 TULRA).

5.2.3 Recognised trade unions

Regulation of the terms and conditions of employment within the British system of industrial relations depends primarily upon the recognition of

1653 Paragraph 26 of the CO's guidance booklet.

trade unions by the employer for bargaining purposes.[1654] Or, to put it in the words of Lord Denning M.R.: "anyone concerned with industry knows the great importance which both sides of industry attach to the recognition of a trade union".[1655]

Recognition offers a number of important advantages for the trade union. The recognised trade union (i) can force the employer into a so-called "method of collective bargaining" (in case of statutory recognition) and (ii) is entitled to disclosure of information that can be helpful to concluding a collective labour agreement. These rights will be discussed in section 6 below. Other advantages a recognised trade union enjoys include the rights for its officials, learning representatives and other members to time off work,[1656] the right to consultation on redundancies,[1657] and rights to information and consultation on specific topics.[1658]

Pursuant to article 178.3 TULRA, "recognition" means "the recognition of the union by an employer, or two or more associated employers, to any extent, for the purpose of collective bargaining". This definition refers to "collective bargaining". Pursuant to article 178.1 TULRA, "collective bargaining" means negotiations relating to or connected with one or more of the bargaining topics dealt with in a collective labour agreement (and set out in section 4.1 above). A more informal way to describe recognition is the process by which an employer accepts a trade union as entitled to act on behalf of a particular group (or groups) of workers to undertake collective bargaining.[1659] It should be noted that recognition does not necessarily regard just one trade union, but can just as well apply to more trade unions.

A trade union needs only to be recognised in one of the bargaining topics for it to be recognised within the meaning of the TULRA.[1660] Moreover, an employer could recognise the trade union only with respect to a specific group

1654 B. Bercusson and B. Ryan, *The British case: before and after the decline of collective wage formation*, page 49.

1655 Court of Appeal, July 1978, ICR 1978 pages 84 *ff*, *National Union of Gold, Silver & Allied Trades v. Albury Brothers Ltd.*

1656 Articles 168, 168a and 170 TULRA.

1657 Article 188 TULRA.

1658 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division NI Labour Relations, pages NI/166 and NI/167.

1659 Incomes Data Services Ltd., *Trade Unions*, page 89.

1660 Incomes Data Services Ltd., *Trade Unions*, page 184.

(or groups) of employees, the so-called "bargaining-unit".[1661] Recognition can either be voluntary or statutory.

5.2.3.1 Voluntary recognition

Should the employer be willing to negotiate with a trade union on one or more of the bargaining topics, with a view to actually reach an agreement, the employer voluntarily recognises such a union. A mere willingness to consult or discuss with the union does not suffice.[1662] The employer's willingness to negotiate may be express – for example a written agreement conferring negotiating rights – or implied. The Court of Appeal has set out general principles that should be taken into account when deciding whether or not a trade union has been recognised.[1663] It ruled that recognition of a trade union for the purposes of collective bargaining is a serious step. Therefore, it should not be held as established unless there is "clear and unequivocal evidence of either an express agreement, or conduct from which recognition should be inferred". The Court of Appeal noted that recognition for the purposes of collective bargaining includes a positive decision to bargain on one or more bargaining topics. This means that "partial recognition" is possible. Finally, it derives from the ruling that recognition requires mutuality: the employer should acknowledge the role of the union to which the latter assents.[1664]

It goes without saying that express recognition is easier to establish than implied recognition. The Employment Tribunal ruled that recognition implies agreement, which involves consent. It continued that where there is neither a written recognition agreement nor an express oral agreement, it suffices that the established facts are clear and unequivocal and give rise to the clear inference that the employers have recognised the union. It then held that this normally involves "conduct over a period of time and the longer that state of facts has existed the easier it is to reach a conclusion that the employers have recognised the union".[1665] Mere union rights to represent employees under

1661 Incomes Data Services Ltd., *Trade Unions*, page 94.

1662 Incomes Data Services Ltd., *Trade Unions*, page 184.

1663 Court of Appeal, July 1978, ICR 1978 pages 84 *ff*, *National Union of Gold, Silver & Allied Trades v Albury Brothers Ltd.*

1664 See also: Incomes Data Services Ltd., *Trade Unions*, page 185.

1665 Employment Appeal Tribunal, IRLR 1977 pages 147 *ff*, *National Union of Tailors and Garment Workers v Charles Ingram & Co Ltd.*

grievance or disciplinary procedures do not amount to voluntary implied recognition.[1666]

5.2.3.2 Statutory recognition

Statutory recognition is a formal and complex manner for trade unions to force the employer into recognition, should the employer not voluntarily do so. The procedure is described in depth in schedule A1 to the TULRA. In (very) broad terms, this procedure works as follows:

An independent trade union may request the employer to be recognised for a specific bargaining unit.[1667] This employer should have a minimum size of 21 employees.[1668] Should the employer and trade union be unable to reach an agreement on this request, the trade union may apply to the Central Arbitration Committee (CAC). In such a case, it requests the CAC to decide on (i) whether the proposed bargaining unit is appropriate and (ii) whether the union has the support of a majority of the employees constituting the appropriate bargaining unit.[1669] Upon acceptation of this application, the CAC decides – after it has given both parties a limited time to still reach an agreement themselves[1670] – whether the proposed bargaining unit is appropriate. If not, it decides which bargaining unit is appropriate.[1671]

If a majority of the employees in the bargaining unit is a member of the union applying for recognition, the CAC must declare the trade union involved as recognised as to conduct collective bargaining on behalf of the employees constituting the bargaining unit.[1672] This is different if any of three specific conditions apply. In that case there should be a secret ballot held in which

1666 See for example: Employment Appeal Tribunal, April and May 1981, ICR 1981 pages 644 *ff*, *Union of Shop, Distributive and Allied Workers v Sketchley Ltd.*

1667 Articles 4 and 6 of Schedule A1.

1668 Article 7 of Schedule A1.

1669 Articles 11 and 12 of Schedule A1.

1670 Schedule A1 also deals with semi-voluntary recognition, which briefly put means that the parties can reach an agreement on recognition themselves, during the statutory recognition process. There are specific rules on semi-voluntary recognition, mainly set out in articles 52 – 63 of Schedule A1. I will not discuss semi-voluntary recognition.

1671 In this respect, the CAC takes into account different circumstances, including (a) the need for the unit to be compatible with effective management, (b) the views of the employer and the union, and (c) existing national and local bargaining arrangements. For this procedure reference is made to articles 18 – 19B of Schedule A1.

1672 Article 22.2 of Schedule A1.

the employees constituting the bargaining unit are asked whether they want the trade union to conduct collective bargaining on their behalf.[1673] These conditions are: (i) the CAC rules that a ballot should be held in the interests of good industrial relations, (ii) a significant number of trade union members within the bargaining unit informs the CAC that they do not want the union to conduct collective bargaining on their behalf, and (iii) "membership evidence"[1674] is produced which brings doubts whether a significant number of trade union members within the bargaining unit want the union to conduct collective bargaining on their behalf – even if they do not openly admit it. A secret ballot should also be held if the CAC concludes that the number of workers in the bargaining unit who are union members fall short of a majority.[1675]

Should the union be supported by (i) a majority of the employees that voted in the ballot and (ii) at least 40% of the employees constituting the bargaining unit, the CAC must issue a declaration that the trade union involved is recognised as to conduct collective bargaining on behalf of the employees constituting the bargaining unit.[1676] If the result is otherwise, the CAC must state that the union is not entitled to be recognised.

It should be noted that collective bargaining for the purposes of Schedule A1 is defined narrower than the definition of collective bargaining in the TULRA. For the purposes of Schedule A1, collective bargaining relates only to negotiations concerning pay, hours and holidays, unless the parties involved choose to define collective bargaining differently.[1677]

5.2.3.3 Derecognition

Employers can withdraw from a voluntary (non-statutory) recognition agreement at any time, provided that the agreement is not legally binding.[1678] By withdrawing voluntary recognition, the employer escapes from future

1673 Article 22.3 of Schedule A1.

1674 Membership evidence is (a) evidence about the circumstances in which union members became member and (b) evidence about the length of time for which union members have been members, in case where the CAC is satisfied that such evidence should be taken into account. See article 22.5 of Schedule A1.

1675 Article 23 of Schedule A1.

1676 Article 29.2 of Schedule A1.

1677 Articles 3.3 and 3.4 of Schedule A1.

1678 See for example: House of Lords October, November 1994 and March 1995, ICR 1995 pages 406 *ff*, *Associated Newspapers Ltd. v Wilson; Associated British Ports v Palmer and others*. See also Incomes Data Services Ltd., *Trade Unions*, page 188.

statutory obligations towards a recognised trade union. The employer, however, does not escape from such current or past obligations.[1679]

Derecognition of statutory recognition is more complex. Basically, there are three statutory derecognition procedures, all set out in detail in Schedule A1. First, there is the procedure in which the employer wishes the trade union recognition to end, as the number of employees it employs has fallen under 21.[1680] Second, there is the procedure in which either the employer or the employees wish the recognition to end on the grounds that there now is only a minority support for the trade union within the bargaining unit.[1681] This procedure is a mirror-image of the recognition procedure, and normally leads to a secret ballot. Should the employer or employees asking for derecognition of the trade union be supported by (i) a majority of the employees that voted in the ballot and (ii) at least 40% of the employees constituting the bargaining unit, the trade union will be derecognised. Finally, the employer can start a procedure requesting derecognition of the trade union that was "automatically" recognised – that is, recognised without a ballot, since a majority of the employees of the relevant bargaining unit was a member of the trade union – on the ground that fewer than half of the employees in the bargaining unit now belong to the union and there is now only minority support for that union.[1682] Basically, if it is established that indeed fewer than half of the employees in the bargaining unit is a trade union member, the trade union will be derecognised should there also be a minority support for the trade union. In order to establish the latter, a similar derecognition procedure as mentioned above (second derecognition procedure) will be followed.

5.3 Employers' confederations and separate employers' associations

The definition of "employers' association" is closely linked to that of trade union. In brief, an "employers' association" means pursuant to article 122 TULRA a temporary or permanent organisation which consists wholly or mainly of employers and whose principal purposes include the regulation of relations between employers and employees or trade unions. A confederation of employers' associations is also considered an employers' association, provided that its main purposes include either the conduct of industrial relations or the

1679 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division NI Labour Relations, page NI/179.

1680 Articles 99 – 103 of Schedule A1.

1681 Articles 104 – 121 of Schedule A1.

1682 Articles 122 – 133 of Schedule A1.

regulation of relations between its members. Finally, employers' associations include combinations of employers and employers' associations.

Given this definition, the elements (i) organisation, (ii) existing of employers for (iii) the purposes of the regulation of relations between employees and employers are of relevance. These elements are, given the explanation given in the context of trade unions, rather self-explanatory. It should be noted that on the question which degree of stability and structure is necessary in order to qualify as an organisation, the demands seem a bit lighter for an employers' association than for a trade union.[1683]

Like a trade union, also an employers' association may, if it so wishes, be listed (article 124 TULRA). This will attribute the employers' association some additional rights.[1684] But unlike a trade union, an employers' association may also register under the Companies Act. It may therefore choose to either be incorporated or not (article 127 TULRA). Should it remain unincorporated, it is nevertheless invested with the same degree of legal personality as a trade union (see above).[1685]

There are about 160 employers' associations in the United Kingdom. Typically, employers see the association as a source of support and encouragement, but the existence of it is less vital to an employer than a trade union is to an employee. Consequently, the employers' association has normally a looser formation than a trade union.[1686]

An important employers' association worth mentioning is the Confederation of British Industry, which more or less parallels TUC. This confederation represents large companies in the private sector and is regarded by the government as its main interlocutor with business. Like TUC, the Confederation of British Industry has no mandate to collectively bargain and bind its affiliates. More in general, most associations only offer advice to members, and only a few actually bargain.[1687]

1683 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division M Trade Unions, pages M/7A and M/7B.

1684 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division M Trade Unions, page M/32.

1685 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division M Trade Unions, page M/18.

1686 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division M Trade Unions, pages M/1 and M/2.

1687 P. Davies and M. Freedland, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report United Kingdom*, pages 35 *ff*.

5.4 The employers

The employers also play a role in the collective bargaining process, as they are entitled to conclude collective labour agreements.

6. The negotiation process / conclusion of a collective labour agreement

Typically, there are a number of steps taken to conclude a collective labour agreement. These steps are normally set out in an agreement on bargaining procedures. In Britain, it is very common for an employer to agree on such bargaining procedures with a trade union (after having recognised this union for collective bargaining purposes).[1688] These voluntary procedural agreements normally contain the following elements:[1689]

i. a definition of the area in which the union's role is acknowledged (which group of employees, at which level (national, group or plant level), at which locations etc.);
ii. the issues that are subject to negotiation;
iii. an identification of the steps by which the agreement is to be sought; and
iv. an identification of the steps to be taken were there a failure to agree (it is good practice to agree that industrial action will not take place until all stages of the negotiation procedure have been exhausted).[1690]

In the case of statutory recognition the employer and (recognised) trade union will also have to agree upon a method of collective bargaining, unless they jointly choose not to do so. The legislator intended this method of collective bargaining to resemble the above-mentioned "standard" voluntary agreement.[1691] The employer and trade union first get the opportunity to voluntarily agree on the method of bargaining. If they succeed, the status of the agreement reached is the same of the statutory status of any other collective labour agreement. This means – as will be set out in section 7.1 below – that such voluntary procedural agreement is solely binding in

1688 See information on collective bargaining on the website from the Advisory, Conciliation and Arbitration Service (ACAS) on collective bargaining: www.acas.org.uk.

1689 Incomes Data Services Ltd., *Trade Unions*, page 124.

1690 See information on collective bargaining on the website from ACAS on collective bargaining.

1691 Incomes Data Services Ltd., *Trade Unions*, page 124.

honour.[1692] Consequently, there are no legal remedies if either party breaches the voluntary procedural agreement, save the one stated below.

If, after statutory recognition, (i) a voluntary, agreed-on procedural agreement is not carried out or if (ii) the parties involved do not succeed in reaching a procedural agreement, they may apply to the CAC for assistance.[1693] The CAC will help the parties to reach a suitable (new or adjusted) agreement on bargaining procedures. If the parties fail to reach such an agreement, the CAC will impose a method of collective bargaining upon the parties.[1694] This method of bargaining takes effect as a binding contract, unless the parties involved agree that they do not consider it legally binding.[1695] Should either the employer or the trade union depart from the (legally binding) bargaining procedure that is imposed by the CAC, the other party may ask the court for an order for specific performance. By law this is the only remedy possible upon breach of an enforceable bargaining procedure imposed by the CAC.[1696]

These "methods of collective bargaining" identify the steps to be taken in order to conclude a collective labour agreement. The actual bargaining is often done by so-called shop stewards, provided that the agreement concerns a workplace-level agreement. Shop stewards are employees of the employer who (voluntarily) act as representative of the union in the plant. The roles of the shop steward include bargaining and representing union members in the workplace.[1697] Shop stewards are nowadays, as opposed to in the past, highly dependent on the trade unions. They not only depend on full time trade union officials, but a trade union can also replace them. Furthermore, the trade union officials need to approve wage agreements negotiated by shop stewards.[1698]

Shop stewards are normally well aware of the situation at the employer with whom they bargain. Still, recognised trade unions have more possibilities to retrieve information for bargaining purposes; they have the right in relation

1692 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division NI Labour Relations, page NI/289.

1693 Articles 30.3, 32 and 58.3 of Schedule A1.

1694 Articles 31.3 and 63.2 of Schedule A1.

1695 Articles 31.4 and 31.5 of Schedule A1.

1696 Article 31.6 of Schedule A1.

1697 P. Davies and M. Freedland, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report United Kingdom*, page 29.

1698 P. Davies and M. Freedland, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report United Kingdom*, paged 31 and 62.

to the employer to disclosure of information. This concerns all information relating to the employer's undertaking (i) without which the trade union would be materially impeded in carrying on collective bargaining with the employer, and (ii) which would be in accordance with "good industrial relations practice" for the employer to disclose in respect of the collective bargaining (article 181.2 TULRA).

Assisted by these procedures, most negotiations are settled between the parties involved.[1699] Should, however, the negotiations break down without a settlement having been reached, the parties involved may turn to the Advisory, Conciliation and Arbitration Service (ACAS). Often the provision to request assistance from ACAS is even set out in the negotiating agreement. ACAS is a service governed by a council comprised of leading figures from business, unions, independent sectors to academics and has the statutory duty to promote the improvement of industrial relations (article 209 TULRA). It may provide assistance to the parties involved in bargaining in order for them to come to an agreement.[1700]

This possible assistance to reach a collective labour agreement notwithstanding, it is of course not a necessity that such an agreement is actually reached. After all, an employer is neither obliged to enter into negotiations nor to conclude a collective labour agreement.[1701] Not entering into a collective labour agreement while a legally binding bargaining procedure is imposed by the CAC may, however, limit the employer's entitlement to adjust the employment conditions for the workers in a bargaining unit to which the bargaining procedure applies. The standard CAC bargaining procedure states that the purpose of the procedure agreement is to "specify a method by which the employer and the union conduct collective bargaining concerning the pay, hours and holidays of the workers comprising the bargaining unit or any section thereof".[1702] It may be argued – and it has – that it constitutes a breach of contract and/or statutory duty for the employer to engage in any individual bargaining with its employees included in the bargaining unit on any of the items pay, hours and holidays (or anything else covered by the

1699 See information on collective bargaining on the website from ACAS on collective bargaining.

1700 See information on collective bargaining on the website from ACAS on collective bargaining.

1701 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division NI Labour Relations, page NI/375.

1702 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division NI Labour Relations, page NI/289.

imposed procedure).[1703] This may be an important incentive for the employer to indeed agree on a collective labour agreement.

Trade unions may have a consultative ballot amongst their members prior to entering into a collective agreement with the employer. This, however, is not a legal necessity and depends on the trade union's constitution. There are only few topics on which ballots are mandatory by law, not including the conclusion of a collective labour agreement.[1704]

Assuming that parties are capable of entering into a collective agreement, it should be noted that there are no registration obligations. The collective labour agreement immediately has effects, effects which will be discussed in section 7 below.

7. The effects of the collective labour agreement

After the social partners entered into a (valid) collective labour agreement, its consequences should be assessed. Again, it should be established (i) to whom the collective labour agreement applies, (ii) which effects such an application has, and (iii) how the parties involved can enforce their rights. These questions are answered for the standard 4 scenarios, that will be discussed in sections 7.1 through 7.4. Section 7.5 sets out which other means of enforcement are in place in case of a breach of the collective labour agreement. Section 7.6 describes a "special" consequence the collective labour agreement has: it may set aside specific statutory provisions. Section 7.7 focuses on the term and termination of collective labour agreements and section 7.8 discusses the collective labour agreement's possible after-effects. Finally, section 7.9 focuses on the role of alternative dispute resolution in British collective bargaining.

7.1 Scenario 1

As noted in section 4.1 above, an "agreement" as referred to in the definition of collective (labour) agreement, is not necessarily synonymous with the term "contract". The rationale behind this is, as said, that a contract is an agreement between parties that is intended to be legally binding, while this is not normally the case with a collective labour agreement. The main rule in British law is that collective employment agreements are not enforceable

1703 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division NI Labour Relations, page NI/289.

1704 The issues which need by law to be balloted on are: merger, political objects, leadership and industrial action. B. Perrins, *Harvey on Industrial Relations and employment Law*, Division M Trade Unions, page M/288.

and must be considered a mere gentleman's agreement. This is made clear in article 179.1 TULRA, which states that a collective labour agreement is "conclusively presumed not to have been intended by the parties to be a legally enforceable contract".

This was already the case under common law (without statutory intervention). In the leading *Ford* case it was ruled that a collective labour agreement is as a rule not legally enforceable, as a result of the contracting parties' lack of intention to create legal obligations.[1705] This was equally found in the report of the aforementioned (section 2 above) Royal Commission on trade unions and employers' associations, chaired by Lord Donovan. This Commission stated:[1706]

> In this country collective agreements are not legally binding contracts. This is not because the law says they are not contracts or that the parties to them may not give them the force of contracts. (…) It is due to the intention of the parties themselves. They do not intend to make a legally binding contract, and without both parties intending to be legally bound there can be no contract in the legal sense.

This common law rule is, as just mentioned, currently set out in article 179.1 TULRA. This article continues and states that a collective labour agreement is only binding should the contracting parties have concluded this agreement (i) in writing while it (ii) contains "a provision which (however expressed) states that the parties intend that the agreement shall be a legally binding contract". If a collective agreement satisfies these requirements it shall, pursuant to article 179.2 TULRA, conclusively presumed to have been intended a legally enforceable contract. The contracting parties may also stipulate that only a part of the collective labour agreement is legally enforceable (179.3 TULRA). It should be noted that it is very rare in practice for a collective labour agreement to contain a statement indicating that it is legally enforceable.[1707] Or, as put by Bercusson: "in the UK, collective agreements are rarely, if ever, legally binding".[1708]

1705 Queens Bench Division, All England Law Reports 1969 pages 481 *ff, Ford Motor Co Ltd. v Amalgamated Union of Engineering and Foundry Workers and others*.

1706 Royal Commission on trade Unions and Employers' Associations 1965 – 1968, Report presented to Parliament by Command of Her Majesty June 1968, paragraph 470.

1707 G.S. Morris and T.J. Archer, *Trade Unions, Employers and the Law*, page 189.

1708 B. Bercusson and B. Ryan, *The British case: before and after the decline of collective wage formation*, page 56.

British Courts seem to be reluctant to hold a collective agreement legally enforceable. The word "binding" in a collective employment agreement, for example, was held insufficient to rule that the parties meant the collective agreement to be legally enforceable. The court considered that binding could very well refer to binding in honour instead of binding by law.[1709]

As collective labour agreements are, apart from rare exceptions, not binding upon the signatory parties, there is no remedy by law if one of the parties fails to comply with the collective labour agreement. The ultimate sanction for a breach of the collective labour agreement is industrial action.[1710] If, in exceptional circumstances, a collective labour agreement is held legally enforceable, the aggrieved party may seek whatever remedy it finds appropriate – specific performance, injunction or damages.[1711] In that respect it should also be noted that breach of contract claims against trade unions are not limited as to the amount that can be recovered,[1712] as opposed to most proceedings in tort (article 22 TULRA).

7.2 Scenario 2

The bound employees cannot enforce the collective labour agreement as against the bound employer, because these employees are not a party to the collective labour agreement.[1713] This argument equally applies the other way around: the employer may not enforce the collective agreement as against his employees, as these employees are not a party to this agreement. Furthermore, neither common law nor TULRA awards direct normative effect to collective labour agreements. As a consequence, the collective labour agreement does not have a direct effect in the individual employment agreement of the bound employer and the bound employee.

Nevertheless, terms of the collective labour agreement can be incorporated into the individual employment contract. This is the case should the individual employer and employee agree that the terms of the collective

1709 High Court, May and June 1986, ICR 1986 pages 736 *ff*, *National Coal Board v National Union of Mineworkers and others*.

1710 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division NII Industrial Actions, page NII/437.

1711 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division NI Labour Relations, page NI/289.

1712 Incomes Data Services Ltd., *Trade Unions*, page 10.

1713 Incomes Data Services Ltd., *Trade Unions*, page 241.

labour agreement are to form part of the employment contract.[1714] Therefore, it is in the hands of the employer and the employee to decide whether in their relation the collective labour agreement applies. Obviously, whether or not to apply a specific collective labour agreement in practice also depends on whether the employee is part of the bargaining unit for which the collective labour agreement was drafted in the first place. After all, the social partners tend to agree on the proper bargaining unit first, either voluntary or imposed by the CAC, before concluding a collective labour agreement for that unit. However, decisive is the mere incorporation of the terms of the collective labour agreement into the individual employment contract.

7.2.1 Incorporation of the collective labour agreement into the individual employment contract

There are three methods on which the employer and individual employee can incorporate the relevant terms of the collective labour agreement: (i) express incorporation, (ii) implied incorporation, and (iii) incorporation by way of agency.[1715]

Express incorporation of a collective labour agreement occurs when the individual employment contract stipulates that (parts of) the contract is (are) regulated by a collective labour agreement. The individual employment contract may refer to the collective labour agreement "as amended from time to time" or "for the time being in force".[1716] Whether or not a particular term of a collective labour agreement is incorporated by such express incorporation is a matter of law. A mere mentioning of a collective labour agreement does not constitute "express incorporation".[1717]

Implied incorporation is obviously more difficult to establish, as there must be some form of implied agreement between the employer and the individual employee to be bound by the terms of the collective labour agreement; there must be a recognisable contractual intent between the individual employee and his employer.[1718] The courts tend to look at the conduct of the parties and establish whether that suggests that they intended the terms of the collective

1714 J. Gaymer, *The Employment Relationship*, page 201.

1715 Incomes Data Services Ltd., *Trade Unions*, page 241.

1716 J. Gaymer, *The Employment Relationship*, page 201.

1717 Employment Appeal Tribunal, April 1979, ICR 1979 pages 713 *ff*, *Stewart v Graig Shipping Co Ltd.*

1718 High Court, Queen's Bench Division, IRLR 1991 pages 286 *ff*, *Alexander and others v Standard Telephones & Cables Ltd (No.2)*.

labour agreement to be incorporated. Courts also look for a collective custom or practice that terms are incorporated.[1719] It should be noted that the mere fact that an employee agreed to the incorporation of terms of a previous collective labour agreement, does not suggest that he also agrees on any changes thereof. If the employee in such a situation challenges the incorporation of terms deriving from an adjusted collective labour agreement, these new terms are not to be considered implicitly incorporated.[1720]

Finally, at least from a theoretical point of view, terms of the collective labour agreement can be incorporated through agency. In that case it should be argued that the union negotiated terms on behalf or their members, binding these members to the agreement itself. Agency and collective labour law, however, are not easily combined in Great Britain. Agency means an authorisation from the principal to the agent for the latter to negotiate and agree on an agreement on behalf of the first. Members should therefore authorise the trade union to agree on employment terms on their behalf. The Employment Appeal Tribunal made clear that trade union membership itself is insufficient to infer an agency relationship.[1721] More in general, it is argued that agency is not likely inferred where the union negotiates a collective agreement which will affect a large number of its members.[1722]

The above states *how* terms of a collective labour agreement can be incorporated into the individual employment contract, but let us now turn to exactly *which* terms of the collective labour agreement can be incorporated into the individual employment contract.

7.2.2 Which terms can be incorporated into the individual employment contract?

As explained in section 4.2 above, in Britain there is a differentiation between terms of a collective nature (comparable with obligatory provisions) and terms of an individual nature (comparable with normative provisions). Only these latter terms can be incorporated into the individual employment contract. There is no absolute consistency as to which clauses are of a collective and

1719 Incomes Data Services Ltd., *Trade Unions*, page 250.

1720 Industrial Tribunal, IRLR 1974 pages 131 *ff*, *Singh v British Steel Corporation*.

1721 Employment Appeal Tribunal, IRLR pages 351 *ff*, *The Burton Group Ltd v Smith*.

1722 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division NI Labour Relations, page NI/455.

which are of an individual nature. Examples showing this are the following Court cases:[1723]

- recognition agreements cannot be incorporated;[1724]
- facilities agreements (granting union officials the use of offices etc.) are arguably incorporated in a specific shop steward's contract;[1725]
- collective disputes resolution mechanisms are not to be incorporated;[1726]
- redundancy agreements meant for long-term policy are not to be incorporated;[1727]
- redundancy procedures agreed on in one specific redundancy situation, however, can be incorporated.[1728]

Many terms, however, are easier to qualify as "terms of an individual nature". Briefly put, these concern terms relating to the relationship between the employer and the employee such as pay, hours, holiday etc. These terms are appropriate for incorporation. Terms relating to the relationship between the employer and the trade union, such as recognition, collective disputes resolution mechanisms, and (arguably) no-strike agreements are terms of a collective nature, and consequently not suitable for incorporation.[1729]

And with that last topic – the no-strike agreement – a relatively sensitive subject is touched upon. The view on whether or not such an agreement may be incorporated differs to quite an extent.[1730] That gave reason for the legislator to intervene, which it did by drafting article 180.1 TULRA. This article states that a term in a collective labour agreement restricting the right

1723 These examples derive from B. Perrins, *Harvey on Industrial Relations and employment Law*, Division NI Labour Relations, page NI/456.

1724 High Court, All England Law Reports 1970 pages 712 *ff, Gallagher and another v Post Office*.

1725 Court of Appeal, IRLR 1985 pages 252 *ff*, *City and Hackney Health Authority v National Union of Public Employees and others*.

1726 High Court, May and June 1986, ICR 1986 pages 736 *ff*, *National Coal Board v National Union of Mineworkers and others*.

1727 See for example: Court of Appeal, IRLR 2005 pages 40 *ff*, *Kaur v MG Rover Group Ltd*.

1728 See for example: Court of Session, IRLR 1998 pages 64 *ff*, *Anderson v Pringle of Scotland Ltd*.

1729 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division NI Labour Relations, page NI/455.

1730 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division NI Labour Relations, pages NI/457 and NI/458.

for the employees to strike or engage in other industrial action will not form part of the individual employment contract. That is only different in the case that the requirements of article 180.2 TULRA are satisfied, in which case the term may be incorporated expressly or impliedly in the individual employment contract. That provision stipulates that the collective labour agreement (i) must be in writing, (ii) containing a provision expressly stating that those terms shall or may be incorporated in such a contract, (iii) is reasonably accessible at his place of work to the employee to whom it applies and is available for him to consult during working hours, and (iv) is one where each trade union which is party to the agreement is an independent trade union.

This section and the one above deal with (i) how to incorporate the terms of a collective labour agreement into an individual employment contract and (ii) which terms are to be incorporated. These both matters were also dealt with in clear wording in the 1991 case *Alexander v Standard Telephones and Cables Ltd (No 2)*. The court noted:[1731]

> The principles to be applied in determining whether a part of a collective agreement is incorporated into individual contracts of employment can be summarised as follows: the relevant contract is that between the individual employee and his employer; it is the contractual intention of those two parties which must be ascertained. In so far as that intention is to be found in a written document, that document must be construed on ordinary contractual principles. In so far as there is no such document or that document is not complete or conclusive, their contractual intention has to be ascertained by inference from other available material including collective agreements. The fact that another document is not itself contractual does not prevent it from being incorporated into the contract if that intention is shown as between the employer and the individual employee. Where a document is expressly incorporated by general words it is still necessary to consider, in conjunction with the words of incorporation, whether any particular part of that document is apt to be a term of the contract; if it is inapt, the correct construction of the contract may be that it is not a term of the contract. Where it is not a case of express incorporation, but a matter of inferring the contractual intent, the character of the document and the relevant part of it and whether it is apt to form part of the individual contract is central to the decision whether or not the inference should be drawn.

1731 High Court, Queen's Bench Division, IRLR 1991 pages 286 *ff*, *Alexander and others v Standard Telephones & Cables Ltd (No.2)*.

7.2.3 What are the legal consequences of incorporation?

As can be inferred from the quote above, the mere fact that a collective labour agreement in itself is not binding by law, does not mean that its incorporation is not binding by law either, as, in fact, it is.[1732] If an individual employment contract incorporates a collective labour agreement as is currently in force between the employer and the relevant trade union, an alteration of that collective labour agreement will directly vary the terms of the individual employment contract accordingly.[1733] This is the case, regardless of whether the individual employee terminates his trade union membership due to the new collective labour agreement and regardless of whether it constitutes an improvement or deterioration of the applying employment conditions. A good example in this respect is the ruling of the Employment Appeal Tribunal in the case *Higgins v Cables Montague Contracts Ltd*.[1734] The employers reached a collective agreement with the unions that arranged for a 20% wage cut for all employees. The employee Higgins terminated his trade union membership and did not accept this wage reduction. The Employment Appeal Tribunal upheld the decision made in first instance, which ruled that since the collective labour agreement was expressly incorporated in the employment contract, the terms of this new agreement formed part of this employment contract. Consequently, the rate of Higgins' salary had been reduced by 20% as of the date that the collective agreement took effect, regardless of the fact that he terminated his union membership.

If a collective labour agreement that has been incorporated in an individual employment contract awards the employer the power to unilaterally change certain employment conditions, this indeed has the effect that the employer has the right to change said conditions without obtaining the employee's consent.[1735] Incorporation of the terms of collective labour agreement therefore has strong effects.

1732 See also: Court of Appeal, December 1982, ICR 1983 pages 351 *ff*, *Robertson and Jackson v British Gas Corporation*.

1733 J. Gaymer, *The Employment Relationship*, page 200.

1734 Employment Appeal Tribunal, January 1995, *Higgins v Cables Montague Contracts Ltd*, case number: [1995] UKEAT 564_93_1201, to be found on http://alpha.bailii.org/uk/cases/UKEAT/1995/564_93_ 1201.html.

1735 Employment Appeal Tribunal, IRLR 1996 pages 516 *ff*, *Airlie and others v City of Edinburgh District Council*. This case concerned the unilateral review and variation of a bonus scheme, as permitted in the collective labour agreement that was incorporated into the individual contracts of employment.

7.2.4 Deviation from the collective labour agreement in the individual employment agreement

The fact that a collective labour agreements applies, does not exclude the possibility for an employer and employee to agree on deviating employment conditions[1736] (with the possible exception that if a bargaining method is imposed by the CAC, that may preclude the employer and employee from validly agreeing on individual employment terms; reference is made to section 6 above). This should, however, be done freely. Article 145B TULRA prohibits the employer to make an offer to the employee who is also a member of the trade union in order to induce this employee that his employment terms will not (or will no longer) be determined by a collective labour agreement negotiated by the union.

Given the fact that, in principle, a collective labour agreement is, in itself, not binding by law and the employer and individual employee can normally deviate from its content by individual employment contract, there it is not much use to differentiate between provisions of a minimum, maximum or fixed nature, as is the rule in the other countries that were researched. British statute also does not give reason for such a distinction.

7.2.5 Enforcement

The bound employees cannot enforce the collective labour agreement as against the bound employer. Likewise, the bound employer cannot enforce the collective labour agreement as against the bound employees. Moreover, the content of that collective agreement does not have direct normative effect. Consequently, there are no legal actions available should the collective labour agreement not be applied to the individual employment agreement of the bound employer and the bound employee. However, if the (individual) terms of the collective labour agreement have been incorporated in the employment contract, the employees and the employer must oblige these terms on pain of being in breach of contract.[1737] The aggrieved party can subsequently under common law claim damages and/or specific performance following this breach of contract.[1738]

1736 Incomes Data Services Ltd., *Trade Unions*, page 253.

1737 G.S. Morris and T.J. Archer, *Trade Unions, Employers and the Law*, page 63.

1738 See for breach of contract: Incomes Data Services Ltd., *Contracts of Employment*, London, August 2001, pages 277 *ff*.

If a bound employee is induced by his employer that his employment terms will not (or will no longer) be determined by a collective labour agreement negotiated by the union, as mentioned above, the employee may present a complaint to the Employment Tribunal (article 145B.5 TULRA). If the complaint is well-founded, the Tribunal shall award £2,600 to this employee (article 145E TULRA).

7.3 Scenario 3

As a collective labour agreement has no direct normative effect even in case both the employer and employee involved are bound by that agreement, it is hardly surprising that such an effect is equally lacking in case just one of these parties is bound to the collective labour agreement. That does not preclude, however, that an employer may just as well incorporate the terms of the collective labour agreement into the individual employment contract of an employee who is not a union member.[1739] In fact, it is irrelevant whether the employee involved is a union member or not, for the terms of the collective labour agreement to apply to the employment contract by means of incorporation.[1740] Moreover, the employer who is not bound by the collective labour agreement may still apply its content by means of incorporation. The Employment Appeal Tribunal ruled that an employer may withdraw from an industry level collective labour agreement, as a consequence whereof it was not bound by that agreement anymore. However, such a withdrawal did not automatically end the incorporation of the terms of the collective labour agreement in the individual employment contracts. The individual employment conditions remained varied by the changing collective labour agreement. In other words, the circumstance that the employer was not bound by the collective labour agreement anymore, did not alter the fact that the contents of the collective labour agreement remained applicable to the individual employment contracts (until the employer would negotiate with his employees variations of the individual employment contracts).[1741]

1739 It should also be noted that membership of the employer of an employer's association is in itself not sufficient to incorporate a collective agreement into an individual contract in case there is no obligation on employers' association's members to introduce particular terms of conditions into the contracts of employees. See J. Gaymer, *The Employment Relationship*, page 205.

1740 Court of Appeal, December 1982, ICR 1983 pages 351 *ff*, *Robertson and Jackson v British Gas Corporation*.

1741 Employment Appeal Tribunal, IRLR 1997 pages 153 *ff*, *Whent and others v T Cartledge Ltd*.

Given the above, the position of the employer and employee in scenario 3 does not really differ from their position in scenario 2. In both instances, the collective labour agreement as such has no influence on their individual relationship. In both instances that is different should the terms of the collective labour agreement be incorporated into the individual employment contract. True, the incorporation of these terms may occur by means of agency, which is more likely to occur if the employee is bound by the collective labour agreement. But then again, this type of incorporation is rarely applied. There is, therefore, no material difference in position between the bound employee and the employee who is not bound when it comes to collective labour agreements.

Having said this, there might still be some sort of difference between these two. It may be that union members are supposed to know the content of a collective labour agreement sooner than non members ought to know this. In the case *Gray Dunn & Co Ltd v Edwards* the Employment Appeal Tribunal held that trade union members are supposed to know the contents of a disciplinary code agreed on between the union and the employer.[1742] This disciplinary code stipulated that an employee who was under the influence of alcohol at work could be summarily dismissed. The employee and trade union member Edwards was indeed dismissed after being found intoxicated at work. He argued he that he did not know that this could lead to a summary dismissal, as he was unaware of the content of the disciplinary code. The Tribunal held in that respect:

> Where employers negotiate a detailed agreement with a recognised union, they are entitled to assume that all employees who are members of the union know of and are bound by its provisions. There could be no stability in industrial relations if this were not so.

These sentences were solely directed at union members. It is not clear whether the same could also apply to an employee who is not a member of the trade union. In any event, in a more recent case the Employment Appeal Tribunal ruled that the dismissal of an employee was unfair, even though it was in accordance with a management-union agreement stipulating that employees too inebriated to report for work after a staff Christmas party would be dismissed.[1743] The case did not make clear whether the individual was a trade union member or not. It was argued by the Employment Appeal Tribunal

1742 Employment Appeal Tribunal, IRLR 1980 pages 23 *ff*, *Gray Dunn & CO Ltd v Edwards*.

1743 Employment Appeal Tribunal, IRLR 1984 pages 379 *ff*, *W Brooks & Son v Skinner*.

that this case was different than the Gray Dunn case, because the collective agreement at stake only covered a single occasion (the Christmas party) and it did not relate to conduct that any reasonable employee would see as likely to lead to summary dismissal (the employer had not taken disciplinary measures in previous years in the same situation). It is therefore not entirely clear whether employees who are a member of the contracting trade union ought to know the contents of a collective labour agreement sooner than employees who are not.

7.4 Scenario 4

Collective labour agreements do in principle only bind in honour. That means that, should a term in the collective labour agreement relate to collectivities, that term is not legally binding. Such terms will normally not be considered terms with an individual nature, which can be incorporated in an individual employment agreement upon which they are awarded a binding force. In other words, terms in a collective agreement relating to collectivities do in principle not bind the subjects involved.

In section 4.2 it is already noted that provisions on funds are in principle not considered (a part of) a collective labour agreement as referred to in article 178 TULRA, since the subject matter does not concern a statutory bargaining topic. Such agreements are therefore "extra-statutory" agreements, which are subject to common law. This means that the agreements are subject to the rules as set forth in the already mentioned Ford case (section 7.1).[1744] In this case it was decided that such agreements are in principle not legally enforceable, unless the specific circumstances demonstrate a contrary intention of the contracting parties involved. To summarise: the employers and employees falling within the scope of application of the collective labour agreement are in principle not legally bound as against collectivities.

7.5 Other statutory means of enforcement

The above-mentioned scenarios discuss, amongst others, whether or not the parties whose rights are concerned are entitled to enforce these rights. The TULRA does not offer many alternatives for enforcement of collective labour agreements than already described above. The only important alternative that the TULRA does provide is the right to bring a matter to the CO instead of the court, should a union (allegedly) have violated rights of its members.

1744 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division NI Labour Relations, page NI/438.

A member, or a former member who was a member at the time of the alleged breach, may turn to the CO should he take the view that the trade union breached or threatens to breach its rules relating to specific matters. These matters concern (i) the appointment, election or removal of a person from office, (ii) disciplinary proceedings by the union, (iii) balloting of members on an issue other than industrial actions, (iv) the constitution or proceedings of an executive committee or decision-making meeting, and (v) specific matters specified by the secretary of State (article 109A TULRA). The CO would normally require the individual to use any internal complaints procedure in the union first to resolve the dispute (article 108B.1 TULRA). Furthermore, applying to the CO with a complaint on a breach of the union rules on the subjects mentioned above, bars the applicant's possibility to apply to the court on the same matter (article 108A.14 TULRA).

If the CO accepts the application, he shall make such enquiries as he sees fit and will hear both parties. He must reach a reasoned decision in 6 months, either making or refusing the declaration asked for (article 108B.2 TULRA). This declaration may be relied upon as if it were a declaration made by the court (article 108B.6 TULRA). The parties involved may appeal against this decision on questions of law (article 108C TULRA).

7.6 Special legal consequences of a collective labour agreement

Also Britain allows variation from specific acts by a collective labour agreement.[1745] This is for example the case with regard to the Working Time Regulation, The Road Transport Regulations, the Merchant Shipping Regulations, the Inland Waterways Regulations, the Sea Fishing Regulations, the Civil Aviation Regulations and the Fixed-term Regulations.[1746] Just like in other countries, collective labour agreements can therefore allow parties to arrange specific matters in the individual employment relationship which could not be arranged without that collective labour agreement.

1745 Or by a so-called "workforce agreement". Basically, such agreement must satisfy 5 conditions: (i) it must be in writing, (ii) it must have a limited duration not exceeding 5 years, (iii) it must cover all relevant employees, (iv) it must be signed by duly elected representatives of the employees concerned (save an exception for small companies), and (v) before signing, the agreement must have been made available to the employees concerned, if necessary with a proper explanation. Reference is made to: B. Perrins, *Harvey on Industrial Relations and employment Law*, Division NI Labour Relations, page NI/461. As the workforce agreement does not qualify as a collective labour agreement, I will not discuss this type of agreement any further.

1746 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division NI Labour Relations, pages NI/462 – NI/464.

7.7 Term and termination

There are no requirements set out in statute with regard to the entrance into force, duration and termination of a collective labour agreement. Consequently, the parties to the collective labour agreement can freely arrange when this agreement enters into force and what its term is. In practice, collective labour agreements with retro-effect are agreed on.[1747]

Termination of a collective labour agreement is rather easy, as such an agreement is in principle not binding. Both parties therefore can withdraw from the agreement with immediate effect. In the case *Robertson and Jackson* this was put as follows:[1748] "It is true that collective agreements such as those in the present case create no legally enforceable obligations between the trade union and the employers. Either side can withdraw." The same was held true in the case *Whent and others v T Cartledge Ltd*.[1749] Even more explicit was the ruling of the High Court in the *National Coal Board* case. It ruled:[1750]

> If, as I have held, the 1946 Agreement is not legally enforceable, either party has always been free at any time to decline any longer to abide by its terms. To argue that the law will import into such an agreement a term allowing termination on reasonable notice seems to me plain nonsense.

As a consequence, any party may terminate the collective agreement at any time, without observing a notice period. This also holds true with regard to a voluntary non-statutory recognition agreement: the employer is entitled to withdraw from such an agreement at any time.[1751]

The above is different should the collective labour agreement be legally binding. In that case, the rules for termination as set out in the agreement itself should be observed. With regard to recognition it should be noted that the employer may only unilaterally terminate a legally binding recognition agreement imposed by the CAC, after the relevant period of three years has ended (article 56 of Schedule A1).

1747 See for example: House of Lords, February – April 1982, ICR 1982 pages 262 *ff*, *Universe Tankships Inc. of Monrovia v International Transport Workers Federation*.

1748 Court of Appeal, December 1982, ICR 1983 pages 351 *ff*, *Robertson and Jackson v British Gas Corporation*.

1749 Employment Appeal Tribunal, IRLR 1997 pages 153 *ff*, *Whent and others v T Cartledge Ltd*.

1750 High Court, May and June 1986, ICR 1986 pages 736 *ff*, *National Coal Board v National Union of Mineworkers and others*.

1751 Incomes Data Services Ltd., *Trade Unions*, page 188.

7.8 After-effects

The collective labour agreement can, as set out above, normally easily be terminated. The terms of the collective labour agreement that have been incorporated in the individual employment contract retain, however, their force even if the collective labour agreement itself is terminated (these terms have after-effects).[1752] This has been decided on several occasions in court. In *Gibbons v Associated British Ports*,[1753] for example, the employment contract incorporated the terms of collective agreements "for the time being in force". The collective agreement was terminated and the employer subsequently sought to reduce the wages of the employee Gibbons. According to the High Court this constituted a breach of contract. The terms governing pay had been incorporated into the employment contract and the termination of the collective agreement had no effect hereon. A similar ruling is in place with regard to an incentive bonus scheme.[1754] An important exception to this rule is if the collective agreement itself entitles the employer to unilaterally withdraw from any provision. In such a case the withdrawal also has direct effects on the individual employment agreement.[1755]

7.9 The role of alternative dispute resolution in collective bargaining

It is very common to arrange for (alternative) dispute resolution in a collective labour agreement in Great Britain. Nearly all collective labour agreements contain a clause to that effect.[1756] Often these clauses provide a basis for voluntary use of ACAS dispute-resolution processes. ACAS will first encourage the parties to settle the dispute by means of negotiation, prior to referring the parties to other means of dispute resolution, such as conciliation or arbitration. [1757]

1752 J. Gaymer, *The Employment Relationship*, page 202.

1753 High Court, Queen's Bench Division, IRLR 1985 pages 376 *ff*, *Gibbons v Associated British Ports*.

1754 Court of Appeal, December 1982, ICR 1983 pages 351 *ff*, *Robertson and Jackson v British Gas Corporation*.

1755 J. Gaymer, *The Employment Relationship*, page 206.

1756 P. Davies and M. Freedland, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report United Kingdom*, page 48.

1757 See L. Dickens, *EIRO Thematic Feature on Collective dispute Resolutions in an enlarged European Union – case of UK*. This report can be found on the EIRO-website.

8. Extending collective labour agreements

Unlike the situation in the Netherlands, Germany and Belgium, there are no mechanisms in place in Britain to extend a collective labour agreement. This used to be different. Briefly put, there were two important mechanisms to extend collective wage setting.

First, the so-called statutory wage councils played a role in British collective wage formation. Representatives of employees, employers and independent members made up these councils. The wage councils were empowered to adopt legally binding orders concerning terms and conditions of employment in less-organised sectors.[1758] Although this mechanism is not truly the same as extending collective labour agreements, it was an important means to set wages collectively.

Second, there used to be "fair wages" mechanisms in place. These mechanisms sought to extend terms of collective labour agreements to workers and employers who were not covered by them.[1759] The 1946 Fair Wages Resolution, for example, required government contractors to observe wages, hours and other conditions that were not less favourable than those applicable to the trade and industry in that district, based on terms agreed in collective bargaining or arbitration. This principle was also applied to other sectors, such as road haulage, public house-building, film-making, broadcasting and public transport.[1760] In addition to this, employers were obliged to respect "recognised terms and conditions" for their trade or industry in their district based on the 1959 Conditions of Employment Act. The 1975 Labour Government's Employment Protection Act also arranged that non-participants needed to oblige general levels of terms and conditions principally set by collective agreements.

The above-mentioned systems were all rescinded in time. As from 1983 the Fair Wages Resolutions lost their force. As a consequence, there was no statutory system in Britain anymore for extending the effects of collective labour agreements to those who did not wish to be bound by them.[1761] In

1758 B. Bercusson and B. Ryan, *The British case: before and after the decline of collective wage formation*, page 95.

1759 B. Bercusson and B. Ryan, *The British case: before and after the decline of collective wage formation*, page 53.

1760 B. Bercusson and B. Ryan, *The British case: before and after the decline of collective wage formation*, page 53.

1761 B. Bercusson and B. Ryan, *The British case: before and after the decline of collective wage formation*, page 55.

1993, the system of wage councils was also abolished altogether by the Trade Union Reform and Employment Rights Act.[1762]

9. The collective labour agreement and the reach of the social partners

9.1 What can the social partners regulate in a collective labour agreement?

Article 178 TULRA gives a quite clear scope of what the contracting parties can arrange in a collective agreement. After all, the bargaining topics are set out in this article and relate to:

(a) terms and conditions of employment, or the physical conditions in which any workers are required to work;
(b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;
(c) allocation of work or the duties of employment between workers or groups of workers;
(d) matters of discipline;
(e) a worker's membership or non-membership of a trade union;
(f) facilities for officials of trade unions; and
(g) machinery for negotiation or consultation, and other procedures, relating to any of the above matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in such negotiation or consultation or in the carrying out of such procedures.

In brief, the agreement must relate to: terms and conditions of employment and conditions of work; hiring, firing and suspension; demarcation; discipline; union membership; union recognition; facilities agreements; procedures and other machinery of collective bargaining.[1763] Within these broad limitations, the social partners may conclude collective labour agreements.

The approach in Britain on possible unwanted content of collective labour agreements was – and to a certain extent still is – rather simple: it is no use to render legally void a specific term in a collective labour agreement, as that

1762 B. Bercusson and B. Ryan, *The British case: before and after the decline of collective wage formation*, page 56.

1763 B. Perrins, *Harvey on Industrial Relations and employment Law*, Division NI Labour Relations, page NI/437.

term has no legal force to begin with.[1764] This, however, was not the approach of the European Court of Justice when it came to discrimination. It ruled that, although collective labour agreements in Britain are not enforceable, they do establish industrial standards. Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions[1765] requires that any discriminatory clause, even in a non-enforceable agreement, should be rendered inoperative, or be eliminated or amended by appropriate means.[1766] As a result of this ruling, the British legislator stated in several acts that a term in a collective labour agreement is rendered void if it provides for unlawful discrimination. Unlawful discrimination relates to: sex discrimination, race discrimination, disability discrimination, religious discrimination, and sexual orientation discrimination.[1767]

9.2 Collective labour agreements and representativity demands

Representativity plays a limited role in British collective bargaining. After all, there are no representativity demands in place to *entitle* a trade union to conclude a collective labour agreement. This is not overly surprising, as the collective labour agreement is not binding in itself. Only the terms that are incorporated into the individual employment agreement are binding by law.

Representativity does play a role in (statutory) recognition. As said in section 5 above, the employer must recognise the trade union which either has a majority of the employees in the relevant bargaining unit as its member, or which is supported by a majority of the employees that voted in a ballot and at least 40% of the employees constituting the bargaining unit. Moreover, only independent trade unions may apply for statutory recognitions, and such independent trade unions surpass, as a rule, company level, which may be considered a mild form of representativity. Consequently, a representative trade union can force an employer to recognise it.

1764 See for example High Court, May and June 1986, ICR 1986 pages 736 *ff*, *National Coal Board v National Union of Mineworkers and others*. The Court described as "plain nonsense" that the doctrine of frustration could apply to a non-enforceable agreement. See also B. Perrins, *Harvey on Industrial Relations and employment Law*, Division NI Labour Relations, page NI/453.

1765 OJ L 39 of 14 February 1976.

1766 European Court of Justice, 8 November 1983, C 165/82, *Commission of the European Communities v United Kingdom of Great Britain*.

1767 See, with reference to the several acts, B. Perrins, *Harvey on Industrial Relations and employment Law*, Division NI Labour Relations, pages NI/452 and NI/453.

9.3 Collective labour agreements and independence of trade unions

Many rights awarded to trade unions are made subject to them being independent. The independence verification of the CO is rather thorough. "Yellow" trade unions would normally not pass such a test. I refer to section 5 above.

10. Summary

10.1 Industrial relations: past and present

Industrial relations were rather turbulent in the British past. Moreover, they have been influenced by politics to quite an extent. The importance of collective agreements had its peak in the mid 1970s, to decline in more recent years. The estimated coverage of collective labour agreements was in those peak years about 76-78%, to drop to about 34% in 2005. Trade union density reached its top in 1978 with 53%, to fall to 29% in 2000.

Collective barging in Britain takes place at three levels: workplace, organisation, and industry. The focus lies very much on the first two levels. Sectoral level agreements have nearly disappeared from the private sector and are under pressure in the public sector.

10.2 The collective labour agreement

A collective labour agreement is an agreement or arrangement concluded between one or more trade unions and one or more employers' organisations or employers, relating to a fixed number of specific bargaining topics. These topics concern the relation between employers and employees as well as the rights and obligations of the contracting parties.

British law is detailed when it comes to categorising trade unions. The rights trade unions enjoy depend on the category they are in. Only specific organisations can qualify as trade unions. A trade union must (i) be an organisation, (ii) consisting wholly or mainly of workers and (iii) having as its principal purpose the regulation of relations between employers and employees. Genuine trade unions can apply for listing. Listed trade unions that are also independent may ask for a so-called certificate of independence. Only truly independent trade unions obtain such a certificate. These independent trade unions can, by law, if specific requirements are satisfied, be recognised vis-à-vis an employer for the purposes of collective bargaining. Being recognised is crucial for collective bargaining.

In Great Britain it is common to distinguish procedural from substantive collective labour agreements. British law also distinguishes between terms that are of an individual nature and those that are of a collective nature, as only the first type of terms can be incorporated into an individual employment contract. Terms of an individual nature concern the relationship between the employer and the individual employees and are comparable to terms that are described in other countries as normative provisions. Collective terms are intended to govern the relationship between the union and the employer and are comparable to terms that are described in other countries as obligatory provisions. Some terms in a British collective labour agreement could be compared with collective normative provisions. However, provisions on funds, which are normally considered important collective normative provisions in many countries, are in principle not part of a collective labour agreement in Britain.

10.3 The consequences of a collective labour agreement

Once a collective labour agreement is concluded, it should be established to whom it applies, what its consequences are and how the rights arising from it can be enforced.

10.3.1 The contracting parties

Collective labour agreements in Britain are in principle not enforceable and must be considered a mere gentleman's agreement. This is different if the contracting parties have concluded this agreement in writing while it contains a provision that states that the parties intend that the agreement shall be a legally binding contract. It is very rare in practice for a collective labour agreement to contain such a statement. As collective labour agreements are nearly always not binding upon the signatory parties, there is no remedy by law if one of the parties fails to comply with the collective labour agreement. The ultimate sanction for a breach of the collective labour agreement is industrial action. Should in very exceptional circumstances a collective labour agreement be held legally enforceable, the aggrieved party may seek whatever remedy it finds appropriate – specific performance, injunction or damages.

10.3.2 The members of the contracting associations

Neither common law nor TULRA awards direct normative effect to collective labour agreements. The terms of the collective labour agreement only apply in the relationship between the bound employer and the bound employee if they are incorporated into the individual employment contract. The individual

employer and employee should therefore agree that the terms of the collective labour agreement are to form part of the employment contract. There are three incorporation methods: express incorporation, implied incorporation, and incorporation by way of agency. This last method is rather theoretical. Not all terms can be incorporated into the individual employment contract; only terms with an individual nature can be incorporated. After being incorporated, the term forms part of the agreement and is legally binding. Variations to the collective labour agreement automatically vary the terms of employment, provided that the individual employment contract incorporates a collective labour agreement as is currently in force. The employer and employee may, however, freely decide to deviate from a term that is incorporated. There is, consequently, no relevant difference in Britain between provisions of a minimum, maximum or fixed nature. The bound employee can neither enforce the collective labour agreement as against the bound employer nor does the content of that collective agreement have direct normative effect. He can, however, enforce terms of collective labour agreements that are incorporated into his individual employment contract. The same applies to the employer. Upon breach of a contractual term, the aggrieved party can, under common law, claim damages and/or specific performance.

10.3.3 Members vs. non-members

An employer may incorporate the terms of the collective labour agreement into the individual employment contract of an employee, regardless of whether he is a union member or not. The employer who is not bound by the collective labour agreement may even apply its content by means of incorporation. There is in that respect no real difference between this scenario and the one mentioned above.

10.3.4 The collectivities

Should a term in the collective labour agreement relate to collectivities, that term is not legally binding. Many of these terms will normally not be considered terms with an individual nature, individual terms which can be incorporated into an individual employment agreement. Other terms, such as provisions on funds, are not even considered appropriate terms for a collective labour agreement, as the subject matter does not concern a statutory bargaining topic.

10.3.5 Special means of enforcement

Should a union (allegedly) have violated rights of its members, these members may bring this matter to the CO instead of to the court should they wish so. These matters should concern (i) the appointment, election or removal of a person from office, (ii) disciplinary proceedings by the union, (iii) balloting of members on an issue other than industrial actions, (iv) the constitution or proceedings of an executive committee or decision-making meeting, and (v) specific matters specified by the secretary of State. The declaration of the CO may be relied upon as if it were a declaration made by the court.

10.3.6 Deviation by collective labour agreement

Collective labour agreements in Great Britain can allow employers and employees to arrange specific matters in the individual employment relationship, which could, given specific legislation, not be arranged without a collective labour agreement giving that opportunity.

10.3.7 Term and termination

The contracting parties can freely establish the collective labour agreement's date of entrance into force and its term. They can terminate the non-enforceable collective labour agreement at any time, without observing a notice period. If the collective labour agreement would be legally binding, the rules for termination as set out in the agreement itself should be observed.

10.3.8 After-effects

After termination of the collective labour agreement, the terms of the collective labour agreement that have been incorporated in the individual employment contract retain their force. This is different if the collective agreement itself entitles the employer to unilaterally withdraw from any provision and the employer uses this power.

10.3.9 The role of alternative dispute resolution in collective bargaining

Nearly all collective labour agreements have introduced some sort of (alternative) dispute resolution mechanism. The organisation ACAS plays an especially important role in that respect. ACAS will first encourage the parties to settle the dispute by means of negotiation, prior to referring the parties to other means of dispute resolution, such as conciliation or arbitration.

10.4 Extending collective labour agreements

There are no mechanisms in Britain anymore to extend a collective labour agreement to those who do not wish to be bound by it.

10.5 The reach of the social partners

The content of the collective agreement must relate to: terms and conditions of employment and conditions of work; hiring, firing and suspension; demarcation; discipline; union membership; union recognition; facilities agreements; procedures and other machinery of collective bargaining. The approach on possible unwanted content of collective labour agreements was rather simple: it is no use to render legally void a specific term in a collective labour agreement, as that term has no legal force to begin with. Nevertheless, due to a decision of the European Court of Justice, the British legislator had to explicitly state that a term in a collective labour agreement is rendered void if it provides for unlawful discrimination, which it did in a number of acts.

Representativity plays only a limited role in British collective bargaining, as there are no representativity demands in place to entitle a trade union to conclude a collective labour agreement. Representativity does play a role in (statutory) recognition: the employer must recognise the trade union which either has a majority of the employees in the relevant bargaining unit as its member, or which is supported by a majority of the employees that voted in a ballot and at least 40% of the employees constituting the bargaining unit.

Many rights awarded to trade unions are made subject to them being independent. The independence verification of the CO is rather thorough. "Yellow" trade unions would normally not pass such a test.

CHAPTER 13

COLLECTIVE LABOUR AGREEMENTS IN EUROPE

1. Introduction

This chapter gives a high level view on collective labour agreements in Europe. Its goal is to present a general outline on collective labour agreements in the Netherlands, Germany, Belgium and Great Britain (jointly referred to as the "Researched Countries") specifically, where appropriate also referring to the situation in other Member States. This chapter is structured along similar lines as the previous chapters.

Section 2 summarises a number of main topics concerning industrial relations in Europe. Section 3 follows with a few brief remarks on the history of industrial relation in the Researched Countries and, on occasion, other Member States. Section 4 scrutinises the three classical rights concerning collective bargaining further. Section 5 compares the definitions of a "collective labour agreement" in the Researched Countries and in other Member States. It also explains which different types of provisions the collective labour agreements in the Researched Countries may contain. Section 6 discusses the parties involved in the collective bargaining process with a specific focus on trade unions and employers' organisations in the Researched Countries and in other Member States.

Subsequently, the bargaining process in the Researched Countries, possibly leading to the conclusion of a collective labour agreement, will be set out and compared in section 7. Section 8 examines the effects of the collective labour agreement in the Researched Countries on all parties involved. This section discusses which parties are bound by the collective labour agreement, which legal effects this agreement has on these parties and how the agreement can be enforced. This will be done with regard to the 4 standard scenarios. It will also deal with the term and termination of the collective labour agreement, its possible after-effects and the role of alternative dispute resolution in collective bargaining.

Section 9 sets out the possibility of extending a collective labour agreement in the Researched Countries and other Member States. It discusses the similarities and differences of the national extension processes. The reach of the social partners in the different countries when concluding collective labour agreements will be set out in section 10. This section focuses on three specific aspects of the reach of the social partners in relation to the conclusion of collective labour agreements: (i) what can the social partners regulate in a collective labour agreement, (ii) are they in any way limited by representativity demands, and (iii) are there any limitations with regard to independence? Finally, section 11 summarises this chapter.

2. Industrial relations in Europe in a nutshell

Just as has been done in the Researched Countries, this section gives a general overview on industrial relations in Europe. Section 2.1 discusses the different European industrial relations models. Obviously, given the many countries in the EU, such an overview is high level in nature. Subsequently, statistics concerning European industrial relations will be discussed in section 2.2, more in specific figures on the density of trade unions and employers' organisation membership and on coverage rates. Section 2.3 states recent trends in industrial relations in Europe and section 2.4 sets out the different levels at which collective bargaining occurs.

2.1 The European industrial relation models

As already follows from the previous chapters, there is no single or even dominant model of European Industrial relations, which largely applies to the individual Member States. In fact, each Member State has a more or less unique system on collective bargaining, varying widely in terms of level, coverage, content and nature.[1768] Still, the social dialogue is, although to a varying degree, of importance to every Member State. Or, as phrased by the European Commission: "there is a strong tradition of social dialogue and partnership between governments, industry and trade unions – even if the detailed mechanisms vary considerably between Member States".[1769]

These national differences notwithstanding, some general statements can be made on the legal framework of collective bargaining. First, almost all

1768 Reference is made to the EIRO publication from T. Schulten, *Changes in national collective bargaining systems since 1990*, 17 May 2005, page 1.

1769 See the Commission Communication on European values in the globalised world COM (2005) 525 final, page 5.

Member States have a rather detailed legal framework on collective bargaining that contains basic provisions on:

- the parties that are entitled to conclude collective labour agreements;
- the possible levels of collective bargaining;
- the hierarchy of different bargaining levels;
- the legal coverage of collective labour agreements; and
- the procedural rules for collective bargaining.[1770]

This legal framework can be part of a labour code or a specific act. In the Scandinavian countries the legal framework is mainly determined by bipartite agreements concluded by the social partners at national level.[1771]

Second, it is not unusual to distinguish between two groups of countries that have a broad range of similarities in their respective collective bargaining systems. This concerns on the one hand the EU-15 Member States, representing an important part of Western Europe, and on the other the newly acceded countries from Central and Eastern Europe. The industrial relations between these two groups differ considerably. Whereas the EU-15 Member States generally spoken concentrate on bipartite collective bargaining, the new Member States' social dialogue is more tripartite in nature. Where bipartite collective bargaining does occur in these countries, it primarily focuses on company level, as opposed to sectoral level, which latter level is the more dominant level in the "old" Member States. Furthermore, the social partners in the new Member States have, certainly in comparison with the old Member States, to cope with organisational weaknesses and limited financial resources.[1772] As will be set out below, the new Member States have usually a lower bargaining coverage when set off against the old Member States.

An exception, however, to this distinction between old and new Member States is Great Britain. This country fits more in the group of new than old Member States, as it also has comparatively weak bargaining institutions with company level bargaining as the predominant bargaining level.[1773] But this is

1770 This list derives from T. Schulten, *Changes in national collective bargaining systems since 1990*, page 2.

1771 T. Schulten, *Changes in national collective bargaining systems since 1990*, page 2.

1772 European Commission, *Industrial Relations in Europe 2006*, page 79.

1773 T. Schulten, *Changes in national collective bargaining systems since 1990*, page 1.

not Great Britain's only peculiarity.[1774] Its common law approach, the lack of a clear statutory recognition of the classical rights concerning collective bargaining and the British *laissez-faire* approach to collective bargaining also make the British system stand out. Moreover, collective labour agreements in Great Britain are almost always binding in honour only, which is a rather uncommon feature when compared to other Member States.

2.2 Statistics

Three figures are of particular relevance when analysing collective bargaining: (i) trade union membership density, (ii) employers' organisation membership density and (iii) collective bargaining coverage.

2.2.1 Trade union membership density

An important measure for trade union power is its organisational representativeness, normally measured by union density.[1775] Union density is defined as the ratio of actual to potential union membership.[1776] Hereafter, the net union density figures are presented, being "the total figure of gainfully employed members (excluding unemployed, students or retired) divided by the total wage earners population of the country".[1777] It should be noted that the comparison of trade union membership between the different Member States is a rather difficult process, as the method of calculation and the quality of the data source can differ considerably.[1778] That also explains why the figures set out below for the Researched Countries may be somewhat different than the figures mentioned in the chapters above. The trade union membership density in the year 2004 in the (at that moment) Member States is, according to the Industrial relations 2006 report, the following:[1779]

1774 To speak with the words of Ryan and Bercusson: "Wage formation in Britain – as currently constituted – is quite different from that of many other European countries." B. Bercusson and B. Ryan, *The British case: before and after the decline of collective wage formation*, page 49.

1775 J. Visser, *Union membership statistics in 24 countries*, page 38.

1776 European Commission, *Industrial Relations in Europe 2006*, page 22.

1777 European Commission, *Industrial Relations in Europe 2006*, page 23.

1778 European Commission, *Industrial Relations in Europe 2006*, page 23. See also J. Visser, *Union membership statistics in 24 countries*, pages 39 – 43.

1779 This information is copied from: European Commission, *Industrial Relations in Europe 2006*, page 25, figure 1.1. The figures show the total figure of gainfully employed members (excluding unemployed, students or retired) divided by total wage earners population of the country. The figure of CZ dates from 2003 and of CY from 2002.

Trade union membership density

Country	Total
BE	49
CZ	22
DK	80
DE	20
EE	12
EL	20
ES	16
FR	8
IE	36
IT	34
CY	53
LV	16
LT	13
LU	46
HU	17
NL	25
AT	32
PL	17
PT	17
SK	31
SI	44
FI	74
SE	77
UK	29
MT	55

As can be derived from the table above, union density clearly differs per Member State. The overall weighted average union density rate in the European Union lies between 20 and 25% of the wage earners.[1780] It should be noted that this was considerably higher in the past. There is a downward trend across Europe in the trade union density rate.[1781] About ten years ago, one in three European workers was a member of a trade union. Nowadays, this is about one in four.[1782]

1780 European Commission, *Industrial Relations in Europe 2006*, page 23.

1781 See also J. Visser, *Union membership statistics in 24 countries*, pages 45 and 46.

1782 European Commission, *Industrial Relations in Europe 2006*, page 23. See also figure 1.1 on page 25.

For completeness' sake, it should be noted that the above-mentioned figures include union membership density in the public sector. This "contaminates" the figures to a certain extent, as the position of civil servants is excluded from the scope of this thesis.[1783] Trade union membership in Europe is particularly high in the public sector when compared to the private sector.[1784] This holds especially true in the administration, health and social services.[1785] This should be taken into account when interpreting the above figures.

2.2.2 Employers' organisation membership density

Employers' organisation density is an indicator comparable with trade union density.[1786] However, this figure is not defined as the ratio of actual to potential membership, as is the case with trade union density, since such a figure would not necessarily say a lot about the employers' organisations' power. Instead, the employers' organisation density figure defines the ratio of the number of employees the members have to the number of employees of potential membership.[1787] Data on employers' organisation density is difficult to collect for various reasons,[1788] and must therefore be interpreted with caution. Taking this into consideration, the (weighted) average employer rate of organisation within the European Union lies approximately between 55 to 60%.[1789] Moreover, this density does not seem to be dropping, as opposed to the trade union membership density.[1790]

1783 See chapter 1, section 2.3.

1784 J. Waddington, *Trade Union Membership in Europe*, a background paper for the ETUC/ETUI-REHS top-level summer school, Florence, 1-2 July 2005, page 1.

1785 European Commission, *Industrial Relations in Europe 2006*, pages 24 and 25.

1786 European Commission, *Industrial Relations in Europe 2006*, page 37.

1787 European Commission, *Industrial Relations in Europe 2006*, page 37.

1788 The employers' associations are reluctant to make available information on their members, they themselves not always have all information necessary available (especially the number of employees their members employ), and density figures are often based on survey data, which is not always available. See European Commission, *Industrial Relations in Europe 2006*, page 37.

1789 European Commission, *Industrial Relations in Europe 2006*, page 37. For a more detailed overview on employers' organisation density reference is made to figure 1.2 on the same page of this report.

1790 European Commission, *Industrial Relations in Europe 2006*, page 38.

2.2.3 Collective bargaining coverage

Across Europe, there are huge differences in collective bargaining coverage. This coverage rate is usually understood as the number of employees covered by a collective agreement as a proportion of the number of employees (that is: wage and salary earners).[1791] There are two main elements that influence the bargaining coverage. First, the level of bargaining is of relevance. Countries with strong sectoral and inter-sectoral bargaining normally have a higher bargaining coverage than countries with mainly company-level bargaining. Second, there is the existence and use of extension procedures. Countries that have and use such procedures tend to have a higher bargaining coverage than countries that do not.[1792] The following table sets out an overview of the collective bargaining coverage in the Member States, with the exception of Luxembourg and Portugal.[1793]

1791 Reference is made to the EIRO publication from F. Traxler and M. Behrens, C*ollective bargaining coverage and extension procedures*, 18 December 2002, page 3.

1792 T. Schulten, *Changes in national collective bargaining systems since 1990*, page 12.

1793 This information is copied from: T. Schulten, *Changes in national collective bargaining systems since 1990*, pages 13 and 14, table 4. The sources needed for compiling the table date back to 2004.

Collective bargaining coverage	
Inter-sectoral bargaining dominant	
Belgium	> 90%
Finland	+/- 90%
Ireland	> 44%
Slovenia	< 100%
Sectoral bargaining dominant	
Austria	98%-99%
Bulgaria	25-30%
Denmark	+/- 77%
Germany	+/- 70%
Greece	60%-70%
Italy	+/- 90%
Netherlands	+/- 80%
Spain	+/- 80%
Slovakia	+/- 40%
Sweden	> 90%
No bargaining level clearly dominant	
France	+/- 90%
Company bargaining dominant	
Cyprus	27%
Czech Republic	25%-30%
Estonia	20%-30%
Hungary	+/- 40%
Latvia	10%-20%
Lithuania	+/- 10%
Malta	+/- 50%
Poland	+/- 40%
Romania	no data
UK	< 40%

An EIRO research established that in the year 2002 on average more than 70% of the employees within the Member States at that time, excluding Greece, were covered by a collective labour agreement.[1794]

2.3 Trends

In all Researched Countries there seems to be a trend towards decentralisation of shaping of employment conditions. The conclusion of company-level collective labour agreements gains ground to the detriment of sectoral collective labour agreements. Moreover, collective labour agreements often

1794 M. Carley, *Industrial relations in the EU, Japan and USA, 2002*, page 18.

leave more room than in the past to fill in general clauses and concepts at enterprise level ("opening clauses"). This tendency towards decentralisation appears not to be unique for the Researched Country but is rather a tendency that can be seen in almost every Member State.[1795] Another trend in Europe is that the scope of the content of collective labour agreements seems to be broadening and now includes restructuring, working conditions of non-standard employees and social rights.[1796]

2.4 Different levels of bargaining

In all Researched Countries there are different levels at which collective bargaining takes place. Three levels should be distinguished: (i) national (or inter-sectoral), (ii) sectoral and (iii) company-level. In each Researched Country collective bargaining is not exclusively defined to just one level. All of these countries have collective bargaining at least at sectoral and company-level. However, in Belgium collective bargaining at inter-sectoral (national) level is also of relevance.

This picture can be applied to other Member States as well. In each Member State collective bargaining takes place at more than one level.[1797] The following table sets out the levels of collective bargaining involved in wage-setting in most of the Member States.[1798] It should be noted that the inter-sectoral level is broadly defined in the table below, as it does not only concern national bilateral agreements between peak federations, but also tripartite wage coordination.

1795 T. Schulten, *Changes in national collective bargaining systems since 1990*, page 19.

1796 European Commission, *Industrial Relations in Europe 2006*, pages 48 and 49.

1797 European Commission, *Industrial Relations in Europe 2006*, page 41.

1798 This table literally derives from: European Commission, *Industrial Relations in Europe 2006*, page 47, table 2.2.

Levels of collective bargaining involved in wage-setting, EU-25			
	Inter-sectoral	**Sector**	**Enterprise**
BE	**	***	*
CZ		*	***
DK	*	***	**
EE	*	*	***
EL	**	***	*
ES	*	***	**
FR		**	**
IE	***	*	*
IT	*	***	**
CY		**	***
LV	*		***
LT		*	***
LU		**	**
HU	*	**	***
MT		*	***
NL	*	***	*
AT		***	*
PL	*	*	***
PT	*	***	**
SI	**	***	**
SK		***	**
FI	***	**	*
SE		***	*
UK		*	***
* existing level of collective bargaining ** important but not dominant level of collective bargaining *** dominant level of collective bargaining			

Based on its own research, EIRO distinguishes three groups of countries within the EU (excluding Luxembourg and Portugal) when it comes to the level of collective bargaining concerning wages only:[1799]

- the first group covers 4 countries (Belgium, Finland, Ireland and Slovenia). In these countries the inter-sectoral level is the most important bargaining level for the determination of wages. Additionally, there are 5 countries (Greece, Estonia, Hungary, Lithuania and Romania) where

1799 T. Schulten, *Changes in national collective bargaining systems since 1990*, page 12.

the national minimum wage is determined by bipartite or tripartite agreements at national level;
- the second group covers 10 countries, mostly in North and West Europe (Austria, Bulgaria, Denmark, Germany, Greece, Italy, the Netherlands, Spain, Slovakia, Sweden). These countries have bargaining systems in which the sectoral-level is the most important bargaining level for wage determination; and
- the third group of 10 countries, including most of the Central and Eastern Europe states (the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Romania) plus Cyprus, Malta and Great Britain, have rather decentralised bargaining systems with company-level bargaining dominant.

France does not fit into any of these groups since it has no pay bargaining level that is clearly dominant. While in particular for small and medium-sized companies sectoral-level is the most important, it is company-level that is key for most large companies.

3. The history of collective bargaining in the Researched Countries

The overviews of the history of industrial relations in the Researched Countries make clear that each country faced its own particular difficulties in the past with regard to industrial relations. Many of the legal consequences a collective labour agreement has today in each country can only really be understood against the backdrop of these past national difficulties. The same applies to national politics: these politics have influenced the laws on industrial relations rather extensively and shaped them into what they are at present. This is most notably the case in Great Britain.

Despite these national differences in collective bargaining in the Researched Countries, there are similarities as well. It is apparent that the introduction of collective bargaining was a struggle in each of these countries. The trade unions all faced a prohibition of employees to join in pursue of better employment conditions. The freedom of association was, in short, much oppressed. In many other (Western) European countries this was not different.[1800] But even after the trade unions were free to form, they had to surmount many other obstacles. Management was not keen on giving up its managerial powers

1800 A.T.J.M. Jacobs, *Het recht op collectief onderhandelen in rechtsvergelijkend en Europees perspectief*, pages 21 *ff*. Jacobs states that the prohibition on the formation of associations was revoked in Western Europe as from about 1870.

easily, most notably its powers to unilaterally set employment conditions. Employers simply refused to enter into collective labour agreements, entered into collective labour agreements with yellow unions, or even terminated the employment contracts of active trade union members.[1801] The most powerful means that trade unions had at their disposition to counter the powers of management, being collective actions, were not always readily available. The right to strike was simply not, or only marginally, recognised in the past.

It was, in summary, very difficult for the trade unions in Europe to actually conclude collective labour agreements. In the years following World War I, things got better for trade unions. Management and labour more or less had to cooperate given the weak economical situation. In these years, and especially after World War II, modern industrial relations formed.[1802] But although it got easier to actually conclude collective labour agreements in these years, the conclusion of the agreement in itself did not solve all problems. The status of a collective labour agreement appeared rather troublesome in many countries. The collective labour agreement simply did not sit well with the standard type of contract. The collective aspects of the collective labour agreements caused difficulties. In the end, a collectivity of employees, and sometimes a collectivity of employers, intended to (primarily) arrange by contract the legal relation not between themselves, as is the case in "normal" contracts, but rather between the individual employer and employee. It was difficult to tie in a direct normative effect of the collective labour agreements in the existing legal systems.[1803]

In the Researched Countries, the above difficulties were overcome by enacting legislation (the Netherlands, Germany and Belgium), sometimes following an agreement reached between both sides of the industry. Great Britain stands out in that respect, as intervention of the state in industrial relations was only applied with reticence. British legislation was mostly limited to simply making collective bargaining possible. In general, it can be noted that most Member States have enacted (detailed) legislation on collective bargaining. Denmark is an exception, as it has no such statutory regulations at all. Besides Great

1801 A.T.J.M. Jacobs, *Het recht op collectief onderhandelen in rechtsvergelijkend en Europees perspectief*, page 44.

1802 A.T.J.M. Jacobs, *Het recht op collectief onderhandelen in rechtsvergelijkend en Europees perspectief*, pages 52 *ff*.

1803 The same applied to collective action, which was also considered out of the ordinary.

Britain, legislation on collective labour agreements is also limited in content in Italy and Ireland.[1804]

4. The classical rights concerning collective bargaining

The three classical rights –the freedom of association, the right to collective bargaining, and the right to strike – are recognised in all of the Researched Countries. The only country in which this recognition is not full and clear is Great Britain.

In the Netherlands, Germany and Belgium the freedom of association is laid out in the Constitution. This is not the case in Great Britain. However, Great Britain incorporated the European Convention on Human Rights (the Convention) into its own legislation through the 1998 Human Rights Act, a Convention which guarantees the freedom of association. Moreover, the freedom of an employee as against his employer to join a trade union is recognised in the TULRA.

The Researched Countries all have acts on collective bargaining. The entitlement to bargain collectively derives from these acts. In Germany, the right to collective bargaining is also (implicitly) embedded in its Constitution. This is the case for at least 15 Member States.[1805] In Belgium, reference is made in its Constitution to the right to collective bargaining. In none of the Researched Countries, however, does the right to collective bargaining entail an *obligation* to bargain. A party is free to refuse to bargain in each of these countries.

In Germany, the right to strike is embedded in the constitution. In Belgium and the Netherlands this right is established by judge-made law. In both of these countries the European Social Charter played in important role in the development of this right. In Britain, there is a freedom to collective action vis-à-vis the state. This freedom is only partial in the relationship between an employee and his employer; although statute gives immunity to the participants of a strike from legal liabilities in many cases, the right as such is lacking. To sum up, Britain does not have a real *right* to strike.

1804 R. Rebhahn, *Collective Labour Law in Europe in a Comparative Perspective Collective Agreements, Settlement of Disputes and Workers' Participation (Part I)*, The International Journal of Comparative Law and Industrial Relations, Autumn 2003, page 274.

1805 T. Schulten, *Changes in national collective bargaining systems since 1990*, pages 3 *ff*. As this research does not include Luxembourg and Portugal, I stated that *at least* 15 Member States protect the right to collective bargaining by Constitution.

It should be noted that the classical rights have, to an important extent, been recognised by all Western European countries after World War II.[1806] Moreover, as set out in chapter 8 of this thesis, all Member States are, in fact, obliged by international legislation (due to accession to relevant treaties and conventions) to recognise these classical rights. From a European Union perspective, the freedom of association is considered a fundamental right.[1807] The right to collective bargaining – meaning the right to enter into negotiations and to conclude collective labour agreements – is also protected at Community level,[1808] as is the case with the right to strike.[1809] The Treaty of Lisbon and the execution of the EU Charter of Fundamental Rights further highlight the recognition of the classical rights.[1810] The protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, however, also makes clear that two countries in particular experience difficulties with the full recognition of these rights, being Great Britain and Poland.

5. Collective labour agreements

There is a great resemblance in the definition of a collective labour agreement and their different provisions in the Researched Countries. This also seems to be the case in other Member States.

5.1 What constitutes a collective labour agreement?

In all Researched Countries there are at least three requirements an agreement must satisfy in order to be regarded a collective labour agreement. A fourth requirement can be found in some of these countries.

First, there must be an agreement. The Netherlands, Germany and Belgium require a written contract. In Great Britain an oral agreement suffices, unless the agreement is intended to be legally enforceable, in which case it must also be agreed on in writing.

Second, only specific parties are entitled to conclude a collective labour agreement. On the one hand there should be employers or employers'

1806 A.T.J.M. Jacobs, *Het recht op collectief onderhandelen in rechtsvergelijkend en Europees perspectief*, page 66.

1807 See chapter 8, section 2.

1808 See chapter 8, section 3.

1809 See chapter 8, section 4.

1810 See chapter 8, section 5.

organisations. This is common in (nearly) all Member States.[1811] On the other hand, there should be trade unions (or sometimes also confederations of trade unions). Here, the situation differs to some extent in other Member States. In most Member States the right to collective bargaining on labour's side is restricted to trade unions. However, in Member States that have a low trade union density or a dual system of employee representation (normally with Works Councils as representatives of labour at company level), the exclusive role of the trade unions in collective bargaining is challenged.[1812] In the Baltic States, for example, (Estonia, Latvia and Lithuania) authorised employee representatives (comparable to Works Councils) are entitled to conclude collective labour agreements at company level, should the employees not be represented by trade unions. In other Member States – including Germany, Austria, the Netherlands, and Spain – Works Councils can sometimes work out, on a company level, certain elements that were left open in opening clauses in sectoral collective labour agreements. In France trade unions can appoint a mandated employee in companies with no union representation, who can enter into company-level collective bargaining. The final agreement, however, has to be confirmed by the trade union.[1813] At EU level (again, without including Luxembourg and Portugal) this leads to the following situation:[1814]

1811 T. Schulten, *Changes in national collective bargaining systems since 1990*, page 6. However, Austria does not allow an individual employer to enter into a collective labour agreement. See R. Rebhahn, *Collective Labour Law in Europe in a Comparative Perspective Collective Agreements, Settlement of Disputes and Workers' Participation (Part I)*, page 274.

1812 T. Schulten, *Changes in national collective bargaining systems since 1990*, page 6.

1813 T. Schulten, *Changes in national collective bargaining systems since 1990*, page 6.

1814 This table derives from: T. Schulten, *Changes in national collective bargaining systems since 1990*, pages 6 and 7, table 2.

	Employees' representatives entitled to conclude collective agreements	
	Only trade unions	**Trade unions, Works Councils and other employees' representatives**
Austria	X*	.
Belgium	X	.
Bulgaria	X	
Cyprus	X	.
Czech Republic	X	.
Denmark	X	.
Estonia	.	X
Finland	X	.
France	X**	.
Germany	X*	.
Greece	X	.
Hungary	X	.
Ireland	X	.
Italy	X	.
Latvia	.	X
Lithuania	.	X
Malta	X	.
Netherlands	X*	
Poland	X	.
Romania	X***	
Slovakia	X	.
Slovenia	X	.
Spain	X*	.
Sweden	X	.
UK	X	.

** Works Councils can renegotiate certain collectively agreed standards at company level, if entitled by sectoral agreements.** In companies with no union representation, unions can appoint 'mandated employees' to negotiate with the employer, but any agreement has to be confirmed by the union. *** Employee representatives are entitled to conclude collective agreements in companies where employees are not organised in trade unions, but Works Councils do not yet exist.*

The above shows that trade unions are the primary representatives of labour in collective bargaining. These trade unions should meet specific demands. These demands will be discussed in section 6 below.

Third, the collective labour agreement should concern employment conditions. This is normally broadly defined. In the Netherlands, the

collective labour agreement is required to principally or exclusively set out the terms of employment applicable to employment agreements, but the Dutch Supreme Court also allowed an agreement that merely contains provisions which *relate* to employment agreements. In Germany, the collective labour agreement may arrange the content, the commencement and the termination of employment agreements. As far as the content is concerned, the collective labour agreement may arrange the same topics that can be arranged in the individual employment agreement. Belgian law stipulates that collective labour agreements should deal with the relation between employers and employees. This enables the contracting parties to arrange subjects in all domains of social law. In Great Britain the bargaining topics are fixed. This is done, however, in a broad manner. Collective labour agreements should deal with: terms and conditions of employment and conditions of work; hiring, firing and suspension; demarcation; discipline; union membership; union recognition; facilities agreements; procedures and other machinery of collective bargaining.

Besides these employment conditions, collective labour agreements in all Researched Countries may set out rights and obligations between the contracting parties. This is explicitly stipulated in the laws of Belgium and Germany, which consequently set out that collective labour agreements have normative *and* obligatory effects. Although not stated in the statutory definition of collective labour agreement, the same holds true in the Netherlands and Great Britain.

Last, the Netherlands, Belgium and Germany require collective labour agreements to be registered. In the first two countries this is a constitutive requirement. In Belgium, the collective labour agreements are even assessed upon registration in order to verify that they satisfy all relevant requirements. In Great Britain there are no "registration demands". Many other Member States also have registration requirements. In Ireland, for example, registration of collective labour agreements by the Labour Court is required when they introduce flexible standards; the Court must be satisfied that such agreements are not in breach of EU law and have been negotiated by representative parties.[1815] The following table shows which Member States have a legal obligation to register the collective labour agreements (with the exception of Luxembourg and Portugal):[1816]

1815 European Commission, *Industrial Relations in Europe 2006*, page 53.

1816 This table literally derives from: T. Schulten, *Changes in national collective bargaining systems since 1990*, pages 9 – 11, table 3.

Registration and national documentation of collective agreements	
	Obligatory registration
Austria	Yes
Belgium	Yes
Cyprus	Yes
Czech Republic	Yes*
Denmark	No
Estonia	Yes
Finland	Yes
France	Yes
Germany	Yes
Greece	No
Hungary	Yes
Ireland	No**
Italy	No
Latvia	No
Lithuania	Yes*
Malta	Yes
Netherlands	Yes
Poland	Yes
Slovakia	Yes*
Slovenia	Yes*
Spain	Yes
Sweden	No
UK	No
** Legal obligation to register exists only for national and sectoral agreements, but not for company agreements. ** Some agreements are registered voluntarily by the Labour Court.*	

In its 2006 research on collective agreements, ILO concluded that collective labour agreements are commonly defined as "agreements regulating conditions to be observed in employment contracts or otherwise in employment relations, concluded by one or more employers or employers' associations on one side, and one or more trade unions on the other".[1817] This research was based on reports from 16 countries, including 11 Member States.[1818] The aforementioned

1817 Reference is made to the ILO research: M. Blatman (general reporter), *Collective Agreements, Synopsis of responses to questionnaire*, 4 September 2006, page 2. This report can be found on the ILO website, under events.

1818 These countries are: Austria, Belgium, Finland, France, Germany, Iceland, Israel, Italy, Malta, the Netherlands, Norway, Slovenia, Spain, United Kingdom, United States and Venezuela. See: M. Blatman, *Collective Agreements, Synopsis of responses to questionnaire*, page 2.

definition fits the above-mentioned criteria. However, it lacks the distinction in effects of collective agreements, which concerns the normative and obligatory effects.

5.2 Different types of provisions

All Researched Countries distinguish (sometimes for practical purposes only) between obligatory and (individual) normative provisions in a collective labour agreement. The obligatory provisions lay down the rights and obligations between the parties concluding the collective employment agreement. These may include provisions on the manner of termination of the collective labour agreement, the possible obligations to consult the counterparty in specific circumstances and a possible obligation to inform members on the collective labour agreement. In Germany, Belgium and in the Netherlands there is also an obligation on the contracting parties to take adequate measures to ensure that their members abide by the collective labour agreement, commonly referred to as the principle of good faith. Such a principle of good faith is recognised in all countries that participated in the above-mentioned ILO Research.[1819] Most especially in Germany and in Belgium – and to a lesser extent in the Netherlands – a so-called peace obligation automatically forms part of the obligatory provisions of a collective labour agreement. However, in multiple other Member States this is not the case.[1820]

Individual normative provisions create rights and obligations between the contracting parties to an individual employment agreement (the employers and employees). These provisions are the quintessence of collective labour agreements. The individual normative provisions typically concern on the one hand working hours, working place and organisation of labour, and on the other the classification of positions, wage scales, education and wage indexation.[1821]

Collective normative provisions are recognised in the Netherlands, Germany and Belgium. These provisions basically arrange the collective employment relations. Their exact content varies from country to country, but all countries seem to have difficulties in clearly distinguishing this group of provisions

1819 M. Blatman, *Collective Agreements, Synopsis of responses to questionnaire*, page 15.

1820 I.H.B. Waas, *Omtrent het bestaan en de rechtsgrondslag van een vredesplicht in Europese collectieve (arbeids)overeenkomsten* [*Regarding the existence and the legal basis of a peace obligation in European collective (labour) agreements*], Sociaal Recht 2004, page 153.

1821 See M. Blatman, *Collective Agreements, Synopsis of responses to questionnaire*, pages 40 *ff*.

from individual normative provisions. In Great Britain, collective normative provisions are not recognised as such. Some terms in a British collective labour agreement, however, could be compared with collective normative provisions in the other Researched Countries. In all Researched Countries, except Great Britain, two "collective normative constructions" seem important. First, the collective labour agreement may provide for rights and obligation that arrange the relation between the employer and its entire personnel or an employee representative body. This construction even bears some relevance in Great Britain. Second, the collective labour agreement may provide for rights and obligations that arrange the relation between the employer and the employees vis-à-vis third collective parties, most notably funds. These constructions will be discussed in more detail in section 8.4 below.

6. The players in the collective bargaining process

In the Researched Countries, there are several parties who play a role in the collective bargaining system, in all cases at least being: (i) the government, (ii) individual employers, (iii) trade union confederations and trade unions, and (iv) employers' confederations and separate employers' organisations.

The governments in the Researched Countries have only a limited involvement in the bargaining process. They typically enact legislation on collective labour agreements and provide for a structure in which collective bargaining takes place. The governments of Germany, the Netherlands and Belgium – as opposed to Great Britain's government – furthermore play a role in extending collective labour agreements.

In each of the Researched Countries individual employers (or a group of individual employers) are entitled to enter into collective labour agreements. There are no specific requirements that these employers must satisfy in that respect.

That leaves us to the players that are - in the Researched Countries, but given section 5.1 above also in other Member States - most actively involved in the collective bargaining process: trade unions and confederations of trade unions on the one hand and employers' organisations and confederations of employers' organisations on the other. After all, besides the individual employer, they are the ones that conclude the collective labour agreements. However, trade unions and confederations of trade unions do not play the same role in all Researched Countries, as confederations do not actually conclude collective labour agreements in all of these countries. In those countries in which both the associations and the confederations are actively involved in

concluding collective labour agreements, the demands they must satisfy are the same. For that reason, hereinafter I will simply refer to "trade unions" when labour's side of industry is meant, comprising employees' associations and – for the countries in which they are of relevance for the conclusion of collective labour agreements – confederations of employees' associations as well. When I refer to "employers' organisations" this includes employers' organisations and – again, for those countries in which confederations play a role in the collective bargaining process – confederations of employers' organisations as well.

Trade unions and employers' organisations share a number of basic characteristics. Both organisations are intermediate organisations: they act as an interface between the state, the economy and their membership.[1822] They typically act on behalf of their members and are normally involved in four types of activity: participation of members, representation of members, services to members and control over members.[1823] Obviously, there are also differences between the both sides of the industry.

6.1 Trade unions

Trade unions are basically independent associations of employees, who have united to represent and defend their interests in the workplace, but also at the general level of the economy and politics.[1824]

6.1.1 General features of trade unions

Although the status of a trade union differs extensively from Member State to Member State,[1825] certain features typify trade unions in general terms. They usually:[1826]

1822 European Commission, *Industrial Relations in Europe 2006*, page 19.

1823 European Commission, *Industrial Relations in Europe 2006*, page 19. Ewing attributes five principal functions to trade unions: a service function, a representation function, a regulatory function, a government function and a public administration function (a function that involves the implementation of public policy that the union may have played part in creating). Reference is made to K.D. Ewing, *The Function of Trade Unions*, Industrial Law Journal, March 2005. In my view the same functions can be attributed to employers' organisations.

1824 European Commission, *Industrial Relations in Europe 2006*, page 19.

1825 T. Schulten, *Changes in national collective bargaining systems since 1990*, page 6.

1826 European Commission, *Industrial Relations in Europe 2006*, page 19.

- have a centralised structure and a division of work between a network of volunteers and a professional apparatus;[1827]
- are recognised in the Member States and have a quasi public status;
- have a distributive function in the economy (they settle wages) and also have a normative function (they are actively involved in setting labour regulations);
- represent and mobilise their members.

Obviously, the extent to which these characteristics apply to the trade unions differs per Member State. In Belgium, for example, (representative) trade unions are far more institutionalised and play a much more public role than in, for instance, Great Britain. Moreover, the influence of members in trade unions is of great importance in Germany, a country which requires a "democratic organisation", and in Great Britain, which requires mandatory ballots for certain trade unions' decisions. In Belgium, however, trade unions have to represent the interests of all employees and not just their members, which entitles them to take decisions that could violate the interests of individual members, but furthers the collective interests.

6.1.2 Organisational structure

Most trade unions are organised on a sectoral or occupational base in Europe.[1828] Moreover, confederations often are based on political and/or religious division.[1829] Some countries, for example, Great Britain, only have one confederation.[1830] Other countries, such as Germany, have one very strong confederation dominating the others.[1831] In southern countries, such as Greece, Portugal and Spain, there are two strong confederations.[1832] Other countries have complex and fragmented confederate structures, including France, Hungary, Italy and Slovenia.[1833] For an overview of the confederations in the Member States, reference is made to the European Commission's report Industrial Relations 2006 pages 20 and 21.

1827 See for a description of modern trade unions: A.T.J.M. Jacobs, *Het recht op collectief onderhandelen in rechtsvergelijkend en Europees perspectief*, pages 35 *ff*.

1828 European Commission, *Industrial Relations in Europe 2006*, page 19.

1829 European Commission, *Industrial Relations in Europe 2006*, page 20.

1830 Which is the Trade Union Congress. Other Member States with only one confederation are Austria, Ireland, Latvia and Slovakia. See European Commission, *Industrial Relations in Europe 2006*, page 19.

1831 Which is the Deutscher Gewerkschaftbund. The same applies to the Czech Republic. See European Commission, *Industrial Relations in Europe 2006*, page 19.

1832 European Commission, *Industrial Relations in Europe 2006*, page 19.

1833 European Commission, *Industrial Relations in Europe 2006*, page 19.

6.1.3 Other features

In all Member States trade unions are entitled to enter into collective labour agreements. However, these trade unions are usually subject to a number of requirements in order to do so. Some of these requirements are basically the same in all Researched Countries, while others vary considerably.

A trade union must, in all Researched Countries, be an organisation. In the Netherlands, this organisation must, by law, be an association having legal personality. In Germany, Belgium and Great Britain this is not the case. In these countries trade unions that are lacking legal personality have some form of functional legal personality, enabling these organisations to perform those acts that are necessary in the collective bargaining process. Trade unions must furthermore pursue the advancement of employment relations and conditions. In the Netherlands and in Germany, the trade union's articles of associations must even specifically stipulate the union's power to enter into collective labour agreements.

There are important differences in the Researched Countries when it comes to independence and representativness of trade unions. Many of the specific German requirements of the trade unions – they must surpass company level, possess real powers and be sufficiently prepared to enter into collective bargaining – can be brought back to these topics. Independence and representativness of trade unions will be discussed in section 11 below. Other specific national demands are sometimes unique for the different Member States. Great Britain's demand that trade unions must wholly or mainly consist of workers, for example, is not to be found in the other countries, although it can be safely assumed that an important part of the trade unions members in these other countries are workers as well.[1834] The same goes for the German demand that trade unions should acknowledge the German laws on collective bargaining and collective action.

6.2 Employers' organisations

Employers' organisations are in many ways the counterparts of trade unions. Broadly spoken, employers' organisations are bodies designed to organise and advance the collective interests that employers have in the labour market and

1834 Although it must be noted that a significant proportion of trade union members has in fact retired from the labour market. Research of Visser indicates that on average this is 17.2% in the 14 Member States he studied. J. Visser, *Union membership statistics in 24 countries*, page 42.

industrial relations.[1835] Employers' organisations tend to be of importance for the existence of multi-employer collective bargaining and statutory provisions for extending collective labour agreements,[1836] as often collective labour agreements can only be extended when concluded with employers' organisations as opposed to individual employers.[1837]

6.2.1 General features of employers' organisations

Employers' organisations differ widely in terms of structure, membership basis and tasks across Europe.[1838] However, EIRO research identified three core areas of activity national employer peak associations deploy,[1839] research which covered most of the Member States (all Member States from the beginning of 2004, as well as the then candidate countries Hungary and Slovenia). These peak associations are involved in:[1840]

- bipartite or tripartite "corporatist" institutions, with the exception of Great Britain;[1841]
- political lobbying on various issues, mostly in the field of the labour market, industrial relations, welfare and economic policy; and
- collective bargaining, either by way of directly negotiating collective agreements with trade unions or by coordinating the bargaining activities of their affiliates (in Luxembourg and Great Britain, however, national employer peak associations do not fulfil this activity).

Besides these activities, employers' organisations tend to provide their members with expert services in industrial relations matters.[1842]

1835 Reference is made to the EIRO publication from M. Behrens and F. Traxler, *Employers' organisations in Europe*, 5 April 2004, pages 1 and 3.

1836 M. Behrens and F. Traxler, *Employers' organisations in Europe*, page 1.

1837 European Commission, *Industrial Relations in Europe 2006*, page 32.

1838 M. Behrens and F. Traxler, *Employers' organisations in Europe*, page 1.

1839 These are organisations that (i) are independent, that is not subordinate to their members, (ii) are organised at national or inter-sectoral level, and (iii) must also fulfil tasks of a pure employers' organisation, that is it must be specialised in representing interests related to the labour market and industrial relations. See M. Behrens and F. Traxler, *Employers' organisations in Europe*, pages 3 – 5.

1840 M. Behrens and F. Traxler, *Employers' organisations in Europe*, page 16.

1841 In Great Britain national employer peak associations are often appointed as competent individuals rather than as official representatives of an employers' association. M. Behrens and F. Traxler, *Employers' organisations in Europe*, page 18.

1842 European Commission, *Industrial Relations in Europe 2006*, page 32.

6.2.2 Organisational structure

The organisational structures of the different employers' organisations are very fragmented. The probable reason for this is that employers' organisations normally have to organise companies with often diverging interests, such as competitors or "critically intertwined companies" (for instance, buyers and sellers of the same product or service providers and service receivers).[1843]

In general, sectoral or branch organisations are the strongest employers' organisations in the Member States.[1844] However, it is not unusual for small and medium sized companies to unite as well.[1845] Every Member State has employers' umbrella organisations and employers' peak federations.[1846] Their role differs from country to country. In, for example, Finland, France, Germany, Hungary, Italy, Luxembourg, the Netherlands, Spain, Sweden and Great Britain employers' organisations affiliated to employers' umbrella organisations and employers' peak federations enjoy a rather substantial autonomy and operate fairly independently. The emphasis of employers' interest representation is, in this field, at the level of the affiliates rather than at the umbrella organisations' level. The lower-level employers' organisations are, in such a case, leading in collective bargaining,[1847] although the umbrella organisations' coordination role can still be of importance. By contrast, in a number of other Member States (such as Belgium, Denmark, Greece and Slovenia), the employers' peak federations' power vis-à-vis their affiliates is more substantial. This even includes the right either to negotiate collective agreements directly, or to impose certain bargaining goals on their affiliates.[1848] For a general overview of some of the employers' organisations in the Member States, reference is made to the European Commission's report Industrial Relations 2006 pages 34 and 35.

1843 European Commission, *Industrial Relations in Europe 2006*, page 33.

1844 European Commission, *Industrial Relations in Europe 2006*, page 33.

1845 This is, for example, the case in Belgium, France, Greece, Hungary, Italy, Lithuania, Malta, the Netherlands, Poland, Portugal and Slovenia. See European Commission, *Industrial Relations in Europe 2006*, page 36. See also M. Behrens and F. Traxler, *Employers' organisations in Europe*, page 7.

1846 European Commission, *Industrial Relations in Europe 2006*, page 36.

1847 M. Behrens and F. Traxler, *Employers' organisations in Europe*, page 17.

1848 M. Behrens and F. Traxler, *Employers' organisations in Europe*, page 17.

6.2.3 Other features

Basically, employers' organisations in the Researched Countries should satisfy the same requirements as trade unions do in order to be eligible to participate in collective bargaining and to conclude collective labour agreements. For these requirements I refer to the comments concerning the trade unions made above. Matters such as independence and representativeness play no, or at least a different, role for employers' organisations, as will be set out in section 10 below. Moreover, generally the test of whether the employers' organisations satisfy the relevant requirements seems to be applied a bit more leniently when compared to trade unions. The Federal Labour Court explicitly ruled in this way for the German situation and the same seems to apply for the situation in Great Britain.

7. The negotiation process / conclusion of a collective labour agreement

The negotiation process in the Researched Countries is basically a free and voluntary process, based on mutual recognition. The parties involved are free to choose whether they wish to enter into a collective labour agreement. Should they wish to enter into collective bargaining they are, to a varying degree, free to choose with whom.

In all Researched Countries parties are free to choose to enter into collective bargaining (save some exceptions)[1849] and subsequently whether they actually reach an agreement. This is a voluntary process; a party cannot be forced by law to conclude a collective labour agreement (it can, obviously, be forced to do so by collective actions).[1850] This is in line with the right to collective bargaining which is laid out in international instruments.[1851] The Convention for the Protection of Human Rights and Fundamental Freedoms the European

1849 In some circumstances an employer is obliged to consult the relevant trade unions. Reference is made to section 6 in chapters 9 through 12. See also R. Rebhahn, *Collective Labour Law in Europe in a Comparative Perspective Collective Agreements, Settlement of Disputes and Workers' Participation (Part I)*, page 276.

1850 In France, for example, companies can sometimes be obliged to bargain with representative trade unions in good faith, but they can not be obliged to actually reach an agreement. See M.A. Moreau, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report France*, page 46. The report can be found on: http://www.unifi.it/polo-universitario-europeo/ricerche/collective_bargaining.html. See also R. Rebhahn, *Collective Labour Law in Europe in a Comparative Perspective Collective Agreements, Settlement of Disputes and Workers' Participation (Part I)*, page 276.

1851 Reference is made to chapter 8, section 3.1.

Court of Human Rights' case law emphasise the *voluntary* nature of collective bargaining and the conclusion of collective agreements. The European Social Charter and ILO Convention C98 also explicitly refer to *voluntary* bargaining. The freedom to bargaining voluntarily is therefore an important principle.

The bargaining parties in the Researched Countries are, to a varying degree, also free to choose with whom the collective labour agreement is concluded. This freedom is, however, considerably less absolute than the freedom to choose whether or not to enter into collective bargaining and to conclude a collective labour agreement. When it concerns sectoral or cross-industry collective labour agreements in Belgium, for example, the parties involved need to conclude these agreements in joint bodies that are comprised of representative social partners appointed by the government. In all cases the social partners need to be representative. Employers in Great Britain are obliged, after the statutory recognition of a trade union by a company, to continue with that trade union should it choose to enter into a collective labour agreement. In Germany, the contracting parties involved should be competent to enter into a specific collective labour agreement (*Tarifzuständigkeit*). More in general, limitations on whom to choose as a bargaining partner are not unique in Europe. Countries most notably demand that bargaining occurs with (the most) representative counterparty and many countries have introduced legal requirements to that effect.[1852] The demands on representativity are diverse and will be discussed in section 10 below.

8. The effects of the collective labour agreement

As has been done in the Researched Countries, the consequences of a validly concluded collective labour agreement should be assessed from a "European perspective". It should be established (i) to whom the collective labour agreement applies, (ii) what effects such an application has, and (iii) how the parties involved can enforce their rights. These questions are answered for the standard 4 scenarios and will be discussed in sections 8.1 through 8.4 below. Section 8.5 concerns possible other means of enforcement that are in place in the Researched Countries in the case of a breach of the collective labour agreement. Section 8.6 sets out the "special" consequence collective labour agreements may have: they may set aside specific statutory provisions. Section

1852 As Kirton-Darling put it: "In many states in which trade union pluralism is a strong feature of the organisational landscape, most notably several continental and southern countries, representativeness is a legal requirement for participation in the negotiation and consultation committees." See J. Kirton-Darling (ed.), *Representativeness of Public Sector Trade Unions in Europe, State Administration and Local Government Sectors*, page 14.

8.7 focuses on the term and termination of collective labour agreements in the Researched Countries and section 8.8 discusses the collective labour agreement's possible after-effects. Finally, section 8.9 relates to the role of alternative dispute resolution in collective bargaining in Europe.

8.1 Scenario 1

In the Netherlands and in Germany, the manner in which the contracting parties are bound towards each other by the (obligatory provisions of the) collective labour agreement is rather straight forward. These parties need, by law, to oblige these provisions and are liable in the case of non-compliance. In both countries, the contracting associations are under the obligation to urge their members to fulfil the obligations arising from the collective labour agreement, but they do not have to guarantee this. The same holds true for Belgium (as the common opinion is that obligatory provisions are binding by law), although the contracting associations are, by law, protected from payment of damages upon breach of the collective labour agreement (unless it is specifically stipulated otherwise in the agreement, which in practice never happens). Moreover, enforcing obligatory provisions in Belgium is not without difficulties, as most contracting organisations (including all employees' organisations) do not have legal personality. The situation is entirely different in Great Britain, as collective labour agreements are considered a mere gentleman's agreement, unless specifically stated otherwise in the agreement (which in practice rarely, if ever, happens). As collective labour agreements are in principle not binding upon the signatory parties, there is no remedy by law if one of the parties fails to comply with the collective labour agreement. The ultimate sanction for a breach of the collective labour agreement is industrial action.

The lack of binding legal effects of the (obligatory provisions of the) collective labour agreement in Great Britain is in sharp contrast with the situation in the continental European countries.[1853] In fact, an overwhelming majority of the reports from the continental countries participating in the research "The evolving structure of Collective Bargaining in Europe 1990 – 2004" led by Sciarra explicitly noted that in their jurisdiction collective labour agreements

1853 But is in line with the other non-continental Member State: Ireland. Reference is made to A. Kerr, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Ireland*, page 6.

bind the signatory parties by contract.[1854] The situation in Great Britain when compared to continental Europe even led the Danish reporter Nielsen to state: "there are profound differences between the UK, on the one hand, and the continental European countries, on the other, with regard to the legal effects of collective agreements". [1855]

8.2 Scenario 2

In the Netherlands, Germany and Belgium the (individual normative) legal norms of the collective labour agreement should be applied to those employers and employees who both (i) are bound by and (ii) fall within the scope of applicability of said agreement. The effects of the (individual normative) legal provisions in these countries are broadly the same. The system in Great Britain is radically different.

8.2.1 Which employers and employees are bound by the collective labour agreement?

Employers in the Netherlands, Belgium, Germany and Great Britain are bound by a collective labour agreement if they are (a) members of one of the contracting employers' association or (b) entered into the collective labour agreement themselves. This is a widely accepted situation in Europe, respecting the autonomy of the individual employer.[1856] Employees in Germany and the Netherlands are bound by the collective labour agreement if they are member of the contracting trade union; in Belgium all employees of bound employers are automatically bound by the collective labour agreement, regardless of their possible trade union membership. In Great Britain only those employees are bound by the collective labour agreement whose individual employment

1854 Most participants clearly stated so in their report. Some reports, however, did not mention the possible binding force of obligatory provisions at all. P. Xuereb from Malta mentioned that the possible binding power of obligatory provisions in collective labour agreements in Malta actually was subject to litigation that at the moment of drafting that report was not yet finished. Reference is made to P. Xuereb, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Malta*, pages 26 and 27.

1855 R. Nielsen, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Denmark*, page 15. This finding is also acknowledged by R. Rebhahn, *Collective Labour Law in Europe in a Comparative Perspective Collective Agreements, Settlement of Disputes and Workers' Participation (Part I)*, page 277.

1856 R. Rebhahn, *Collective Labour Law in Europe in a Comparative Perspective Collective Agreements, Settlement of Disputes and Workers' Participation (Part I)*, pages 281 and 282.

agreement incorporates the collective labour agreement, regardless of any trade union membership issues.

8.2.2 Which employers and employees fall within the collective labour agreement's scope of application?

In all Researched Countries, the social partners themselves determine the scope of application of the collective labour agreement in that agreement. Logically, a number of elements need to be taken into account in that respect, such as: (i) the group of employees falling within the scope of the collective labour agreement; (ii) the employer or group of employers falling within the scope of the collective labour agreement; (iii) the geographical territory; and (iv) the duration of the agreement.

8.2.3 What are the legal consequences?

The (individual normative) provisions of the collective labour agreement apply directly, and with mandatory effect, to the individual employment agreement of the bound employer and the bound employee in the Netherlands, Belgium and Germany. This means that every normative provision of the collective labour agreement automatically applies to the individual employment agreement, modelling the individual employment agreement and setting aside possible from the collective labour agreement deviating provisions. This is a typical situation in Europe: the collective labour agreement sets, in a mandatory fashion, the employment conditions for the employer and employee that are both bound by the collective labour agreement.[1857]

The situation in Great Britain, however, is entirely different. Neither common law nor TULRA awards direct normative effect to collective labour agreements. The terms that are of an individual nature of the collective labour agreement (comparable to individual normative provisions) only apply to the relation between the employer and the employee if they have been incorporated into the individual employment contract, regardless of whether both the employer and the employee are bound by the collective labour agreement or not. The individual employer and employee should thus agree that the individual terms of the collective labour agreement are to form part of the employment contract. After being incorporated, the terms are applicable to the agreement and are legally binding. Variations to the collective labour

1857 R. Rebhahn, *Collective Labour Law in Europe in a Comparative Perspective Collective Agreements, Settlement of Disputes and Workers' Participation (Part I)*, page 277.

agreement automatically vary the terms of employment, provided that the individual employment contract incorporates a collective labour agreement as is currently in force. This sets Great Britain, together with Ireland, off from the continental Member States.[1858]

8.2.4 Deviation from the collective labour agreement in the individual employment agreement

In the Netherlands and in Belgium it is important to distinguish between different sorts of normative provisions of the collective labour agreement, which can be standard, minimum or maximum. If a provision is standard, it does not allow for any variation of that provision in individual employment contracts. A minimum provision allows departure in the individual employment contract in favour of the employee. Maximum provisions in collective labour agreements may not be exceeded in individual employment agreements. In both Belgium and in the Netherlands minimum provisions are the rule: a provision is deemed to be a minimum provision, unless stated otherwise. In some countries, such as Sweden, this is the other way around: a provision is deemed to be a standard provision, unless stated otherwise.[1859] This is a system in which provisions of a collective labour agreement are mutually compulsory: the parties of the individual employment agreement are not allowed any deviation, if the provision of the collective labour agreement does not allow such deviation, whether in the employee's favour or to his detriment.[1860]

In Germany *all* provisions are, by law, minimum provisions. This "principle of favour" is not unusual when compared to other Member States,[1861] and is

1858 R. Rebhahn, *Collective Labour Law in Europe in a Comparative Perspective Collective Agreements, Settlement of Disputes and Workers' Participation (Part I)*, page 278.

1859 R. Rebhahn, *Collective Labour Law in Europe in a Comparative Perspective Collective Agreements, Settlement of Disputes and Workers' Participation (Part I)*, page 278.

1860 R. Rebhahn, *Collective Labour Law in Europe in a Comparative Perspective Collective Agreements, Settlement of Disputes and Workers' Participation (Part I)*, page 278.

1861 On the basis of the principle of favour "collective labour agreements can only improve economic and working conditions". Reference is made to European Commission, *Industrial Relations in Europe 2006*, page 51 and to S. Sciarra, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; Draft General Report*, page 27. How this principle of favour relates to possible after-effects that terms of a collective labour agreement can have will be discussed in section 8.8 of this chapter and section 4.4 of chapter 16.

even recommended by the ILO.[1862] Provisions in collective labour agreements in Bulgaria, the Czech Republic, Hungary, Malta, Poland, Slovakia, and Slovenia are, by law, minimum provisions as well. The Baltic countries also enforce the principle of favour, and Cyprus and Greece to a certain extent.[1863] However, it should be noted that exceptions to this principle of favour are common in all systems.[1864] In Germany, for example, an exception to this principle can follow from specific acts which can allow collective labour agreements to deviate from legal standards, a method that will be discussed further in section 8.6 below. The principle of favour with its exceptions has, more in general, a wide support as can be concluded from the ILO-report, which states:[1865]

> The principle of "favour" to the employee is still "firmly" rooted in many countries. When there are exceptions, they are framed either by law or regulation or by superior collective agreements.

In this system the provisions of a collective labour agreement are unilaterally compulsory: the parties of the individual employment agreement may deviate from the collective labour agreement only in favour of the employee and his position, and may not deviate to his detriment.[1866]

In Great Britain, there is no relevant difference between provisions of a minimum, maximum or fixed nature. The employer and employee may freely decide to deviate from a term deriving from a collective labour agreement that is incorporated in the employment agreement. The same holds true for Ireland. In this system the provisions of a collective labour agreement are supplemental: the parties of the individual employment agreement may deviate in both directions; their private autonomy remains unrestricted.[1867]

1862 Article 3.3 of ILO Recommendation R91 states: "stipulations in contracts of employment which are more favourable to the workers than those prescribed by a collective agreement should not be regarded as contrary to the collective agreement".

1863 European Commission, *Industrial Relations in Europe 2006*, page 51.

1864 S. Sciarra, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; Draft General Report*, page 27.

1865 M. Blatman (general reporter), *Collective Agreements, Synopsis of responses to questionnaire*, page 61.

1866 R. Rebhahn, *Collective Labour Law in Europe in a Comparative Perspective Collective Agreements, Settlement of Disputes and Workers' Participation (Part I)*, page 278.

1867 R. Rebhahn, *Collective Labour Law in Europe in a Comparative Perspective Collective Agreements, Settlement of Disputes and Workers' Participation (Part I)*, page 278.

8.2.5 Enforcement

In the Netherlands, Belgium and Germany the (individual normative) terms of the applicable collective labour agreement have a direct normative effect, and therefore become part of the individual employment agreement. As a consequence, both the employer and the employee must abide by the content of that collective labour agreement, on pain of being in breach of contract. Should a party breach the contract, the aggrieved party can claim specific performance and/or damages. This is a rather common model in Europe.[1868]

In Great Britain, the bound employee can neither enforce the collective labour agreement as against the bound employer nor does the content of that collective agreement have direct normative effect. He can, however, enforce terms of collective labour agreements that are incorporated into his individual employment contract. The same applies to the employer. Upon breach of a contractual term, the aggrieved party can also under common law claim damages and/or specific performance. Besides Great Britain, also Ireland abides to this system.[1869]

A third system can be witnessed in Europe as well, especially in the Scandinavian countries. Here the employer is only obliged to act in accordance with the collective labour agreement vis-à-vis the contracting trade union(s). Only these trade union(s) have a cause of action, excluding the individual employees.[1870]

8.3 Scenario 3

If the employer is not bound by the collective labour agreement while the employee is, the collective labour agreement does not apply on the basis of statute in the Netherlands, Germany and Belgium. This is also the case in

1868 R. Rebhahn, *Collective Labour Law in Europe in a Comparative Perspective Collective Agreements, Settlement of Disputes and Workers' Participation (Part I)*, page 277.

1869 R. Rebhahn, *Collective Labour Law in Europe in a Comparative Perspective Collective Agreements, Settlement of Disputes and Workers' Participation (Part I)*, page 278.

1870 R. Rebhahn, *Collective Labour Law in Europe in a Comparative Perspective Collective Agreements, Settlement of Disputes and Workers' Participation (Part I)*, page 277. This system is, for instance, in place in Sweden, Denmark and Finland.

Great Britain, as the collective labour agreement is not legally binding anyhow. This is also the general rule in Europe.[1871]

If the employer is bound by the collective labour agreement while the employee is not, the collective labour agreement does not apply automatically in Germany and the Netherlands. However, in the Netherlands – as opposed to Germany - the employer still is obliged to apply the agreement. In Great Britain, the collective labour agreement would not apply in this situation either, nor would the employer be under duty to apply that agreement. However, in all three countries it is possible and common to arrange in the individual employment agreement that a specific collective labour agreement applies to an employee who is not bound. This is done by using a reference clause, stipulating that a specific collective labour agreement applies. In such a case, the collective labour agreement will govern that employment agreement.

The above situation is quite different in Belgium. In Belgium, merely the position of the employer is relevant when determining whether the collective labour agreement applies directly in the relation between the employer and the employee. A collective labour agreement applies to an employment agreement in the situation that the employer is bound, regardless of whether the employee is bound or not. This system is far from unique in the EU. It is applied, although to a differing extent, in 18 of 25 Member States as the following table shows:[1872]

1871 R. Rebhahn, *Collective Labour Law in Europe in a Comparative Perspective Collective Agreements, Settlement of Disputes and Workers' Participation (Part I)*, pages 281 and 282. Rebhahn also deals with a number of exceptions to this rule on said pages.

1872 This table literally derives from: T. Schulten, *Changes in national collective bargaining systems since 1990*, pages 6 and 7, table 2, with the exception of the footnote.

	Employees covered by collective agreements	
	Only employees who belong to the parties signatory to the agreement (eg trade union members)	**All employees working for an employer that is covered by an agreement**
Austria	.	X
Belgium	.	X
Bulgaria	X	.
Cyprus	.	X
Czech Republic	.	X
Denmark	.	X
Estonia	X	.
Finland	X*	X*
France	.	X
Germany	X	.
Greece	.	X
Hungary	.	X
Ireland	X	.
Italy	.	X
Latvia	X	.
Lithuania	X**	X**
Malta	.	X
Netherlands	.	X[1873]
Poland	.	X
Romania	X	
Slovakia	.	X
Slovenia	.	X
Spain	.	X
Sweden	X	.
UK	.	X
** There are agreements with 'normal' applicability covering trade union members only and agreements with erga omnes applicability covering all employees. ** National and sectoral agreements cover only trade union members, while company agreements cover all employees of the company*.		

As shows from this table, many national collective labour agreements have an *erga omnes* effect, binding all employees employed by the bound employer, regardless of these employees' possible membership of a contracting trade union. It is argued by Rebhahn that an important aim for having this *erga omnes* effect is to achieve uniform working conditions for which the collective

1873 It should be noted that the bound employer should apply the collective labour agreement to all employees employed by him (article 14 ACLA), but that the agreement does not automatically apply to all of these employees.

labour agreement, besides the individual employment agreement, is regarded a proper tool.[1874]

8.4 Scenario 4

In the Netherlands, Germany and Belgium, collective normative provisions can play an important role. In these countries there are basically two important constructions with regard to collective normative provisions, which will be discussed below. British law merely distinguishes between terms that are of an individual nature and those that are of a collective nature; "real" collective normative provisions are not in place. However, some terms in a British collective labour agreement could be compared with collective normative provisions.

First, collective labour agreement in Germany, the Netherlands and Belgium may provide for rights and obligation that arrange the relation between the employer and its entire personnel (most explicit in Germany) or an employee representative body (the Works Council or even, in Belgium, a union delegation). The employer who is bound by the collective labour agreement should apply these collective normative provisions in these three countries. Some terms in a British collective labour agreement could be compared with this type of collective normative provisions. This is, for example, the case should a collective labour agreement arrange specific rights that union officials (shop stewards) enjoy, such as granting them the free use of facilities at the individual employer's premises. Such provisions bear resemblance to provisions on the Belgian union delegation. However, counter to the situation in Belgium, these terms only bind in honour in Great Britain.

Second, a collective labour agreement may provide for rights and obligations that arrange the relation between the employer and the employees vis-à-vis third collective parties, most notably funds. In Germany, the Netherlands and Belgium it is possible to arrange (binding) legal relations concerning such funds, including the right of these funds to collect contributions directly from bound employers, and the rights of (bound) employees to a direct entitlement

1874 R. Rebhahn, *Collective Labour Law in Europe in a Comparative Perspective Collective Agreements, Settlement of Disputes and Workers' Participation (Part I)*, page 284. Another argument mentioned by Rebhahn is that the *erga omnes* effect may prevent competition of employees in an enterprise with unfavourable working conditions: employers should not be able to take advantage of the fact that some employees do not join a trade union. I do not regard this a particular strong argument. It just as well can be argued that employees who refuse to join a trade union should not be allowed to benefit from the sacrifices made by employees who are a trade union member: free riders behaviour should not be rewarded.

towards these funds. In Belgium all employees employed by a bound employer can enjoy such a right, while in Germany this is only the case with regard to members of the contracting trade unions. In the Netherlands, it is questionable whether collective normative provisions should be applied to employees who are not bound by the collective labour agreement through membership of the contracting trade unions. However, if these employees have accepted the collective labour agreement, most notably through a reference clause, the collective normative provisions should certainly be applied. In Great Britain, provisions on funds are, in principle, not considered (a part of) a collective labour agreement, since the subject matter does not concern a statutory bargaining topic. Such agreements are therefore "extra-statutory" agreements, which are subject to common law. Such agreements are, in principle, not legally enforceable, unless the specific circumstances demonstrate a contrary intention of the contracting parties.

8.5 Other statutory means of enforcement

In the Researched Countries, a number of general means of enforcement of the collective labour agreement are to be found. There are also specific means of enforcing provisions of a collective labour agreement, depending on the nature of the provisions at stake.

8.5.1 General means of enforcement

Employee representative institutions may play an important role in the enforcement of collective labour agreements. This is the case in Germany, the Netherlands and Belgium, countries in which employee representative bodies (the Works Council or the union delegation) may verify whether the employer actually obliges the provisions of an applicable collective labour agreement. Although this power is not institutionalised in Great Britain, it is logical that a shop steward verifies whether his employer obliges the provisions of an applicable collective labour agreement as well. These employee representative institutions do not act on a possible breach of the collective labour agreement by the employer themselves, but they are likely to inform the contracting trade unions of such a breach.

In the Netherlands, Germany and Great Britain the government plays no real role in verifying whether the collective labour agreement is applied correctly. In Belgium, however, the BACLA is enforced by officers of the judicial police and civil servant appointed by the Crown. Furthermore, collective labour agreements in Belgium may confer the power to sanction offenders who do

not abide by the rules set out in the collective labour agreement to the joint committees or sub-committees.

8.5.2 Enforcement of obligatory provisions

As already mentioned in scenario 1, the usual remedy of a breach of an obligatory provision is for the counterparty to institute proceedings on the basis of breach of contract. This is common in many continental Member States. However, in Great Britain and Ireland this is different, as in these countries collective labour agreements only bind in honour. The ultimate means of enforcement in said jurisdictions is to call for collective actions.

8.5.3 Enforcement of individual normative provisions

Once a collective labour agreement applies to the employment agreement, (in Great Britain by incorporating the collective labour agreement in the employment contract) the individual normative provisions should be obliged. Upon breach of a contractual term, the aggrieved party can claim damages and/or specific performance. In the Netherlands and in Belgium, the contracting trade unions may play an important role in enforcing individual normative provisions as well. They may initiate proceedings against the employer in breach, and may claim specific performance and in the Netherlands even damages. This is different in Germany; only in specific situations can trade unions start litigation against the employer in breach of individual normative provisions. In some other continental European Member States, such as in Finland, Denmark and Sweden, only contracting trade unions are entitled to start litigation against the employer upon breach of individual normative provisions, excluding the individual employees.[1875] In Great Britain, as said, the union's ultimate response to an employer in breach of a collective labour agreement is engaging in collective actions.

8.5.4 Enforcement of collective normative provisions

The collectivities themselves may enforce collective normative provisions of a collective labour agreement in the Netherlands, Germany and Belgium. In these three countries, the contracting parties may also enforce the collective normative provisions of a collective labour agreement. Signatory trade unions may, for example, instigate proceedings against the employer who

1875 R. Rebhahn, *Collective Labour Law in Europe in a Comparative Perspective Collective Agreements, Settlement of Disputes and Workers' Participation (Part I)*, pages 277 and 280.

refuses to pay contributions due to a fund. This is obviously different in Great Britain, as collective labour agreements do not, in principle, contain collective normative provisions. If they do contain similar provisions, these provisions are not binding by law.

8.6 Special legal consequences of a collective labour agreement: ¾ mandatory law

The laws of all Researched Counties contain provisions that can be set aside by a collective labour agreement, as opposed to by "just" an individual employment agreement. These provisions will be referred to as provisions of ¾ mandatory law. Setting aside such provisions is usually to the disadvantage of employees and creates more flexibility for the employers. Dorssemont refers to this as a system of flexicurity: in collective bargaining flexibility is exchanged for setting security on the limits of that flexibility.[1876] In Germany, this system of ¾ mandatory law constitutes an important exception to the already discussed principle of favour.

This system of ¾ mandatory law sits well in a European context. It is not unusual for directives to stipulate that collective labour agreements may deviate from standard norms. In particular, with regard to working time, fixed-time and part-time work – all areas that are covered by EU legislation – it is becoming increasingly usual that derogations from the law are arranged in collective labour agreements.[1877] More and more Member States have introduced a system of ¾ mandatory law and the Industrial Relations in Europe 2006 Report even views this as an "increasing trend".[1878] The system is particularly well established in the Netherlands, Denmark and Sweden.[1879] It can be viewed as a part of the subsidiary role collective labour agreements can have in relation to statutory law: statutory law can be tailored on the appropriate level by collective labour agreements.[1880]

1876 F. Dorssemont, *Green Paper Modernising Labour Law to meet the Challenges of the 21st Century, 'Collectief Arbeidsrecht, waer bestu bleven?'*, page 153.

1877 S. Sciarra, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; Draft General Report*, page 42. Typically, directives that are transposed agreements of the European social partners concluded in the context of the European social dialogue contain such stipulations of ¾ mandatory law. See also: F. Dorssemont, *Green Paper Modernising Labour Law to meet the Challenges of the 21st Century, 'Collectief Arbeidsrecht, waer bestu bleven?'*, page 153.

1878 European Commission, *Industrial Relations in Europe 2006*, page 10.

1879 European Commission, *Industrial Relations in Europe 2006*, pages 52 and 53.

1880 See also: S. Sciarra, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; Draft General Report*, page 30.

8.7 Term and termination

In all Researched Countries the freedom of contract plays an important role when it comes to term and termination of the collective labour agreement. Consequently, the contracting parties are free to establish the date on which their collective labour agreement enters into force and whether the legal norms of the collective labour agreement have retro-effect. Moreover, the signatory parties are free to establish the duration of the collective labour agreement. Here, the position of the social partners in the Netherlands is limited somewhat, as it is not possible to conclude a collective labour agreement with a duration exceeding 5 years.

When it comes to termination there are certain differences between the Researched Countries. Termination is easy in Great Britain, as a (non binding) collective labour agreement can be terminated at any time, with or without notice given. In the Netherlands, collective labour agreements can be terminated by notice at the end of their term. Should a collective labour agreement not be terminated by notice, the agreement is considered to be (tacitly) renewed after termination of its original term for the same term, but not exceeding one year, unless stipulated otherwise in the agreement. In fact, this system bears quite a resemblance with a system permitting collective labour agreements for indefinite duration, as the contracting parties have to actively terminate the collective labour agreement in order for that agreement to end. In Belgium and Germany a collective labour agreement entered into for a fixed period of time ends by operation of law at the end of its term, unless stipulated otherwise in the agreement. A collective labour agreement entered into for an indefinite period of time can be terminated by notice. In Belgium, however, it is possible to stipulate that the agreement cannot be terminated by notice at all. In all Researched Countries it is possible to terminate the collective labour agreement by mutual consent.

8.8 After-effects

The general rule of contract law is that the effects of an agreement end upon termination of that agreement. In all Researched Countries, that is the case with regard to the obligatory provisions of a collective labour agreement; they lose force after the collective labour agreement has expired. Matters are, however, more complicated with regard to individual and collective normative provisions.

Once a collective labour agreement applies to the employment agreement (in Great Britain by incorporating the collective labour agreement in the

employment contract) the individual normative provisions have after-effects in all Researched Countries. That means that these provisions retain their force after expiry of that collective labour agreement. This is only different if the collective labour agreement specifically stipulates otherwise. The employer and employee are, however, after expiry of the collective labour agreement[1881] entitled to change the content of the individual employment contract should they wish so, observing the rules applicable for such a change in the different countries, in fact terminating the collective labour agreement's after-effects. That makes sense, as the expiry of the term of the collective labour agreement restores the full contractual freedom of the employer and the employee. In all Researched Countries, the after-effects are also terminated once a new collective labour agreement applies.

There are practical and social arguments that make attributing after-effects to individual normative provisions logical. After-effects arrange the period between two subsequent collective labour agreements and therefore contribute to rest and tranquillity in the relevant company or sector. Moreover, if after-effects of individual normative provisions were to be denied, the employee would upon expiry of the collective labour agreement fall back on his "old" employment conditions. Especially if the collective labour agreement had lasted a considerable period of time, the termination of the collective labour agreement would likely mean a "free-fall" in employment conditions for the employee involved, which is hardly acceptable from a social point of view. But from an administrative perspective this would also potentially constitute problems, as it would be difficult to exactly establish the old employment conditions.

From a legal perspective there are also arguments in favour of attributing after-effects to individual normative provisions. If an applicable collective labour agreement tacitly amends the employment contract, in fact altering the employment conditions, it makes sense that the "mere" termination of the collective labour agreement does not undo all changes. This argument, however, potentially involves difficulties for the social partners. If the collective labour agreement fully and unconditionally (for indefinite duration) changes the individual employment conditions, there is no real need for any theory on "after-effects". In such a case, the employment agreement is just changed, which can only be made undone by changing the employment agreement itself again. This does not necessarily constitute a problem in countries like

1881 In Great Britain, however, the employer and employee may also change the individual employment agreement that has been altered by an applicable collective labour agreement during the term of that agreement.

Belgium, the Netherlands and Great Britain, in which countries new collective labour agreements may alter employment conditions to the detriment of the employee. In consequence, the social partners in these countries still have ample room to negotiate new terms, without being hindered by the after-effects of the previous collective labour agreement. In other words, in these countries the after-effects can be terminated by a subsequent collective labour agreement, regardless of whether any arrangement on after-effects would be in place. That is different in countries such as Germany, where the principle of favour is in force. Should the after-effects of individual normative provisions have indefinite duration, in fact unconditionally changing the employment conditions of the individual employee, the social partners cannot make these after-effects undone in a subsequent collective labour agreement (to the detriment of the employees). This would lead to a static bargaining situation. In Germany, however, the after-effects have no indefinite duration, but lapse at the moment new arrangements have been put in place, which includes a new collective labour agreement.[1882] This restores the dynamics that are needed for proper industrial relations. Given the above, a proper arrangement on after-effects is particularly important in a system that is based on the principle of favour.[1883]

As stated above, all Researched Countries attribute after-effects to the individual normative provisions. The situation is more diverse when it comes to collective normative provisions. In Germany these provisions have after-effects. This is not the case in the Netherlands, Belgium or Great Britain. Collective normative provisions that also apply individually do have after-effects in Belgium.

8.9 The role of alternative dispute resolution in collective bargaining

In all Researched Countries alternative dispute resolution mechanisms play a part in collective labour law, including collective labour agreements. In variable degrees this holds true for all Member States. Alternative dispute resolution may be applied both in the process of negotiating a new collective labour agreement in order to tackle controversies on the content of specific stipulations, as well as after the collective labour agreement is concluded, in case a dispute arises on the proper execution of said agreement. It may invigorate the collective bargaining process, increase the chances of reaching

1882 Reference is made to chapter 10, section 7.8.

1883 Which observation will be discussed in detail in chapter 16, section 5 for the proposed European system on transnational collective labour agreements.

an agreement and improve the quality and effectiveness of the negotiation process and its outcome.[1884]

Basically, three mechanisms of alternative dispute resolution are often applied within the EU: conciliation, mediation and arbitration.[1885] Conciliation uses the expertise of a neutral third party to assist negotiations and foster agreement among the social partners. Mediation takes one additional step, as the neutral third party may even make recommendations. Arbitration goes beyond that, as is allows the third party to unilaterally end the dispute between the parties.[1886] In some Member States dispute resolution is free and autonomous; while in others compulsory dispute resolution exists.[1887] As a rule, alternative dispute resolution is mostly applied to disputes of interest (as opposed to disputes of law). In these cases mediation is most popular, followed by conciliation and finally arbitration, a method which is not widely used.[1888] When disputes of law are at stake, the parties involved are more inclined to seek resolution in the court system.

9. Extending collective labour agreements

In the Netherlands, Germany and Belgium it is possible to extend a collective labour agreement in such a fashion that it applies to all employers and employees falling within the scope of applicability of that agreement. In Great Britain this possibility does not exist. The extension techniques in the first three countries are rather similar, leading to an extension by means of a governmental decree of (parts of) a collective labour agreement.

First, the collective labour agreement that is to be extended should meet specific demands. This means that the collective labour agreement must be a proper collective labour agreement with a clear scope of application. In Belgium the agreement should be concluded within the joint bodies; it should

1884 See F. Valdés Dal-Ré, *Synthesis Report on conciliation, mediation and arbitration in the European Union Countries*, March 2002, page 5. This report can be found on: http://ec.europa.eu/employmentsocial/labour_ law/publications_en.htm.

1885 See F. Valdés Dal-Ré, *Synthesis Report on conciliation, mediation and arbitration in the European Union Countries*, page 21.

1886 See C. Welz and M. Eisner, *EIRO Thematic Feature on Collective dispute Resolutions in an enlarged European Union*, page 1. This report can be found on the EIRO-website.

1887 See C. Welz and M. Eisner, *EIRO Thematic Feature on Collective dispute Resolutions in an enlarged European Union*, page 7.

1888 See C. Welz and M. Eisner, *EIRO Thematic Feature on Collective dispute Resolutions in an enlarged European Union*, page 18.

therefore not concern a company level agreement. Although such a demand is not in place in the Netherlands[1889] and in Germany, extension obviously is only really interesting when it regards agreements surpassing company level. Furthermore, briefly put, only (individual and collective) normative provisions of a collective labour agreement can be extended. In Germany and the Netherlands, the collective labour agreement should already apply to a majority of employees falling with the scope of applicability of the collective labour agreement. In Germany, the extension should also serve the public interest, while in the Netherlands and Belgium the extension can be refused if it would violate the public interest.

Second, procedural demands and safeguards need to be satisfied. This means that there should be a request for extension, which needs to be published. Third parties may subsequently oppose to the request. In the Netherlands, the relevant minister may ask the Labour Foundation's advice on the extension request, while in Germany the minister needs to obtain the approval of a special committee prior to its decision to extend a collective labour agreement. In Belgium no such check is in place. In all countries, the actual decision to extend (parts of) the collective labour agreement, needs to be published.

Third, there are statutory limitations in place on the duration of the binding collective labour agreement. In all three countries there is either no or only a limited possibility for retro-effect of the extended collective labour agreement. Moreover, the extension may not outlast the duration of the actual collective labour agreement.

Once declared binding, the collective labour agreement applies to all employment agreements concluded, or to be concluded, within the term of the extension decree that fall within the scope of application of that binding agreement. The legal norms of such a collective labour agreement apply to all these employment agreements and – generally speaking – the legal position of employers and employees that were not yet bound by the collective labour agreement becomes the same as that of the employers and employees who were already bound by the collective labour agreement regardless of the extension. That means that the provisions have direct normative effect. Unlike the Netherlands, in Germany and Belgium the extended collective labour agreements have after-effects.

1889 Although some scholars in the Netherlands argue that extension of company-level agreements is not possible in the Netherlands, such an exclusion does not appear from the relevant acts.

Extension of collective labour agreements is not uncommon in the EU. According to an EIRO research, there are basically three manners to extend collective labour agreements:[1890]

- extension in the narrow sense (*erga omnes*), making a collective agreement binding within its field of application by explicitly binding all those employees and employers which are not members of the parties to the agreement;
- enlargement, providing for a collective agreement to apply in sectors or areas where it did not apply yet and where no union and/or employers' association capable of collective bargaining exists. The scope of the original collective labour agreement is thus "enlarged"; and
- functional equivalents, including compulsory membership of the bargaining parties' organisations or legal provisions requiring government contractors to comply with the terms of a relevant collective agreement.[1891] These functional equivalents are not based on formal extension mechanisms but do in effect extend the provisions of an agreement to a larger constituency.

These three types are regularly used, as can be concluded from the table below that sets out the existence or non-extistence of extension provisions in 19 Member States:[1892]

1890 F. Traxler and M. Behrens, C*ollective bargaining coverage and extension procedures*, page 13.

1891 This latter form of extending collective labour agreements may, however, be in violation of article 49 of the EC Treaty. Reference is made to chapter 8, section 6.3.3 and the European Court of Justice, 3 April 2008, C-346/06, *Rüffert/Land Niedersachsen*.

1892 This table literally derives from: F. Traxler and M. Behrens, C*ollective bargaining coverage and extension procedures*, pages 13 and 14, table 7.

Varieties of extension provisions			
Country	**Extension in the narrow sense**	**Enlargement**	**Functional equivalents**
Austria	+	+	+
Belgium	+	-	-
Denmark	+	-	-
Finland	+	-	+
France	+	-	-
Germany	+	-	+
Greece	+	-	-
Hungary	+	-	-
Ireland	+	-	+
Italy	-	-	+
Luxembourg	+	-	-
Netherlands	+	-	-
Poland	+	-	-
Portugal	+	+	-
Slovakia	+	-	-
Slovenia	-	-	+
Spain	+	+	-
Sweden	-	-	-
UK	-	-	-
Notes: + indicates existence of extension mechanism			

As shows from this table, with the exception of Sweden and the UK, all Member States mentioned above have a system to extend collective labour agreements. The most frequently used extension method is "extension in the narrow sense", which is – to a different degree – applied in 15 of the above-mentioned countries. This is also the method described above with regard to Germany, the Netherlands and Belgium. The exact requirements and procedures for this type of extension differs in said 15 countries, but common elements can be found as well. Most of the time, this type of extension requires:

- a public act or decree, issued by the government authority in charge of labour matters;
- a request of one of the social partners party to the collective labour agreement or another social partner; and
- a minimum requirement for extension, most notably minimum rates for coverage of the relevant agreement prior to extension.[1893]

1893 F. Traxler and M. Behrens, C*ollective bargaining coverage and extension procedures*, page 14.

Enlargement procedures are only common in Austria, Portugal and Spain. Functional equivalents to extension can be found in Austria, Finland, Germany, Ireland, Italy and Slovenia.

Although extension of collective labour agreements is quite common within the EU, this is not to say that there is no opposition against this practice. As Denmark and Sweden have a strong tradition of voluntarism when it comes to collective agreements, extending these agreements is only possible in Denmark when it comes to transposing the content of EC directives while it is not possible at all in Sweden.[1894] The Constitutional Court of the Czech Republic even held in its 2004 ruling the extension by ministerial decree of a collective labour agreement to employers that were not bound by it through membership of an employers' organisation unconstitutional. The Court argued that extending a collective labour agreement beyond the signatory parties would violate the contractual freedom.[1895] In Poland, the Minister of Labour is, by law, entitled to extend the application of a supra-establishment collective agreement to employees to whom no agreement applies (enlargement of the collective labour agreement) when the overriding social interest so requires and this is requested by an appropriate trade union or employers' organisation. This entitlement is, however, never used in practice and scholars argue that such an extension would be at odds with the private parties' freedom to bargain.[1896]

10. The collective labour agreement and the reach of the social partners

10.1 What can the social partners regulate in a collective labour agreement?

In Europe, there is a tradition of "autonomy of collective bargaining", meaning "the development of collective agreements as sources for the free

1894 European Commission, *Industrial Relations in Europe 2006*, page 51.

1895 I. Tomeš, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Czech Republic*, page 3. The report can be found on: http://www.unifi.it/polo-universitario-europeo/ricerche/collective_bargaining.html. See also: European Commission, *Industrial Relations in Europe 2006*, page 51.

1896 See M. Sewerynski, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Poland*, page 4. This type of extension should be distinguished from the possibility to apply a collective labour agreement to all employees of a bound employer. In any case, in Poland the "regulatory function of collective agreements is strengthened by the rule that its provisions apply to all employees of the employer covered by an agreement, including those who are not members of the union". See the same page of the same report.

definition of wage policies and working conditions".[1897] This autonomy is, as already set out in chapter 8 above, often seen as an expression of freedom of association.[1898] This has given social partners in Europe considerable room to determine the content of their collective labour agreements. Moreover, collective labour agreements are, in the Researched Countries, also considered private agreements, bringing about the contractual freedom of the signatory parties.

As already stated in section 5.1 above, collective labour agreements in the Researched Countries should, besides setting out the rights and obligations of the contracting parties, concern employment conditions, which is normally defined broadly. Obviously, collective labour agreements may not contravene norms "higher in hierarchy", such as national and international laws and regulations, which can include the demands that collective labour agreement may not contravene public policy or violate good morals.

10.2 Collective labour agreements and representativity demands

When it comes to representativity, the situation in the Researched Countries differs to quite an extent. The only country that requires *representative* social partners in order to conclude a collective labour agreement is Belgium. Social partners in Belgium are only representative when they meet strict demands (with the exception of course of the employer that concludes a company-level collective labour agreement, which is obviously representative to conclude that agreement). As mentioned,[1899] the representativity demands in Belgium constitute a form of *institutional* representativity, as opposed to *factual* representativity. Factual representativity demands are not in place in Belgium. An enterprise level collective labour agreement can, for example, be concluded with just one (institutional) representative organisation, even though that organisation only represents a minority of the employees in said enterprise. The mere fact that the law appointed an organisation as representative suffices in Belgium. In the Netherlands and Germany there are no strict representativity demands that the social partners must meet in order to conclude valid collective labour agreements. These demands are not strictly necessary as collective labour agreements only directly bind the members of the contracting parties. However, on the side of labour this argument only partially holds true, as many employees in said jurisdictions are bound by a collective labour agreement through a reference clause in their employment

1897 European Commission, *Industrial Relations in Europe 2006*, page 41.

1898 See also: European Commission, *Industrial Relations in Europe 2006*, page 41.

1899 See chapter 11, section 5.

contract. In Germany mild representativity demands do apply. After all, an organisation must (i) be competent to conclude a collective labour agreement, (ii) surpass company level, and (iii) possess real powers (a demand which only fully applies to trade unions). Representativity plays only a limited role in British collective bargaining, as there are no representativity demands in place to entitle a trade union to conclude a collective labour agreement. Representativity does play a role in (statutory) recognition: the employer must recognise the independent trade union (which normally means that the trade unions surpasses company level) which either has a majority of the employees in the relevant bargaining unit as its member, or which is supported by a majority of the employees that voted in a ballot and at least 40% of the employees constituting the bargaining unit.

This diverse situation is not only in place in the Researched Countries, but in all countries in the EU. This clearly follows from the research that was conducted on the assignment of the Commission with regard to representation in the European social dialogue.[1900] One of the lessons that the Commission drew from the aforementioned research was that the diversity of practice in the different Member States is such that there is no single model as to representativeness that could be replicated at European level.[1901] Representativity simply differs depending on the national tradition.[1902] This, however, does not stand in the way of some general remarks on representativity in the EU.

When it comes to representativity in the "old" EU, it is not uncommon to distinguish between 4 groups of countries: the southern countries (such as Italy, Portugal, and Spain), continental countries (such as Germany, Austria, Belgium, France and Hungary), Nordic Countries (such as Denmark, Sweden, Finland, and Estonia) and Anglo-Saxon countries (Great-Britain).[1903] In (very) general terms these groups of countries have the following similarities. In the southern countries there are detailed legal codes for determining trade union representativeness, of which the most common factors are membership rates (trade union density) and results of workplace elections.[1904] In the continental

1900 See chapter 5, section 2.2.

1901 Reference is made to annex 3 of COM (1993), 600 final.

1902 Institut des Sciences du Travail, *Report on the representativeness of European Social Partner Organisations*, page 5. See also A.Ph.C.M. Jaspers, *Representativiteit: representeren of vertegenwoordigen?*, pages 15 *ff*.

1903 J. Kirton-Darling (ed.), *Representativeness of Public Sector Trade Unions in Europe, State Administration and Local Government Sectors*, page 14, with reference to Ebbinghaus and Visser.

1904 J. Kirton-Darling (ed.), *Representativeness of Public Sector Trade Unions in Europe, State Administration and Local Government Sectors*, page 16.

countries legal codes exist on representativity, which use a combination of quantitative and qualitative criteria.[1905] Trade unions, for example, need to be independent (a qualitative criterion), independence which partially depends on the number of paying members (a quantitative criterion). The Nordic countries as a rule do not have legal requirements on trade union representativeness, mainly because the Nordic bargaining system is based on principles of voluntarism.[1906] Mutual recognition rather than representativity forms the central principle. In Great Britain, as said, representativeness of trade unions depends mainly on recognition of the employer, either or not forced after CAC determination. Some, but not all, acceding countries have statutory representativeness criteria in place.[1907]

10.3 Collective labour agreements and independence of trade unions

In Germany and in Great Britain strict independence demands apply to trade unions: a trade union must be independent from the employer (and, in the case of Germany, from state, church and political parties). In Belgium, there are no statutory requirements on the level of independence of trade unions. However, as only representative trade unions may enter into collective labour agreements, and there are only three large, strong and independent trade unions, the issue of representativity is actually a non-issue. The only deviating country is the Netherlands, a country in which there are no statutory demands on the level of independence trade unions require (from the employer) in order to conclude legally valid collective labour agreements. Trade unions that were not independent from the employer have, in fact, concluded valid collective labour agreements in this jurisdiction. Viewed from an international perspective, this Dutch situation is out of tune. ILO Convention C98 and Recommendation R169 simply require free and independent employers' and workers' organisations.[1908]

1905 J. Kirton-Darling (ed.), *Representativeness of Public Sector Trade Unions in Europe, State Administration and Local Government Sectors*, page 17.

1906 J. Kirton-Darling (ed.), *Representativeness of Public Sector Trade Unions in Europe, State Administration and Local Government Sectors*, page 19.

1907 J. Kirton-Darling (ed.), *Representativeness of Public Sector Trade Unions in Europe, State Administration and Local Government Sectors*, pages 14 and 15.

1908 See chapter 8, section 2.1.

11. Summary

11.1 Industrial relations in Europe: past and present

The introduction of collective bargaining was a struggle in the Researched Countries, and more in general in Europe. The freedom of association was much oppressed; trade unions faced a prohibition to join in pursuit of better employment conditions. Employers opposed collective bargaining vigorously. The right to strike was simply not, or only marginally, recognised. In the period after World War I, it was, as a rule, easier to conclude a collective labour agreement. This did, however, not solve all problems, as the status of a collective labour agreement appeared rather troublesome in many countries. The collective labour agreement did not sit well with the standard type of contract. The collective aspects of the collective labour agreements caused difficulties. In a number of countries these difficulties were overcome by enacting legislation.

Today, there is no single or even dominant model of European industrial relations, which largely applies to the individual Member States. Each Member State has a more or less unique system on collective bargaining, varying widely in terms of level, coverage, content and nature. Notwithstanding these differences, almost all Member States have a rather detailed legal framework on collective bargaining that contains basic provisions on: (i) the parties that are entitled to conclude collective labour agreements; (ii) the possible levels of collective bargaining; (iii) the hierarchy of different bargaining levels; (iv) the legal coverage of collective labour agreements; and (v) the procedural rules for collective bargaining. Furthermore, in each Member State collective bargaining takes place at more than one of the following levels: (i) national (or inter-sectoral), (ii) sectoral and (iii) company. It depends on the Member State in question as to which level of collective bargaining is dominant.

Trade union density, defined as the ratio of actual to potential union membership, differs widely between the Member States. The overall weighted average union density rate in the EU lies between 20 and 25% of the wage earners and was considerably higher in the past. Employers' organisation density, defined as the ratio of the number of employees the members of employers' organisations have to the number of employees of potential membership, differs as well but is higher than trade union density. The (weighted) average employer rate of organisation within the EU lies approximately between 55 to 60% and does not seem to be dropping. Collective bargaining coverage, understood as the number of employees covered by a collective agreement as a proportion of the number of employees (that is: wage and salary earners),

varies greatly as well. In the year 2002 on average more than 70% of the employees within the Member States at that time, excluding Greece, were covered by a collective labour agreement.

There seems to be a European trend towards decentralisation of collective bargaining, leaving more room to individual companies to tailor employment conditions at enterprise level. Another trend in Europe is that the scope of content of collective labour agreements seems to be broadening and now includes restructuring, working conditions of non-standard employees and social rights.

11.2 The collective labour agreement and the parties involved

The definition of a collective labour agreement in the Researched Countries and its different provisions bear great resemblance. This appears to be the same in other Member States. In all Researched Countries there are at least three requirements that an agreement must satisfy in order to be regarded a collective labour agreement. First, there must be an agreement, typically a written contract. Second, only specific parties are entitled to conclude a collective labour agreement. On the one hand there should be employers or employers' organisations and on the other trade unions. Third, the collective labour agreement should concern employment conditions. This is normally broadly defined. A fourth requirement is in place in some of the Member States, which means that the collective labour agreement is to be registered.

All Researched Countries distinguish (sometimes for practical purposes only) between obligatory and normative provisions in a collective labour agreement. The obligatory provisions lay down the rights and obligations between the parties concluding the collective labour agreement. The normative provisions can be divided into individual and collective normative provisions. Individual normative provisions create rights and obligations between the contracting parties to an individual employment agreement (the employers and employees). These provisions are the quintessence of collective labour agreements. Collective normative provisions are recognised in the Netherlands, Germany and Belgium. These provisions basically arrange the collective employment relations. Some terms in a British collective labour agreement, however, could be compared with some of the collective normative provisions in the other Researched Countries.

Trade unions in Europe are basically independent associations of employees, who have united to represent and defend their interests in the workplace, but also at the general level of the economy and politics. They usually (i)

have a centralised structure and a division of work between a network of volunteers and a professional apparatus; (ii) are recognised in the Member States and have a quasi public status; (iii) have a distributive function in the economy (they settle wages) and also have a normative function (they are actively involved in setting labour regulations); and (iv) represent and mobilise their members. In all Member States trade unions are entitled to enter into collective labour agreements. However, these trade unions usually are subject to a number of requirements in order to do so. Some of these requirements are basically the same in all Researched Countries. A trade union must in all Researched Countries be an organisation and must pursue the advancement of employment relations and conditions. In the Netherlands and in Germany the trade union's articles of associations must specifically stipulate the unions' power to enter into collective labour agreements. There are important differences in the Researched Countries when it comes to independence and representativeness of trade unions. In general, this holds true with regard to trade unions in other Member States as well.

Employers' organisations are in many ways the counterparts of trade unions. Broadly spoken, employers' organisations are bodies designed to organise and advance the collective interests that employers have in the labour market and industrial relations. Employers' organisations tend to be of importance for the existence of multi-employer collective bargaining and statutory provisions for extending collective labour agreements. Employers' organisations differ widely in terms of structure, membership basis and tasks across Europe. Basically, employers' organisations in the Researched Countries should satisfy the same additional requirements as trade unions do in order to be eligible to participate in collective bargaining and to conclude collective labour agreements. However, generally the test of whether the employers' organisations satisfy the relevant requirements seems to be applied a bit less strict when compared to trade unions.

11.3 The consequences of a collective labour agreement

Once a collective labour agreement is concluded, it should be established to whom it applies, what its consequences are and how the rights arising from it can be enforced.

11.3.1 The contracting parties

In the Netherlands, Germany and Belgium, the contracting parties are bound towards each other by the (obligatory provisions of the) collective labour agreement. All parties need, by law, to oblige these provisions. This is

typically the situation in the continental European countries as well. Things are different in Great Britain and Ireland, as collective labour agreements in these jurisdictions are considered a mere gentleman's agreement, unless specifically stated otherwise in the agreement. As collective labour agreements are in principle not binding upon the signatory parties in these countries, there is no remedy by law if one of the parties fails to comply with the collective labour agreement. The ultimate sanction for a breach of the collective labour agreement is industrial action.

11.3.2 The members of the contracting associations

In the Netherlands, Germany and Belgium the (individual normative) legal norms of the collective labour agreement should be applied to those employers and employees who both (i) are bound by and (ii) fall within the scope of applicability of said agreement. Employers in said countries are bound by a collective labour agreement if they are (a) member of one of the contracting employers' association or (b) entered into the collective labour agreement themselves. Employees in Germany and the Netherlands are bound by the collective labour agreement if they are member of the contracting trade union; in Belgium all employees of bound employers are automatically bound by the collective labour agreement, regardless of their possible trade union membership. In all Researched Countries, the social partners themselves determine the scope of application of the collective labour agreement in that agreement. The (individual normative) provisions of the collective labour agreement apply directly and with mandatory effect to the individual employment agreement of the bound employer and the bound employee in the Netherlands, Belgium and Germany. The situation in Great Britain is entirely different. Neither common law nor statutory law awards direct normative effect to collective labour agreements. The terms that are of an individual nature of the collective labour agreement (comparable to individual normative provisions) only apply to the relationship between the employer and the employee if they have been incorporated into the individual employment agreement, regardless of whether both the employer and the employee are bound by the collective labour agreement or not. Variations to the collective labour agreement incorporated into the individual employment agreement in principle automatically vary the terms of employment.

In the Netherlands and in Belgium it is important to distinguish between different sorts of normative provisions of the collective labour agreement, which can be standard, minimum or maximum. In Germany all provisions are, by law, minimum provisions. This "principle of favour" is not unusual when compared to other Member States. In Great Britain, there is no relevant

difference between provisions of a minimum, maximum or fixed nature. The employer and employee may freely decide to deviate from a term deriving from a collective labour agreement that is incorporated into the employment agreement.

In the Netherlands, Belgium and Germany the (individual normative) terms of the applicable collective labour agreement have a direct normative effect, and therefore become part of the individual employment agreement. In Great Britain, this is only the case if the collective labour agreement is incorporated into this individual employment contract. In all Researched Countries, once the collective labour applies, both the employer and the employee must abide by its content on pain of being in breach of contract. Should a party breach the contract, the aggrieved party can claim specific performance and/or damages.

11.3.3 Members vs. non-members

If the employer is not bound by the collective labour agreement while the employee is, the collective labour agreement does not apply on the basis of statute in the Netherlands, Germany and Belgium. This is also the case in Great Britain, as the collective labour agreement is not legally binding anyhow. If the employer is bound by the collective labour agreement while the employee is not, the collective labour agreement does not apply automatically in Germany, the Netherlands and Great Britain. However, in all three countries it is possible and common to arrange in the individual employment agreement through a reference clause that a specific collective labour agreement applies to an employee who is not bound. This situation is quite different in Belgium. In Belgium, merely the position of the employer is relevant when determining whether the collective labour agreement applies directly in the relation between the employer and the employee. A collective labour agreement applies to an employment agreement in the situation that the employer is bound, regardless of whether the employee is bound or not. This system of collective labour agreements with *erga omnes* effects is dominant in the EU.

11.3.4 The collectivities

In the Netherlands, Germany and Belgium, collective normative provisions play an important role. In these countries there are basically two constructions with regard to collective normative provisions: (i) collective labour agreement may provide for rights and obligations arranging the relation between the employer and its entire personnel (most explicit in Germany) or an employee representative body (the Works Council or even, in Belgium, a union

delegation), and (ii) a collective labour agreement may provide for rights and obligations arranging the relation between the employer and the employees vis-à-vis third collective parties, most notably funds. Although British law merely distinguishes between terms of an individual and terms of a collective nature, some terms could be compared with the first group of collective normative provisions described above.

11.3.5 Special means of enforcement

In all Researched Countries, employee representative institutions (the Works Council, the union delegation or a shop steward) may play an important role in the enforcement of collective labour agreements. Only in Belgium the state plays a role in enforcing collective labour agreements.

11.3.6 Deviation by collective labour agreement

The laws of all Researched Counties contain provisions that can be set aside by a collective labour agreement, as opposed to by "just" an individual employment agreement (provisions of ¾ mandatory law). This system of ¾ mandatory law sits well in a European context, as it is not unusual for directives to stipulate that collective labour agreements may deviate from standard norms. Particularly with regard to working time, fixed-time and part-time work it is becoming increasingly usual that derogations from the law are arranged in collective labour agreements.

11.3.7 Term and termination

In all Researched Countries the freedom of contract plays an important role when it comes to term and termination of the collective labour agreement. The contracting parties are free to establish the date on which their collective labour agreement comes into force and whether the legal norms of the collective labour agreement have retro-effect. The signatory parties are also free to establish the duration of the collective labour agreement, although social partners in the Netherlands may not conclude a collective labour agreement with a duration exceeding 5 years. Termination of a collective labour agreement is easy in Great Britain, as a (non binding) collective labour agreement can be terminated at any time, with or without notice being given. In the Netherlands, collective labour agreements can be terminated by notice at the end of their term. Should a collective labour agreement not be terminated by notice, the agreement is normally considered to be (tacitly) renewed after termination of its original term for the same term. In Belgium and Germany a collective labour agreement entered into for a fixed period of time ends by

operation of law at the end of its term. A collective labour agreement entered into for an indefinite period of time can be terminated by notice.

11.3.8 After-effects

In all Researched Countries the obligatory provisions of a collective labour agreement lose force after the collective labour agreement has expired. The individual normative provisions, however, have after-effects in all these countries once a collective labour agreement applies to the employment agreement (in Great Britain by incorporating the collective labour agreement into the employment agreement). That means that these provisions retain their force after expiry of that collective labour agreement. This is only different if the collective labour agreement specifically stipulates otherwise. The employer and employee are, however, after expiry of the collective labour agreement entitled to change the content of the individual employment contract should they wish to do so, observing the rules applicable for such a change in the different countries, in fact terminating the collective labour agreement's after-effects. The introduction of a new collective labour agreement also terminates the after-effects of the individual normative provisions in all Researched Countries. The situation is more diverse when it comes to collective normative provisions. In Germany these provisions have after-effects. This is not the case in the Netherlands, Belgium and in Great Britain. Collective normative provisions that also apply individually do have after-effects in Belgium.

11.3.9 The role of alternative dispute resolution in collective bargaining

In all Researched Countries alternative dispute resolution mechanisms play a part in collective labour law, including collective labour agreements. To variable degrees this holds true for all Member States. Basically, three mechanisms are often applied within the EU: conciliation, mediation and arbitration. In some Member States dispute resolution is free and autonomous; while in others compulsory dispute resolution exists. As a rule, alternative dispute resolution is mostly applied to disputes of interest (as opposed to disputes of law).

11.4 Extending collective labour agreements

In the Netherlands, Germany and Belgium a collective labour agreement can be extended as a result of which it applies to all employers and employees falling within the scope of applicability of that agreement. In Great Britain this possibility does not exist. The extension techniques in the first three countries are rather similar.

First, the collective labour agreement that is to be extended should meet specific demands: it should be a proper collective labour agreement with a clear scope of application. Briefly put, only normative and collective normative provisions of a collective labour agreement can be extended. In Germany and the Netherlands the collective labour agreement should already apply to a majority of employees falling with the scope of applicability of the collective labour agreement in order for it to be extended. The extension should furthermore serve the public interest, or at least not violate it.

Second, procedural demands and safeguards need to be satisfied. This means that there should be a request for extension, which needs to be published. Third parties may subsequently oppose to such a request. In the Netherlands and in Germany a specific institution may respectively must be involved in the extension-process. The actual decision to extend (parts of) the collective labour agreement, needs to be published.

Third, there are statutory limitations in place on the duration of the binding collective labour agreement. In all three countries there is either no or a limited possibility for retro-effect of the extended collective labour agreement. The extension may not outlast the duration of the actual collective labour agreement.

Once declared binding, the collective labour agreement applies to all employment agreements concluded or to be concluded within the term of the extension decree that fall within the scope of applicability of that binding agreement. The provisions of the extended collective labour agreement have direct normative effect. Unlike the Netherlands, in Germany and Belgium the extended collective labour agreements have after-effects.

Extension of collective labour agreements is not uncommon in the EU. There are basically three different manners to extend collective labour agreements: (i) extension in the narrow sense (*erga omnes*), making a collective agreement binding within its field of application by explicitly binding all those employees and employers which are not members of the parties to the agreement; (ii) enlargement, providing for a collective agreement to apply in sectors or areas where it did not apply yet and where no union and/or employers' association capable of collective bargaining exists; and (iii) functional equivalents, including compulsory membership of the bargaining parties' organisations or legal provisions requiring government contractors to comply with the terms of a relevant collective agreement.

The most frequently used extension method is "extension in the narrow sense". Most of the time, this type of extension requires: (i) a public act or decree, issued by the government authority in charge of labour matters; (ii) a request of one of the social partners to the collective labour agreement or another social partner; and (iii) a minimum requirement for extension, most notably minimum rates for coverage of the relevant agreement prior to extension.

11.5 The reach of the social partners / representativity and independency requirements of social partners

In Europe, there is a tradition of "autonomy of collective bargaining". This has given social partners in Europe ample room to determine the content of their collective labour agreements. Collective labour agreements in the Researched Countries should, besides setting out the rights and obligations of the contracting parties, concern employment conditions, which is normally defined broadly. Collective labour agreements may not contravene norms "higher in hierarchy", such as national and international laws and regulations.

When it comes to representativity, the situation in the Researched Countries differs to quite an extent. The only country that requires *representative* social partners in order to conclude a collective labour agreement is Belgium. In the Netherlands and Germany there are no strict representativity demands that the social partners must meet in order to conclude valid collective labour agreements. In Germany mild representativity demands do apply. Representativity plays only a limited role in British collective bargaining, as there are no representativity demands in place to entitle a trade union to conclude a collective labour agreement. Representativity does play a role in (statutory) recognition. This diverse situation can be seen in all Member States. Research established that the diversity of practice in the different Member States is such that there is no single model as to representativeness that could be replicated at European level.

In Germany and in Great Britain strict independence demands apply to trade unions. In Belgium there are no statutory requirements on the level of independence of trade unions. However, as only a limited number of representative trade unions may enter into collective labour agreements, which are strong and independent unions, the issue of representativity is actually a non-issue. The only deviating country is the Netherlands, a country in which there are no demands on the independence of trade unions and yellow trade unions in fact concluded valid collective labour agreements. Viewed from an international perspective, the Dutch situation is out of tune,

as ILO Convention C98 and Recommendation R169 simply require free and independent employers' and workers' organisations.

PART III

SUGGESTIONS FOR EUROPEAN LEGISLATION ON TRANSNATIONAL COLLECTIVE BARGAINING

CHAPTER 14

TOWARDS A EUROPEAN SYSTEM ON TRANSNATIONAL COLLECTIVE BARGAINING

1. Introduction

A preliminary question that arises when discussing a European system on transnational collective bargaining is whether there is a proper European basis in place for the execution of such a system. This is a topic that will be discussed in section 2. Once it is established that there either seems room to draft European legislation on transnational collective labour agreements, or that such room is to be made, the obvious next question is: how could a European system on transnational collective bargaining be shaped? There are, of course, many options. That gives reason to first fence off this system. In that respect, it is important to establish how this new system will relate to the European social dialogue. In section 3 below I will explain that this system will not replace, but rather will complement the institutionalised bargaining process embedded in the European social dialogue. It will be argued that said institutionalised bargaining process is very comparable to national extension procedures, which gives reason to focus the remainder of this thesis on normal, *i.e.* non-extended, transnational collective labour agreements. Furthermore, the new transnational collective bargaining system should also be placed at the appropriate level or levels. As noted in part II, collective bargaining can typically occur at three levels: company, sectoral and inter-professional. These levels should be situated in a specific geographical area within the European Union. These topics will be discussed in section 4.

The system that I envisage for transnational collective labour agreements will be based on the traditions in industrial relations in place in various Member States, as set out in part II. That also means that it should be founded on important and fundamental principles, being the three classical rights. Employers' and employees' organisations should be free to form and employers and employees should be free to join (freedom of association). The parties involved should be free to voluntarily arrange employment law topics by agreement (right to collective bargaining and autonomy of the social partners). Trade unions should be able to persuade employers' organisations

and employers into proper arrangements by (threatening with) collective actions (right to collective actions). This will be explained in section 5 below. The negotiation process that follows should be free and voluntary, as will be discussed in section 6.

The new system should make clear exactly what constitutes a transnational collective labour agreement and what can be arranged by it. It should also make clear whom it may concern. These are topics that will be discussed in section 7 below. Finally, section 8 summarises this chapter.

2. The legal basis for a European system on transnational collective bargaining

It is reminded that the Community can only act within the limits of the powers conferred to it by the EC Treaty (conferred or attributed powers).[1909] Attribution of powers occurs on an article-by-article basis. As a result, Community acts must be properly based on a suitable article of the EC Treaty, giving specific competence to draft such an act.[1910] This choice should explicitly be made in that act.[1911] If the chosen basis would not constitute sufficient ground for that act, such an act can be annulled or declared invalid.[1912] On occasion, that has happened in the past.[1913]

2.1 General considerations for choosing the proper basis

When choosing the proper legal basis for Community acts there are two important considerations. First, the choice has to be based upon objective factors amenable to judicial review.[1914] Those factors include, in particular,

1909 Reference is made to chapter 2, section 3.1

1910 Craig and De Búrca, *EU Law, Text, Cases and Materials*, page 122.

1911 Clear on that was for example European Court of Justice, 16 June 1993, C-325/91, *France v. Commission*. It ruled in paragraph 26: "Community legislation must be clear and its application foreseeable for all interested parties. As a result of that requirement for legal certainty, the binding nature of any act intended to have legal effects must be derived from a provision of Community law which prescribes the legal form to be taken by that act and which must be expressly indicated therein as its legal basis."

1912 Reference is made to articles 230 and 231 of the EC Treaty.

1913 See for example: European Court of Justice, 5 October 2000, C-376/98, *Germany v. European Parliament*.

1914 See for example: European Court of Justice, 26 March 1987, C-45/86, *Commission v. Council*.

the aim and content of the measure.[1915] Second, when searching for the proper legal basis of a specific act, a specific legal basis gains precedence over a general legal basis.[1916] It may also be the case that such an act has to be based on more than one article of the EC Treaty in order to properly cover the content of that act, or as a compromise of the Council in the event of a dispute amongst its members as to which article provides the correct legal basis.[1917]

The aim and content of a European act on transnational collective bargaining would obviously be to ascertain that all Member States recognise and apply transnational collective labour agreements on equal footing. It can be argued that differences in appreciation of the status and consequences of a transnational collective labour agreement per country directly affect the functioning of the common market. Besides this economic approach, a social approach can be followed as well. After all, a European act on transnational collective bargaining would protect specific social rights and it can lay a foundation of minimum employment conditions. Both the economic and social part of such an act fall within the *general* ambit of the EC Treaty, as already follows from articles 2 and 3 of the EC Treaty. But what *specific* basis, if any, can be chosen for an act on transnational collective bargaining?

2.2 Article 137 of the EC Treaty

Given the topic – collective labour agreements – the attention is automatically drawn to the social provisions of the EC Treaty. These articles may serve as a specific ground to base an act on transnational collective labour agreements on. Article 136 of the EC Treaty states that Community and Member States shall promote employment, improved living and working conditions, in order to make their harmonisation possible while the improvement is being maintained.[1918] To that end, Community shall support and complement activities in a number of fields summed up in article 137.1 of the EC Treaty. Fields mentioned in this article include health and safety, working conditions,

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1915 See for example: European Court of Justice, 11 June 1991, C-300/89, *Commission v. Council*.

1916 See for example: European Court of Justice, 23 February 1988, C-68/86, *UK v. Council*.

1917 Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities*, page 234, footnote 307.

1918 Article 136 of the EC Treaty can in itself not form a basis for enacting Community legislation, as it gives no competence to do that (it does not attribute powers). See J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, page 44.

social protection of employees, representation and collective defence of the interests of workers and employers and equality between men and women. These are all issues that can be dealt with in a transnational collective labour agreement. The Council may, pursuant to article 137.2 if the EC Treaty, give the aforementioned support and may complement these activities in these social fields *i.a.* by adopting directives. At first glance, this article seems an appropriate basis giving competence to enact legislation regarding transnational collective bargaining. However, Community action in the field of social policy (in any event) based on article 137 of the EC Treaty is subject to article 137.5 of the EC Treaty. This paragraph states that the provisions of article 137 of the EC Treaty shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs. All these themes are (potentially) crucial for an act on transnational collective labour agreements.

As argued in chapter 6, section 5.1 of this thesis, the scope of article 137.5 of the EC Treaty was until recently far from clear. The rulings of the European Court of Justice in the *Del Cerro Alonso* and *Impact* cases gave more insight in the scope of this article. The Court of Justice explained that, as article 137.5 of the EC Treaty limits the main paragraphs 1 and 4 of that article, the matters reserved by paragraph 5 must be interpreted strictly. The exception set out paragraph 5 relating to pay, is explained by the fact that fixing the level of pay falls within the contractual freedom of the social partners at a national level and within the relevant competence of Member States. Consequently, paragraph 5 excludes determination of the level of wages from harmonisation under articles 136 *ff* of the EC Treaty. The exception of article 137.5 must on the one hand be interpreted as covering measures which amount to direct interference by Community law in the determination of pay within the Community. However, the exception cannot, on the other hand, be extended to any question involving any sort of link with pay, as that would deprive some areas of article 137.1 of the EC Treaty of much of their substance. To summarise, directives implemented on the basis of article 137 of the EC Treaty may concern issues linked to the matters set out in paragraph 5 of that article, but may not set out specific rules on levels of pay or, so it seems, on conditions when and how to exercise the right of association, the right to strike and the right to impose lock-outs.

When interpreting article 137.5 of the EC Treaty like that, it still seems to give room to serve as a basis to draft a European act on transnational collective bargaining on, provided that the act itself does not set out specific rules on levels of pay or on conditions when or how to exercise the right of association, the right to strike and the right to impose lock-outs. The act would not set out levels on pay, as it would leave that up to the social partners who eventually

could include pay in their collective labour agreement (if they would choose to arrange levels of pay in their transnational collective agreement, that is). This seems sufficiently in line with the ratio of article 137.5 of the EC Treaty, leaving matters like pay up to social partners at the appropriate national level, as the proposal for an act on transnational collective bargaining set out in this thesis includes social partners at national level. Still, an important disadvantage is that the act may not give substantive rules on the recognition of the right of association and the right to strike.

To summarise, it seems that article 137 of the EC Treat gives room for a directive on transnational collective bargaining, provided that it does not set rules on the level of pay and on the conditions when or how to exercise the right of association, the right to strike and the right to impose lock-outs.

2.3 Article 94 of the EC Treaty

But is article 137 of the EC Treaty the sole basis for an act on transnational collective bargaining? Some would argue it is. They would state that, because article 137 of the EC Treaty provides for an appropriate (although because of paragraph 5 limited) basis for such an act on transnational collective bargaining, the aforementioned principle that a specific basis should prevail over a more general basis, prevents another – less "specialised" – article of the EC Treaty from being used as a basis for such an act. This view has, for instance, been forwarded by Novitz.[1919]

The correctness of the view stated above may be questioned. It must be acknowledged that the mere fact that possible legislation on transnational collective bargaining has a social element to it does not automatically mean that the foundation of that legislation must derive from the articles regarding social provisions of the EC Treaty. It is generally accepted that harmonisation of national laws and policy in the social field can be necessary for the proper functioning of the internal market.[1920] In fact, many acts in the social field have been based on articles concerning the common, free market. The Posted Workers Directive, for instance, clearly has a "social element" to it but is

1919 T. Novitz, *Promoting Core Labour Standards and Improving Global Social Governance: An Assessment of EU Competence to Implement Commission Proposals*, EU Working Papers, European University Institute, 2002, RSC No. 2002/59, page 26. See also T. Novitz, *International and European Protection of the Right to Strike: A Comparative Study of Standards Set by the International Labour Organization, the Council of Europe and the European Union*, page 162.

1920 Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities*, page 1047.

based on the current articles 55 and 47.2 of the EC Treaty. Many other social Community initiatives are based on the current article 94 of the EC Treaty. This article stipulates that "the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations and administrative provisions of the Member States as directly affect the establishment or functioning of the common market". Examples of directives based on this article are the directives on collective redundancies, transfer of undertaking, employer insolvency, and the application of equal pay between genders.[1921] In other words, article 137 of the EC Treaty is not an exclusive basis for Community legislation in the field of social policy.[1922]

Engels and Salas argue that article 94 of the EC Treaty has been used in the past applying a three step approach.[1923] First, the recitals of a directive based on article 94 of the EC Treaty spot differences in the different Member States as to the protection granted to employees faced with a specific situation at hand (such as a transfer of undertaking or collective dismissal). Second, it is set out that efforts should be made to reduce these differences. Last, it is substantiated that the existence of these differences has a direct effect on the functioning of the common market. Applying this three step approach to Community legislation on transnational collective labour agreements reveals that article 94 of the EC Treaty may form an appropriate basis.[1924] As said in paragraph 2.1 above, there are differences in appreciation of the status and consequences of a transnational collective labour agreement in each Member State. These differences should be reduced. The differences also directly affect the functioning of the common market. In the end, differences in regulations

1921 Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities*, pages 1050 and 1067. See also J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, page 59.

1922 J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, pages 27 and 61. See also Engels and Salas, *Labour Law and the European Union after the Amsterdam Treaty*, page 99. See also Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities*, page 1060. They, however, do think that article 137 of the EC Treaty will bring forth that recourse to other, more general bases for harmonisation will become less frequent.

1923 C. Engels and L. Salas, *Labour Law and the European Union after the Amsterdam Treaty*, pages 88 and 89.

1924 For completeness' sake I note that article 95 of the EC Treaty would not form a proper basis for legislation on transnational collective bargaining, as article 95.2 explicitly excludes "rights and interests of employed persons" from its scope.

on issues like pay in transnational collective labour agreements, peace obligations and employment conditions may directly influence the common market. Article 94 can therefore, in my view, be an appropriate foundation to base legislation on transnational collective labour agreements on.

This conclusion is shared by the authors of the Report (Transnational Collective Bargaining: Past, Present and Future). They state the following:[1925]

> A possible only legal basis on which the directive could be grounded is represented by article 94 TEC. We think that a directive offering an optional scheme for transnational collective bargaining could provide additional opportunities for bringing closer social standards and harmonising collective procedures. We must recall that in the past such a legal basis served the purpose to favour secondary legislation aimed at avoiding distortions in competition. Albeit in a very different economic context, we feel that harmonisation still is an objective to be pursued in taking measures which affect both the economic and the social sphere.

They add that all European social partners should be consulted in order to disseminate the legislative initiative and clarify its purposes.

But why is this analysis important, if article 137 of the EC Treaty already provides for an appropriate basis for an act on transnational collective labour agreements? Besides that fact that the act may have to be based on two legal bases (both article 139 and 94 of the EC Treaty), another argument may be forwarded as to why it is important to assess whether article 94 is a proper article to base said act on.

Article 137.5 of the EC Treaty prevents, as previously mentioned, an act to contain conditions on when and how to exercise the right of association, the right to strike and the right to impose lock-outs. These topics are in my view important when it comes to transnational bargaining. It has been argued that, should article 94 of the EC Treaty be used as a basis for Community legislation, the exception of article 137.5 of the EC Treaty does not apply. Article 137.5 of the EC Treaty specifically states that "the provisions of *this article* shall not apply to pay the right of association, that the right to strike or the right to impose lock-outs" (emphasis added). This may mean that said provision does not necessarily block the topics outlined in paragraph 5 from *all* Community legislation. It has been argued that these topics may be dealt with, if another legal basis than article 137 of the EC Treaty is used. Engels

1925 E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, page 36.

and Salas, for example, claim that article 94 of the EC Treaty could perfectly well be applied to introduce Community legislation on minimum pay, if the Community act concerned will pass the aforementioned three step approach. In their view, the same applies to all other topics that are, on the basis of paragraph 5, excluded from the scope of article 137 of the EC Treaty.[1926] Other – but as will be set out below not all – scholars agree to this point of view.[1927] Hellsten, for instance, also agrees to the line of reasoning of Engels and Salas stated above, but views that article 94 of the EC Treaty is not appropriate for a topic like pay alone,[1928] as pay does not fit the target of article 94 of the EC Treaty: approximation should cover laws, regulations and administrative provisions, not the (pay) interests concerned.[1929]

The above position is not generally accepted. Article 137.5 of the EC Treaty may very well have to be interpreted "rigidly", fully excluding the topics of paragraph 5 from Community legislation, in consequence making these topics exclusively a national affair.[1930] Clear on that was, for instance, Advocate-General Mengozzi in his opinion in the *Laval* case. He argued that the effectiveness of article 137.5 of the EC Treaty would be violated if the Community institutions were allowed to resort to other legal bases in order to adopt measures designed to approximate the laws of the Member States on the topics that are excluded by article 137.5 of the EC Treaty.[1931] Scholars defending this position probably feel strengthened by the *Del Cerro Alonso* and *Impact* cases, in which the European Court of justice held that "(…) the exception relating to 'pay' set out in Article 137(5) EC is explained by the fact that fixing the level of pay falls within the contractual freedom of the social partners at a national level and within the relevant competence of Member

1926 C. Engels and L. Salas, *Labour Law and the European Union after the Amsterdam Treaty*, pages 88 and 89.

1927 Such as A. Lyon-Caen, Lord Wedderburn and B. Fitzpatrick. See J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, page 65, who refers to these authors.

1928 Which specific topic was subject to Hellsten's research.

1929 J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, pages 65 and 66.

1930 For examples of scholars who support this "rigid" approach, see: J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, page 34. See also, R. Kowanz, *Europäische Kolektivvertragsordnung, Bestansdaufnahme und Entwicklungsperspektieven*, pages 334 – 336.

1931 Opinion of Advocate-General Mengozzi, 23 May 2007, in case C-341/05, *Laval*, paragraph 57.

States".[1932] However, the Court followed by stating: "In those circumstances, in the present state of Community law, it was considered appropriate to exclude determination of the level of wages from harmonisation *under Article 136 EC et seq*" (emphasis added). The European Court therefore links article 137.5 of the EC treaty explicitly to the articles 136 *ff* of the EC Treaty. That may imply that another legal basis for an act on transnational collective labour still is possible, without the limitations of article 137.5 of the EC Treaty, although I must say that this position seems doubtful.

In summary, an act on transnational collective bargaining may likely (also) be based on article 94 of the EC Treaty. It is, however, doubtful whether that may lead to the circumvention of the exceptions of article 137.5 of the EC Treaty. It therefore does not seem to be a better or stronger basis than article 137 of the EC Treaty. It may at best be a more appropriate basis together with article 137 of the EC Treaty.

2.4 Article 308 of the EC Treaty

The system of conferred powers may leave gaps. Here the doctrine of implied-powers may step in. Even if an article of the EC Treaty in itself does not seem to confer powers to a Community institution to draft an act, that institution may still proceed on the basis of the implied-powers doctrine, if that act is necessary for that institution to carry out its tasks expressly conferred to it by the EC Treaty.[1933] Article 308 of the EC Treaty plays an important role when filling in potential *lacunae* in the EC Treaty. It stipulates:

> If action by the Community should prove necessary to attain, in the course of the operation of the Common Market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

There are two important considerations when it comes to applying article 308 of the EC Treaty. First, the *lacunae* must be in the powers granted, not in the sum of objectives of the Community.[1934] These objectives can be found in

1932 European Court of Justice, 13 September 2007, C-307/05, *Del Cerro Alonso*, paragraph 40 and European Court of Justice, 15 April 2008, C-268/06, *Impact/ Minister*, paragraph 123.

1933 See for example: European Court of Justice, 9 July 1987, C-281/85, *Germany v. Commission*.

1934 Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities*, page 236.

articles 2 and 3 in particular of the EC Treaty, but also further on in the EC Treaty. The European Court of Justice was clear on this, and stated that article 308 of the EC Treaty "being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community".[1935] Second, article 308 of the EC Treaty only applies if the Treaty has not otherwise conferred the necessary powers; it is a "last resort".[1936] That is not to say that article 308 can only be invoked if the necessary powers do not exist at all. It may very well be that they do exist but are insufficient to provide a satisfactory and effective solution.[1937]

Article 308 of the EC Treaty has served as a legal basis before in the social field. The Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees,[1938] for instance, was based on this article. Even more so, the Heads of State and governments invited the Community institutions in 1972 to draft an action plan for social policy, based on several provisions of the EC Treaty, including the current article 308, which would also facilitate the conclusion of European collective agreements in the appropriate sectors.[1939] Apparently, article 308 of the EC Treaty was considered as an appropriate basis for drafting legislation on

1935 European Court of Justice, 28 March 1996, Opinion 2/94, on the accession to the European Convention on Human Rights.

1936 See for example: European Court of Justice, 26 March 1987, C-45/86, *Commission v. Council*, in which the Court stated: "it follows from the very wording of article [308] that its use as the legal basis for a measure is justified only where no other provision of the Treaty gives the Community institutions the necessary power to adopt the measure in question".

1937 Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities*, page 236. This may, for example, be the case if another article that confers powers describes a directive in a situation in which a regulation would be necessary.

1938 Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, OJ L 294, 10 November 2001, pages 22 – 32.

1939 J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, page 84.

transnational collective labour agreements, if no other provision could serve as a basis.[1940]

Given the above, article 308 of the EC Treaty might constitute on appropriate basis for such legislation, next to articles 137 and 94 of the EC Treaty. Article 308, however, has a clear advantage over articles 137 and 94 of the EC Treaty. The latter articles only permit the use of the instrument directive, while article 308 of the EC Treaty allows the use of regulations. The clear advantage of a regulation is that it has a general and direct effect in all Member States. A directive needs to be implemented nationally, possibly changing its content to some extent. That would in my view potentially jeopardise the uniform applicability of the transnational collective labour agreement in all Member States.[1941] Besides, the implementation of a possible directive on transnational collective labour agreements may prove difficult in certain Member States, as this implementation into national law might be at odds with already existing national laws on collective labour agreements, resulting in complicated changes of these national laws. I would therefore be inclined to choose the instrument "regulation" over the instrument "directive" in order to implement Community legislation on transnational collective labour agreements. That means that the general article 308 of the EC Treaty would have to be chosen as a basis for legislation on transnational collective labour agreements over the specific articles 137 and 94.

But there may also be another argument to choose for a regulation based on article 308 of the EC Treaty. It may circumvent the applicability of the exceptions stated in article 137.5 of the EC Treaty, should these exceptions have a broader scope than "just" article 137 of the EC Treaty, as the *Del Cerro Alonso* and *Impact* cases seem to entail. Let us again look at these cases. The Court ruled:[1942]

1940 But also other scholars opted for article 308 of the EC Treaty. See, with reference to other scholars, R. Kowanz, *Europäische Kolektivvertragsordnung, Bestansdaufnahme und Entwicklungsperspektieven*, page 336.

1941 See also F. De Ly, *Europese Unie en Eenvormig Internationaal Privaatrecht* [*European Union and Unified Private International* Law], in F. De Ly and J. Wouters, Europees *Gemeenschapsrecht en Internationaal Privaatrecht* [*European Community Law and Private International Law*], Mededelingen van de Nederlandse Vereniging voor Internationaal Recht, 1996, page 37.

1942 European Court of Justice, 13 September 2007, C-307/05, *Del Cerro Alonso*, paragraph 40 and European Court of Justice, 15 April 2008, C-268/06, *Impact/ Minister*, paragraph 123.

> (…) the exception relating to 'pay' set out in Article 137(5) EC is explained by the fact that fixing the level of pay falls within the contractual freedom of the social partners at a national level and within the relevant competence of Member States. In those circumstances, in the present state of Community law, it was considered appropriate to exclude determination of the level of wages from *harmonisation* under Article 136 EC et seq" (emphasis added).

Substantive *harmonisation* of national rules on the topics stated in article 137.5 of the EC Treaty is apparently not allowed. Harmonisation of the various laws by directives – which is the aim of both article 137 and article 94 of the EC Treaty – is therefore not possible with regard to these topics. However, if *new* rules are designed, rules that do not yet exist in the laws of the Member States, there cannot be any harmonisation. Consequently, it may be argued that upon the introduction of a fully new act on transnational collective bargaining by means of a regulation, arranging for rules that solely apply to said transnational collective bargaining, the exception of article 137.5 of the EC Treaty may not apply. As Member States do not yet have laws on *transnational* collective labour agreements (they may apply the laws on *national* collective labour agreements to these transnational collective labour agreements), it may be argued that a regulation on transnational collective labour agreements is not a harmonisation operation, but the introduction of something new. In fact, this has been argued by Kowanz, who claims that a regulation based on article 308 of the EC Treaty circumvents the applicability of the exceptions stipulated in article 137.5 of the EC Treaty.[1943]

In summary, although article 308 of the EC Treaty should be considered a last resort, there are good reasons to fall back on that article, as it (i) opens the possibility to base the act on transnational collective bargaining on a regulation instead of a directive, thus guaranteeing the uniform applicability of the transnational collective labour agreement in all Member States and (ii) possibly circumvents the applicability of the exceptions stipulated in article 137.5 of the EC Treaty.

2.5 Article 137.5 of the EC Treaty revisited

Falling back on article 308 of the EC Treaty may, given the above, very well solve the possible problems surrounding article 137.5 of the EC Treaty. However, if, in spite of the above-mentioned arguments, that article would still exclude all Community legislation on, as is particularly relevant for this

1943 R. Kowanz, *Europäische Kolektivvertragsordnung, Bestansdaufnahme und Entwicklungsperspektieven*, pages 334 – 336.

thesis, the right of association and the right to strike, even if solely arranged for in connection with transnational bargaining, there are a few "solutions".

First and foremost, the EC Treaty itself could (should) be adapted and article 137.5 should be changed or revoked altogether in order to legitimately draft European legislation on transnational collective bargaining, including on the recognition of the currently exempted right of association and the right to strike.[1944]

Alternatively, the act on transnational collective bargaining could simply not provide for the Community recognition and support of these two rights. These rights would, in consequence, solely be governed by national laws. That would certainly not have my preference, as will be set out in section 5 below, but it would be an option nonetheless. That option has become slightly easier to accept, due to the facts that the EU Charter is signed by the relevant Community institutions and the Union shall accede to the Convention (provided that the Lisbon Treaty will be ratified). Both the EU Charter and the Convention recognise the classical rights at stake. Unfortunately, the United Kingdom and Poland are only partially influenced by these steps due to the protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom. Consequently, both countries may stricter limit the classical bargaining rights than other Member States see fit on the basis of the EC Charter. That would, in my view, not necessarily prevent an act on transnational collective bargaining from becoming effective. The act may state that, just as has been done with the Regulation on the functioning of the internal market in relation to the free movement of goods among the Member States and the Service Directive,[1945] that it will not affect the national rules on the right of association and the right to strike. In these circumstances adopting the act on transnational collective bargaining, although in a somewhat adapted manner when compared with the proposal set forth in this thesis, seems still possible.

A final "solution" could be that the Community institutions and the Member States may once again revert to a two-track system, in which all countries save for Poland and the United Kingdom would go ahead with the act on transnational collective bargaining. Although this is not a situation I would prefer, it has been done before in the field of social policy (the Protocol on Social Policy). It has eventually even resulted in the party that originally

1944 See also B. Bercusson, *European Labour Law and the EU Charter of Fundamental Rights – summary version* -, page 27.

1945 See chapter 8, sections 6.3.2 and 6.3.3.

opted-out, the United Kingdom, to opt-in again. Reference is made to chapter 2, section 2.3.

2.6 The principle of subsidiarity

But even when a proper legal basis is found for the act on transnational collective bargaining, the subsidiarity test must still be applied. As explained in chapter 2, section 3.1, given article 5 of the EC Treaty, three (intertwined) subjects are relevant: (i) the Community can only take action if the objectives of that action cannot be sufficiently achieved by the Member States, (ii) the Community can better achieve the action and (iii) if the Community does act, it should not go beyond what is necessary to achieve the objectives of the EC Treaty.

As concluded in chapter 7, section 6, there is (i) a need or demand for transnational collective labour agreements and (ii) for new legislation in that field, that should obviously cope with important subjects such as the status of the transnational collective labour agreement, the parties involved, the consequences of such an agreement, the manner of conclusion and enforcement, the applicable law and the termination of transnational collective labour agreements. This is something that the laws of the Member States cannot (adequately) cope with. They lack the power to introduce an arrangement that stretches out over the entire EU, giving rules on how to deal with the aforementioned subjects. Member States clearly lack authority to impose on individuals outside their borders (such as companies, employees and possible third parties situated outside the jurisdiction of the Member State concerned) the applicability of the terms and conditions set out in the transnational collective labour agreement. They lack the power to stipulate that a transnational collective labour agreement has an equal effect in all Member States, which equal effect is needed for a uniform application of the transnational collective labour agreement. They cannot impose rules of enforcement on parties situated in different Member States, and cannot claim exclusive jurisdiction over these matters in order to try to achieve that. Member States do not have authority to adequately arrange for matters concerning applicable law in contracts. They cannot regulate which parties must be involved in bargaining on a transnational collective labour agreement in EU perspective. In short: Member States cannot satisfactorily regulate transnational collective labour agreements.

The above can be done by the Community institutions. In any event, it can be better achieved by these institutions than by the individual Member States (who, in my view, cannot achieve these matters at all, let alone adequately).

Community action would furthermore have scale advantages, making certain that the entire EU is covered (unless the two-track option is called for, as mentioned in section 2.5 above). Such coverage is important, as issues addressed in the transnational collective labour agreements may often have a European (or even global) reach.

Given the above, Community action is, from a "comparative efficiency" perspective, opportune. But are there, from a "proportionality perspective", other, less far-reaching measures possible to cope with the issues at hand? The answer to this question is negative, as explained in chapter 7, section 10. Alternative tools like the open method of coordination, mutual recognition and regulatory competition cannot (adequately) solve the problems that are involved with transnational collective bargaining.

An act on transnational collective labour agreements therefore, in my view, passes the (vertical) subsidiarity test of article 5 of the EC Treaty. But what about horizontal subsidiarity? Can (European) social partners take matters in their own hand? I believe not. This option has been suggested by Schiek. As substantiated in chapter 5, section 7.4, it is my view that this will not work. European and national social partners lack authority to draft rules on transnational collective bargaining that apply on equal footing to all Member States. Alternatively, the European social partners may enter into an agreement on transnational collective bargaining, which is subsequently implemented by a Council decision. That, however, would certainly not circumvent the applicability of article 137.5 of the EC Treaty (and would normally, but not necessarily, give rise to a directive instead of a regulation). Notwithstanding this, the European social partners should definitively be involved in the drafting process of the act on transnational collective labour agreements.

To sum up: drafting an act on transnational collective labour agreements will in my view pass the subsidiarity test of article 5 of the EC Treaty. Reverting to horizontal subsidiarity by letting the (European) social partners draft an equivalent of such an act will not work.

2.7 Conclusion

Given the above it should be concluded that article 308 of the EC Treaty is the most appropriate legal basis for Community legislation on transnational collective labour agreements. That article permits the use of regulations. As regulations have important advantages over directives, I would be inclined to choose article 308 of the EC Treaty over article 137 and 94 of the EC Treaty.

Moreover, the use of a regulation on the basis of articles 308 of the EC Treaty may possibly circumvent the applicability of the exceptions stipulated in article 137.5 of the EC Treaty. Drafting a regulation on transnational collective labour agreements will in my opinion pass the subsidiarity test of article 5 of the EC Treaty, while reverting to horizontal subsidiarity by letting the (European) social partners draft an equivalent of such an act will not work.

The above means that the Council can, acting unanimously on a proposal from the Commission, and after consulting the European Parliament, issue a regulation on transnational collective bargaining. Article 308 of the EC Treaty does not confer a formal role to the European social partners in the legislative process. However it is, in my view, a sound plan to involve these social partners as much as possible in this process, in the same manner as has been done with regard to the proposals laid down in the Report. In any event, the European social partners should be consulted on the basis of article 138.2 of the EC Treaty.

3. Relation to the European social dialogue / extension of collective labour agreements

The system of transnational (European) collective bargaining that I envisage should not be considered a replacement of the existing European social dialogue. That is, to a certain extent, self-explanatory. The European social dialogue has not only a bargaining function, but also a consultation function. Consultation is a topic that is not touched in the proposed system of transnational collective bargaining. Furthermore, an important goal of the bargaining embedded in the European social dialogue is to overcome the on occasion failing European legislative process; it should be considered a regulatory technique.[1946] There is no real reason to abolish that. However, the fact that bargaining within the European social dialogue is a regulatory technique makes it vulnerable to flaws, as is set out in chapter 6 of this thesis. The system of autonomous transnational collective bargaining I pursue is based on the traditions of industrial relations in the EU, which makes it less vulnerable to these flaws.[1947]

Upon closer inspection, it should be noted that collective bargaining, as embedded in the European social dialogue, bears great resemblance to the extension of collective labour agreements as is in place in many Member States.

1946 Chapter 6, section 2.

1947 Chapter 7, section 9.

As set out in chapter 13, section 9, extension of collective labour agreements in the different Member States is often made subject to at least the following three requirements: (i) a public act or decree, issued by the government authority in charge of labour matters; (ii) a request of one of the social partners party to the collective labour agreement or another social partner; and (iii) a minimum requirement for extension, most notably minimum rates for coverage of the relevant agreement prior to extension. Moreover, on occasion (iv) a collective labour agreement has, prior to its extension, be tested against the public interest.[1948] The consequences of the extension are that the agreement applies in a mandatory fashion to all employers and employees falling within the scope of applicability of the extended collective labour agreement.

These requirements fit perfectly well within the "extension" process of European collective labour agreements by a Council decision. After all, there must be a public act implementing the European collective labour agreement, which, until today, has always been a directive. The signatory parties must furthermore jointly request the Commission to submit their agreement to the Council to have it implemented. The signatory parties must also meet certain minimum requirements for their agreement to be extended; they must, taking into consideration the content of the agreement in question, taken together, be sufficiently representative. Finally, the agreement requires a general (political) approval prior to its implementation; it must serve the public interest. Once implemented, the European collective labour agreement applies in a mandatory fashion to all employers and employees falling within the scope of applicability of the (implemented) European collective labour agreement. In other words, implementing European collective labour agreements by a Council decision closely relates to the extension process of collective labour agreements as is in place in many Member States.

The above gives sufficient reason, in the remainder of this thesis, to focus on the effects of a normal, *i.e.* non-extended, transnational collective labour agreement under a new collective bargaining system, and not on the extension of such agreements. A system of extension of transnational (European) collective labour agreements simply is already in place.[1949] That is not to say that the proposed new system on transnational collective bargaining cannot complement the European social dialogue. It should be reminded that the European social partners have an option to implement collective labour agreements concluded within the European social dialogue either by a Council

1948 Which is, for example, the case in Germany, Belgium and the Netherlands.

1949 That is not to say that the European "extension process" is perfect. However, I will exclude that topic from the remainder of this thesis.

decision, or in accordance with the procedures and practices specific to management and labour and the Member States. This second implementation method also has flaws, including the unclear binding effect and potential problems with regard to implementation.[1950] Here, the proposed new system may play a role for a new manner of "implementation" of European collective labour agreements, concluded in full autonomy by the social partners.

4. Bargaining levels

Basically, there are three important levels of collective bargaining that can be witnessed in many Member States: company level, sectoral level and inter-professional (national) level. The question is whether each of these levels is appropriate for collective bargaining in a new, transnational system. These levels will be discussed in sections 4.1 through 4.3 below. Subsequently, the geographical area in which the transnational collective labour agreements could apply will be set out in section 4.4.

4.1 Company level

All Member States have bargaining at company-level.[1951] This level also seems quite appropriate for transnational collective bargaining. Deinert's limited research showed that multinational companies seem to be interested in transnational collective bargaining,[1952] and transnational collective bargaining already occurs at company level.[1953] Moreover, company-level transnational bargaining may bring specific advantages to multinational companies.[1954] Finally, the commission seems rather enthusiastic about this level and intends to formulate rules for transnational collective bargaining (also) at company-level:[1955]

> Providing an optional framework for transnational collective bargaining at either enterprise level or sectoral level could support companies and sectors to handle challenges dealing with issues such as work organisation, employment, working conditions, training. It will give the social partners a basis for increasing their capacity to act at transnational level. It will provide an innovative tool to adapt to

1950 See chapter 6, section 4.3.

1951 Chapter 13, section 2.4.

1952 Chapter 7, section 5.

1953 Chapter 4, section 3.

1954 Chapter 7, section 3.5.

1955 Communication from the commission on the social agenda, COM (2005) 33, page 8.

changing circumstances, and provide cost-effective transnational responses. Such an approach is firmly anchored in the partnership for change priority advocated by the Lisbon strategy.

Besides the above, the existence of the European Company may also play a role in the further development of transnational collective bargaining at company-level. It is conceivable that multinational companies would choose for a European Company to have one and the same legal structure throughout the European Union. It is maybe not that farfetched that the same multinational companies would opt for transnational collective agreements equally applying to all of these European Companies.

4.2 Sectoral level

All Member States have collective bargaining at sectoral level.[1956] This level seems appropriate for transnational collective bargaining as well. This is clearly indicated in the aforementioned quote from the 2005 Commission Communication. The opportunities for transnational bargaining at sectoral level have been particularly recognised since 1997. Since that year there have been various initiatives taken by European sectoral social partners aimed at a more explicit European coordination of national bargaining.[1957] But a more important development occurred in 1998. In that year the Commission argued that "the sectoral level is a very important area for development both on general issues such as employment, industrial change and a new organization of work and on upcoming specific demands on the labour market" and considered the development of negotiations at sectoral level "a key issue".[1958] In the same year the SSD Committees have been established which Committees have proven a success.[1959]

Transnational collective bargaining could, in my view, really flourish between the social partners having seat in a SSD Committee. The conditions for transnational collective bargaining in such a Committee are well. The social partners having seat in a SSD Committee actually meet on a regular basis as they are part of the Commission's consultation process on the basis of article 138 of the EC Treaty. In that process, they are confronted with new topics on which they can bargain. Moreover, as in many cases only one European employees' organisation and only one European employers' organisation have

1956 Chapter 13, section 2.4.

1957 See chapter 4, section 2.4.

1958 COM (1998) 322, page 14.

1959 See chapter 4, section 4.

seat in a SSD Committee,[1960] the logistics of collective bargaining are fairly easy. To summarise, sectoral-level seems an appropriate level for transnational collective bargaining.

4.3 Cross-industry level

Not all Member States have cross-industry collective bargaining at national level.[1961] Where that bargaining level is in place, it sometimes takes the form of tripartite collective bargaining. Bargaining at this level may strongly resemble drafting legislation: general rules are adopted, which are intended to be extended throughout the entire economy where possible. This level seems not overly appropriate for transnational collective bargaining, unless with the goal of drafting generally applicable, law-like arrangements. As argued in section 3 above, there is already an appropriate institute for these types of arrangements, being article 138 *ff* of the EC-Treaty. Moreover, cross-industry social partners do not seem to be overly active in the field of transnational collective bargaining, besides their involvement in the European social dialogue. A transnational cross-industry bargaining level would also seem rather complicated, as it would potentially involve a great many participants. All in all, it does not seem an overly appropriate level for transnational collective bargaining and is therefore excluded from the proposals on a new system of transnational collective bargaining.

4.4. Geographical scope of applicability

In the Researched Countries, collective labour agreements can have a national scope of applicability, but also a more limited, regional scope. In order for transnational collective labour agreement to be truly transnational, they should at least apply within the jurisdiction of two Member States. That is the minimum threshold. As the goal of this thesis is to develop European legislation on transnational collective bargaining, the maximum geographical scope of such a collective labour agreement is the entire EU. A transnational collective labour agreement should therefore at least have force in two Member States and at a maximum in all Member States.

1960 E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, page 11.

1961 Chapter 13, section 2.4.

5. The three classical rights, leading to autonomous collective bargaining

The new system of transnational collective bargaining should, ideally, be based on the three classical rights: (i) the freedom of association, (ii) the right to collective bargaining and (iii) the right to strike. These rights are recognised in the Member States at national level.[1962] Their importance is repeatedly confirmed by multiple scholars.[1963] The Committee on Employment and Social Affairs also stressed their importance.[1964] Most importantly, these rights are protected by a great many international instruments and already apply, although with some limitations, to the European Community.[1965]

The importance of these rights is well summarised by Dorssemont: "Collective agreements constitute a spontaneous and natural outcome of the recognition of three fundamental workers' rights: (a) the freedom of association, the right to form and join trade unions, (b) the right to strike and (c) the right to or freedom of collective bargaining."[1966] These rights also lead to collective autonomy, "the development of collective agreements as sources for the free definition of wage policies and working conditions".[1967] And that is exactly what is pursued by the Commission: European collective labour agreements as sources of law.[1968] It is also exactly what is in place in the Member States: autonomous collective bargaining is recognised throughout the EU,[1969] and actually is a central element in most European bargaining systems.[1970] Autonomy can be best described by pointing at four of its essential elements:

1962 See chapter 13, section 4. It should, however, be noted that the full recognition of the right to strike in Great Britain is questionable.

1963 See for example: A. Lo Faro, *Regulating Social Europe: reality and myth of collective bargaining*, page 102 and 153, E. Franssen, *Legal aspects of the European Social Dialogue*, pages 8 *ff*; F. Dorssemont, *Some Reflections on the Origin, Problems and Perspectives of the European Social Dialogue*, page 9; D. Buda, *On course for European labour relations? The prospects for the social dialogue in the European Union*, page 33; and A.T.J.M. Jacobs, *Het recht op collectief onderhandelen in rechtsvergelijkend en Europees perspectief*, page 65.

1964 Committee on Employment and Social Affairs, *Report on transnational trade union rights in the European Union*.

1965 Reference is made to chapter 8 hereof, and section 2.5 above.

1966 F. Dorssemont, *Some Reflections on the Origin, Problems and Perspectives of the European Social Dialogue*, page 9.

1967 European Commission, *Industrial Relations in Europe 2006*, page 41.

1968 COM (2002) 341, page 19.

1969 See chapter 8, section 3.3.

1970 N. Bruun, *The Autonomy of Collective Agreement*, page 5.

(i) independence of trade unions, (ii) independent sphere towards the state authorities in which the parties to the collective labour agreement can act, (iii) some balance of power between both parties (which balance unions can achieve by being representative and well organised) and (iv) instruments and tools for the participating parties to put pressure on their counterparties.[1971]

Autonomous collective bargaining can only be sufficiently achieved by activeness on the side of public authority; a *laissez-faire* attitude does not suffice.[1972] This certainly applies to *transnational* collective bargaining, as there is an imbalance in powers between labour and management at European level, justifying an active approach from Community institutions.[1973] A purely *laissez-faire* system shows weaknesses when external changes occur and thus cannot constitute real autonomy.[1974] Therefore, a proper system of transnational collective bargaining, with true protection of the three fundamental rights, is indispensable. Very clear on this is Keller: "In addition to existing individual rights, the EU will have to guarantee social and collective rights in the future if it wants to overcome the massive shortfall of popular legitimacy and acceptance of the Community on the part of its citizens, as well as to forestall possible losses in 'social' productivity."[1975] Equally clear is Blank, who argued: "If one looks at the more long-term prospect of cross-border European collective bargaining with the aim of cross-border agreements, it is evident that one indispensable precondition is the anchoring of collective rights at European level. This includes freedom of association, the right to collective bargaining and the right to strike (…)."[1976] A new system on transnational collective bargaining should therefore actively protect the above-mentioned three classical rights.[1977]

1971 N. Bruun, *The Autonomy of Collective Agreement*, page 5.

1972 F. Dorssemont, *Some Reflections on the Origin, Problems and Perspectives of the European Social Dialogue*, page 14. See also chapter 6, section 3.1.

1973 See chapter 7, section 3.7 and S. Smismans, *The European social dialogue between constitutional and labour law*, pages 356 and 357.

1974 S. Sciarra, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; Draft General Report*, page 12.

1975 B. Keller, *National industrial relations and the prospects for European collective bargaining – The view from a German standpoint*, page 63.

1976 M. Blank, *Collective Bargaining in the European Union – The standpoint of IG Metall*, pages 166 – 167.

1977 As previously mentioned, article 137.5 of the EC Treaty should be revoked or altered to make such an active protection possible, if that article stands in the way of that protection.

6. Voluntary and free negotiations

A logical consequence of autonomy of collective bargaining is the free and voluntary nature of that bargaining process, based on mutual recognition. The social partners are free to choose whether or not to bargain, whether or not to conclude a collective labour agreement and, albeit to a lesser extent as will be further discussed below, with whom. This is a system that basically can be found in the Researched Countries.[1978] This is also a system that is pursued at European level. The Court of First Instance clearly held, with regard to the European social dialogue, that representatives of management and labour concerned in the negotiation stage are those who have demonstrated their *mutual willingness* to initiate the process provided for in article 4 of the Agreement on Social Policy and to follow it through to its conclusion.[1979] The negotiation phase is therefore embedded in a free and voluntary environment. This is encouraged by the Commission, who in its 1998 Communication "Adapting and promoting the Social Dialogue at Community level" reaffirmed that (i) it is up to the social partners to decide who sits at any negotiation table,[1980] and (ii) the negotiation process is based upon principles of autonomy and mutual recognition of the negotiating parties.[1981] In the light of all of this, the Commission also pursued an *optional* (as opposed to mandatory) framework for transnational collective bargaining.[1982] The European Economic and Social Committee emphasised that optional means that it is at the social partners' discretion whether or not to make use of a framework enabling them to conclude transnational collective labour agreements.[1983] Finally, this is in line with many international instruments,[1984] including the case law of the European Court of Human Rights' under the Convention for the Protection of Human Rights and Fundamental.[1985] This Court clearly emphasises the *voluntary* nature of collective bargaining and the conclusion of collective agreements.[1986]

1978 Chapter 13, section 7.

1979 UEAPME case, paragraph 75, emphasis added.

1980 COM (1998) 322, page 12.

1981 COM (1998) 322, page 14.

1982 COM (2005) 33, page 8.

1983 Opinion of the European Economic and Social Committee on the Communication from the Commission on the Social Agenda COM (2005) 33 final, paragraph 4.3.2.

1984 Reference is made to chapter 8, section 3.1.

1985 See chapter 8, section 3.1.2.

1986 European Court of Human Rights, 6 February 1976, *Swedish Engine Drivers/ Sweden.*

That social partners are free to choose whether or not to enter into collective bargaining and whether or not to conclude collective labour agreements is one thing. That they are entitled to do so with every social partner of their own choosing is, as already referred to above, another. After all, in many Member States collective bargaining can only be done with representative trade unions. In the system I envisage trade unions only have to meet "mild" representativity demands in order to be entitled to enter into a transnational collective labour agreement. The employer does not necessarily have to enter into collective bargaining with, for example, the most representative trade union. However, the proposed system does promote bargaining with clearly representative trade unions, as collective labour agreements concluded with these parties have a stronger effect. Besides that, representative trade unions are obviously in a better position to "force" an employer into collective bargaining by threatening with, or engaging in collective actions than trade unions that are not representative. Consequently, the natural flow of things would likely lead representative trade unions to do most of the transnational bargaining. The proposed system of representativity in transnational collective bargaining, the exact meaning of that term and the requirements social partners need to satisfy in order to be entitled to conclude transnational collective labour agreements, will be scrutinised in chapter 15.

The system I propose is therefore fully free and voluntary, including the choice with whom to bargain, provided that the social partner meets certain basic demands. As a consequence, a representative social partner cannot demand a place at the negotiation table through law, but it has to do so by showing its power. The advantage of such a system is that it fully respects the autonomy of the social partners; they are the ones that can choose whom to bargain with. Another advantage is that it does not have to be established in advance which social partners are best equipped to bargain with each other. A lesson learned from the European social dialogue is that it is extremely difficult to establish on forehand general representativity criteria which entitle a social partner to participate in bargaining.

7. The transnational collective labour agreement

A transnational collective labour agreement should obviously be defined. Before proposing a definition in section 7.6, let us first turn to the potentially important factors of such an agreement. As is stated in chapter 13, paragraph 5.1, at least four factors are considered important at national level: (i) the agreement, (ii) the bargaining agents, (iii) the content and (iv) possible registration. These factors will be discussed in sections 7.1 through 7.4. Section 7.3 also discusses the types of provisions that can be found in a collective

labour agreement: individual normative, collective normative and obligatory provisions. A fifth factor should not be forgotten with regard to *transnational* collective labour agreements, which is the transnational element, which will be discussed in section 7.5.

7.1 The agreement

It is obvious that a collective labour agreement should be an agreement. As the definition of "transnational collective labour agreement" should be the same in every Member State, the term should be interpreted autonomously on the basis of international law. What could be considered "an agreement" from an international perspective is already discussed in chapter 5, section 5.2.1. As mentioned, UNIDROIT and the Commission on European Contract Law (also known as the Lando Commission) drafted rules on agreements, being the Principles of International Commercial Contracts and the Principles of European Contract Law respectively. Both Principles lack a definition of the term agreement, but give information on the different components of an agreement:

- at least two parties should be present in order to be able to enter into an agreement;
- these parties must have the intention to be legally bound and they must reach sufficient agreement in order to conclude an agreement;
- the agreement must have a certain (legal) effect on the parties; either one or more of the parties must perform.

When it comes to collective bargaining, the agreement must not only affect the relation between the signatory parties, but more importantly, when it concerns organisations, the relation between their members (ultimately being employers and employees).

Given the above, a general international definition of "agreement" could be "an act whereby two or more parties reach sufficient consent as to do or omit from doing something that affects their and, in the case of organisations, their members' legal relation".

It is rather common in the national laws on collective bargaining to require the agreement to be laid down in writing.[1987] This demand can also be found in the definition of collective labour agreement in ILO Recommendation R91 and in the proposals to draft legislation on transnational collective bargaining from

1987 See chapter 13, section 5.1.

the expert group lead by Ales.[1988] In my opinion, this demand makes perfectly sense. In the end, the consequences of the agreement have a broad range. In other words, the agreement does not merely affect the bargaining parties, but (a great number of) other parties – most notably being the employer and employees – as well. All these parties must know the exact content of the agreement, which is particularly difficult if it concerns transnational collective agreements that inherently have a potentially large scope. Sufficient knowledge on the exact content of the agreement can only be properly achieved if the agreement is agreed on in writing.

7.2 The bargaining agents

National legislation makes clear that only specific parties are entitled to act as a bargaining agent and consequently to conclude a collective labour agreement.[1989] On the one hand there should be employers or employers' organisations. On the other hand there should be trade unions. That these parties are entitled and legitimised to conduct collective bargaining is beyond dispute in all Member States. In some Member States, however, parties other than trade unions may also conclude collective labour agreements, such as authorised employee representatives or Works Councils. As explained in chapter 1 section 2.2, there are a number of arguments as to why the role of the Works Council should be limited in collective bargaining, for which reasons I exclude this institution (and other authorised employee representatives apart from trade unions) from being a bargaining agent. Collective bargaining at labour's side should therefore be limited to trade unions.[1990] The requirements that employers' organisations and trade unions should satisfy in order to conclude transnational collective agreements will be discussed in chapter 15, section 6.

1988 E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, page 39.

1989 See chapter 13, section 5.1.

1990 It should be noted that in the proposals forwarded in the report *Transnational Collective Bargaining: Past, Present and Future*, the trade unions also were in charge of bargaining on labour's side, although the European Works Council could be awarded an advisory role in this process. See E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*.

7.3 The content

National legislation makes clear that collective labour agreements should concern employment conditions.[1991] This can equally be derived from the definition of a collective labour agreement in ILO Recommendation R91 ("agreements … regarding working conditions and terms of employment"). These employment conditions should at a minimum be the same conditions that can be arranged in an individual employment agreement. These conditions concern the individual normative provisions: the rights and obligations between the employer and employee. The individual normative provisions could, for example, concern on the one hand, working hours, working place and organisation of labour, and on the other, the classification of positions, wage scales, education and wage indexation.

Besides these individual normative provisions, the social partners should also be able to agree on collective normative provisions. These provisions basically arrange the collective employment relations. Although such provisions are not in place in all Member States – Great Britain, for example, does not have such provisions – social partners in many Member States value the possibility of including collective normative provisions in the collective labour agreement. It is ultimately up to the contracting parties (and in line with their autonomy which is pursued in the underlying system) whether or not to actually use their power to arrange collective employment relations. Furthermore, there is a practical argument which gives reason to grant social partners the right to arrange collective employment relations, being the fact that many countries struggle with the exact difference between individual and collective normative provisions. This exact difference is less relevant if both types of provisions may be inserted in a transnational collective labour agreement. These arguments also imply that the social partners should – in full autonomy – be able to provide for rights and obligations that arrange the relation between the employer and the employees vis-à-vis third collective parties, most notably funds. In, for example, the Netherlands, Germany and Belgium it is possible to arrange (binding) legal relations concerning such funds. Obviously, it should concern third collective parties that directly attribute to the well-being of the employers and employees, such as social funds, or associations arranging for education. The collective normative provisions will be discussed in more detail in chapter 15, section 4.4.

Besides (individual and collective) normative provisions, a transnational collective labour agreement should also be able to set out rights and obligations

1991 See chapter 13, section 5.1.

between the contracting parties. Consequently, in accordance with national law on collective bargaining, transnational collective labour agreements should deal with obligatory provisions as well. These provisions may include stipulations on the manner of termination of the collective labour agreement, the possible obligations to consult the counterparty in specific circumstances and an obligation to inform members on the collective labour agreement. Whether these obligatory terms should also include an implied principle of good faith and an implied peace obligation will be discussed in chapter 15, section 4.2.

The proposed topics that can be arranged in a transnational collective labour agreement are undeniably broad in range. In fact, the range is broader than is common in some Member States. However, in a system that is based on the autonomy of the social partners, it makes sense to leave it at their discretion to decide on which topics they wish to bargain. This especially holds true, as many of the common problems that social partners may wish to tackle on a transnational level are broad in nature, giving reason to broadly define the subject matter on which transnational collective agreements can be concluded. In any case, social partners active in the European social dialogue (should) address, according to the Commission, topics linked to vocational training, industrial change, the knowledge society, demographic patterns and globalisation.[1992] Furthermore, currently popular transnational bargaining topics – corporate social responsibility and restructuring – are also "broad" topics, at least broader than strictly defined employment conditions.[1993] Finally, a current European trend in national collective bargaining is that the scope of content of collective labour agreements is broadening as well.[1994] To summarise, a broad scope of content of transnational collective labour agreements is logical.

7.4 Registration

In many Member States collective labour agreements must be registered at the proper authorities.[1995] This demand may prove useful with regard to transnational collective agreements, as these agreements have a potentially large scope. If transnational collective labour agreements are registered at the proper authorities, these authorities can subsequently make the agreements public (for instance, through their publication on the internet). This will

1992 Many of these topics derive from COM (2002) 341, page 16.

1993 See chapter 4, section 3.

1994 See chapter 13, section 2.3.

1995 See chapter 13, section 5.1.

make it easier for the ultimate "consumers" of the agreement to exactly know their content. As already stated in section 7.1 above, this is of the utmost importance.[1996]

Moreover, said authorities may also be empowered to verify specific items relating to the transnational collective labour agreement, as will be set out in the following chapters, and specific formal requirements. I would be inclined to require that the agreement meet formal requirements in order for that agreement to be a proper transnational collective agreement. These requirements derive from article 16 BACLA[1997] combined with annex 3 of the 2004 Commission Communication "Partnership for change in an enlarged Europe – Enhancing the contribution of European social dialogue".[1998] The transnational collective labour agreement should include:

a. the names of the signatory organisations;
b. the identity of the persons concluding the agreement and the capacity in which these persons act;
c. the group of employees on the one hand and the employer, group of employers or sector on the other to which the agreement applies, and the geographic territory in which the agreement applies;
d. the term of the agreement, if it is concluded for a fixed period of time, or the manner in which the agreement can be terminated, including the notice period, if it concerns an agreement concluded for an indefinite period of time or for a definite period of time containing a (tacitly) renewal clause;
e. the date of entrance into force;
f. the date of conclusion of the agreement;
g. the signature of the persons that are entitled to execute the agreement;
h. a stipulation as to which language(s) is/are the original; and
i. a stipulation as to which law applies to the (obligatory provisions of) the agreement.[1999]

1996 In the report *Transnational Collective Bargaining: Past, Present and Future*, it is also proposed that the collective labour agreements should be registered in order to be accessible to interested parties. See E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, page 39.

1997 Article 16 BACLA summarises the minimum content of the Belgium collective labour agreement.

1998 COM (2004) 557.

1999 Reference is made to chapter 16, section 2.2 of this thesis.

Should the agreement not meet these minimum demands, the agreement should be refused and should therefore not be regarded as a transnational collective labour agreement.

7.5 Transnational

A transnational collective labour agreement should – obviously – be transnational. That means that the normative parts of the collective labour agreement should not be "connected with one country only".[2000] On the contrary, the norm setting power of the collective labour agreement should, in line with the European Works Council Directive which regards *transnational* information and consultation of employees, have an impact in at least two different Member States. As follows from the above, the transnational part should focus on the normative provisions of the collective agreement, as these provisions form the basis of the entire collective labour agreement. Should the normative provisions not have a transnational effect, but only the obligatory provisions (the signatory parties are, for instance, established in two Member States), the agreement does not qualify as a transnational collective labour agreement.

7.6 Definition of a transnational collective labour agreement

Given the above, a definition of a transnational collective labour agreement could read as follows: "a transnational collective labour agreement is an agreement in writing which is registered at the designated authorities, meeting the required minimum formalities and concluded between one or more employees' organisations and one or more employers' organisations or one or more employers, in which individual and collective relations between employers and employees, in enterprises or in a sector, are set out as having an impact in at least two Member States, and which can deal with the rights and obligations of the contracting parties. These collective relations may also concern the relation between employers and employees vis-à-vis third parties, established for the well-being of the employers and employees."

8. Summary

A European system on transnational collective labour agreements must be based on an appropriate foundation in the EC Treaty. Article 308 of the EC Treaty is in my view the best possible basis for that, as it (i) opens the possibility to base the act on transnational collective bargaining on a regulation instead

2000 See article 3.3 of the Treaty of Rome.

of a directive, thus guaranteeing the uniform applicability of the transnational collective labour agreement in all Member States and (ii) possibly circumvents the applicability of the exceptions stipulated in article 137.5 of the EC Treaty. Drafting a regulation on transnational collective labour agreements will in my opinion pass the subsidiarity test of article 5 of the EC Treaty, while reverting to horizontal subsidiarity by letting the (European) social partners draft an equivalent of such an act will not work. This means that the Council can, acting unanimously on a proposal from the Commission, and after consulting the European Parliament, issue a regulation on transnational collective labour agreements.

Collective bargaining, as embedded in the European social dialogue, leading to the implementation of European collective agreements by a Council decision, bears great resemblance to the extension of collective labour agreements, as is in place in many Member States. A European "extension mechanism" is thus already in place. That gives reason to focus in the remainder of this thesis on the effects of a normal, *i.e.* non-extended, transnational collective labour agreement under a new collective bargaining system, and not on the extension of such agreements. This system may, however, be applied as a new implementation method, for the implementation of European collective agreements agreed on in the European social dialogue. This can be useful, as implementation of European collective labour agreements in accordance with the procedures and practices specific to management and labour and the Member States suffers from flaws, which may be overcome by the proposed system of transnational collective bargaining.

Transnational collective bargaining may play a role at company and sectoral level. Transnational collective bargaining at cross-industry level seems the least appropriate. As for the scope of transnational collective bargaining, the agreement should at least apply within the jurisdictions of two Member States, and at a maximum in all Member States.

The new system of transnational collective bargaining should be based on the three classical rights: (1) the freedom of association, (2) the right to collective bargaining and (3) the right to strike. These rights should be actively protected. The transnational collective bargaining process should be free and voluntary. The social partners should be free to choose whether or not to bargain and whether or not to conclude a collective labour agreement. The social partners should furthermore be free to choose with whom they wish to bargain, although transnational collective labour agreements concluded with clearly representative trade unions have a stronger effect in the proposed system. All

social partners should meet specific "mild" representativity demands in order to be entitled to participate in transnational collective bargaining.

The definition of transnational collective labour agreements should contain five components. First, there should be an agreement, being an act whereby two or more parties reach sufficient consent as to do or omit from doing something that affects their and, in the case of organisations, their members' legal relation. Second, that agreement should be concluded between, on one side, employers or employers' organisations, and on the other, trade unions. Third, transnational collective labour agreements should be able to deal with individual normative, collective normative and obligatory provisions. The scope of content of transnational collective labour agreements should be broad. The transnational collective labour agreement should furthermore be registered and meet a number of specific formalities. Finally, the agreement should be truly transnational, meaning that the normative provisions of the collective agreement should have an impact in at least two different Member States. Given these components, a definition of a transnational collective labour agreement could read as follows: "a transnational collective labour agreement is an agreement, in writing, which is registered at the designated authorities, meeting the required minimum formalities and concluded between one or more employees' organisations and one or more employers' organisations or one or more employers, in which individual and collective relations between employers and employees in enterprises or in a sector are set out as having an impact in at least two Member States, and which can deal with the rights and obligations of the contracting parties. These collective relations may also concern the relation between employers and employees vis-à-vis third parties, established for the well-being of the employers and employees."

CHAPTER 15

THE PARTIES INVOLVED AND THE BINDING POWERS

1. Introduction

The previous chapter explained on which levels transnational collective bargaining that is embedded in a new system can take place, what constitutes a transnational collective labour agreement and whom it may concern. This chapter focuses on the binding power of the transnational collective labour agreement and the requirements that the signatory parties should satisfy in order to be involved in its conclusion. These two topics are very much intertwined. The binding power of a collective labour agreement may depend on the requirements the social partners involved must meet (the representativity of the social partners), but also on the coverage rate of a collective labour agreement (the representativity of the collective labour agreement). This will be explained in section 2 hereof. The Researched Countries will serve as a model for this explanation as their systems will be scrutinised.

The above already betrays that "representativity" is an important topic, just as was announced in chapter 7, section 4.1. This gives sufficient reason to further discuss representativity in its different forms, when and why it is of relevance, and whether representativity should simply boil down to numbers. These topics will be set out in section 3. Section 4 explains the basics of the new system of transnational collective bargaining that I envisage. It deals with the basic questions of the sort of binding power that the collective labour agreement should have (in honour or by law) and which parties are to be bound by that agreement. The main difficulties, of course, relate to the normative effects of the transnational collective labour agreement. For that reason, section 5 explains in detail which employees are to be bound by the collective labour agreement that applies to their employer. Section 6 describes the requirements that the parties to a transnational collective labour agreement should satisfy in order to conclude such an agreement. Section 7 summarises this chapter.

2. The binding powers of collective labour agreements and representativity demands in the Researched Countries

There are important differences and similarities between the Researched Countries concerning their respective position towards representativity in collective bargaining. The term "representativity" will be discussed in more detail in section 3 below. In the previous chapters, this term was placed in the key of requirements that the social partners involved in collective bargaining should satisfy with regard to minimum size (including a minimum number of members), a certain level of power or a specific status (apart from independence of the social partners).[2001] Representativity in this section is regarded broader and focuses on (i) the demands that the contracting social partners should meet on the aforementioned topics in order to be qualified to represent the parties to whom the collective labour agreement should apply (representativity of the social partners), and (ii) the demands that the collective labour agreement itself should satisfy on the same topics in order to apply to a large group of individuals (representativity of the collective labour agreement).[2002] In other words, representativity is placed in the key of *recognition of the legitimacy* of (a) social partners to negotiate collective labour agreements and (b) a collective labour agreement to apply to a large group of individuals.[2003]

The importance of representativity in relation to the binding powers of a collective labour agreement in the Researched Countries can be best explained for the following three situations:

1. representativity on the side of management when it comes to "normal" (*i.e.* non-extended) collective labour agreements;
2. representativity on the side of labour when it comes to "normal" (*i.e.* non-extended) collective labour agreements; and
3. representativity on the both sides of the industry when it comes to extended collective labour agreements.

2001 Reference is made to chapter 8, section 7.

2002 In short, it is verified whether the collective labour agreement should have a specific "size" (coverage) or strength in order to apply to a larger group than the original group.

2003 This is not a unique notion. The *Institut des Sciences du Travail* also placed representativity in the key of recognition of legitimacy. Reference is made to their report: *Report on the representativeness of European Social Partner Organisations*, page 5.

2.1 Management's representativity concerning normal collective labour agreements

On management's side, there are only two important parties in the Researched Countries, those being the individual employers and the employers' organisations. Although this may be an open door: none of the Researched Countries requires the employer to satisfy specific representativity demands when concluding a company-level collective labour agreement. This is self-evident, since the employer must be regarded "representative" as it acts on its own behalf. There is, in other words, no actual situation of representation. When it concerns collective labour agreements that surpass company-level, the only Researched Country that has strict representativity demands on management's side is Belgium. In Belgium only representative employers' organisations are empowered to conclude collective labour agreements. As previously mentioned,[2004] the representativity demands in Belgium introduce a form of *institutional* representativity, as opposed to *factual* representativity. Factual representativity demands are not in place in Belgium. The mere fact that the law qualifies an organisation as being representative suffices in Belgium in order for that party to conclude legally valid collective labour agreements, regardless of whether or not that organisation is factually representative in the specific situation at hand. Germany has mild representativity demands, as it does not require the employers' organisations to have a certain size or power in a specific sector, but it does require these organisations to be competent in that sector and to surpass company level.[2005] In the Netherlands and in Great Britain there are no representativity demands at all.

Do representativity demands for management really matter in the Researched Countries? In my opinion they do not. After all, in all these countries collective labour agreements only apply to employers that are either bound by that agreement (by signing the agreement themselves or by being a member of a contracting employers' organisation) or choose to apply it voluntarily. In other words, all employers to which the collective labour agreement applies are, to a certain extent, involved in the conclusion or applicability of that agreement; all employers have a vote in it. There are therefore no pressing reasons for the Researched Countries to require specific representativity demands on management's side for the applicability of normal collective labour agreements. The fact that Belgium nevertheless requires strict representativity

2004 See chapter 11, section 5.

2005 It must be admitted that the second demand – the employers' organisation should surpass company level – is probably one that each employers' organisation will satisfy. It is not much use having an employers' organisation that merely consist of or concludes collective labour agreements for just one employer.

on management's side still makes sense for the Belgian situation, as the employers' organisations that are entitled to conclude collective labour agreements[2006] must have a seat in a joint body, a body which has a public function. In order to be eligible to have a seat in such a public body, it is logical that the organisation involved has to have a certain power, a certain level of support in society, and should therefore be a *representative* employers' organisation.

2.2 Labour's representativity concerning normal collective labour agreements

On labour's side, only employees' organisations, in particular trade unions, are of relevance in the Researched Countries. In these countries, basically three systems of representativity combined with specific binding powers of the collective labour agreements can be distinguished. These systems all have their advantages and disadvantages, which will also be discussed in general terms.

2.2.1 The Netherlands and Germany

First, there is the system as it applies in the Netherlands and in Germany. In the Netherlands, there are no representativity demands that employees' organisations should satisfy at all. In Germany, the employees' organisations should meet the same mild representativity demands as the employers' organisations, as described above, but they should also possess "real powers". In this Dutch/German system, a trade union that has little members amongst the employees of an employer (a non-representative trade union) could nonetheless still conclude a valid collective labour agreement with that employer.[2007] Does this lack of (strict) representativity demands make sense?

A collective labour agreement concluded with a non-representative trade union is not necessarily overly burdensome in the Netherlands and Germany. Collective labour agreements in both countries only directly apply to the members of the contracting trade unions (the bound employees). These employees chose to be member of that (non-representative) trade union, they normally had the chance to vote on the draft agreement prior to it becoming a real collective labour agreement as a consequence whereof the collective

2006 More in specific: collective labour agreements surpassing company-level, as only at those levels employers' organisations play a role.

2007 In this example it concerns a company-level collective labour agreement, which example will be followed throughout the analysis that follows. However, the same applies *mutatis mutandis* to collective labour agreements surpassing company-level.

labour agreement justifiable applies to them. So far, there are in my view no problems.

The above, however, does not accurately describe the situation in said jurisdictions. First, in both countries the employer often uses reference clauses in the standard employment contracts, stating that a specific collective labour agreement applies. Consequently, the same collective labour agreement concluded with a non-representative trade union applies to all employees of the employer. Second, in the Netherlands the collective labour agreement may not apply directly to the employees that are not bound, but the employer is nonetheless by law obliged to apply the collective labour agreement to these employees, unless the collective labour agreement stipulates otherwise (article 14 ACLA). Do these circumstances change the above analysis?

Let us first focus on the reference clauses. These can only potentially be burdensome to employees that are not directly (through trade union membership) bound by the collective labour agreement. After all, the bound employees chose to be member of the trade union and normally had the opportunity to vote on the draft agreement. The analysis below therefore focuses on the position of the employee who is not bound by the collective labour agreement, *i.e.* the employee who is not a member of a contracting trade union.

When an employee who is not bound by a collective labour agreement enters into service with an employer who offers him an employment contract, including a reference clause referring to a collective labour agreement, in my view there is no real problem for that employee if that collective labour agreement is agreed on with a non-representative trade union. The employee knows (or at least has the opportunity to know)[2008] the content of the collective labour agreement upon deciding whether or not to sign the employment agreement, including the reference clause. The fact that the employee is "the weaker party" – and therefore in the most negative situation has no choice but to sign the agreement – does not change this. After all, the employer could as well have put the content of the collective labour agreement in standing

2008 The employer is by law obliged to inform the employee in writing of the collective labour agreement governing the employee's conditions of work, or in the case of collective agreements concluded outside the business by special joint bodies or institutions, the name of the competent body or joint institution within which the agreement was concluded. Reference is made to article 2.2 of Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship. See OJ L 288, 18 October 1991, pages 32 – 35.

employment conditions, and could give the same "weak" employee the choice to either accept it and enter into service, or not accept it and not be employed by the employer.

There is one "but" to the above. Collective labour law in Germany and the Netherlands allow the parties to an employment agreement to deviate from specific statutory provisions if an applicable collective labour agreement specifically permits them to do so (¾ mandatory law). This deviation is usually to the detriment of the employee, and provides more flexibility for the employer. Here the fact that the employee is the weaker party and simply needs to swallow the unfavourable employment conditions may be an argument against permitting a collective labour agreement that is agreed on with a non-representative trade union. This is an issue I will address further on in this chapter.

Things are getting more complicated in the course of the employment agreement. Once a new collective labour agreement is concluded during the course of the employment agreement, the content of that new agreement directly applies through the reference clause to the individual employment agreement of the employee who is not bound by the collective labour agreement. The individual employee does, in this situation, not have a chance to verify the content of the new agreement and to decide whether he thinks that it is agreeable or not. In my opinion, this is not necessarily troublesome. The employee chose, at the moment of entering into the service of the employer, that (part of) his employment conditions would be arranged by a particular collective labour agreement. He subsequently had the opportunity to become a member of that trade union, as a consequence whereof he would have been in the situation to influence the content of the (renewed) collective labour agreement as a member. Should the employee have chosen not to do that, he also chose that he could be confronted with employment conditions that were drafted without his involvement. In my opinion, the prevention of such a situation – which was apparently acceptable to the employee involved, as he did not become a member of the contracting trade union – is not worth defending by law.

There is, not surprisingly, again a "but" to the above. The employer could have agreed on a renewed collective labour agreement with another than the original trade union(s), or one or more of the original trade unions that signed the original collective labour agreement, refuse to sign the renewed collective labour agreement (while at least one of them is willing to sign the renewed collective labour agreement). This is a new situation for the employee, and places him in a different position when compared to the paragraph above.

Him potentially having become a member of (one of) the original contracting trade union(s) would not have helped him to influence the renewed collective labour agreement (unless he became a member of the trade union that was willing to sign the renewed collective labour agreement). This is a situation which has appeared troublesome, at least in the Netherlands.[2009] This is again an issue I will address further on in this chapter.

Now I will focus on article 14 ACLA, as applicable in the Netherlands. This article obliges the employer to apply the collective labour agreement to all of its employees, unless stipulated otherwise in the collective labour agreement itself. An employer typically obliges with this provision by using a reference clause in all employment agreements. However, not all employment agreements contain a reference clause. If, for example, the employer decides together with one or more trade unions to conclude a collective labour agreement after the company of the employer already is active for many years, it is very unlikely that the employment agreements of the employees contain a reference clause. The employer is in these circumstances obliged to offer the terms of the collective labour agreement to all employees, including employees who are not bound by the collective labour agreement.[2010] This gives the employees not bound by that collective labour agreement the opportunity to pick the situation that fits them best: they either chose to stick to the already applicable employment conditions, or they pick the new terms. This gives the employees an important disincentive to become a trade union member: employees are better off awaiting the results of the collective bargaining and then chose to either accept these new terms, should these fit well in their personal situation, or to deny them, should they feel better off with their "old" employment conditions. The employees that are not bound by the collective labour agreements become "free riders",[2011] and take free advantage of the results achieved by trade unions, also made possible by the money and efforts of the bound employees.

2009 Reference is made to chapter 9, section 9.2. Reference is also made to S. Sagel, *Representativiteit van vakbonden en gebondenheid van werknemers aan cao's*.

2010 In Germany this situation would not occur, as the employer is not obliged to offer the terms of the collective labour agreement to employees who are not bound by the agreement.

2011 See for example F.B.J. Grapperhaus, *De wenselijkheid van een nieuwe regeling voor de verhouding van niet-gebonden werknemers tot een CAO*, pages 184 *ff*. See also J. Visser, *Union membership statistics in 24 countries*, page 39.

The above analysis leads to the following interlocutory findings:

- as the collective labour agreement by law only applies to bound employees, the lack of (strict) representativity demands is not burdensome;
- this is somewhat different due to reference clauses, which bind the other employees to the collective labour agreement as well. The "pain" is especially felt with regard to issues of ¾ mandatory law and once a collective labour agreement is renewed involving other than all original signatory trade unions;
- article 14 ACLA adds, for the Dutch situation only, further pain to this, as it "rewards" employees that are not bound and leads to a free riders effect.

In Germany, some of the "pains" mentioned in the second bullet point are softened by law. Collective labour agreements in Germany may only contain minimum provisions: the principle of favour. A renewed collective labour agreement cannot, therefore, deteriorate the employment conditions that already applied to the individual employment agreement. The renewed collective labour agreement can therefore do little damage to the employment conditions of the employees who were not bound.[2012] This is different with regard to possible provisions of ¾ mandatory law; these provisions may be to the disadvantage of the employees. Here, it is relevant that German law has mild representativity demands. The trade unions should therefore be regarded a sufficient match against the employer; they should, after all, possess real powers. Moreover, the competency demand in Germany makes the competition for a trade union to conclude a collective labour agreement considerably smaller when compared to the Netherlands.[2013] The situation that a small trade union from another branch suddenly enters into a collective labour agreement with an employer is therefore less likely to occur in Germany than in the Netherlands.

The principle of favour, as mentioned in the paragraph above, constitutes a clear advantage for the employees and reduces the importance of concluding collective labour agreements with representative trade unions. However, what is an advantage for one party is usually a disadvantage for the other. The principle of favour excludes the possibility for the employer to respond to

2012 A new collective labour agreement in Germany can, however, terminate the after-effects of the previous collective labour agreement, which may also be to the detriment on the employees involved. This is a topic that will be discussed in chapter 16, section 5 with regard to the proposed European system on transnational collective bargaining.

2013 See chapter 10, section 9.2.

economical unfavourable circumstances by cutting back on employment conditions.

A disadvantage of both the German and Dutch system is that it can sometimes prove impossible for the employer to apply one collective labour agreement to all of its employees. Employees who are not bound by the collective labour agreement and who refuse to sign a reference clause (which can be the case if the employees already work for the employer once the employer decides to enter into collective bargaining for the first time) cannot, under the system of collective labour law in said jurisdictions, easily be forced to accept the applicability of that agreement. This can stand in the way of uniformity of employment conditions, an important reason to conclude a collective labour agreement in the first place, and can be particularly difficult in times of economic distress.

2.2.2 Belgium

Things are radically different in Belgium. Here, the employees' organisations require the same institutional representativity as employers' organisations do when it comes to concluding collective labour agreements. It is a system of institutional representativity: trade unions are considered representative, at all times, once declared so by the government. The question should be asked whether these representativity demands make sense.[2014]

In Belgium the terms of a collective labour agreement apply to all employees of the bound employer, regardless of whether the employees are member of the contracting trade union(s) or not, and regardless of whether they signed a reference clause. The collective labour agreements have an *erga omnes* effect. Therefore, employees who are not involved in (the drafting of) the collective labour agreement, who are not represented by an organisation of their choosing in the collective bargaining process, and who have not agreed to the applicability of the collective labour agreement, are still confronted with its effects. This needs justification. This justification can be found by the fact that the trade unions are respresentative; the trade unions in Belgium are obliged to take into consideration the position of *all* employees when bargaining, not just the position of their members. For the same reason the trade unions are entitled to agree on minimum, standard and maximum provisions in collective labour agreements.

2014 For the difference between the Belgian institutional model and the Dutch contractual model reference is made to M. Rigaux and T. van Peijpe, *Knelpunten in Nederlands en Belgisch cao-recht* [bottlenecks in Dutch and Belgian CLA-law], Samson H.D. Tjeenk Willink, Alphen aan den Rijn, 1994, pages 26 – 28.

This system has the important advantages that the collective labour agreement applies to all employees (who fall within the scope of application of the collective labour agreement) and that, particularly in times of economical distress, measures can be taken that lead to the cutting back of employment conditions. Nonetheless, it also has certain disadvantages. First, the system attributes the right to collective bargaining only to a limited number of trade unions that are considered representative. It would therefore seem logical that the criteria of being entitled to obtain the status "representative" are clear and unambiguous. In the Belgian situation, the lack of such clarity was held to violate ILO-principles according to the ILO Committee on Freedom of Association. Furthermore, the Belgian institutionalised system is rather hostile to new or small trade unions: the Belgium system requires only a limited number of trade unions, which need to be strong and representative. New and/or small trade unions will not have a chance to enter into collective bargaining. This leads to "static" situations,[2015] and is at odds with the general position in Europe that tends to favour pluralism.[2016]

2.2.3 Great Britain

In Great Britain there are no representativity requirements that employees' organisations have to meet in order to be entitled to conclude collective labour agreements, but representativity does play a role in (statutory) recognition of trade unions.

Let us begin with the demands in the (statutory) recognition process. Trade unions that are recognised have specific rights, such as the right to receive information that can be helpful to conclude a collective labour agreement. An employer can voluntarily recognise a trade union, in which case that trade union does not have to meet specific requirements. In my opinion, that lack of specific requirements makes sense in said situation, as the employer chose to recognise that trade union, and consequently voluntarily committed itself to

2015 A.Ph.C.M. Jaspers, *Representativiteit: representeren of vertegenwoordigen?*, page 40.

2016 E. Franssen and A.T.J.M. Jacobs, *The question of representativity in the European social dialogue*, page 1309 and S. Sciarra, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; Draft General Report*, page 6. Pluralism is important in order to prevent "insiders" in the employment process to exclude "outsiders" from that process. See F. Dorssemont, *Green Paper Modernising Labour Law to meet the Challenges of the 21st Century, 'Collectief Arbeidsrecht, waer bestu bleven?'*, page 152 (although Dorssemont disagrees with the criticism expressed in relation to the Belgian demands on representativity).

fulfil certain obligations. In case the employer refuses to voluntarily recognise the trade union, that trade union can still force the employer to do so. If a majority of the employees in the bargaining unit of the employer is a member of the union applying for recognition, or if the majority of the employees that voted in the ballot supports the trade union, that union must, by law, be recognised. These requirements for statutory recognition also make sense in my view. After all, if the employer is unwilling to voluntarily award the trade union specific rights that recognised trade unions enjoy, there should be a justification for the trade union's entitlement to still enforce its rights. This justification can be found in the representativeness of the trade union involved.

Does the lack of representativity demands when concluding collective labour agreements make sense? To a certain extent it does. The terms of collective labour agreements in Great Britain do not have a binding force. It is therefore at the discretion of the parties involved – in this analysis the employer and the employee – to decide whether or not to apply the terms of the collective labour agreement. In this respect, representativity demands are not needed. However, the terms of a collective labour agreement do apply if these are incorporated in the collective labour agreement via a reference clause. With regard to this situation, the same analysis as was put forward in the Dutch and German situation is applicable. Briefly put, that means that the lack of representativity demands is most burdensome with regard to issues of ¾ mandatory law and once a collective labour agreement is renewed with anything other than all original signatory trade unions.

2.3 Representativity concerning extended collective labour agreements

Concerning the extension of collective labour agreements, merely the position of the social partners in the Netherlands, Belgium and Germany is of relevance, as extension is not possible in Great Britain. Dutch and German law require, among others, specific demands on coverage of a collective labour agreement, before it can be extended. Broadly put, in both countries the collective labour agreement that is to be extended has to cover at least 50% of the employees working within the scope of application of the collective labour agreement. There are no additional representativity demands in place when it comes to extending collective labour agreements in Belgium; the "standard" demands as described above are deemed to suffice. Consequently, all countries have representativity demands in place. But are these representativity demands logical?

Extended collective labour agreements apply to all employers and employees that fall within the scope of application of these agreements, regardless of whether they were in any way involved in (the drafting of) these agreements. There should be a justification for this wide applicability. This justification can be found in several demands, such as the fact that the legislator is involved in the extension process (it requires an extension decree) and that the extension should promote the general interests of society, or at least not contravene these interests. Another justification – and the one relevant for this part of the thesis – can be found in the existence of representativity demands the collective labour agreement should meet: it should apply to at least 50% of the employees working within the scope of application of the collective labour agreement. In the Netherlands and Germany, the existence of this representativity demand is explained by pointing at the circumstance that "only a majority can bind a minority" and the rule that "a minority should not be able to model the working conditions of a majority" respectively. The legislators of these countries therefore apparently view that employers and employees who are not involved in a specific collective labour agreement, can only be obliged to follow one if that collective labour agreement is "democratically chosen" by a majority.[2017] In Belgium, the government chose to only award important entitlements as drafting collective labour agreements (that could be extended) to such organisations that have an important influence on the social and economic situation in Belgium, being the *representative* organisations. The power and prestige of these organisations therefore entitles them to conclude collective labour agreements that can have an important general impact if extended.

2.4 Conclusion

On the basis of the above, the following general conclusions can be drawn:

- If only employers and employees that are involved with the collective labour agreement – either by signing the collective agreement, or by being a member of the contracting organisations, or by agreeing to follow that agreement via a reference clause – are bound by that agreement, there is little need for representative parties to conclude that collective labour agreement.
- The above is different (i) if the collective labour agreement permits deviation from ¾ mandatory law and (ii) for employees who are not bound

2017 An analogy with the UEAPME case is easily made. In that case the Court of First Instance required a democratic legitimisation for the entitlement of the European social partners to have their collective labour agreement "extended" by a Council decision. Reference is made to chapter 5, section 3.3.

by a collective labour agreement through membership of a contracting trade union, but are instead bound by it though a reference clause, in case the renewed collective labour agreement is concluded by different parties than the ones that concluded the original collective labour agreement.
- If all employees are directly bound by a collective labour agreement, there should be a justification for that, for example, the demand that the contracting trade unions should be representative.
- If all employers and employees that fall within the scope of application of a collective labour agreement are to be bound by that agreement, there should be a justification for that, a justification which could include that the agreement should, prior to be extended, already apply to a majority of the employees that fall within the scope of application of that agreement.

3 Representativity and collective bargaining

The above conclusions show that representativity – either of the parties that conclude the collective labour agreement, or of the collective labour agreement itself given its large coverage – is relevant in relation to the binding powers of a collective labour agreement. That gives sufficient reason to further define representativity and to analyse when and why it is important.

3.1 Forms of representativity

According to Black's Law Dictionary, representative means "one who stands for or acts on behalf of another".[2018] That is a very narrow definition of "representative" and one that does not fit well in the context of collective bargaining. In that context, two important forms of representation should be distinguished.[2019] First, representativity can be viewed as a part of general employment relations in a state: an organisation (social partner) is representative if a government recognises or appoints that organisation as discussion partner or as a party that can act on behalf of third parties. This is a form of institutional representativity that, for example, is in place in Belgium. Second, representativity can be viewed as the circumstance that an organisation can be considered a trustworthy spokesperson for a group of individuals whose interest it claims to defend. This is representation in a more sociological sense.

2018 B.A. Garner, Black's Law Dictionary, Eight Edition.

2019 See, including references, F. Dorssemont, *Over de 'representativiteit' van 'sociale partners' in de Europese Sociale Dialoog*, page 143. The forms of representativity derive from his text.

This form of representation is normally connected to *factual* representativity, meaning that an organisation should have a sufficient number of members amongst the group of employees whose interests it claims to defend. In other words: if an organisation has at least an x-percentage of members in the entire group it claims to represent, it can be considered a trustworthy spokesperson of that group. Obviously, institutional and sociological representativity do not rule each other out and can even coincide: an organisation can be appointed as representative because it (validly) claims to be a trustworthy spokesperson of a certain group of individuals. Factual representativity can for that reason also be important for institutional representativity.

The above describes the forms of representativity. It does not necessarily describe the concept of representativity in collective bargaining. In order to give such a description, we need to dig deeper. The main goal of collective bargaining, brought back to its base, is that two parties – on the one side the employer or employers' organisation and on the other side the trade union – arrange the legal relations of other parties, being the employer and its employees, by means of a collective labour agreement. The terms of the collective labour agreement consequently directly apply to this employer, or the employers *that were represented* by the employers' organisation, and the employees *that were represented* by the trade union.[2020] Here the core of representativity in collective bargaining emerges, regardless of which form of representativity is used: representative organisations are organisations that are recognised in a legal system to act legitimately on behalf of and bind others.[2021]

3.2 When is representativity important?

The above describes representativity and its different forms. It does not explain when representativity is of importance and to whom this in particular applies. Should the social partners merely represent the interests of their own members, questions on representativity are not overly important. After all, employers' and employees' organisations can be considered to represent – to act on behalf of – their members. Membership normally implies that the members wish the organisation to represent their interests and as a general rule means that the organisations may, in the field of collective employment law, represent their members. Often the organisation's articles of association

2020 Which in many systems in the EU are all employees employed by a bound employer.

2021 This applies regardless of whether the collective labour agreement only binds in honour and regardless of whether it has *erga omnes* effects.

arrange for such representation.[2022] In other words, social partners should be considered trustworthy spokespersons for their own members, they should be deemed able to represent and bind their own members.

However, it is rather common that the representational powers of the social partners exceed merely the interests of their own members. Tripartite consultation and negotiation, for instance, clearly show this. Trade unions are in such a case considered to represent the interests of all employees, and employers' organisations of all employers. The same can apply to collective bargaining. A collective labour agreement can, as follows from chapter 13, apply to all employers and all employees that fall within the scope of applicability of that agreement, even to those who are not members of the contracting social partners. In these situations the concept of representativity is of particular importance. It should be established whether the social partners should be entitled to act on behalf the entire group of employers and employees and bind them in collective bargaining.

As said, social partners often serve the interests of a larger group than merely their members. This certainly holds true with regard to trade unions: they often have to serve the interests of all employees, and not just of their members. This is obvious in countries in which a collective labour agreement automatically applies to all employees working for the bound employer. The contracting trade unions need in such an event to represent the interests of all employees, regardless of their membership.[2023] But also in countries in which the collective labour agreement merely automatically applies to the members of the contracting trade unions, the contracting trade unions very often in fact also arrange the employment conditions of other, unbound employees. In the end, these latter employees are often covered by the content of the collective labour agreement through reference clauses.[2024]

Member States are far more hesitant to apply collective labour agreements to employers who are not directly bound by the collective labour agreement. An employer is normally not automatically bound by a collective labour agreement, but only if it is a member of a contracting employers' association or executed the agreement itself. By way of exception, this employer (and its employees) can also be bound by the collective labour agreement once

2022 F. Dorssemont, *Over de 'representativiteit' van 'sociale partners' in de Europese Sociale Dialoog*, page 144.

2023 See for example Belgium, chapter 11, section 7.3.1.

2024 See for example the Netherlands and Germany, respectively chapters 9, section 7.3.2 and 10, section 7.3.

that agreement is extended, and the employer falls within the scope of applicability of that extended collective labour agreement. It should be noted that a number of Member States disputed whether such an extension is permitted.[2025] This discussion pays particular attention to the position of the employers, and not so much to the position of its employees. For example, in Poland scholars argue that extension of collective labour agreements (to unbound employers and employees) is at odds with the private parties' freedom to bargain, for which reason such an extension in fact never occurs. Surprisingly, this argument is not applied in Poland to employees employed by a bound employer, as a collective labour agreement automatically applies to all employees of such an employer, including to those employees who are not a member of the contracting union(s).[2026] More in general, *extension* of collective labour agreements to employers and employees who are not bound by that agreement is normally only permitted if specific requirements are met. As a rule, extension requires a public act or decree, issued by the government authority in charge of labour matters and the collective labour agreement that is to be extended should have a minimum coverage rate. These requirements are not in place in countries in which collective labour agreements only have an *erga omnes* effect towards employees, covering the employment conditions of all employees employed by the bound employer.

All in all, in collective bargaining representativity demands are particularly important with regard to trade unions, as they typically serve the interests of all employees employed by a bound employer and falling within the scope of application of the collective labour agreement. Representativity demands are less important with regard to employers' organisations, as collective labour agreements only apply to their members – and employers' organisations are deemed to be representative for their own members – with the exception of extended collective labour agreements. As this thesis does not focus on extended transnational collective labour agreements, as set out in chapter 14, section 3, but merely on normal (non-extended) transnational collective labour agreement, representativity is particularly relevant for trade unions. This particularly holds true since my suggestions for a transnational system on collective bargaining will be based on the rule that only employers that either are member of the contracting employers' organisations or executed the agreement themselves are bound by that agreement, while the employment conditions of employees who are not a member of the contracting trade union(s) but are employed by a bound employer and fall within the scope of applicability of a collective labour agreement, may in specific circumstances

2025 See chapter 13, section 9.

2026 See chapter 13, sections 8.3 and 9.

also be governed by that agreement. Given these arguments, the further analysis on representativity will primarily focus on the position of trade unions.

3.3 Why is representativity of trade unions relevant?

The above shows that representativity of trade unions in collective bargaining is relevant. It does, however, only partially explain why it is relevant and what its advantages are. The analysis below tries to explain in further detail why representativity of trade unions is so important for the purpose of collective bargaining.

First, not every party should be able to act on behalf of a large group of employees for the purpose of setting employment conditions; not every party can be considered a trustworthy spokesperson for that group of employees. This power should be legitimatised. A legitimating factor can be found in the special position that is awarded to trade unions throughout the EU: they are entitled in every Member State, and often on an exclusive basis, to enter into collective bargaining in order to establish employment conditions.[2027] Another legitimating factor can be found in the representativeness of the trade unions, regardless of how this concept is exactly shaped in each country. The role of trade unions can be put in the key of "participatory democracy;"[2028] they play because of their representativity a role in shaping the society. This is not new at European level, as the Court of First Instance already ruled in the UEAPME case that the social partners, while executing their entitlements based on articles 138.4 and 139 of the EC Treaty, play a part in the democracy of the EU. It ruled:[2029]

> (…) the principle of democracy on which the Union is founded requires – in the absence of the participation of the European Parliament in the legislative process – that the participation of the people be otherwise assured, in this instance through the parties representative of management and labour (…).

The more representative a trade union is – the better spokesperson it is for the employees – the better it can fulfil its function in the participatory democracy,[2030] *i.e.* by shaping proper employment conditions.

2027 See chapter 13, section 5.1.

2028 See chapter 6, section 3.3.

2029 UEAPME case, paragraph 89.

2030 See chapter 6, section 3.3.

This brings us to the following argument: representative trade unions are best able to arrange the optimum employment conditions for the employees.[2031] After all, historically, trade unions were primarily formed to counterbalance management's powers. Trade unions had to struggle to persuade management to give up its managerial power to unilaterally set employment conditions.[2032] In order to be able to counterbalance these managerial powers, the trade unions had to rely on the power of the employees' collective, their great numbers. If trade unions represent only an insignificant number of employees, that would jeopardise their possibility to truly counterbalance management's powers. Closely related to that is the fact that the trade unions' strongest means to counterbalance these powers is by engaging in collective actions, most notably strikes. In order for a strike to be effective, the trade unions require a sufficient number of participating employees. Having a significant number of members amongst the employees will certainly help to promote the employees' willingness to participate in collective actions.[2033]

Furthermore, trade unions that have a sufficient number of members amongst the relevant group of employees can benefit from these members' knowledge, experience and manpower, necessary to conduct proper collective bargaining. This is also a benefit that enables the trade unions to get a proper feeling of what really matters to the employees working for a specific company or in a specific sector. Moreover, trade unions with a significant number of members have a steady flow of income due to the membership contributions. This income is necessary for the financial independence of the trade union. In summary, there are many arguments that establish the importance of the representativeness of trade unions in collective bargaining.

3.4 Just factual representativity?

In section 3.1 it is stated that factual representativity is relevant for both institutional and sociological representativity. The relevance of factual representativity is also confirmed in section 3.3 above, as many advantages of representativity relate to the number of members trade unions have amongst the group of employees whose interests they claim to represent.

2031 See F.B.J. Grapperhaus, *Representativiteit van werknemersorganisaties* [*Representativity of employees' organisations*], in: *CAO-recht in beweging* [*CLA-law in motion*], SDU, The Hague, 2005, page 108. This argument, as well as the two following arguments derive from this article.

2032 See chapter 13, section 3.

2033 After all, one of the roles trade unions specifically have in Europe is to mobilize their members. Reference is made to: European Commission, *Industrial Relations in Europe 2006*, page 19.

This, however, does not mean that factual representativity alone suffices when it involves collective bargaining, as this would not be true. The mere fact that a trade union has a certain number of members amongst the employees does not necessarily and automatically make that trade union a trustworthy spokesperson.[2034] Other requirements are of importance as well.[2035] Some of these requirements, referred to as "mild representativity requirements", are in place in the Researched Countries.

Trade unions are only in a position to achieve a proper bargaining result if they are independent from their counterparty, most notably from the employer(s). That means that they should be financially independent, but also independent from facilities provided by the employers. The trade unions should preferably surpass company level, which also improves their independence. These demands can, to a differing degree, be found in Germany and Great Britain. Moreover, trade unions should have sufficient feeling with the employees whose interest they claim to represent. That feeling can, as set out above, be provided by the members. But it can also be further developed should the trade unions focus on the specific sector in which the employees work. If trade unions were to focus exclusively on a specific area of expertise, they would be able to develop a specific competence in that area and could conclude better collective labour agreements. This principle is applied in Germany and is referred to as *Tarifzuständigkeit*.[2036] Furthermore, the trade unions should have an efficient and proper organisation, in which their members have a genuine influence on the decision-making process. Only in such an environment can a trade union truly represent anyone. This demand can clearly be observed in Germany and Great Britain. The trade unions should also possess real powers. They should be able to persuade the counterparty to enter into collective bargaining and to agree on reasonable proposals. The trade unions should be able to cope with a genuine labour struggle and should be able and willing, if necessary, to engage in industrial action. This is what the Germans refer to as *Mächtigkeit*. Other factors that can also play a role in making the trade unions a trustworthy spokesperson for the employees in

2034 See also paragraph 102 of the UEAPME case: "Even if that criterion [the criterion relating to factual representativity; author] may be taken into consideration when determining whether the collective representativity of the signatories of the framework agreement is sufficient, it cannot be regarded as decisive (…)".

2035 See F. Dorssemont, *Over de 'representativiteit' van 'sociale partners' in de Europese Sociale Dialoog*, pages 148 and 149. See also S. Sagel, *Representativiteit van vakbonden en gebondenheid van werknemers aan cao's*, pages 40 *ff*. The "other requirements" partially derive from both authors.

2036 See chapter 10, section 6.

collective bargaining are their past performance and, closely connected to this, the way they are regarded by employers and employees (their status).

3.5 Representativity and coverage

The analysis above is based on the position of the social partners, more in particular of the trade unions, towards their members. It sets out relevant requirements that trade unions need to satisfy in order to be a trustworthy spokesperson in collective bargaining for the employees in general, not merely for their members. A different approach is to analyse the position of the collective labour agreement itself, rather than the position of the parties that concluded the collective labour agreement.

Taking the collective labour agreement instead of, or besides, the status of the contracting parties as a point of reference in collective bargaining is not unique. In fact, it is regularly applied in many Member States, especially when it concerns the extension of collective labour agreements. In Member States where collective labour agreements can be extended, a common requirement is that said collective labour agreement, prior to the extension, must have a minimum coverage rate.[2037] Such minimum coverage is apparently seen as a reason, or justification, to apply the agreement to a greater group than the group to which it originally applied. This is an interesting notion and is closely related to representativity of social partners. In the end, representative organisations are organisations that are deemed able, in a legal system, to act on behalf of and bind others. The same applies to the coverage rate of a collective labour agreement; because a collective labour agreement has a high coverage – and therefore apparently is deemed as a proper standard in a specific group or sector by a great number of individuals – it can, in specific circumstances, bind a larger group of individuals than the original group. Or, in other words, a collective labour agreement is representative if it is deemed able in a legal system to bind others.

The above does not explain why a collective labour agreement with a specific minimum coverage rate can, in specific circumstances, bind a larger group of individuals than the original group. In the Netherlands and in Germany, countries that require a coverage of over 50% of the employees in the relevant sector in order for a collective labour agreement to be extended, this is justified by pointing at the circumstance that "only a majority can bind a minority" and the rule that "a minority should not be able to model the working conditions of a majority" respectively. Apparently, some sort of democratic principle is

2037 See chapter 13, section 9.

in place to justify the general applicability of a collective labour agreement. This can, to a certain extent, be compared to the "participatory democracy" in which the social partners operate. If a collective labour agreement applies to most employers and/or employees in a specific sector, employers and employees who are important players within society, democracy can bring forth that it should apply to all employers and employees; the collective labour agreement is "democratically chosen" by a majority. Closely related hereto is a reasonableness test. If at least a certain minimum number of targeted people accept the collective labour agreement, it must be considered a reasonable collective labour agreement within a certain sector.[2038]

Of course, the above arguments should be regarded with reticence. After all, it is not always reasonable that a majority binds a minority. For the same reason Member States are not only based on the principle of democracy (the majority of votes is decisive), but also on principles as constitutional rights, protecting minorities. Moreover, most extension procedures require a number of demands that should be satisfied, not only the demand that the collective labour agreement has a minimum coverage rate. Nevertheless, the fact that an agreement does cover a minimum number of individuals is frequently considered as a requirement to bind a larger group of individuals than the original group.

3.6 Representativity and collective bargaining in the European social dialogue

Just to recall, chapter 5 of this thesis sets out that representativity plays an important role in the European social dialogue as well. Only "representative" organisations may participate in the dialogue, and agreements reached between these organisations can only be implemented by a Council decision if, having regards to the content of the agreement, the signatories, taken together, are sufficiently representative.

4. Fundamental choices in a new system of transnational collective bargaining

There are many fundamentals possible in a transnational collective bargaining system. This calls for choices. Although these choices inherently carry certain subjective elements to them, they inevitably have to be made. First, in section 4.1, it will be decided whether transnational collective labour agreements should bind by law or in honour only. Second, it will be decided which

2038 See section 2.3 above.

parties are to be bound by the collective labour agreement. In this respect, the positions of (i) the contracting parties, (ii) the employers and employees and (iii) third parties are to be distinguished. In this part the question whether to choose for a institutional system or rather a system that has a contractual basis will be addressed as well. This will be discussed in sections 4.2 through 4.4.

4.1 Binding by law or in honour?

Collective labour agreements can have two types of binding power: they can be binding by law or in honour only. In almost all Member States the collective labour agreement is binding by law. Exceptions to this rule can be found in Great Britain and Ireland; in these countries collective labour agreements are binding in honour only, unless stipulated otherwise in the collective labour agreement.[2039] Because most Member States favour a system in which collective labour agreements are binding by law, it makes sense to apply this system in a transnational context as well. If, however, there are fundamental objections against such a system, this choice obviously needs reconsidering.

Let us focus on the reasons for Great Britain to chose for a system in which collective labour agreements are binding in honour only. Insightful is the following quote in the report of the Royal Commission on trade unions and employers' associations:[2040]

> In this country collective agreements are not legally binding contracts. This is not because the law says they are not contracts or that the parties to them may not give them the force of contracts. (…) It is due to the intention of the parties themselves. They do not intend to make a legally binding contract, and without both parties intending to be legally bound there can be no contract in the legal sense.

Apparently, collective labour agreements in Britain can be legally binding if the contracting parties wish so. Because mostly these parties do not favour this sort of binding power, it is assumed that collective labour agreements do not have such power, unless stated otherwise in the agreement. This explains the principle set out in article 179.1 TULRA. This reason cannot be considered fundamental, but merely practical. It furthermore does not seem to apply within most countries of the EU, as nearly all Member States consider

2039 For the Irish situation reference is made to A. Kerr, *The evolving structure of Collective Bargaining in Europe 1990 – 2004; National Report Ireland*, page 6.

2040 Royal Commission on trade Unions and Employers' Associations 1965 – 1968, Report presented to Parliament by Command of Her Majesty June 1968, paragraph 470.

collective labour agreements binding by law. If it is assumed that most social partners in countries that have a system of legally binding collective labour agreements favour such a system, which seems a relatively safe assumption, it should be concluded that most social partners in the EU would opt for a system of legally binding collective labour agreements.

But also for other reasons I favour a system providing for legally binding agreements. After all, important goals of collective labour agreements are (i) to arrange in a uniform fashion the employment conditions between the employers and employees to which the collective labour agreement applies and (ii) to secure peace and tranquillity within the company or sector to which the collective labour agreement applies. This uniform applicability of employment conditions can more easily be achieved if the parties involved are by law obliged to observe the provisions of the collective labour agreements. Moreover, peace and tranquillity within the company or sector are more easily secured if the provisions of a collective labour agreement can be enforced in a legal manner, instead of through collective actions, which are ultimately necessary to enforce collective labour agreements that bind in honour only.

However, should the parties concluding the collective labour agreement chose the agreement to bind only in honour, in my opinion, the will of the parties should prevail. This fits in the important principle of autonomy of the social partners. Therefore, transnational collective labour agreement should be binding by law, unless stipulated otherwise by the contracting parties.

4.2 The parties to the collective labour agreement

Once the primary choice is made that the provisions of the collective labour agreement in principle bind by law, the choice that the contracting parties are by law obliged to abide by the obligatory provisions of the collective labour agreement is only logical. This means that the signatory parties are responsible by law for the proper execution of the collective labour agreement. Should they fail to fulfil the obligations arising from the collective labour agreement, their counterparties should in principle be entitled to start proceedings and claim specific performance, payment of damages or even dissolution of the collective labour agreement. This system is in place in the Netherlands and in Germany. In Belgium, however, the contracting organisations may pursuant to article 4.2 BACLA not be forced to pay damages upon a failure to observe the provisions of the collective labour agreement.[2041] I am not in favour of such

2041 The situation in Great Britain is excluded from this analysis, as the provisions of the collective labour agreement are not binding by law in that jurisdiction.

a provision. The proposed system concerning transnational collective labour agreements attributes important powers to the signatory organisations. With great power, there must also come great responsibility.[2042] This responsibility should include being liable for payment of damages upon breach of a provision. Moreover, the Belgian provision on payment of damages is in my view somewhat unfair, as it only excludes organisations from financial liability, but not individual companies. Consequently, should a company under the Belgian system breach an obligatory provision of a company-level collective labour agreement, said company can be held liable and can be forced to pay damages to the contracting trade union. Should this contracting trade union breach an obligatory provision of the same company-level collective labour agreement, it can be held liable, but cannot be forced to pay damages to the company. This constitutes in my view an inequality of arms. I therefore propose that each party is fully liable for damages resulting from a breach of the obligatory provisions of a collective labour agreement. This should, in line with what is argued above, be different if the contracting parties explicitly chose so. In other words, the signatory parties should be free to arrange that they cannot be held liable (to pay damages).

A different question is whether the contracting organisations should automatically be bound by the principle of good faith. As already mentioned,[2043] many countries oblige contracting associations on the basis of national law to take adequate measures to ensure that their members abide by the collective labour agreement, which is often referred to as the principle of good faith. Some scholars and the Commission argue that such an obligation equally rests on the European social partners in the European social dialogue.[2044] I am in favour of such an implied principle of faith and see no reason to deviate from that rule in transnational collective bargaining. Another issue is whether the contracting organisations should be held *liable* for the non-performance of their members of specific provisions of the collective labour agreement. Here, two scenarios should in my view be distinguished. The first scenario regards the liability of the contracting organisation for its members that are

2042 Quote from: J.M. Straczynski, *The amazing Spider-Man*, Amazing Fantasy number 15, Marvel Comics, August 1962.

2043 See chapter 13, section 5.2.

2044 Franssen argues that the obligation of good faith rests on the European social partners within the European social dialogue. She also refers to G. Schnorr who subscribes to this point of view. See E. Franssen, *Legal aspects of the European Social Dialogue*, page 126. The Commission also takes this opinion. It states: "there is an obligation (…) for the signatory parties to exercise influence on their members in order to implement the European agreement"; COM (2004) 557, page 16.

also organisations (and not individual employers or employees).[2045] In such a case, the contracting organisation should in my view be liable for the non-performance of its members, and, in any event, these members should by law be obliged to fulfil their part of the (obligatory provisions of the) collective labour agreement, if any.[2046] Should this be different, the members of the contracting organisation could hide behind the façade of the contracting organisation, and could in effect block the proper execution of the obligatory parts of the collective labour agreement (if any part would be directed at these members), without such a member and contracting organisation being directly liable on the basis of the collective labour agreement. The second scenario regards the liability of the contracting organisation (or its members that are also organisations) for the non-performance of employers or employees. Liability in such a case would, in my opinion, be a bridge too far. It is impossible for organisations to influence, let alone to steer, all the actions of the employers and employees. In brief, I would choose for the system in place in Germany: the contracting association is obliged to promote that its members fulfil the obligations arising from the collective labour agreement; it does not have to guarantee this with regard to the individual employers and employees. The contracting association is, however, liable for the performance of the collective labour agreement of its members should these members also be organisations, and these members are likewise responsible for the proper execution of their part of the transnational collective labour agreement, if any. In deviation of these rules the contracting parties may, if they so choose, stipulate different rules with regard to liability, including that the association has to guarantee the proper performance of the employers or employees of the collective labour agreement.

Whether or not to also opt for an implied peace obligation in a new system of transnational collective bargaining is a different matter. A peace obligation is implied in the laws of some Member States, but definitely not in all.[2047] Furthermore, it is highly doubtful whether a peace obligation is in place with

2045 For example, a transnational organisation that has as members national organisations, which national organisations in turn have as members employers or employees. These parties are given section 6.2.1 below allowed to participate in transnational collective bargaining.

2046 Please note that in Germany central organisations can also conclude a collective labour agreement, in which case both the central organisation and its members are bound by the obligations arising from the collective labour agreement. See chapter 10, section 7.1.

2047 See chapter 13, section 5.2.

regard to collective agreements concluded in the European social dialogue.[2048] Finally, an implied peace obligation has potentially far-reaching consequences for the parties involved, and must at least have their full consent in order not to violate their right to collective actions.[2049] All in all I would not choose to incorporate an implied peace obligation in the system on transnational collective bargaining at this moment.[2050]

4.3 The employers and employees

It is elementary to decide which employers and employees are to be bound by the collective labour agreement. This decision also involves the choice between either an institutional or a contractual system. In section 4.3.1 it will be explained what, for the purpose of this thesis, is meant by an institutional and contractual system, and what its main consequences are. Sections 4.3.2 and 4.3.3 will set out which choices will be made for the employers and employees respectively.

4.3.1 The collective labour agreement: institution or contract?

Although my primary intention is to develop a pragmatic, workable system of international collective labour agreements, some basic background information on the theory on institutes is indispensable. The foundations of this theory were laid by M. Hauriou.[2051] This theory is based on a democratic system of institutions – the consciousness and responsibility of each person is maximised.[2052] According to Hauriou, an institution is "an idea of a work or enterprise that is realised and endures juridically in a social milieu". Institutions comprise three elements: (i) the idea of the work or enterprise to be realised in a social group, (ii) the organised power put at the service of this

2048 I.H.B. Waas, *Omtrent het bestaan en de rechtsgrondslag van een vredesplicht in Europese collectieve (arbeids)overeenkomsten*, pages 152 *ff*.

2049 F. Dorssemont, review of E. Franssen's *Legal aspects of the European Social Dialogue*, SMA 2003-6, page 278.

2050 In my view additional research is required in order to have a clear opinion on the consequences and reach of a potential implied peace obligation prior to deciding whether such obligation should be incorporated in a new system on transnational collective bargaining.

2051 M. Hauriou, *La théorie de l'institution et de la fondation*, Cahiers de la Nouvelle Journée, 1925-4, pages 2 – 45. For an in depth discussion about the theory of Hauriou and his successors, reference is made to F. Dorssemont, *De onderneming: Arbeidsgemeenschap of Rechtsorde?* [*Is the Enterprise a Working Community or a Legal Order?*], Tijdschrift voor Privaatrecht, 2003, pages 1313 – 1412.

2052 Reference is made to the Maurice Hauriou website: www.hauriou.net.

idea for its realisation and (iii) the manifestations of communion that occurs within the social group with respect to the idea and its realisation. This is linked with the three stages the institution has to pass: the interiorisation of the idea by the group, followed by incorporation and finally by personification of the institution. The consequence of the presence of an institution is that it forms a juridical personality. This juridical personality should be seen as a "third" legal entity, separate from state and individual. The institution cannot be reduced to contract or multiple contracts, but is more than that: it has its own legal character. The consequence hereof is that the content of the mutual legal rights and obligations for persons involved with the institution is not so much determined by contract, but rather by what is necessary for the proper performance of that institution. This is quite the opposite of the point of departure of the contractual system. In this system, the individuals as opposed to the institutions are placed central. The arrangements between the individuals are binding in their mutual rights and obligations, regardless of whether they operate within an institution.[2053]

According to the institutional theory, the specific area to which a collective labour agreement applies – be it a company, sector or state – can be viewed as an institution. The interests of the individuals should be adjusted to the interests of the institution, which is shaped by the collective labour agreement. As a consequence, the collective labour agreement should be applied to *all* parties that fall within the scope of application of the collective labour agreement, setting aside the individual interests.[2054] This is different in the contractual theory. In a contractual system the collective labour agreement only applies to those parties that (directly or indirectly) chose to be bound by it. The employers that are bound by the collective labour agreement in such a system are the employers that either are members of the contracting employers' association or that signed the collective labour agreement themselves. The employees who are bound are those who are a member of the contracting

2053 It must be admitted that the above-mentioned difference between the institutional and contractual approach is stated rather strongly. Dorssemont, for example, argues that the difference between the both approaches is not that strong, and that the both can even be brought together. See F. Dorssemont, *De onderneming: Arbeidsgemeenschap of Rechtsorde?*, pages 1406 – 1408.

2054 See for instance: F. Koning, *Het systeem van het collectieve arbeidsvoorwaardenrecht*, pages 139 – 140 and J.A.M. Cornelissens, *Van Individualistische naar Institutionele Vorming van Arbeidsvoorwaarden* [*From Individualistic to Institutional shaping of Employment Conditions*], Kluwer, Deventer, 1959, in particular pages 100 – 105 and 139. That collective labour agreements may supersede the individual norms also follows from Romano's theory on institutions. Reference is made to F. Dorssemont, *De onderneming: Arbeidsgemeenschap of Rechtsorde?*, pages 1366 – 1368.

trade unions, or those who agree with the applicability of the collective labour agreement.[2055]

I do not want to discuss whether the institutional theory of Hauriou can (fully) be applied to collective labour agreements, let alone to transnational collective labour agreements. As said, my approach is much more pragmatic. It can be observed that many Member States have introduced a system what I would call institutional. By "institutional system" I mean a system which has as a consequence that the collective labour agreement applies to all individuals who operate within the agreement's scope of applicability, regardless of whether or not they are bound to the agreement by contract. This definition of institutional system does not do justice to the theory of Hauriou, but suits the purposes of this thesis.[2056] Belgium, for example, has an institutional system (according to my definition). The collective labour agreement has an *erga omnes* effect on the employees; it applies to all employees working for a bound employer, regardless of the fact whether they agreed to the applicability hereof by trade union membership or contract. The same applies to the system of extended collective labour agreements in the Netherlands and in Germany. Other Member States have chosen a contractual system. By "contractual system" I mean a system which has as a consequence that collective labour agreements only apply to individuals who are bound by that agreement by contract. When it concerns non-extended collective labour agreements, the Netherlands and Germany, for example, have a contractual system. Only those employers are bound by the collective labour agreement that either are members of the contracting employers' association or that signed the collective labour agreement themselves. Furthermore, only those employees are bound by the collective labour agreement who are a member of the contracting trade union(s), or who agreed to the applicability of the collective labour agreement. Obviously, choosing for either the institutional or the contractual system has consequences which, depending on personal preference, can be called advantages or disadvantages. In my opinion, there are at least three major consequences.

2055 Again it must be noted that the difference between the contractual and institutional approach is applied strongly.

2056 Here, I am one of the many authors that refer to the institutional theory without fully and consistently applying that theory. My only excuse is that I have no intention to draft a system that fits within the institutional theory, or whatever other theory for that matter. I merely intend to suggest some principles for a system on transnational collective labour agreements that, in my view, could make it to a workable system.

First, in the contractual system individualism and voluntarism prevail over collectivism and non-voluntarism, while this is the other way around in the institutional system. After all, the contractual system is based on the individual and his free choice how to shape his employment conditions. The institutional system thrives on collectivism and means non-voluntarism: if the social partners – which are deemed to represent the collectivities – wish so for the good of the collective, individuals can simply be "confronted" with the terms of a collective labour agreement, regardless of whether they wish so or not. In my view, one should be careful to force terms on individuals to which they did not consent. As discussed in chapter 13, section 9, a number of Member States fiercely disputed extension of collective labour agreements to employers and employees that were not bound by the collective labour agreement. The constitutional Court of the Czech Republic held extension of collective labour agreements unconstitutional, as it would violate contractual freedom. Also in Poland scholars argue that such an extension is at odds with the private parties' freedom to bargain. Still, in the majority of the Member States extension of collective labour agreements is possible. However, these collective labour agreements must as a rule satisfy multiple demands. These demands often include that extension requires a public act or decree, issued by the government authority in charge of labour matters and that the collective labour agreement has a minimum coverage rate. To summarise, extension should be applied reticently and requires strong justification.

This brings us to the second consequence: the institutional system requires strong social partners or a high coverage rate of the collective labour agreement, while the contractual system does not. These requirements are necessary in an institutional system because the effects of the collective labour agreement are comparable to that of an act; all parties that fall within the collective labour agreement's scope of applicability need to apply that agreement. In the Belgian institutional system, for example, only a limited number of strong social partners are appointed by the government as they are deemed to be representative in all circumstances. A consequence of this requirement is that clear and unambiguous rules must be drafted on forehand on the requirements that an organisation must satisfy in order to become representative. These rules should single out those organisations that are in principle always, within the

entire sector for which they are appointed, sufficiently representative.[2057] In the Netherlands and in Germany, for example, collective labour agreements can only be extended (gaining an *erga omnes* effect) if they have a certain minimum coverage.[2058] These strong (representative) social partners respectively this high coverage rate justify the *erga omnes* effect of the collective labour agreement. In a contractual system collective labour agreements can also be applied to companies or sectors if they are concluded by less strong social partners, or in situations in which there is a less significant coverage ratio. In the end, only those parties that chose to are governed by the collective labour agreement. In this system there can be a collective labour agreement in companies or sectors that do not have strong social partners or a high coverage rate of the collective labour agreement, and there can be a higher level of diversity of trade unions. The possible representativity demands these social partners must meet should obviously also be clear, but can easier be tested on a case-by-case scenario (that is, per concluded collective labour agreement, since the social partners do not have to be automatically representative in all circumstances in a specific sector, as opposed to the institutional system in place in Belgium) and have to be less strict.[2059]

Third, it should be noted that the institutional system is much more inclusive than the contractual system. In its pure form, it includes all employees and employers that fall within the scope of applicability of the collective labour agreement. In a more moderated form, it covers all employees working for the bound employer (and falling within the scope of application of the collective labour agreement), not just the employees who are bound by their membership of the contracting trade union(s) or by a reference clause. This has specific consequences, which I would consider advantages. The first advantage is of a fundamental nature. Most employers wish to treat their employees equally. This goal is obviously better attained if the agreement applies to all employees.

2057 When applied to the European Union, it appears be difficult to draft clear and unambiguous rules that social partners must meet in order to be *generally* representative, which would be a consequence if the institutional system as is in place in Belgium is chosen. After all, the criteria drafted by the Commission in order to single out social partners that are representative have been heavily criticised. Reference is made to chapter 6, sections 3.2 and 3.3. Furthermore, it also has been proven difficult to draft general rules on representativity at European level in *specific* cases (relating to a single European collective labour agreement), justifying that such single European collective labour agreement has *erga omnes* effect. Reference is made to the UEAPME case.

2058 As trade union density in Europe is dropping, it can prove pretty difficult to fall back on a general system that requires a high coverage of collective labour agreements.

2059 See the conclusions in section 4.2 above.

Such equal treatment is normally considered an important rationale of collective labour agreements: they should lay a uniform fundament under the employment conditions applicable in a company or multiple companies. The second advantage is of practical nature. From an EU law perspective it is difficult to differentiate between employees who are a contracting trade union's member and those who are not. Article 8.1 of the Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data ("the Privacy Directive") prohibits the processing of personal data revealing, amongst others, trade union membership.[2060] There are only limited exceptions to this rule. In practice, it is therefore very difficult in many Member States for an employer to differentiate between employees who are a trade union member and those who are not. It is therefore more practical to treat them equally.

Taking into consideration these three consequences the following observations can be made:

1. Extension of collective labour agreements should be applied reticently and requires strong justification.
2. The institutional system requires strong social partners or a high coverage rate of the collective labour agreement, while the contractual system does not. The aforementioned strong social partners should in principle meet clear and unambiguous rules, that, in an institutional system as is in place in Belgium, must be drafted on forehand and apply generally (as opposed to in a specific situation, in relation to a specific collective labour agreement).
3. Extension of collective labour agreements to all employees has important advantages as all employees are treated equally and potential difficulties on privacy issues can easily be tackled.

While the first two observations would favour a contractual system, the third observation points at an institutional system. This is not necessarily troublesome. On balance, a system does not necessarily have to be purely contractual or purely institutional. The Dutch system of normal (non-extended) collective labour agreements, for example, is a contractual system but a bit out of tune when it concerns the position of article 14 employees; the employer is also obliged to apply the employment conditions to the employees who are not bound by the collective labour agreement. The Belgian system for normal (non-extended) collective labour agreements on the other hand is an

2060 Directive of the European Parliament and of the Council of 24 October 1995, OJ L 281, 23 November 1995, pages 31 – 50.

institutional system, but only when it regards the position of the employees, as the employers merely need to apply the collective labour agreement if they have concluded it or are a member of the contracting employers' association(s). The systems can thus be applied flexibly.

4.3.2 The position of the employers

What does the above mean for the position of the employers? It should be noted that in the Researched Countries collective labour agreements only apply to the employers that are bound by it. The institutional system does not apply to employers. This is only different when it comes to extended collective labour agreements. However, as noted in chapter 14, section 3, a system of extension is not pursued in the underlying thesis. Therefore, it seems logical to follow the contractual system with respect to employers. This is also in line with the argument that extension of collective labour agreements should be reticently applied. Consequently, only those employers that are either a member of (one of) the contracting employers' organisation(s) or signed the transnational collective labour agreement themselves, are bound by that agreement.

4.3.3 The position of the employees

Things are somewhat different when it comes to the position of the employees. In most Member States a collective labour agreement applies to *all* employees of the bound employer (and falling within the scope of application of the collective labour agreement), as follows from chapter 13, section 8.3. Even in Poland – a country which has reservations against extending collective labour agreements to employers and employees to whom no agreement applies (enlargement of the collective labour agreement) – a collective labour agreement does apply to all employees of the employer bound by a collective labour agreement, including those employees who are not members of the contracting trade union. As already mentioned, such a general binding effect has important advantages, as all employees are treated equally and no problems occur with regard to privacy issues. However, the above analysis also shows that such a system requires justification, as employees can be bound by terms that were not of their choosing.

The best method of justification would, in my opinion, be the principle of favour. This allows departure from the terms of the collective labour agreement in the individual employment contract in favour of the employee, and prohibits in consequence that collective labour agreements deteriorate existing employment conditions. This principle is also rather commonly used

in Member States,[2061] and is recommended by the ILO.[2062] It is, therefore, a valuable point of departure in a transnational system. Should the collective labour agreement by law be a minimum agreement, this would be sufficient justification for its applicability to all employees. In any case, a minimum collective labour agreement cannot harm any of the employees.[2063] However, all national laws that apply the principle of favour have exceptions to this rule.[2064] This will also be the case in the proposed European system for transnational collective labour agreements. These exceptions require justification which can amongst others be found in mild representativity demands on the side of the trade unions, as will be discussed in section 6 below.

If the contracting parties wish to fully depart from the principle of favour, for example, because times of economic distress warrant a cut back in wages, there must be sufficient justification to apply the collective labour agreement to all employees. If such justification is lacking, the contractual system should be taken as a starting point. Only if a sufficient level of justification is in place, a collective labour agreement (also) containing maximum or standard provisions may apply to all employees working for the bound employer. Once it is established that a transnational collective labour agreement applies in the relation between the employer and employee, it has, in line with the choice that a collective labour agreement is intended to bind by law, a direct mandatory effect on the individual employment agreement. This entire system will be explained in detail in section 5 below.

4.4 Third parties

As argued in chapter 14, section 6.3, transnational collective labour agreement should also be able to deal with collective normative provisions. As noted in chapter 13, section 8.4, there are two important constructions when it concerns such provisions.

First, these provisions may provide for rights and obligation that arrange the relation between the employer and its entire personnel or an employee representative body. The employer who is bound by the collective labour agreement should apply these collective normative provisions in the

2061 See chapter 13, section 8.2.

2062 Reference is made to article 3.3 of the 1951 ILO recommendation number 91 (R91) on collective agreements.

2063 With the notable exception of the minimum collective labour agreement offering less than the previous minimum collective labour agreement. This topic will be discussed in depth in chapter 16, section 5.2.

2064 See chapter 13, section 8.2.

Netherlands, Germany and Belgium. In an international system, there is in my view no real reason to oppose to a system that allows the contracting parties to a collective labour agreement to give *additional* rights to the entire personnel or to an employee representative body. If the contracting parties consider such provisions useful, they should have the opportunity to include these in a collective labour agreement, provided that the principle of favour is observed. When it comes down to it, employers are, given paragraph 4.3.2, bound by contract to the collective labour agreement and therefore chose to be bound by a collective labour agreement that could have this content. Employees who are employed by the bound employer are, given section 4.3.3, in principle automatically bound by a collective labour agreement, but this does not constitute a concern if it is a minimum agreement. I see no compelling reason why the contracting parties should be allowed to *limit* rights of the entire personnel or of an employee representative body. This could very well violate national law and disrupt the balance between trade unions and works councils. If this nonetheless proves necessary and does not violate any laws, such limitation should be justified. This justification should be found in representativity, in which case the same criteria apply as are in place for collective labour agreements that depart from the principle of favour and will be set out in section 5 below. Another matter is that the contracting parties should be allowed to discontinue the additional rights granted to the entire personnel or to an employee representative body. If this would not be possible, this would lead to a very static system. The discontinuation of additional rights granted will be discussed and justified in chapter 16, section 5.3.

Second, as argued, the transnational collective labour agreement may provide for rights and obligations that arrange the relation between the employer and the employees vis-à-vis third parties. If the transnational collective labour agreement arranges for payment to these third parties by the employer, while the employees (who satisfy certain requirements set out in the collective labour agreement) can enjoy the benefits, there are in my opinion – following the explanation given in the paragraph above – no real reasons against this system. This would be different if the employees, for example, were obliged to pay a contribution to the third parties. Although I can imagine that reasonable contributions of the employees can be required – it does not seem unreasonable that an employee contributes to a fund established in his interest, or to a personal education – the fact remains that the employee in such a case is confronted with obligations. These obligations need justification. This justification should be found in representativity, in which case the same criteria apply as are in place for collective labour agreements that depart from the principle of favour and will be set out in section 5 below (criteria which

include, as seems especially relevant in this respect, the possibility that the employee voluntarily chooses to pay his dues in order to be eligible to enjoy the benefits offered by the third parties).

Once it is established that the collective normative provisions apply in a specific situation, they apply directly and with mandatory effect to the parties concerned. This is a logical consequence of the choice made in section 4.1 above that collective labour agreements are intended to bind by law.

5. The position of the employees of the bound employer in detail

Taking into consideration the section above, I suggest the following system with regard to the position of the employees of the bound employer:

1. A transnational collective labour agreement that merely contains minimum provisions automatically applies to and has mandatory effects on all employees of the bound employer who fall within the scope of applicability of that agreement. By way of exception, however, the transnational collective labour agreement may (i) allow the employer and employee to deviate from ¾ mandatory law if either permitted at European or relevant national level, (ii) oblige each employee to pay a reasonable compensation to the contracting trade union(s) and (iii) provide for an opening clause that can be filled in by social partners at national level.

2. A transnational collective labour agreement that (also) contains standard and/or maximum provisions only applies to and has mandatory effects on bound employees who fall within the scope of applicability of that agreement. It also, however, applies to, and has mandatory effects on, employees who are not bound by it, but who do fall within the scope of applicability of that agreement if:
   a. the contracting trade union(s) has (have) sufficient members amongst (i) all employees (the bargaining group) and (ii) each individual group of employees (the bargaining units) to which the transnational collective labour agreement applies; or
   b. the contracting trade union is or trade unions are recognised by the employees of each relevant bargaining unit; or
   c. the individual employee accepts the collective labour agreement; or
   d. it already applies to an important majority of the employees in the relevant bargaining group, and to a sufficient number of employees in each individual bargaining unit.

5.1 The minimum transnational collective labour agreement

In the first suggestion above, the collective labour agreement containing (i) only minimum provisions will apply to (ii) bound employees and employees who are not bound, provided (iii) that they fall within the scope of applicability of the collective labour agreement. The suggestion also contains (iv) three exceptions to the principle of favour.

5.1.1 Minimum provisions

The collective labour agreement should solely contain minimum provisions. A minimum provision allows departure in the individual employment contract in favour of the employee only. That means that existing employment conditions may not be deteriorated by the transnational collective labour agreement. It also means that, during the term of the transnational collective labour agreement, the employers and employee may agree on different employment conditions than those stipulated in the collective agreement, provided that these employment conditions are in favour of the employee.

There are two important difficulties concerning minimum collective labour agreements. First, the situation may arise that specific advantageous employment conditions may be offered to the employee in a minimum collective labour agreement (which were not set out in the individual employment agreement), which advantageous conditions are not offered anymore, or to a lesser extent, in the subsequent minimum collective labour agreement. This is a situation that relates to after-effects of provisions set out in a collective labour agreement, an issue that will be discussed in depth in chapter 16, section 5.2.

Second, a problematic issue in practice is to establish what exactly a favourable provision is. Does the *entire* content of the minimum collective labour agreement, as a package, have to be more favourable to the employee involved than his *entire* package of employment conditions deriving from his employment agreement, or should each *individual* employment condition in the minimum collective labour agreement be more favourable than each *individual* employment condition deriving from his employment agreement, or perhaps should relating employment provisions be taken together? Furthermore, who should establish which conditions are more favourable: is this the subjective opinion of the employee involved (who ought to know and decide which provisions are more favourable to him) or should an objective method be applied?

Although it goes beyond the scope this thesis to thoroughly scrutinise these problems, I would favour a system in which (closely) relating provisions of the minimum collective labour agreement are compared with (closely) relating provisions deriving from the employee's employment agreement. If, for example, the minimum collective labour agreement prescribes a minimum salary of EUR 2,000 per month and a minimum holiday allowance of 10% payable once a year (both provisions directly relating to minimum pay), the employer should in my view be permitted to pay an all-inclusive salary of 2,500 per month, while stipulating not to pay an additional 10% holiday allowance. Such a system gives – albeit limited – room for flexibility and reasonableness and fairness, which would potentially be lacking if each *individual* provision of the minimum collective labour agreement would be compared with each *individual* provision deriving from the employee's employment agreement. Comparing *entire* employment packages, however, is in my view impractical. It would be very difficult, if possible at all, to establish exactly how valuable the entire collective labour agreement package is when compared with the entire package of employment conditions deriving from the employee's employment agreement.

Furthermore, it is ultimately at the discretion of the competent court to establish which provisions are more favourable. That court should, from an objective point of view, establish which conditions are more favourable: those deriving from the minimum collective labour agreement or those from the individual employment agreement? The (subjective) opinion of the employee should not be decisive. If that would be the case, it would be impossible for the social partners, including the employer, to establish in advance how to deal with the minimum collective labour agreement in relation to the individual employee's existing employment conditions. They should in such a case discuss the employment conditions with all employees in order to find out what each individual employee would hold more dearly: the employment conditions deriving from his employment agreement, or those deriving from the minimum employment agreement. Moreover, it would not lead to uniform employment conditions, uniformity which is an important goal pursued by collective bargaining.

5.1.2 Binding power of the transnational collective labour agreement

That the collective labour agreement applies to bound employees – employees who are a member of (one of) the contracting trade union(s) – is, in my view, rather self-explanatory. The bound employees chose to become a member of the trade union and had a chance to vote on a draft agreement. The terms of the collective labour agreement should be applied to them. That the agreement

should also apply to employees who are not bound by the collective labour agreement can be explained by the fact that such an "*erga omnes* system" is in place in most Member States, while it also offers specific advantages, as all employees are treated equally and no problems occur with regard to privacy issues. The justification that the collective labour agreement also applies to the employees who are not bound by the agreement, can be found in the mild representativity demands that apply to the trade union(s), as set out in detail in section 6 below, and the fact that the agreement only contains minimum provisions. The employees who are not bound by the collective labour agreement can therefore not be confronted with a deterioration of their existing employment conditions, but only with an improvement. The minimum transnational collective labour agreement has, in line with the choice made in section 4.1 above that a collective labour agreement is intended to bind by law, a direct mandatory effect on the individual employment agreements of the employer and employees bound by the transnational collective labour agreement.

5.1.3 Scope of applicability of the transnational collective labour agreement

The contracting parties are, given their autonomy, free to determine the scope of applicability of the collective labour agreement. The social partners should in that respect take the following four elements into account:[2065] (i) the group of employees falling within the scope of the collective labour agreement; (ii) the employer or group of employers falling within the scope of the collective labour agreement; (iii) the geographical territory; and (iv) the duration. The transnational collective labour agreement should only be applied to the employees who fall within the scope of application of that agreement.

5.1.4 Exceptions to the principle of favour

The principle of favour has three exceptions in the current suggestions on a new system. First, the parties to the collective labour agreement may, if necessary to the detriment of the employees, deviate from ¾ mandatory law if either permitted by European law, or by the law applicable in the jurisdictions in which the agreement has force. The possibility of such a deviation has certain advantages. It gives the contracting parties the opportunity to tailor statutory law at the appropriate level. It furthermore introduces flexibility at the side of the employer, while trade unions are present to warrant the interests of the employees in the negotiation process. As discussed in chapter

2065 See chapter 13, section 8.1.

13, section 8.6, this system sits well in a European context and an increasing number of Member States apply it.

As already explained, ¾ mandatory law concerns law of which the minimum standards protecting the employee may be dropped in an employment agreement, provided that the social partners agree to it in a collective labour agreement. The fact that the trade union has to observe mild representativity criteria, as discussed in section 6, and the fact that either the European legislator or the legislator of the Member State in which the international collective labour agreement has force permits such a deviation, should warrant a reasonable outcome and can be considered sufficient justification for this exception.

At European level there are already instruments that give social partners room to adapt or complement a European directive. Important examples of such European laws concern the directives on working time, fixed-time and part-time work. Member States, however, can prevent that social partners introduce more flexible arrangements than the ones described in the directives, even if the directives allow the social partners to do so. In the end, Member States may introduce more favourable national law in their jurisdiction, taking away the possibility of deviation by collective labour agreement. I can imagine that, upon introduction of a law on transnational collective labour agreements, future European legislation in a mandatory fashion attributes the right to deviate from the core content of that legislation by (transnational) collective labour agreement. Individual Member States are in such a situation not entitled to limit the social partners' powers.

Besides the above, the transnational collective labour agreement may in the current proposal also deviate from national ¾ mandatory law, provided that the collective labour agreement satisfies the national requirements in order to deviate from that national law. In the Netherlands, for example, there are no specific requirements that the social partners should satisfy in order to deviate from Dutch ¾ mandatory law. It seems illogical that "European" social partners would, in such a case, be unable to deviate from Dutch ¾ mandatory law in a transnational collective labour agreement. The fact that national legislation permits deviation from national ¾ mandatory law is, in my view, as said, sufficient justification that at transnational level this can also be done under the same conditions.

Second, the contracting parties should be able to arrange that every employee should contribute a reasonable amount of money to the contracting trade union(s). All employees falling within the scope of applicability of the

collective labour agreement may benefit from the agreement. If an individual employee does not benefit himself, some of his colleagues may do so. A limited level of solidarity can reasonably be expected from an employee. Such mandatory contribution prevents a *free riders effect*. It is, in my view, quite unfair that everybody can enjoy the advantages of a good transnational collective labour agreement, while only the members of the trade unions make a financial sacrifice in terms of contribution. However, such mandatory contribution may not force employees to become a member of the trade union, as that would be at odds with the negative freedom of association. The mandatory contribution may therefore not depend on the employee's trade union membership (everybody has to pay; members of contracting trade unions must pay the contribution due and non-members a fee set out in the transnational collective labour agreement) and may not exceed a reasonable amount. The reasonable contribution must be aimed at covering the actual costs for concluding the transnational collective labour agreement and, if necessary, to enforce that agreement. The reasonable contribution should at all times be lower than the normal contribution an employee should pay to the trade union in order to be a member during the duration of the collective labour agreement. Most trade unions provide multiple services, not merely the service of negotiating (and, if necessary enforcing) a collective labour agreement. It would be unfair for an employee, who does not want to become a trade union member, to pay the full membership fee, merely for the trade union's activity of negotiating a collective labour agreement. For these reasons, the mandatory contribution must be set at covering the actual costs for concluding the transnational collective labour agreement and, if necessary, to enforce that agreement, and may per annum not exceed 50% of the normal annual membership contribution and may furthermore not exceed a reasonable fixed amount, for example, EUR 100 per annum.

The above system is, as said, in my view compatible with the negative freedom of association, as employees are not compelled to join the contracting trade unions; they merely have to pay a reasonable (not excessive) contribution in order for a proper transnational collective labour agreement to be concluded and, if necessary, to be enforced, for the good of all employees. The fees paid by the employees not being a member of the contracting employees' organisations should not be allocated to fund other (general) activities of the contracting employees' organisations. It should also be noted that this system does not unjustifiably violate property rights of the employees not being a member of the contracting employees' organisations. Article 1 Protocol I of the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol XI, guarantees the peaceful enjoyment of a person's possessions and prohibits that person to be deprived of

his possessions, *except* in the public interest and subject to the conditions provided for by law and by the general principles of international law. Proper functioning of a transnational collective bargaining system, that reasonably and equally apportions the costs actually incurred for that goal, is in my view in the public interest. As long as the fees to be paid by employees not being a member of the contracting employees' organisations indeed are used for the conclusion of the transnational collective labour agreement and, if necessary, for the enforcement thereof for all employees concerned (and thus are proportionate) there is no violation of any property right. If, by contrast, these fees are used by the contracting trade unions to finance general trade union work, there would be a violation of property rights. The employees organisations' must make it transparent that the fees due are spend properly and for the right causes. The above system seems to fully comply with the ruling of the European Court of Human Rights, in which a similar system in Sweden was held legitimate in the core, but was held disproportionate with regard to the amount of money that needed to be contributed by employees not being a member of the contracting employees' organisations as set off against the services rendered by the employees organisations financed by those fees.[2066]

The third suggested exception that applies to the principle of favour concerns opening clauses: the transnational collective labour agreement may allow – whether or not with restrictions set out in the transnational collective labour agreement – the national social partners to fill in a transnational collective labour agreement at national level, including to apply a national collective labour agreement that contains standard or maximum provisions. This national collective labour agreement should obviously satisfy the national requirements for such a collective labour agreement. In this manner the transnational collective labour agreement can give national social partners room to tailor that agreement at national level, which in my view could be particularly useful with regard to sectoral transnational agreements. This exception to the principle of favour is legitimised by the fact that at national level the statutory provisions on collective labour agreements that are already in place must be observed.

This third exception may possibly be further amplified, but such amplification is insufficiently researched in this thesis in order to fully comment on that. In some countries it is possible that collective labour agreement leave an opening

2066 European Court of Human Rights, 13 February 2007, *Evaldsson and others / Sweden*. It should be noted that the European Court of Justice did not assess whether the system was compliant with the negative freedom of association.

clause that a Works Council or other (democratically chosen) employee representative body could use to work out. Works Councils may play a role in fixing employment conditions through means of an opening clause in Austria, Germany, the Netherlands and Spain. In Estonia, Latvia and Lithuania authorised representatives of employees are entitled to conclude collective labour agreements at company level.[2067] It is conceivable that in a European system Works Councils could be attributed the right – through an opening clause, and, if desired by the parties of the collective labour agreement, under specific conditions set out in that transnational collective labour agreement – to adapt the employment conditions of the employees working for the bound employer to the detriment of the employees. The justification for that would lie in the fact that (i) a collective labour agreement applies, that was concluded with a trade union or trade unions that has or have to observe mild representativity criteria and leaves a matter open for employee representatives[2068] via an opening clause, (ii) after which that employee representative body agreed hereto. It is also conceivable that the law would only allow such deterioration under these conditions for specific topics, such as working hours, working place and organisation of labour. There are obviously also arguments against such a system, such as the fact that employee representatives are in a position that is too weak to really bargain with the employer and that such bargaining is the task for the trade unions. It should be noted that, given the table presented in chapter 13, section 5.1, a majority of Member States does not attribute a role to Works Councils or other employee representative bodies to bargain on employment conditions. Anyway, the topic "Works Council" was excluded from the scope of this thesis, for which reason I will lay this additional potential exception to the principle of favour to rest.

5.2 The transnational collective labour agreement containing maximum and/or standard provisions

A transnational collective labour agreement that (also) contains standard and/or maximum provisions only applies to and has mandatory effects on bound employees who fall within the scope of applicability of that agreement. It also, however, applies to and has mandatory effects on employees who are

2067 Reference is made to chapter 13, section 5.1.

2068 Which representatives should, according to the choice made by Member States, in some form be available in undertakings employing at least 50 employees in any one Member State, or establishments employing at least 20 employees in any one Member State. See article 3 of Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, OJ L 80, 23 March 2002, pages 29 – 34.

not bound by it, but who do fall within the scope of applicability of that agreement if:

a. the contracting trade union(s) has (have) sufficient members amongst (i) all employees (the bargaining group) and (ii) each individual group of employees (the bargaining units) to which the transnational collective labour agreement applies; or
b. the contracting trade union is or trade unions are recognised by the employees of each relevant bargaining unit; or
c. the individual employee accepts the collective labour agreement; or
d. it already applies to an important majority of the employees in the relevant bargaining group, and to a sufficient number of employees in each individual bargaining unit.

Given the autonomy of the social partners and also given the third exception that applies to the principle of favour with regard to minimum transnational collective labour agreements, the contracting social partners of the transnational collective labour agreement (also) containing standard and/or maximum provisions may allow derogations via collective labour agreements at national level through opening clauses.

5.2.1 Main rule: contractual system

As mentioned in section 4 above, applying a collective labour agreement to employees who are not bound by it through contracting trade union membership requires justification. The main justification ground is the principle of favour, which does not apply in this situation. The mild representativity demands are, in my view, insufficient to justify the applicability to all employees of the collective labour agreement also containing standard and/or maximum provisions. This leaves us with the contractual system: an employee is merely bound to the collective labour agreement if he is a member of (one of) the contracting trade union(s).

This also leaves us with a practical difficulty: how can employers establish which employee is bound by the collective labour agreement and which is not? As already mentioned, article 8.1 of the Privacy Directive prohibits the employer to process personal data on trade union membership. I would argue that in this case the exception of article 8.2 (b) should apply. This article stipulates that the exception of paragraph 1 does not apply, where processing is necessary for the purposes of carrying out the obligations and specific rights of the controller (employer) in the field of employment law, in so far as it is authorised by national law providing for adequate safeguards. A law on international collective labour agreements should arrange that the employer

can, in this situation, at all times call upon the aforementioned exception. The trade unions must, in such a case, give information on the names of their members working for the employer. Should this be considered too "touchy", or an unacceptable violation of the trade unions' autonomy,[2069] another solution seems possible as well. In such a case, the individual employees that are a member of (one of) the contracting trade union(s), should have an option of whether or not to inform their employer of their membership.[2070] It will, in that case, be at the discretion of the individual employee whether or not to step forward. From a privacy point of view this solution would work as well. In the end, the prohibition of article 8.1 of the Privacy Directive on the processing of personal data revealing trade union membership, is, pursuant to article 8.2 (a), not applicable if the data subject (the employee) has given his explicit consent to the processing of those data (except where the laws of the Member State provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject's giving his consent, which in my view should in the underlying situation be excluded by law, as the employee can voluntarily chose whether or not to give the membership information to his employer; he is not forced to do so).

5.2.2 Exceptions to the main rule

It is self-evident that the situation described above is not optimal. Collective labour agreements should not only be fully put to use in good times, resulting in favourable employment conditions, but also in bad times, resulting in stringent measures needed for the continuance of a company or companies.[2071] However, there should be a justification for the general applicability (*i.e.* to all employees, bound or not) of the collective labour agreement that also contains standard and/or maximum provisions. If any of the following exceptions applies, that would, in my view, sufficiently justify the applicability of such collective labour agreement to all employees. If the exceptions do not apply, the collective labour agreement only applies to the employees referred to in section 5.2.1 above. Once it is established that the transnational collective labour agreement applies to the relation between the employer and the employee that collective labour agreement has, given that a transnational

2069 Which, for example, Bercusson presumably would argue as he already stated that checks on representativeness and mandate of the signatory parties "go to the heart of the autonomy of the social partners". B. Bercusson, *Democratic Legitimacy and European Labour Law*, page 162.

2070 If they would step forward and state that they are a member, it makes sense that they are obliged to furnish sufficient evidence of that membership.

2071 It is no coincidence that current company-level transnational collective bargaining focuses on transnational restructuring as well.

collective labour agreement is intended to bind by law, a direct mandatory effect on the individual employment agreement.

5.2.2.1 Factual representativity

The first exception applies in the case that the contracting trade union is, or in the case of several contracting trade unions taken together are, sufficiently representative in the bargaining unit(s) of the company or sector to which the collective labour agreement applies. In such a case, the factual representativity of the contracting trade union(s) justifies the fact that the agreement applies to all employees in the relevant bargaining unit(s).

Exactly what should constitute the bargaining unit and when a trade union or several trade unions is/are sufficiently representative in this unit or these units is a matter of choices. The bargaining group can be described as the entire group of employees to which the collective labour agreement would, given its own scope of applicability, apply.[2072] This bargaining group can, depending on the scope of applicability of the collective labour agreement, be divided into several bargaining units. For the definition of these bargaining units I suggest to link up with the definition of entity as has been defined by the European Court of Justice in the light of the European Directive on Transfer of Business.[2073] This definition reads as follows: "an entity is an organised grouping of persons or assets facilitating the exercise of an economic activity which pursues a specific objective".[2074] The entity should also, in the light of established jurisprudence, be stable.[2075] In a transnational situation, it is quite likely that each country has one or more separate bargaining units. If at least 25% of the employees of the entire bargaining group is a member of the contracting trade union(s), and in each individual bargaining unit this

2072 That means that the employees that do not fall within the scope of application of the collective labour agreement – for example the "higher-level" employees, such as managers – are excluded from the definition.

2073 Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. OJ L 82, 22 March 2001, pages 16 – 20.

2074 See for example European Court of Justice, 2 December 1999, Case C-234/98, *G.C. Allen and Others v Amalgamated Construction Co. Ltd.*

2075 See for example European Court of Justice, 11 March 1997, Case C-13/95, *Ayse Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice*.

number is at least 20%,[2076] the trade union(s) is/are, in my view, sufficiently representative.[2077] If one or more individual bargaining units do not reach that 20%, the collective labour agreement should not apply to the employees of that unit.[2078]

In the bargaining process, the contracting trade union(s) should be able to determine, after the employer or employers' organisation(s) have provided full details on the total number of employees of the bargaining group and units (that fall within the scope of applicability of the collective labour agreement), whether they have sufficient members amongst the employees. The institution where the collective labour agreement is registered,[2079] should ultimately verify these numbers.

5.2.2.2 Recognition of the trade union(s)

In certain companies and in certain sectors the density of trade union membership may be lower than 25%. It would in my view be unjust that in these companies or group of companies constituting the relevant sector an employer or a group of employers would be unable to adjust the employment conditions, an adjustment which may also be to the detriment of the employees. In such companies or group of companies the employees could be offered a chance to vote whether they wish that the package of their employment conditions is arranged by a specific trade union or trade unions.[2080] [2081] The trade union can, consequently, be recognised by the employees as competent

2076 In analogy of the UEAPME case, each bargaining unit should be scrutinised separately. After all, the Court of First Instance ruled in paragraph 94 of the UEAPME case that *all categories of workers* need to be represented. The same should in my view apply to all bargaining units.

2077 These numbers are undeniably subjective and can be replaced by other numbers. I have not conducted any research on the reasonableness of these numbers. However, an overall factual representativity of 1 out 4 seems reasonable to me.

2078 That is, the collective labour agreement does not apply on the basis of this first exception. That does not exclude the possibility that the collective labour agreement applies on the basis of the contractual system of section 5.2.1 above, or on the basis of the other exceptions.

2079 See chapter 14, section 6.4.

2080 In the following text I will, in order to improve the readability, just refer to the recognition of a single trade union, instead of several trade unions.

2081 It may be that employees are willing to recognise a trade union in order to arrange employment conditions, even if these are to the detriment of these employees. Employees may be better off with a strong trade union arranging their (deteriorated) employment conditions, than dealing with their employer on an individual basis.

to arrange their employment conditions. This is a situation that could, for example, occur once an employer chooses (or is forced to choose by the relevant trade union) that in the future the employment conditions should be arranged by a collective labour agreement, or that the employer together with the relevant trade union wishes to offer the employees a choice in that matter. I expect that recognition of a trade union is more likely to occur on company-level than on sectoral-level, as it is in my view unlikely that all employees of all companies within a sector would often agree on the recognition of the same trade union.

The second exception to the main rule applies to the trade union that is recognised as representative by the employees of the bargaining group. If the employees have appointed a trade union as eligible to represent their interests, that trade union may also agree on a collective labour agreement that contains standard and/or maximum provisions. The justification for this lies in the appointment (and with that: the representativity) of the trade union.

For this system, I suggest following closely the system of Great Britain when it comes to statutory recognition and derecognition. This transnational recognition process should in my view relate to collective bargaining in general and not, as is the case in Great Britain, only to certain topics. Furthermore, the role of the British CAC should be fulfilled by a European body. If a majority of the employees in the bargaining group[2082] is a member of the union applying for recognition, the trade union involved must be declared as recognised as to conduct collective bargaining on behalf of the employees constituting the bargaining group. This is different if any of three specific conditions apply. In that case there should be a secret ballot held in which the employees constituting the bargaining group are asked whether they want the trade union to conduct collective bargaining on their behalf. These conditions are: (i) the European body rules that a ballot should be held in the interests of good industrial relations, (ii) a significant number of trade union members within the bargaining group informs the European body that they do not want the union to conduct collective bargaining on their behalf,

2082 The social partners involved in collective bargaining must determine the bargaining group. The recognition concerns the group as a whole and not the individual bargaining units. However, if a bargaining unit opposes to being part of the group, that unit can apply for derecognition in accordance with the procedure set out below. This system advances equality within the original bargaining group, prevents bargaining units from backing out of the bargaining group too easily during the recognition phase, but leaves room for these units to initiate derecognition procedures.

and (iii) "membership evidence"[2083] is produced which brings doubts whether a significant number of trade union members within the bargaining group want the union to conduct collective bargaining on their behalf - even if they do not openly admit it. A secret ballot should also be held if the European body concludes that the number of employees in the bargaining group who are union members fall short of a majority. Should the union be supported by (i) a majority of the employees that voted in the ballot and (ii) at least 40% of the employees constituting the bargaining group, the European body must issue a declaration that the trade union involved is recognised as to conduct collective bargaining on behalf of the employees constituting the bargaining group. If the result is otherwise, the European body must state that the union is not entitled to be recognised for this bargaining group.

Derecognition should be possible on the request of the employer or of a certain minimum number of employees. Derecognition on request of management would in my view not be overly important in most situations, as the employer or employers' organisation(s) could simply decide not to bargain with the recognised trade union anymore.[2084] Derecognition of a trade union requested by employees is more important, as they could have been disappointed in the performance of that trade union. A request signed by a minimum of 10% of employees of the entire bargaining group, or a minimum number of for instance 150 employees should that be less than said 10%, would seem reasonable to initiate a derecognition process for the bargaining group. In analogy of the model in Great Britain, first there should be the procedure in which it is requested that the recognition ends on the ground that there now is only a minority support for the trade union within the bargaining group. This procedure is a mirror-image of the recognition procedure, and normally leads to a secret ballot. Should the party asking for derecognition of the trade union be supported by (i) a majority of the employees that voted in the ballot and (ii) at least 40% of the employees constituting the bargaining group, the trade union will be derecognised. Second, the same procedure can be started with regard to derecognition of the trade union that was "automatically" recognised – that is, recognised without a ballot, since a majority of the employees of the bargaining group was a member of the trade union – on the

2083 Membership evidence is (a) evidence about the circumstances in which union members became member and (b) evidence about the length of time for which union members have been members, in case where the competent European body is satisfied that such evidence should be taken into account.

2084 This possibility would gain in importance if it is decided that employers or employers' organisations would be obliged to only conduct bargaining with recognised trade unions (once it or they are recognised). As set out in chapter 14, section 6, I am not in favour of such an obligation.

ground that fewer than half of the employees in the bargaining group now belong to the union and there is now only minority support for that union. If it is established that indeed fewer than half of the employees in the bargaining group is a trade union member, the trade union will be derecognised should there also be a minority support for the trade union. In order to establish the latter, a similar derecognition procedure as mentioned above should be followed.[2085]

Besides this derecognition of the trade union for the entire bargaining group, it should also be possible that an individual bargaining unit asks for derecognition, especially since the recognition procedure focuses on the entire bargaining group. After all, as said in section 5.2.2.1 above, the position of each bargaining unit is of relevance. In my view, however, an individual bargaining unit should meet relatively high standards in order to withdraw from the recognised trade union, as such a withdrawal jeopardises an important goal of collective bargaining: equal treatment of the employees. I would propose that a bargaining unit can only withdraw from the recognition of the trade union in case 25% of the employees constituting said bargaining unit request a derecognition procedure concerning that bargaining unit, followed by a secret ballot in which over 50% of the employees constituting that bargaining unit vote for derecognition.

5.2.2.3 Acceptance of the transnational collective labour agreement

A third exception applies if the employee accepts the collective labour agreement (also) containing maximum and standard provisions. In such a case that collective labour agreement would also apply to that employee. This exception is, in deviation to the two exception grounds stated above and the one stated below, an exception that applies to an individual (the employee who accepted the collective labour agreement) and not to the entire group (all employees within the bargaining group).

This acceptance can occur both before and after the collective labour agreement has been concluded. In the latter case the employee commits himself voluntarily to the new collective agreement, which forms sufficient justification for applying the collective labour agreement to an employee who is not a contracting trade union's member. The acceptance can also occur on

2085 A derecognised trade union may still have sufficient members to be factually representative. I would, however, expect such a trade union to be very reluctant to continue collective bargaining. I furthermore expect that many employees cease their membership upon derecognition, leading to the loss of factual representativity of that trade union.

forehand by means of a reference clause. Upon acceptance of the collective labour agreement at the moment the employee enters into service, he knows (or at least has the opportunity to know) the content of the collective labour agreement. As already explained in section 2.2.1 above, the fact that the employee is "the weaker party", and consequently has no choice but to sign the agreement, does not change this. After all, the employer could as well have put the content of the collective labour agreement in standing employment conditions, and could have given the same "weak" employee the choice to either accept it and enter into service, or not accept it and not be employed by the employer. The fact that the collective labour agreement may also deviate from ¾ mandatory law, is sufficiently justified by the facts that (i) the employee knows the content of the agreement and accepts it, (ii) the trade unions should satisfy mild representativity demands and (iii) either the European legislator or the legislator of the Member State in which the international collective labour agreement has force permits such a deviation.

Should, during the course of the employment agreement, the content of the transnational collective labour agreement referred to in the reference clause change – for example, from a minimum collective labour agreement to an agreement containing standard and/or maximum provisions – the question arises whether the reference clause is sufficient justification to apply the altered transnational collective labour agreement to the unbound employee. The individual employee does, in this situation, not have a chance to verify the content of the new agreement and to decide whether he thinks it is agreeable or not. As already stated above, this is, in my opinion, not overly troublesome. The employee chose, at the moment of entering into the service of the employer, that (part of) his employment conditions would be arranged by a particular transnational collective labour agreement. He subsequently had the opportunity to become a member of the contracting trade union, as a consequence whereof he would have been in the position to influence the content of the (renewed) collective labour agreement as a member. Should the employee have chosen not to do that, he accepted that he could be confronted with employment conditions that were drafted without his involvement. In my opinion, the prevention of such a situation – which was apparently acceptable to the employee involved, as he did not become a member of the contracting trade union – is not worth defending by law. This analysis is different should a renewed transnational collective labour agreement be concluded with another than the original trade union, or one or more of the original trade unions that signed the original transnational collective labour agreement refuse to sign the renewed transnational collective labour agreement (while at least one of them is willing to sign that renewed agreement). This is a new situation for the employee, and places him in a different position when compared to

his position described above. Him potentially having become a member of (one of) the original contracting trade union(s) would not have helped him to influence the renewed transnational collective labour agreement (unless he became a member of the trade union that was willing to sign the renewed agreement). In this situation there is, in my opinion, insufficient justification that the transnational collective labour agreement, containing maximum and/or standard provisions, applies to the employee who is not bound by that agreement through trade union membership.

Should employees have accepted a reference clause, and should they be unsatisfied with the performance of the contracting trade union, they should be entitled to derecognise this trade union. On balance, there is, in my view, no good reason to, on the one hand, entitle employees to a derecognition procedure once they have recognised the trade union through a recognition procedure, but on the other, not entitle them to do the same once they have accepted that a specific trade union arranges their employment conditions by agreeing to a reference clause. The same derecognition procedure as stated above should therefore apply with regard to a trade union that is empowered to arrange the employment conditions of employees on the basis of a reference clause.

5.2.2.4 Applicability of the transnational collective labour agreement to a sufficient number of employees

Finally, I propose a fourth exception to the main rule that transnational collective labour agreements that contain maximum and/or standard provisions only apply to bound employees: if the employment agreement already applies to an important majority of the employees in the bargaining group, it should apply to all employees within that group. I anticipate that this exception is mainly applied by companies in financial trouble, who wish to address these issues by means of a collective labour agreement, but (i) have insufficient trade union members amongst their employees to rely on the first exception, (ii) have insufficient time to go through the recognition process as mentioned in the second exception, and (iii) have no general reference clause in all their standard employment agreements to bind all employees by means of contract. The justification for this fourth exception lies in the fact that (i) an important majority should be able to bind a minority,[2086] (ii) such a majority acceptance normally implies that the content of the agreement is reasonable and (iii) mild representativity demands should be met by the trade union(s).

2086 Which principle is, as set out in section 3.5 above, applied regularly within the Member States with regard to extension of collective labour agreements.

A collective labour agreement applies to the employees who are either bound by it through membership of the contracting trade union, or who accepted the collective labour agreement by means described in section 5.2.2.3 above. Should the collective labour agreement already apply to, for example, 60% or more of the employees constituting the entire bargaining group that collective agreement should, given the paragraph above, apply to all employees within the bargaining group. This rule, however, needs optimising. On balance, if, for example, the collective labour agreement is very positive for several specific bargaining units, but rather negative for another bargaining unit, it is unfair to apply the collective labour agreement to that other bargaining unit. Each bargaining unit should therefore exceed a certain threshold in order for the collective labour agreement to apply to that unit. Although fixing this threshold again is undeniably subjective, I would suggest putting it on the applicability of the collective labour agreement to at least 40% of the employees within a specific bargaining unit.[2087] If that threshold cannot be reached in a specific bargaining unit, the collective labour agreement should not apply to all of the employees in that bargaining unit.[2088] To sum up, that means that a collective labour agreement that contains maximum and/or standard provisions applies to all employees in all bargaining units (that is the entire bargaining group), provided that it already applies to (i) an important majority of at least 60% of the employees in the entire bargaining group, and (ii) at least 40% of the employees in each individual bargaining unit.

6. The contracting parties / social partners

The binding powers of the transnational collective labour agreements are set out above. The next step is to establish the proper parties that should be involved in the bargaining process. In that respect, it should be noted that there are already European criteria in place that social partners must meet in order to participate in European bargaining in the European social dialogue. That gives rise to the preliminary question of whether these parties should not also be allowed to participate in transnational collective bargaining in the current proposed system. This question will be answered in section 6.2 below.

2087 Both the 60% and the 40% figures are subjective. I have not conducted any research on the reasonableness of these numbers.

2088 That is, the collective labour agreement does not apply on the basis of this fourth exception. That does not exclude the possibility that the collective labour agreement applies on the basis of the contractual system of section 5.2.1 above, or on the basis of the other exceptions.

If the answer to the above question is negative, individual sets of rules should be developed for the participating social partners. In that context, the position of management and labour should be distinguished. After all, it is not overly important to draft representativity demands for management's side, as in the proposed system only those employers are bound by the collective labour agreement that are either a member of the contracting employers' organisation(s) or signed the collective labour agreement themselves. That gives, taken into consideration section 3.2 above, no need for representativity demands on the side of management. It is, however, important to draft representativity demands on labour's side, as the transnational collective labour agreement applies as a general rule to *all* employees working for the bound employer. The starting point of the principle of favour rules out the need for strict representativity demands. The fact that the contracting parties may deviate from ¾ mandatory law, however, gives reason for mild representativity demands. Besides mild representativity demands for trade unions, both employers' organisations and trade unions should meet specific organisational demands, in order to guarantee an efficient participation of the organisation in the bargaining process and a democratic participation of the organisations' members. These demands, obviously, do not apply should an individual employer (or a number of individual employers) be a signatory party (or parties) to the collective labour agreement, although some remarks will be made with regard to these parties in section 6.1. The organisational demands are discussed in section 6.3 and the mild representativity demands for the trade unions in section 6.4.

6.1 The employers

The position of employers in transnational collective bargaining is not overly complicated: as long as they are truly employers based on the rules of the Member State in which they are situated, they should be deemed capable of participating in the conclusion of transnational collective labour agreements applying to their own organisation. This possibility will obviously be particularly interesting for multinational companies. These multinational companies normally consist of a great number of (and over time, changing) legal entities situated in different Member States. Each of these subsidiaries should, if so desired by the parties involved in collective bargaining, be able to fall under the scope of application of the transnational collective labour agreement. That can be achieved by simply letting that subsidiary execute the agreement, or providing a sufficient mandate to another party who executes

the agreement (also) on behalf of the subsidiary.[2089] Still, in very big groups of companies this could prove problematic, as a great many of powers of attorney should be provided, not to mention the fact that the configuration of the companies' network constantly changes.[2090] A solution could be found by applying the provisions that are developed in the Directive on the establishment of a European Works Council in that respect. If the controlling undertaking of a group of companies concludes the agreement, that agreement can apply to all undertakings within that group.[2091]

6.2 Apply the Commission's requirements to organisations?

The Commission set out the criteria that organisations must meet in order to participate in the European social dialogue.[2092] They should:

1. be cross-industry or relate to specific sectors or categories and be organised at European level;
2. consist of organisations which are themselves an integral and recognized part of Member State social partner structures and with the capacity to negotiate agreements, and which are representative of all Member States, as far as possible; and
3. have adequate structures to ensure their effective participation in the consultation process.

Based on these criteria, the Commission drafted a list pointing out the participating social partners. It may make sense to simply follow these criteria and this list in order to establish which parties should be entitled to participate in transnational collective bargaining in the current proposed system. This would surely be logical should the Commission's criteria be widely accepted. However, they are not. The criteria have been criticised mainly on the grounds that they (i) do not lead to sufficient participation of the people in the EU and (ii) exclude national social partners' direct participation.[2093] This first point of critique is not overly relevant in this respect, as the transnational collective labour agreements proposed in this thesis are not intended to substitute

2089 A. Sobczak, *Legal dimensions of international framework agreements in the field of corporate social responsibility*, page 117.

2090 E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, page 22.

2091 E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, page 22.

2092 See chapter 5, section 2.2.

2093 Reference is made to chapter 6, section 3.2 and 3.3.

Community legislation, as is the case when it comes to collective agreements concluded within the European social dialogue. Moreover, the participation of the employees involved is sufficiently guaranteed in the proposed system when it concerns a collective labour agreement that is potentially burdensome for the employees involved, being an agreement (also) containing maximum or standard provisions. The second point of critique is, however, relevant, particularly because the transnational collective labour agreement can also apply to just a part of the European Union, and probably, in practice, most often will. There is no need to exclude national social partners from this system, quite on the contrary. In order to have the most inclusive representativity level as possible, both national social partners and European social partners should be able to participate. That gives reason to formulate new requirements, which social partners need to satisfy in order to be able to participate in transnational collective bargaining.[2094]

The above obviously does not mean that the "successful" requirements established for the European social dialogue for social partners to satisfy should be left aside. Moreover, general remarks addressed to European social partners should also be taken into account. Important remarks were made in the 2006 Industrial Relations in Europe report. It stated that European social partners are only able to live up to their expectations "if their organisational structure, their representativeness and their interaction patterns are adequate to play a role at the workplace and in participative democracy".[2095] Social partners involved in transnational collective bargaining should, in summary, be as close to the employees and employers as possible. This should, in my view, also apply to the social partners involved in transnational collective bargaining in the proposed system.

6.3 Organisational demands

Taking the above into consideration, organisations that participate in transnational collective bargaining should satisfy the following organisational requirements.

6.3.1 *National and transnational organisations*

As mentioned in the section above both organisations that are structured nationally, and those that are structured internationally, should, in my view, be permitted to participate in transnational bargaining. National

2094 See also the last footnote in section 2.2.2 of this chapter.

2095 European Commission, *Industrial Relations in Europe 2006*, page 8.

and transnational organisations may also join forces. If, for example, a transnational trade union covering the Netherlands, Belgium and Luxembourg is established, that transnational trade union may team up with national trade unions in order to increase its level of representativity. There are, in my view, three different organisations that should be able to participate in transnational collective bargaining.

First, there are participating national organisations. These organisations must, in analogy of the above-mentioned Commission's demands, be "an integral and recognized part of Member State social partner structures and have the capacity to negotiate agreements". More specifically: a national organisation needs to satisfy the national demands as applicable in its jurisdiction in order to qualify as a social partner that is entitled to negotiate collective agreements.[2096] These national demands need to be automatically accepted for the purpose of transnational collective bargaining, provided that the sum of all participants of each side of the industry satisfies all of the requirements stated in this section. Furthermore, there are participating transnational organisations consisting of national members. These organisations must, again in analogy of the above-mentioned Commission's demands, consist of members that are "an integral and recognized part of Member State social partner structures and have the capacity to negotiate agreements". This situation is not very different from the above; the national organisations "merely" organised themselves internationally.[2097] The remarks made above apply *mutatis mutandis* to this situation. Last, there are participating transnational organisations that are truly international, *i.e.* that are not built up from national members but directly represent the individual employers or employees in different countries. It makes no sense that these organisations have to be recognised at a national level. In the end, if viewed differently, a Member State could effectively bar these organisations from transnational collective bargaining. These organisations must, nonetheless, satisfy all of the other requirements stated in this section.

2096 The national social partner's entitlement to enter into collective bargaining is obviously of the utmost importance. This was also clearly demanded from the members of European social partners by the European Parliament and the Economic and Social Committee. Reference is made to chapter 5, section 2.2.

2097 Also from a liability view there are not that many differences. As argued in section 4.2 above, the national organisations should also ensure that the obligatory provisions of the transnational collective labour agreement that relate to them are diligently observed.

6.3.2 The organisations should cover all relevant Member States

As mentioned before, it is likely that the transnational collective labour agreement covers a number of Member States, but not all Member States. There is no reason to demand that the signatory organisations have coverage outside the jurisdictions to which the collective labour agreement applies. However, within the jurisdictions to which the agreement applies, the signatory organisations should have coverage, as they directly affect the employment conditions of individuals in that jurisdiction. Said coverage can be obtained by participating national social partners (either as a member of a transnational organisation, or as an individual signatory party) or by the transnational organisation itself, directly representing members (employers or employees) it should have in that jurisdiction.

6.3.3 The organisational structure of the organisations must guarantee a proper defence of the interests they claim to represent

Organisations involved in collective bargaining must be a trustworthy spokesperson for the group of individuals they claim to represent. That should, in my view, mean that the organisation must make sufficiently clear whose interests it claims to protect. National organisations need to satisfy the national requirements in this respect, which should be accepted for the purpose of transnational collective bargaining. Transnational organisations should make sufficiently clear whose interests they claim to represent, preferably by means of the articles of association. The bottom-line, however, should be that it is sufficiently clear for every party involved – including the individual employers and employees – whose interests the collectivity of each side of the industry represents in collective bargaining.

Furthermore, it is reminded that an organisation should at least be representative for its own members. This is, however, only true if that organisation actually listens to its members, or, put differently, these members are in a position to materially influence the decision-making process of that organisation. I would view the exact arrangement to guarantee this democratic structure as an internal matter if, however, it is guaranteed that the outcome of the process is democratic and (thus) includes all members. This should, in my view, also mean that transnational organisations consisting of national social partners, have obtained a sufficient mandate of these national social partners to guarantee that indeed finally the employees or employers, whatever may be the case, are truly represented.[2098] This is in line with the general remark

2098 I refer to chapter 6, section 3.2.

made in the 2006 Industrial Relations in Europe report, basically requiring the social partners to be as close to the employees and employers as possible.

Finally – and this concerns the employees' organisations in particular – the organisations must guarantee that every individual that falls within the scope of applicability of the transnational collective labour agreement they conclude, must be able to become a member of at least one of the participating organisations.[2099] Organisations can only defend the interests of individuals, if these individuals have the opportunity to join.

6.3.4 Legal personality?

Although I would favour a system in which all participating organisations in collective bargaining have legal personality from a personal point of view – legal personality establishes with certainty the status of the organisation and prevents an organisation to denounce responsibility by denying liability merely on formal grounds – I have to admit that having legal personality is not a requirement that is generally applied in Europe. It can even be argued, as it is in Germany,[2100] that how an organisation is shaped from a legal point of view falls under the freedom of association. Moreover, in the proposed system for transnational collective bargaining national social partners are recognised. These national social partners do not necessarily have to have legal personality. Such a demand would therefore exclude a great many of national organisations, jeopardising the plurality of the organisations involved.[2101]

This choice means that sometimes organisations cannot be (easily) held liable upon breaching obligatory provisions of the transnational collective labour agreement, as they simply cannot be involved in litigation according to the national laws of that organisation. Although this is something I regret, it is a logical consequence of the choice above. It can, however, be a reason for the bargaining parties to demand from the other side of the industry

2099 Provided of course that the individual is willing to pay the contribution and to abide by the (reasonable) internal rules and regulations of the organisation.

2100 See chapter 10, paragraph 5. It should be noted that among the Member States there is a clear majority in favour of trade unions' rights regarding legal personality. B. Bercusson (ed.), *European Labour Law and the EU Charter of Fundamental Rights – summary version* - , page 26.

2101 E. Franssen, for example, demanded European organisations participating in the European social dialogue to have legal personality. Reference is made to E. Franssen, *Legal aspects of the European Social Dialogue*, page 112. This led to critical remarks from Dorssemont. See F. Dorssemont, review of E. Franssen's *Legal aspects of the European Social Dialogue*, page 278.

that all organisations join up in a transnational organisation having legal personality, which organisation can subsequently be addressed upon a breach of contract.[2102]

6.4 Mild representativity demands applicable to labour

As set out above, the proposed system requires mild representativity demands on the side of labour. I would suggest that employees' organisations involved in transnational collective bargaining should, *as a whole*, meet the following representativity demands at all times. That means that all signatory employees' organisations ("labour") should be taken together, in order to verify whether these organisations jointly satisfy the following representativity demands. I am in favour of such collective approach, because if each national trade union would be scrutinised, the "weakest link" would jeopardise the entire collective labour agreement, while labour's side as a whole would perfectly well be able to satisfy the applicable requirements.

6.4.1 Labour must be independent / surpass company level

Labour must be fully independent from the other side of industry, management.[2103] It must not be under the domination or control of an employer or employer's organisation, and it may not be liable to interference by an employer or employer's organisation tending towards such control. The Certification Officer in Great Britain drafted a very helpful set of criteria that could be applied to verify whether labour is indeed independent. I refer to chapter 12, section 5. One of the criteria mentioned by the Certification Officer is, in my opinion, so important that it should be considered a separate requirement in order for labour to be fully independent: labour should surpass company level. The member base of labour should be broader than only the employees of the company or companies with which the transnational collective labour agreement is concluded.

2102 Although in such case it remains questionable whether an action against such transnational organisation is really worth taking, as that organisation presumably has little means to actually compensate losses.

2103 Which demand may, strictly spoken, not truly be considered a part of representativity, but rather an element of *being* a real trade union. See on this F. Dorssemont, *Rechtspositie en Syndicale Actievrijheid van representatieve werknemersorganisaties*.

6.4.2 Labour must possess real powers

Labour should possess real powers towards management. It should be able to persuade management to enter into collective bargaining and to agree on reasonable proposals. The trade unions should be able to cope with a genuine labour struggle and should be able and willing, if necessary, to engage in industrial action. This is what in Germany is known as *Mächtigkeit*.

6.4.3 Labour must be competent to conclude the collective labour agreement

Another requirement that enables labour better to be a representative organisation, is that it has the ability to focus on the specific sector in which the employees whose interests it claims to represent work. Labour should only be competent to conclude collective labour agreements in the sector of its expertise. This requirement is based on the principle that is applied in Germany and is referred to as *Tarifzuständigkeit*. This requirement is closely connected with the one set out in section 6.2.3 above, stating that it should be sufficiently clear for every party involved – in this case also being all relevant employees – that labour represents the interests of employees in the sector in which the collective labour agreement is concluded. This demand resembles one of the requirements an organisation must meet in order to be "sufficiently representative" for the purpose of implementing the agreement by a Council decision in the European social dialogue. After all, that organisation must, according to the Commission, have a *genuine interest* in the matter with regard to which the agreement is concluded.[2104]

7. Summary

7.1 Representativity and binding powers of a collective labour agreement

Representativity can be viewed as (i) the demands that the contracting social partners should meet with regard to (a) minimum size (including a minimum number of members), (b) a certain level of power or (c) a specific status in order to be qualified to represent the parties to whom the collective labour agreement should apply (representativity of the social partners), or (ii) the demands that the collective labour agreement itself should satisfy on the same topics in order to apply to a large group of individuals (representativity of the collective labour agreement). In other words, representativity can be placed in the key of *recognition of the legitimacy* of social partners to negotiate collective labour agreements and a collective labour agreement to apply to

2104 Reference is made to chapter 5, section 6.2.2.1.

a large group of individuals. When representativity within this meaning in the Researched Countries is scrutinised in relation to the binding powers a collective labour agreement has, the following conclusions can be drawn:

- If only employers and employees that are involved with the collective labour agreement – either by signing the collective agreement, or by being a member of the contracting organisations, or by agreeing to follow that agreement via a reference clause – are bound by that agreement, there is little need for representative parties to conclude that collective labour agreement.
- The above is different (i) if the collective labour agreement permits deviation from ¾ mandatory law and (ii) for employees who are not bound by a collective labour agreement through membership of a contracting trade union, but are instead bound by it though a reference clause, in case the renewed collective labour agreement is concluded by different parties than the ones that concluded the original collective labour agreement.
- If all employees are directly bound by a collective labour agreement, there should be a justification for that, for example the demand that the contracting trade unions should be representative.
- If all employers and employees that fall within the scope of application of a collective labour agreement are to bound by that agreement, there should be a justification for that, a justification which could include that the agreement should, prior to be extended, already apply to a majority of the employees that fall within the scope of application of that agreement.

7.2 Representativity and collective bargaining

In the context of collective bargaining two forms of representation should be distinguished. First, there is institutional representativity: an organisation (social partner) is representative if a government recognises or appoints that organisation as discussion partner or as a party that can act on behalf of third parties. Second, there is sociological representativity: an organisation can be considered representative if it is a trustworthy spokesperson for a group of individuals whose interests it claims to represent. Institutional and sociological representativity do not rule each other out and can coincide. Both forms of representativity are normally related to *factual* representativity, meaning that an organisation has a sufficient number of members amongst the group of employees whose interests it claims to represent. Regardless of which form of representativity is used, the core of representativity in collective bargaining

is that representative organisations are organisations that are recognised in a legal system to act legitimately on behalf of and bind others.

Representativity is of particular importance when organisations represent a larger group than merely their members. This definitely occurs with regard to trade unions: they often have to serve the interests of all employees, and not just of their members, as collective labour agreements often apply to all employees of a company or in a specific branch. Member States are far more hesitant to apply collective labour agreements to employers who are not directly bound by the collective labour agreement. Representativity demands in collective bargaining are therefore especially important with regard to trade unions, and much less when it comes to employers' organisations.

Representativity of *trade unions* is important because:

- Not every party is entitled to act on behalf of a large group of employees for the purpose of setting employment conditions; many countries awarded this entitlement exclusively to trade unions, which in turn play an important role in the "participatory democracy". Trade unions can better fulfil this task once they are representative.
- Representative trade unions are best able to arrange the most optimum employment conditions for the employees.
- Trade unions that have a sufficient number of members amongst the relevant group of employees (representative trade unions) can benefit from these members' knowledge, experience and manpower, which is necessary to conduct proper collective bargaining.
- Trade unions with a significant number of members (representative trade unions) have a steady flow of income due to the membership contributions, which ensures their independence.

Factual representativity of the trade union is also relevant. However, factual representativity alone does not suffice in collective bargaining in order for trade unions to be trustworthy spokespersons for the employees whose interests they claim to represent. Other requirements are of importance as well, such as:

- being independent;
- surpassing company level;
- focussing on a specific area of expertise, a specific sector;
- having an efficient and proper organisation in which members have an influence on the decision-making process;
- possessing real powers;
- having a strong past performance; and
- having a strong status.

The above focuses on the position of the trade unions rather than on the collective labour agreement itself. The coverage of the collective labour agreement is often taken into account in Member States when it concerns the extension of that agreement: a collective labour agreement that is to be extended must sometimes have a minimum coverage rate, possibly exceeding 50% of the employees in the relevant sector. This minimum coverage is seen as a reason, or justification, to apply the agreement to a greater group than the original group. The reason for this is that a majority can model the employment conditions of a minority (a "democratic" principle) and that the content of the collective labour agreement is apparently reasonable as it applies to a majority. These arguments, however, should be reticently applied. In any case, it is not always reasonable that a majority binds a minority.

7.3 Fundamental choices in a new system of transnational collective bargaining

Collective labour agreements can have two types of binding power: they can be binding by law or in honour only. Because most Member States favour a system in which collective labour agreements are binding by law, and there are no fundamental objections against such a system, a system on transnational collective bargaining providing for legally binding agreements seems logical. This is specially the case as legally binding transnational collective labour agreements can better attain important goals such as (i) to arrange, in a uniform fashion, the employment conditions between the employers and employees to which the collective labour agreement applies and (ii) to secure peace and tranquillity within the company or sector to which the collective labour agreement applies.

7.3.1 The parties to the collective labour agreement

Given the above-mentioned choice, it is logical that the contracting parties are, by law, obliged to abide by the obligatory provisions of the collective labour agreement. The signatory parties are responsible, by law, for the proper execution of the collective labour agreement. Should they fail to fulfil this obligation, their counterparties should be entitled to start proceedings and claim specific performance, payment of damages or even dissolution of the collective labour agreement. This should only be different if the contracting parties explicitly stipulate otherwise. In the proposed system on transnational collective bargaining the contracting parties should observe the implied principle of good faith: they are legally required to take adequate measures to ensure that their members abide by the collective labour agreement; they do not have to guarantee this with regard to the individual employers and

employees. The contracting association is, however, liable for the performance of the collective labour agreement of its members should these members also be organisations, and these members are likewise responsible for the proper execution of their part of the transnational collective labour agreement, if any. I would not choose for the new system to incorporate an implied peace obligation at this moment.

7.3.2 The employers and employees

Many Member States have introduced an institutional system: a system which has as a consequence that the collective labour agreement applies to all individuals that operate within the agreement's scope of applicability, regardless of whether or not they are bound to the agreement by contract. Other Member States have chosen for a contractual system: a system which has, as a consequence, that collective labour agreements only apply to individuals that are bound by that agreement by contract. Choosing for either an institutional or a contractual system has at least three major consequences:

1. In the contractual system individualism and voluntarism prevail over collectivism and non-voluntarism (the individual freely chooses the employment conditions) while this is the other way around in the institutional system (the individual can be confronted with employment conditions which it has to accept as the signatory parties collectivity agreed on these conditions). Collectivism and non-voluntarism should be approached carefully: a number of Member States fiercely disputed the extension of collective labour agreements to unbound employers and employees. Extension of collective labour agreements should be applied reticently and requires strong justification.

2. The institutional system requires strong social partners or a high coverage rate of the collective labour agreement while the contractual system does not. These strong (representative) social partners respectively this high coverage rate justify the *erga omnes* effect of the collective labour agreement in an institutional system. The strong social partners should meet clear and unambiguous rules, that must be drafted on forehand and apply generally, if an institutional system such as the one that is in place in Belgium is chosen. In a contractual system collective labour agreements can also be applied to companies or sectors if they are concluded by less strong social partners, or in situations in which there is a less significant coverage ratio, since only those parties that chose so are covered by the collective labour agreement. The social partners must

also meet clear and unambiguous rules, which can be tested on a case-by-case scenario and have to be less strict.

3. The institutional system is much more inclusive than the contractual system. In its pure form, it includes all employees and employers that fall within the scope of applicability of the collective labour agreement. This has advantages. The first advantage is of a fundamental nature: most employers wish to treat their employees equally, a goal which is better attained if the agreement applies to all employees. The second advantage is of practical nature: from an EU law perspective it is difficult to differentiate between employees who are a contracting trade union's member and those who are not given the Privacy Directive.

Taking into consideration these three consequences the following observations can be made:

1. Extension of collective labour agreements should be applied reticently and requires strong justification.
2. The institutional system requires strong social partners or a high coverage rate of the collective labour agreement, while the contractual system does not. The aforementioned strong social partners should in principle meet clear and unambiguous rules, that, in an institutional system as is in place in Belgium, must be drafted on forehand and apply generally (as opposed to in a specific situation, in relation to a specific collective labour agreement).
3. Extension of collective labour agreements to all employees has important advantages as all employees are treated equally and potential difficulties on privacy issues can easily be tackled.

While the first two observations would favour a contractual system, the third observation points at an institutional system. This is not necessarily troublesome. When it comes down to it, a system does not necessarily have to be purely contractual or purely institutional.

7.3.2.1 The position of the employers

The institutional system does not apply to employers in the Researched Countries with regard to normal, non-extended collective labour agreements. Therefore, it seems logical to follow the contractual system with respect to employers.

7.3.2.2 The position of the employees

Things are different when it comes to the position of the employees. In most Member States a collective labour agreement applies to *all* employees of the bound employer (who fall within the scope of application of the collective labour agreement). Such a general binding effect has important advantages, as all employees are treated equally and no problems occur with regard to privacy issues. However, such a system requires justification, as employees can be bound by terms that were not of their choosing. The best method of justification would, in my opinion, be the principle of favour. This allows departure from the terms of the collective labour agreement in the individual employment contract in favour of the employee, and prohibits in consequence that collective labour agreements deteriorate existing employment conditions. This principle is also commonly used in Member States. However, all national laws that apply the principle of favour have exceptions to this rule. This will also be the case in the proposed system for transnational collective labour agreements. These exceptions require justification which can, amongst others, be found in mild representativity demands on the side of the trade unions. If the contracting parties wish to fully depart from the principle of favour, for example because times of economic distress warrant a cut back in wages, there must be sufficient justification to apply the collective labour agreement to all employees. If such justification is lacking, the contractual system should be taken as a starting point. Only if a sufficient level of justification is in place, a collective labour agreement (also) containing maximum or standard provisions may apply to all employees working for the bound employer. This leads to the following system with regard to the position of the employees of the bound employer:

1. A transnational collective labour agreement that merely contains minimum provisions automatically applies to and has mandatory effects on all employees of the bound employer who fall within the scope of applicability of that agreement. By way of exception, however, the transnational collective labour agreement may (i) allow the employer and employee to deviate from ¾ mandatory law if either permitted at European or relevant national level, (ii) oblige each employee to pay a reasonable compensation to the contracting trade union(s) and (iii) provide for an opening clause that can be filled in by social partners at national level.

2. A transnational collective labour agreement that (also) contains standard and/or maximum provisions only applies to and has mandatory effects on bound employees who fall within the scope of applicability of that agreement. It, however, also applies to and has mandatory effects on

employees who are not bound by it but do fall within the scope of applicability of that agreement if:

a. the contracting trade union(s) has (have) sufficient members amongst (i) all employees (the bargaining group) and (ii) each individual group of employees (the bargaining units) to which the transnational collective labour agreement applies; or
b. the contracting trade union is or trade unions are recognised by the employees of each relevant bargaining unit; or
c. the individual employee accepts the collective labour agreement; or
d. it already applies to an important majority of the employees in the relevant bargaining group, and to a sufficient number of employees in each individual bargaining unit.

7.3.3 Third parties

With regard to collective normative provisions, there are two important constructions. First, these provisions may provide for rights and obligation that arrange the relation between the employer and its entire personnel or an employee representative body. The employer who is bound by the collective labour agreement should apply these collective normative provisions. There is no reason to oppose to a system that allows the contracting parties to a transnational collective labour agreement to give *additional* rights to the entire personnel or to an employee representative body. The principle of favour must be observed. If this is not the case (while obviously the content of the collective normative provisions do not violate any laws) the limitation of rights should be justified. This justification should be found in representativity, in which case the same criteria apply as are in place for collective labour agreements that depart from the principle of favour with regard to individual normative provisions. Another matter is that the contracting parties should be allowed to discontinue the additional rights granted to the entire personnel or to an employee representative body in order to prevent a static system. Second, the transnational collective labour agreement may provide for rights and obligations that arrange the relation between the employer and the employees vis-à-vis third parties. If the transnational collective labour agreement arranges for payment to these third parties by the employer, while the employees can enjoy the benefits, there are no real arguments against this system. This would be different if the employees were obliged to pay a contribution to the third parties. In such a case the employee is confronted with obligations, which should be justified in the same manner (representativity) as set out above.

As the collective labour agreement is intended to bind by law, the collective normative provisions apply directly and with mandatory effect to the parties concerned.

7.4 The contracting parties / social partners

7.4.1 The employers

The position of employers in transnational collective bargaining is not overly complicated: as long as they are truly employers based on the rules of the Member State in which they are situated, they should be deemed capable of participating in the conclusion of transnational collective labour agreements applying to their own organisation. It seems practical for groups of companies to entitle the controlling undertaking to conclude the transnational collective labour agreement, an agreement which should subsequently apply to all undertakings within that group.

7.4.2 Organisational demands for organisations

Organisations that participate in transnational collective bargaining should satisfy the following organisational requirements:

- Both organisations that are structured nationally and those that are structured internationally should be permitted to participate in transnational bargaining. National organisations need to satisfy the national demands as applicable in their jurisdiction in order to qualify as a social partner that is entitled to negotiate collective agreements. The same applies to national members of participating transnational organisations. Participating transnational organisations that are truly international, *i.e.* that are not build up from national members, should not be required to meet national demands, but should satisfy all of the requirements stated below.
- The signatory organisations should have coverage in all jurisdictions in which the agreement applies.
- Organisations must make sufficiently clear whose interests they claim to represent. National organisations need to satisfy the national requirements in this respect. All organisations must place their members in a position that they can materially influence the decision-making process of their organisation.
- Organisations should not necessarily have legal personality.

7.4.3 Mild representativity demands applicable to labour

The proposed system requires mild representativity demands on the side of labour. Employees' organisations involved in transnational collective bargaining should, *as a whole*, meet the following representativity demands at all times:

- they must be fully independent from the other side of industry, management, and should surpass company level;
- they should possess real powers towards management; and
- they should only be competent to conclude collective labour agreements in the sector of their expertise.

CHAPTER 16

APPLICABLE LAW, ENFORCEMENT, TERM, TERMINATION, AFTER-EFFECTS AND OTHER TECHNICALITIES

1. Introduction

The previous chapters explained the transnational collective labour agreement, its binding force and the parties entitled to conclude it. This chapter concerns important "technicalities" of the transnational collective labour agreement.

An important topic is the enforcement of the transnational collective labour agreement. This is relevant for the three different types of provisions: the obligatory, the individual normative and the collective normative provisions. However, before the means of enforcement can be discussed, it should first be established which law applies to said different provisions. The topics of applicable law and enforcement will be dealt with in sections 2 and 3 respectively. Thereafter the term and termination of the collective labour agreement will be discussed in section 4. Section 5 discusses the possible after-effects of the different provisions of the transnational collective labour agreement. The possible role of (mandatory) alternative dispute resolution in the proposed system of transnational collective bargaining will be considered in section 6. Section 7 concerns the reach of the social partners when it comes to transnational collective labour agreements: what is their relation to national law and national collective labour agreements? Section 8 summarises this chapter.

2. Law applicable to transnational collective labour agreements

Collective labour law in the Member States is strongly embedded in the respective national law systems. In case a specific national act on collective labour agreements has procedural or material lacunas, these lacunas are filled in with general rules of national law. A breach of a provision of a collective labour agreement is, for example, often viewed as a breach of contract, triggering general national rules on that topic. On the basis of these rules the collective labour agreement is enforced. In a European system, unfortunately,

this embedment is lacking. There is no European civil code that could assist the parties concerned should a European directive on transnational collective labour agreements have lacunas. This means that private international law must play a role, selecting the applicable law to complement the proposed directive on transnational collective labour agreements where necessary. This system is somewhat disadvantageous, as in consequence issues such as enforcement (as discussed in more detail in section 3 below) depend, to a certain extent, on national law, which obviously differs from country to country. This means that the impact of the transnational collective labour agreement can vary in the different Member States. As long as there is no European code on civil law this, however, is a situation that cannot be prevented. Of course, the applicable national law must observe the European basis of the transnational collective labour agreements, which will ensure a reasonable level of equality: national law is only there to complement the European rules on transnational collective bargaining.

There are two aspects that are relevant when determining which law applies to the different provisions of the transnational collective labour agreement. It should be determined (i) which law may apply on the basis of private international law rules applying in Europe and (ii) whether these private international law rules give room for a practical, workable choice of applicable law. In order to develop such a workable system, the different types of provisions – obligatory, individual normative and collective normative – of a transnational collective labour agreement should be distinguished.

2.1 Private international law in Europe

The Rome Convention and its future successor Rome I are relevant with regard to private international law in Europe. Both instruments give ample room to tailor the topic applicable law in Community legislation. Article 20 of the Rome Convention stipulates that the Convention does not affect "the application of provisions which, in relation to particular matters, lay down choice of law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts". In other words, the Rome Convention leaves room for an act on transnational collective labour agreements to arrange a law which applies to the different types of provisions of a transnational collective labour agreement. It successor, Rome I, also leaves room in article 23. To summarise, it is possible to draft practical rules on applicable law in the proposed act on transnational collective labour agreements.

2.2 The law applicable to obligatory provisions of a transnational collective labour agreement

Potentially, multiple parties from different jurisdictions may be involved in the conclusion of a transnational collective labour agreement. This may give rise to complicated private international law issues when determining the law that governs the (obligatory provisions of) that agreement. In order to prevent possible discussions, thus in order to advance clarity which is of the utmost importance when it concerns relations involving numerous third parties such as collective labour agreements, I propose that the contracting parties are obliged to make an explicit choice on the applicable law in the transnational collective labour agreement. This system of "chosen law" lies at the fundament of the European instruments on private international law given article 3 of the Rome Convention and article 3 of Rome I.[2105] I would be inclined to demand that the chosen applicable law must be of one of the Member States in which the transnational collective labour agreement applies. In that manner a link between the applicable law on (the obligatory provisions of) the transnational collective labour agreement and the jurisdictions in which it applies remains.

2.3 The law applicable to individual normative provisions of a transnational collective labour agreement

As explained in the previous chapter, the individual normative provisions of the transnational collective labour agreement in the current proposal become part of the individual employment agreement as they have direct normative effect. As a consequence, these provisions (as automatically incorporated in the individual employment agreement) need to be assessed on the basis of the law that applies to that employment agreement. This is the only workable

2105 Article 6 of the Rome Convention and article 8 of Rome I do not apply, as these articles solely relate to individual employment contracts, as opposed to collective labour agreements.

option: the employer and employee should not be confronted with two different sets of law in their mutual relation.[2106]

2.4 The law applicable to collective normative provisions of a transnational collective labour agreement

In particular with regard to collective normative provisions, difficulties may arise in connection with private international law. The reason for these difficulties is that not only are the social partners and the employers and employees involved, but potentially also other third parties, being the employee representative body and third collective parties, such as funds. As noted in chapter 15, section 4.4, there are two important constructions when it concerns collective normative provisions, which will be discussed separately below.

2.4.1 The law applicable to the relation between the employer and its employee representative body or its entire personnel

First, collective normative provisions may provide for rights and obligations that arrange the relation between the employer and (i) its employee representative body or (ii) its "entire personnel".[2107]

The law that applies between the employer and the employee representative body will normally be rather straightforward. National legislation may oblige the employer to establish an employee representative body. That national law subsequently applies to the relation between the employer and the employee representative body. If the same employer is active in several countries, and is

2106 If the employment agreement already was governed by two different sets of law – one chosen and the other one (for the mandatory part) applicable on the basis of article 6.2 in conjunction with article 6.1 of the Rome Convention – the normative provisions of the applicable transnational collective labour agreement should apply in the same manner. In other words: the norms are equally governed by on the one hand chosen law and on the other hand (for the mandatory part) by the law applicable on the basis of article 6.2 in conjunction with article 6.1 of the Rome Convention. This is, however, a situation that is not overly practical. I would therefore be inclined to make an additional comment with regard to the Rome Convention, and its successor, Rome I. These instruments should make it possible that a transnational collective labour agreement stipulates that only one national law applies in specific crossborder situations. This would help out companies and employers active in the border regions. This would advance employee mobility, one of the potential advantages of transnational collective bargaining. Reference is made to chapter 7, section 3.1.

2107 Which may also be a specific group of that entire personnel. Reference is made to chapter 13, section 8.4.

obliged to establish employee representative bodies in more than one country because of its branch offices in the several countries, the law applicable to the collective normative provisions will vary per branch office.

The law that applies between the employer and its entire personnel would ideally run parallel to the law that governs all the employment agreements between the employer and all its employees. This will not always, however, be the case. The employer may very well employ a group of employees whose employment contracts are governed by one national law, while it also employs a group of employees whose employments contracts are governed by another national law. The situation that the same collective normative provisions applying to the relation between the employer, or as the case may be, branch office on the one hand, and the entire personnel on the other, are governed by different national laws is obviously not workable (if even possible). That calls for a different solution. I propose to follow the same line of reasoning, as applied above, concerning the relation between the employer and its employee representative body. If the employer is resident and active in one country, the law of that country (the "country of residence")[2108] should apply to the relation between the employer and its entire staff. If the employer is active in several countries and has branch offices situated in these countries, the law of the country in which the branch office is situated should apply to the relation between that branch office and the employees working for that branch office. These laws will normally run (in as far as possible) parallel to the law applicable to the employment agreements of most of the employees working for the employer or as the case may be that branch office, as the main rule is that the law of the country in which the employee habitually performs his work applies to the individual employment agreement.[2109] These laws will also run parallel with the laws that would apply between the employer or as the case may be the branch office on the one hand and the employee representative body on the other, should the employer or branch office be obliged to establish such a body. This is of importance, as the employee representative body can be considered to represent the interests of the entire personnel, and will in the proposed system also be a key party with regard to the enforcement of collective normative provisions.[2110] Things are a bit more complicated if the employer is situated in one country, while it employs employees in different countries, without having branch offices in these different countries. In such

2108 What exactly constitutes the employer's country of residence is thus a factual decision, depending on the country in which the employer has its office(s) and is (primarily) active.

2109 Reference is made to article 6.2 of the Rome Convention.

2110 Reference is made to section 3.3 below.

a case it would in my view make sense to apply the law of the country in which the employer is factually situated and is primarily active (the country if residence) to the collective normative provisions of the transnational collective labour agreement.[2111] After all, collective normative provisions tend to relate to the employer and possibly its premises – the employer must for example have a policy stimulating equal opportunities or supply a room in which all employees are allowed to take some leisure time – for which reason the applicability of the law of the country of residence of the employer is the most logical choice. Moreover, should the employer be obliged or become obliged (should it pass a specific threshold with regard to the number of employees it employs) to establish an employee representative body, the law of the country in which the company is situated would apply to the relation between the employer and its employee representative body as well.

2.4.2 The law applicable to the relation between the employer and employees vis-à-vis third collective entities

Second, the transnational collective labour agreement may provide for rights and obligations that arrange the relation between the employer and the employees vis-à-vis third parties. Also with regard to this category potential issues of private international law may occur. It is of course in the interest of the ultimate consumers of the transnational collective labour agreement – the employers and employees – that potential rights and obligations against third parties are governed by the same law that governs their employment contracts. It is also in their interest that possible claims from and against such third parties can be referred to a court in their own country. This, however, implies that the third collective parties (such as funds) are confronted with rights and obligations from and against employers and employees that are governed by various law systems, depending on the law applicable to the employment agreements of the employers or employees involved, alleged rights which can be submitted to courts in different countries. It also implies, should one and the same employer employ a group of employees whose employment contracts are governed by one national law, while it also employs a group of employees whose employments contracts are governed by another national law, that third collective entities can be confronted with claims governed by different laws from employees of one and the same company. That is a system that in my view is not workable.

2111 This rule notwithstanding, if a collective normative provision is in fact also an individual normative provision, that individual normative provision is in accordance with section 2.2 above governed by the law that governs the individual employment agreement.

The relation between the third collective entity and the employer and the employees it employs should be governed by one law. This should be different in case the company is active in several countries and has branch offices in these countries, in which situation the law of the country in which the branch office is situated should apply to the relation between the third collective entity on the one hand and the branch office and the employees working in that branch office on the other. For these reasons, the same line of arguing as is applied in section 4.2.1 above should be followed. That means that (i) should the employer be active in one country, the law of that country should apply to the relation between the third collective entity on the one hand and the employer and its employees on the other. Should (ii) the employer be active in several countries, and should it have branch offices situated in these countries, the law of the country in which the branch office is situated should apply to the relation between the third collective entity on the one hand and the branch office and the employees working in that branch office on the other. Should (iii) the employer be situated in one country, while it employs employees in different countries, without having branch offices in these different countries, the relation between the third collective entity on the one hand and the employer and its employees on the other should be governed by the law of the country in which the employer is factually situated and primarily active (the country of residence).

3. Enforcement of transnational collective labour agreements

The above makes it clear which law applies to the different provisions a transnational collective labour agreement may have. It subsequently makes sense that this national law should be applied when enforcing these provisions. Consequently, the transnational collective labour agreement is enforced as if it were a national collective labour agreement. This means that the parties involved in the transnational collective labour agreement should have the same rights as national parties would have upon breach of a national collective labour agreement. It also means that, if, pursuant to national legislation, other parties (such as the government) play a role in the enforcement of national collective labour agreements, these parties should equally enforce transnational collective labour agreements. Should, however, a national system have insufficient means for the proper enforcement of the norms of the transnational collective labour agreement, or should these national means be insufficiently clear and legally certain, the Member States concerned should be, on the basis of the proposed system on transnational collective bargaining, obliged to introduce minimum means for effective enforcement. In the end, each Member State must guarantee that the proposed act on transnational collective bargaining works in its country. In the following sections the manner

of enforcement of the three types of provisions – obligatory, individual normative and collective normative – is set out, applying the general rules described above.

3.1 Enforcement of obligatory provisions

In the proposed European system on transnational collective bargaining, the party that is in breach of an obligatory provision of the transnational collective labour agreement, is in principle liable for the losses resulting from such a breach to its counterparty or counterparties. A potential claim on breach of such obligatory provisions needs to be assessed applying the chosen national law, which has to fill in procedural and material lacunas. Of course, the chosen law should observe the European basis of the transnational collective labour agreements and must therefore make filing and awarding such claims possible even if these claims would not be possible or awarded under national law. This applicable national law should, in brief, provide the tools for enforcement of the obligatory provisions of the transnational collective labour agreement. A possible lawsuit has to be brought before a national court, preferably a court of the country whose law applies to the transnational collective labour agreement. Questions on the European system of transnational collective bargaining should be referred to the European Court of Justice on the basis of article 234 of the EC Treaty. Should in a Member State in which jurisdiction the transnational collective labour agreement applies other techniques be in place to enforce obligatory provisions of a national collective labour agreement, these techniques should equally be applied to the transnational collective labour agreement.

3.2 Enforcement of individual normative provisions

The normative provisions of the transnational collective labour agreement become part of the individual employment agreement as they have direct normative effect. They are governed by the same law that governs the individual employment agreement. These provisions therefore become, in a manner of speaking, part of "national employment law". This has two main consequences.

First, the individual employer and employee should turn to the same enforcement tools as would apply were these normative provisions incorporated in the individual employment agreement on the basis of an applicable national collective labour agreement. In other words: all national remedies following a breach of employment contract at the disposal of the employer and employee

in their mutual relation should apply equally to normative provisions deriving from an applicable transnational collective labour agreement.[2112]

Second, all other parties that have, on the basis of national law, a right to enforce normative provisions of applicable national collective labour agreements should also have the same rights to enforce individual normative provisions of applicable transnational collective labour agreements. If, for example, an employee representative body within a company has, pursuant to national legislation, a role in the enforcement of individual normative provisions of national collective labour agreements, it should also be entitled to play the same role in the enforcement of normative provisions of a transnational collective labour agreement. Obviously the same applies to trade unions. If a trade union, pursuant to national law, is entitled to enforce individual normative provisions of a collective labour agreement, it should also be entitled to do the same for individual normative provisions of transnational collective labour agreements.[2113] In my view that entitlement should not only be attributed to national trade unions that, pursuant to national law, are entitled to enforce individual normative provisions of an applicable collective labour agreement, but also to transnational trade unions and to trade unions from other countries that were involved in the transnational collective labour agreement concerned and have an interest in its enforcement. These trade unions should be treated on equal footing as national trade unions, and should consequently have the same enforcement rights as national trade unions.

3.3 Enforcement of collective normative provisions

In line with section 2.4 above, the two constructions of collective normative provisions will be discussed separately below.

3.3.1 Enforcement of collective normative provisions governing the relation between the employer and its employee representative body or its entire personnel

The most logical party to enforce these types of provisions in the proposed system is the employee representative body. That employee representative body is either the body to which these rights are directed, or the proper institution to defend the collective interests of the employees working in

2112 As set out in chapter 13, section 8.2.5, this is a common model of enforcement in Europe.

2113 This is, for example, common in the Scandinavian countries. See chapter 13, section 8.2.5.

the company (or as the case may be: branch office) for which the body is established, in case said collective normative provisions are directed to these employees. In line with what is argued above, the employee representative body should be entitled to enforce these collective normative provisions with all means that are available to it on the basis of the applicable national law, as if these collective normative provisions of the transnational collective labour agreement were collective normative provisions of a national collective labour agreement. Should these means be lacking or should they be insufficiently clear and legally certain, the Member States concerned should be obliged on the basis of the proposed system on transnational collective bargaining to introduce minimum rights for these employee representative bodies to enforce said collective normative provisions. In the event that the employee representative body is lacking altogether in a specific situation, the individual employees themselves should be entitled to call upon these collective normative provisions, if they are ultimately addressed by these provisions.[2114] If this would be different, a potentially effective enforcement mechanism would be missing. These employees too should be entitled to enforce these provisions with all the means attributed to them on the basis of national law. Should these means not be available, or be insufficiently clear and legally certain, the Member States concerned should again be obliged on the basis of the proposed system to introduce minimum rights for these employees to enforce said collective normative provisions.

Furthermore, the contracting trade unions should be empowered to enforce these collective normative provisions as against the individual employer (or as the case may be: branch office),[2115] as well as other trade unions should applicable national law arrange for that option in respect to national collective labour agreements, an option which should in such a case be applied *mutatis mutandis* in respect to an applicable transnational collective labour agreement. This can be considered as a final security, should the employee representative body or the employees involved be insufficiently capable of enforcing these provisions themselves. Again, these trade unions should be entitled to resort to all enforcement techniques available on the basis of applicable national law. If national law does not provide for such enforcement techniques, or if such techniques are insufficiently clear and legally certain, the proposed system obliges the Member State concerned to introduce minimum rights for these trade unions to enforce the collective normative provisions.

2114 Which is in accordance with the law applied in Germany. See chapter 10, section 7.4.

2115 See also chapter 13, section 8.5.4.

3.3.2 Enforcement of collective normative provisions governing the relation between the employer and employees vis-à-vis third collective entities

The enforcement of these types of collective normative provisions may be somewhat complicated. After all, the proposed system means that the collective third parties can be confronted with claims that are governed by varying laws, depending on which party makes the claim, as the law of the country of residence of the employer (or as the case may be: the branch office) applies. In order to streamline this situation, I propose that each third collective entity is obliged to establish a representative – a specific national office – in the country of each Member State in which the transnational collective labour agreement concerned applies. These national representatives should be entitled to directly demand performance on the basis of the collective normative provisions of the transnational collective labour agreement from the employer (or, as the case may be, the employee)[2116] in the country of residence of the employer. Likewise, the employee (or, as the case may be, the employer) is entitled to demand performance from the third collective party through this party's national representative in the country of residence of the employer by whom he is employed.[2117]

Furthermore, the signatory parties to the transnational collective labour agreement should be entitled to demand specific performance of these collective normative provisions from the parties bound by the collective normative provisions of the transnational collective labour agreement (the employers and employees) as against the third collective party,[2118] as well as performance from the third collective party as against these employers or employees entitled to such a performance.

Finally, and this remark applies to both constructions of collective normative provisions, I would propose in line with what has been argued above that

2116 It is likely that only incidentally the employee is obliged to perform as against the third collective party on the basis of collective normative provisions arising from the transnational collective labour agreement, as it seems more logical that especially the employer has to contribute to the third collective party. If, however, the employee needs to perform as against the third party, the representative of the third party established in the country in which the employer (or as the case may be: the branch office) is situated should be entitled to directly address the employee. In most situations this will be the same country as the employee's home country, as most employees live and work in the same country.

2117 In case the employee works for a branch office of the employer, this obviously concerns the country of residence of the branch office.

2118 This is in line with the system as applicable in the Netherlands, Germany and Belgium. Reference is made to chapter 13, section 8.5.4.

if national law provides for other (national) enforcement methods following a breach of the collective normative provisions, these methods may also be applied *mutatis mutandis* to transnational collective labour agreements in force in that jurisdiction.

4. Term and termination

As previously stated,[2119] the freedom of contract is an important principle with regard to the term and termination of (national) collective labour agreements. I see no reason why this should be different in relation to transnational collective labour agreements. This freedom of contract is also in line with the autonomy of the social partners, another principle that is respected at national level[2120] and forms one of the fundaments of the proposed European system on transnational collective bargaining.[2121] Taking both principles into account, I propose the following system with regard to the term and termination of transnational collective labour agreements.

4.1 The date of entering into force

The contracting parties should be free to establish the date on which their collective labour agreement enters into force.[2122] This is fully in line with the freedom of contract and the social partners' autonomy, but also with the laws of the Researched Countries. The contracting parties should also, along the same lines, be able to decide whether or not to attribute retro-effect to the legal norms of the transnational collective labour agreement.

4.2 Term

In my view the signatory parties should also be free to establish the duration of the transnational collective labour agreement. This includes the choice for either an agreement for a definite or for an indefinite period of time. Only such a system fully respects the freedom of contract and autonomy of the social partners. This system is applied in most of the Researched Countries, which forms an indication of its appropriateness. In the Netherlands, however, a different system is applied. Dutch social partners cannot conclude a collective labour agreement with a duration exceeding 5 years. Although this Dutch

2119 See chapter 13, section 8.7.

2120 See chapter 13, section 10.1.

2121 See chapter 14, section 6.

2122 Which date should clearly be indicated in the transnational collective labour agreement. Reference is made to chapter 14, section 7.4.

system is difficult to match with the freedom of contract and the social partners' autonomy, it should be established whether there were fundamental reasons giving rise for this system. If these fundamental reasons are there, they may give reason to reconsider the proposed transnational system.

The Dutch legislator deemed collective labour agreements of indefinite duration undesirable, as (i) the social partners can only reasonably foresee the near future and (ii) collective labour agreements of indefinite duration should be dissolved by courts should the social partners not arrange alternative termination manners in the agreements themselves. Dissolution of an agreement by the court would, according to the Dutch legislator, again be undesirable, because (a) it would be difficult for the court to judge whether the collective labour agreement should be dissolved and (b) the contracting parties would have the opportunity to consistently try to dissolve the collective labour agreement, which would endanger the stability that the collective labour agreement intended to bring.[2123]

These arguments seem little convincing. If the law would arrange that collective labour agreements entered into for an indefinite period of time could always be terminated by notice – the option chosen in the proposed transnational system – there is little incentive for the contracting parties to turn to a court in order to dissolve the collective labour agreement. There should therefore be little fear that courts would be overwhelmed with cases concerning the dissolution of transnational collective labour agreements. Moreover, the possible termination by notice of a collective labour agreement does not necessarily jeopardise the stability that the collective labour agreement intended to bring. The parties could, for example, agree on a relatively long notice period, which enables them to timely arrange relevant matters during the notice period, ideally leading to a relatively smooth termination. They could also decide to agree on a collective labour agreement for a definite period of time – which in the proposed system cannot be terminated by notice prematurely, unless stipulated otherwise by the contracting parties – in order to bring stability in the market for a fixed period of time. The contracting parties could even agree that such an agreement would be prolonged for an indefinite period of time upon termination of the fixed term collective labour agreement. Finally, the transnational collective labour agreement's after-effects prevent that stability is jeopardised in an intolerable manner. To summarise: there are no convincing reasons for the European legislator to disallow social partners to conclude transnational collective labour agreement of indefinite duration.

2123 See chapter 9, section 7.7.2.

4.3 Termination

A transnational collective labour agreement entered into for an indefinite period of time can be terminated by notice by each party, observing the applicable notice period.[2124] For clarity reasons, I would be inclined to demand that notice should be served in writing. Moreover, I would propose to arrange that, should only one of multiple contracting parties of one side of the industry terminate the collective labour agreement, the entire collective labour agreement should end. This prevents a disturbance in balance of power between all the parties involved.

A transnational collective labour agreement concluded for a fixed period of time terminates by operation of law and cannot be terminated prematurely, unless specifically stipulated otherwise in the agreement. This is in line with the law in Germany and in Belgium. It is also in line with logics: a fixed term agreement ends after termination of the agreed period of time. It should not be permitted to terminate the fixed term collective labour agreement prematurely by notice, unless this is specifically permitted in the collective labour agreement. After all, once a binding agreement is made for a fixed term, the parties should stick to that term. This gives stability in the market.

The signatory parties can also arrange that the transnational collective labour agreement entered into for a fixed period of time is automatically tacitly renewed, if they explicitly stipulate this in the agreement. In that situation the agreement does not lapse at the end of the term, unless terminated by one of the parties at such term's end.[2125]

Besides termination by giving notice, the contracting parties to the transnational collective labour agreement should also be able to terminate that agreement by other means – for example by mutual consent or dissolution of the contract – if and in as far as permitted by the law governing the transnational collective labour agreement as chosen by the social partners in accordance with section 2.1 above. This is in line with the proposed system, in which national law plays (and has to play given the lack of a uniform European civil law) a complementary role.

2124 The termination method and notice period should clearly be indicated in the transnational collective labour agreement. Reference is made to chapter 14, section 7.4.

2125 The termination method should again be clearly indicated in the transnational collective labour agreement. Reference is made to chapter 14, section 7.4.

5. After-effects

The general rule of contract law is that the effects of an agreement end upon termination of that agreement. When it concerns collective labour agreements, however, this rule is not always applied. It is useful to distinguish between obligatory provisions, individual normative provisions and collective normative provisions when it concerns after-effects.

5.1 Obligatory provisions

With regard to the obligatory provisions of the collective labour agreement the above-mentioned general rule applies to all Researched Countries; these provisions lose force upon expiry of the collective labour agreement. I see no reason to deviate from this rule with regard to a transnational collective labour agreement.

5.2 Individual normative provisions

With regard to individual normative provisions the above rule is not followed in the Researched Countries. In all these countries the individual normative provisions retain their force upon termination of the collective labour agreement. These after-effects do not apply in case the transnational collective labour agreement specifically stipulates this.[2126]

As already explained, there are practical, social and even legal arguments to assume after-effects of individual normative provisions.[2127] These effects should therefore be accepted. The same applies to the limitation of the after-effects on the basis of an agreement between the signatory parties. In line with the laws of the Researched Countries, the freedom of contract and the autonomy of the social partners, the after-effects should not apply in case the transnational collective labour agreement specifically stipulates this. In such a situation the amendment of the individual employment agreement is, given the content of the applicable transnational collective labour agreement, only temporarily. In other words, unless explicitly stipulated differently, individual normative provisions retain their force upon expiry of the transnational collective labour agreement. The employer and employee are, however, after the termination of the transnational collective labour agreement entitled to change the content of the individual employment contract should they wish so, in effect terminating the collective labour agreement's after-effects. Obviously,

2126 Reference is made to chapter 13, section 8.8.

2127 Reference is made to chapter 13, section 8.8.

they should observe the rules applicable for such a change as in force in the different countries. Other parties may also terminate the after-effects of the transnational collective labour agreement, if that change is allowed by the law that applies to the individual employment agreement.[2128] These limitations on the after-effects are hardly troublesome, as they are arranged by national law. A more difficult question is whether a subsequent transnational collective labour agreement can also terminate the after-effects of the previous transnational collective labour agreement. As already explained in chapter 13, section 8.8 this is a particular touchy subject when it concerns a collective bargaining system that is based on the principle of favour, as in the underlying European system.

5.2.1 Option 1: full and unconditional after-effects

If it were assumed that the transnational collective labour agreement fully and unconditionally (for indefinite duration) adapts the individual employment agreement that falls within the scope of application of that collective labour agreement, the current system would either become very static or difficult to execute.[2129] After all, a minimum transnational collective labour agreement may not deteriorate existing employment conditions.[2130] If all "extras" the minimum transnational collective labour agreement offers unconditionally become part of the individual employment conditions upon expiry of said transnational agreement, these extras may not be revoked by a subsequent minimum transnational collective labour agreement. That would on the one hand lead to a strict protection of the interests of the employees involved. On the other hand this option would lead to a very static situation, only allowing continuous upwards movement of employment conditions, without being able to discontinue (to the detriment of the employees) so much as an element favourable to an employee introduced by a previous transnational collective labour agreement. That element could pursuant to this option only be removed or adjusted to the detriment of the employee by a transnational collective labour agreement containing provisions of a standard or maximum nature, invoking the corresponding consequences with regard to representativity. Choosing this option would, in brief, lead to static industrial relations only capable of easily improving employment conditions, but not of adapting even

2128 These parties could for example be national trade unions in cooperation with the employer or relevant employers' organisation, or an employee representative bode in cooperation with the employer.

2129 In this situation there would be no real reason to speak about "after-effects", as it concerns the full and unconditional change of employment conditions. Reference is made to chapter 13, section 8.8.

2130 Reference is made to chapter 15, section 5.1.1.

a minor element of a previous transnational collective labour agreement to the detriment of the employee.

5.2.2 Option 2: after-effects up to the introduction of a new collective labour agreement

Another option would be to restrict the after-effects in time. These after-effects could for instance, similar to German law,[2131] have force up to the moment a new transnational collective labour agreement applies. In such a situation, the transnational collective labour agreement (directly and with mandatory effect) alters the individual employment conditions, alterations which do not become undone upon expiry of the transnational collective labour agreement, but do end once a new transnational collective labour agreement applies.

This second option would grant the parties to a minimum transnational collective labour agreement much more room to manoeuvre when concluding a subsequent minimum agreement and therefore leads to vivid industrial relations. However, this option also has undesirable side-effects which will be explained in the following example. An employee earns a contractual salary of EUR 1,000 per month at the end of the year 1999. As per 1 January 2000 a minimum transnational collective labour agreement enters into force which arranges a minimum salary of EUR 1,200 per month. At the end of 2004 the employee's salary has due to said collective labour agreement increased to EUR 1,500 per month, but at that time the collective labour agreement terminates. Given the after-effects the salary remains at the level of EUR 1,500 per month during the year 2005. On 1 January 2006 a subsequent minimum transnational collective labour agreement enters into force setting the minimum wage at EUR 1,100 per month. If the coming about of a new transnational collective labour agreement would fully terminate the after-effects of the previous transnational collective labour agreement, the employer may technically apply this salary of EUR 1,100 per month to the employee, as it would not violate the agreement's minimum character. The *contractual* salary was fixed at a level of EUR 1,000 per month, while the entitlement to the salary fixed by the previous transnational collective labour agreement lapsed upon the coming about of the new transnational collective labour agreement. Choosing this second option could in brief lead to unacceptable social situations. This is even more so since the employer can conclude a minimum transnational collective labour agreement terminating the after-effects of the previous transnational collective labour agreement with any

2131 Reference is made to chapter 10, section 7.8

employees' organisation that meets the minimum requirements as set out in the previous chapter.

This second option could also create problems with regard to collective labour agreements containing standard or maximum provisions. I will again clarify this with an example. An employee earns a contractual salary of EUR 2,500 per month at the end of the year 1999. As per 1 January 2000 a transnational collective labour agreement enters into force which arranges a maximum salary of EUR 2,000 per month as a response to a financial crisis. At the end of 2004 the salary of the employee has remained at the same level of EUR 2,000 per month, at which time the collective labour agreement terminates. Given the after-effects the salary remains at the level of EUR 2,000 per month during the year 2005. In this period the position of the employer slightly improves. As a consequence, the employer is able to conclude a new transnational collective labour agreement that enters into force on 1 January 2006 setting the minimum wage at EUR 2,250 per month. If the coming about of a new transnational collective labour agreement would fully terminate the after-effects of the previous transnational collective labour agreement, the employer may *not* apply this salary of EUR 2,250 per month to the employee, as it would violate the agreement's minimum character. After all, the *contractual* salary was fixed at a level of EUR 2,500 per month prior to the entering into force of the previous transnational collective labour agreement. Consequently, even though the salary was in fact increased by the new transnational collective labour agreement, such a new salary would only be legally enforceable if the new agreement is a transnational collective labour agreement containing standard or maximum provisions. That is an odd consequence, as the change in employment conditions is in favour of the employee.

5.2.3 Towards a third way

Given the undesirable consequences of the options stated above a different solution should be sought. The following considerations are in my view of importance in that respect.

It is reminded that after-effects have important advantages. The main rule should therefore be that all individual normative provisions have after-effects, unless these effects are undesirable. As set out in section 5.2.1 above, the after-effects are undesirable if they lead to static situations hindering transnational collective bargaining. Such a static situation only occurs in case the new collective labour agreement (i) must have a minimum character and (ii) deteriorates the employment conditions that apply on the basis of the

after-effects. After all, if the new transnational collective labour agreement is an agreement containing maximum or standard provisions that meets the corresponding requirements for such types of provisions, there is no difficulty to start with, as these type of provisions may validly change the employee's employment conditions to his detriment, regardless whether these conditions derive from a previous transnational collective labour agreement. Furthermore, in case the new minimum transnational collective labour agreement solely introduces terms that are advantageous to the employees, the after-effects of the previous transnational collective labour agreement do not hinder the conclusion of this new collective labour agreement. To summarise, after-effects of individual normative provisions should be limited in case the new collective labour agreement has a minimum character and deteriorates the employment conditions that apply on the basis of the after-effects. These limitations should be justified. In that respect there are in my view three important observations.

First it should be noted that after-effects of individual normative provisions are only of relevance if the expired transnational collective labour agreement awarded additional rights to an employee involved. If it did not, the individual normative provisions could not have changed the already existing employment conditions, as a consequence whereof there are no after-effects at all. In other words: in such a case the individual normative provisions do not retain their force, but the already existing more favourable employment conditions do. This is an important observation, because it means that after-effects are only relevant when (i) the employees' organisation was able to achieve a positive result for the employee involved and (ii) that employee already enjoyed a benefit from the previous collective labour agreement. In my view it is to a certain extent acceptable that a third party that apparently was strong enough to award additional rights to an employee from which this employee has benefited may also be allowed to discontinue these additional rights if there are valid reasons for such discontinuation.

Second, an assertion deriving from the previous chapter is of relevance here as well: once an employee knows that (part of) his employment conditions are arranged by a particular transnational collective labour agreement, he has the opportunity to become a member of the contracting trade union. If that employee becomes a member, he is in the position to influence the content of the renewed collective labour agreement. Should he choose not to become a member, he accepted that he could be confronted with employment conditions that were drafted without his involvement. This situation is different should a renewed transnational collective labour agreement be concluded with other than the original trade unions. This observation, just as in the

previous observation, suggests that it is to a certain extent legitimised that the employees' organisations may discontinue additional rights previously granted in a transnational collective labour agreement, provided of course that it are the same parties that concluded the previous agreement.

Last it should be noted that not every change to the detriment of the employee is unacceptable. If (a) for good reasons (b) only "marginal" rights of the employee are discontinued to his detriment, this can be acceptable under the conditions stated in the paragraphs above. These two circumstances are communicating vessels: a change hardly affecting the employees requires only little justification, while a change that has a more important impact on the employees, needs strong justification. Important grounds for justification could for example be that specific employment conditions were traded in for other (more important) employment conditions, or that a specific employment condition cannot (reasonably) be offered anymore due to a change in legislation. It is ultimately up to a court to decide whether a discontinuation of an entitlement attributed in a previous transnational collective labour agreement as referred to above is deemed justified. However, any change to the detriment of the employee with regard to base salary[2132] – being the core element of the employee's remuneration – could in my view never be sufficiently justified by the signatory parties. Should a change in base salary be necessary, a collective labour agreement containing standard or maximum provisions should be concluded.

These three observations bring me to the following proposed system when it concerns the discontinuation of after-effects of individual normative provision due to the applicability of a new (minimum) transnational collective labour agreement: after-effects of a previous transnational collective labour agreement may only be terminated by a subsequent minimum transnational collective labour agreement that (i) is concluded with all employees' organisations that also concluded the previous transnational collective labour agreement, (ii) explicitly states valid reasons justifying the discontinuation of the effects of specific individual normative provisions, while (iii) this discontinuation may not relate to base salary. Upon termination of the after-effects, the employment conditions that were introduced to the employees on the basis of the previous collective labour agreement automatically lapse, and cannot, therefore, be considered a right of the employee anymore.[2133]

2132 Such as periodical salary, thirteenth month and holiday allowance.

2133 For this reason this construction is technically not an exception to the principle of favour. Once the after-effects of individual normative provisions lapse, these provisions automatically become undone, and are not employment conditions anymore.

5.2.4 Conclusion

Given the above, individual normative provisions of a transnational collective labour agreement have after-effects, unless specifically stipulated otherwise in the agreement. These after-effects self-evidently terminate once the employment conditions acquired by the employee due to these after-effects are adapted, in accordance with the law that applies to the individual employment agreement, but also once a subsequent minimum transnational collective labour agreement applies that (i) is concluded with all employees' organisations that also concluded the previous transnational collective labour agreement, (ii) explicitly states valid reasons justifying the discontinuation of the after-effects of specific individual normative provisions, while (iii) this discontinuation may not relate to base salary.

5.3 Collective normative provisions

Collective normative provisions have after-effects in Germany, but not the Netherlands or Great Britain. Collective normative provisions that also apply individually do have after-effects in Belgium. Again, the signatory parties are entitled to stipulate in the collective labour agreement that the terms do not have after-effects.[2134]

In my view, there are sound reasons to also attribute after-effects to collective normative norms of transnational collective labour agreements. Many of the arguments that gave rise to attributing after-effects to individual normative provisions also apply to collective normative provisions. In other words, collective normative provisions retain their force upon expiry of the transnational collective labour agreement, unless stipulated otherwise in the collective labour agreement. These after-effects can obviously be terminated in accordance with the law that applies to these provisions. In line with what has been argued above, the after-effects can also be discontinued once a subsequent minimum transnational collective labour agreement applies that (i) is concluded with all employees' organisations that also concluded the previous transnational collective labour agreement and (ii) explicitly states valid reasons justifying the discontinuation of the after-effects. In my view, these reasons should relatively easily be considered sufficient, as collective normative provisions have, as a rule, less of an impact on the individual employees.

2134 Reference is made to chapter 13, section 8.8.

6. Mandatory alternative dispute resolution?

Alternative dispute resolution mechanisms play a part in collective labour law in all Researched Countries, but also in many other Member States.[2135] In some Member States alternative dispute resolution is even compulsory. Given the importance that the proposed system attaches to the social partners' autonomy, and therefore to their freedom of choice, it should be up to the social partners to decide whether or not to enter into alternative dispute resolution.[2136] In other words: a voluntary system rather than a mandatory system of alternative dispute resolution is pursued. This voluntary character notwithstanding, easily accessible alternative dispute resolution should be made possible. I would suggest that, as per Member State, a specific body is appointed the task of rendering alternative dispute resolution services, including services in the field of mediation, conciliation and arbitration. It would be at the discretion of the contracting parties of the transnational collective labour agreement whether or not to use the services of these bodies, and to choose between the different types of alternative dispute resolution.

7. The reach of the social partners in transnational collective bargaining

As mentioned before, the law on collective labour agreements in most Member States respects, to quite an extent, the collective autonomy of the social partners. This means that, in principle, it is at the social partners' discretion what they wish to arrange in the collective labour agreement. This is not different at transnational level, as also in that system the autonomy of the social partners is pursued. Of course, the social partners involved in the conclusion of transnational collective labour agreements must operate within the limits of what constitutes a transnational collective labour agreement, as defined in chapter 14. This collective autonomy notwithstanding, the parties drafting the collective labour agreement must obviously also abide by the hierarchy of legal norms. This is the case in Member States, and should not be different with regard to transnational collective labour agreements.

2135 See chapter 13, section 8.9.

2136 This is in line with the suggestions forwarded in the Report. Reference is made to: E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, page 40. This is also in line of the predominant favour of autonomous and voluntarist alternative dispute resolution procedures in the Member States. See F. Valdés Dal-Ré, *Synthesis Report on conciliation, mediation and arbitration in the European Union Countries*, page 17.

It is self-evident that transnational collective labour agreements may not contravene European and other applicable mandatory international law. These agreements should furthermore respect the national law of the Member State in which they apply, including that country's constitution. This can in certain jurisdictions mean that specific provisions of a transnational collective labour agreement may not be enforced should they contravene reasonableness and fairness.[2137] This may especially be the case with regard to transnational collective labour agreements that are not minimum in nature. Member States should, however, reticently apply these national stipulations with regard to the reasonableness and fairness, provisions which can in effect undermine the proper execution of the European system on transnational collective bargaining.

The above obviously concerns *mandatory* law; it is logical that variations of directory law in transnational collective labour agreements are permitted. As already explained in chapter 15, transnational collective labour agreements may vary from national ¾ mandatory law, provided that they satisfy the requirements in place of the countries in which they apply.[2138]

Another matter is the relation of the transnational collective labour agreement with national collective labour agreements. In my view transnational collective labour agreements should be ranked higher in hierarchy than national collective labour agreements. This is in line with the general rule that international (European) law supersedes national law.[2139] Besides, there are good arguments for such a ranking. An important goal of the transnational collective labour agreements is to create as much uniformity in the Member States as possible with regard to the consequences of the transnational collective labour agreement. It would be at odds with this goal to allow national collective labour agreements to deviate from the transnational collective labour agreement. This is not to say that national collective labour agreements cannot vary from transnational collective labour agreements. When it concerns a minimum transnational collective labour agreement, that agreement allows variation at national level in favour of the employee. National collective labour agreements that contain more favourable clauses than the transnational collective labour agreement in such a case still may apply as that national agreement does in such a case not deviate from the transnational agreement. When it concerns

2137 This is, for instance, the case in Belgium and the Netherlands.

2138 See chapter 15, section 5.1.4.

2139 Also Schiek argues that European collective labour agreements should be ranked higher than national collective labour agreements. See D. Schiek, *Autonomous Collective Agreements as a Regulatory Device in European Labour Law: How to read Article 139 EC*, pages 55 and 56.

transnational collective labour agreements also containing maximum and/or standard provisions, national collective labour agreements cannot introduce more favourable provisions (unless permitted through an opening clause in the transnational collective labour agreement), but such transnational collective labour agreements are required to satisfy strict demands, as set out in section 5.2.2 in chapter 15 hereof. The fact that such transnational collective labour agreements outrank national collective labour agreements is therefore in my view sufficiently legitimised.

8. Summary

Transnational collective labour agreements can, contrary to national collective labour agreements, not be embedded in a uniform system of law as a European civil code is lacking. This means that private international law must play a role, establishing the law applicable to the different terms (obligatory, individual normative and collective normative) of the transnational collective labour agreement. This applicable law is important for the enforcement of the transnational collective labour agreement. This transnational agreement is enforced as if it were a national collective labour agreement. Should, however, a national system have insufficient means for the proper enforcement of the terms of the transnational collective labour agreement, or should these national means be insufficiently clear and legally certain, the Member State concerned is obliged to introduce minimum means for effective enforcement.

The contracting parties are obliged to make an explicit choice on the law applicable to the obligatory provisions of the transnational collective labour agreement. The chosen law must be of one of the Member States in which the transnational collective labour agreement applies. In the proposed European system on transnational collective bargaining, the party that is in breach of an obligatory provision of the transnational collective labour agreement is in principle liable for the losses resulting from such a breach towards its counterparty or counterparties. A potential claim on breach of such obligatory provisions needs to be assessed applying the chosen national law, which has to fill in procedural and material lacunas of the European system. The applicable national law should, in brief, provide the tools for enforcement of the obligatory provisions of the transnational collective labour agreement. Should, in a Member State in which jurisdiction the transnational collective labour agreement applies, other techniques be in place to enforce obligatory provisions of a national collective labour agreement, these techniques should equally be applied to the transnational collective labour agreement.

The individual normative provisions of the transnational collective labour agreement in the current proposal become part of the individual employment agreement as they have direct normative effect. As a consequence, these provisions (as automatically incorporated in the individual employment agreement) need to be assessed on the basis of the law that applies to that employment agreement. This means that the individual employer and employee should turn to the same enforcement tools as would apply were these normative provisions incorporated in the individual employment agreement on the basis of an applicable national collective labour agreement: all national remedies following a breach of employment contract at the disposal of the employer and employee apply. It also implies that all other parties that have, on the basis of national law, a right to enforce normative provisions of applicable national collective labour agreements should also have the same rights to enforce individual normative provisions of applicable transnational collective labour agreements.

There are two important constructions when it concerns collective normative provisions. First, collective normative provisions may provide for rights and obligations that arrange the relation between the employer and (i) its employee representative body or (ii) its "entire personnel". National legislation may oblige the employer to establish an employee representative body. That national law subsequently applies to the relation between the employer and the employee representative body. If the same employer is active in several countries, and it is obliged to establish employee representative bodies in more than one country because of its branch offices in the several countries, the law applicable to the collective normative provisions will vary per branch office. The law that applies between the employer and its entire personnel runs parallel, as it is the law of the country in which the employer is resident and active (the "country of residence"). If the employer is active in several countries and has branch offices situated in these countries, the law of the country in which the branch office is situated should apply to the relation between that branch office and the employees working for that branch office. The party that is to enforce these collective normative provisions is the employee representative body. That body is either the body to which these rights are directed, or the proper institution to defend the collective interests of the employees working in the company (or as the case may be: branch office) for which the body is established. The employee representative body should be entitled to enforce the collective normative provisions with all means that are available to it, on the basis of the applicable national law, as if these provisions were the collective normative provisions of a national collective labour agreement. In the event that the employee representative body is not established, the individual employees themselves should be entitled to call on these collective

normative provisions; if they are ultimately addressed by these provisions. These employees should also be entitled to enforce these provisions with all the means attributed to them on the basis of national law. Furthermore, the contracting trade unions should be empowered to enforce the collective normative provisions as against the individual employer (or as the case may be: branch office). Should the aforementioned three enforcement techniques not be available, or be insufficiently clear and legally certain, the Member States concerned should again be obliged on the basis of the proposed system to introduce minimum rights for such an enforcement of collective normative provisions. Finally, if national law provides for other (national) enforcement methods following a breach of the collective normative provisions, these methods may also be applied *mutatis mutandis* to transnational collective labour agreements in force in that jurisdiction.

Second, the transnational collective labour agreement may provide for rights and obligations that arrange the relation between the employer and the employees vis-à-vis third parties. With regard to applicable law, the same line of arguing as above is applied. Should (i) the employer be active in one country, the law of that country applies to the relation between the third collective entity on the one hand and the employer and its employees on the other. Should (ii) the employer be active in several countries and should it have branch offices situated in these countries, the law of the country in which the branch office is situated should apply to the relation between the third collective entity on the one hand and the branch office and the employees working in that branch office on the other. Should (iii) the employer be situated in one country, while it employs employees in different countries, without having branch offices in these different countries, the relation between the third collective entity on the one hand and the employer and its employees on the other should be governed by the law of the country in which the employer is factually situated and primarily active (the country of residence). The enforcement of these types of collective normative provisions is rather complicated. For that reason, each third collective entity is obliged to establish a national representative in each Member State in which the transnational collective labour agreement concerned applies. These national representatives are entitled to directly demand performance on the basis of the collective normative provisions of the transnational collective labour agreement from the employer or the employee in the country of residence of the employer. Likewise, the employee or the employer is entitled to demand performance from the third collective party through this party's national representative in the country of residence of the employer by whom he is employed. Furthermore, the signatory parties to the transnational collective labour agreement are entitled to demand specific performance of these collective normative provisions from the parties bound

by the collective normative provisions of the transnational collective labour agreement (the employers and employees) against the third collective party, as well as performance from the third collective party against these employers or employees entitled to such a performance. Finally, if national law provides for other (national) enforcement methods following a breach of the collective normative provisions, these methods may also be applied *mutatis mutandis* to transnational collective labour agreements in force in that jurisdiction.

When determining term and termination of the transnational collective labour agreement, the freedom of contract and the autonomy of the social partners are the leading principles. Consequently, the contracting parties are free to establish the date on which their collective labour agreement enters into force and to attribute retro-effect to the transnational collective labour agreement.

The signatory parties are furthermore entitled to establish the duration of the transnational collective labour agreement. This includes the choice for either an agreement for a definite or an indefinite period of time. A transnational collective labour agreement entered into for an indefinite period of time can be terminated by notice by each party, observing the applicable notice period. For clarity, notice should be served in writing. A transnational collective labour agreement concluded for a fixed period of time terminates by operation of law and cannot be terminated prematurely, unless specifically stipulated otherwise in the agreement. The signatory parties can also arrange that the transnational collective labour agreement entered into for a fixed period of time is automatically tacitly renewed, if they explicitly stipulate this in the agreement. In that situation the agreement does not lapse at the end of the term, unless terminated by one of the parties at such term's end. Besides termination by giving notice, the contracting parties are also able to terminate the agreement by other means if and in as far as permitted by the law governing the transnational collective labour agreement.

The obligatory provisions of the transnational collective labour agreement lose force upon expiry of that agreement. This is different with regard to individual normative provisions. These provisions have after-effects, unless specifically stipulated otherwise in the agreement. These after-effects obviously terminate once the employment conditions acquired by the employee due to these after-effects are adapted in accordance with the law that applies to the individual employment agreement, but also once a subsequent minimum transnational collective labour agreement applies that (i) is concluded with all employees' organisations that also concluded the previous transnational collective labour agreement, (ii) explicitly states valid reasons justifying the discontinuation of the after-effects of specific individual normative provisions, while (iii) this

discontinuation may not relate to base salary. A similar system is suggested for collective normative provisions.

The social partners are free to decide whether or not to enter into alternative dispute resolution in case of a dispute. Easily accessible alternative dispute resolution should be made possible. Every Member State should appoint a specific body to this task.

The social partners' are free to decide what they wish to arrange in the transnational collective labour agreement, provided that they operate within the limits of what constitutes a transnational collective labour agreement. Obviously, they must also abide by the hierarchy of legal norms. Transnational collective labour agreements may not contravene European and other applicable international law. They should furthermore respect the national law of the Member State in which they apply. They may vary from national ¾ mandatory law, provided that they satisfy the requirements in place of the countries in which they apply.

Transnational collective labour agreements are ranked higher in hierarchy than national collective labour agreements. This is in line with the general rule that international (European) law supersedes national law and with a goal of transnational collective labour agreements (the creation of a level of uniformity in the Member States). National collective labour agreements can, however, vary from transnational collective labour agreements. When it concerns a minimum transnational collective labour agreement, that agreement allows variation at national level in favour of the employee. When it concerns transnational collective labour agreements also containing maximum and/or standard provisions, national collective labour agreements cannot introduce more favourable provisions (unless permitted through an opening clause in the transnational collective labour agreement).

CHAPTER 17

SUMMARY AND FINAL REMARKS

1. Introduction

The previous three chapters presented a general outline on what European legislation on transnational collective bargaining might look like. This chapter concludes this thesis. As is good practice when it concerns final chapters, it will summarise the thoughts and the rationale behind these thoughts, as set out in this thesis. First, the answer on the preliminary question whether there is a need or demand for transnational collective labour agreements in Europe is explained (section 2). Subsequently, the answer on the second preliminary question – is there a need for a new legal framework on transnational collective labour agreement – will be set out (section 3). The general steps leading to a new European system on transnational collective bargaining, based on the European traditions will be discussed in section 4, followed by a summary of the actual proposal in section 5. This chapter will end with a number of final remarks in section 6.

2. Is there a need or demand for transnational collective labour agreements in Europe?

2.1 Changing challenges for and role of the (European) social partners leading to, among other things, autonomous transnational collective bargaining[2140]

The (European) social partners used to play a very modest role at European level. Only since the mid nineteen eighties has their role gradually enhanced. Since about the year 2000, however, both the challenges for and the role of the social partners within the EU have changed significantly:

- In 2000 the Lisbon Strategy was introduced, aiming to bring about economic, social and environmental renewal in the EU, resulting in making

2140 Chapters 3 and 4.

the EU the world's most dynamic and competitive economy. The social partners are to play an important role in this strategy.

- In 2001 the Commission noted in its White Paper "European Governance" that on the one hand Europeans feel alienated from the Union's work, while on the other hand they still expect European-wide action in many domains. The Commission decided to reform European governance. One of the methods to achieve this is to better use different policy tools, including the European social dialogue.
- Since the beginning of 2000, the EU was on the brink of enlargement. The social partners were to play an important role in this process. They needed to "smooth out" the enlargement, mainly by assisting the social partners in the then (in 2000) candidate countries. That role would remain relevant even after the accession of said countries.
- The social partners are faced with the "new" challenges of globalisation, economic and monetary union, technological change and the transition to a knowledge based economy, changing employment and labour markets, demographic change and new balances between family, work and education.

As a consequence of these changes, the cross-industry social partners have, following their December 2001 Laeken declaration, decided to reposition. They deemed it necessary, among other things, to develop a more autonomous social dialogue. To that effect, they concluded two successive work programmes, jointly covering the period 2003 – 2008, setting out their course of action independently from Community institutions. They also chose, in deviation from the past, to implement European collective agreements reached within the European social dialogue autonomously, therefore not involving the Community institutions in this process. In 2007, ETUC adopted an "offensive" strategy and action plan, to strengthen European trade unionism, *i.a.* by strengthening itself and its members. ETUC seems keen on gaining a more prominent role in Europe.

This repositioning is well received by Community institutions and bodies. Both the Commission and the High Level Group Industrial Relations and Change of the European Union wish to further strengthen the position of the European social partners. The Commission, in particular, has been very active to support the European social partners. It wholeheartedly involves the European social partners on the main Community initiatives having social repercussions and generously interprets article 138.2 of the EC Treaty. It furthermore established Sectoral Social Dialogue Committees (SSD Committees) in 1998, in order to enhance the sectoral social dialogue.

Recently, plans have been made to further enhance the position of the European social partners. The European Constitution had a specific role in mind for the social partners within the EU in terms of participatory democracy. As is known, the European Constitution is not ratified. That, however, does not affect the fact that the Community institutions and the Member States wished to award an important role to the European social partners with regard to the democracy of the Union. But also the Treaty of Lisbon, that is to take the place of the European Constitution, emphasises the importance of the European social partners. Article 11 of the amended Treaty on European Union repeats the principle of participatory democracy. Although it is not certain that the Treaty of Lisbon will be ratified, the continuing importance of the European social partners is clearly recognised in this Treaty.

2.2 Europeanisation of collective bargaining already exists[2141]

Europeanisation of collective bargaining and negotiations already is a fact. This Europeanisation can be witnessed at national level, but also at transnational level. At European company-level, quite a number of transnational collective labour agreements have been concluded. Partially this has been done with the European Works Council, but more importantly with European sectoral trade unions also, sometimes combined with national trade unions. The topics of corporate social responsibility and restructuring especially attract the interest of multinational companies. Furthermore, a relatively vivid European sectoral social dialogue exists. Since the establishment of the SSD Committees in 1998 until the middle of 2002, the social partners involved concluded approximately 230 commitments of different types and scale, such as opinions and common positions, declarations, guidelines and codes of conduct, charters, agreements etc. Finally, at European cross-industry level, between 1986 and August 2002 the European social partners involved have issued joint statements or entered into framework agreements 40 times in the European social dialogue.

2.3 Transnational collective bargaining in Europe seems to have advantages, outweighing the disadvantages[2142]

Transnational collective bargaining offers certain advantages, which can be divided into institutional advantages and advantages for the parties and their members involved.

2141 Chapter 4.

2142 Chapter 7.

On an institutional level, transnational collective bargaining has at least five advantages. Transnational collective bargaining, especially on a European-wide level, may: (i) prove useful in case Community institutions are unable to make decisions; (ii) help to overcome regulatory shortcomings; (iii) help to overcome the democratic deficit; (iv) prove to be an important tool for proper European Governance; and (v) be a proper method for horizontal subsidiarity.

Apart from these institutional advantages, transnational collective bargaining may also benefit the social partners themselves, and ultimately the employers and employees. Transnational collective bargaining may *i.a.*:

- be a proper response to the Europeanisation and internationalisation of markets, simplifying cross-border labour and enabling the "European Social State" to better compete with the rest of the world;
- prevent social dumping and can be a proper tool to maintain a social Europe;
- prove a necessity in order to cope with the consequences of the EMU;
- form a good, broad basis to deal witch common problems at the appropriate level;
- have specific advantages for European multinationals;
- enable the European social partners to take matters in their own hands instead of leaving it up to the European legislator; and
- help create a power equilibrium between trade unions on the one hand and employers and employers' organisations on the other.

Naturally, there are also (potential and real) disadvantages attached to (European) transnational collective bargaining. These can be divided into three categories: (i) fundamental arguments against collective bargaining in general, (ii) fundamental arguments against (European) transnational collective bargaining and (iii) practical arguments against (European) transnational collective bargaining.

First, from an economical point of view, scholars have argued that trade unions and collective bargaining hinder economic development and lead to higher unemployment. These scholars favour a fully free market. They fundamentally object to any kind of collective bargaining. Since assessing these arguments in depth is beyond the scope of this thesis, it is simply assumed that, given the European-wide practice of collective bargaining, collective bargaining, in general, has advantages outweighing its disadvantages. Another potential fundamental objection against collective bargaining in general, which problem may even be clearer at transnational level than at national level, is the declining

representativity level of the social partners. If (trade union) membership density continues to decline and drops under a critical level upon which the social partners cannot be considered representative anymore for the employers and the employees they are supposed to represent, or if for any other reason the same happens, collective bargaining as we know it will fail, both at national and transnational level. It is therefore imperative, when drafting a system on collective bargaining, to ascertain that there is an important material link between the social partners and the employers and employees they represent (representativity demands). Second, some authors consider that *European* collective bargaining has inherent, fundamental disadvantages. They argue that European collective bargaining adversely affects competition in Europe, since it leads to common employment conditions throughout Europe, resulting in a weakened economy that creates fewer jobs. This argument is based on a false assumption, since the goal of European-level collective bargaining is not fully levelling out employment conditions throughout Europe. Instead, it recognises the differences in Europe and only interferes when needed. Last, there are many practical arguments raised against transnational (European) collective bargaining, such as:

- differences in the organisation, ideology and interest of Europe's national trade unions;
- limits of international solidarity of workers if strikes are needed;
- trade unions weaknesses to establish an autonomous transnational system of industrial relations;
- a lack of interest of employers and employers' organisations;
- the risks and costs of coming to European collective bargaining; and
- differences in the legal systems of the different countries.

Although (some of) these practical disadvantages are real and not at all easily overcome, they do not fundamentally obstruct (European) transnational collective bargaining. All of these disadvantages are of a practical nature and are therefore potentially temporary. Especially when trade union membership remains on acceptable levels, the practical issues facing transnational collective bargaining can be tackled. Meaningful transnational collective bargaining may even give a boost to trade union membership, which could lead to stronger trade unions and more employees' solidarity when needed. In consequence, transnational collective bargaining seems worthwhile, provided that representativity of the social partners remains within acceptable levels. This conclusion is, as set out above, supported by practice, as transnational collective bargaining already exists. The answer to the first preliminary question, whether there is a need or demand for transnational collective labour agreements, should therefore be answered with: yes.

3. Is there a need for a new legal framework on transnational collective labour agreements?

Given the above conclusion, the second preliminary question becomes relevant: is a (new) system on transnational collective bargaining needed? A new system is obviously only needed if the current possibilities are inadequate. There are two existing means of concluding (European) transnational collective agreements, being by bargaining within the institutionalised European social dialogue and "outside" the institutionalised European social dialogue. Do these means for (European) transnational collective bargaining suffice?

3.1 Bargaining within the European social dialogue[2143]

3.1.1 An explanation of bargaining within the European social dialogue

Pursuant to article 138.2 of the EC Treaty, the Commission must consult the social partners before submitting proposals in the social policy field. The social partners that are consulted must meet three criteria. They must: (a) be cross-industry or relate to specific sectors or categories and be organised at European level, (b) consist of organisations which are themselves an integral and recognised part of Member State social partner structures and with the capacity to negotiate agreements, and which are representative of all Member States, as far as possible, and (c) have adequate structures to ensure their effective participation in the consultation process. Based on these criteria, the Commission has drafted a list of organisations that are to be consulted, which list is reviewed regularly.

On the occasion of the consultation, the social partners are entitled to inform the Commission of their wish to enter into a collective agreement. The social partners that can participate in the negotiations have to be, according to the ruling of the Court of First Instance in the *UEAPME* case, (1) among those parties consulted by the Commission and (2) admitted to the negotiation table by the other social partners involved. Alternatively, the social partners may enter into negotiations without prior consultation being required. The same social partners, as defined by the Court of First Instance, are entitled to participate in the negotiations leading to agreements as referred to in article 139 of the EC Treaty. If the social partners have reached an agreement they can either request it to be implemented by a Council decision or implement

2143 Chapters 5 and 6.

it themselves in accordance with the procedures and practices specific to management and labour and to the Member States.

Should the social partners choose the first option, they must jointly request that the agreement be implemented by a Council decision on a proposal from the Commission (article 139.2 of the EC Treaty). In such case, the agreement must meet seven conditions:

- the agreement must concern matters covered by article 137 of the EC Treaty;
- the contracting parties must have a sufficiently representative status;
- the contracting parties must have a mandate of their members;
- the content of the agreement may not contravene Community law (legality);
- the agreement must avoid imposing administrative, financial and legal constraints that holds back the creation and development of small and medium-sized undertakings;
- the agreement must pass a general (political) test on its content; and
- the objectives of the proposed implementation must not sufficiently be achieved by the Member States and should therefore be achieved by the Community (principle of subsidiarity).

If these conditions are met, the Commission will not alter the agreement upon its proposal for its implementation. The Commission does not allow the Council to amend the agreement either. The European Parliament does not play an official role in this procedure, but is informed on the proposed implementation of the agreement. The choice of legal instrument (directive, regulation or decision) for the implementation depends on the content of the agreement at hand, but to date all agreements have been implemented through a directive.

The social partners could also choose to implement the agreement in accordance with the procedures and practices specific to management and labour and the Member States. The content of the European collective agreement is, in such a case, transposed, by means of national procedures, in each Member State. The formal rules of implementation at national level thus depend on the national law of each Member State. The European collective agreement has no direct normative effect.

3.1.2 A critical analysis of bargaining within the European social dialogue

The setting of articles 136 – 139 of the EC Treaty seems to strongly deviate from the "usual" situation in the Member States concerning collective employment law. It is said that, in supranational context, legislation supporting collective bargaining has preceded the actual collective bargaining itself. This "reversal of action" seems to suggest that European collective bargaining is radically different to national collective bargaining. This difference could be explained when scrutinising the function of the European social dialogue which is, according to Lo Faro, not so much promoting the European social partners' interests, but "no more than one of providing support for Community regulation and legitimacy". The current institutionalised European Social Dialogue must accordingly be seen as a regulatory technique. This might explain some flaws in the current European system. I have divided these flaws into three categories: flaws relating to the articles 136 – 139 in general, those relating to agreements implemented by national mechanisms and practices and those relating to agreements implemented by a Council decision.

The general remarks relate to (1) the absence of important constitutional rights (freedom of association, right to collective bargaining and the right to strike), (2) the participants of the European social dialogue (who are "management and labour", are they representative and do they have full autonomy) and (3) the lack of direct normative effect of the European agreements reached, which leads to the lack of uniform applicability of the European collective labour agreements.

With regard to implementation of agreements by national mechanisms and practices, it must be concluded that this introduces nothing new. Moreover, it can be argued that this manner of implementation is "weak" and even "inconsequential" as it has little Community relevance. Partly as a consequence of this, there are a number of important flaws attached to this implementation method: (1) there is an unclear binding effect of the agreement reached, (2) there are insufficient rules with regard to the requirements the European social partners have to meet, (3) potential difficulties exist with regard to the implementation of the agreement and (4) difficulties are in place concerning the effects, follow-up and enforcement of the agreement.

Obviously, implementation of agreements by a Council decision is something that did not exist prior to its institutional introduction. Although this method of implementation has Community relevance, there are still disadvantages. Basically, these disadvantages can be divided into (1) limitations concerning the content of the agreement and (2) limitations imposed on the agreement

by the implementation procedure. The content of the agreement must be covered by article 137 of the EC Treaty and is subject to the exception of article 137.5 of the EC Treaty, which limits the European social partners' autonomy. Furthermore, the criteria on representativity, small and medium-sized undertakings, the political general approval and subsidiarity limit the social partners in their collective autonomy as well.

The above explains that the institutionalised European social dialogue seems not the proper forum in which to develop transnational collective bargaining. It simply has too many flaws.

3.2 Bargaining "outside" the European social dialogue

The (European) social partners may opt to conclude collective agreements "outside" articles 138 and 139 of the EC Treaty in order to escape these articles' flaws. This, however, is not helpful: the distinction between concluding agreements "within" or "outside" the scope of these articles seems artificial for organisations that qualify as "labour" and "management" as referred to in said articles. Collective agreements concluded by these organisations simply fall within the scope of these articles, which merely gives them additional rights which they are free to use or not.

If organisations do not meet the above-mentioned qualification "labour" and "management", they can still enter into collective agreements that are subsequently implemented by themselves or by their members in jurisdictions, in accordance with the rules of those jurisdictions. These organisations are, however, not entitled to the additional rights set out in articles 138 and 139 of the EC Treaty. The types of collective agreements referred to in this paragraph consequently have merely national effects as opposed to Community effects and should be regarded as "national" transnational collective labour agreements.[2144] These national agreements are different when compared to transnational collective labour agreements that do have Community effects, the European transnational collective agreements, such as collective agreements reached within the European social dialogue and implemented by a Council decision.

National transnational collective labour agreements are agreements that satisfy the national requirements that collective labour agreements need to satisfy for that country concerned, having a scope of application covering several jurisdictions. This is, however, a practical definition of a national

2144 See besides chapter 6, section 6, also chapter 1, section 2.1.

transnational collective labour agreement, since from a purely legal stance there is no such thing (yet) as a "transnational collective labour agreement". There are no specific rules on subjects like the procedure, the negotiating agents and the binding powers of a transnational collective labour agreement: a transnational collective labour agreement simply has no specific legal status, and certainly no Community status. Its actual (national) status and effects must, in consequence, be determined by national law on a case-by-case scenario, in accordance with the principles of private international law. This may bring about specific (and undesired) difficulties, that are comparable to the flaws European agreements implemented by national mechanisms and practices have. Transnational collective labour agreements concluded "outside" articles 138-139 of the EC Treaty do therefore not form a proper foundation to base transnational collective labour agreements on.

3.3 Conclusion: the existing legal bases are inadequate for proper transnational collective bargaining

The above shows that there are insufficient legal means to base proper transnational collective bargaining on. This analysis is shared by the possible participants of transnational collective bargaining (European and national trade unions, European and national employers' organisations and multinational companies). Among these possible participants there is a shared opinion that, should transnational collective bargaining be promoted, proper rules on transnational collective bargaining will have to be introduced.[2145] Said analysis is also shared by the Commission and the European Economic and Social Committee, as the Commission proposes to introduce European legislation on transnational collective bargaining, a proposal which is supported by the European Economic and Social Committee.

4. Towards a European system on transnational collective bargaining

4.1 How should a European system on transnational collective bargaining be shaped?[2146]

An expert group led by Ales was invited by the Commission to make suggestions for a new system on transnational collective bargaining. This group drafted the report "Transnational Collective Bargaining: Past, Present and Future". It proposed to create joint negotiating bodies within which transnational

2145 Chapter 7, section 5.

2146 Chapter 7.

collective labour agreements can be concluded. The agreements themselves would not have a legally binding effect, but acquire such effect through implementation by managerial decision adopted by all national companies in the relevant sector (or the national company involved in company-level collective bargaining). The system should be set out in a directive providing for an optional framework for transnational collective bargaining.

I have doubts about this proposal. It "copies" many of the flaws of institutionalised collective bargaining into the new system of bargaining in joint negotiating bodies. The joint negotiating bodies are comprised of the same European social partners that are active in the European social dialogue. All the comments forwarded on the position of "management and labour" in collective bargaining within the European social dialogue therefore apply *mutatis mutandis* to the proposed transnational collective bargaining system. Moreover, the facts that (i) the collective agreement concluded within the joint negotiating bodies has to be implemented by managerial decision and (ii) lacks uniform effect as it is binding "according to the national laws or practices", which differ from country to country, are peculiar and at odds with one of the principles that the authors of the Report hold dear: a direct and homogeneous impact of agreements. The reason that these flaws are copied in is, in my view, because the authors of the report wished to stick as close to the European social dialogue as possible. I consider this a mistake. A new system of transnational collective bargaining should not be based on a new form of the European social dialogue but should instead be more comparable to "classical" collective bargaining as is in place in the Member States.

In order to be able to develop a European system that is based on collective bargaining, as is in place in the Member States, national laws should be analysed. In general terms, it is useful to compare national laws when drafting new legislation.[2147] Comparative law can be used as an aid to the legislator and as a means to unify law. It should not only be used by national legislators, but also by the European legislator. Comparing different national law models could lead to the conclusion that one of those models, that which fits best the aim of the European Community, should be used as a basis for European legislation. Such a comparison could also lead to a new model, based on processes that exist in most of the countries, or a model that applies best to all countries. This European model may well be an identification of a "common law" within the different countries involved, which is a more or less virtual law that thus does not actually exist in any one of those countries. Obviously, this European model should take into account Europe's own rules and dynamics.

2147 Chapter 1, section 3.

When taking this into consideration, it is peculiar that the expert group referred to above did not compare national laws when proposing the optional framework for transnational collective bargaining.

In most Member States, three classical rights are of crucial importance in their respective laws on concluding collective agreements: (1) the freedom of association, (2) the right to collective bargaining and (3) the right to strike. For this reason, it would appear logical that transnational collective bargaining could not exist without these rights. In any event, many scholars argue that transnational collective bargaining must be based on these three rights. However, neither collective bargaining within the European social dialogue, nor transnational collective bargaining in the proposed new system touch on these classical rights. Both systems are therefore not comparable to national collective bargaining. This is a weakness: a European system on transnational collective labour agreements should be closer akin to the traditions of the Member States than it is to day, and than proposed by the expert group. That is the only way to tackle the problems surrounding collective bargaining within the European social dialogue, flaws which are also "copied in" to the proposals of the expert group.

4.2 Collective labour law in the Researched Countries and other Member States

The analyses above gives rise to conduct research on the national laws on collective bargaining in the Member States. I especially scrutinised the laws of the Netherlands, Germany, Belgium and Great Britain.[2148] The results of that research were subsequently placed in a wider, European perspective.[2149]

4.2.1 Collective labour law in the Member States

Today, there is no single or even dominant model of European industrial relations, which largely applies to the individual Member States. Each Member State has a more or less unique system on collective bargaining, varying widely in terms of level, coverage, content and nature. Notwithstanding these differences, almost all Member States have a rather detailed legal framework on collective bargaining that contains basic provisions on: (i) the parties that are entitled to conclude collective labour agreements; (ii) the possible levels of collective bargaining; (iii) the hierarchy of different bargaining levels; (iv) the legal coverage of collective labour agreements; and (v) the procedural rules

2148 Chapters 9 through 12.

2149 Chapter 13.

for collective bargaining. In each Member State collective bargaining takes place at more than one of the following levels: (a) national (or inter-sectoral), (b) sectoral and (c) company. It depends on the Member State at hand which level of collective bargaining is dominant.

4.2.2 The collective labour agreement

The definition of a collective labour agreement in the Researched Countries and its different provisions bear great resemblance. This appears to be the same in other Member States. In all Researched Countries there are at least three requirements an agreement must satisfy in order to be regarded a collective labour agreement. First, there must be an agreement, typically a written contract. Second, only specific parties are entitled to conclude a collective labour agreement. On the one hand there should be employers or employers' organisations and on the other trade unions. Third, the collective labour agreement should concern employment conditions. This is normally broadly defined. A fourth requirement is in place in some of the Member States, which means that the collective labour agreement is to be registered.

All Researched Countries distinguish (sometimes for practical purposes only) between obligatory and normative provisions in a collective labour agreement. The obligatory provisions lay down the rights and obligations between the parties concluding the collective labour agreement. The normative provisions can be divided into individual and collective normative provisions. Individual normative provisions create rights and obligations between the contracting parties to an individual employment agreement (the employers and employees). These provisions are the quintessence of collective labour agreements. Collective normative provisions are recognised in the Netherlands, Germany and Belgium. These provisions basically arrange the collective employment relations. Some terms in a British collective labour agreement, however, could be compared with some of the collective normative provisions in the other Researched Countries.

4.2.3 The social partners

Trade unions in Europe are generally independent associations of employees, who have united to represent and defend their interests in the workplace, but also at the general level of the economy and politics. They usually (i) have a centralised structure and a division of work between a network of volunteers and a professional apparatus; (ii) are recognised in the Member States and have a quasi public status; (iii) have a distributive function in the economy (they settle wages) and also have a normative function (they are

actively involved in setting labour regulations); and (iv) represent and mobilise their members. In all Member States trade unions are entitled to enter into collective labour agreements. However, these trade unions are usually subject to a number of requirements in order to do so. Some of these requirements are basically the same in all Researched Countries. A trade union must, in all Researched Countries, be an organisation and must pursue the advancement of employment relations and conditions. In the Netherlands and in Germany the trade union's articles of associations must specifically stipulate the unions' power to enter into collective labour agreements. There are important differences in the Researched Countries when it comes to representativeness of trade unions. The only country that requires *representative* trade unions in order to conclude a collective labour agreement is Belgium. In the Netherlands and Germany there are no strict representativity demands that the trade unions must meet in order to conclude valid collective labour agreements. In Germany mild representativity demands do apply. Representativity plays only a limited role in British collective bargaining, as there are no representativity demands in place to entitle a trade union to conclude a collective labour agreement. Representativity does play a role in (statutory) recognition. This diverse situation can be seen in all Member States. Research established that the diversity of practice in the different Member States is such that there is no single model as to representativeness that could be replicated at European level. In the Researched Countries there are also differences with regard to the independence of trade unions. In Germany and in Great Britain strict independence demands apply to trade unions. In Belgium there are no statutory requirements on the level of independence of trade unions. However, as only a limited number of representative trade unions may enter into collective labour agreements, which are strong and independent unions, the issue of representativity is actually a non-issue. The only deviating country is the Netherlands, a country in which there are no demands on the independence of trade unions and yellow trade unions, in fact, concluded valid collective labour agreements. Viewed from an international perspective, the Dutch situation is out of tune as ILO Convention C98 and Recommendation R169 simply require free and independent employers' and workers' organisations.

Employers' organisations are in many ways the counterparts of trade unions. Broadly spoken, employers' organisations are bodies designed to organise and advance the collective interests that employers have in the labour market and industrial relations. Employers' organisations tend to be of importance for the existence of multi-employer collective bargaining and statutory provisions for extending collective labour agreements. Employers' organisations differ widely in terms of structure, membership basis and tasks across Europe. Basically, employers' organisations in the Researched Countries should satisfy

the same additional requirements as trade unions do in order to be eligible to participate in collective bargaining and to conclude collective labour agreements. However, generally the test whether the employers' organisations satisfy the relevant requirements seems to be applied a bit less strictly when compared to trade unions.

4.2.4 The consequences of a collective labour agreement

Once a collective labour agreement is concluded, it should be established to whom it applies, what its consequences are and how the rights arising from it can be enforced.

4.2.4.1 The contracting parties

In the Netherlands, Germany and Belgium, the contracting parties are bound to each other by the (obligatory provisions of the) collective labour agreement. All parties need by law to oblige these provisions. This is typically the situation in the other continental European countries as well. Things are different in Great Britain and Ireland, as collective labour agreements in these jurisdictions are considered a mere gentleman's agreement, unless specifically stated otherwise in the agreement. As collective labour agreements are, in principle, not binding upon the signatory parties in these countries, there is no remedy by law if one of the parties fails to comply with the collective labour agreement. The ultimate sanction for a breach of the collective labour agreement is industrial action.

4.2.4.2 The members of the contracting associations

In the Netherlands, Germany and Belgium the (individual normative) legal norms of the collective labour agreement should be applied to those employers and employees who both (i) are bound by and (ii) fall within the scope of applicability of said agreement. Employers in said countries are bound by a collective labour agreement if they are (a) member of one of the contracting employers' association or (b) entered into the collective labour agreement themselves. Employees in Germany and the Netherlands are bound by the collective labour agreement if they are member of the contracting trade union; in Belgium all employees of bound employers are automatically bound by the collective labour agreement, regardless of their possible trade union membership. In all Researched Countries, the social partners themselves determine the scope of application of the collective labour agreement in that agreement. The (individual normative) provisions of the collective labour agreement apply directly and with mandatory effect to

the individual employment agreement of the bound employer and the bound employee in the Netherlands, Belgium and Germany. The situation in Great Britain is entirely different. Neither common law nor statutory law awards direct normative effect to collective labour agreements. The terms that are of an individual nature of the collective labour agreement (comparable to individual normative provisions) only apply to the relationship between the employer and the employee if they have been incorporated into the individual employment agreement, regardless of whether both the employer and the employee are bound by the collective labour agreement or not. Variations to the collective labour agreement incorporated into the individual employment agreement in principle automatically vary the terms of employment.

In the Netherlands and in Belgium it is important to distinguish between different sorts of normative provisions of the collective labour agreement, which can be standard, minimum or maximum. In Germany all provisions are, by law, minimum provisions. This "principle of favour" is not unusual when compared to other Member States. In Great Britain, there is no relevant difference between provisions of a minimum, maximum or fixed nature. The employer and employee may freely decide to deviate from a term deriving from a collective labour agreement that is incorporated into the employment agreement.

In the Netherlands, Belgium and Germany the (individual normative) terms of the applicable collective labour agreement become part of the individual employment agreement due to the aforementioned direct normative effect. In Great Britain, this is only the case if the collective labour agreement is incorporated into this individual employment contract. In all Researched Countries, once the collective labour applies, both the employer and the employee must abide by its content or risk being in breach of contract. Should a party breach the contract, the aggrieved party can claim specific performance and/or damages.

4.2.4.3 Members vs. non-members

If the employer is not bound by the collective labour agreement while the employee is, the collective labour agreement does not apply on the basis of statute in the Netherlands, Germany and Belgium. This is also the case in Great Britain, as the collective labour agreement is not legally binding anyhow. If the employer is bound by the collective labour agreement while the employee is not, the collective labour agreement does not apply automatically in Germany, the Netherlands and Great Britain. However, in all three countries it is possible and common to arrange in the individual employment agreement

through a reference clause that a specific collective labour agreement applies to an employee who is not bound. This situation is quite different in Belgium. In Belgium, merely the position of the employer is relevant when determining whether the collective labour agreement applies directly in the relation between the employer and the employee. A collective labour agreement applies to an employment agreement in the situation that the employer is bound, regardless of whether the employee is bound or not. This system of collective labour agreements with *erga omnes* effects is dominant in the EU.

4.2.4.4 The collectivities

In the Netherlands, Germany and Belgium, collective normative provisions play an important role. In these countries there are basically two constructions with regard to collective normative provisions: (i) collective labour agreement may provide for rights and obligations arranging the relation between the employer and its entire personnel (most explicit in Germany) or an employee representative body (the Works Council or even, in Belgium, a union delegation), and (ii) a collective labour agreement may provide for rights and obligations arranging the relation between the employer and the employees vis-à-vis third collective parties, most notably funds. Although British law merely distinguishes between terms of an individual and terms of a collective nature, some terms could be compared with the first mentioned group of collective normative provisions.

4.2.5 Deviation by collective labour agreement

The laws of all Researched Counties contain provisions that can be set aside by a collective labour agreement, as opposed to by "just" an individual employment agreement (provisions of ¾ mandatory law). This system of ¾ mandatory law sits well in a European context, as it is not unusual for directives to stipulate that collective labour agreements may deviate from standard norms. Especially with regard to working time, fixed-time and part-time work it is becoming increasingly usual that derogations from the law are arranged in collective labour agreements.

4.2.6 Term and termination

In all Researched Countries the freedom of contract plays an important role when it comes to term and termination of the collective labour agreement. The contracting parties are free to establish the date on which their collective labour agreement enters into force and whether the legal norms of the collective labour agreement have retro-effect. The signatory parties are also

free to establish the duration of the collective labour agreement, although social partners in the Netherlands may not conclude a collective labour agreement with a duration exceeding 5 years. Termination of a collective labour agreement is easy in Great Britain, as a (non binding) collective labour agreement can be terminated at any time, with or without notice given. In the Netherlands, collective labour agreements can be terminated by notice at the end of their term. Should a collective labour agreement not be terminated by notice, the agreement is normally considered to be (tacitly) renewed after termination of its original term for the same term. In Belgium and Germany a collective labour agreement entered into for a fixed period of time ends, by operation of law, at the end of its term. A collective labour agreement entered into for an indefinite period of time can be terminated by notice.

4.2.7 After-effects

In all Researched Countries the obligatory provisions of a collective labour agreement lose force after the collective labour agreement has expired. The individual normative provisions, however, have after-effects in all these countries once a collective labour agreement applies to the employment agreement (in Great Britain by incorporating the collective labour agreement into the employment agreement). That means that these provisions retain their force after expiry of that collective labour agreement. This is only different if the collective labour agreement specifically stipulates otherwise. The employer and employee are, however, after expiry of the collective labour agreement, entitled to change the content of the individual employment contract should they wish so, observing the rules applicable for such change in the different countries, in fact terminating the collective labour agreement's after-effects. The introduction of a new collective labour agreement also terminates the after-effects of the individual normative provisions in all Researched Countries. The situation is more diverse when it comes to collective normative provisions. In Germany these provisions have after-effects. This is not the case in the Netherlands, Belgium and in Great Britain. Collective normative provisions that also apply individually do have after-effects in Belgium.

4.2.8 The role of alternative dispute resolution in collective bargaining

In all Researched Countries alternative dispute resolution mechanisms play a part in collective labour law, including collective labour agreements. In variable degrees this holds true for all Member States. Basically, three mechanisms are often applied within the EU: conciliation, mediation and arbitration. In some Member States dispute resolution is free and autonomous; while in others

compulsory dispute resolution exists. As a rule, alternative dispute resolution is mostly applied to disputes of interest (as opposed to disputes of law).

4.2.9 Extending collective labour agreements

In the Netherlands, Germany and Belgium a collective labour agreement can be extended as a result whereof it applies to all employers and employees falling within the scope of applicability of that agreement. In Great Britain this possibility does not exist. The extension techniques in the first three countries are rather similar.

First, the collective labour agreement that is to be extended should meet specific demands: it should be a proper collective labour agreement with a clear scope of application. Briefly put, only normative and collective normative provisions of a collective labour agreement can be extended. In Germany and the Netherlands the collective labour agreement should already apply to a majority of employees falling with the scope of applicability of the collective labour agreement in order for it to be extended. The extension should furthermore serve the public interest, or at least not violate it.

Second, procedural demands and safeguards need to be satisfied. This means that there should be a request for extension, which needs to be published. Third parties may subsequently oppose to such request. In the Netherlands a specific institution may and in Germany a specific institution must be involved in the extension-process. The actual decision to extend (parts of) the collective labour agreement, needs to be published.

Third, there are statutory limitations in place on the duration of the binding collective labour agreement. In all three countries there is either no or a limited possibility for retro-effect of the extended collective labour agreement. The extension may not outlast the duration of the actual collective labour agreement.

Once declared binding, the collective labour agreement applies to all employment agreements concluded or to be concluded within the term of the extension decree that fall within the scope of applicability of that binding agreement. The provisions of the extended collective labour agreement have direct normative effect. Unlike the Netherlands, in Germany and Belgium the extended collective labour agreements have after-effects.

Extension of collective labour agreements is not uncommon in the EU. There are basically three different manners to extend collective labour agreements: (i) extension in the narrow sense (*erga omnes*), making a collective agreement binding within its field of application by explicitly binding all those employees and employers which are not members of the parties to the agreement; (ii) enlargement, providing for a collective agreement to apply in sectors or areas where it did not apply yet and where no union and/or employers' association capable of collective bargaining exists; and (iii) functional equivalents, including compulsory membership of the bargaining parties' organisations or legal provisions requiring government contractors to comply with the terms of a relevant collective agreement.

The most frequently used extension method is "extension in the narrow sense". Most of the time, this type of extension requires: (i) a public act or decree, issued by the government authority in charge of labour matters; (ii) a request of one of the social partners to the collective labour agreement or another social partner; and (iii) a minimum requirement for extension, most notably minimum rates for coverage of the relevant agreement prior to extension.

4.3 The reach of the social partners in national laws and EU law[2150]

In Europe, there is a tradition of "autonomy of collective bargaining". This has given social partners in the Member States ample room to determine the content of their collective labour agreements. Collective labour agreements in the Researched Countries should, besides setting out the rights and obligations of the contracting parties, concern employment conditions, which is normally defined broadly. Collective labour agreements may not contravene norms "higher in hierarchy", such as national and international laws and regulations. But there are also Community rules that may limit the social partners in the field of collective employment law.

Collective labour agreements limit competition between the different companies that (are required to) participate. After all, collective labour agreements set minimum and sometimes even maximum standards. Therefore, the content of a collective labour agreement can clash with the Community rules on competition. The European Court of Justice had to decide on the validity of extended collective labour agreements in specific branches, obliging all employers falling within their scope of applicability to participate in a compulsory pension scheme. The companies opposing these collective labour agreements argued that the extension of these agreements violated

2150 Chapter 8.

the Community's rules on freedom of competition. However, the European Court of Justice, referring to the social policy objectives that are pursued by collective labour agreements, ruled that collective labour agreements concluded in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of European competition law.

Collective labour agreements might also violate the highly developed European equal treatment legislation. The EC Treaty directly prohibits discrimination on the ground of pay for male and female workers. The EC Treaty furthermore entitles the Council to take appropriate action to combat discrimination based on racial or ethnic origin, religion or belief, disability, age or sexual orientation. The European Court of Justice has held several stipulations in collective labour agreements to contravene European equality law.

Free movement of goods, persons, capital and services – the market freedoms – may also limit collective labour law.

Free movement of persons encompasses both the freedom of movement of workers and the right of establishment. Employees deriving from one Member State may not be hindered within the territory of another Member State to pick up an activity as an employed person. This prohibition also affects collective labour agreements. The right of establishment blocks protective stipulations prohibiting foreign companies to deploy certain activities and may, given the *Viking* case, even limit the right to strike in specific circumstances.

Free movement of goods has not (yet) clashed with fundamental employment rights, but very well could have. The free movement of goods has clashed with the freedom of expression and freedom of assembly. The European Court of Justice subsequently balanced the rights involved. It is easy to imagine a situation in which collective actions could be at odds with the free movement of goods, for example due to road blocks. This possibility was explicitly taken into account when drafting the Regulation on the functioning of the internal market in relation to the free movement of goods among the Member States, which states that the Regulation may not be interpreted as affecting the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike.

The free movement of capital and, in particular, of services may be on bad terms with collective labour law. Service providers may temporarily pursue their activities in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals. Restrictive

conditions of the host state are not allowed, unless these conditions can be justified by overriding requirements relating to the public interest, most notably on the grounds of protection of the posted worker. If that is the case, the European Court of Justice will verify whether this protection is already granted in the state of establishment and whether the steps that are taken are proportionate. The freedom to provide services may, given the *Laval* case, even limit the right to strike.

Free movement of services involves the danger of social dumping. These two topics – the abolition between Member States of obstacles to the free movement of persons and services and a climate of fair competition and measures guaranteeing respect for the rights of workers – have led to the adoption of the Posted Workers Directive. The potential clash between, on the one hand these market freedoms, and on the other the European social model led to heated discussions in relation to the Service Directive. The Service Directive has been adapted in such manner that all interests are served as much as possible.

5. A proposal for a European system on transnational collective bargaining

5.1 Demarcation of the proposed system of transnational collective bargaining[2151]

Before discussing the proposed Community system on transnational collective bargaining, it should be assessed what the legal basis for such a system could and should be. Articles 94 and 137 of the EC Treaty give bases for Community legislation on transnational collective labour agreements. On these bases, a *directive* on this subject can be issued. Article 308 of the EC Treaty may, however, be used as a more general basis. That article permits the use of regulations. As regulations have important advantages over directives, especially given the direct applicability of regulations, I would be inclined to choose article 308 of the EC Treaty as the most appropriate basis for drafting legislation on transnational collective labour agreements. Moreover, the use of a regulation on the basis of article 308 of the EC Treaty may possibly circumvent the applicability of the exceptions stipulated in article 137.5 of the EC Treaty. Drafting a regulation on transnational collective labour agreements will in my opinion pass the subsidiarity test of article 5 of the EC Treaty, while reverting to horizontal subsidiarity by letting the (European) social partners draft an equivalent of such an act will not work. That means that the

2151 Chapter 14.

Council can, acting unanimously on a proposal from the Commission, and after consulting the European Parliament, issue a regulation.

Collective bargaining, as embedded in the European social dialogue, leading to the implementation of European collective agreements by a Council decision, bears great resemblance to the extension of collective labour agreements as is in place in many Member States. A European "extension mechanism" is thus already in place. That gave reason to focus in the previous chapters on the effects of a normal, *i.e.* non-extended, transnational collective labour agreement under a new collective bargaining system, and not on the extension of such agreements. The proposed system may, however, be applied as a new implementation method, as a means for the (direct) implementation of European collective agreements agreed on in the sectoral European social dialogue. Such a new "implementation system" can be useful, as implementation of European collective labour agreements in accordance with the procedures and practices specific to management and labour and the Member States suffers from flaws, which may be overcome by the proposed system of transnational collective bargaining.

Transnational collective bargaining, as proposed in this thesis, may play a role at company and sectoral level. Transnational collective bargaining at cross-industry level seems insufficiently appropriate. As for the scope of transnational collective bargaining, the agreement should at least apply within the jurisdictions of two Member States, and at a maximum in all Member States.

5.2 The fundamentals of transnational collective bargaining: active protection of classical rights resulting in free and voluntary bargaining[2152]

The above gives an idea on the scope of the proposed transnational collective bargaining system. Let us now turn to the fundamentals of such a system. What was already made clear is that the proposed system will rely on the three classical rights: (1) the freedom of association, (2) the right to collective bargaining and (3) the right to strike. These rights are already protected by international instruments, but, until recently, not always evidently in the European Community.

Many international treaties acknowledge and promote the freedom of association. This freedom includes the right of workers and employers to

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organise themselves free of intervention, as well as the right not being forced to join or to remain in such an association. These treaties did, until recently, not have a formal legal status in the European Community. There was no formal acknowledgement of the freedom of association for the European Community; at least not set out in any of the Community treaties, and the freedom of association is (at least to a certain extent) even excluded from the scope of the EC Treaty given article 137.5. This notwithstanding, the European Court of Justice recognises the (positive and negative) freedom of association and considers it a fundamental right which is protected in the Community legal order.

The right to collective bargaining is difficult to define. In any event it encompasses the freedom for the social partners to enter into negotiations in order to reach a binding agreement on employment topics. A broader interpretation of this concept would include the obligatory and normative effects a collective agreement may have, and possibly even the direct normative effects of the agreement. The mere right to enter into negotiations and to conclude collective labour agreements is recognised in many international instruments. These treaties did, until recently, not have a formal legal status in the European Community. However, articles 138.4 and 139 of the EC Treaty also award these rights to a specific group of European social partners. The freedom of contract seems to protect exactly the same rights to other (European) social partners and employers as well. This part of collective bargaining – a narrow sense of collective bargaining – is therefore protected at a European level. In this narrow sense the social partners also have a right to collective autonomy. Some of the international instruments also arrange for the (normative and obligatory) effects of the collective labour agreement. ILO Recommendation R91 even arranges for the direct normative effects of a collective labour agreement. There are no indications that these parts of the right to collective bargaining – in its broad sense – are recognised on a European level. Collective autonomy is also not fully recognised in this broad sense. On the contrary, since European agreements lack direct normative effect and the European social partners depend on third parties to implement these agreements, their autonomy is less evolved than that of the national social partners in the Member States. The European social partners' autonomy is (at least to a certain extent) limited by law, should they wish to have their agreement implemented by a Council decision.

The right to strike is also recognised in many international instruments. These treaties dit, until recently, not have a formal legal status in the European Community. The right to strike is (at least to a certain extent) explicitly excluded from the scope of the EC Treaty given article 137.5. This notwithstanding,

the European Court of Justice conformed that the right to strike forms an integral part of the general principles of Community law the observance of which the Court ensures.

The three classical rights are, given the above, at least partially recognised at EU level. This recognition has become stronger recently and may even continue to grow stronger in the near future. The EU charter has been given legally binding force. Should the Treaty of Lisbon be ratified and enter into force, the Union shall also accede to the Convention. In consequence, the institutions of the Union must respect the rights written into the Charter and the Convention, including the right on the freedom of association, the right to collective bargaining and the right to strike. The same obligations will be incumbent upon the Member States when they implement the Union's legislation. Unfortunately, a protocol exempts Poland and the United Kingdom from important obligations deriving from the EU Charter.

The above three classical rights should, in the proposed system, be fully and actively recognised in the European Community. A simple *laissez-faire* attitude should not suffice. Besides fully respecting the three classical rights, the transnational collective bargaining process should furthermore be free and voluntary. The social partners should be free to choose whether or not to bargain and whether or not to conclude a collective labour agreement. The social partners should furthermore be free to choose with whom they wish to bargain, although transnational collective labour agreements concluded with clearly representative trade unions have a stronger effect in the proposed system. All social partners should meet specific "mild" representativity demands in order to be entitled to participate in transnational collective bargaining.

5.3 Proposed definition of transnational collective labour agreement[2153]

The above gives a rough outline on what the proposed regulation on transnational collective bargaining may encompass and which fundamentals are deemed crucial. In order to further narrow down the subject at hand, a definition of a transnational collective labour agreement should be given, which includes a reference to the parties whom the agreement may concern. Transnational collective labour agreements should contain five components. First, there should be an agreement, being an act whereby two or more parties reach sufficient consent as to do or omit from doing something that affects their and, in case of organisations, their members', legal relation. Second,

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that agreement should be concluded between, on the one hand, employers or employers' organisations, and, on the other, trade unions. Third, transnational collective labour agreements should be able to deal with individual normative, collective normative and obligatory provisions. The scope of content of transnational collective labour agreements should be broad. The transnational collective labour agreement should furthermore be registered and meet a number of specific formalities. Finally, the agreement should be truly transnational, meaning that the normative provisions of the collective agreement should have an impact in at least two different Member States. Given these components, a definition of a transnational collective labour agreement could read as follows: "a transnational collective labour agreement is an agreement in writing which is registered at the designated authorities, meeting the required minimum formalities and concluded between one or more employees' organisations and one or more employers' organisations or one or more employers, in which individual and collective relations between employers and employees in enterprises or in a sector are set out, having an impact in at least two Member States, and which can deal with the rights and obligations of the contracting parties. These collective relations may also concern the relation between employers and employees vis-à-vis third parties, established for the well-being of the employers and employees."

5.4 The binding power of the transnational collective agreement and the signatory parties[2154]

An important part of developing a system of transnational collective bargaining is establishing the binding power of the transnational collective labour agreement and the requirements that the signatory parties should satisfy in order to be involved in its conclusion. Research of the laws of the Researched Countries shows that these two topics are very much intertwined. The binding power of a collective labour agreement may depend on the requirements the social partners involved must meet (the representativity of the social partners), but also on the coverage rate of a collective labour agreement (the representativity of the collective labour agreement). These two observations give reason to further explore the concept representativity.

5.4.1 Representativity in the key of legitimacy and its consequences

Representativity can be viewed as (i) the demands that the contracting social partners should meet with regard to (a) minimum size (including a minimum number of members), (b) a certain level of power or (c) a specific status in

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order to be qualified to represent the parties to whom the collective labour agreement should apply (representativity of the social partners), or (ii) the demands that the collective labour agreement itself should satisfy on the same topics in order to apply to a large group of individuals (representativity of the collective labour agreement). In other words, representativity can be placed in the key of *recognition of the legitimacy* of social partners to negotiate collective labour agreements, and a collective labour agreement to apply to a large group of individuals. When representativity within this meaning in the Researched Countries is scrutinised, in relation to the binding powers a collective labour agreement has, the following conclusions can be drawn:

- If only employers and employees that are involved with the collective labour agreement – either by signing the collective agreement or by being a member of the contracting organisations, or by agreeing to follow that agreement via a reference clause – are bound by that agreement, there is little need for representative parties to conclude that collective labour agreement.
- The above is different (i) if the collective labour agreement permits deviation from ¾ mandatory law and (ii) for employees who are not bound by a collective labour agreement through membership of a contracting trade union, but are instead bound by it though a reference clause, in case the renewed collective labour agreement is concluded by different parties than the ones that concluded the original collective labour agreement.
- If all employees are directly bound by a collective labour agreement, there should be a justification, such as the demand that the contracting trade unions should be representative.
- If all employers and employees that fall within the scope of application of a collective labour agreement are bound by that agreement, there should be a justification for that, a justification which could include that the agreement should, prior to be extended, already apply to a majority of the employees that fall within the scope of application of that agreement.

5.4.2 What is representativity in collective bargaining / when and why is it relevant?

In the context of collective bargaining two forms of representation should be distinguished. First, there is institutional representativity: an organisation (social partner) is representative if a government recognises or appoints that organisation as a discussion partner or as a party that can act on behalf of third parties. Second, there is sociological representativity: an organisation can

be considered representative if it is a trustworthy spokesperson for a group of individuals whose interests it claims to represent. Institutional and sociological representativity do not rule each other out and can coincide. Both forms of representativity are normally related to *factual* representativity, meaning that an organisation has a sufficient number of members amongst the group of employees whose interests it claims to represent. Regardless of which form of representativity is used, the core of representativity in collective bargaining is that representative organisations are organisations that are recognised in a legal system to act legitimately on behalf of and bind others.

Representativity is of particular importance when organisations represent a larger group than merely their members. This occurs especially with regard to trade unions: they often have to serve the interests of all employees, and not just of their members, as collective labour agreements often apply to all employees of a company or in a specific branch. Member States are far more hesitant to apply collective labour agreements to employers who are not directly bound by the collective labour agreement. Representativity demands in collective bargaining are therefore especially important with regard to trade unions, and much less with regard to employers' organisations.

Representativity of *trade unions* is important because:

- Not every party is entitled to act on behalf of a large group of employees for the purpose of setting employment conditions; many countries awarded this entitlement exclusively to trade unions, which in turn play an important role in the "participatory democracy". Trade unions can better fulfil this task once they are representative.
- Representative trade unions are best able to arrange optimum employment conditions for the employees.
- Trade unions that have a sufficient number of members amongst the relevant group of employees (representative trade unions) can benefit from these members' knowledge, experience and manpower necessary to conduct proper collective bargaining.
- Trade unions with a significant number of members (representative trade unions) have a steady flow of income due to the membership contributions, which ensures their independence.

Factual representativity of the trade union is also relevant. However, factual representativity alone does not suffice in collective bargaining in order for trade unions to be trustworthy spokespersons for the employees whose interests they claim to represent. Other requirements are of importance as well, such as:

- being independent;
- surpassing company level;
- focussing on a specific area of expertise, a specific sector;
- having an efficient and proper organisation in which members have an influence on the decision-making process;
- possessing real powers;
- having a strong past performance; and
- having a strong status.

The above focuses on the position of the trade unions rather than on the collective labour agreement itself. The coverage of the collective labour agreement is often taken into account in Member States when it concerns the extension of that agreement: a collective labour agreement that is to be extended must sometimes have a minimum coverage rate, possibly exceeding 50% of the employees in the relevant sector. This minimum coverage is seen as a reason, or justification, to apply the agreement to a greater group than the original group. The reason for this is that a majority can model the employment conditions of a minority (a "democratic" principle) and that the content of the collective labour agreement is apparently reasonable as it applies to a majority. These arguments, however, should be reticently applied. After all, it is not always reasonable that a majority binds a minority.

5.5 Binding powers of the proposed transnational collective labour agreement[2155]

Collective labour agreements can have two types of binding power: they can be binding by law or in honour only. Because most Member States favour a system in which collective labour agreements are binding by law, and there are no fundamental objections against such system, a system on transnational collective bargaining providing for legally binding agreements seems logical. This is especially the case as legally binding transnational collective labour agreements can better attain important goals such as (i) to arrange in a uniform fashion the employment conditions between the employers and employees to which the collective labour agreement applies and (ii) to secure peace and tranquillity within the company or sector to which the collective labour agreement applies.

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5.5.1 The parties to the collective labour agreement

Given the above-mentioned choice, it is logical that the contracting parties are, by law, obliged to abide by the obligatory provisions of the collective labour agreement. The signatory parties are responsible by law for the proper execution of the collective labour agreement. Should they fail to fulfil this obligation, their counterparties should be entitled to start proceedings and claim specific performance, payment of damages or even dissolution of the collective labour agreement. This should only be different if the contracting parties explicitly stipulate otherwise. In the proposed system on transnational collective bargaining the contracting parties should observe the implied principle of good faith: they need by law to take adequate measures to ensure that their members abide by the collective labour agreement; they do not have to guarantee this with regard to the individual employers and employees. The contracting association is, however, liable for the performance of the collective labour agreement of its members, should these members also be organisations, and these members are likewise responsible for the proper execution on their part of the transnational collective labour agreement, if any. I would not choose for the new system to incorporate an implied peace obligation at this moment.

5.5.2 The employers and employees

Many Member States have introduced a system that I call institutional: a system which has, as a consequence, that the collective labour agreement applies to all individuals that operate within the agreement's scope of applicability, regardless of whether or not they are bound to the agreement by contract. Other Member States have chosen for a system that I call contractual: a system which has, as a consequence, that collective labour agreements only apply to individuals that are bound by that agreement by contract. Choosing for either an institutional or a contractual system has at least three major consequences:

1. In the contractual system individualism and voluntarism prevail over collectivism and non-voluntarism (the individual freely chooses the employment conditions) while this is the other way around in the institutional system (the individual can be confronted with employment conditions which it has to accept as the signatory parties collectivity agreed on these conditions). Collectivism and non-voluntarism should be approached carefully: a number of Member States fiercely disputed extension of collective labour agreements to unbound employers and employees.

Extension of collective labour agreements should be applied reticently and requires strong justification.

2. The institutional system requires strong social partners or a high coverage rate of the collective labour agreement while the contractual system does not. These strong (representative) social partners respectively this high coverage rate justify the *erga omnes* effect of the collective labour agreement in an institutional system. The strong social partners should meet clear and unambiguous rules, that must be drafted in advance and apply generally, if an institutional system such as the one that is in place in Belgium is chosen. In a contractual system, collective labour agreements can also be applied to companies or sectors if they are concluded by weaker social partners, or in situations in which there is a less significant coverage ratio, since only those parties that chose to are covered by the collective labour agreement. The social partners must also meet clear and unambiguous rules, which can be tested on a case-by-case scenario and can therefore be more lenient.

3. The institutional system is much more inclusive than the contractual system. In its pure form, it includes all employees and employers that fall within the scope of applicability of the collective labour agreement. This has advantages. The first advantage is of a fundamental nature: most employers wish to treat their employees equally, a goal which is better attained if the agreement applies to all employees. The second advantage is of a practical nature: from an EU law perspective it is difficult to differentiate between employees who are a contracting trade union's member and those who are not given the Privacy Directive.

Taking into consideration these three consequences the following observations can be made:

- Extension of collective labour agreements should be applied reticently and requires strong justification;
- The institutional system requires strong social partners or a high coverage rate of the collective labour agreement, while the contractual system does not. The aforementioned strong social partners should, in principle, meet clear and unambiguous rules, that, in an institutional system as is in place in Belgium, must be drafted in advance and apply generally (as opposed to in a specific situation, in relation to a specific collective labour agreement);

- Extension of collective labour agreements to all employees has important advantages as all employees are treated equally and potential difficulties on privacy issues can easily be tackled.

While the first two observations would favour a contractual system, the third observation points at an institutional system. This is not necessarily troublesome. After all, a system does not have to be purely contractual or purely institutional.

5.5.2.1 The position of the employers

The institutional system does not apply to employers in the Researched Countries with regard to normal, non-extended collective labour agreements. Therefore, it seems logical to follow the contractual system with respect to employers.

5.5.2.2 The position of the employees

Things are different when it comes to the position of the employees. In most Member States a collective labour agreement applies to *all* employees of the bound employer (who fall within the scope of application of the collective labour agreement). Such general binding effect has important advantages, as all employees are treated equally and no problems occur with regard to privacy issues. However, such a system requires justification, as employees can be bound by terms that were not of their choosing. The best method of justification would, in my opinion, be the principle of favour. This allows departure from the terms of the collective labour agreement in the individual employment contract in favour of the employee (for difficulties concerning this principle of favour in relation to after-effects I refer to section 5.7.3). This principle of favour is also commonly used in Member States. However, all national laws that apply the principle of favour have exceptions to this rule. This will also be the case in the proposed system for transnational collective labour agreements. These exceptions require justification, which can among others, be found in mild representativity demands on the side of the trade unions. If the contracting parties wish to fully depart from the principle of favour, for example because times of economic distress warrant a cut back in wages, there must be sufficient justification to apply the collective labour agreement to all employees. If such justification is lacking, the contractual system should be taken as a starting point. Only if a sufficient level of justification is in place, a collective labour agreement (also) containing maximum or standard provisions may apply to all employees working for the bound employer. This

leads to the following system with regard to the position of the employees of the bound employer:

1. A transnational collective labour agreement that merely contains minimum provisions automatically applies to and has mandatory effects on all employees of the bound employer who fall within the scope of applicability of that agreement. By way of exception, however, the transnational collective labour agreement may (i) allow the employer and employee to deviate from ¾ mandatory law if either permitted at European or relevant national level, (ii) oblige each employee to pay a reasonable compensation to the contracting trade union(s) and (iii) provide for an opening clause that can be filled in by social partners at national level.

2. A transnational collective labour agreement that (also) contains standard and/or maximum provisions only applies to and has mandatory effects on bound employees who fall within the scope of applicability of that agreement. It, however, also applies to and has mandatory effects on employees who are not bound by it but do fall within the scope of applicability of that agreement if:
   a. the contracting trade union(s) has (have) sufficient members amongst (i) all employees (the bargaining group) and (ii) each individual group of employees (the bargaining units) to which the transnational collective labour agreement applies; or
   b. the contracting trade union is or trade unions are recognised by the employees of each relevant bargaining unit; or
   c. the individual employee accepts the collective labour agreement; or
   d. it already applies to an important majority of the employees in the relevant bargaining group, and to a sufficient number of employees in each individual bargaining unit.

5.5.3 Third parties

With regard to collective normative provisions, there are two important constructions. First, these provisions may provide for rights and obligation that arrange the relation between the employer and its entire personnel or an employee representative body. The employer who is bound by the collective labour agreement should apply these collective normative provisions. There is no reason to oppose to a system that allows the contracting parties to a transnational collective labour agreement to give *additional* rights to the entire personnel or to an employee representative body. The principle of favour must be observed. If this is not the case (while obviously the content of the collective normative provisions does not violate any laws) the limitation of rights should

be justified. This justification should be found in representativity, in which case the same criteria apply as are in place for collective labour agreements that depart from the principle of favour with regard to individual normative provisions. Another matter is that the contracting parties should be allowed to discontinue the additional rights granted to the entire personnel or to an employee representative body in order to prevent a static system. Second, the transnational collective labour agreement may provide for rights and obligations that arrange the relation between the employer and the employees vis-à-vis third parties. If the transnational collective labour agreement arranges for payment to these third parties by the employer, while the employees can enjoy the benefits, there are no real arguments against this system. This would be different if the employees were obliged to pay a contribution to the third parties. In such a case, the employee is confronted with obligations, which should be justified in the same manner (representativity) as set out above.

As the collective labour agreement is intended to bind by law, the collective normative provisions apply directly and with mandatory effect to the parties concerned.

5.6 The signatory parties

5.6.1 The employers

The position of employers in transnational collective bargaining is not overly complicated: as long as they are truly employers based on the rules of the Member State in which they are situated, they should be deemed capable of participating in the conclusion of transnational collective labour agreements applying to their own organisation. It seems practical for groups of companies to entitle the controlling undertaking to conclude the transnational collective labour agreement, an agreement which should subsequently apply to all undertakings within that group.

5.6.2 Organisational demands for organisations

Organisations that participate in transnational collective bargaining should satisfy the following organisational requirements:

- Both organisations that are structured nationally and those that are structured internationally should be permitted to participate in transnational bargaining. National organisations need to satisfy the national demands as applicable in their jurisdiction in order to qualify as a social partner that is entitled to negotiate collective agreements. The same ap-

plies to national members of participating transnational organisations. Participating transnational organisations that are truly international, *i.e.* that are not build up from national members, should not be required to meet national demands, but should satisfy all of the requirements stated below.
- The signatory organisations should have coverage in all jurisdictions in which the agreement applies.
- Organisations must make sufficiently clear whose interests they claim to represent. National organisations need to satisfy the national requirements in this respect. All organisations must place their members in a position that they can materially influence the decision-making process of their organisation.
- Organisations should not necessarily have legal personality.

5.6.3 Mild representativity demands applicable to labour

The proposed system requires mild representativity demands on the side of labour. Employees' organisations involved in transnational collective bargaining should, *as a whole*, meet the following representativity demands at all times:

- they must be fully independent from the other side of industry, management, and should surpass company level;
- they should possess real powers towards management; and
- they should only be competent to conclude collective labour agreements in the sector of their expertise.

5.7 Important technicalities of the proposed transnational collective bargaining[2156]

5.7.1 Applicable law

Transnational collective labour agreements cannot, contrary to national collective labour agreements, be embedded in a uniform system of law as a European civil code is lacking. This means that private international law must play a role, establishing the law applicable to the different terms (obligatory, individual normative and collective normative) of the transnational collective labour agreement. This applicable law is important for the enforcement of the transnational collective labour agreement too. This transnational

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agreement is enforced as if it were a national collective labour agreement. Should, however, a national system have insufficient means for the proper enforcement of the terms of the transnational collective labour agreement, or should these national means be insufficiently clear and legally certain, the Member States concerned are obliged to introduce minimum means for effective enforcement.

5.7.1.1 Obligatory provisions

The contracting parties are obliged to make an explicit choice on the law applicable to the obligatory provisions of the transnational collective labour agreement. The chosen law must be of one of the Member States in which the transnational collective labour agreement applies. In the proposed European system on transnational collective bargaining, the party that is in breach of an obligatory provision of the transnational collective labour agreement is in principle liable for the losses resulting from such a breach towards its counterparty or counterparties. A potential claim on breach of such obligatory provisions needs to be assessed applying the chosen national law, which has to fill in procedural and material lacunas of the European system. The applicable national law should, in brief, provide the tools for enforcement of the obligatory provisions of the transnational collective labour agreement. Should, in a Member State in which jurisdiction the transnational collective labour agreement applies, other techniques be in place to enforce obligatory provisions of a national collective labour agreement, these techniques should equally be applied to the transnational collective labour agreement.

5.7.1.2 Normative provisions

The individual normative provisions of the transnational collective labour agreement in the current proposal become part of the individual employment agreement as they have direct normative effect. As a consequence, these provisions (as automatically incorporated in the individual employment agreement) need to be assessed on the basis of the law that applies to that employment agreement. This means that the individual employer and employee should turn to the same enforcement tools as would apply were these normative provisions incorporated in the individual employment agreement on the basis of an applicable national collective labour agreement: all national remedies following a breach of employment contract at the disposal of the employer and employee apply. It also means that all other parties that have, on the basis of national law, a right to enforce normative provisions of applicable national collective labour agreements should also have the same

rights to enforce individual normative provisions of applicable transnational collective labour agreements.

5.7.1.3 Collective normative provisions

There are two important constructions when it concerns collective normative provisions. First, collective normative provisions may provide for rights and obligations that arrange the relation between the employer and (i) its employee representative body or (ii) its "entire personnel". National legislation may oblige the employer to establish an employee representative body. That national law subsequently applies to the relation between the employer and the employee representative body. If the same employer is active in several countries, and it is obliged to establish employee representative bodies in more than one country because of its branch offices in the several countries, the law applicable to the collective normative provisions will vary per branch office. The law that applies between the employer active in one country and its entire personnel runs parallel, as it is the law of the country in which the employer is resident and active (the "country of residence"). If the employer is active in several countries and has branch offices situated in these countries, the law of the country in which the branch office is situated should apply to the relation between that branch office and the employees working for that branch office. The party that is to enforce these collective normative provisions is the employee representative body. That body is either the body to which these rights are directed, or the proper institution to defend the collective interests of the employees working in the company (or as the case may be: branch office) for which the body is established. The employee representative body should be entitled to enforce the collective normative provisions with all means that are available to it, on the basis of the applicable national law, as if these were provisions of the transnational collective labour agreement, collective normative provisions of a national collective labour agreement. In the event that the employee representative body is not established, the individual employees themselves should be entitled to call on these collective normative provisions, if they are ultimately addressed by these provisions. These employees should also be entitled to enforce these provisions with all the means attributed to them on the basis of national law. Furthermore, the contracting trade unions should be empowered to enforce the collective normative provisions as against the individual employer (or as the case may be: branch office). Should the aforementioned three enforcement techniques not be available, or be insufficiently clear and legally certain, the Member States concerned should again be obliged, on the basis of the proposed system, to introduce minimum rights for such enforcement of collective normative provisions. Finally, if national law provides for other (national) enforcement

methods following a breach of the collective normative provisions, these methods may also be applied *mutatis mutandis* to transnational collective labour agreements in force in that jurisdiction.

Second, the transnational collective labour agreement may provide for rights and obligations that arrange the relation between the employer and the employees vis-à-vis third parties. With regard to applicable law, the same line of arguing as above is applied. Should (i) the employer be active in one country, the law of that country applies to the relation between the third collective entity on the one hand and the employer and its employees on the other. Should (ii) the employer be active in several countries and should it have branch offices situated in these countries, the law of the country in which the branch office is situated should apply to the relation between the third collective entity on the one hand and the branch office and the employees working in that branch office on the other. Should (iii) the employer be situated in one country, while it employs employees in different countries, without having branch offices in these different countries, the relation between the third collective entity on the one hand and the employer and its employees on the other should be governed by the law of the country in which the employer is factually situated and primarily active (the country of residence). The enforcement of these types of collective normative provisions is rather complicated. For that reason each third collective entity is obliged to establish a national representative in each Member State in which the transnational collective labour agreement concerned applies. These national representatives are entitled to directly demand performance on the basis of the collective normative provisions of the transnational collective labour agreement from the employer or the employee in the country of residence of the employer. Likewise, the employee or the employer is entitled to demand performance from the third collective party through this party's national representative in the country of residence of the employer by whom he is employed. Furthermore, the signatory parties to the transnational collective labour agreement are entitled to demand specific performance of these collective normative provisions from the parties bound by the collective normative provisions of the transnational collective labour agreement (the employers and employees) as against the third collective party, as well as performance from the third collective party as against these employers or employees entitled to such performance. Finally, if national law provides for other (national) enforcement methods following a breach of the collective normative provisions, these methods may also be applied *mutatis mutandis* to transnational collective labour agreements in force in that jurisdiction.

5.7.2 Term and termination

When determining term and termination of the transnational collective labour agreement, the freedom of contract and the autonomy of the social partners are the leading principles. Consequently, the contracting parties are free to establish the date on which their collective labour agreement enters into force and to attribute retro-effect to the transnational collective labour agreement. The signatory parties are furthermore entitled to establish the duration of the transnational collective labour agreement. This includes the choice for either an agreement for a definite or an indefinite period of time. A transnational collective labour agreement entered into for an indefinite period of time can be terminated by notice by each party, observing the applicable notice period. For clarity, notice should be served in writing. A transnational collective labour agreement concluded for a fixed period of time terminates by operation of law and can not be terminated prematurely, unless specifically stipulated otherwise in the agreement. The signatory parties can also arrange that the transnational collective labour agreement entered into for a fixed period of time is automatically tacitly renewed, if they explicitly stipulate this in the agreement. In that situation the agreement does not lapse at the end of the term, unless terminated by one of the parties at such term's end. Besides termination by giving notice, the contracting parties are also able to terminate that agreement by other means if and in as far as permitted by the law governing the transnational collective labour agreement.

5.7.3 After-effects

The obligatory provisions of the transnational collective labour agreement lose force upon expiry of that agreement. This is different with regard to individual normative provisions. These provisions have after-effects, unless specifically stipulated otherwise in the agreement. These after-effects obviously terminate once the employment conditions acquired by the employee due to these after-effects are adapted, in accordance with the law that applies to the individual employment agreement, but also once a subsequent minimum transnational collective labour agreement applies that (i) is concluded with all employees' organisations that also concluded the previous transnational collective labour agreement, (ii) explicitly states valid reasons justifying the discontinuation of the after-effects of specific individual normative provisions, while (iii) this discontinuation may not relate to base salary. A similar system is suggested for collective normative provisions.

5.7.4 Dispute resolution

The social partners are free to decide whether or not to enter into alternative dispute resolution in case of a dispute. Easily accessible alternative dispute resolution should be made possible. Every Member State should appoint a specific body to this task.

5.7.5 Reach of the social partners

The social partners' are free to decide what they wish to arrange in the transnational collective labour agreement, provided that they operate within the limits of what constitutes a transnational collective labour agreement. Obviously, they must also abide by the hierarchy of legal norms. Transnational collective labour agreements may not contravene European and other applicable international law. They should furthermore respect the national law of the Member State in which they apply. They may vary from national ¾ mandatory law, provided that they satisfy the requirements that are in place in the countries in which they apply.

Transnational collective labour agreements are ranked higher in the hierarchy than national collective labour agreements. This is in line with the general rule that international (European) law supersedes national law and with a goal of transnational collective labour agreements (the creation of a level of uniformity in the Member States). National collective labour agreements can, however, vary from transnational collective labour agreements. When it concerns a minimum transnational collective labour agreement, that agreement allows variation at national level in favour of the employee. When it concerns transnational collective labour agreements that also contain maximum and/or standard provisions, national collective labour agreements cannot introduce more favourable provisions (unless permitted through an opening clause in the transnational collective labour agreement).

6. Final remarks

I realise that the proposed system does not cover all aspects and details to make it a "ready made" proposal for a regulation on transnational collective labour agreements. Still, it is detailed enough to point to a direction that transnational collective labour agreements could – and perhaps should – go. It also provides for an alternative for the system on transnational collective bargaining forwarded by the expert group led by Ales.

The proposal under consideration has sufficient reference points with industrial relations systems of multiple Member States. They should be able to recognise at least a part of their own national bargaining system in this proposal. This may lead to an easier acceptance. Also the voluntary nature of bargaining within the proposed system – nobody is obliged to enter into collective bargaining – may help Member States to accept this system.

The above notwithstanding, I realise that it will be far from easy to convince every Member State to embrace the described European system on transnational collective bargaining in the current, or even in an adapted form. The mere fact that it is based on the three classical rights may give some Member States cold feet, as also can be witnessed when the proposed implementation at European level of fundamental rights is concerned. Besides the recognition of the classical rights, also the legally binding force, the relation to national collective bargaining and the suggested representativity demands for the social partners involved in transnational collective bargaining to meet may turn out to be insurmountable obstacles.

And even if the regulation on transnational collective bargaining were to be accepted and implemented, in the proposed or amended form, we are still miles away from a more or less vivid climate of proper transnational bargaining. Employers' organisations seem to be not overly keen on transnational collective bargaining (and at least some of them are likely to reject this proposal), practical obstacles have to be overcome and national laws may prove difficult when trying to reach a transnational collective labour agreement that is effective and embraced in several jurisdictions. The first transnational collective labour agreements are likely to arrange only fairly "easy" topics and keep appropriate distance from "hard core" employment conditions that are normally arranged nationally. It will, without doubt, take years before transnational collective bargaining may truly develop and reach maturity.

Still, giving the potential participants a legal framework will at least increase the chances for transnational collective bargaining to develop, bringing about its potential advantages in due time. The possibility of bargaining beyond borders, on topics that truly matter, will, in my view, improve over years, not only because the social partners may get acquainted with the new tool, but also because European legislation is likely to bring the laws of the different Member States closer together, making it easier for a transnational collective labour agreement to arrange matters in several jurisdictions at once. Transnational collective bargaining could furthermore be supported by other European legislation, for example by permitting transnational collective

labour agreements to deviate from certain provisions set out in such European legislation (¾ mandatory law). This may be especially promising in cross-border regions, where it can be imagined that transnational collective labour agreements can arrange subjects such as applicable law, competent courts and perhaps even applicable social security regulations, provided of course, that the relevant European legislation allows such arrangements. This could improve workers' mobility, enhance the economy and protect employees.

All in all, a proper system on transnational collective bargaining may help bring Europe further into the future, at first opening new paths for willing and perhaps adventurous parties, and in time maybe providing a proper and valuable tool for many multinational companies, employers' and employees' organisations. Transnational collective bargaining can help to improve social conditions on the one hand, while furthering economic progress on the other. And that is what the EU is all about.

ANNEX I: BIBLIOGRAPHY

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