COLLECTIVE BARGAINING IN EUROPE

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PRESENTATION

For quite some time now, employers' and trade union organisations from each country in the European Union have been looking to the Member States to gain more knowledge of their legal labour systems. There is no doubt that in these systems, collective bargaining plays an important role from many points of view. However, information about them is, most of the time, scarce, incomplete or insufficient. Often references are made to comparative systems without this being accompanied by the direct and express knowledge of the institutions being analysed. On its part, the European Commission is reflecting on the possibilities of a Community standard on collective bargaining that might contribute to the difficult birth of collective agreements on the European level. This is why the National Advisory Committee on Collective Agreements, in its goal of having at its disposal this information, analysis and study of collective bargaining of a general nature, saw it fit to sponsor a collective work on collective bargaining in Europe that hitherto did not exist.

The reason for such a comprehensive goal and interest is two-pronged. First, there are virtually insurmountable differences between the labour laws and agreement practices of each Member State. This is the case of the *erga omnes* applicability that exists in some systems like in Spain and Finland, versus the relative applicability of the agreement in other States. There are also variations with respect to the registration of agreements, as well as the authority to bargain collectively. Second, there are difficulties on the Community level, as until 1992 the national representative professional organisations, particularly employers' organisations, successfully opposed collective bargaining on the European level. When the Community Charter on Fundamental Rights was passed in 1989 by the majority of the Member States and Commissioner Vasso Papandreou began presenting Directive drafts on diverse issues related to safety and health in the workplace, the employers' representatives relaxed their resistance to

bargaining, and the agreement on social policy was reached which was attached as an annex to the Maastricht Treaty and after that to the Treaty of Amsterdam itself. At present, there are still problems with harmonisation on the national level, even though a series of European agreements have been concluded, subsequently reinforced by Directives that pave the way in this direction.

Knowledge of the legislative situation and practice of collective bargaining in the Member States, at least the essential ones, is of transcendental importance for two reasons. The first stems from the accelerated process of continental integration of economic sectors, which obliges us to know how working and employment conditions are regulated in the countries that comprise the European Common Market. It is evident to all that when a company is looking to set up offices and invest in a certain country, it must know what its system of industrial relations is like and particularly, the procedure, nature and effects of collective bargaining there. By the same token, when a trade union wishes to coordinate an activity referring, for instance, to a European works council, the closure of a company or staff downsizing, it must also consider the facts on this subject. The second reason is that the process of convergence on the European level requires a previous knowledge of the similarities and differences between the various labour relations systems, especially an element as important as collective bargaining.

On its part, Court of Justice case law (Albani case and others) is reaching decisions that challenge the validity of certain clauses of national collective agreements insofar as they could infringe upon competition regulations. Of particular interest is the case of Sweden, where there have been high-profile cases that are examined in the corresponding chapter of this book.

The structure of collective bargaining also differs considerably from one country to the next. Although most of these structures gives preference to the sectoral and national level, there has been a pronounced shift in recent years toward the company level. Despite the fact that in all the Member States the usual bargaining parties are the trade unions and employers' associations or the employers themselves, a clear evolution can also be seen in some countries geared toward permitting an "opening" for bargaining with works committees and other more specific representative subjects. In some systems, notably in Belgium, there are subjects or organisations where bargaining is conducted institutionally, such as the Councils or the Chambers. The content of collective bargaining also varies from one country to another, although there are coincidences on basic matters. In some

countries, the legislation offers an opening for certain matters in favour of flexibility, but only against collective agreements. The limited applicability of most agreements is compensated by the extension mechanism of *erga omnes*, although the requirements and procedures for this are different in each country, without an *a priori* extension of certain agreements being possible in certain cases. The challenging of agreements abides by procedures and formulas which, at times, only the social partners are permitted, according to special legal rules and before specialised courts. There are also extrajudicial procedures to settle disputes arising from the application and interpretation of agreements, but these solutions vary in each country.

The considerations that have just been formulated highlight the importance that should be given to the study made in this book. It has been drawn up by an internationally trained team of renowned experts from the different Member States, who have developed parallel analyses that allow comparisons to be made among them. Their efforts have been coordinated by Professor Ojeda Avilés, who is himself one of the most qualified and recognised specialists in comparative industrial systems. Together, these professionals have made it possible for us to have today this exhaustive inventory of analysed issues, accompanied by relevant contributions that shed a good deal of light on each one of the problems that collective bargaining currently faces.

We have also seized the opportunity of this comparative analysis of systems to pay special attention to European or inter-State collective bargaining. It might be said that this is just international collective bargaining, as European standards on the matter are practically non-existent. However, we have found a series of institutions that facilitate bargaining activity, so that social dialogue in the institutional sense — as seen in Val Duchesse and the joint sectoral committees for several years now — has served to bring the European partners closer together and achieve important structures, despite modest objectives. The research team from the European Trade Union Institute has first-hand information, going out of their way to identify actors, attitudes and perspectives. The social partners' participation in the regulatory process of the European Union has also opened up a series of channels through which collective bargaining has entered. Thus, the two types of agreements that have emerged in accordance with the participative pattern are studied; that is, those agreements reinforced via a Council decision and voluntary agreements, among which interesting comparisons have been made.

The applicability of European collective instruments deserves special treatment, a mission that has been undertaken by the Coordi-

nator of the work, as a kind of complement to what comes before. From the study of the various kinds of European agreements, surprising conclusions can be drawn, such as that agreements reinforced by a Council decision are perhaps not the strongest or the most authentic, or that there are different methods of internal application by which what was agreed on the European level in a national agreement or agreements does not necessarily have to be incorporated.

The in-depth, specialized study on European works councils, carried out by one of the experts best qualified to undertake this assignment, allows us to deduce to what extent agreements are possible, theoretically and practically, in said councils. From surveys conducted in recent years in multinational companies, it is known that European works councils have had certain unexpected positive effects; in particular, improved coordination between the parent company and its subsidiaries and their contribution to the peaceful resolution of crises and company closures. These legal bases and their various aspects are rigorously examined, resulting in the first theoretical foundation for these council agreements without failing to consider agreements establishing works councils.

The content of the matters dealt with in the various reports and the expertise of the specialists who have prepared them makes this work almost one of a kind in the field of comparative studies, probably the first to integrate such a broad, extensive and ambitious content and scope.

Thus it was necessary to have, especially in Spain, a study on comparative collective bargaining, as the existing publications on the subject were in very short supply and not very relevant. Before this book was published, we were forced to resort to the volume compiled by the ILO on collective bargaining in industrialised countries with market economies, whose content was not the same and was also more sociological than legal. This is, therefore, a unique contribution to the study of collective bargaining designed to flesh out, now with special focus and breadth, the current panorama, also enriched by the recent publication of "The Actors of Collective Bargaining", edited by Roger Blanplain (*Bulletin of Comparative Labour Relations*, Kluwer), which contains contributions from the participating countries in the XVII World Congress of Labour Law and Social Security held in Montevideo in 2003; as well as the work "La dimensión europea de la autonomía colectiva: la negociación colectiva comunitaria" (or, "The European dimension of collective autonomy: Community collective negotiation), coordinated by Professor Baylos Grau and published by Editorial Bomarzo, to mention two that appeared in 2004.

This study is, therefore, a unique report that gives Spain and other countries access to an updated legal analysis of the treatment of collective bargaining in Europe, to facilitate the knowledge and consultation of its wide spectrum of readers who, as with most of the studies supported by the Advisory Committee, are many. In this context, the Commission itself already devoted attention to some aspects tied to this work in the XII and XV Seminars on Collective Bargaining, held in 2000 and 2002, with contributions from Professors Timo Kauppinen, Alessandro Garilli and Manfred Weiss.

Last but not least, we would like to thank the authors of this study for their interest and personal predisposition to take on the reports, the coordination of which Professor Ojeda has tackled with his usual dedication, rigor and effectiveness. Our thanks also go to the Ministry of Labour and Social Affairs and its Subdirectorate of Publications, without whom this work would not have been possible. And finally, the National Advisory Committee on Collective Bargaining, which has also devoted their full energies to this project. A project that has been, on its part, extremely laborious due to the need and advisability of translating the reports written by the authors in German, and especially in English, into Spanish.

Madrid, March 2004.

JUAN GARCÍA BLASCO
President of the National Advisory Committee on Collective Bargaining

INTRODUCTION

This report on collective bargaining in Europe is divided into two parts or sections. In the first, specialists from the most relevant countries analyse the distinguishing features of collective bargaining in their respective countries, arranged according to a series of common sections to highlight the similarities and differences between systems. Although it has been very difficult to gather the opinions of experts from each country, we have nonetheless been able to obtain the opinions of the most qualified experts in the key countries, these being the ones that, either because of their proximity to Spain (Portugal, France, Italy) their importance in themselves (Germany, Holland, Belgium), or the value of their paradigm (Sweden, Finland), we have deemed it appropriate to include in any case.

In the second part, other experts study the core issues of strictly European bargaining, from the phenomenology of these agreements in such to their legal application or social concertation as well as European works council agreements. In these cases we have not tried to achieve a uniform treatment, as each subject has its specific characteristics, so the authors were able to focus their subjects as they best saw fit.

As far as we know, this is the first attempt to ascertain the situation of collective bargaining in Europe, following the publication a few years back by the ILO of an interesting volume on collective bargaining in developed countries. This book included both European as well as other non-European ones, but without the exhaustive treatment of European countries offered in this work and without contemplating collective bargaining on the EU level; the latter issue actually

being a whole set of issues, rapidly evolving at that, which surely justifies the publication of this work. For all these reasons, we hope that this study will be useful, responding to the diverse needs both of the social actors as well as experts on the subject at universities and specialised institutes.

Seville, March 2004.

ANTONIO OJEDA AVILÉS

Part I

COLLECTIVE BARGAINING IN COUNTRIES OF EUROPEAN UNION

Chapter 1

COLLECTIVE BARGAINING IN GERMANY [*]

Ulrich Zachert, Hamburg

1. PRINCIPLES, MEANING AND STRUCTURE OF COLLECTIVE BARGAINING

1.1. Principles of collective bargaining

1.1.1. Constitutional framework

The central principles of collective autonomy — that is, the right to arrange working and economic conditions via collective bargaining, can be found in the Constitution of the German Federal Republic of 23 May 1949. Article 9.3 of the Basic Law (GG) guarantees all persons and professions the right to form associations to safeguard and improve their economic and working conditions.

At no point does Article 9.3 GG refer to collective bargaining. However, case law and the general opinion of the doctrine consider that *freedom of association* also implies that associations have the right to enter into collective agreements under their own responsibility or, in other words, *collective autonomy.*

Some recent judicial pronouncements contemplate certain formulations, by which the *Constitutional Court* makes note of the meaning and function of collective autonomy. On one hand, with respect to the protective function of the collective agreement, the procedure for a fair, efficient balancing of interests between the parties is ensured:

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[*] The structure of this work follows, as far as possible, the writings of Professor Antonio Ojeda Avilés, dated 15 April 2002. My thanks to Professor Natividad Mendoza Navas for her translation into the Spanish version.

"collective autonomy aims to compensate for workers' structural inferiority, individually, in the signing an employment contract, since through collective bargaining enables the parties to negociate salary and working conditions in a more or less balanced position" [1].

Collective autonomy also takes into consideration the idea of *exoneration of the state* and with it, the modern concept of *subsidiarity:* "collective autonomy, constitutionally recognised, preserves a sphere in which workers and employers can freely decide about their opposing interests. This freedom is legitimised by the historic experience that collective bargaining successfully promotes — and better than state intervention — the objectives of the different economic and general interest groups" [2].

Finally, collective autonomy satisfies the notion of self-determination: "Article 9.3 GG is a right to freedom that extends the protection of associations to all its spheres of action. Hence, certain matters, especially those related to wages, as well as others such as working hours and holiday time, are ceded to the bargaining parties, which will then be able to regulate working and economic conditions in an autonomous way" [3].

1.1.2. Legal framework

These constitutional principles are defined in the Collective Agreement Act (Tarifvertragsgesetz, or TVG) of 9 April 1949 (drafted 25 August 1969). This standard establishes only a few essential bases and a general framework, leaving the parties with ample manoeuvring room to specify the content of the bargaining:

- § 1 TVG: Content and form of the collective agreement.
- § 2 TVG: Bargaining subjects.
- § 3 TVG: Scope of application.
- § 4 TVG: Effect.
- § 5 TVG: General applicability.
- §§ 6-12 TVG: Formal rules.
- § 12a TVG: Collective agreements for persons similar to wage-earners.

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[1] BVerfG 26-6-1991, BVerfGE 84, 212, 229.
[2] BVerfG 2-3-1993, BVerfGE 88, 103, 114.
[3] BVerfG 24-4-1996, BVerfGE 94, 268, 284 *et seq.*

1.2. Meaning of collective bargaining

Now, as before, *collective bargaining* is important to ensuring wages and setting rules about working hours and conditions. Although in recent years we have witnessed the weakening of collective bargaining, a trend that is being repeated in most European countries, in Germany collective bargaining is the most important instrument by which working and economic conditions may be stipulated to the benefit of workers. The *annual* figure of new collective agreements, or of revised agreements, remains constant, hovering at between 7,000 and 8,000. All together, around 57,000 collective agreements are registered with the Labour Ministry [4].

Yet how far collective agreements are spread and extended differs according to sector, company size (large, medium or small) and region, especially in the eastern states. Generally speaking, in Germany there are around 33 million workers, manual labourers, white-collar workers and civil servants. According to recent statistics, 63 percent of workers are employed in companies where a *sectoral or branch agreement* is applied (Branchentarifvertrag) while 7 percent are held to *company agreements* (Firmentarifvergrag). In the eastern states, *the sectoral agreement* accounts for 45 percent of workers and the *company agreement*, 10 percent. *The average number of workers covered by a collective agreement* of 62 percent is however higher since companies, which are not bound to a collective agreement, often adapt it. This is because the *employment contract* takes as a reference the parameters appearing in the agreement. Therefore, it can be said that 80 percent of German workers, either directly or indirectly, are in the subjective scope of some kind of collective agreement.

By and large, the collective agreement improves upon the terms of laws the latter stipulating certain minimum standards that affect all workers, regardless of the scope of the collective agreement. For example, a 37-hour work week when the Law provides for 48, or 30 days off, not counting Saturdays, while the Law provides for 24 including Saturdays.

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[4] The most recent statistics can be found in: BUNDESMINISTERIUM FÜR ARBEIT UND SOZIALORDUNUNG/CLASEN, *Tarifvertragliche Arbeitsbedingungen im Jahr 2001*. See also (*www.bma.de*) in "Arbeit" under "Arbeitsrecht", Tarifliche Vorsorge fürs Alter, *Bundesarbeitsblatt* (2002), p. 41 *et seq.*, and WSI (ed.), *Tarifhandbuch*, 2002.

1.3. Structure of the collective agreement

1.3.1. Territorial scope

The bargaining parties have total freedom to describe the territorial framework of the collective agreement. Thus, we have national or regional collective agreements and agreements that affect specific sectors of production as well as company agreements.

In Germany, regional collective agreements predominate [5], generally coinciding with the delimitation of federal states. Unlike in the Anglo-American sphere, where company agreements outweigh other types, workers from the same sector or branch have identical working conditions, so the agreement exercises a "cartel function."

1.3.2. Company agreements and shop/enterprise agreements

The provisions of territorial or industry-wide collective agreements (Flächentarifvertrag) are established by the works council, via *shop/enterprise agreements (Betriebsvereinbarungen)*, since this representative authority has codetermination rights, as stipulated by the Works Council Act (Betriebsverfassungsgesetz, BetrVG). The bargaining parties are not either the trade unions or the employers, but the *works council,* elected by *all the workers* employed in the company, on one side, and the owner of said company, on the other. In the public sphere the same philosophy holds sway, although other laws are applied. This second level brings us to a *decentralisation in the execution* of territorial agreements which allows them to be adapted to the employers' needs.

In this sense, although German law recognises that the works council plays a central role in converting precepts of the agreement rules, §§ 77.3 and 87.1 BetrVG establish the pre-eminence of the collective agreement over shop/enterprise agreements signed by the representative body. This pre-eminence expresses the *principle of dual representation* of interests in Germany (dual channel), whereby the trade unions have authority in the sector and region, and the works councils in the company. Moreover, the authority of the agreement does not only derive from the Law, as expressed in §§ BetrVG 77.3 and 87.1, but also from the Constitution (see 1.1.1.), whose Article

[5] On the following, ZACHERT, *Lecciones de derecho del trabajo alemán*, Madrid 1998, p. 63 *et seq.*

9.3 recognises collective autonomy, while according to majority opinion, participation in the company does not find support in our Constitution.

In practice, there is a *reciprocal ("dialectical") relationship between collective bargaining and the aforementioned codetermination,* which explains why of late, the (regional) collective agreement has delegated certain prerogatives to the shop/enterprise agreement. The latter address, at once, the companies' need for flexibility and the workers' wishes on matters such as how working time is organised. However, this transfer of powers poses some problems, not only because it alters the principle of the prevalence of the collective agreement over the shop/enterprise agreement, but also because the workers' committee, as § 74.2 BetrVG points out, does not recognise the trade union's right to strike in the event of dispute.

How ties between (regional) collective agreements and shop/enterprise agreements will be developed in the future depends on whether the parties decide to overcome the mentioned flexibility through collective bargaining itself, admitting that the agreement has opening clauses that tolerate — and at the same time control — this decentralisation, both in the area of enterprise agreements as well as in the employment contract (See Epigraph 10) [6].

1.3.3. Personal scope

In addition to the spatial scope, collective agreements also establish which workers they affect; that is, their *personal scope*. Regarding this, it must be stressed that if in the past, the working conditions of manual labourers and salaried workers were agreed separately, there is a growing tendency to determine a single set of working conditions for both groups, as has been the case for some time in the chemical industry. Thus, in spring 2002, the metalworkers' union called a three-week strike, not only to improve their salary conditions, but also to obtain equal pay for both kinds of workers [7].

In the public sector, working conditions for manual labourers and white collar workers, around 3.1 million, are also regulated by col-

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[6] Of the many positions on the matter, see (with empirical contributions), OPPOLZER/ZACHERT, *Krise und Zukunft des Flächentarifvertrags*, 2002; HÖLAND/REIM/BRECHT, *Flächentarifvertrag und Günstigkeitsprinzip*, 2002.

[7] Binspink/WSI, "Tarifarchiv, Tariflicher Halbjahresbericht...", WSI-Mitt (2002), pp. 371, 379.

lective agreements. According to predominating case law and doctrine, collective agreements do not apply to the employment relations of 1.7 million civil servants. Their working conditions are provided for by Law, however the Law abides by the rules stipulated by collective bargaining.

2. TYPES AND SPECIALITIES OF COLLECTIVE AGREEMENTS ACCORDING TO LAW AND CASE LAW

2.1. Types of collective agreements by scope of application

§§ 2.1 and 2.3 TGV distinguish between collective agreements signed by trade unions and employers' associations, *association-level agreements (Verbandstarifverträge),* and collective agreements between unions and an individual employer, in other words, *company agreements (Firmentarifverträge).*

The number of company agreements versus association-level agreements signed by both associations, has increased, albeit slightly, in recent years. Of the collective agreements in force in the year 2001, 34,500 are association-level agreements and 23,000 are company agreements [8]. Case law explains the relationship between these agreements, in keeping with the *speciality principle*, by which the closest agreement takes precedence over the other [9]. In keeping with the idea of the single and unified trade union and large industry-wide unions, collective bargaining is in "a single hand", so the connection between association-level agreements and company agreements poses no major problem.

2.2. Types of collective agreements by content

Bargaining practice differentiates between *pay agreements, framework agreements on pay grades and general agreements on employment conditions*.

Pay agreements stipulate wages, and generally speaking, their validity is almost always limited from one to up to two years.

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[8] BUNDESMINISTERIUM FÜR ARBEIT UND SOZIALORDUNUNG/CLASEN, *Tarifvertragliche Arbeitsbedingungen...*, cited, p. 5 *et seq.*; ZACHERT, "Firmentarifvertrag als Alternative?" (*NZA-Sonderbeilage*), num. 24 (2000), p. 17 *et seq.*

[9] Commentaries include: DÄUBLER, *Tarifvertragsrecht*, 3rd ed., 1997, Randnr. 1490; KEMPEN/ZACHERT, TVG, 3rd ed.,1997, § 4 Randnr. 129 *et seq.*; WANK, in Wiedemann, TVG, 6th ed., 1999, § 4 Randnr. 289 *et seq.*

Framework agreements on pay grades, however, organise the various occupational categories by activity, from which the pay of manual workers and white-collar workers is derived. These collective agreements are valid for longer than collective salary agreements, generally signed for a two- to three-year period.

General agreements on employment conditions cover a wide spectrum of aspects to this respect. Among other matters, they can stipulate working time, pay supplements for night shifts, temporary leave, annual holiday time, dismissals, periods of notice, working conditions, occupational skills and employment guarantees. The validity of these is for the most part the same as for frame-work agreements; that is, three years or more.

In addition to the above, there are also *other collective agreements* that do not fall into any of the mentioned categories. Of these, as § 4.2 TVG stipulates, we must mention the collective agreements described by the joint institutions of the bargaining parties in which various conditions are established, such as holiday pay, provisions for the elderly and disabled, and of importance are also other agreements that regulate conciliation procedures.

3. PARTIES TO THE COLLECTIVE AGREEMENT AND OTHER TYPES OF AGREEMENTS

3.1. Legal principles

The main parties in industrial relations are associations or *trade unions* on one side, and *confederations of employers* or *individual employers*, on the other.

Based on the constitutional principle established in Article § 9.3 GG, which expressly recognises freedom of association, and by interpretation (case law), union activity, collective autonomy and the right to strike [10], both organisations can terminate collective agreements. The Collective Agreement Act stipulates in its § 2.1 that bargaining parties are trade unions, employers and employers' associations.

Unlike in other countries, such as Spain and France, the concept of union is not regulated by Law, but rather it is the result of common

[10] Thus the Constitutional Court, among others, BVerfG 26-6-1991, BVerfG 84, 212. New perspectives in ZACHERT, *AR-Blattei* SD 1650.1 "Vereinigungsfreihet/ Koalitionsfreiheit", 2001, Randnr. 1 *et seq.*

law. According to the case law of the Federal Labour Court and the Constitutional Court, a trade union is an association of workers with bargaining capacity that is only required to have a enough social power to be able to exert pressure on the other party, the company, to reach a collective agreement [11].

3.2. Trade unions

Trade union structure is based on the principle of *single/unified trade union* and *industry trade union*. Belonging to the German Federation of Trade Unions (DGB), founded in 1949, are eight branch Federations. The organisation of workers around a single trade union with no political or religious ties is mainly the result of the disastrous consequences of the splitting-up of the workers' movement during the Nazi dictatorship and the period leading up to it.

Through the grouping together of different unions, the number of industry trade unions has steadily decreased in recent years. In the spring of 2001, the administration and public services union, the transportation and communications union (ÖTV), the postal workers' union (DPG), the commerce, banking and insurance union (HBV), the media industries, printing and paper, publishing and design union (IG Medien) and the German Union of Salaried Employees (DAG) formed a single service sector union (Ver.di). From that point on, the DAG, as an employees' union, has been part of the DGB, so the new trade union (Ver.di) and the metal workers' union (IG Metall) are now the two major unions, representing two thirds of the DGB's nearly 8 or 9 million affiliates. The number of employee affiliates is about 30 percent.

While there may be other unions that do not belong to the DGB, they have little influence on collective bargaining. However, there are some exceptions, especially in the new federal states of the East, which show a certain degree of authority outside of the large unions. Business owners take advantage of this situation to reach agreements on special conditions, more favourable to them on the collective level. Thus, the metalworking employers' association of the states of former East Germany and the Christian metalworkers' union reached an agreement that on essential matters, such as working hours,

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[11] BAG 15-3-1977. Arbeitsrechtliche Praxis (AP) N2. 24 article 9 GG; BVerfG 24-2-1999, BverfGE 100, 214, 223. Doctrinal contributions include notes on comparative law: GAMILLSCHEG; *Kollektives Arbeitsrecht,* 1997, p. 452 *et seq.*

they would essentially stay away from the objectives set by IG Metall [12].

3.3. Employers' associations

Private business owners, on their part, have a three-level system of representing interests. First, employers' organisations that have the role of representing economic policy interests to state organisms and public opinion. Their central organisation is the *Confederation of German Industry (BDI).*

On the second level are the Chambers of Industry and Commerce, considered to be public entities with compulsory affiliation.

Thirdly, there are employers' associations that act as a party to bargaining collective agreements. They belong to the umbrella organisation *Confederation of German Employers' Associations (BDA),* which is made up of 46 employers' associations. Within the BDA, the *industrial federations* are highly important, among them the "Gesamtmetall", which includes 13 regional employers' associations from the metallurgy industry and the Federation of the Chemical Industry Employers' Associations, which has 12 regional associations. Affiliation to employers' associations is voluntary, and their affiliation rate ranges from 40-45 percent.

As for the administration and public services, the employers are the national government, the provincial governments and the municipal governments. These three state bodies coordinate their bargaining, thus guaranteeing the same level of protection for personnel from different sectors with identical activities.

3.4. Other parties and collective agreements

The bargaining parties of the shop/*enterprise agreements* (see 1.3.2), which have, according to 77 BetrVG (Works Council Act), the same applicability as collective agreements, are the employer of the company in question and the works council, an authority which has, as laid out in §§ 87 BetrVG, codetermination rights in so-called social matters. It is important to remember, at any rate, as stipulated

[12] At present, the courts of first instance are studying the nature of this association as a union; NAUDIT, "Tarifrechtliche Entwicklungen unter besonderer Berücksichtigung der neuen Bundesländer", *AuR* (2002), p. 288 *et seq.*

in §§ 77.3 and 87.1 BetrVG, that the company agreement takes precedence over these (shop/enterprise) agreements.

The means to settle disputes between bargaining parties is the strike, a measure which, on the other hand, cannot be exercised in the scope of the Workers' Committee Constitution Law, as §§ 74 BetrVG expressly prohibits it. Thus, any disputes that arise to this respect will be resolved via the conciliatory committee (Einigungsstelle), an organ which, according to § 76 BetrVG, can be designated as an institutional conciliatory procedure in the company.

4. CONTENT OF COLLECTIVE BARGAINING AND LIMITS OF COLLECTIVE AUTONOMY

4.1. Legal principles

The regulatory framework of collective bargaining consists of the Constitution and the Collective Agreement Act (see Ch. 1.1).

With regard to the Constitution, its Article 9.3 guarantees, on one hand, to all persons and professions, the right to form associations to safeguard and improve working and economic conditions.

On the other hand, development of the mentioned constitutional mandate, § 1.1 TVG, says that the collective agreement must establish the rights and obligations of the contractual parties and contain rules that can regulate the content, engagement, and termination of employment relations, as well as questions related to the company and matters involving the woks councils rights.

4.2. The content of collective bargaining in practice

4.2.1. Traditional content

Based on the abovementioned legal foundations, which give the parties ample manoeuvring room to establish working and economic conditions [13], the bargaining parties have agreed to certain rules that cover a wide spectrum of these conditions [14].

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[13] About respect for basic rights, ERFK/DIETRICH, 2nd ed., 2001, Article 3 GG, Rndnr. 48 Recently ZACHERT, "Elemente einer Dogmatik der Grundrechtsbindung der Tarifparteien", AuR (2002), p. 330 *et seq.*

[14] Details in WSI, *Tarifhandbuch*, 2002 (annual publication). BUNDESMINISTERIUM FÜR ARBEIT UND SOZIALORDUNUNG/CLASEN, *Tarifliche Arbeitsbedingungen*

The *"traditional content"* of collective bargaining refers to wages, working hours, holiday pay ("which is spent in Majorca"), improved working conditions and measures to protect against dismissals. We must also point out the rules about the reduction of working time which, gradually, since 1984, has been set at 35 hours per week through collective bargaining [15].

Concerning salary, in Germany, unlike in other European countries, there is no law stipulating a minimum wage. This is generally due to the importance of collective bargaining, which in fact regulates labour relations for most workers. There is, however, one exception: the construction sector, where the difficulty of applying collective agreements led to the passing, in 1996, of the *Law on Posted* Workers ("Arbeitnehmerentsendegesetz") which establishes a minimum wage for this industry.

4.2.2. New trends in collective bargaining

The new contents of collective bargaining are marked by the social agents' need to respond to the changes in the production situation in the workforce. They generally give companies more flexibility and offer more alternatives to the individual requirements of workers without altering the essence of the collective agreement; that is, without losing sight of the protection of the workers [16]. In this sense, although the contractual parties in the agreements evaluate the indicated ideas often differently, the progress of collective bargaining in a number of sectors shows that those involved have a certain interest in reaching agreement on key issues.

Collective bargaining favours *employment stability and the aforesaid flexibility*, since in times of crisis a substantial reduction of working hours is expected (sometimes down to 30 hours a week), with corresponding salary cuts, although this is compensated by guar-

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(2002) (annual publication). Also refer to (www.bma.de) in "Arbeit" under "Arbeitsrecht."

[15] ZACHERT, "Ein Jahrzehnt tariflicher Wochenarbeitszeitverkürzung", ZTR (1995), p. 435 *et seq.*; by the same author, "L'orario di Lavoro nella RFT", *Quaderni di Diritto del Lavoro e delle Relazioni Industriali* (1995), p. 303 *et seq.*

[16] ZACHERT, "Flexicurity im Arbeitsrecht – eine schwierige Balance", WSI-MITT (2000), p. 283 *et seq.*; by the same author, "A Chance of Paradigm in German Labour Law — An Inspiration to Other Countries?", *The International Journal of Comparative Labour Law and Industrial Relations* (1999), p. 21 *et seq.*, and "Resentí mutamenti nel Diritto del lavoro tedesco", in *Il Diritto del Mercato del Lavoro* (2000), p. 89 *et seq.*

anteeing employment for a period of 2 to 4 years ("Volkswagen model")[17].

Policy concerning working time is giving both the companies and the workers themselves a great deal of flexibility to establish working hours through corridors and work accounts[18]. Increasingly, the possibility of reducing the number of working years is also being exploited through part-time agreements for pre-retirees, without this meaning a sizeable cut in their pensions.

Recently, special attention has been given to collective agreements that guarantee the training of young workers, ensuring transition in their careers. In the metallurgy industry, for example, in June 2003 a collective agreement was signed that includes rules and procedures to guarantee the occupational skills and posterior training of all workers.

There is also some discussion, with respect to wage flexibility, as to whether collective agreements should connect part of this to company profits. The chemical sector has had rules of this nature since 1998, though the metalworkers' union, during bargaining in spring of 2002, successfully rejected this notion.

The described examples mostly are articulated in the regional collective agreements, which often stipulate only frame-principles and contain opening clauses (Öffnungsklauseln) so bargaining subjects can develop these particularities through enterprise agreements.

4.3. Limits of collective autonomy by the Competence Law

According to case law[19] and majority doctrine[20], the job market and the collective agreement are not affected by national standards (§ 1 Law Against Limitations of Competence) or European standards that prohibit the formation of cartels (art. 81 TEC)[21]. In principle the

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[17] ZACHERT, "Medidas en creación y reparto de empleo en Alemania", *RL,* pp. 84, 87 *et seq.*; by the same author, "Beschäftigungssicherung durch Tarifvertrag als Prüfstein für Umfang und Grenzen der Tarifautonomie", *DB* (2001), p. 1198 *et seq.*

[18] ZACHERT, "Medidas de creación y...", cited, pp. 84, 87 *et seq.*

[19] BAG, 27-6-1989, AP Nr. 113 zu article 9.3 GG Arbeitskampf

[20] For example, WIEDEMANN in Wiedemann, *TVG*, Einl., Randnr. 36 and 371.

[21] In European law: EuGH 21-9-1999 — Albany, Brentjes and Bokken, *NZA* (2000), p. 201; EuroAS (1999), p. 194, commented by LÖRCHER; AuR (2000), p. 26, with commentary by BLANKE; BLANKE, "National Report", in BRUNS (ed.), C*ollective Agreement and Competition in the EU*, 2001, p. 146 *et seq.*

secondary effects of the "cartel" must be accepted to guarantee base level working conditions. To do this, employers may also coordinate their behaviour in the job market, reaching agreements about the creation of compensation funds. One exception to the rule is the (theoretical) case that the signing parties abuse the collective agreement and deliberately pursue rules that lead to restricting competence [22].

4.4. Limits of collective bargaining by general interest

The bargaining parties, as much of the doctrine understands it, are not limited, in their field of action, by public interest. Attempts to determine the aspirations of trade unions via this route have been rejected by the court. Thus, the *German Federal Court* (BGH) rejected a lawsuit that would have required the bargaining parties to pay compensation to make up for the loss of a year's worth of monetary value [23]. Insofar as there is no independent order that provides the correct solution as far as the distribution of income and salary goes, the collective autonomy provided for in article 9.3 GG, as *fair proceedings* [24], shall guarantee equal opportunities to the parties and enable a fair rapprochement of interests [25].

5. THE BARGAINING PROCESS

Collective bargaining is conducted in a different way according to the trade union being dealt with, depending on what is established in its statutes. Thus, below we will explain how collective bargaining is done in the metallurgy industry, between IG Metall and its employers' association [26].

The collective agreement must be denounced, by the agreed deadline, by one of the parties. The decision about termination and denouncing of collective agreements, in the case of regional collective agreements (Bezirkstarifverträgen), which represent the majority, is

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[22] BAG 27-6-1989, AP Nr. 113 about article 9 GG Arbeitskampf; DÄUBLER, Tarifvertragsrecht, Randnr. 380.

[23] BGH 14-3-1978, NJW (1978), p. 2031

[24] RAWLS, Eine Theorie der Gerechtigkeit, 1975, p. 107 *et seq.*, 337 *et seq.*, and 334.

[25] KEMPEN/ZACHERT, TVG, Einl. Randnr. 83, 135 *et seq.*

[26] See ZACHERT, *Tarifvertrag*, 1979, p. 32 *et seq.*, and by the same author, "Der Ablauf einer Tarifverhandlung", GMH (1979), p. 172 *et seq.*

the duty of regional secretary (Bezirksleiter), as the representative of the union's executive committee.

As for how union strategy is developed in this context, the bargaining committee (Tarifkommission) plays a fundamental role. Said committee, on the regional level, is predominantly composed — sometimes exclusively — of honorary members (belonging to the works council or union delegates) expressly elected to perform this task.

Normally, from this main bargaining committee emerges another, smaller committee (Verhandlungskommissionen) which, on the mentioned level, presided by the regional secretary, is in charge of directing conversations with the employers' representatives.

These main bargaining committees generally provide advice and support, so any movement along these lines requires their intervention. Even in those cases where the union's executive board makes a decision about some matter, the bargaining committee's influence in the bargaining process is also significant. Given the functions of the committee members, often members of the workers' committee and trade union delegates, the authority of this union should not be underestimated.

As for the employers' side, bargaining committees (Tarifkommission) are also set up, composed of members from the different companies, as well as representatives from their corresponding association. The same occurs with the trade unions; the general bargaining committee also designates the authority that will be responsible for bargaining directly with the corresponding body from the trade unions (Verhandlungskommissionen).

Bargaining either results from an agreement between the parties, a conciliation process, or a strike.

6. FORMALITIES AND INFORMING ABOUT COLLECTIVE AGREEMENTS

6.1. Formalities

§§ 1.2 TVG establishes that collective agreements must be made in writing. The objective of this rule is to avoid ambiguities, so the contractual parties and affected subjects have a foundation that ensures their respective rights[27]. Relatively often, collective agreements

[27] BAG 9-7-1980, AP Nr. 7 zu §§ 1 TVG Form.

make reference to other agreements, or other laws, a reference which is considered to be in keeping with the Law [28].

6.2. Informing about collective agreements: obligation to publish

6.2.1. Publication by the state

§§ 7.1 TVG stipulates that the signing parties of a collective agreement must send the original agreement, one authenticated copy and two additional copies of each agreement and their modifications to the Federal Ministry of Labour and Social Order (now Ministry of Economy and Labour), in a period of one month after the agreement is made, postage paid. Notice of the expiration of each collective agreement must likewise be given one month in advance.

They should also send, postage paid, to the highest provincial labour authority in the region where the collective agreement will be effective, three copies of the same, no later than one month after the agreement is reached or modified. Likewise, notice of the expiration of each collective agreement must be given in the indicated time period. Once one of the parties have fulfilled this obligation, the other is released of it.

Paragraph 7.2 TVG, on its part, indicates that whoever, out of fraud or negligence, fails to meet the obligation explained in section 1, or who fails to do so correctly or within the time period stipulated by law, is guilty of an infraction. Non-compliance may be sanctioned with a fine.

These are the legal requirements that must be met for the Federal Ministry of Economy and Labour to register the signing, modification and expiration of agreements, as well as the beginning and end of *erga omnes* applicability of the same.

The registration of collective agreements in the Federal Ministry of Economy and Labour registry has a merely informative purpose, since it thus contributes to their publication, an important part of the bargaining system. As the registration does not have constitutive effect, it is not essential for the agreement to be valid, except for agreements of general applicability. Hence, in accordance with §§ 5.7 TVG, when the *erga omnes* declaration of an agreement and its repeal is announced by the State, both must be made public.

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[28] Details in KEMPEN/ZACHERT, TVG, §§ 1 Randnr. 376 *et seq.*

With regard to the principle of publicity, all individuals have the right to request a free copy of the registrations (not the agreement text). Likewise, they can also claim a "negative proof", that is, a certification that a registration of a certain kind does not exist, for instance of erga omnes validity. However, in practice, it is possible to receive a particular collective agreement. The uploading of over 57,000 agreements onto a network would be very costly, thus there is no way to inform oneself electronically (Internet). The social partners, even if they have this registration, are not interested in facilitating these data to the Ministry [29].

6.2.2. Publication by the employer

While the registration made based on §§ 6 TVG only contains information about its validity, §§ 8 TVG requires that the complete text of the agreement be published and made available to the workers, so that they can demand their rights from their employer. §§ 8 TVG orders the employer to display, in an appropriate place in the establishment, the collective agreements in force in the company.

Publishing an agreements in the company, however, does not determine its application, since one of the characteristics of the collective agreement is its immediacy; that is, its is implemented when the contract of employment is signed, even when the parties are unaware of its existence. For this reason, according to case law, failure to publish does not favour the employer in situations such as the implementation of short expiration periods (Ausschlussfristen) in the agreement [30].

7. APPLICABILITY OF THE COLLECTIVE AGREEMENT

7.1. Regulatory applicability of the collective agreement

Collective agreements are the expression of collective contractual freedom [31], even if they have, as §§ 4.1 TVG states, normative

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[29] Author's question to the Ministry of Labour, on 19 July 2002.

[30] BAG 23-1-2002, NZA (2002), p. 800; for the precedent, see LEDESMA/ ZACHERT, *Panorama actual de la negociación colectiva en Alemania*, 1997, p. 30 *et seq.* For more details: DÄUBLER, *Derecho del Trabajo*, 1994, p. 212 *et seq.*

[31] Controversial, in this sense, is the recent case law of the Federal Labour Court, see BAG 29-8-2001, AuR (2002), p. 351 *et seq.*; ZACHERT, "Elemente einer Dogmatik der Grundrechtsbindung der Tarifparteien", *AuR* (2002), p. 330 *et seq.*

(regulatory), force of law in their field of application. That is, they lay down minimum conditions for affiliated workers who are bound to and favoured by this agreement. This normative/*regulatory effect* means, showing the *principle of protection* of the collective agreement, that the employer will not be able to reduce the conditions stipulated in the agreements to the workers' disadvantage.

This does not mean that that the employer cannot improve the salary and working conditions established in the agreement, granting these benefits on top of those stipulated in the agreement. In this manner, adhering to the *principle of the most favourable* standard gathered in §§ 4.3 TVG, the individual employment contract can improve on the terms of the agreement. However, this measure has stirred up a complex debate that threatens the very foundations of our bargaining system, as it raises the question of which is the most favourable standard.

This problem arises, in particular, when it comes to reducing the number of working hours stipulated in the collective agreements. If the work week established in the agreement is 37 hours and the employer offers the worker, in an individual employment contract, to work 40 hours, increasing his or her salary and guaranteeing employment for a certain period of time, is the collective agreement still valid in this case? Or should the individual agreement be considered more favourable because the worker gets paid more? The *Federal Labour Court* stresses — and I share this opinion — that the collective agreement would take precedence, because if not, the agreement would be reduced to the status of a mere recommendation that can be applied when the situation is favourable and denied when it is inconvenient for the employer. The normative/regulatory effect of the collective agreement would, then, disappear[32].

7.2. Personal scope: limited applicability of the collective agreement

7.2.1. *General principle: limited applicability*

Unlike in Spain, in German law, collective agreements do not have *erga omnes* applicability. Collective agreements benefit and

[32] BAG 20-4-1999, AP Nr. 89 zu article 99 GG; new publications about this very extensive and polemic debate: KEMPEN, "Kollektivautonomie contra Privatautonomie: Arbeitsvertrag und Tarifvertrag", Sonderbeilage zu *NZA*, num. 3 (2000), p. 7 *et seq.*; ZACHERT, "Individuum und Kollektiv im Arbeitsrecht: alte Fragen —

obligate only those affiliated to trade unions and the members of the respective employers' association, since they have *limited applicability*. This standard, anticipated in §§ 3.1 TVG, which demands that both the workers as well as the employers be organised, has a few exceptions that are worthy of mention.

7.2.2. Exceptions to applicability restricted by Law

One exception to the general law described in the previous paragraph can be found in § 3.2 TVG. It affects collective agreements provisions of a company scope and specific questions of the Works Constitution Act. In order for these standards to be applied, the only requirement is that *the employer* be bound. Thus, the collective agreement would bind the entire staff, regardless of union affiliation. Among these are rules related to order in the company, health and safety, as well as others that extend the codetermination rights of the works council. They are, in short, rules that do not allow differential treatment of individuals depending on their union affiliation.

Another exception, more relevant than the abovementioned one, is the so-called *declaration of general applicability* (*erga omnes* applicability) of the agreement[33]. As per §§ 5 TVG, the Ministry of Economy and Labour, with the approval of a committee made up of three representatives from, respectively, the employers' associations and the workers' committees, can decide that a collective agreement has *erga omnes* applicability. To do so, one of the parties to the collective agreement must request it, and the following conditions must be met:

1. The employers bound by the agreement should together employ, at minimum, 50 percent of the workers included in its subjective scope.

2. The procedure must be deemed to be in the public interest. The conditions set out in numbers 1 and 2 will not be imposed if this declaration is necessary to overcome a state of social emergency.

The purpose of *erga omnes* applicability is to extend the agreement's protection to those sectors with working conditions inferior to

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neue Probleme", *AuR* (2002), p. 41, 47 *et seq.* against, PICKER, "Tarifautonomie-Betriebsautonomie-Privatautonomie", *NZA* (2002), p. 761 *et seq.*, and ZÖLLER, Sonderbeilage zu NZA, num. 3 (2000), p. 1 *et seq.*

[33] On comparative law: ZACHERT (dir.), *Die Wirkung des Tarifvertrages in der Krise*, with contributions by OJEDA AVILÉS/PÉREZ PÉREZ/LE FRIANT and MARIUCCI, 1991.

it. It is especially relevant in branches with small companies and those fields with big fluctuations in labour, while in the big industrial sectors such as chemicals or metalworking, for the reasons already cited, this phenomenon is practically nonexistent. On the other hand, in construction as well as retail and certain branches of the food and beverage industry and other similar industries, the disadvantages inherent to the activity must be compensated for, and general applicability is an extremely important instrument for this. Among other things, employers who do not belong to the association that signed the agreement are required to make contributions to social compensation funds. Of the approximately 57,000 collective agreements that exist, only 550 have *erga omnes* applicability. These agreements cover roughly 5.5 million workers, but of these only a million make use of the collective agreement's applicability for the first time [34].

As we have already seen, the law states that the declaration of *erga omnes* must be deemed to be in the "public interest", which will be determined by the Ministry of Economy and Labour. Also, employers who adopted the agreement must employ, at minimum, 50 percent of the workers included in the agreement. The agreement in question must be, therefore, quite important.

To extend the agreement to those not bound by it, the law establishes a procedure that must be followed to declare its *erga omnes* applicability [35]. First, one of the signing parties must present a request to the Federal Ministry of Economy and Labour. The petition will then be published in the Official Bulletin, allowing any institution that so wishes to express or present their position in writing. The Official Bulletin then announces a hearing before the proper Committee, made up of three delegates from the trade unions and three delegates from the employers' associations, which decides by majority vote. Once the Ministry declares *erga omnes* applicability, this is published in the Official Bulletin. The general validity logically expires when the agreement in question runs out.

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[34] Statistics can be found in RdA (2000), p. 183; WONNEBERGER, *Die Funktion der Allgemeinverbindlicherklärung von Tarifvertägen*, 1992, p. 48; KREIMER-DE FRIES, in BISPINCK (ed.), *Tarifpolitik der Zukunft*, p. 205 *et seq.*, 216; CLASEN, *Tarifliche Vorsorge fürs Alter.*

[35] According to the Constitutional Court, the declaration of general effectiveness has a *sui generis* legal nature: BverfG 24-5-1977, BVerfGE 44, 322, 340.

7.2.3. Exceptions to applicability restricted by employment contract

In practice, collective agreements are applied to most workers, since the individual employment contract generally refers to them. In this case, the agreement does not govern with its normative/regulatory effect but as a *regulation of the individual contract of employment*. If the employers' motivation to act in this way is doubted, we should note that, for one, it forces collective conditions to be applied even to non-unionised workers. It also shows workers who do not belong to a union organisation that it is not necessary to belong to any union or devote one percent of his or her salary to benefit from the advantages established by the agreement.

In addition, as the Federal Labour Court established in a 1968 ruling, collective agreements cannot contain *differential treatment clauses* that require the employer to grant provisions or rights exclusively to unionised workers [36].

7.3. Termination of the collective agreement

The collective agreement generally ceases to be valid when it is *denounced* by one of the parties in the determined time period.

Despite this fact, as §§ 4.5 TVG stipulates with respect to §§ 3.3 TVG, the clauses of the collective agreement remain valid after its expiration until another agreement come into force to replace it [37]. This is what we call the *ultra-activity* of the collective agreement. Collective employment relations are maintained on identical terms, albeit somewhat more fragile, since the agreement can be substituted by any other arrangement and, consequently, also by an individual contract of employment. This regulation, together with the principle that the rights from the agreement cannot be waived (§§ 4 section 4 TVG), contributes to the security of collective agreement structures.

Finally, with regard to the effects of the collective agreement we should mention the *peace obligation*. Acknowledged by case law [38], the peace obligation gives stability to the collective agreement during

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[36] BAG, Grosser Senat, 29-11-1967, AP Nr. 13 zu article 9 GG. The appeals courts criticize this solution, see ZACHERT, "Renaissance der tariflichen Differenzierungsklausel?", DB (1995), p. 322 *et seq.*

[37] Case law interprets the context of both rules in a strict sense: BAG 18-3-1992, AP Nr. 13 zu §§ 3 TVG.

[38] Fundamentally: BAG 21-12-1982, AP Nr. 76 zu article 9 GG Arbeitskampf.

its period of validity, from one to three years, since employers cannot reduce the conditions established therein, nor can workers, on their part, adopt measures to pressure the employer into improving the conditions in the agreement.

This means that during periods of economic instability, workers have a relatively secure situation, as it limits the tendency to worsen their salary and working conditions [39].

8. APPLICATION OF THE COLLECTIVE AGREEMENT

Considering that it is in the field of Labour Law where the difference between law in the books and law in practice is the most pronounced [40], it is not surprising that a number of problems arise when it comes to implementing the provisions of the collective agreement. These difficulties, however, are less marked in German law than in many neighbouring European countries.

This is so, to a large extent, because the works council plays a central role in the application of the agreement (e.g., § 80.1.1 BetrVG). In this sense, *participation and co-determination at the enterprise level* resolves certain disputes which would otherwise need to be revised by labour jurisdiction. It can be said, then, that after signing a collective agreement, there is a second level of bargaining, codetermination in the enterprise, which adapts the provisions to the collective agreement.

In addition, the collective agreements in the different production sectors also envisage the formation of *joint committees*, which are responsible for settling any disputes that result from applying the agreement's rules such as, for instance, rules relating to workers' occupational classification [41]. To ascertain the number and practice of these bodies, we would have to examine at each collective agreement, since no known source addresses these matters.

9. CHALLENGING THE COLLECTIVE AGREEMENT

The normative/regulatory content gives all workers covered by the collective agreement's scope a direct right against their employer.

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[39] LEDESMA/ZACHERT, *Panorama actual...*cited, p. 17 *et seq.* and p. 24 *et seq.*

[40] RAMM, "Zur bedeutung der Rechtssoziologie für das Arbeitsrecht", in NAUCKE/TRAPPE, *Rechtssoziologie und Rechtspraxis*, 1970, p. 169.

[41] KEMPEN/ZACHERT, TVG, §§ 1, Randnr. 81.

If the employer does not respect its provisions, *any worker can file a lawsuit individually* with the *labour courts*. The most common are complaints about occupational classification in the public sector.

Trade unions, according to majority opinion, do not have the right to challenge a collective agreement, via the courts, in representation of its affiliates. Unions have other possibilities, as *signing parties of the agreement*, although they lack importance [42]. However, the *Federal Labour Court*, in a 1999 ruling, qualified the previous notion, permitting the procedural intervention of said organisations in the event that the *shop/enterprise agreements* go against the clauses of the collective agreement [43].

When it comes to *interpreting the collective agreement*, the labour courts are reluctant to put themselves in the parties' place and settle disputes on their behalf [44]. To back this assertion with an example: the *Federal Labour Court* ruled that the Labour Courts are not authorised to ignore a rule in a collective agreement, even when they feel it makes no socio-political sense [45].

The *German administration* does not have the authority that work inspectors or employment offices in countries like France, Italy or Spain do. Nor is there a specific conciliation system like the Advisory Conciliation and Arbitration Service (ACAS) in England [46] or the "Servicio Interconfederal de Mediacion y Arbitraje" (SIMA) in Spain.[47]:

10. PERSPECTIVE

10.1. The relation between company and enterprise agreements

With all its ambivalence, the trend towards decentralisation and differentiation of the territorial collective agreement stands to continue, and a certain degree of authority will be transferred to the enterprise level.

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[42] See KEMPEN/ZACHERT, TVG, §§ 4, Randnr. 100 *et seq.*

[43] BAG 20-4-1999, AP Nr. 89 zu article 9 GG.

[44] Detailed, ZACHERT, "Auslegung und Überprüfung von Tarifverträgen durch die Arbeitsgerichte", in Festschrift für Arbeitsgerichtsverband, 1994, p. 573 *et seq.*

[45] BAG 24-4-2001, AP Nr. 243 zu §§1 TVG Tarifverträge: Bau mit Anmerkung ZACHERT.

[46] TOWERS/BRAUN (ed.), Employment Relations in Britain: 25 years of the Advisory conciliation and arbitration service, 2000.

[47] FUNDACIÓN SIMÁ (ed.), *Solución extrajudicial de conflictos laborales*, 1999. See also "Solución extrajudicial de conflictos", *RL* (2000) (specialised).

From time to time, the collective agreement in itself envisages certain opening clauses; we might refer to this as *controlled decentralisation.*

Just as collective bargaining is being displaced to the enterprise level or even to the individual contract of employment level, the collective agreement's precedence over the shop/enterprise agreement is being called into question (§§ 77.3 BetrVG). It is approved by a part of the doctrine, not by the Courts and can be called a tendeny of *wild decentralisation* (see 1.3.2. and 7.1.).

On the political front, liberal and conservative parties propose a reform of §§ 77.3 BetrVG, and with it the elimination of the principle of pre-eminence of the collective agreement over the shop/enterprise agreement. If this occurs, not only will the structure of the legal labour code, which has been in place for hundreds of years, be challenged, but a constitutional conflict is also produced [48].

10.2. The relation between collective agreements and state law

Together with the aforementioned, there is also an attempt to adjust the relationship between collective agreements and state law.

The evolution in this respect is surely contradictory. On one hand, some *Constitutional Court* rulings allow the legislator to intervene in the agreements reached by collective bargaining and limit collective autonomy referred to in article 9.3 GG [49]. On the other hand, the *Constitutional Court* assumes that the minimums contemplated in collective bargaining can be realized with state assistance. In particular, it is referring to the establishment, by decree, of a minimum wage in the construction sector [50].

Another controversial aspect are the so-called *declarations of fidelity*. Unions demand — and there is a law to this respect — that the state recognise the application of the collective agreement in sectors such as construction, regardless of whether the company is covered by the scope of said agreement. Thus, although the *European Court*

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[48] DIETERICH, "Flexibilisiertes Tarifrecht und Grundgesetz", *RdA* (2002), p. 1 *et seq.*

[49] DIETERICH, "Tarifautonomie und Verfassungsgericht", *AuR* (2000), p. 390 *et seq.* ZACHERT, "Tarifvertrag, Günstigkeitsprinzip und Verfassungsrech", *AuR* 2004, p. 121 *et seq.*

[50] BVerfG 18-7-2000, *DB* (2000), p. 1768

of Justice allows it[51], both, parts of the political and the scientific sectors are against such a measure[52].

10.3. The future of the collective agreement

The main points of conflict have been outlined[53]. As for the development of collective bargaining, "crisis" means, at the same time, "opportunity."

This implies that the social partners see the collective agreement as an instrument that allows a compensation of interests and facilitates a balance between economic efficiency and social protection.

At any rate, despite the doubts and questions raised and the diverse controversial points of view presented, there are also signs that make us optimistic about the future of the collective agreement in Germany.

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[51] EuGH 26-9-2000, Kommission/Französische Republick, *NJW* (2000), p. 3629.

[52] Among others, SCHOLZ, "Vergabe öffentlicher Aufträge nur bei Tarifvertragstreue?", *RdA* (2001), p. 193 *et seq.*, and also BGH 12-1-2000, *NZA* (2000), p. 327.

[53] More detailed: ZACHERT, "Zukunft des Flächentarifvertrages", *AIB* (2000), p. 204 ff.

Chapter 2

COLLECTIVE BARGAINING IN BELGIUM

Chris Engels and Lisa Salas, Leuven

1. INTRODUCTION

Collective bargaining in Belgium is entirely regulated by an Act of 5 December 1968 on collective Bargaining Agreements and Joint Committees [1]. This Parliamentary Act foresees the possibility for engaging in collective bargaining at the various levels of industrial relations.

The 1968 Act sets out the rules that govern collective bargaining in Belgium. It determines the scope of collective bargaining, with respect to the people covered by it, as well as with respect to the issues that can be addressed in a collective bargaining agreement. It defines what a collective bargaining agreement is, which rules it has to obey, who can negotiate it, what its binding force will be, whether it can be extended to cover the entire work force etc. The 1968 Act equally regulates the place of the various kinds of collective bargaining agreements and other sources of labor and employment law.

The 1968 Act gives a definition of what a collective bargaining agreement is. It is defined as an agreement concluded between one or more employee organizations (read: trade unions) on the one hand and one or more employers' associations or one or more employers and regulating individual and collective relations between employers and employees at the level of the company or the level of the industry and in which also the rights and obligations of the contracting parties are defined [2].

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[1] Act of 5 December 1968, Official Gazette, 15 January 1969, often amended thereafter.

[2] Act of 5 December 1968, Official Gazette, 15 January 1969, often amended thereafter, art. 5.

2. PERSONAL COVERAGE OF COLLECTIVE BARGAINING IN BELGIUM

The Act of 5 December 1968 states that it is applicable to workers performing in furtherance of an employment contract and to employers. In its article 2, § 3 it excludes from its scope the personnel of the State, the provinces, the communities and the workers of the public sector. A few exceptions are explicitly foreseen in the Act[3]. In principle public sector employees are therefore not covered by collective bargaining.

In its article 19, the Act of 5 December 1968 furthermore specifies that a collective bargaining agreement is binding on:

> "1. the organizations that concluded it and the employers that are members of such organizations or that have concluded the agreement, as from the date it comes into force;
>
> 2. the organizations and employers subsequently acceding to the agreement and the employers who are members of such organizations, as from the date or their accession;
>
> 3. employees who became affiliated to an organization bound by the agreement, as from the date of their affiliation;
>
> 4. all workers in the service of an employer bound by the agreement"[4]. The fact that some of the workers do not agree with the provisions, does not take away from the binding effect of the collective bargaining agreement in respect to them[5].

The above does not mean that the parties to the collective bargaining agreement would not be able to determine the personal scope of application of their own collective bargaining agreements. The can themselves, when concluding the collective bargaining agreement determine the conditions that need to be satisfied in order to be able to benefit form the application of the collective bargaining agreement, unless self-evidently the choice of the worker to whom the agreement would be applicable, would be discriminatory and in violation of the law.

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[3] Act of 5 December 1968, Official Gazette, 15 January 1969, often amended thereafter, art. 2, § 3.

[4] Act of 5 December 1968, art. 19.

[5] Supreme Court, 1 February 1993, Rechtskundig Weekblad, 1993-94, 47; Labour Court, Liège, 26 May 1998 and 24 November 1998, Sociaalrechtelijke Kronieken, 1999, 237.

It does not matter for a collective bargaining agreement's coverage whether an employee is unionized or not. For a company level agreement the rule is that it is applicable to whomever is employed by the employer, regardless whether he/she should be considered to be a free-rider or not. Trade union membership is thus not required in order to be able to be covered by a collective bargaining agreement.

Membership in an organization that concluded a collective bargaining agreement may be important for an employer when dealing with sector collective bargaining agreements that are not rendered generally binding by the King. In that case an employer will only be bound by the sector level agreements if it is itself a member of the employers' association that concluded the agreement

3. TYPES OF COLLECTIVE BARGAINING AGREEMENTS

With respect to the types of collective bargaining agreements a two-fold distinction will be made. On the one hand the distinction regarding the duration of the collective bargaining agreements (fixed term or not), and on the other hand a distinction based on the level of the industrial relations system at which the collective bargaining agreements have been concluded.

3.1. Distinction on the basis of the duration of the agreement

Article 15 of the Act of 5 December 1968 explicitly foresees three kinds of collective bargaining agreements in this respect:

1. collective bargaining agreements for a fixed term, indicating the duration of their validity[6];
2. collective bargaining agreements for an indefinite period of time; and
3. collective bargaining agreements for a fixed term with a renewal clause.

The last two kinds of collective bargaining agreement need to contain the way the agreement can be terminated and the terms of notice that need to be respected. Partial notice is only possible if the

[6] See also: Act of 5 December 1968, Official Gazette, 15 January 1969, often amended thereafter, art. 16, 5°.

collective bargaining agreements foresee so explicitly. Notice needs to be in writing in order to have any effect. This notification needs to be deposited at the Ministry of Labor[7].

3.2. Distinction on the basis of the level of the industrial relations system where the collective bargaining agreement is concluded

Collective Bargaining Agreements are concluded at the various levels of industrial relations in Belgium: at the national inter-industry level in the National Labor Council. The National Labour Council is composed of employers' and employee representatives and presided by a civil servant who is not a party to the collective bargaining agreements as such. Collective Bargaining Agreements concluded within the National Labor Council are almost always rendered binding by Royal Decree and then become applicable to all employers and employees in the private sector. More than 80 such national inter-industry collective bargaining agreements have been concluded.

A tier of industrial relations just below the one of the National Labour Council is situated at the level of the various industries or sectors of business. Sector level collective bargaining takes place in the joint committees of industry set up per sector of industry. Mostly these joint committees are set up separately for blue and white-collar workers, so that bargaining for the two kinds of workers often takes place separately. There are far over one hundred of these joint committees in Belgium. In these, several hundreds of collective bargaining agreements are concluded per year. It is fair to say that thee brunt of the wages and the working conditions for a large number of employees are set at the level of the joint committee of industry.

One more level below, is the level of the individual enterprise. It should be taken into account that lower level collective bargaining agreements can not go against the content of higher-level collective bargaining agreements. They may not foresee conditions and benefits which are less advantageous to the employee. However, they can foresee conditions, which are more advantageous. Various Parliamentary Acts foresee that certain topics (such as under certain conditions night work and weekend work) need to be regulated by an enterprise collective bargaining agreement. It is then not surprising that over the last couple of year the emphasis has become more and more on en-

[7] Act of 5 December 1968, Official Gazette, 15 January 1969, often amended thereafter, art. 18.

terprise level bargaining, especially if one would look at the mere number of collective bargaining agreements that are concluded per year.

4. NEGOTIATION PARTIES OR PARTIES TO THE COLLECTIVE BARGAINING AGREEMENT

The Act of 5 December 1969 determines who can be party to a collective bargaining agreement. The Act sets the criteria for both sides of the industrial relations scene.

4.1. Worker side

As far as the worker side is concerned the Act explicitly restricts the right to conclude legally enforceable collective bargaining agreements to what is referred to as the representative trade unions. This notion of representative trade unions is not defined in general for all of Belgian labor law, but is defined in relation to the conclusion of collective bargaining agreements. The Act on Collective Bargaining Agreements defines a representative trade union as follows:

> "For the purposes of the application of this Act, the following shall be deemed to be a representative trade union …:
>
> 1. Inter-occupational organizations of workers … established at national level and represented on the Central Economic Council and the National Labor Council; the workers' organizations shall at least have 50,000 members;
>
> 2. the occupational organizations affiliated to or forming part of an inter-occupational organization referred to in paragraph 1" [8].

Analyzing the above definition, one notes that the following criteria apply;

1. Inter-occupational.
2. Established at national level, and thus not just organized in one part of the country (e.g. Wallonia or Flanders).
3. Be represented in the Central Economic Council and the National Labor Council and
4. Have at least 50,000 members.

[8] Act of 5 December 1968, art. 3.

Or to be affiliated to a trade union that satisfies all the above conditions.

The conditions 1, 2 and 4 are straight forward and do not pose too many problems in their practical application. More problems arise, however, with regard to condition number three, namely the membership of the National Labor Council. Given the overriding importance of the recognition as a representative trade union, one would expect also this criterion to be objective and readily applicable. Unfortunately nothing is further removed from the truth. The Parliamentary Act of May 29, 1952 that establishes the National Labor council states:

> "The members of the National Labor Council shall be appointed by the King. The most representative trade union organizations and the most representative employers associations will be represented in equal numbers. The members who represent the most representative trade unions will be chosen form a double list submitted by the nationally established inter-occupational organizations" [9].

The Act does not specify any of the criteria the King (i.e. the Minister of Labor) has to respect while making a choice among the trade unions. This system results in the absolute freedom of choice for the Minister. Practically speaking, only the traditional trade unions have been able to sit in the National Labor Council. The application of the above criteria leads to a practical monopoly of three traditional trade unions : the Catholic trade union (ACV/CSC) the Socialist trade union (ABVV/FGTB) and the Liberal trade union (ACLVB/ CGSLB). The three trade unions are organized in both linguistic parts of the country. The Socialist trade union used to be bigger in Wallonia. However, since the last social elections for employee representatives in the works council, it worked out that the Catholic trade union is the biggest in both Wallonia and Flanders. The Libreral trade union is the smallest of the three. It has a unified organizational structure for blue and white collar workers, which the two biggest trade unions do not have. They are all organized on a national, provincial, regional and even local level.

Attempts by other organizations to challenge the monopoly system of the three trade union organizations have not been successful. Attempts to challenge the representativity have been brought before

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[9] Act respecting the establishment of the National Labor Council, 29 May 1952, section 2, §2, Official Gazette, 31 May 1952, often amended thereafter

national courts, not with any success, however[10]. Challenges to the concept were also brought before the International Labour organization, where the Committee on the Freedom of Association has had, on several occasions, the opportunity to address the Belgian concept of representative trade unions. While the committee self-evidently recognizes the fact that a distinction can be made between different trade unions, it stated that the Government should use pre-established criteria of a precise nature. The criteria should be objective, pre-established and conclusive, and thus not allowing any possibility for abuse [11].

Apart from the fact that the Belgian legal criteria are not pre-established in law and not objectively verifiable, the Committee also stressed that the Belgian criteria attach too much importance to an affiliation to a national or inter-occupational trade union or one represented in the National labor Council. Trade unions that are most representative of a particular category of workers should be associated with the collective bargaining process so as to permit it to adequately represent and defend the collective interests of its members, according to the Committee [12].

Works Council, Health and Safety Committees or Trade Union Delegations, can not conclude collective bargaining agreements in the sense of the Act of 5 December 1968 [13].

4.2. Employer side

Both individual employers and employer's associations can be parties to a collective bargaining agreement. The criteria for representativity mentioned above for workers organizations, apply to employers' associations as well, with the obvious exception of that requiring at least 50,000 members. However, an employer's association, in any branch of activity, that does not meet these criteria may

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[10] See e.g.; Conseil d'Etat, 3 February 1967, nº 12.205, Arresten van de Raad van State, 1967, 161; Cour d'Arbitrage, 18 November 1992, Journal des Tribunaux de Travail, 1994, 4; Cour de Cassation, 27 April 1981; Arresten van het Hof van Cassatie, 1980-81, 973.

[11] International Labour Organization, Official Bulletin, Series B, Vol. LXX, nº 2, 1987, case 1250; International Labour Organization, Official Bulletin, Series B, Vol. LXII, nº 3, 1979, case 918.

[12] International Labour Organization, Official Bulletin, Series B, Vol. LXII, nº 3, 1979, case 918.

[13] Labor Court Brussels, 7 November 1986, Sociaalrechtelijke Kronieken, 1987, 7.

not be declared representative by the Crown; and in fact some representative employers' associations are not affiliated to an inter-occupational organization [14].

An employer that wants to conclude a collective bargaining agreement at enterprise level has to do so with the representative trade unions. It is clear that in general the employer can conclude such an agreement with only one representative trade union, leaving out the others. Their agreement is not required in order to have a valid company level collective bargaining agreement.

The 1968 Act lies down that the delegates of the organizations are presumed to have competence to conclude an agreement on behalf of their organization, and that such a presumption is irrefutable. Through this provision the law is attempting to solve the problem which is constituted by the fact that some negotiators have in fact no power to conclude an agreement. Nowhere in the act it is stated who is a delegate of the trade union organization or what indicates that he or she is recognized as such[15].

Trade union delegates are not competent to conclude collective bargaining agreements on behalf of their trade union. Indeed, delegates, only represent the unionized membership in the enterprise and not as such the trade union. The same is true for the employee representatives in the works council or the committee for the prevention and protection at work. If such employee representative or delegates are involved in some kind of bargaining with the employer, it can never take the form of collective bargaining regulated by the Act of 5 December 1968.

Trade unions — and only among them the ones considered to be representative — are the only bodies competent to conclude collective bargaining agreements on behalf of the workers[16].

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[14] See: C. ENGELS, 'Deregulation and Labour Law: The Belgian case', in *Deregulation and Labor Law in search of a Labor Law Concept for the 21th Century,* The Japan Institute of Labour, 1999, 57.

[15] See: R. BLANPAIN and C. ENGELS, Belgium, in International Encyclopaedia for Labor Law and Industrial Relations', R. BLANPAIN (ed.), The Hague London Boston, Kluwer Law International, s.d.; n° 556, 268-269.

[16] See: C. ENGELS, 'Deregulation and Labour Law: The Belgian case', in *Deregulation and Labor Law in search of a Labor Law Concept for the 21th Century,* The Japan Institute of Labour, 1999, 57-58.

5. SUBJECTS OF COLLECTIVE BARGAINING OR CONTENT OF THE COLLECTIVE BARGAINING AGREEMENTS

Collective bargaining agreements in Belgium deal with wages and working conditions in the broadest sense. The 1968 Act states that it determines individual and collective relationships between the parties to it [17].

A collective bargaining agreement is often referred to as a double-yoked egg [18]. This then means that it has a double content: one the one hand it regulates labor and employment conditions for employers and employees, both at a collective and at an individual level. This all has a normative nature, imposing norms on employers and employees and regulating their specific conditions. The collective bargaining agreement on the other hand also stipulates rights and obligations of the parties who conclude the agreement. This constitutes what is referred to as the obligatory part of the collective bargaining agreement.

With respect to the normative part of the collective bargaining agreement a further distinction needs to be made between the individual and the collective normative part. Individual normative stipulations are the rules, which comprise the wages and working conditions of the individual employees. Stipulations about wages and benefits, cost of living clauses (indexation of wages in line with the increase of the cost of living), job classifications, working time issues, holidays, vacations etc. Collective normative stipulations govern the collective relationship between the social partners at the level the collective bargaining agreement is concluded. This could be the enterprise level or any higher level of collective bargaining. Examples of such collective normative stipulations are the establishments, the conditions for establishment, and the function of the trade union delegation in the company, procedures for the settlement of industrial disputes etc.

The collective bargaining agreement also regulates the relationship between the parties that concluded it, besides regulating employment conditions for the employers and employees belonging to its scope. The collective bargaining agreement can stipulate such obliga-

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[17] Act of 5 December 1968, Official Gazette, 15 January 1969, often amended thereafter, art. 5.

[18] See: R. BLANPAIN and C. ENGELS, Belgium, in International Encyclopaedia for Labor Law and Industrial Relations, R. BLANPAIN (ed.), The Hague London Boston, Kluwer Law International, s.d.; n° 571, 275.

tions explicitly, such as rules dealing with the interpretation of the collective bargaining agreement [19]. It is generally admitted that some obligatory stipulations are of the essence of the collective bargaining agreement, even without these obligations being explicitly mentioned in the text of the collective bargaining agreement. This would be the case for the so-called peace obligation and the duty to implement [20]. The peace obligation means that the parties will refrain from industrial action for as long as the collective bargaining agreement is in force. This is a relative duty, however, unless the parties provide otherwise. The second duty is the duty resting on the parties to implement the collective bargaining agreement. This also means that the parties have the duty to exert influence on their members to live up to the normative stipulations of the agreement. This implies that the parties to the collective bargaining agreement inform their members of the content of the agreement that has been concluded and that the members do not conclude agreement or contracts that go against the collective bargaining agreement. The parties have to exert influence on their members, without at the same time being able to deliver a guarantee on their members behavior. The obligatory part is as such not binding on the members [21].

It is interesting to note that some discussion has recently come up with respect to employee rights in light of outsourcing and transfer of business activities. The issue of employee rights being safeguarded in case of a transfer of a business (under the transfer directive) has lead to quite an extensive debate. It is unclear where the borderline is between a full transfer of a business entailing a full application of the European directive on the transfer of businesses and the mere transfer of an economic activity. In the former case the employees get the full protection of the law, in the latter case there is no protection whatsoever. It is equally clear that in a number of circumstances it is very hard, if not impossible, to predict whether the directive [22] and it implementing legislation (in this case for Belgium an inter-industry collective bargaining agreement, n° 32 *bis* concluded within the National Labour Council) apply to a business transaction that is pri-

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[19] See: R. BLANPAIN and C. ENGELS, Belgium, in International Encyclopaedia for Labor Law and Industrial Relations, R. BLANPAIN (ed.), The Hague London Boston, Kluwer Law International, s.d.; n° 576, 276.

[20] See: BLANPAIN and C. ENGELS, Belgium, in International Encyclopaedia for Labor Law and Industrial Relations, R. BLANPAIN (ed.), The Hague London Boston, Kluwer Law International, s.d.; n° 577, 276 e.s.

[21] See: Labour Tribunal, 12 June 1989, Sociaalrechtelijke Kronieken, 1989, 349.

[22] Directive 2001/23/EG, 12 March 2001.

marily aimed at ensuring to take over the economic activity which is the core of the business that is targeted. In order to safeguard the rights of the employees a few sectors of industry have concluded sector level collective bargaining agreement determining the rights of the employees in case of a take over of an economic activity. Such is for example the case in the security industry or in the cleaning business. The sector level collective bargaining agreement determine that in case of the loss of a contract, that the new contractor has to take over a percentage of the old work force, or at least offer them a contract depending on the sector of industry. It is clear that such sector level collective bargaining agreements grant employees additional rights they would not have otherwise, since the collective bargaining agreement that implemented the Transfer Directive may in these cases not apply. In as much as the Directive and its implementing legislation would already be applicable it is self-evidently not possible to restrict the scope of the Directive and its implementing legislation. However, in as much as the directive would not be applicable since the transaction would not be considered a transfer of a business, the sector level collective bargaining agreements are extending the scope of the collective bargaining agreement implementing the Transfer Directive in Belgian law. Recently at the occasion of the bankruptcy of the Belgian national airline a discussion come up in the framework of the take over of some of the parts of the bankrupt airline. It is clear that some of the activities in an airport depend on being granted a license to operate. A loss of the license would mean the employer would be out of business at that particular airport. The idea came up by a potential employer at the airport to extend the Transfer Directive principles to the situation where an employer would be faced with a loss of the license. The trade unions embraced the idea. However, nothing has come out of the discussion yet, even though it has been going on for a couple of months now. Issues have been raised that such collective bargaining agreements are in conflict with the principle of freedom of movement of services and all the anti competitive and ant-monopoly provisions. It is clear that the implication of airline industry and surrounding businesses in such kind of collective bargaining agreements has raised a number of European law issues. At the national level no clear answers have been formulated yet, by any judges. The issue of the validity of the collective bargaining agreements in the other sectors has not resulted in any significant discussion.

A few examples of issues that national industry level collective bargaining agreements concluded in the National Labour Council have dealt with over the years is indicative of the kind of issues that have

been treated. Self-evidently the list is only indicative, many more such collective bargaining agreements have been concluded:

— Collective bargaining agreement n° 1 bis, dealing with special non-competition clauses [23].

— Collective bargaining agreement n° 5, 24 May 1971 dealing with the trade union delegation [24].

— Collective bargaining agreement n° 8, 16 March 1972 dealing with the indexation of wages [25].

— Collective bargaining agreement n° 9, 9 March 1972 dealing with works councils [26].

— Collective bargaining agreement n° 10, 8 May 1973, dealing with collective dismissals [27].

— Collective bargaining agreement n° 14, 22 November 1973, dealing with reduction of weekly working time [28].

— Collective bargaining agreement n° 17, 19 December 1974, dealing with a supplementary indemnity to be paid to older workers when they get terminated [29].

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[23] Collective Bargaining Agreement n° 1 bis, 21 December 1978 modifying collective bargaining agreement n° 1 of 12 February 1970 dealing with special non-compete clauses in the Act on Contracts of Employment dealing with special non-competition clauses, again modified by collective bargaining agreement n° 1 ter of 28 February 1980, rendered generally binding by Royal Decree, 19 February 1971 March 1979 and 10 June 1980, Official Gazette 7 April 1979 and 10 June 1989.

[24] Collective Bargaining Agreement n° 5, 24 May 1971, dealing with the status of the trade union delegation of the personnel in enterprises, modified and supplemented by Collective Bargaining Agreement n° 5 bis of 30 June 1971 and 5 ter of 21 December 1978, not rendered generally binding by Royal Decree.

[25] Collective Bargaining Agreement n° 8, 16 March 1972, dealing with the transformation technique of the index rate in collective bargaining agreements, rendered generally by Royal Decree of 10 April 1972, Official Gazette 9 May 1972.

[26] Collective Bargaining Agreement n° 9, 9 march 1972, ordering the collective bargaining agreements concluded in the National Labour council dealing with works councils, rendered generally binding 12 September 1972, Official Gazette, 25 November 1972, thereafter modified.

[27] Collective Bargaining Agreement n° 10, 8 May 1973, dealing with collective dismissals rendered generally binding by Royal Decree of 6 August 1973, Official Gazette, 17 August 1973, thereafter modified.

[28] Collective Bargaining Agreement n° 14, 22 November 1973, dealing with the reduction of weekly working time, rendered generally binding by Royal Decree of 22 June 1975, Official Gazette, 15 August 1975, thereafter modified.

[29] Collective Bargaining Agreement n° 17, 19 December 1974, dealing with supplementary indemnity to be paid to older workers when they get terminated, very often modified thereafter.

— Collective bargaining agreement n° 21, 15 May 1975, dealing with an average guaranteed minimum monthly income [30].

— Collective bargaining agreement n° 24, 2 October 1975, dealing with the procedures for information and consultation of the worker representatives in case of collective dismissal [31].

— Collective bargaining agreement n° 29, 29 November 1976 dealing with overtime [32].

— Collective bargaining agreement n° 32bis, 7 June 1985 dealing with safeguarding the workers rights in case of a contractual transfer of a business [33].

— Collective bargaining agreement n° 39, 13 December 1983 dealing with the information and consultation of the social consequences of the introduction of new technologies [34].

— Collective bargaining agreement n° 42, 2 June 1987, dealing with new working time regimes in companies [35].

— Collective bargaining agreement n° 62, 6 February 1996, dealing with the establishment of a European Works council or a procedure in community-scale undertakings and community-scale groups of undertakings for the process of informing and consulting workers [36].

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[30] Collective Bargaining Agreement n° 21, 15 May 1975, not rendered generally binding by Royal Decree.

[31] Collective Bargaining Agreement n° 24, 2 October 1975, dealing with the procedures for information and consultation of workers representatives in case of collective dismissal, rendered generally binding by Royal Decree of 11 March 1977, Official Gazette, 17 February 1976, thereafter modified.

[32] Collective Bargaining Agreement n° 29, dealing with overtime, 29 November 1976, rendered generally binding by Royal Decree of 6 March 1976, Official Gazette, 8 March 1977.

[33] Collective Bargaining Agreement n° 32 bis, 7 June 1985, dealing with the safeguarding of the worker rights in case of a contractual transfer of a business, rendered generally binding by Royal Decree of 25 July 1985, Official Gazette, 9 August 1985, thereafter modified.

[34] Collective Bargaining Agreement n° 39, 13 December 1983, dealing with the information and consultation of the social consequences of the introduction of new technologies, rendered generally binding by Royal Decree of 25 January 1984, Official Gazette, 8 February 1984.

[35] Collective Bargaining Agreement n° 42, 2 June 1987, dealing with the introduction of new working time regimes in companies, rendered generally binding by Royal Decree of 18 June 1987, Official Gazette, 26 June 1987, thereafter modified.

[36] Collective Bargaining Agreement n° 62, dealing with 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 workers, 6 February 1996, rendered generally binding by Royal Decree of 22 March 1996, Official Gazette, 10 April 1996.

— Collective bargaining agreement n° 68, 16 June 1998, dealing with privacy protection of workers against camera surveillance at the work place [37].

— Collective bargaining agreement n° 72, 30 March 1999 dealing with the prevention of stress at work [38].

— Collective bargaining agreement n° 81, 26 April 2002, dealing with the privacy protection of workers with respect to the control of electronic online communication data [39].

— Collective bargaining agreement n° 82 dealing with outplacement of workers older than 45 years [40].

Wage restraint measures

Collective Bargaining in Belgium has not always been free from government intervention. On several occasions the Belgian government has intervened in order to 'keep the Belgian economy competitive', and by thus imposing limits on how much the wage costs could grow over a certain period of time. Quite often the government allowed the social partners to set the limits themselves, under the threat of imposing a government ceiling if the parties could not come to an agreement on time [41].

6. NEGOTIATION PROCEDURE — BARGAINING COMMISSIONS

As indicated above collective bargaining agreements are negotiated at the various levels of industrial relations in Belgium.

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[37] Collective Bargaining Agreement n° 68, 16 June 1998, dealing with the privacy protection of workers against camera surveillance at the work place, rendered generally binding by Royal Decree of 10 September 1998, Official Gazette, 2 October 1998.

[38] Collective Bargaining Agreement n° 72, 30 March 1999, dealing with the prevention of stress at work rendered generally binding by Royal Decree of 21 June 1999, Official Gazette, 9 July 1999.

[39] Collective Bargaining Agreement n° 81, 26 April 2002, dealing with the privacy protection of workers with respect to the control of electronic online communication data, rendered generally binding by Royal Decree of 12 June 2002, Official Gazette, 29 June 2002.

[40] Collective Bargaining Agreement n° 82, 10 July 2002 dealing with the outplacement of workers older than 45 years, rendered generally binding by Royal Decree of 20 September 2002, Official Gazette, 5 October 2002.

[41] See: C. ENGELS, 'Deregulation and Labour Law: The Belgian case', in *Deregulation and Labor Law in search of a Labor Law Concept for the 21th Century,* The Japan Institute of Labour, 1999, 60-63.

At the lowest level they are negotiated between an employer and one or more trade unions which have the status of representative trade union. There is no obligation for an employer to conclude a collective bargaining agreement with all trade unions being present in the company. A valid enterprise collective bargaining agreement can be concluded between the employer and just one of the trade unions. It will be binding on the entire work force and not just the members of the one trade union that signed it [42].

It should be noted that some specific legislative Act that allow parties to regulate specific matters at enterprise level may indicate that the collective bargaining agreement through which the matter is to be regulated at enterprise level, is to be concluded e.g. with all the trade union that have members being part of the trade union delegation within the company. One example is the matter of the introduction of flexible working time arrangements at company level. Such arrangements can be made by way of enterprise collective bargaining agreement. However, the collective bargaining agreement will only legally introduce flexible working time arrangements in the company if it signed by all the trade unions represented in the company trade union delegation.

The 1968 Act provides that collective bargaining agreements can be concluded either within a joint body or outside such a body. In practice most of the agreements are concluded within a joint body, since the legal value of such agreements is higher [43]. The following joint bodies can be mentioned: at the highest level there is the National Labour Council, at the level of the industry there are the joint committees of industry and the sub-committees.

Joint committees and sub-committees are composed of a chairperson and a vice-chairperson, an equal number of representatives of the employers' associations and an equal number of trade union representatives. All are to be designated by the Royal Decree. The chairperson is most of the time a civil servant and is acting in an independent manner. One of the most important tasks of the joint committees is the conclusion of collective bargaining agreements. A collective bargaining agreement concluded in the joint committee is only valid if it is agreed upon by all the parties in the joint committee.

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[42] See: Labour court Brussels, 20 March 1987, Journal des Tribunaux de Travail, 238; Conseil d'Etat, 8 January 1986.

[43] See: BLANPAIN and C. ENGELS, Belgium, in International Encyclopaedia for Labor Law and Industrial Relations, R. BLANPAIN (ed.), The Hague London Boston, Kluwer Law International, s.d.; n° 560, 270.

The National Labour council sits at the highest level of industrial relations, namely the inter-industry national level. It has an equal number of employers representatives and trade unions representatives. Collective bargaining agreements in the Council can be of two kind. A first kind, is the collective bargaining agreement that is applicable to the entire private sector once it is rendered generally binding by Royal Decree. However, the National Labour Council is equally competent to conclude collective bargaining agreements which are valid only for one industry, namely when there is no joint committee which has been composed for that industry, or when the joint committee that has been installed, does not function. An overview of a number of the important national inter-industry wide collective bargaining agreements concluded in the National Labour council can be found *supra*.

7. FORMALITIES TO BE SATISFIED

Article 13 paragraph one of the Act of 5 December 1968 states that a collective bargaining agreement must in be writing [44]. The agreement of all the contracting parties should be shown [45].

With respect to the language requirements it is stated that the collective bargaining agreement should be drafted either in Dutch, French or German depending on whether the collective bargaining agreement is to be applied only in one of the corresponding language regions [46]. Otherwise it needs to be drafted in Dutch and in French, e.g. when one is dealing with a company that has establishments all over the country.

Each agreement has to contain a number of stipulations:

1. the names of the organizations that conclude the agreement;
2. the name of the joint body if concluded in such body;
3. the identity of the signatory parties and if the agreement is not concluded in a joint committee, the capacity in which the signatory parties act and where applicable, the functions within their organization;

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[44] Act of 5 December 1968, Official Gazette, 15 January 1969, often amended thereafter, art. 13, paragraph 1.

[45] Supreme Court, 4 May 1981, Arresten van het Hof van Cassatie, 1980-81, 998.

[46] Act of 5 December 1968, Official Gazette, 15 January 1969, often amended thereafter, art. 13, paragraph 2.

4. the workers, the branch of industry or the enterprises and the territory to which the agreement applies, unless the agreements is applicable to all employees and employees of the joint committee for which it is concluded;

5. the duration of validity of an agreement for a fixed term or the ways in which an agreement for an indefinite period of time can be terminated and the term of notice to be respected (the latter also for a fixed term agreement with a renewal clause);

6. the date of entering into force, if different form the date of its conclusion;

7. the date of the conclusion of the agreement;

8. the signature of the persons having the capacity to sign [47].

Collective bargaining agreements need to be deposited at the Ministry of Labour. Agreements not drawn up in writing, or in the 'wrong' language, or not properly signed and who do not contain the mandatory provisions stated above cannot be deposited at the Ministry of Labour. It has been decided that even in that case, that the agreement remains binding for the parties to it [48].

The object, date duration, scope and place of deposition of an agreement concluded in a joint committee has to be published by means of insertion of a notice n the Official Gazette [49]. The same holds for a notice of termination of the collective bargaining agreement.

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[47] Act of 5 December 1968, Official Gazette, 15 January 1969, often amended thereafter, art. 16.

[48] See: R. BLANPAIN and C. ENGELS, Belgium, in International Encyclopaedia for Labor Law and Industrial Relations, R. BLANPAIN (ed.), The Hague London Boston, Kluwer Law International, s.d.; n° 563, 272.

See equally: Supreme Court, 30 May 1988, Journal des Tribunaux de Travail, 352, note C. Wantiez; Labour Court Liège, 26 May 1998 and 24 November 1998, Sociaalrechtelijke Kronieken, 1999, 237; Labor court Antwerp, 22 May 1996, Rechtskundig Weekblad, 1996-97, 1237; Labour Tribunal Antwerp, 8 October 1997, Sociaalrechtelijke Kronieken, 1998, 409, note F. Dorssemont; Labour court Brussels, 19 December 1988, Journal des Tribunaux de Travail, 271; Labour Court Antwerp, 25 March 1994, Rechtskundig Weekblad, 1994-95, 922; Labor Tribunal Charleroi, 10 February 1986. Sociaalrechtelijke Kronieken 1987, 154; Labour Tribunal Antwerp, 8 October 1997, Sociaalrechtelijke Kronieken, 1998, 8; JF Gerard, 'Les effets de l'absence de dépôt d'une convention collective de travail et la place du droit commun des obligations', Journal des Tribunaux de Travail, 1990, 169 (arguing that collective bargaining agreements that are not deposited can only have moral value).

[49] Act of 5 December 1968, Official Gazette, 15 January 1969, often amended thereafter, art. 25.

8. EFFECT (*ERGA OMNES*, QUID AFTER EXPIRATION DATE, DENOUNCING THE AGREEMENT)

With respect to the validity of collective bargaining agreements in time, reference is made to the discussion on the duration of collective bargaining agreements. It should furthermore be stressed that the application of the theory of incorporation, means that the individual employment contract that was implicitly modified by a collective bargaining agreement, remains applicable in its (implicitly) modified state upon the expiration of the collective bargaining agreement, unless the latter provides differently (see *infra*).

8.1. Agreements not rendered generally binding

A distinction has to be introduced between the normative and obligatory provisions of the collective bargaining agreement, as discussed above.

With respect to the normative provisions, it has to be stressed that these provisions bind the employer that concluded the agreement, that acceded to it, or the employer that is a member of the employers' association that concluded the agreement or of one that acceded to it. In any of these cases the provisions of the collective bargaining agreement have a more binding effect than the individual employment contracts. For other employers the individual normative provisions have an effect beyond the contract parties or their members. The 1968 Act foresees a supplementary binding effect of the normative individual provisions of a collective bargaining agreement on employers who are not members of a signatory party, but who fall within the scope of a joint committee in which the agreement is concluded. The binding force is supplementary only in as much as deviations from the provisions are possible by individual written contracts of employment [50].

This supplementary binding force will take effect 15 days following the publication of the notice in the Official Gazette. The notice has to mention the object, date, duration, scope and place of deposition of the collective bargaining agreement.

The employees are bound the same way as their employer, whether they are unionized or not.

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[50] Act of 5 December 1968, Official Gazette, 15 January 1969, often amended thereafter, art. 26.

With respect to the supplementary binding force it has to be stressed that there is no official way of knowing whether an employer belongs to an employers' association that signed the collective bargaining agreement.

When a collective bargaining agreement (which is higher in the hierarchy of sources than an individual contract of employment) that implicitly modified by the provisions of a individual contract of employment, ceases to be applicable, the individual contract of employment will remain modified, unless the collective bargaining agreement contains a stipulation that foresees the contrary[51] This means that the modified individual contract would remain in force even after the notification and lapse of the notice period. Given the fact that one is then dealing with an individual employment contract, it is clear that the parties may bargain on an individual basis in order to change the said contract of employment. Incorporation of the provisions of a collective bargaining agreement can occur only with respect to individual normative provisions and not the collective normative ones[52].

The obligatory provisions of the collective bargaining agreement are not enforceable in court[53]. These kinds of provisions have to depend on the good will of the parties concerned.

8.2. Agreements rendered generally binding

Only agreements concluded in a joint body can be rendered generally binding by Royal Decree. This would give the collective bargaining agreement a more binding force since they would go up in the hierarchy of sources (see supra). Violation of collective bargaining agreements that are rendered generally binding by Royal Decree is subject to criminal sanctions.

If a collective bargaining agreement that contains collective normative provisions is rendered generally binding, the collective normative provisions would then become applicable also to the employers who do not belong to an employers' association that did not sign the agreement.

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[51] Act of 5 December 1968, Official Gazette, 15 January 1969, often amended thereafter, art. 23.

[52] See: Labour Court Brussels, 18 June 2001, Journal des Tribunaux de Travail, 2001, 481.

[53] See: R. Blanpain and C. Engels, Belgium, in International Encyclopaedia for Labor Law and Industrial Relations, R. Blanpain (ed.), The Hague London Boston, Kluwer Law International, s.d.; n° 586, 280.

Extension is only possible if the parties to the agreement ask for it. Self-evidently the extension ends when the agreement is terminated. The Government continues to play a secondary role, even when it puts the governmental power at the disposal of the social partners as in the case of extension [54]

8.3. Hierarchy of sources

Article 51 of the 1968 Act sets out a list of the legal sources which regulate the employment relation and does so in a hierarchical order. From the highest to the lowest level these are:

1. the mandatory provisions of the law;

2. collective bargaining agreements that are rendered generally binding, and this in the following order:

a. agreements concluded in the National Labour Council;

b. agreements concluded in a joint committee of industry;

c. agreements concluded in a joint sub-committee;

3. collective bargaining agreements that are not rendered generally binding, where the employer is a signatory thereto or if affiliated to an organization which is a signatory party to the agreement and this in the following order:

a. agreements concluded in the National Labour Council;

b. agreements concluded in a joint committee of industry;

c. agreements concluded in a joint sub-committee;

d. agreements concluded outside a joint body;

4. an individual agreement in writing;

5. a collective bargaining agreement in a joint body but not declared generally binding where the employer, although not a signatory there to or not affiliated to an organization that is a signatory there to, is within the jurisdiction of the joint body in which the agreement was concluded;

6. company work rules;

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[54] See: R. BLANPAIN and C. ENGELS, Belgium, in International Encyclopaedia for Labor Law and Industrial Relations, R. BLANPAIN (ed.), The Hague London Boston, Kluwer Law International, s.d.; n° 588, 281.

7. the supplementary provisions of the law;
8. a verbal individual contract of employment;
9. customs[55].

The hierarchy that is established through article 51 of the Act of 5 December 1968 does not prevent individual bargaining between an employer and an employee, and does not prevent collective bargaining at a lower level of industrial relations such as the company level. It is foreseen, however, that the results of the lower level bargaining (whether individual or collective) can not go against the provisions of the higher level collective bargaining agreement[56]. In case the lower level agreement foresees better terms and conditions than the higher level agreement, this is not considered to be contrary to higher level provisions that foresee inferior terms for the employees. Unless explicitly foreseen differently, Belgian law always allows deviating from the higher norm to the benefit of the workers concerned[57]. A collective bargaining agreement can never go against the provisions of a mandatory provision of the law[58].

9. ADMINISTRATION OF THE AGREEMENT

Collective bargaining agreements that are not rendered generally binding remain agreements concluded between private parties and are interpreted as such. The way of interpretation is not the same as it is for, e.g. Parliamentary Acts. There is no documented history of the negotiations that lead to the final conclusion of a collective bargaining agreement so that this can not be used to explain the terms of the agreement. If the parties to the agreement would have a different point of view, this will most likely result in discussion among them and maybe in the conclusion of a collective bargaining agreement which interprets or modifies the first one. In case there is an individual employment conflict in court (courts are not competent to deal with collective cases), dealing among other things with the interpre-

[55] Act of 5 December 1968, Official Gazette, 15 January 1969, often amended thereafter, art. 51.

[56] Act of 5 December 1968, Official Gazette, 15 January 1969, often amended thereafter, art. 9.

[57] See: C. ENGELS, 'Deregulation and Labour Law: The Belgian case', in *Deregulation and Labor Law in search of a Labor Law Concept for the 21th Century,* The Japan Institute of Labour, 1999, 63.

[58] Supreme Court, 10 January 2000, Rechtkundig Weekblad, 2000-2001, 692.; Supreme Court, 27 January 1994, Sociaalrechtelijke Kronieken, 1994, 75.

tation of certain stipulations of the collective bargaining agreement, it will be the civil judge before whom the case is, who will deal with the interpretation the way the judge sees fit.

With respect to the ability of the Belgian Supreme Court to check whether a court has interpreted a collective bargaining agreement correctly, a difference is made between those rendered generally binding and those not. For the latter the Supreme Court has no power to check on the interpretation which is done autonomously by the lower level court. For the former kind of collective bargaining agreements, the Supreme Court retains the ability to check whether the lower court has correctly interpreted the agreement [59]. Such collective bargaining agreements then have to be interpreted like acts of an administrative authority [60].

The observance of collective bargaining agreements is in the first place observed by the trade union delegation that operates in very many enterprises. If the trade union delegation thinks the provisions of a collective bargaining agreement are not being respected by an employer, it can appeal to the employer itself directly. It can also appeal to the outside trade union representatives who can contact the employer. If things do not get resolved in this way, the matter may be brought before the conciliation committee established for the joint committee of industry to which the employer belongs [61].

The application of collective bargaining agreements that are rendered generally binding by Royal Decree, is sanctioned with criminal sanction. The inspection services of the Department of Employment and Labour controls the application of such collective bargaining agreements. They have the power to issue warning, to set a fixed time limit within which the offender must comply with the provisions of the law, and to draw up written reports for the prosecution which will be accepted as prima facie evidence. A copy of the report must be transmitted to the offender [62].

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[59] Supreme Court, 14 April 1980, Rechtskundig Weekblad, 1980-81, 112. See also: O. DELEYE, "De C.A.O. en het Hof van Cassatie", Journal des Tribunaux de Travail, 1995.

[60] W. RAUWS, "Interpretatie van collectieve arbeidsovereenkomsten" [Interpretation of Collective Bargaining Agreements], in CAO recht, CedSamson, loose-leaf, 7.2/11.

[61] See: R. BLANPAIN and C. ENGELS, Belgium, in International Encyclopaedia for Labor Law and Industrial Relations, R. BLANPAIN (ed.), The Hague London Boston, Kluwer Law International, s.d.; n° 597, 285.

[62] See: R. BLANPAIN AND C. ENGELS, Belgium, in International Encyclopaedia for Labor Law and Industrial Relations, R. BLANPAIN (ed.), The Hague London Boston, Kluwer Law International, s.d.; n° 598, 285.

Individual conflicts that relate to the application of collective bargaining agreements belong to the material competence of the specialized labor courts that exist in Belgium [63]. An employee can therefor claim the application of a collective bargaining provision to his/her individual case, and can do so, before a court of law.

10. ABILITY TO CONTEST THE VALIDITY IN COURT

A 1991 modification of the Act of 5 December 1968 makes an end to the discussion whether or not a collective bargaining agreement could be challenged before the highest Belgian Administrative court (Conseil d'Etat) in an action to have it annulled.

Article 26 in fine of the 1968 Act clearly states now that collective bargaining agreements that are concluded in a joint committee of industry can not be challenged for annulment before the Conseil d'Etat. The other kids of collective bargaining agreements can self-evidently not be challenged either.

The Cour d'Arbitrage confirmed that the fact that one can not bring a suit before the Conseil d'Etat does not mean that the legality of the collective bargaining agreement could not be challenged [64]. In case an action is brought before the court, the parties can always try to point out that the provision of the collective bargaining agreement that they do not want to see applied, is in conflict with a provision which higher in the hierarchy of sources (see *supra*). If the judge agrees, the judge can consider the provision of the said collective bargaining agreement to be null and void, without at the same time surpassing the contours set by the individual case before the court. This means that a court can never in general state that the provision in discussion is null and void and that it is taken out of the collective bargaining agreement for the future.

11. OTHER QUESTIONS/ISSUES, IF ANY

Two issues are worth mentioning in this context. The first on deals with the transfer of a part of a business in the sense of the EU Transfer directive and the second one deals with the discussion that is going on in Belgium on regionalization and the extension of the binding force of collective bargaining agreements.

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[63] Art. 578, 3° of the Code of Civil Procedure.
[64] Cour d'Arbitrage, 19 May 1993, Official Gazette, 9 June 1993, 14.143.

11.1. Outsourcing and the continued applicability of sector level collective bargaining agreements

The Act of 5 December 1968 states in its article 20 that 'in case of a transfer of an entire company or part of it, that the new employer will be bound by the agreements that were binding on the previous employer, until they cease to have effect.' Recently a discussion has come up with respect to the application of this article 20 in a situation where a part of a company is being transferred (e.g. quite often in cases of outsourcing of non core businesses) and will belong to another company which itself belongs to another joint committee of industry. It was always argued that the sector level agreements would continue to apply to the transferred part of the business, regardless of the difficulties that this brings along in practice. In a 1999 case of the Labour Court of Appeals of Antwerp, it was argued for the first time that the said sector level collective bargaining agreements did not transfer as such to the new company belonging to the other sector of industry and thus being reigned by different collective bargaining agreements[65]. Self-evidently the employees involved in the transfer do not loose all the rights that they had with respect to the sector level collective bargaining agreements (of the old sector). On the basis of the incorporation of the provisions of the collective bargaining agreement that ceased to have effect because of the transfer of the business to another joint committee, into the individual contract of employment the employee's rights are safeguarded. The new employer and the employees can jointly decide to modify employment conditions in order to be able to harmonize these with the employment conditions in the new sector of industry.

11.2. Regional or Community wide extension of collective bargaining agreements

Up to recently there had been a discussion whether regional collective bargaining agreements would be possible. The question arose as to the validity of a regional government rendering generally binding collective bargaining agreements dealing with regional or com-

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[65] Labour Court Antwerp, 17 May 1999, Journal des Tribunaux de Travail, 2000, 24, note C. ENGELS. See also: C. ENGELS, Overdracht van onderneming en outsourcing, Larcier, 2000, 59-64; C. ENGELS, Wijziging van paritiar comité bij overgang van onderneming en het lot van de collectieve arbeidsovereenkomst [Change of joint committee in case of transfer of a business and the fate of the collective bargaining agreement], Journal des Tribunaux de Travail, 2000, 27-29.

munity matters. The Act of 5 December 1968 only foresees that the King (read the Minister of Labour) can render generally binding a collective bargaining agreement.

In a recent piece of advice (24 January and 28 March 2002) the Conseil d'Etat stated that when dealing with community or regional matters, that the federal government would not be able to render generally binding the collective bargaining agreement that deals with either regional or community matters. This means that only the regional or community government should be able to do so and that the regional or community legislator should pass legislation in order for its governments to be able to do so.[66]

The entity of the state that will be able to render generally binding collective bargaining agreements will thus depend on the corresponding competence of either the federal state or the region or community, in line with the constitutional division of competencies. It is clear that the legislative framework will now have to be amended accordingly.

[66] See: P. Populier, "Vlaamse C.A.O.'s" [Flemish Collective Bargaining Agreements], Rechtskundig Weekblad, 2002-2003, 154.

Chapter 3

COLLECTIVE AGREEMENTS IN FINLAND

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1. BACKGROUND

The collective agreement-system was introduced into statutory law in Finland in 1924, the year in which the Collective Agreements Act was adopted. It was based on Hugo Sinzheimer's draft for a German Act that never got adopted in Germany. In practice collective bargaining, however, became important only after the second world war when the labour movement gained power.

A modernized version of the Act was made more than 20 years later in 1946 and the system of collective bargaining in practice was based on the new Act passed in 1946. In 1970 the collective bargaining system was extended also to the public sector and the development changed towards what could be called a Nordic model for industrial relations. This model can shortly be characterised by some of its important features:

— a unified trade union movement and a high unionization rate;

— a long tradition of labour regulation through collective bargaining;

— a long tradition of government regulation based on close cooperation with trade unions and employer organizations in support of labour peace as well as the right to collective action;

— tripartite cooperation on economic policy and employee and trade union participation at different levels [1].

[1] See KNUDSEN, HERMAN and BRUUN, NIKLAS, EJIR 1998, Vol 4, No 2 132. More generally about the so called Nordic model, see BRUUN *et al.* (1992) and LILJA (1992).

After the Second World War collective agreements have played an important role in Finland for regulating terms and conditions of the employment relationship.

2. STRUCTURE OF THE COLLECTIVE NEGOTIATIONS IN FINLAND

Since the end of the 1960s the Finnish labour market system has consisted of hierarchy of four different levels[2]. At the first or top level, the central organizations of both employers and employees enter into both incomes policy agreements and general agreements. The incomes policy agreements include comprehensive agreements on wages, agricultural income, tax policy and questions concerning economic policy. The labour market organizations, other interest organizations, the Government and the Bank of Finland are all involved in the process. Although often formulated in writing, in strictly legal terms the incomes policy agreement is best characterized as an informal agreement. At times a comprehensive incomes policy has not occured, but instead a centralized labour market agreement that has been based or more or less clearly documented expectations of the Government's economic policy for the agreement-period has been satisfactory.

The central labour market agreements and the incomes policy agreements together establish a framework or guidelines for the collective agreements that are concluded by sectoral federations. These central labour market agreements are not collective agreements in the strict sense and have no direct legal effect on the parties to a collective agreement. In addition to the framework or guidelines which give the agreements something of the character of an incomes policy for the development of earnings, a general agreement concluded by the central labour market organizations often covers questions to be resolved over a longer period of time. Such general agreements have been concluded concerning the protection of employees against dismissal as well as the rationalization of and co-operation within the firm. In practice, general agreements have been implemented by making them part of the collective agreement individually accepted by nationwide confederations for different branches. These general agreements are central agreements, but they are called general agreements because they are intended to be in force during a longer period than the collective agreements on pay

[2] See BRUUN (2002), 194.

and other benefits. For instance in the year 2001 the central organisations within the industry concluded a new general agreement on protection against unlawful dismissals.

The most important level for concluding an agreement on the labour market is the level of the nationwide industrial federations where, in practice, the collective agreements defined in the Collective Agreements Act are made. The comprehensive and detailed agreements at this second level are of great importance in the regulation of the terms and conditions of work within individual employment relationships at different workplaces in the various nationwide branches (e.g. metal industry, paper industry). The stipulations on generally applicable collective agreements (*erga omnes*) in the employment Contracts Act apply to these agreements (see below).

While it is possible to conclude a valid collective agreement at the level of the local workplace, i.e. the third level, such agreements are more common in large firms such as Finnair or the Finnish Broadcasting Corporation, which do not belong to an employer organization. Otherwise, even though during the last few years both the interest in and need for local solutions appear to have increased, local agreements are most often still concluded with the support of a delegating clause within a confederation agreement.

At the fourth or individual level it is always possible within the framework of individual employment contracts to agree on more advantageous conditions over and above the minimum level established by the collective agreement. It is however not possible to conclude agreements below this minimum level.

In Finland the system of collective bargaining is also applied in the public sector, in the state sector as well in the local municipalities. The separate legislation regulating the public collective agreements differ however in some respects from that applied in the private sector. The system is very centralized and for instance the peace obligation far reaching.

In Finland, as in other Nordic countries, the municipal bargaining system is similar to that used in the private sector. Local authority employers have the same rights as private-sector employers to lead and to delegate the work, and to decide what work the employees shall carry out. The local authorities are important employers. Their responsibilities as employers are ultimately borne by politically elected councils.

Labour legislation has been developed in Finland, as in the Nordic countries in general, through co-operation between the la-

bour market parties and the government. The so-called tripartite co-operation also helps to solve many questions in the social security sector.

3. TYPES AND SPECIALITIES OF COLLECTIVE AGREEMENTS UNDER THE FINNISH LEGISLATION AND JURISPRUDENCE

After the war had ended, in 1945, collective agreements were concluded for blue-collar employees in all industries. For salaried employees it took longer to reach the agreement-phase. The collective agreements have during the last 50 years not only been facing a numeral growth, but also reached a very broad coverage when it comes to the matter they are regulating. Gradually the collective eagreements have become more extensive and detailed.

As mentioned before, the present framework for collective agreements is based on the structure of trade unions and employer's associations. However, the areas do not always coincide. Therefore, an employers' federation may have collective agreement relations with several employees' federations and vice versa. Even though the number of collective agreements concluded by one federation is not limited to one, most of the employers' and employees' federations are not parties to more than a few collective agreements which cover the whole area of Finland. However, there are some exceptions, as the Finnish Electric Workers' Federation [3].

But even where the system makes that employees and truck drivers for instance belong to the same union as the blue-collar employees, the industry based collective agreement often has no wage standards applicable. Instead, the collective agreement refers to wage standards in other collective agreements.

Besides the ordinary collective agreements, the Finnish Employers' Confederation (nowadays Confederation of Finnish Industry) and the Central Organization of Finnish Trade Unions have concluded general agreements on such questions which can better be regulated by inter-industry agreements. These agreements are not usually called collective agreements (even if they might be collective agreements in the legal meaning of the term) but general agreements as mentioned earlier.

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[3] Suviranta (2000), 178.

In Finland the collective agreements system can be devided into different levels, with agreements on local level or national level. The agreements network can be divided into national blue-collar agreements, national white-collar agreements and local agreements.

In addition to the confederation-wide, industry-wide or craft-wide agreements, there are local agreements of various kinds. In general the local agreement is a company agreement, which protects the employment relationships of an employer not belonging to any employers' association and concluded between the employer and a trade union, which may be either a local trade union or an industry- or craft-wide federation. In most cases such a company agreement is an accession agreement in which is agreed to apply the national collective agreement of the industry in question. An accession agreement is seldom concluded for a definite period, but includes future agreements until terminated by either of its parties[4].

A new general agreement in 1993, during a severe recession in Finnish economy, transferred bargaining rights partly to the local level, jobs in the municipal sector were secured by means of local bargaining through so-called "savings agreements". The purpose of these agreements was to diminish labour costs, maintain jobs and cut the number of dismissals and lay-offs. Usually, the savings agreements included an employment security guarantee for the period of validity of the agreement.

4. NEGOTIATING PARTIES

The trade unions negotiate collective agreements for their members. In Finland collective agreements cover all members irrespective of where they live or work. Some matters can also be agreed upon locally, but only in the case when there is mutual understanding between the employer and the employee representative.

A valid collective agreement can according to the Collective Agreements Act be negotiatiated by one or several employers or registered associations of employers and one or more registered associations of employees. Association of employers means any association whose specific objects include that of safeguarding the employers' interests in the employment relationship, whereas association of employees means any association whose specific objects

[4] Suviranta (2000), 171.

include to safeguard the employees' interests in the employment relationship.

Finnish trade unions and employer's associations are generally registered, and have a corporative personality. In fact, they must be registered in order to be capable of concluding collective agreements. In theory, these agreements are legally binding only on the signatories and the employees affiliated to the central union that negotiated them. However, an employer must in all cases due to an explicit provision in the Act respect the terms and conditions of an agreement even with respect to employees who do not belong to the central union that negotiated the agreement.

Nowadays Finland has one of the highest rates of union membership in the industrialised world, with 80 per cent of employees organised in trade unions. With 76 trade unions organised into three central confederations, there is a union for every employee regardless of line of work, type of employment or status in the enterprise. The Central Organisation of Finnish Trade Unions SAK, the Finnish Confederation of Salaried Employees STTK and the Confederation of Unions for Academic Professionals in Finland AKAVA are recognised and respected organisations of considerable social standing.

Employee organisations occupy a powerful position in the evolution of the Finnish society. These central employee confederations are politically non-aligned. They work closely together, both at national and international level, and have common objectives: to improve the welfare and quality of life of employees and to improve working life. Both individually and collectively the employee confederations submit their opinions to the Finnish government and to Parliament concerning changes in legislation on employment and social affairs, taxation, environmental and energy policy, education and training, employment and the evolution of working and business life. The views of the employee confederations carry considerable weight.

Trade union members pay membership dues to their unions, in return for which they enjoy such benefits as contractual security, training, legal aid and leisure-time services. Employers often set off trade union dues from the wages of organised employees and pay them directly to the union. Organised employees are also usually members of an unemployment benefit fund for their various industries. Such membership entitles the employee to earnings-related benefit in case of unemployment.

Also the employer side is well organised in Finland. Employers have own central unions in each sector: industries, service sector,

agriculture and within municipalities, state and church. All central organisations of the employers have their own member unions negotiating the labour agreements with the central organisations of the employees. The most important Employer Confederations in the private sector are the Confederation of Finnish Industry EK.

In the public sector of local government or municipalities the negotiating parties are the Commission for Local Authority Employers and the principal negotiating organisations for the employees. The parties have agreed the negotiating procedure in the Main Municipal Agreement.

Section 4 of the Collective Agreements Act gives a list of the parties bound by a collective agreement. They are on one hand the parties to the agreement, or the employers or associations that are party to the collective agreement together with those who have in writing joined the agreement and, on the other hand, those who are bound by the agreement without being party to it, i.e. the registered member associations who are party to the agreement together with the employers and employees who, during the validity of the agreement, are or have been members of an organisation that is bound by the agreement. In other words, resignation from an organisation during the period of validity of the agreement does not mean that the employer or employee is no longer bound by a collective agreement for the duration of its effect. On the other hand, an organisation that is bound by a collective agreement without being a party is not bound by the agreement if it ceases to belong to the member organisation.

An employer who is bound by a collective agreement also has the duty to apply the regulations in the collective agreement to employees who themselves are not bound by the collective agreement. However, this provision in the Collective Agreements Act is optional. Under the Employment Contracts Act, irrespective of the restraints in the collective agreement under the Collective Agreements Act, the employer is also obliged to observe the wage and other conditions that have been decided for the work in question in the nation-wide collective agreement for the branch in question (*erga omnes*-effect).

According to the stipulation in the Employment Contracts Act the employer shall observe at least the provisions of a national collective agreement considered representative in the sector in question (*generally applicable collective agreement*) on the terms and working conditions of the employment relationship that concern the work the employee performs or other comparable work. A collective agree-

ment is usually considered representative if it covers at least 50 % of the employees in the sector concerned but specific features as the organisatiuonal structure in the sector might justify that even agreements with lower representativity is regarded as representative.

Any term of an employment contract that is in conflict with an equivalent term in a generally applicable collective agreement is void, and the equivalent provision in the generally applicable collective agreement shall be observed instead.

In derogation from what is said above, an employer which is required under the Collective Agreements Act to observe a collective agreement in which the other contracting party is a national employee organization is allowed to apply the provisions of this collective agreement.

Provisions on confirmation of the general applicability of a collective agreement, on the validity of the general applicability and the availability of agreements are laid down in the Act on Confirmation of the General Applicability of Collective Agreements. According to that Act a special Board makes a decision as soon as possible after the coming into force of a collective agreement whether this is to be declared generally applicable and thereby obligatory to apply for all the employers in the sector. An employer can appeal to the labour court in order to argue that the collective agreement does not after all fulfil the criteria for being generally applicable. All the generally applicable collective agreements are registered and available at a website of the state authorities.

5. MATTERS TO NEGOTIATE. IS THERE SOME PROBLEM WITH THE COMPETITION LAWS?

National negotiations preceding the collective agreements govern the conditions of municipal service and employment and cover such issues as pay, working time and annual leave. The municipal collective agreement system plays a major role in promoting good labour market relations and avoiding industrial disputes.

A collective agreement generally concerns the conditions to be complied with in contracts of employment or in employment generally. Since the beginning of the 1990s, employment has become an objective of the national incomes policy negotiations. The focus has been on controlling inflationary pressures in order to secure competitiveness and to stabilise employment. In 1993, the central organisa-

tions reached an agreement on improving the employability of young people, setting out new regulations concerning the salaries of young employees on a sector-specific basis. In 1995, the aim was reducing unemployment.

Equal opportunities are regarded as being integrated into collective bargaining. Central incomes policy agreements have been a key factor in promoting equality over the past two decades, with decisions taken on issues such as childcare leave, maternity leave and parental leave. There have been so-called women's pay awards — aimed at promoting equal pay — in the late 1980s and again in 1995, while the central social partners have also agreed on joint job evaluation schemes with the aim of equalising pay.

The normative competence of the social partners in the present Collective Agreements Act of 1946 states that the collective agreement is one concerning *employment terms and conditions* . These terms and conditions are usually divided into terms giving individual benefits (pay, wages etc) or common benefits to the workers (canteens, safety and health measures etc).

The relationship between competition law and collective agreements has been settled in the Act on Competition Restrictions of 1992. Section 2 paragraph 1 of this Act states that "This law shall not be applied to agreements or arrangements which concern the labour market". There are a few cases where the relationship between labour and competition law has been at stake and normally the borderline is regarded as clear.The starting point is that clauses in collective agreements have immunity from competition law, only as far as they genuinely are related to employment terms and conditions (in the large sense). Especially clauses in collective agreements on manpower and how the employer is entitled to use outside workforce have raised problems.

In one case a clause restricting the use of temporary agency workers was regarded as null and void on competition grounds. The reasoning was that a trader has to have the right to decide himself whether his works are carried out by his own workers or by subcontractors. This right could not be restricted by a collective agreement [5].

The most important case in Finland on the relationship between competition law and collective agreements is the so called *Paper Mills Case"* [6].

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[5] See HELLSTEN (2001), 117-136.

[6] This case is reported in English in the International Labour Law Reports ILLR (published by Martinus Nijhoff, now Kluwer) (1996), 310-327.

6. NEGOTIATION PROCEDURES

A collective agreement for a specific period gets it contents essentially in two ways: the grassroots way and a centralized way. In certain federations the aspirations of the members concerning the contents of the next collective agreement are discussed in local trade unions in good time before the agreements negotiations are planned to begin. After the local discussions, the negotiating objectives of the federation are discussed and formulated by the competent organs of the federation and presented in writing to the employers' federation. At this stage, the demands presented to the employer side are not final.

Meanwhile, the confederations have begun their negotiations, often under the auspices of incomes policy at central state level. They aim to agree on principles for the new collective agreements. If the confederations succeed, their agreement provide for a wage increase plus a percentage of the yearly wages of each agreement field.The agreement of the confederations may also provide for improved benefits, such as lengthened holidays and the government might link tax reductions to the package.

The statutes of the confederations normally give a two-week period for the member-federations to decide whether or not to accept the general solution: the solution is seen as accepted if it is not rejected to within two weeks. However, the final negotiations with the opposite party are still to come; the principles and numbers included in the general solution are to be converted into terms for a collective agreement. Employee federations try to observe the grassroot aspirations as far as possible, but often they have to be changed due to that no confederation can support a member federation's demands in excess of the general solution, despite the fact that it might have been taken by the member federation.

The next step is for the federations to accept the solution. In the 1980s it became more common for federations in Finland to reject the solution and impose favourable wages through strikes. Where the confederations are not able to agree on a solution, the next step is to bargain on federation level. At this stage the federations have freer hands, although the difference is not that big as the factual economic possibilities have to be taken into account. In addition, the national organs of incomes policy present their recomendations also to the negotiators on federation-level. Collective bargaining is conducted by big and small delegations. Of course, both parties want to find a solution, but even if the agreement period would be finished,

the work will go on. The slogan "no contract, no work" is unknown in Finland.

But even if the negotiations lead nowhere, one of the parties (usually the employee-side) declare the negotiations finished. The conclusion eventually achieved by the representatives of the parties is actually not totally a sign that a collective agreement has been concluded. The negotiators do not have authority to accept and sign the result of the bargaining before it's been endorsed by the council or board involved.

There are no provisions on good faith in the Finnish legislation and such problems are rare. One reason for this is that a valid collective agreement has to be made in writing (see below).

7. PERFECTION OF THE AGREEMENT: REQUISITIES. IS OBLIGED THE OFFICIAL PUBLICATION OR SOME OTHER? IS THE WRITTEN FORM ESSENTIAL? MUST IT BE REGISTERED?

The paper that finally is signed by the representatives is not a complete collective agreement.It includes only the changes from the previous period. An agreement text is, however, compiled by representatives for both federations. This compilation is used as the relevant agreement for the period in question.

The collective agreement must regulate conditions of employment in order to enjoy the legal effects regulated by the Collective Agreements Act. This means that a collective agreement is an agreement on the norms that apply to the "employment contract or otherwise to the employment relationship". The agreement can, however, include other provisions, but without any terms to be observed in employment relationships it cannot be called a collective agreement.

A prerequisite for an agreement is that its contents is drawn up during the negotiations between the parties. Finnish trade unions and employer's associations must be registered in order to be capable of concluding a collective agreement.

The requirements for collective agreements are presented in the Collective Agreements Act (section 2). According to this section, every collective agreement shall be drawn up in written form. But the Collective Agreements Act has an alternative manner in which the requirement of written form can be fulfilled: the agreement terms

may be entered in a record over the agreement negotiations and the record certified in a manner accepted by the parties. This way does not require a record certified in writing by representatives of the parties.

The employer party to the agreement is obliged to, within one month of the date on which the agreement was signed, deliver it as a paper copy and electronically to supervision of the ministry in charge of occupational safety and healt. In addition, an employer party to a national collective agreement shall provide the mentioned ministry with the number of it's member companies and the number of their employees grouped according to the collective agreements that apply to their employment relationships.

In a case where an individual employer separately agrees in writing with an association of employees that it will observe the regulations of a national collective agreement it's obliged to provide the ministry with the number of its employees that are covered by the agreement it has made.

If an employer, an employer's association or employees' association later accedes to the collective agreement or a posessor of an undertaking takes part of it or if the agreement totally expires, the employer party shall notify the ministry in question within one month. The employee party on the other hand shall inform the ministry on it's employed members grouped according to the agreements that apply on their relationships.

8. EFFECTIVENESS. *ERGA OMNES* EFFECT? WHAT HAPPENS WHEN THE AGREEMENT REACHES THE FINAL DATE? MUST IT BE DENOUNCED TO FINISH?

Usually a collective agreement is valid for a certain agreement period. An agreement concluded for a definite period ceases to have effect at the closing of the stipulated period. On the other hand, the agreement usually provides for an extension of one extra year if notice to terminate the agreement is not done a certain period (usually two months) before the ending of the agreement period.

Any collective agreement which is concluded for a period more than four years is treated on the expiration of the fore years as a collective agreement for an undefined period. Where a collective agreement in Finland is not concluded for a definite period, any party may give three months' notice of termination of the agreement at any

time. Notice of termination has to be given in writing. The agreement provides regularly for an extension of one year if not notice to terminate the agreement is given.

Despite the end of the agreement period, the agreement terms must be respected until a new agreement has been made up or the agreement negotiations have broken down. Another common demand is that the party giving notice has to propose a new agreement; if this is not done the notice does not have any effect. A collective agreement can as well be rescinded if the agreement has been seriously violated, when those on the opposite side can't be expected to follow the agreement's regulations. Usually the suffering part brings a case before the Labour Court.

When a collective agreement expires due to notice given by the employee side there is no need for any separate denouncement of the agreement. It has however an continuous effect as a part of the individual employment relationships if not otherwise agreed. Therefore during the period ewhen no agreement is in force the provisions on pay and different benefits in the previous collective agreement are usually applied.

A representative nation wide collective agreement must according to a specific provision in the Employment Contracts Act (2:7) be applied also by a non organized employer,i.e. it is generally applicable. That means as was explained above that individual clauses in the employment contract that are unfavourable for the individual employee are null and void and the employer must apply terms and conditions stipulated in the collective agreement (*erga omnes*).

9. AGREEMENT'S ADMINISTRATION? WHICH AND HOW TAKES IN CHARGE THE APPLICATION, INTERPRETATION, CONFLICTS, ETC. ABOUT THE CONTENTS OF THE AGREEMENT BEFORE TO PRESENT A SUE IN FRONT OF THE COURT? SOME PARITETIC COMMISSION OF THE PARTIES?

Collective bargaining in Finland is primarily regarded a private law activity and the parties decide on the procedures and the administration of the agreement themselves as autonomous parties.

In the amendments to the 1946 Act, the surveillance duty of the agreement parties has been defined more in detail, as well as fines for violations. Most conflicts in Finland concerning the collective agree-

ment that must be dealt with in front of the Labour Court are matters of interpretation of the agreement.

The shop steward system is an important corner stone of the Finnish collective labour relations system, and has mainly been regulated in general agreements between central labour market organizations and in collective agreements. The job security of shop stewards is regulated in the Employment Contracts Act and special provisions about their activities are contained in other legislation, but the central elements of the system is based on the collective agreements [7].

According to the General Agreement of 1997, the shop steward shall be elected by the local trade union concerned. The union is entitled to organize the elections at the workplace, which entails that the shop stewards are commonly elected by the union members at the establishment or department and certified to the employer by the union. The personal employment relationship of a shop steward is not altered on account of this election, but he might be entitled to compensated time off from his normal duties in accordance with the provisions in the agreement.

As a representative for the local union, the shop steward has dual tasks. On one hand he shall represent the interest of the trade union and its members towards the employer and see to it that the empoyer fulfils his obligations, especially those based on the collective agreement. He is entitled to negotiate concerning any differences in opinions with the supervisor of the department. If an agreement cannot be reached, the negotiations might be referred to the chief shop steward in the company and a manager representative. If the negotiations fail even at this level, either of the parties may demand that the negotiations be continued between the parties to the collective agreement. The other side of the shop steward's tasks consists of internal union matters, but he should also see to it that the union members fulfil their obligations towards the employer, regarding for instance labour peace.

In some work places there might be non-organized workers who are not represented by any shop steward. The new Employment Contracts Act contains provisions on the right for such employees to choose a special elected representative or representative of trust. The legal position of this representative, which is subsidiary to the shop steward system, is defined in the Act in a way that corresponds to what is agreed on for shop stewards in many collective agreements.

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[7] See Suviranta (2000), 151.

The Employment Contract Act states that the elected representatives are entitled to any information that they need to carry out the duties described in law and release from work obligations. The employer must compensate for any loss of earnings caused thereby. Release from work obligations in order for the elected representative to carry out other duties and compensation for loss of earnings must be agreed upon with the employer.

There are no separate paritetic or other commissions, the local trade union and the shp steward is responsible for the administration of the agreement. Also the co-operation within undertakings is linked to the system of collective agreements. It gives, however, employees who are not represented by the parties to the collective agreement a possibilty to choose their own representation.

10. IMPUGNATION OF THE AGREEMENT. IS IT POSSIBLE TO GO TO THE TRIBUNAL TO CONTEST THE COLLECTIVE REGULATION OF THE AGREEMENT? FOR WHAT REASONS? ARE THERE ALTERNATIVES TO THE JUDGES, AS ARBITRATION OR CONCILIATION METHODS AND ORGANS?

There is no official administrative supervision of the observance of duties in collective agreements, except for some collective agreements supervised by the labour protection authorities. Instead, what is agreed in a collective agreement, is binding like the context of any contract; the other part may always ask for the fulfilment of any neglected obligation. However, the remedies are not the same as the law describes for private law contracts.

The Collective Agreement Act states that the individual norms of a collective agreement have an automatic and obligatory effect on employment relationships. This means that where the stipulation in an employment contract is in conflict with a stipulation in a collective agreement, it is invalid. In such cases the stipulations of the collective agreement apply.

There are two different ways to guarantee that the normative stipulations in a collective agreement are followed in the work place. In the first instance, an employer who is bound by a collective agreement and who has broken one of the normative clauses in the agreement or who has good reason for having understood that he was breaking such a stipulation may be sentenced to pay a maximum fine

not exceeding EUR 25 300. This so called compensatory fine is the main remedy for breach of obligations in the collective agreement.

An employee who is bound by a collective agreement may under the same conditions be sentenced to pay a maximum fine of EUR 250 (864/2001). The latter sanction has little importance in practice as the majority of the conditions in a collective agreement involve the duties of the employer. Moreover, in a collective agreement it is the association that is responsible for that its members follow the stipulations in the collective agreement. An association that neglects its duty of control may be sentenced to pay a maximum fine of EUR 25 300.

The compensatory fine may be repeated until the circumstances contrary to the collective agreement change. When a compensatory fine is imposed, according to the Collective Agreements Act, all the facts which have emerged, such as the extent of the damage or the degree of guilt are carefully taken into account. According to section 10 in the Act, it is for special reasons possible to refrain from imposing a compensatory fine. In the same section it is stated that the compensatory fine shall go to the injured party.

The legal effects of the collective agreement are generally applicable for the period for which the agreement has been concluded. In addition, doctrine and practice support the conclusion that the conditions of a collective agreement have a certain effect that extends beyond the end of the agreement period. That is to say that the conditions of a collective agreement are also to be applied during a situation where there is no collective agreement in force. The sanctions presented above do not however apply in such situations.

The parties to a collective agreement in Finland are allowed to use other procedures than the Labour Court in order to resolve disputes, but this has to be agreed upon in the collective agreement. Such a clause is very rare in Finnish practice, traditionally it has been used in the collective agreement entered into by the Bookworkers Union and the Publishers.

11. THE LABOUR COURT

The regulation of industrial peace in Finnish law is based on a fundamental division into disputes of interest and disputes of rights. Disputes of interest are resolved in open negotiations where the parties may even resort to industrial action in order to realize their goals. Violations and disputes of rights refer, in contrast, to the application

of a pertinent collective agreement and may be brought before the Labout Court, whose decisions are final, i.e., its decisions may not be appealed [8].

The Labour Court has a tripartite composition consisting of employers, employees and impartial representatives who are appointed for three years. As a rule the court sits in two departments of six judges but it also may sit in plenary session. The plaintiff and the defendant before the Labour Court are, in general, organizations who are parties to an agreement.

The Labour Court settles about 100 disputes a year involving a collective agreement's validity, existence, content or comprehensiveness. The Court not only decides whether an action has violated the Collective Agreements Act or one of the stipulations of an agreement, but also considers and passes sentences on cases involving the breaking of industrial peace.

12. IMPORTANT QUESTIONS ABOUT COLLECTIVE AGREEMENTS IN FINLAND

The collective agreements set up in Finland are under the 6 § demanded to affect in an obligatory way on all work relations. The most significant clause of the Finnish labour legislation is the Emplyment Contracts Act 2:7, stating that the collective agreements are generally applicable. On this point Finland deviates from the other Nordic countries where such *erga omnes*-clause is unknown.

The system of collective bargaining is based on the freedom of negotiation and the freedom of contract. The state may, however, intervene in disputes of interest and negotiations during a period not covered by an agreement so as to prevent the development of a strike or a lockout. According to the Mediation in Labour Disputes Act a work stoppage, i.e. a strike or a lockout, may not take place over a labour dispute without a minimum two-week written notification of the work stoppage being given to a mediator. Mediation is the responsibility of a national mediator and six regional mediators. The purpose of the two-week period is to give the mediator the possibility to begin negotiations with the parties in order to resolve the dispute. In certain exceptional cases, when it is in the general interest, the Ministry of Labour may in addition delay the time for the commencement

[8] Suviranta (2000), 126-129.

of the work stoppage. Although the Mediation in labour Disputes Act makes it obligatory for the parties to take part in the negotiating process led by the mediator, according to Finnish law a settlement cannot be made compulsory. Neither of the parties is obliged to accept the proposed mediated settlement[9].

Finnish collective agreement-praxis is characterized by the custom to note some legislation also in the collective agreement. Others of the specialities in Finnish collective agreements law are that the peace obligation and the surveillance obligation are mandatory. They cannot be curtailed by agreement. The agreement parties themselves may enlarge their own obligations, but they cannot enlarge the statutory duties of the member associationbs or member employers in any way or engage individual employees in any personal responsibility for the observance of labour peace.

The aim with the peace obligation-effect is to guarantee industrial peace during an agreement period. However, the duty of industrial peace is relative. The only forbidden industrial actions are those directed at particular stipulations in the collective agreement or at the agreement as a whole. The only two important exceptions to the main rule that the duty to maintain industrial peace is absolute is so-called political actions and under certain circumstances so called sympathy-actions. These can be undertaken even during the period the agreement is in force. However, the duty to maintain industrial peace ceases with the expiry of the period for the collective agreement.

The duty of industrial peace is generally divided into an active and passive duty to maintain peace. The passive duty involves the duty not to take forbidden measures in disputes; it applies to employers and associations who are parties to or who are bound by the agreement but does not apply to individual employees who can never be sentenced for breaking peace. The active duty involves the duty to assure that members, i.e. organizations and individuals, do not resort to use of forbidden actions in disputes.

Individual employees can not ne sanctioned for undertaking unlawful industrial action during the contractual period, it is always their organisation that bear responsibility.

The economic sanction that may be imposed for breaking industrial peace is a maximum compensatory fine of EUR 25.300.The fine is levied, instead of damages, with due consideration to the assignment of blame and to the circumstances described in law.

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[9] See TIITINEN-RUPONEN (1998).

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Chapter 4

COLLECTIVE AGREEMENTS IN FRANCE

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1. STRUCTURE OF COLLECTIVE NEGOCIATION IN FRANCE

1.1. General features

In the French system of industrial relations statutory law historically has played and today still plays an essential part. Therefore, this leaves only a secondary role for collective bargaining, particularly when taking into account the continuous flow of new legislation in the labor field and the prominent role played by the individual labor contract in relations between employer and employee. Nevertheless, collective bargaining in practice does more than fill gaps, which have been left in legislation. On the one hand, in very general terms that we shall qualify below, the law merely lays down a minimum standard of protection on which collective agreements may build at various levels: national, industry-wide, regional, enterprise, establishment; down to and including the individual contract of employment. Each level, with exceptions discussed below, may add further advantages for the worker regarding wages, benefits and working conditions. On the other hand, collective agreements have often played a pioneering role in bringing new developments and improvements in working conditions, as with the Renault agreement on the duration of holidays whose content was later generalized by law. In many instances they also give substance to legal texts which alone would have remained empty declarations of principle, such as is the case for the act on professional training. Besides, collective bargaining constitutes a more flexible instrument of industrial relations and during the past forty years it has experienced a limited growth in use and a

somewhat increasing importance in the industrial relations field. Finally, the Government has often claimed to pursue, and sporadically attempted to enforce, a policy towards reinforcing the part played by collective bargaining, with occasional lapses such as imposing the 35 hours week through statute instead of leaving its adaptation to the social partners.

Nevertheless, although enshrined in the law by the preamble of the Constitution, the right to engage in collective bargaining stopped short of providing for its corollary upon the employer: the duty to bargain. An act of 13 November 1982 was introduced to fill that void; however it too stopped short of defining this duty to bargain, which is in no way a duty to reach agreement nor even a duty to bargain in good faith in the sense of the US practice.

The government had then taken notice then that about 3,000,000 employees, mostly in the service sector of the economy, were not covered by collective agreements, and that other 'gaps', whether occupational, geographical or both, existed in that coverage. The goal of the act of 13 November 1982 was to enhance collective bargaining and even to go beyond encouraging its use. It had the specific purpose of making collective bargaining a privileged tool of social progress and an essential element of the French Industrial Relations system. The results were somewhat mitigated.

For more than three-quarters of a century five texts have regulated collective agreements. First, the act of 23 March 1919 considered them to be like any other agreement, only binding the parties and wholly subject to the law of contracts. Then the act of 24 June 1936 introduced two essential features which remain very important in the present system, namely the special role of the most representative unions and the possibility of the extension, by the Minister of Labor under certain conditions, of a collective agreement, i. e. its extension to an entire industry, making it binding even for enterprises or employers not party to its negotiation and signature. After the Second World War in conditions of a post-War economy the act of 23 December 1946 gave a prominent role to government intervention in collective bargaining. The contents of collective agreements were spelled out by the act; wages were excluded from negotiations to facilitate control by the state; their scope was automatically industry-wide; and finally, agreements could not be concluded without the authorization of administrative authorities. This system was short-lived and the act of 11 February 1950 marked the return to a climate characterized by the freedom to negotiate, as a principle, but with the provisos of the maintaining nevertheless of the system of

extension by administrative authorities and of the privileged level of the industry sector. It is that act, modified by acts of 13 July 1971 and 13 November 1982, which nevertheless provides the basic framework of the French system of collective bargaining. All these and some subsequent texts are now embodied in Title 3 of the first book of the Labor Code (sections 131 *et seq.).*

1.2. Statutory law, collective agreements and individual contract of employment

This succession of acts well illustrates the dual characteristics of the collective agreement and the problems created by its integration into French law. On the one hand, the collective agreement is a contract. It arises from the will of those that elaborated and signed it. It creates reciprocal duties, and the state cannot substitute its authority for the result of the bargaining and negotiating of the parties, even if administrative authorities may extend it. On the other hand, the collective agreement is a regulation for those members of the groups under its coverage, who must abide by it without having contractually bound themselves. Although it has been negotiated between parties, it becomes a kind of internal regulation of a whole occupation if negotiated at industry-wide level, for instance.

The courts have recognized the dual nature of the collective agreement; conceived as a contract, it has the effect of a regulation as well as certain effects of a contract. Its mixed nature stems from the fact that it is a contract between collective bodies, therefore with effects unknown for ordinary contracts. In fact, the French courts have historically tended to emphasize the contractual aspects.' The dual nature of the collective agreement leaves two types of general problems to be resolved on the theoretical level, with important practical consequences: the relations of the collective agreement to the law on the one hand, and to the individual contract of employment on the other hand, as both institutions play an essential role in French Labor Law. The relationship of the collective agreement and the law may be summarized in the following way: two propositions establish the basic regime, and then they must be qualified: in principle, a collective agreement cannot violate public policy and public order, and it may bring the employees provisions more favorable than the legal ones.

Obviously those two propositions need some explaining, as they may conflict. The first proposition holds that a collective agreement

cannot contravene public policy and public order; the problem therefore remains of the definition of public policy and public order in Labor Law. According to Courts the following belong to the category of texts elaborating public policy and public order:

a) Legal texts, which by the terms used present an imperative nature. For instance, union shops and closed shops are specifically forbidden by the wording of Section L 413-2 of the Labor Code. Although they might be more favorable to employees than the absence of such provisions, the express imperative character of the law forbids them.

b) Legal texts, which do not expressly forbid given actions but nevertheless 'exceed the domain of Labor Law or include advantages and guarantees not liable to be contractually agreed upon'. For instance a collective agreement provision would contravene public order in that meaning and thus could not be effective if it aimed to change the order established by law of creditors in the event of bankruptcy of an enterprise. Such other cases would include modification by collective agreement of the electoral law, for the purpose of work council elections, for instance, which are deemed by the courts to fall under such law, the judicial courts' competence and the like.

Thus in principle collective agreements may not contravene provisions of public policy and public order. However the imperative public order character of some texts has been mitigated by the courts to some extent, and therefore this principle is now not as intangible as it once was. It is under the public order domain that a collective agreement cannot modify the competence of public employees or create rules sanctioned by criminal penalties. However, court decisions have accepted that when the increase of legal rights of employee representative was allowed by law and furthered by a collective agreement, hindrance to these additional rights, though created not by the law itself, constituted the penal offence of 'hindrance to the functions of employee representative'. Social public order, thus is different of absolute public order.

As it will be discussed below, the Labor Code generally provides that when an extended collective agreement provisions contravenes legal provisions, when this possibility is created by the legal provisions themselves, failure to observe the agreement contravening provisions, called derogatory provisions, is liable to the sanctions which would be applied in cases of the violation of the legal provisions themselves.

Nevertheless, with this marked exception, Section 132-4 of the Labor Code provides that a collective agreement may always improve provisions for workers beyond those contained in existing laws and regulations. Sometimes, however, the notion of improved conditions is clear: a provision of a collective agreement granting, for instance, twice the minimum legal monthly wage to the lower paid employees may be construed as more favorable without any doubt. But what of a provision which would replace a daily payment system with a piece-work system allowing employees to earn more money but at the expense of more effort? Some court decisions have provided guidelines as to how to evaluate the more or less favorable nature of a new provision relative to an old one. Firstly the favorable nature of a provision should be evaluated strictly as a 'juridical' matter by analyzing the contents of the two provisions and neglecting the long-term economic consequences. For instance a provision of a collective agreement providing for a steep increase in hourly wages might in the long term threaten employment, but it is nevertheless to be considered as an improvement in the position of the workers.

The comparison between the two provisions in order to determine the more favorable one should be 'objective', i. e. evaluated not in terms of individual subjective situations in specific instances but in terms of the interest of the workers' collective. It should be emphasized that the interest to be considered is that of the employees only, not of the collectivity constituted by the employees and the employer. The comparison should also be carried out analytically. When texts rule on several issues, each issue must be compared in the two texts separately, where they have the same object. On each issue the most favorable solution should be applied, either the contractual one or the guarantee provided by law to the employee. These two texts should not be compared globally in order to find out which one is the most favorable as a whole. The latter method should be applied only when the issues are interrelated in such a way that they could not be separated, either in fact or in the minds of the parties.

The relationship between employee and employer is created in French Law by the individual contract of employment. It is that contract which gives rise to the obligation of the employee to accomplish work under subordination and to that of the employer to provide work, direct it and to pay for it. This relationship of subordination between employee and employer is not created by the collective agreement alone; the latter could not give rise to reciprocal obligations between employee or employer, which are not already based on individual employment contracts. Nevertheless, the collective agree-

ment does impose its provisions upon individual contracts of employment concluded between employer and employee. When an employer is bound by a collective agreement its provisions apply to all contracts of employment which he concludes. The contents of the collective agreement apply because its provisions are automatically and compulsorily substituted for the provisions of the individual contract, already concluded, which are not in agreement with it. New individual contracts must abide by the collective agreement, but already existing individual contracts containing provisions in disagreement with the collective agreement do not become void. The provisions of the collective agreement are simply substituted for those already contained in the individual contract if they run contrary to it. This effect takes place automatically with the conclusion of the collective agreement. This is an exceptional effect, contrary to the regular law of contract according to which provisions of a contract can be made void only by law, but never automatically substituted by others. In addition, in the application of a collective agreement the parties to the individual contract cannot, in a new contract, abandon the provisions of the collective agreement, except of course for ones more favorable to the employee.

This substitution takes place through a very specific mechanism. The provisions of the collective agreement are not definitively incorporated into the individual contracts in lieu of the provisions they replace. They are only provisionally accepted in the individual contract of which they become a part for the duration of a collective agreement. Because they are not definitively incorporated, when the collective agreement ends or is replaced by another one its provisions disappear from the individual contract. Such may be the case in instances of the breaking up of the enterprise or its merger, sale or even a change in the type of business; or when notice of termination is given by one party to the agreement or when the duration of an agreement of fixed duration has elapsed. Then the collective agreement becomes inapplicable, after a delay of one year as discussed below, and if no new agreement is concluded to replace it. But because of the doctrine of 'acquired rights', employees already benefiting from provisions of the old agreement keep those benefits,. New employees however would not acquire them. However, if a new agreement is concluded, and if it contains a provision suppressing some of the benefits of the old agreement, then, every employee falls under the new agreement and the old provision disappears

On the other hand, just as the collective agreement can contain provisions more favorable than the law, the individual employment

contract can contain provisions more favorable than the collective agreement. This applies to individual contracts already concluded as well as to future individual contracts. In the first case, if the provision of an existing contract is more favorable than that contained in the new collective agreement, it is not substituted and remains in force. In the second case, the provision of the new individual contract more favorable to the employee supersedes the provision contained in the existing collective agreement. Very explicitly, a decision from the high court of 17 October 2000 makes the provision of a new collective agreement containing a covenant of non competition non applicable to an employee whose individual contract of employment, concluded by definition before then, contained a provision excluding such covenants, non applicable to him.

Finally, it should be emphasized that although collective bargaining is mainly a bilateral process between employers and unions and has been left a relatively reduced space within inudstrial relations processes, as discussed above, the government has nevertheless not entirely kept out of its mechanisms. Firstly, as discussed above, statutory law contains several substantive provisions that in other countries would belong to the sphere of collective bargaining. Such are, for instance, provisions regulating minimum monthly wages, the duration of the annual vacation, and the like. This constitutes a basic level of social guarantees upon which collective bargaining in several instances builds, and upon which the individual employment contract may further build. Secondly, the government has provided an incentive to bargaining in several instances: by direct action of the Prime Minister; by letter to the relevant organizations of employers and employees; by direct action of the Ministry of Labor, convening a joint bargaining commission or the negotiating of an industry-wide agreement. It has also intervened indirectly by passing acts whose application, in order to be effective, demands consultation and negotiation at the level of the organization of employers and unions, as is the case with the legal provisions on participation in profit-sharing. Conversely it has embodied into statute the content of some collective agreements. Indirectly again, it provides state aid and subsidies to an industry negotiating an agreement with the unions, as it has done repeatedly in the case of aid to the steel industry. Besides, it should be stressed that as we shall see below, the government has the right to proceed to an extension or an enlargement of a collective agreement already negotiated between union and an employers' organization of which not all employers in the industry are members. The extension may or may not be industry-wide.

1.3. Employees covered

The act of 1982 has defined the scope of application of the legal regulation of collective bargaining: It covers all occupations, trades, professions, branches of industry, commerce, agriculture etc. in the private sector, without exception. This includes, but is not limited to (because section L 131-2 expressly mention 'all bodies in the private sector') workers at home, domestic servants, employees of professional bodies, unions, societies, cooperative enterprises, sanitary and social organs (with agreement of the Ministry to collective agreements for the latter two) and the like. In the public sector coverage is extended to the employees of public enterprises or establishments of an industrial or commercial nature. Excluded are only civil servants, some public employees, and employees governed by specific statutes. However this exclusion is more theoretical than practical and has some breaches. For instance, on the one hand, the statute of civil servants provides that civil service unions have a right to participate in the decisions regarding working conditions and that they can negotiate with the Government before decisions regarding civil servants salaries. On the other hand "conclusive summaries" (*relevé de conclusions"* are often drawn after such negociations or at the end of a conflict in the civil service noting the positions reached after bargaining by the parties. Nevertheless, they are not collective agreements and in any case, if they can concern wages, have not in any case the power to change anything in the statute either of civil service or the specific public service concerned

2. TYPES AND SPECIALTIES OF COLLECTIVE AGREEMENTS

The act of 1982 established and confirmed two distinctions. It first defined two categories of collective agreements 'collective conventions' and 'collective agreements'. Theoretically collective conventions *(conventions collectives)* deal with the whole of the conditions of employment, wages and social guarantees, whereas collective agreements (accords *collectifs)* deal specifically with one of these topics only. However their legal regulation is exactly the same for all practical purposes and thus we shall continue to refer to collective agreements in the generally accepted meaning.

Then, the Labor Code establishes a distinction between inter-industry, industry-wide and enterprise-wide agreements.

2.1. Inter-industry and industry-wide collective agreements

These maybe of two types, regular or fulfilling the necessary conditions of extension by ministerial decree. Some provisions apply to all industry-wide collective agreements, additionally to the general provisions outlined above, and a special system applies to agreements fulfilling the conditions for extension. Agreements can also be concluded on an inter-industry basis, on a specific topic as such has been the case for important matters such as vocational training, additional retirement benefits and the like. If extended, inter-industry agreements, signed by center employers organizations and center unions federations then become applicable to all employees in the private sector.

The act of 13 November 1982 introduced into French Law a totally new and foreign provision: the duty to bargain now made compulsory at industry level. However the act has not provided a definition of or even a framework for the contents of this new duty to bargain. It is clearly not a duty to reach agreement; clearly too it is not even a duty to bargain in good faith. No specific sanction for refusal to bargain is provided and the law of torts says very little regarding refusal to enter into a pre-contractual period, although some elements do exist, which require the intention to harm the other potential party to negotiations.

The duty to bargain is required of unions and employers' associations already linked by an industry-level collective agreement. It includes a duty to bargain over wages, without further precision. This may aim at minimum wages, which are often the level at which industry-wide collective agreements operate, but clearly also at actual wages paid or guaranteed wages. It also includes a duty to 'examine' job classifications, economic development, the evolution of employment in the industry, part-time work and the evolution of currently paid wages by category and sex in regard to minimum wages by category. The duty to 'examine' does not seem to be strictly speaking a duty to bargain, but a duty to find out if there is a need to bargain.

A duty to bargain about professional equality between men and women has been added.

All other topics may be bargained over, but there is no duty to do so as far as they are concerned. The duty to bargain over wages applies every year, over professional equality between men and women every three years and the duty to examine job classifications every

five years. In both cases shorter periods may be agreed upon by the parties.

2.1.1. Determination of the applicable industry collective agreement for an enterprise

In some cases problems may arise in determining which industry-wide collective agreement is to apply in specific cases. The general principle even in regard to an enterprise with several activities relevant to different industries is the application of one collective agreement. In that case the collective agreement relative to the principal activity of the employer will be applied. The employer may not avoid it by choosing to belong to an employers' organization in another secondary 'activity. Exceptionally, two specific situations may arise in which for various reasons the employer is party to several employers' organizations when the enterprise has different activities; for instance, the employer may be compulsorily a party to an extended collective agreement, relating to one of the activities, as discussed below, and at the same time voluntarily a member of an employers' organization in industrial fields covering its other activities. In the first case the enterprise has different fields of activity, but they are carried out in separate establishments. Then each establishment will be covered by a collective agreement relevant to the field of activity, which it pursues.

In the second case, the activities are carried out in the same establishment and are too interdependent to determine clearly which worker carries out which precise activity, relevant to which precise industrial branch. In such case a most favorable collective agreement among those to which the employer ' subject is then applied. In another case the employer may be a member of an organization which is party to several collective agreements with the same union federation of differing territorial scope and may also be party to an agreement at the level of his enterprise. Here there is really not a conflict but a concurrence of collective agreements. If an agreement of a larger territorial scope already exists, by law a new agreement may only improve on its provisions as far as the employees covered by its scope are concerned, because the provisions of the agreement of greater scope are already known to the parties. If the agreement of a more restricted territorial scope exists first and an agreement of wider scope is concluded, the courts have tended to combine the provisions of the two agreements) to apply the more favorable to the employees. But the Law provides that in such situation the parties must adapt the

contents of their earlier agreement to those of the new agreement, with more favorable provisions and a greater territorial scope.

It should also be noted that even the case of an employer with a single activity may not be devoid of problems as to the applicable industry-wide collective agreement, for even though the parties freely decide on the economic activities to be covered, generally by reference to the classification of the National Institute of Statistics and Economics, discussed above, and even though the act of 13 November 1982 embodied in the Labor Code demands that the parties define the occupational scope of the convention 'in terms of economic activities', the High Court' considers that the economic activity retained by the parties constitutes only a simple presumption and demand that the judges, in case of dispute, investigate the economic activity actually carried out by the employer.

2.1.2. Consequences of agreements following each other in time

By application of the doctrine of the provisional incorporation of the provisions of the collective agreement into the individual employment contract, at the end of the existence of the collective agreement those provisions disappear from the individual labor contract, which reverts to its former terms prior to the agreement, save for a period of a year or until the conclusion of a new agreement, according to Section L 132-8 of the Labor Code. The question is, what happens if the new agreement, succeeding the first, contains some provisions which are less favorable than those contained in the first one? We should distinguish between cases in which the new collective agreement contains and cases in which it does not contain a provision maintaining the advantages acquired by the employees. If it does not, according to present doctrine the former collective agreement disappears, leaving only the conditions of employment arising from the provisions of law and the individual employment contract. The provisions of the new collective agreement by hypothesis must be generally more favorable than the ones established by statutory law as discussed above, but in some instances may be less favorable than those of the former agreement. Nevertheless they apply. Thus most collective agreements contain a provision to maintain the advantages acquired in the former agreement, notwithstanding contradictory provisions of the new agreement. There the provisions of the old agreement apply only when more favorable than the provisions of the new one. Failing such a provision, the new less favorable provisions apply. If no new agreement follows the former one, after a period of

a year (lapsed agreements for a fixed duration not renewed) or 15 months (agreements for an indefinite duration, unilaterally terminated, where three months of the period of notice must be added to the period of one year) as discussed above, then the provisions more favorable than statutory law disappear for the new employees, since for the old ones, section L 132-8, provides that, by exception, they become acquired advantages and as such incorporated in their individual contract of employment. The situation is nevertheless complex, for a comparison between the agreements must be carried out to determine which one is the most favorable. The courts have decided that this comparison should not be carried out globally, nor of individual activities as discussed above. If the enterprise has different fields of activity but they are carried on in separate establishments, each establishment will be covered by a collective agreement relevant to the field of activity, which it pursues. The situation arising from a change of employer has been discussed above.

2.1.3. Right of opposition

An act of December 31, 1992 has introduced a very innovative provision, existing already at enterprise level, as discussed below, but in a somewhat different way. It is clear from the procedure of revision discussed above and from the immediately preceding discussion that an agreement signed at industry level by several representative unions can be modified by a new amending agreement signed, for instance by only one representative union, and suppressing provisions which were more favorable to employees than statutory law, or replacing them by less favorable ones. To foresee such circumstances, the act, now incorporated into section L 132-7, provides, on the one hand, that only the unions signatory to an agreement can sign a new agreement amending it, and that, on the other hand, if such an agreement contains less favorable provisions than before, representatives unions not having signed the amending or new agreement (but party to the former) can oppose it, in a delay of 15 days, if and only if they represent the majority of the employees within the industry.

2.2. Enterprise level collective agreements

All agreements above the level of the enterprise fall into the preceding category. Agreements at the level of the enterprise or below (establishment) were made easier to conclude by the act of 1971,

after which they were considered collective agreements under the same full legal status as others. The act of 13 November 1982 fundamentally established their status.

Firstly, it is clear that in order to qualify as a collective agreement with the specific status and conditions of applications described above, anagreement must fulfil the conditions of validity and form discussed below when dealing with collective agreements in general. If not (for instance if they were not deposited with the Ministry of Labor or if they were not signed by a representative union but by an enterprise committee, as may sometimes be the case), they would qualify only as simple contracts under the law of contract with related consequences for coverage and enforcement.

Secondly, they must be distinguished from pre-electoral agreements reached before elections to the enterprise committee, which it must be recalled here differ in that they must be signed by *all* the representative unions in the enterprise.

Thirdly, they must be distinguished from a final type of agreement born out of practice but without legal status, namely agreements to end a strike signed between unions and employers, which cover such matters as the conditions under which work is resumed, the absence of sanctions for some acts which might have occurred during the strike, or payment for certain hours affected or not affected by strike action.

Negotiations can take place at the level of the enterprise, a group of establishments belonging to the same enterprise, a single establishment or at several of these levels, each lower level complementing the higher level under the conditions discussed above. Negotiation occurs between the head of the establishment or enterprise and a delegation from the representative unions within the enterprise. According to Section L 132-20 of the Labor Code, a delegation must include the union delegate, who therefore must have been previously appointed by the union. The size of the delegation is fixed by agreement, or failing agreement it is composed of all union delegates in the enterprise or establishment with a minimum of two persons (one of whom may not be a union delegate in the latter case). The law remains silent regarding the possibility whether union officers not employed in the enterprise may take part in the delegation, although the point was raised during the parliamentary debate. If the enterprise has on its premises employees belonging to other enterprises (temporary workers, guards, waiters or cooks, etc.) their union delegate may be heard at their request during the negotiations.

The time spent on negotiations is paid by the enterprise, the union delegates must receive the relevant information, and the union section is granted a number of hours per year of paid time to be allocated freely in order to prepare for negotiations.

Section L 132-30 of the Labor Code specifically provides that enterprises employing 49 employees or fewer may regroup and reach agreements with representative unions in order either to create paritary commissions to set up specific agreements or to allow for special employee representatives.

The content of enterprise collective agreements, with the exception of the duty to bargain discussed below, is freely fixed by the parties according to the general principles discussed also below. The same general principles are to be followed as concern the conditions of validity, of form, of compulsory provisions (the minimum provision defining scope, duration, renewal, revision, termination), of conclusion, of accession, and so forth

2.2.1. Duty to bargain

The act of 1982 also introduced the duty to bargain within the enterprise. There are specific cases and a general duty. A few exist, for instance, the right to expression, is to be defined by agreement between representative unions and employees.

The new general duty to bargain, already discussed in general terms and at industry level, also exists at enterprise level. It applies to all enterprises, whatever their size, provided that at least one union section exists and one union delegate has been appointed. It should be recalled here that representative unions may appoint a workers' representative elected as their nominee also fulfilling the functions of union delegate in enterprises employing under 50 employees. This duty to bargain takes place yearly. The employer, on his own, once every 12 months or on the request of a representative union within 15 days of the request must convene the parties to negotiation. If he requested he must also within 8 days forward the request to other representative unions in the enterprise. The scope of and parties to negotiation follow the general principles. According to Section L 132-27 of the Labor Code the duty to bargain bears upon actual wages by categories of employee, actual duration of work and the organization of working time, professional equality between men and women and the means to attain it. It may, but does not must, also bear on training and reduction of working time. Special attention is to

be paid at the opportunity of these negociations to the situation of employment and notably part-time work, temporary work, low wages, In enterprises not covered by an industry wide agreement, this annual compulsory Negociation must also bear on a system of health insurance and gain sharing, profit sharing and employees savings plans.

Information regarding average wages and standard deviation by category and sex, hours worked and the scheduling of work time must be given to the union negotiators. Again, there is no duty to bargain in good faith, much less to reach agreement. The employer must merely convene two meetings and provide the information. Only if no agreement is reached must a written and dated notice of disagreement be deposited with the Ministry of Labor according to Section L 132-29, which gives no additional information as to its content. This may in future be the starting point if courts decide to build upon the duty to bargain and give it substantive content (final offer, unilateral employer's action, etc).

3. THE NEGOTIATING PARTIES TO THE AGREEMENT

3.1. The parties to the agreement

Section L 132-2 of the Labor Code provides that on the employer's side the possibility of concluding a collective agreement is open in the widest possible way to one or several employers' associations or any other grouping of employers or one or several employers acting individually. It implies therefore that employers either grouped into any kind of society, association, even a trade association, or not belonging to any association but getting together only for that specific purpose, may validly sign a collective agreement. Firstly, then, employers do not have to gather in specific employers' associations created for purposes of industrial relations. They can be grouped in any legal form of association, such as professional associations or bodies of lawyers or physicians. Societies (Associations) are now expressly mentioned in Section L 132-2. Secondly, individual employers can sign an agreement individually, either one by one or several together. Thirdly, there is no criterion of representativeness here for employers' associations. Anyone or any group of employers may bind itself in a collective agreement.

The Labor Code establishes the conditions under which employees' organizations can sign collective agreements. The rules here are

very different. This possibility is open only to unions of employees legally constituted as such, with a minor exception discussed below. For instance, enterprise committees or mutual associations or any other group could not validly sign a collective agreement. Besides, this possibility has been open only to unions considered as 'most representative' unions since the acts of 1971 and 1982, which that way enjoy a monopoly on bargaining whereas the constitution of unions is free and potentially open. According to general principle the representativeness is to be evaluated at the level of implementation: nationally for national agreements, at the level of the industry for industry-wide agreements, at the level of the region for regional agreements, and finally at the enterprise or establishment level for enterprise or establishment agreements. Section L 132-2 now specifies that the following may sign an agreement:

1. Unions recognized as the most representative at national level (obviously for signing national or industry-wide agreements).

2. Unions affiliated with those which are representative at national level.

Therefore this means that any union at local, regional or enterprise or establishment level, provided it is affiliated with one of the five union federations mentioned above, is automatically considered representative for this purpose. It should be recalled that this presumption of automatic representativeness is now the general rule.

3. Unions not representative at national level, not affiliated with a representative union at national level, but which can prove that they are representative for the occupational or territorial scope of application of the collective agreement.

4. In very specific cases, discussed below, individual employees, non union officers or non union members commissioned for that specific purpose alone by a representative union.

Thus a very important advantage is given to national union federations already recognized as representative. The national and local unions affiliated to them have an automatic representative character even if they are weak at local level.

It should also be emphasized that for a collective agreement to be binding it is enough for it to have been signed by an employer or an employers' organization and one union, though restricted by the new right given unions under certain conditions to oppose agreements signed by one employer and minority unions, discussed below. The

employer is then bound and the collective agreement applies to all individual labor contracts existing or to be concluded between that employer and all his employees. Therefore, in French Law, the Us concept of bargaining unit is meaningless. The bargaining unit is automatically constituted of everybody in the employment of the employer or group of employers signing the agreement, including management. In France numerous collective agreements at various levels fall into that category. Even when several unions have participated in the bargaining process, the agreement might ultimately be signed only by one or two unions and it becomes applicable immediately. On the one hand this may appear protective of the employee, because the guarantees and advantages provided by the agreement apply to all; but it might also present certain problems if the union which has signed is little or not at all representative at the relevant level, but nevertheless benefits from the legal presumption of representativeness by its affiliation with a nationally representative federation. The collective agreement that such a union with little contact and support may sign may be of little protective quality or even harmful to employees. Nevertheless the automatic representativeness qualifies that local union to sign; and by signing, even alone, it qualifies the collective agreement for implementation unless another union fulfils the condition necessary to oppose it at enterprise level only, through a process described below.

Regarding both unions and employers' associations, both types of organizations, at whatever level considered, must explicitly have been granted the power to conclude an agreement by their members. This power is not legally automatically attached to the organization, whether a union or an employers' association. On the contrary, the competence to bind the members that they represent must expressly be conferred upon the organizations and the negotiators representing them. This specific competence may stem from several sources: either a provision of the by-laws of the organization, or a specific deliberation of the organization giving the negotiators the competence to sign on behalf of it, or special written powers given by all the members of the organization. In the absence of a legal mandate given to the negotiators in one of these three ways, the collective agreement must be considered as void. The courts have consistently applied this rule in cases where individual members of employers' associations claimed not to be bound by a collective agreement signed on behalf of the members but not authorized to do so by any of the three possible methods.

3.2. Accession

Any representative union, any employers' association, grouping of employers or individual employer who were not originally party to a collective agreement may accede to it subsequently, even though they did not participate in the negotiations. Accession can be freely decided at any time after the agreement is concluded by unions, organizations of employers or individual employers. This capacity was given to the latter only with the act of 1971. Accession may come from a union organization or individual employer provided nevertheless that the acceding party falls within the scope of the collective agreement either occupationally, geographically or by sector. For instance a metal workers' union could not accede freely to the chemical industry's national agreement, no more than an organization of blue and white collar employees could accede freely to a collective agreement signed only by a supervisory staff union.

In these cases accession by a party not falling within the occupational or geographical scope of an agreement must be agreed upon by the other parties it concerns if the agreement was concluded at industry or inter-occupational level. Besides, in such a case at enterprise level accession by an employer is now submitted to the agreement of the representative unions in the enterprise (new sections L 132-16 and L 132-25 of the Labor Code).

Accession must be in writing, must explicitly state the relevant collective agreement acceded to, must be notified to and filed in five copies with the Ministry of Labor and one with the labor court where the convention was originally filed. The original parties to the convention must also be notified of the accession. The effects of accession may vary. On the one hand, all acceding parties are bound by all the obligations arising from the agreement; on the other hand, the acceding parties do not automatically benefit from the advantages of the contractual part of the conventions. To be able to do so the acceding party must accede totally and completely and must, since 1971, be deemed a representative organization.

Accession may bring advantages to the union as such, for example being a party to renegotiations, or being given the right to a seat on a paritary commission provided for by the agreement. It brings none to the employees if another union in its scope had already signed the agreement , who by definition and by application of the principle outlined above are all already covered by the agreement because their employer was already a party to it.

3.3. Contravening provisions and the right of opposition

The act of 13 November 1982 introduced two new possibilities: the possible conclusion of contravening provisions from derogatory agreements and the right of opposition given to some unions, at enterprise level.

Contravening provisions result from Section L 132-26 of the Labor Code, which authorizes "derogatory" enterprise collective agreements to contravene statutory or regulatory provisions in Labor Law, when the act or decree establishing these provisions expressly allows it. The act systematically submits the implementation of these contravening provisions to derogatory collective agreements, sometimes, for some provisions to the existence of such agreements at both the level of the industry and the enterprise. This is extended by Section L 132-26 to wages set by collective agreements at higher levels. The areas where such provisions have been allowed by new Acts are restricted up to now to wages and working time. It has in practice become used mostly since 1999 for agreements implementing the 35 hours week, and often providing in a way derogatory to statutory law for the modulation or annualization of the work time.

The notion of contravention certainly cannot entail contravening more favorable provisions, because that case is already covered and allowed as discussed above. Thus it entails contravention by providing less favorable provisions or different provisions from the legal ones. The aim is to allow the parties to introduce some degree of flexibility at enterprise level into the maze of regulations applicable to wages and duration of work. It should also be remarked that Section 132-26 provides this possibility for enterprise collective agreements only and that no similar provisions exist for industry-level collective agreements, which furthermore are sometimes necessary to be concluded first in order than an enterprise level agreement might allow for it in certain cases.

Due to the principle of the automatic application of a collective agreement to all employees when signed by an employer and one representative union, there is a risk here, even more high than at industry level for successive agreements as discussed above, that such derogating agreements could be signed by a minority union made representative by virtue of its affiliation with a representative confederation. In that case, it would not only be less favorable conditions than in the past, but less favorable conditions than the ones provided for by statutory law which would be concerned. Therefore in the case of such

agreements a right to oppose them has been given to union which did not sign them yet which, at enterprise or establishment level, received a majority of the votes of registered employees (not the employees having taking part to the vote, but of the ones able to vote, thus including abstentions) in the latest elections to the enterprise committee (or workers' representatives if there is no committee).

This opposition to a collective agreement must be notified in writing with its reasons within eight days of its conclusion. The contravening agreement thus becomes void in its totality, not only for the disputed provisions.

3.4. Exceptions to the monopoly on collective negociation and agreements by the representative unions

Since 1967, in order to favor their conclusion, the law has provided that by exception profit and gainsharing agreements could be concluded in (with) the elected works council, and not only with the unions.

More recently, the act of 12 November 1996, in order to allow for the development of collective agreements in enterprises where no union delegates existed (for reasons of not being submitted to that obligation because of size, or because of the weak rate of organization in France), had set up an experimental provision for 3 years, inspired by an inter-industry collective agreement of November 9, 1995 furthered by a similar agreement of April 8, 1999. In that framework, Industry-wide collective agreements could provide for enterprise or establishment level collective agreements to be signed within the industry, not only by union delegates representing the representative unions, but in the many cases where they were non existent either by the elected personnel delegates or the members of the works council, or by specially commissioned regular employees appointed to such purpose by representative unions. The industry level collective agreement has to provide for the topics upon which such agreements could be signed (most often derogatory agreements). It also has to set up an industry level committee approving the contents of such agreements, to be concluded at most for three years.

Since few agreements had been concluded at industry level under the act of 1996, the two acts on the 35 hours work week of 13 June 1998 and of 19 January 2000, in order to ease its implementation have also included the possibility of negotiating an enterprise or establishment level collective agreement with a union commissioned regular

employee, without the prior conclusion of an industry level collective agreement. Such agreements, however, are possible only when there are neither union delegates nor prior industry level agreements under the act of 1996. They are limited to collective agreements providing for a shorter work week in exchange of Government subsidies under the regime of the 1998 and 2000 Acts.

Finally, the seeds of deeper change are finally present into new statutory Law. The above mentioned Act of January 2000 provides for the notion of "majoritary" agreement, for now only for working time agreements with government subsidies, but introducing thereof the first significant breach into the monopoly of the most representative unions. The act provides that, for the subsidies to be granted, the collective agreement on working time reduction must have been signed by the unions having gathered the majority of the votes in the elections for employee representatives within the enterprise (works council and employee delegates). Failing that a referendum of the employees may, at the request of the signatory union, be organized.

4. MATTERS TO NEGOCIATE

The act of 13 November 1982 has defined in a very general way what are the contents of a collective agreement: all the conditions of employment and of work and social guarantees of employees. Texts outside that domain, or not fulfilling the other required conditions of collective agreements (parties, compulsory provisions to be included regarding renewal, termination, conflict over its application, and conditions of form) are not to be treated as 'collective agreements' but come under the principles of civil law applying to regular contracts.

For regular industry wide agreements, at national level or othetwise (local, régional, etc.), geographical, occupational, time scope and level of discussion are decided freely and without any formalities or specific processes; only the content of the negotiation is to some extent regulated.

As it will be discussed below, within the section devoted to other questions, in France, collective agreements can be "extended" or "enlarged" by the Minister of Labor. In that case they are subject to special conditions.

Here in addition to the minimum content for all industry wide agreements discussed above, Section 133-5 of the Labor Code pro-

vides that for the possibility of enlargement or extension to exist, a collective agreement must necessarily contain a given substantial minimum of provisions. The law does not establish the exact contents of these provisions but only provides that they must relate to the following subjects:

1. The free exercise of union rights and the freedom of opinion of employees.

2. Workers' representatives, Health and safety committees, enterprise committees and the financing of the social and cultural activities managed by the committee.

3. Essential elements used to determine the grading and occupational characterization of personnel, in particular the vocational degrees or their equivalent, created since more than one year, to be taken into account.

4. Elements relating to wages, by categories of worker, and procedures and for periodic revision of wages. Not the actual amount of wages must be stated but:

* Minimum national wages of the unskilled worker in the branch.
* Hierarchical coefficients to be applied to the various occupational qualifications of employees,
* Wage premiums for hard or dangerous work.
* Modalities of application of the principle 'equal pay for equal work' for women and young people and procedures to be followed when difficulties arise on that matter, especially within the provisions of Section L 132-12, al. 2 of the Labor Code.

5. Paid vacations.

6. Conditions regarding hiring, which must respect freedom of union membership.

7. Conditions of termination of employment, notably regarding the period of notice and severance pay.

8. Methods of organizing and working of apprenticeship and vocational training in the branch of activity concerned, including the provisions special for the handicapped.

9. Occupational equality between women and men and affirmative action provisions taken to remedy existing inequalities, particularly as regards access to employment, training, promotion and conditions of work and employment.

10. Equality of treatment between employees, whatever their belonging to an ethnic, nation or race notably as regards access to employment, training, promotion and conditions of work and employment.

11. Conditions aiming concretely to provide for the right to work of the handicapped, notably through the compulsory employment of handicapped persons provided by Section L 323-9 of the Labor Code.

12. As far as is needed in the branch of activity:

a) Specific conditions of work for women who are pregnant or nursing babies and for the youth.

b) Conditions or employment and pay of part-time employees.

c) Conditions of employment and pay of home workers.

d) Guarantees for expatriate employees.

e) Conditions of employment for employees of other enterprises working on the premises, notably temporary workers.

f) The conditions within which the employees authors of an invention devolved to the employer benefit from additional pay.

13. Conciliation procedures governing collective labor disputes between employers and employees linked by the agreement.

14. The conditions of access to a health insurance program.

15. The conditions of access to gainsharing, profit sharing plans and to enterprise savings plans.

However it should be noted that even if all the compulsory provisions are not contained in a collective agreement, the Minister of Labor may nevertheless proceed to extend or enlarge it after favorable advice from the National Commission on Collective Negotiation.

Section 133-7 then lists a series of provisions, which collective agreements may contain but which are not mandatory for the possibility of extension. They concern:

1.° specific conditions of work: overtime, shift work, night work, Sunday work and holiday work;

2.° general conditions for remuneration of piece work except if it concerns dangerous or unhealthy work;

3.° seniority and attendance bonuses;

4.° compensation for work-related expenses;

5.° social security guarantees, referred to in section L. 911-2 of the Labor Code;

6.° arbitration procedures for the settlement of collective conflicts;

7.° conditions of exercise of mutualistic responsibilities;

Clearly this last area is unlimited; the parties may add and include all legally negotiable provisions.

5. NEGOCIATING PROCEDURE

For enterprise level collective agreements, within the very broad framework outlined above of the duty to bargain, since the act of 11 February 1950, the negotiation and conclusion of collective agreements operates completely freely. The parties meet of their own free will without government interference and decide freely the contents, scope, etc. There are no such organs as joint councils, nor are there any governmental guidelines.

It is different at industry level. Besides the duty to bargain, discussed above, all collective agreements with a scope based on industry(ies) must contain compulsory provisions. The following ones deal with the form of the agreement.

— the delineation of the occupational scope by reference to an economic activity (Section L 132-5 of the Labor Code);

— duration (Section L 132-6 of the Labor Code);

— conditions of revision and renewal (Section L 132-7 of the Labor Code);

— conditions of termination (Section L 132-8 of the Labor Code);

— conditions relative to the right to be absent, the means of compensation for wage loss and travel expenses of employees of enterprises who have been called upon to take part in the negotiation of the collective agreement (Section L 132-17 of the Labor Code);

— the institution of joint paritary commissions of interpretation of the meaning of the agreement.

The latter two conditions were introduced by the act of 13 November 1982 which however did maintain a formerly existing compulsory provision under the acts of 1950 and 1971, that of the institution of the mandatory conciliation commission. In face of the failure of conciliation and arbitration in the French system of Industrial Relations, the act has rendered the law in conformity with practice, and conciliation is no longer mandatory. It did not in any case prevent a party from striking, as discussed elsewhere in this paper.

The negotiation and the conclusion of an agreement liable to be extended or enlarged is again another case. It must take place through a joint commission composed equally of representatives of the representative unions and employers' organizations. The commission is presided over by a representative of the Minister of Labor. Such joint commissions are convened by the Minister of Labor either on his own initiative, or on the request of a representative union or employers' organization. The Labor Code provides that when two unions or one union and one employers' organization request it, the Minister of Labor is under obligation to convene the commission. Every party summoned to the joint commission has to send designated representatives under penalty of a fine. Nevertheless, once the joint commission has been convened, it may be under the obligation to bargain discussed above but it does not have to reach an agreement. The only obligation for the parties is to meet and negotiate: here again there is no obligation to bargain in good faith.

The law provides that the convention must be negotiated *and* concluded in the joint commissions; negotiation alone would not be enough to qualify it for possible extension or enlargement.

The Minister may convene only representative unions and employers' organizations. Unlike regular collective agreements, those susceptible to extension must be signed by both representative employers' organizations and unions. Representativeness is to be assessed at the level at which the joint commission meets, whether national or regional in the industry considered. Representativeness is to be examined case by case in each industry considered and eventually in each region by an administrative inquiry. The presumption of representativeness in favor of the main federations applies here also. The criteria to be taken into account for judging representativeness in that instance are listed in Section L 133-2 of the Labor Code. The French system of industrial relations features plural unionism and the question was raised whether a collective agreement had to be signed by all representative unions within its scope for its extension. Court decisions did tend to demand it but since the law of 1971, Section L

133-11 of the Labor Code provides that when a collective agreement, otherwise negotiated as susceptible of extension, nevertheless had not been signed by all the representative organizations, whether unions or employers' associations (if several of the latter are involved), the Minister of Labor could still extend it provided that the National Commission on Collective Negotiation (to be discussed below) had not formally opposed it by more than two employees or two employer members. Therefore, all representative unions and employers' organizations must have negotiated the agreement, but not all of them must have signed it for its possible extension by the Minister of Labor, although at least one of each must have done so.

Finally, the occupational scope is fixed by law, whereas for regular collective agreements the parties fix it freely. It must consist here of the 'branch of activity' or the inter-industrial level, themselves not defined by the law and loosely defined by the courts. In the largest sense the term branch is synonymous with 'industry-wide' such as in chemicals, metalwork etc.; but it may be more restricted such as is the case in the sense of the 'automobile' industry within 'metal working'. Here many problems do remain, such as for instance, whether the toy industry should be considered as part of the chemicals industry or an element of metal work or wood work.

Here also reference is often made to the classification of the National Institute of Statistics and Economic Studies, and since 1982 scope must be defined in terms of economic activities according to Section 132-5 of the Labor Code, but no definition of economic activities is given.

However Part 2 of Section 132-5 allows that annexes and covenants modifying agreements may have a different scope from that of the agreement they modify. Extension is possible. In the same way enlargement may be limited to a 'professional sector' itself part of a branch of industry.

Territorial scope may be national, regional or local, within the occupational scope of the 'branch of activity'.

6. PERFECTION OF THE AGREEMENT

In view of the importance of the collective agreement as a charter of industrial relations within the relevant sphere the law has provided for minimal conditions of form. Firstly, Section L 132-2 of the Labor Code provides that collective agreements must be made in writing, otherwise they are void. This is clearly understandable as quite often

the collective agreement will give content and substance to individual contracts of employment. Besides, the law provides that, at the time of hiring the employee be given a copy of the relevant collective agreement together with his contract of employment. Therefore writing is necessary. Secondly, collective agreements must be deposited in five copies with the Ministry of Labor and one copy with the geographically competent labor court. Interested persons can consult the remaining copy at the Labor Court (*conseil des Prud'hommes)* where it remains or may obtain copies at their own expense. The deposit is made by the parties as a joint expense.

The collective agreement becomes applicable on the day following the one on which it has been deposited. Furthermore, in enterprises and establishments where the collective agreement becomes applicable, it must be made known to the employees. A notice must be posted in the work place, in the place where hiring is carried out, and at the door of that place. That notice must include the fact that a collective agreement has been signed, the parties to it, and the date and place of deposit. A copy of the agreement must be placed at the disposal of the employees. Further, the head of the enterprise must provide the enterprise committee, the workers' representatives and the union delegates with the text of the collective agreement applicable in the enterprise. As will be discussed below, collective agreements extended by the Ministry of Labor are published in their totality in the *Journal Officiel* of the French Republic. Besides, collective agreements must contain provisions regarding termination, renewal, revision, and conflicts relative to their application, discussed below. Finally, as discussed above, they must be given to newly hired employees.

If the agreement at enterprise level contains provisions contravening legal or regulatory provisions when the law itself and these provisions themselves expressly forecast that possibility, or when they contravene wage levels fixed by collective agreement at another level, then they cannot be deposited before a delay of eight days has elapsed in order to allow for other representative unions in the enterprise to oppose it if they fulfil the necessary conditions discussed below.

7. EFFECTIVENESS OF THE COLLECTIVE AGREEMENT

7.1. Individuals covered

As is clear from the above discussions regarding the parties to a collective agreement, it is binding on:

— the unions, employers' organizations, individual employers and employer members of the organizations which signed it;

— unions, employers' organizations and their members and individual employers who subsequently acceded to it;

— employers who have become affiliated to an organization bound by the agreement;

— employers who have members of an organization bound by the agreement and have subsequently resigned from it, as discussed below;

— all the employees of an employer bound by an agreement, whether unionized or not, and whether or not their union has signed.

Modifications of the legal status of the enterprise will be discussed below when dealing with the application of the agreement.

7.2. Territorial coverage

The parties freely fix the territorial scope of the agreement. The most commonly used are the establishment, the enterprise, the department or the region in a given industry, the industry itself, and the national. Nevertheless, the parties may decide on a different territorial scope if they wish. Generally, when agreements are concluded between various members of the same national union and employers' associations in a given industry, the role of the regional agreement is to improve upon the industry-wide one, that of the local agreement to improve upon the regional, etc., possibly down to establishment level. In practice, the level of the agreement will depend upon the reciprocal strength and relationship between the parties. For instance, in the metal industry there is no national convention, since the employers' federation have always insisted upon and succeeded in negotiating mostly at regional level to better account for differences between enterprises in the field according to their geographical position.

7.3. Occupational scope

Except for conventions 'susceptible of being extended', the parties may freely determine the occupational scope of the agreement. They can include or exclude at will parts of an industry or a given occupation. However the Labor Code provides that the occupational scope must be defined 'in economic terms'. Most frequently the parties will refer to the economic concept of an industry-wide 'branch

of activity' as determined by the National Institute of Statistical and Economic Studies. For agreements concluded at other levels than the industry cumulative coverage is often possible. This is specifically the case when supplements are negotiated for occupational categories of personnel. A collective agreement will cover all employees but contain special supplements for white collar workers, or supervisory staff and similar employees, or managerial employees. Collective agreements negotiated for a single occupation cutting across industry lines are more rare but do exist and are now covered by Section L 132-11 of the Labor Code as well as inter-industry nation-wide agreements. One example is the agreement covering travelling salesmen, which is applicable in all branches of industry and trade.

7.4. Coverage in time

A collective agreement takes effect on the day following its deposit. It applies instantly to existing individual labor contracts, whether of fixed duration or indefinite duration. If they are of fixed duration, their length may not exceed five years. If they are of indefinite duration they may be ended unilaterally by one party to the agreement by giving notice of termination. This system results from a compromise between two opposite needs in a collective agreement. As an equilibrium between conflicting bargaining powers shifting in time, the agreement must be of short duration. As — at the same time — the charter for industrial relations between the parties, the agreement must be of sufficient duration to introduce a degree of stability into their relationship.

Collective agreements may be concluded either for a definite or an indefinite duration.

A collective agreement of definite duration ends at the time decided by the parties within the upper limit of five years after its conclusion. Nevertheless, the parties may end it by common agreement before the total agreed duration has elapsed. Collective agreements must contain provisions concerning the form and time of their renewal. If the parties do not expressly exclude it, a fixed term collective agreement, which is not terminated when that term has elapsed, must be treated as an agreement of indefinite duration. It continues to generate its effects until a party has given notice of termination. In addition, since the act of 1971, when a term of notice has been given for a collective agreement of indefinite duration, or when the term of a collective agreement of fixed duration has elapsed, they remain effective either until a new one has been negotiated or until

a year has elapsed, unless a period longer than a year has been provided to that effect by the parties to the agreement.

In the case of an agreement of indefinite duration, it can be unilaterally ended by one of the parties. According to Section L 132-8 of the Labor Code every collective agreement of an indeterminate duration must include the procedure to be followed to terminate it. It may be by common agreement or by unilateral termination; in the latter case a period of notice must be fixed. It there is none, the law fixes it at three months. Unilateral termination must be notified to the other parties in the same forms that the agreement was deposited. Partial termination is forbidden by law unless authorized in the agreement itself. If the agreement is terminated by all the parties on one side, employees or unions, at the end of the period of notice the agreement remains valid for one full year unless a provision of the agreement provides for a longer delay. The law provides for new negotiations within three months, but without sanction. In the case of collective agreements signed by several unions or employers' organizations, the notice of termination affects only the party issuing it. The collective agreement remains valid for the other parties. The party terminating unilaterally additionally remains bound for one year by its contractual obligations. If it is an employer the obligation to enter new negotiations within three months without sanction remains valid, but not if it is a union. For the employees, if the terminating party is a union, there are no adverse consequences; since several unions have signed it, the employer remains bound by the agreement.

According to Section L 132-8 collective agreements either of fixed or indefinite duration must also contain certain provisions regarding procedures for revision and renewal. A notice of intent to renew given by one party does not terminate the agreement, which remains in force. It only initiates the procedure for renewal with no obligation on the parties to reach agreement. Also, the party giving notice of intent to revise must indicate which sections it wants to revise and how. The main industry-wide collective agreements provide for renewal through the meeting of a joint commission and submit notice of intent to renew to a given period of delay.

8. THE ADMINISTRATION OF THE COLLECTIVE AGREEMENT

As discussed above the collective agreement has a dual nature. It is at the same time a contract between the parties who have signed it and a binding regulation for members of the unions and employers'

organizations, which have signed it. It has both a contractual and a normative element.

8.1. Applications of the collective agreement between the parties

As discussed above the collective agreement must contain provisions regarding its duration, termination and renewal or revision. These will regulate the relationships between the parties regarding the ending of the agreement. As far as other potential relationships between the parties are concerned, they may establish them perfectly freely according to the law of contract provided that they stay within the limits of public order as discussed above. In practice, collective agreements may provide for a variety of provisions, beyond wages and working conditions, such as commissions in the form of joint commissions for the interpretation or the renewal of the agreement, the establishment of co-management of a complementary system of social security above the legal minimum, training and employment, provisions for mediation of conflicts, and the like. Due to the principle of contractual freedom varieties of those provisions may be found in actual collective agreements.

Nevertheless, it should be remarked that the normative provisions exceed in both importance and number the contractual provisions. Employers' organizations would rather avoid the risk of being tied by contractual provisions, while the unions want to feel free to resume demands or industrial action regarding new normative provisions immediately after signature. Similarly, unions consider that a collective agreement has the effect of obliging employers to apply the normative provisions consisting of supplementary benefits for employees but should not bind the unions in their action to improve consistently and continuously the working and living conditions of their members. In addition, as explained above a collective agreement signed and established at a given level, say industry-wide, could not prevent further negotiation at lower levels, the region or enterprise for instance, whether to adapt that agreement to local conditions, or to add provisions, generally more favorable to the employees, except for the cases discussed below.

8.2. The principle of loyal implementation

In some countries, the existence of a collective agreement provides for an obligation for the union to abstain from industrial action

for the duration of the agreement. There is no such obligation in France. However, a much weaker principle is written in the law. Section L 135-3 of the Labor Code provides that parties to a collective agreement expressly including individual employers are bound not to do anything which might compromise the loyal implementation of the agreement, but that they are to answer for that implementation only in the limits determined by the agreement. Firstly, the courts hold that the principle of the loyal implementation of a collective agreement between the parties to the agreement is weaker than the regular obligation between ordinary parties to a normal contract. Secondly, Section L 135-3 provides only for refraining from acting in a way which would compromise implementation and does not in any way create an obligation to act positively to ensure it. Generally, contract law implies an obligation to act with a view to the implementation of the contract. Here, in the event of difficulties in the implementation of the contract, what the law demands from the parties to the collective agreement is only a vague degree of neutrality. Thirdly, in the terms of the law the parties bound by a collective agreement would still have to answer only within the limits determined by the agreement. Therefore, in the absence of special provisions in the agreement, the organizations party to it have no obligation to act towards their constituents, members of their own organization who fail to work to carry out its terms. Thus what emerges from the principle of loyal implementation is a much watered down peace obligation. The only real obligation upon the parties is not to actively encourage members of their organization to violate the provisions of the collective agreement.

This of course applies only to the points covered in the agreement. It should be underlined that in any case it always remains possible to resort to industrial action for different demands bearing on points not covered in the agreement. In fact it must be added that the parties may provide in the agreement for special conditions governing the use of industrial action, such as arbitration, conciliation, delays, etc. Nevertheless they could not provide for an absolute obligation of industrial peace, for this would constitute the union's waiving the right to strike and the law provides that a collective agreement cannot contain provisions less favorable to workers than the legal ones, as discussed above; and such would be the case in these circumstances. Finally, in any case, it should be observed that the collective agreement binds only the parties to it, in its contractual aspect, and not the members of the organization they represent; the latter retain the freedom to resort to industrial action to improve on the collective agreement at their benefit at every possible level of bargaining down to that of the individual labor contract.

8.3. Application of the normative provisions of the collective agreement

While collective agreements which may be extended are submitted by law to a minimum obligatory normative content, there are no such rules regarding regular collective agreements. They may freely regulate all the conditions of employment and work and social guarantees. As discussed above, with the exception of derogatory agreements discussed below, they must make provisions more favorable to the workers than those already legally existing provided they conform to public order and public policy. In fact collective agreements cover the entire working life of the employees with a great variety of provisions, sometimes barely above the legal minimum, sometimes extremely innovative. Here also the parties may freely negotiate and establish normative rules and a wide array of these do exist regarding apprenticeship, training, working conditions, wages, seniority, job prospects, career guarantees, sick pay, re-hiring after illness, lay-off, retirement, supplementary social security etc, There are too many of them to list here.

In terms of the personal scope of the agreement, except for extended collective agreements, to be discussed below, the application of an agreement to an enterprise will depend upon the membership of the employer in an employers' organization and on its field of activity. The basic principle is that one and only one collective agreement applies to one enterprise. The determination of the collective agreement to be applied is decided by the membership of the employer in the employers' organization, which has signed the agreement. The fact that an employer resigns from an employers' organization does not allow him to cease applying the agreement to his employees. He is still bound by as provided by the act of 13 November 1982. Thus unless provided otherwise in the agreement, it applies to members and former members of employers' organizations in their relationship with their employees. The determining criterion is, then, the membership in the employers' organization, which has signed.

When following this rule a problem arises in the event of a change in the structure of the enterprise. Section L 132-8 of the Labor Code provides that in the event of merger, sale of the enterprise, secession, or a change of activity collective agreements covering the enterprise remain in effect regarding the workers benefiting from them until new agreements are signed or there is no new agreement, for a period of one additional year, and rights granted by the agreement continue to benefit present employees. Thus, after one year the effect of the

collective agreement ceases if the new employer is not a member of the employers' organization, which has signed, or has not himself signed a new agreement. Nevertheless, of course, the individual contracts of employment do persist according to Section 122-12 of the Labor Code. Only the provisions of the collective agreement, by definition more favorable than the legal minimum or provisions of other agreements covering a large scope, disappear from new contracts of employment concluded after the agreement ceases to apply. This is an application of the legal definition of the effect of the collective agreement. As discussed above, the collective agreement's provisions are not definitively incorporated into the individual contract of employment, but only become part of it for the duration of the collective agreement and for, at most, one year after its termination if no new agreement has been negotiated except for acquired rights, by which the provisions of the collective agreement will have been definitively incorporated into the individual labor contract because they have been already applied by the employer to individual employees already in employment. The doctrine of acquired rights is now embodied in Section 132-8 of the Labor Code.

9. IMPUGNATION OF THE COLLECTIVE AGREEMENT

Regarding the contractual obligations of the parties, we have already discussed the reluctance of the parties to bind themselves to reciprocal obligations and the very weak nature of the obligation of loyal execution, as well as the absence of an obligation to maintain industrial peace. Nevertheless, collective agreements are contracts. Unions and employers' associations, as well as individual employers, do have corporate capacity; therefore if the parties include specific obligations in the agreement they are enforceable in law between the parties just as are regular contracts. Of course, individual workers always retain the right to engage in industrial action. The compulsory provisions between the parties concern renewal, revision, and termination of the agreement. There is no possible suppression of the right to strike; at most the union will accept an agreement providing for a term of notice before calling for industrial conflict.

Regarding the normative obligations arising from the collective agreement, they are also enforceable in law. The implementation of the normative provisions in case an employer does not apply them may be very easily sought in court.

Conflict may also arise as the validity of a provision or, as an ancillary consideration to another legal action, as to the real meaning

or interpretation of that provision. Several types of litigation are possible arising from a collective agreement. For instance, in the case of a collective agreement signed by one union and one employers' organization the following cases are possible: first of a contractual type between the two organizations, both with corporate capacity, which have signed. Second, each organization may sue its own members for not respecting an agreement; this action has a disciplinary nature. As discussed above, members of an employers' organization are bound by an agreement signed by the organization. Thirdly, each organization may act against any person bound by an agreement; the most frequent example is a union suing an isolated employer who is bound by the agreement but not applying its provisions in the individual employment contracts with his employees. This legal action is of the type discussed when dealing with the corporate capacity of unions and employers' organizations to sue. It is also conceivable but less probable that an employers' organization might sue an isolated employee. Besides these three collective types of action, opportunities for individuals also exist. Any individual covered by a collective agreement may sue for its implementation or for damages against any other individual bound by the agreement. This is the action of an individual employee against an individual employer or vice-versa, for non-respect of the normative provisions of the agreement. In fact this action is often confused with the action arising from an individual contract of employment into which the provisions of the collective agreement are temporarily incorporated.

Other types of action may concern the nullity or the interpretation of the collective agreement. The causes of nullity are these applicable to any contract (object, cause, consent) or specific causes of nullity for collective agreements (non-respect of the conditions of form, or of the specific object to be pursued by a collective agreement, as discussed above).

The nullify of the collective agreement as a contract may be total or partial. Often the courts prefer to void only the provision, which is contentious and let the rest of the agreement stand. Also if the collective agreement is void for the specific causes of nullity applicable to collective agreements as such, then the court may void it as a collective agreement but hold it valid as a simple contract under civil law and subject to the provisions of the law of contract.

The Supreme Civil Court also accepts that an action in interpretation of the meaning of the collective agreement be pursued in order to clarify if certain rights are due to the employees, even in the absence of an actual dispute. If the parties to the collective agreement

have provided for a joint interpretation commission or any other non-judicial mechanism of interpretation, the court, confirming the dim view of French Labor law towards labor arbitration, holds that these provisions do not prevent any one of the parties from litigation on the matter of interpretation, and that any decision on interpretation handed down by such a commission is not binding on a court if a dissatisfied party sues.

Also, Section L 135-4 contains a very exceptional provision in French law, frequently used in such instances. All organizations with the corporate capacity to sue (whether unions, employers' associations or employers' organizations in any form) and whose members are party to a collective agreement are specifically allowed to sue (on behalf of their members) for all actions arising from that collective agreement. This is an individual action exercised by an organization. The reason behind this provision is that an individual employee might be afraid to act alone against his employer or might not know well enough the applicable provisions of the collective agreement. Therefore, for instance, in the case of a suit brought by a union on behalf of an employee, the union does not even need a mandate from the interested employee. It does not even need to mention the name of the interested worker, who may remain anonymous. It is enough that the interested employee, a member of the union, be aware that a suit is brought in his name and on his behalf by the union.

Besides Section L 135-4 additionally provides that when a person or an organization sues for an action arising from a collective agreement, any organization or group whose members are bound by the agreement may intervene in the case because of the interest in the judicial decision for its members. Even if the initial party drops the suit, the group or organization may pursue the action.

It should also be recalled that according to Section L 411-11 of the Labor Code the unions, as organizations, are given the right to sue for any act prejudicing directly or indirectly the occupation the members of which they represent. Finally it should be recalled, that, as discussed above, the act of 13 November 1982 has made penal offences of the violation of collective agreements which provide some types of benefits beyond the law, or even derogating to the law by specific permission of a specific statute.

Regarding the competence of the relevant jurisdiction, the situation is particularly confused. Individual labor disputes are within the jurisdiction of the labor courts *(Prud'hommes)* arising from the application of individual labor contracts and therefore of the provisions

of the collective agreements provisionally incorporated into them. But the action arising from the contractual part of the agreement, obligatory for the parties who have signed it, falls within the jurisdiction of the regular civil courts as does the interpretation of the collective agreement. Nevertheless, the labor courts, although they do not hear cases for purposes solely of interpretation, do have the right to interpret the provisions of the agreements when an individual labor dispute involves a provision temporarily incorporated into the individual employment contract. When a penal offence, such as hindrance to union rights, is concerned, then the penal courts are competent.

10. OTHER QUESTIONS ABOUT COLLECTIVE AGREEMENTS WHICH ARE OF IMPORTANCE IN FRANCE

As several times alluded to above, when dealing with the matters to negociate in acollective agreement, France has set up a specific procedure for the extension or enlargement of collective agreements.

The Minister of Labor has been given powers in law for enlarging or extending agreements beyond the scope provided for by the parties. The provisions of the collective agreement do then become compulsory for employees and employers who do not belong to organizations which have signed it but who fall within the scope of the newly extended or enlarged agreement, whether territorial or occupational. Therefore, the collective agreement becomes the professional charter for an industry and/or a region. Nevertheless, special conditions have to be fulfilled in order that a collective agreement may be extended.

Besides, the two procedures are conceptually different. The extension is an administrative decision by which a collective agreement becomes compulsory for all employees and employees contained *within* its scope, geographical or occupational, even of course those who were not members of organizations party to the agreement. Enlargement is an administrative decision by which a collective agreement, already extended, sees its scope enlarged and becomes compulsory for all employees and employees *outside* its occupational or geographical scope.

When a collective agreement fulfils the conditions relating to its conclusion and to its content discussed above within the section dealing with matters to negociate, with an exception mentioned below, the Minister of Labor may proceed to extend the agreement. He

nevertheless does not have to do so and remains free to proceed or not to the extension according to his own assessment if he has initiated procedures for extension on his own. However the Minister must start the procedure immediately if the extension is requested by a representative union or employers' association.

The Ministry verifies that the collective agreement has been deposited there, since section 132-10 of the Labor Code makes it a condition of validity. It further verifies that the agreement has been negotiated and concluded in the form discussed above and that if fulfils all other conditions relative to the parties, the contents, the scope and so forth. Then the agreement is checked for its conformity to Labor Law. Finally, the Ministry provides a report, which is forwarded to the sub-commission on Conventions and Agreement of the National Commission of Collective Negotiation. Then Section L 133-14 of the Labor Code provides that the procedure for extension enters a second stage with an inquiry by means of publication in the Journal Officiel of the French Republic of a note which informs of the possible extension, the place where the collective agreement can be consulted and its scope, and which invites all interested persons to make their advice known within fifteen days.

The next step entails the consultation of the National Commission of Collective Negotiation. It is presided over by the Minister of Labor or his representative and it includes:

— The Minister of Agriculture or his representative;

— The Minister of the Economy or his representative;

— 18 union representatives appointed by the Minister as follows: six proposed by the CGT, four by the CFDT, four by the CGT-FO, two by the CFTC and two by the CGC;

— 18 representatives of the employers' associations, appointed as follows: two members representing the agricultural occupations, two representing self-employed craftsmen, proposed by their own organizations; nine members proposed by the CNPF including two representing small and medium enterprises, two representing the nationalized sector (after consultation of the MEDEF) and two proposed by the CGPME.

The Commission is composed of two sub-commissions: one on wages, which is consulted before the government decides to increase the minimum wage as discussed above, and one on conventions and agreements, of interest here.

Section L 136-2 of the Labor Code spells out the role of the Commission:

— Proposals to the Minister of Labor to facilitate the development of collective negotiation, notably in harmonizing the definitions of the 'branches of industry'.

— To give its opinion on all acts and decrees regulating collective bargaining.

— To give an explicit and detailed opinion to the Minister before extension or enlargement of a collective agreement, or the repeal of such.

— If approached by at least half the members of an interpretation commission constituted by a collective agreement, to give its opinion on the interpretation of provisions of the agreement.

— To give a detailed opinion to the Minister of Labor on the fixation of the minimum wage.

— To monitor the evolution of actual and minimum wages in collective agreements and also public enterprises.

— To analyze the yearly account of collective bargaining.

— To monitor annually through collective agreements the application of the principle: 'equal pay for equal work', the principle of professional equality between men and women, the principle of equality of treatment between employees without distinction due to ethnical, national or racial origin, and to identify and analyze remaining inequalities and make appropriate proposals to promote equality in law and fact.

Therefore the commission gives detailed advice on extension. In principle the Minister is not legally bound to follow the advice of the commission although in practice he generally does so. The commission can never impose extension upon the Minister. Nevertheless, in certain specific circumstances a right of veto is given to the commission.

This does not apply if the agreement to be extended or enlarged fulfils all the necessary conditions. But if the agreement has not been signed by all the representative unions or employers' associations within its ambit, if it does not contain all the required provisions or if it covers only one or several categories of employees but not all of them (for instance blue or white collar only) then the Minister of Labor cannot proceed to extension if either two representative unions or two employers' associations oppose the extension in writing, giv-

ing reasons why. For enlargement this written, reasoned opposition must be given by the majority of members. However, the Minister can order a report on the consequences of extension and then decide the extension after a second opinion of the commission.

The Minister has the power of control. He may further decide to exclude certain provisions of the collective agreement from extension, either because they are unlawful and against public order or because they do not suit the branch of the economy to which they would apply if the agreement were extended. In the latter case the commission is consulted and the excluded provisions must not be an essential part of the agreement. The last step in the procedure of extension is the issuing by the Minister of Labor of an administrative order of extension. The administrative order of extension must respect the provisions of the collective agreement within the Minister of Labor's powers of control: this control by the Minister of Labor is subject to appeal in the administrative courts. Both the administrative order of extension and the collective agreement are published in the *Journal Officiel* of the French Republic.

Even though extended or enlarged, the collective agreement nevertheless remains a contract between the parties with both its obligatory and normative elements. The contractual nature is not changed by the administrative order of extension, therefore:

— If the Minister of Labor has made use of the prerogative to exclude certain inappropriate provisions from the agreement, they still apply to the contracting parties, although their effect is not extended.

— The extended agreement disappears according to the procedure provided for in the agreement. For instance, notice of termination when provided for applies whether a collective agreement is extended or not. The life of the collective agreement is not lengthened because of the administrative order of extension. When the collective agreement ends according to the contractual provisions included in it, the administrative order of extension automatically becomes void.

Nevertheless the binding nature of the collective agreement is reinforced. It formerly bound only the members of the organization who signed it. It now binds all employers and all employees within its scope: the 'branch of activity' referred to by the parties. Then the normative provisions of the collective agreement become mandatory in the relationships of all employees and employers comprised in that branch of activity. Obviously organizations which have not signed it are *not* bound by the contractual part but only by the normative provisions.

Extension also strengthens the application of the collective agreement:

— The Labor Inspector may now control its application as if it were an administrative regulation;

— special provisions exist to advertise it. The administrative order of extension must be published in the *Journal Officiel;*

— provisions included in the collective agreement relating to minimum wages, if not observed, become a penal offence punished by a fine;

— when an extended collective agreement by specific authorization of a statute provides for contravening provisions because they are inferior to the legal ones, violation of the agreement's provisions are punished as violations of the law would be (for instance as regards duration of work or overtime pay).

It should be noted that the Minister of Labor may withdraw the extension even if the collective agreement is not terminated by contractual means. This may occur when the Minister estimates that the collective agreement no longer meets the needs of the 'branch of activity'. Withdrawal must occur in the same forms as extension. The administrative order of withdrawal must be published in the *Journal Officiel* of the French Republic.

As mentioned above, instances of enlargement may also occur. The Labor Code provides that the Minister of Labor may proceed to the enlargement of an agreement if in a given area for a given 'branch of activity, either there are no unions able to conclude an agreement, or if although they exist, they are persistently unable to reach one'. According to the Labor Code, the absence of collective agreements for five years or the absence of annexes or amended agreements to an existing one for five years is to be considered to be an analogous case.

It also provides that the Minister may enlarge a collective agreement already extended in the same 'branch of activity' to a different territorial area (another locality for instance) where economic circumstances are similar. Also the Minister of Labor may enlarge to an occupational sector a collective agreement already extended into another occupational sector if the sector concerned is in similar circumstances.

Finally, the Minister may enlarge one inter-industry collective agreement to branches of industry not initially included in its scope.

The procedure for enlargement is basically similar to that for extension except that the right of opposition to enlargement given to the National Commission on Collective Negotiation must emanate from the majority of members rather than only two members.

Chapter 5

COLLECTIVE AGREEMENTS IN THE NETHERLANDS

I. Asscher-Vonk, Nimega

1. INTRODUCTION

1.1. History

Collective agreements came up, in the Netherlands, in the last quart of the 19th century. Among the first were the collective agreements of the Diamond Cutters and the Printing industry. In the beginning of the 20th century, discussions were held concerning the question what legal effect collective agreements had. In 1929 the Wet op de Cao (Act on collective agreements) (WCAO) [1] came into being. In 1937 followed the Wet op het algemeen verbindend en onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten (Act on the declaring generally binding of collective agreements (WAVV) [2].

In the last decennium of the 20th Century some discussion came up, instigated by the economist and later Minister of Finance Gerrit Zalm, about the desirability of generally binding declaring. The question was whether the Government should actively test the accordance of provisions in collective agreements with the general economic policy of the government, or leave the responsibility for the content of the collective agreement with the Social partners, and only refuse to declare generally binding on formal grounds. This discussion is still going on. A recent development shows a tendency towards more individual collective agreements — more enterprise-structured agreements.

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[1] Wet van 24 December 1927, Stb. 415.
[2] Wet van 25 May 1937, Stb. 801.

Moreover, within collective agreements there is the trend to leave maximum individual room for choice to the employee[3].

Collective agreements have played an important role in the development of labour conditions. Many labour conditions, for instance yearly holidays, leave for family reasons, fair dismissal were first laid down in collective agreements. These and other subject have found their way in legislation after having been part of collective agreements.

When the need of regulation of rights and duties comes up, it is always subject for debate whether the matter should be left to the discretion of social partners, in other words should be laid down in collective agreements only, or whether the legislator should take steps. This, one might say subsidiarity debate, is held every time.

The classic aims of collective agreements are: strengthening the economic and social position of the employee, furthering of labour peace and prevention of competition in the field of labour conditions. Nowadays, a more modern aim of collective negotiations is to be catalyst of employment policy. Modern agreements aimed at employment policy try to further individual arrangements. These arrangements may comprise training, career, weight of the job[4].

2. STRUCTURE OF NEGOTIATIONS

Collective negotiations in the Netherlands are structured per (branch of) industry, e.g. printing industry, building, bakeries, ICT etc. Moreover, for some (usually big) undertakings separate collective negotiations are held, that lead to own, separate collective agreements. After an initial growth (after the Second World War) of industry- wide agreements relative to enterprise- agreements, recently there seems to be the tendency to negotiations per enterprise and decentralized negotiations. Most of the collective bargaining is done nation-wide at the level of the industry or the branch of economy. About 75% of the Dutch workers are subject to a collective agreement. Industry-wide collective agreements cover about 85% of these workers. Bargaining parties at this level are representatives of one or

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[3] See also M. J. HUISKAMP, Koplopers en volgers in cao-onderhandelingen, ESB 1990 p. 205, see also FRANK TROS, Schuivende marges: trends in arbeidsvoorwaardenvorming en arbeidsverhoudingen, Samsom Alphen aan den Rijn 2000.

[4] H. STRATING, SMA 2002.

more associations of employers on the one hand and trade unions on the other. Decisive for the applicability of the collective agreement in an employment relationship is the membership of the employer of an Employers association. The number of members of employers associations is not officially known [5]. The biggest employers association, the VNO-NCW, reports in its Brochure [6] that more than 60 % of the small enterprises and almost 100 % of the bigger enterprises are members of that organisation. The VNO_NCW represents in that way 80 % of the employement in the Netherlands economy. A minority of the workers subject to a collective agreement (15%) is covered by a collective agreement at the level of the enterprise, notably in the largest enterprises (Philips, Shell, Akzo Nobel etc.). Signatories to these collective agreements are the employer on the one hand and one or more trade unions on the other.

2.1. Scope of persons

Collective agreements, meaning to bring about certain labour conditions in individual labour contracts, are meant for employment contracts. Usually collective greements point at the concept of employee and employer als defined in art. 7:610 of the Civil code, where the elements work, wages and subordination are mentioned. The scope of collective agreements is, however, principally, not limited to employees. The definition of collective agreements in the WCAO (art. 1, par. 1) mentions "agreements by which mainly or exclusively labour conditions for employment contracts are laid down", while as par. 2 of that article states that a collective agreement can also bear upon contracting for work and contract of assignment. Indeed, a number of collective agreements do count non-employed workers within their scope, for instance the collective agreement for the building industry, where self-employed workers, if they are not entrepreneurs, are included in the scope of the collective agreement. Selfemployed persons, that have a function comparable with employees are in some cases covered by the collective agreement. There are no separate collective agreements for workers that ave not an employment contract. The one exception on this rule, the Collective Agreement for Temporary Workers can not anymore be counted as such, since from 1999 on temporary workers by legal definition are employees.

[5] The official statistical Bureau, the CBS, reports that these data are not known.
[6] Het Lidmaatschap van VNO-NCW, January 2002, p. 4.

Self-employed people do not have their own trade unions but in some cases are welcome to join the existing trade unions.

Every collective agreement defines it's own scope, within the limits of the law. In a number of cases, "irregular" workers are excluded from the scope of the collective agreement, for instance on call workers, holiday workers, temporary helps etc. In former years, it was also not unusual to exclude part-time workers form the scope of collective agreements. That specific provision has noww to be deemed null and void because in violation with the WOA (Act forbidding discrimination on the ground of working time) of 1998 (see under 9).

Collective agreements more often then not limit their scope to the "lower" employees. The board, and very often managerial staff are excluded from the collective agreements. Their labour conditions are settled in individual negotiations between the employer and the employee.

The position of public employees is a bit more complicated [7]. The Constitution provides that the legal position of government personnel shall be regulated by statute. Due to an agreement in 1993 between the Minister of Home Affairs, the provinces, the association of Dutch municipalities, the association of water control boards and the four largest confederations of unions in the public sector, negotiations on terms and conditions of employment have been decentralised. For this purpose the public sector is divided into nine branches (central government, defence, education, the police, the judiciary, municipalities, provinces, water control boards and public utilities).

Article 125 of the Government Personnel Act 1929 states, among other things, that in the case of civil servants 'the manner in which consultations on matters of general significance for the legal status of government personnel are conducted with the relevant staff organizations' must be regulated by General Administrative Order, unless it is already regulated by statute [8]. Provincial and municipal authorities and water boards are also required to adopt rules for the conduct of consultations, again unless it is already regulated by statute.

According to the Government Personnel Act 1929 terms and working conditions are imposed unilaterally by the government in a regulation (central government) or an ordinance (provinces, munic-

[7] For this paragraph, I quote extensively from W. Bouwens, National report for the XVII World Congress of Labour law and Social security, theme I.

[8] For military personnel the same provision can be found in the Military Personnel Act 1931.

ipalities, water boards). However, protocols have been made up between the government and staff representatives at different levels according to which an agreement has to be reached before any changes can be made to the terms and conditions of employment. Because of this collective bargaining in the civil service nowadays increasingly more resembles the collective bargaining system in the private sector.

Finally I want to mention the special procedure for settling disputes at the central government sector established in 1984. In that year the Advisory and Arbitration Committee (AAC) was appointed. If one of the negotiating parties considers that consultations are unlikely to culminate in an agreement, the point at issue can be submitted to the AAC. The committee's advice may be requested by the chairperson or by the (majority of the negotiating) staff federations. For arbitration all of the participants have to subscribe the request [9].

3. TYPES AND SPECIALTIES

A specialty of the Collective agreements in the Netherlands is the way in which they are influenced by tripartite negotiations on national level. Bouwens [10] writes for the World Congress of the ISLLSS for 2003: Collective bargaining at national level in the Netherlands takes place mainly in the Labour Foundation (STAR) and the Social and Economic Council (SER).

The STAR was set up in 1945 as a private consultative and cooperative body between the employers' federations and the confederations of trade unions. It was also recognised by the government as the official, social and economic advisory body. The STAR at the present time includes three central employers' associations and the three largest trade-union confederations in the Netherlands [11].

The SER was established in 1950. It became the main body of the statutory industrial organisation (monitoring commodity and industrial boards) and a (new) advisory body of the government in major social and economic affairs. The SER, which, apart from representatives of the employers' federations and the confederations of trade-

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[9] See W. BOUWENS, National report for the XVII World Congress for the International Socialty of Labour law and Social Security, theme I.

[10] *Ibidem.*

[11] See MAARTEN VAN BOOTENBURG, Aan den Arbeid, Amsterdam, Bert Bakker, 1995.

unions, also includes independent experts appointed by but not accountable to the government, took over a number of advisory tasks from the STAR.

The STAR, which has headquarters in the same buildings as the SER (belonging to the SER), remained as a platform for consultations on current affairs in trade and industry, between employers and employees and together with the government as well. Twice a year a roundtable-discussion between the government and social partners takes place in the STAR. In spring there is a general presentation from the side of the government on the issues of financial, fiscal and budgetpolicies for the next year. In the autumn, after the detailed plans of the government for the next year have been published, there is a discussion about these plans and measures, indirectly in relation to collective bargaining. Bipartite negotiations in the STAR regularly result in recommendations to the social partners working at industry/company level of the economy. These recommendations don't have any legal status but influence collective bargaining at a lower level[12]. Famous examples of agreements concerning labour conditions between the government and the social partners are the Accoord van Wassenaar of 1982. Since that time, regularly central agreements are made about for instance provisions concerning training and schooling, career and employability, labour conditions etc.

The negotiating process between the government and the social partners, that also takes place in the Social and Economic Council [13], and the bipartite negotiating process in the Stichting van de Arbeid is considered a Dutch particularity, often called the "poldermodel".

4. NEGOTIATING PARTIES [14]

In the Netherlands there is no special legal statute on trade unions and employers associations. They are both subject to rules in the Dutch Civil Code governing associations in general. Every union has complete freedom of action and may freely establish its constitution.

The Collective Agreements Act 1927 sets out the requirements the bargaining parties have to meet to establish a legally binding collective agreement. An association of employers or a union of employees is only allowed to establish a collective agreement if, first-

[12] *Ibidem.*
[13] Which also has independent members.
[14] Again I quote Bouwens' Report for the World Congress of 2003.

ly, it is incorporated in a body with 'full legal capacity' and, secondly, its constitution refers to the possibility of entering into a collective agreement. No conditions relating to the size, independence or representative ness of the parties to the collective agreement can be found in law or case law. The Civil Code greatly facilitates access to full legal capacity, so employers' and employees' organisations have no difficulty in meeting this requirements. In effect all employers' associations and the major trade unions have acquired full legal capacity.

In the second place, only unions which have the authority to conclude collective agreements laid down in their bylaws are authorized to conclude a collective agreement.

4.1. Trade unions

In the Netherlands some 25% of the employees are members of the trade unions. Rates of unionisation vary considerably within the working population. Some occupational sectors have a 'high' rate of unionisation, for instance in transportation (56%) and the civil service (45%). Unionisation is low in other sectors, such as the retail trade (12%) and information technology (6%).

The SER undertook the task of laying down criteria for assessing representativeness in a directive. However, this directive is only used to determine representativeness of employers' and employees' organisations, which want to take part in all sorts of administrative, consultative and legal bodies, for instance in industrial boards. It isn't decisive for collective bargaining on wages and working conditions. There, representativeness is a question which negotiating parties themselves have to deal with.

Most of the time a multiplicity of trade unions represents the workers. Often at least three unions are involved each affiliated to one of the three 'rival' confederations, which are also represented in the STAR and the SER [15]. Multi-unionism isn't considered a problem in the Netherlands. A collective agreement is as a rule signed by all of the unions active in the economic sector or enterprise concerned,

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[15] These confederations are: the FNV, established in 1982 by a merger between the Social Democratic Trade Unions Confederation and the Catholic Trade Unions Confederation, representing 1.2 million members; the CNV, comprising of mostly Protestant unions and totalling about 360,000 members; the UMHP, a confederation of white collar unions, which now totals about 225,000 members.

or by none of them. Cases in which collective bargaining has given rise to disagreement between the unions are rare. If they do occur, neither the excluded union, nor its members, are bound by the results of the bargaining process. They may continue to press for a more favourable collective agreement.

If representativeness of a certain trade union is challenged in general the only way for this trade union to gain access to the negotiating table is by organising a successful strike. However exclusion of an evidently representative trade union from current collective bargaining in court law was considered unlawful a number of times [16]. To determine representativeness of the trade union the total amount of members in the company/branch represented by the excluded trade union was compared with the amount of members represented by each of the negotiating unions (absolute representativeness). In some of the court decisions a trade union had to be admitted because it was obviously representative for a certain group of workers, which would become subject to the results of the collective bargaining process and which was hardly represented by the others unions (relative representative ness).

A union only can join an existing collective agreement if the signatory parties give their consent. If the union becomes a signatory party then the rights and obligations recognised to the trade unions that were the original signatories, are recognised to the newcomer as well.

4.2. Employers' representation in the private sector

In the Netherlands among employers the rate of organisation is high. Employers' organisations exist in almost every sector of the economy. Almost all of them are affiliated to one of the three 'umbrella-organisations', represented in the SER and the STAR [17]. These three organisations are co-operating within the framework of the Council of Employers' Organisations.

Collective agreements at branch level as a rule are signed by all of the employers' organisations active in the economic sector con-

[16] For instance: Hof Arnhem 14 maart 1995, JAR 1995/96.

[17] These organisations are: VNO-NCW, representing 80,000 large and medium sized enterprises in industry, commerce, banking, insurance and other services; MKB-Nederland, representing about 125,000 medium and small enterprises outside agriculture and horticulture; LTO-Nederland, representing 65,000 enterprises in agriculture and horticulture.

cerned, or by none of them. These collective agreements aren't legally binding for the employers that aren't member of the signatory organisations, unless the collective agreement is made generally binding by the Minister of Social Affairs and Employment. The existence of a collective agreement at company level will lead to an exception to the industry-wide extension.

Dutch law doesn't contain special provisions for the situation in which members of the employers' association want to negotiate an agreement applicable to his/her enterprise when an agreement already exists that applies to an upper level. According to the Collective Agreement Act the employer in this situation is bound to respect both collective agreements. Usually this problem is resolved by inserting dispensation clauses in the collective agreement at the level of the industry or branch of company to which the enterprise belongs.

4.3. Employers' representation in the public sector

As a consequence of the decentralisation of collective bargaining in the public sector in 1993 it is no longer always the Minister of Home Affairs who conducts the negotiations for the employer's side. In five of the nine branches (the central government, defence, education, the police and the judiciary) negotiating takes place with representatives of the central government. Associations of the provinces, municipalities and water control boards represent employers at the other levels.

The decentralisation doesn't mean that employers in the different branches operate entirely separate. They have set up a federation of employers in the public sector (VSO). The VSO plays a co-ordinating role in outlining conditions of employment in the various branches. The vast majority of the municipalities adopt with little or no modification whatever is agreed at national level. Furthermore it should be noted that the model ordinances for municipalities for the most part are duplicated in those of the water boards and the provincial authorities.

The financial room for manoeuvre within which pay and conditions are set is determined jointly by government and (given its budgetary powers) parliament.

Bargaining on behalf of the employees usually are the four largest staff confederations in the public sector. Sometimes other employee associations that are considered representative, take part in the nego-

tiations as well. Representativeness is determined with regard to the number of persons the federations represent. It needs to be assessed separately for each consultative forum: the federations representing government staff in one branch are not necessarily considered representative in every other branch [18].

5. BARGAINING ISSUES

The matters negotiated are described, but not in a restrictive way, in art. 1 WCAO, where a collective agreement is defined as an agreement regulating "mainly or exclusively labour conditions". Among them are wages, working time, holiday rights, leave rights etc. Fase [19] argues that a collective agreement can pertain to subjects about which employers and trade unions in their task of promoting interests negotiate and settle disputes.

There has been some case law concerning the question whether the obligation to pay a third party can be part of a collective agreement. The Hoge Raad ruled that indeed provisions like that can be part of a collective agreement [20].

Collective agreements are known to contain provisions concerning mandatory partaking in certain pensionfunds (Albany-Case, ECJ 21 Sept. 1999 and a number of others) and provisions concerning mandatory participation in health insurance with a specific company (Van der Woude, ECJ 21 Sept. 2000) . Provisions such as these have given rise to questions concerning competition law. In these cases, the ECJ ruled that the exclusive position of the pensionfund, or the health insurance did not constitute violation of the EC-competition rules.

Another question is, whether, if for certain provisions the written form is prescribed, as is for instance for the trial period clause, laying down the clause in the collective agreement does cover that requirement. In the case of the non-competition clause the matter has been decided by a remark of the government in the Parliamentary discussions: since the written form is prescribed to protect the employee by making them fully realize what he agrees to, the collective agreement is not sufficient to meet the requirement. For other instances of the requirement of the written form, for instance the trial period, the

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[18] Bouwens, *o.c.*

[19] W. J. P. M. Fase, C.a.o.-recht, Samsom uitgeverij Alphen aan den rijn 1982 p. 23

[20] HR 10 June 1983, NJ 1984, 147.

matter has not yet been decided. I would think that the question has to be solved with regard to the purpose of the requirement. If the purpose is, as is in the case of the competition clause, to make the employee fully realise what he does, provision by collective agreement has to be deemed insufficient. If the aim is to facilitate proof, the answer may be different.

6. NEGOTIATING PROCEDURE

The negotiations are governed by the normal rules of good faith etc. that govern all negotiations. The rules about pre-contractual good faith are also applicable. The meanings and justified expectations of the parties play a role in the interpretation of the contract between bargaining powers [21]. The interpretation of the conditions in the agreement that are meant to become a part of individual labour contracts, however, have to be interpreted more to the letter. (see below). Bargaining parties are supposed, but not legally bound, to stay within the limits agreed in central negotiations between the government and the social partners on the national level which may have got a transposition in the form of a recommendation.

The law forbids to agree to closed-shop provisions or to discriminatory provisions.

About the practice of negotiation not much is known. The tradtion in the Netherlands is mutual consultation, rather then war. Aggressiveness is not the usual style.

7. PERFECTION OF THE AGREEMENT

Art. 3 WCAO prescribes the written form for the Collective agreement.

Art. 4 Wet op de Loonvorming prescribes that the Minister of social Affairs is to be notified in writing of the concluding, amending or termination of collective agreements. An agreement that has not been registrated in that way is not a collective agreement in the legal sense [22]. The minister confirms receipt of the notification. A collective agreement or amendment of a collective agreement cannot be

[21] C. E. M. Schutte, Overzicht van het cao-recht, Nijmegen 1998, p.10.
[22] HR 30 November 2002, JAR 2002, 16.

binding before the day following the sending of the notification by the Minister.

There is not a public register where collective agreements are kept.

Usually, collective agreements contain the provision that the employer should hand a copy of the agreement to each employee. Moreover, art. 7:655 of the Civil Code contains the Clause that the employer should inform the employee, in writing, of the applicable collective agreement. Lastly, members of trade unions can gat a copy from their trade union.

If a collective agreement has been declared generally binding (*erga omnes* effect, see under 7) the decision has to be publicized in the Staatscourant (Official Gazette) (art. 5 Wet AVV).

8. EFFECTIVENESS

8.1. Binding effects on workers and employers

It is usefull to discuss separately the effectiveness of collective agreements per se and (provisions of) collective agreements that have been declared generally binding, as it is the very effectiveness that is influenced by the Generally binding declaring.

A Collective agreement is binding upon the parties to the agreement and their members (art. 12 and 13 Wet CAO). Moreover, the employer-member of the agreeing party has to apply the collective agreement also with regard to the employees that are not members of the agreeing party on the employees side (art.14 Wet CAO). These employees, however, are formally not entitled to claim the conditions as laid down in the collective agreement. There is some (old) case law denying the employee that right[23].

In practice, however, usually the employee-not member gets the same conditions as the employee-member. In many cases the employer does not know which employee is member of the trade union, and which is not. Moreover, it is usual to refer in the individual labour contract to the collective agreement, and stipulate that the provisions of the collective agreement are part of the individual contract. If that is the case, the employee can claim the labour conditions, on the basis of his own individual contract. If the collective agreement is applied,

[23] HR 17 June 1957, NJ 1957, 527.

without protest, on the non-organized employee, the conditions are deemed to be part of the individual contract [24].

8.2. Date of effectiveness

The collective agreement starts, if not otherwise stipulated, on the 15th day after the conclusion of the agreement. Usually the date of effectiveness is stipulated in the Collective agreement. The collective agreement is applicable also on the labourcontracts in existence at that moment (art. 7 WCAO).

As concerns the expiration of the collective agreement, the following rules apply.

Usually collective agreements are concluded for a fixed period, which can not be longer than 5 years. Usually the period is one or two years. If the collective agreement does not contain a time-clause, the agreement is deemed to be entered upon for one year. After the lapse of that time, the agreement can be expressly renewed for the same period, but maximally one year. Implicit renewal is, if there is no express renewal, prescribed by law, also for maximally one year (art. 19 WCAO).

The collective agreement expires on the final date if either parties have expressly stipulated that expiration in the agreement or the parties have given notice. The notice should be in the written form.

The law contains no provision concerning ultra-activity. After expiration of the collective agreement, the parties of the agreement are no longer bound (for instance, the trade unions regain the right to strike, which may have been suspended by the collective agreement).

The conditions in individual labour contracts, however, that have been shaped by the collective agreement, keep their shape, i.e. the provisions remain binding, unless the parties agree on other conditions. This has been argued in legal literature and has been decided in case-law [25].

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[24] W. J. P. M. Fase, C.a.o.-recht, Samsom uitgeverij Alphen aan den rijn 1982 p. 55.

[25] C. E. M. Schutte, Overzicht van het cao-recht, Nijmegen 1998, p. 52. HvJ Ned. Antillen 5 July 19977, NJ 1978, 134.

8.3. Collective agreements that have been declared generally binding

The decision to declare generally binding has to be taken by the Minister of Social Affairs, following the procedure regulated in art. 4 Act AVV. In the first place, there should have been a request to declare generally binding by (one of the) parties to the Collective agreement. The request is publicized in the Staatcourant (Official Gazette) Objections may be brought forward. A provision in a collective agreement can only be declared generally binding if italready applies on an important majority of the labour relations in the industry. The Minister may consult with the Stichting van de arbeid (Foundation of labour). Applicable are the rules laid down laid down and publicized as Toetsingskader Algemeen verbindendverklaring CAO-bepalingen, lastly amended in December, 2004 [26]. Reasons for refusal of the Declaration are (1) Conflict with the law, for instance if provisions in collective agreements would be contracy to equal treatment legislation, (2) Conflict with public interest. An instance of this might be that effect of certain provisions would be detrimental for the social and economic development. Since, however, the primary responsibility of the partners at collective agreements must be the first consideration, this reason will not easily be used; and (3) great prejudice to the legitimate interests of others.

The importance of AVV for collective agreements, and the importance of collective agreements for balanced labour relations and industrial peace, a condition for a positive social and economic development, are put first and foremost.

The *effect* of the generally-binding declaring is that all provisions in labour contracts, that are in conflict with the provisions of the collective agreement are null and void, the provision of the collective agreement takes the place of the annihilated provision. The effect pertains to all labour relations concerned in the branch of industry. Enterprises can, however, ask for dispensation, for instance because in the enterprise there is an "own" collective agreement. Requests of that kind usually are complied with.

The Declaration that the (provisions of) the collective agreement are generally binding (AVV) contains the effective date and the date of expiration (art. 4 and 5 WAVV). The AVV can not have retroac-

[26] Toetsingskade algemeen verbind verklaringcao-bepalingen van 2 December 1998, Staatscourant 1998, 240, gewijzigd 0- 14 June 2002, (effective January 1th, 2003) Staatscourant 2002, 114, p. 11.

tive effect. The expiration date can not be more than two years after the effective date, nor after the expiration date of the (original) collective agreement. Premature termination is possible by Ministerial Decree (art. 6 WAVV).

Ultra-activity of the AVV collective agreement provision has been denied in case law[27]. The Hoge Raad (Supreme Court) ruled that an employee can not base his claims on provisions of an AVV collective agreement that has expired. In more recent case law, the Hoge Raad refines this rule. When a claim, based on an AVV- collective agreement, has become effective in the period the AVV was effective, the employee does not loose that claim with the expiration of the AVV[28].

9. SPECIAL ISSUES

When discussing application and enforcement of collective agreements there are different questions to be answered. In the first place: who is entitled to enforce the collective agreement. I will call that the question of the Actor. In the second place, before what forum the claim has to be brought, and who is to interpret the collective agreement. In the third place, the content of the claims has to get attention. In the fourth place, the question what procedure is applied in deciding. I will discuss these questions below, both for collective agreements per se and AVV collective agreements. Where there are differences between the two, I will point that out. I limit myself here to enforcement before the courts. Enforcement by way of strike is a different matter altogether. Enforcement of an existing agreement by way of strike will in may cases not be possible if there are still other (legal) ways oif inforcement. Strike is to be considered the ultimum remedium.

9.1. Obligations of the signing parties

A collective agreement contains, first of all, obligations between the contracting parties. Enforcement of these obligations is in the hand of these parties (trade unions, employers or employers organisations. In the second place, a collective agreement may contain obligations of members of organisations toward the contracting parties. For instance, the obligation of employers to donate money in certain funds.

[27] HR 18 January1980, NJ 1980, 348.

[28] HR 28 January 1994, NJ 1994, 420 see also HR 7 June 2002, JAR 2002, 154.

Here, again, the negotiating parties have to enforce the obligations. Provisions creating rights of individual parties against the contracting parties, for instance the right not to be striked against, have to be enforced by the individual party concerned. Obligations and rights from the collective agreement between individual employers and employees, that have become part of their individual labour contract, are to be enforced by the individual parties. These rights will also be obligations between (collective, i.e. trade unions and employers' organisations) contracting parties. They, too can enforce the agreement (see above). If the collective agreement is declared generally binding, even trade unions that have not been party to the collective agreement, but who have members whose labour contracts are governed by the collective agreement, can also claim damages for themselves and for their members (WAVV art. 3).

The capability for trade unions to enforce observance is one of the reasons why existing statutory obligations are "reiterated" in collective agreements, for instance the obligation to pay wages when the employee is ill. If the obligation has become part of a collective agreement, collective enforcement possibilities arise.

An organisation of employers or a trade union can also take action on behalf of its members. If they do, a special procedure (art. 3:305a BW) is applicable. The claim can not exist of damages, only of performance.

The Works council has the obligation in art. 28 of the Works Council Act, to further the observance of the provisions concerning labour conditions. In that way, the Works Council has its own authority to investigate whether labour conditions are observed.

Third parties, for instance the tax authorities, can base their own claims on the labour conditions as shaped by the collective agreement [29].

9.2. Jurisdiction

Obligations rising from collective agreements, whether AVV or not, are to be brought before the civil Courts. The Netherlands do not have specialized labour courts. Disputes concerning collective agreements, as well as disputes concerning individual labour contracts fall within the competence of the District Court, and are to be decided by the judge of the subdisctrict court (kantonrechter) [30].

[29] C. E. M. Schutte, Overzicht van het cao-recht, Nijmegen 1998, p. 92.
[30] Wet RO art. 42, Wetboek Burgerlijke rechtsvordering art. 93.

In some cases, collective agreements set up special bodies for the settlement of disputes. In a number of instances parties are bound to refer there dispute to the committee, before filing their claim with the Court. In other cases, disputes rising from the collective agreement are to be submitted to arbitration. If these clauses are coercive, they can not be declared generally binding (art. 2 par.5 sub a WAVV). Moreover, they are not applicable on employees that are not member of the trade union, but on whom the employer is obliged to apply the labour conditions from the collective agreement[31].

9.3. Content of the claims

Collective parties can if the obligations from the collective agreement are violated, claim not only their own damages, but also the damages of their members (art. 15 WCAO). Both material and immaterial damages can be claimed.

An organisation of employers or a trade union can also take action on behalf of its members. The claim under art. 3:305a BW can not exist of damages, only of performance.

9.4. Procedure

The normal rules of civil procedure are applicable on cases about collective agreements. The Wet AVV contains a special rule of investigation. Art. 10 WAVV rules that if one or more employers' organisations or trade unions, at whose request the collective agreement has been declared generally binding, suspect that in a company generally binding provisions of a collective agreement are not observed, they can, prior to a claim in Court, request the Minister to set up an investigation. The Minister instructs his civil servants to perform the investigation and informs the petitioners of the result.

Above I mentioned the special procedure for organisations to litigate on behalf of its members of 3:305a BW. This is a procedure not especially for trade unions. There are a few conditions to be fulfilled. In the first place, the interests to be defended should be similar to the own interests of the organisation. In the second place, there should have been consultation between the parties. In the third place, if the person concerned raises objections against the lawsuit,

[31] C. E. M. Schutte, Overzicht van het cao-recht, Nijmegen 1998, p. 93.

his case can not be used as basis for the claim, nor has order effect in is regard. The claim can only pertain to publication of the verdict, and can not exist of damages, material nor immaterial.

10. IMPUGNATION OF THE AGREEMENT

Collective agreements have to meet the general requirements of agreements. Especially important is that they can not be contrary to mandatory provisions, either from national or European law (equal pay). If clauses in a collective agreement are contrary to mandatory provisions, they are null and void. The individual labour contract will not be shaped by the provision from the collective agreement, but by the Statutory provision instead. For instance if in a collective agreement wages would have been set below the level of the Statutory Minimum wages, the provision in the Collective agreement is null and void and the employee is entitled to the statutory minimum wage. If a Collective agreement would contain a clause in violation with the (mandatory) legislation on equal treatment, for instance award less rights to part-time workers, part-time workers can, on the basis of the law (WOA), claim equal rights as full time workers under the collective agreement.

There is also the (theoretical) possibility that provisions of a collective agreement are declared null and void by the Minister. During the time this possibility has been in existence, from 1937, when the WAVV, where it is regulated, was introduced, this possibility has never been used. The provision has been contested by collective partners, on the ground that it is opposed to the freedom of negotiating [32]. The Minister has in 1988 pointed at this instrument as a possible remedy when a collective agreement contains a discriminatory provision [33].

11. FINAL COMMENTS

11.1. Interpretation of the agreement's provisions

The first question I would like to draw attention to is the matter of interpretation of provisions in collective agreements. The Supreme court decided that the text of the collective agreement is decisive,

[32] STAR-advis October 1989, p. 35, quoted by C.E.M. SCHUTTE, Overzicht van het cao-recht, Nijmegen 1998, p. 80.

[33] Letter of the Minister of Social Affairs 19 May 1988, quoted at C. E. M. SCHUTTE, Overzicht van het cao-recht, Nijmegen 1998, p. 80.

such in opposition to the doctrine governing the interpretation of agreements in general. The meaning, the aim envisaged by the parties of the collective agreement is not decisive [34]. If, however, the aim envisaged by the parties at the collective agreement becomes clear from the collective agreement itself, or from the added, written explanation, and therefore is knowable for the individual employers and employees that have not taken part in the negotiations, the meaning and the aim envisaged by the parties can have bearing on the interpretation of the collective agreement.

11.2. Regulations on working conditions

An interesting point may also be the "provision for the regulation of labour conditions" (Wet op de Loonvorming [35] art. 5). The Minister can, upon joint request of one or more employers or employers unions on the one hand and one or more trade unions on the other hand, decide upon a regulation with the same content as a collective agreement. The procedure to be followed in this case also contains the consulting of the organisations of employers and trade unions on the national level. Regulations such as these have the same effect as collective agreements.

Moreover, art. 6 of the Wet op de Loonvorming creates the possibility that the Minister, at the request of the Stichting van de Arbeid [36] gives a regulation for the labour conditions for a certain category of workers. These regulations have erga-omnes effect.

The Wet op de Loonvorming also contains the provisions that enable the Minister to create Regulations concerning wages, that enables the government to pursue wage politics. The autority of the government to influence wages has been diminishing from a strong grip in 1945 to a fairly theoretical and exceptional possibility now.

11.3. Government influence

The Wet op de loonvorming, as amended in 1987, enables the Minister to intervene in special situations. Required is a sudden

[34] HR 17 September 1993, NJ 1994, 173.

[35] Wet van 12 February 1970, Stb. 69.

[36] Stichting van de Arbeid (Foundation of labour). Bipartite (Employers/trade-unions) body on national level that has consultative and coordinating functions. The Stichting van de Arbeid a.o. issues recommendations at negotiating parties concerning the content of the collective agreements and the level of labour conditions.

emergency in the national economy, caused by one or more external factors that arise by starts and fits, that necessitates measures concerning the level of wages and other material labour conditions (art. 10 Wet op de loonvorming). The measures are temporary (not exceeding six months, this period can be extended with at most six months) and should be accompanied by the announcement of other relevant measures. The measures concerning the wages freeze or restrict the wages.

11.4. Relations between trade unions and works council

Another aspect I would like to draw attention to is the relation of the trade union with the works council. In the Netherlands, the tasks and competency of the Works council has been described in the Wet op de Ondernemingsraden. Some collective greementd broaden the competence of the works council. Generally speaking, primary labour conditions (wages, working time, holiday etc) find their regulation in collective agreements, while secondary and tertiary labour condigions (organisation of working time, schemes for checking on personnel) are subject to the consent of the works council. The wet op de Ondernemingsraden contains a provision that draws a further line between the competency of the Trade Unions and the Works council. If a matter is agreed in a collective agreement, the works council is no longer competent to issue (or withhold) its consent to propositions of the employer on that point.

The relation between works councils and collective agreements has been recently described by the Minister of Social Affairs [37].

11.5. Concurrence of collective agreements

The problem of concurring collective agreements and possible collision may occur in a number of instances. In the first place, after a merger or transference of an undertaking two or more collective agreements may be applicable. For this situation the Law has given a solution in art. 14a WCAO and art. 2a Wet AVV. The provisions stipulate that the labour conditions applicable before the transference of the undertaking remain applicable, until a new agreement is agreed upon or declared generally binding [38].

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[37] Eerste kamer 2001-2002, 222a, nr 9b.

[38] M. M. Olbers, Trekt de avv-cao de ondernemingscao? SMA 1989, p. 143-154 en Pres. Rb. Rotterdam 14-12-1989, KG 1989, 31.

In the second place, there is the situation that in an enterprise activities belonging to different branches of industry are performed. For instance, in a supermarket not only consumer goods are sold, but also bread is baked, meat is processed etc.

In the third place, different collective agreements may be applicable because there is one agreement has been declared generally binding, while another is also in existence in a particular enterprise. The problem seems not to have much practical meaning in the Netherlands [39]. Usually problems of collision are prevented by explicit provisions in collective agreements that regulate the scope of the agreement. These provisions are decisive for the question whether or not the collective agreement is applicable on a certain employee. Other solutions in collective agreements are also possible, as for instance in the Temporary Work Agreement. That agreement regulates under what conditions which collective agreement is applicable: that of the Agency or that of the enterprise where the work is actually performed. Moreover, if the collective agreem,ent has a minimum-character, the most favourable condition may be applied, without conflict with the other collective agreement (in the Netherlands, the Gunstigheitsprinzip only prevails if the collective agreement allows it).

11.6. The denominated 3/4 coercive law

The last question I would like to draw the attention to is the matter of so-called 3/4 coercive law.

Private law, the law of contracts, in principle leaves the parties free to negotiate. In labour law, however, many statutory provisions are to be found that are coercive: agreements that are contrary to the statutory provision are null and void. From 1953 on, Dutch Labour law has the possibility that a statutory provision leaves room for deviation, but only by way of collective agreement. The protection, offered by the collective negotiations is for these cases deemed equivalent to the protection offered by provisions of mandatory law.

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[39] W. J. P. M. Fase, C.a.o.-recht, Samsom uitgeverij Alphen aan den rijn 1982, p. 64. C. E. M. Schutte, Overzicht van het cao-recht, Nijmegen 1998, p. 54.

Chapter 6

COLLECTIVE BARGAINING IN ITALY

Bruno Veneziani, Bari

1. CONSTITUTIONAL ROOTS OF TRADE UNION FREEDOM AND THE COLLECTIVE BARGAINING SYSTEM

The Italian Constitution marks (1948) a turning point in the evolution of the industrial relations system passed four years after the fall of the fascist regime and its corporatist structures. Its main legal provision — dealing with industrial and collective labour relations — is art. 39:

"The organisation of the trade unions shall be unrestricted.

No obligation shall be imposed upon trade unions other than that of registration at a local or central office in accordance with the provisions of the law.

It shall be a condition of registration that the rules of a union provide for a democratic internal structure.

Registered trade unions shall have legal personality. They shall have power each being represented in proportion to its membership to conclude collective agreements with binding force on all persons belonging to the categories to which the agreements relates".

This article introduced the basic principle of "freedom of trade union organisation" and, because of the weakness of the trade union movement in the period it was enacted, it endeavoured to solve the problem of making collective agreements generally binding. So the article was based on the principle of registered unions as a way of recognising their legal status.

Registration could have meant decisive control by the State in the internal affairs of a divided movement as it was at that time. In fact,

in the period 1948-1950 a series of events occurred among the different political groups in the labour movement which had brought about the formation of the CGIL (Confederazione Generale Italiana del Lavoro), CISL (Confederazione Italiana Sindacati dei Lavoratori), UIL (Unione Italiana del Lavoro) and which, after the liberation from the fascist Regime, resulted in the establishment of a unitarian Federation (Patto di Roma 1944) signed by the representatives of Communist, Socialist and Christian democratic labour leaders.

Therefore, the possible implications of the Constitution concerning the control of unions never became reality even though some right-wing political parties tried to promulgate statutes by implementing constitutional provisions. These political parties had hoped to limit the social effects of the trade unions' policy and to curb industrial conflict.

Anyway, it must be remembered that many recent events regarding tensions among different unions, their crisis of representativeness and the need to control minority groups of workers and their bargaining behaviour have, however, provided the basis for a new attention given to the problem of union regulations, above all in the perspective of giving an erga omnes effect to current collective agreements.

The problems at stake are all strictly linked to each other: basic democracy procedure within the trade union by way of self-regulation or via legislation, redefinition of the concept of "representative unions", regulating the effects of collective agreements in case of infra-union disagreement via referendum among the workers.

The reasons for decreasing interest in implementing the constitutional provision were linked to a wider sphere of application of collective agreements (mainly national) brought about by the gradual improvement in the standard of living and increase in the collective bargaining power of labour.

It is important to point out that all technical instruments such as the Constitution, statutes and judicial decisions are crucial in establishing the rules of the game in Italian collective labour relations. But the relevancy of the written law is secondary compared with the impact of some significant variables of the industrial macrosystem, such as the technological characteristics of an industrial community, market and budgetary constraints, and locus and distribution of power in the wider, globalised society.

So the main rule concerning trade union freedom is still today only art. 39, para. 1, proclaiming the freedom of trade union orga-

nisation. This has consequences from the legal and industrial relations point of view, which are both closely interwoven.

The first consequence is that the lack of legislation on collective bargaining (especially in the private sector) has favoured the establishment of a system of self-discipline in industrial relations, so-called "collective autonomy", which represents a theoretical and conceptual tool to understand the whole structure of collective and also individual labour relations. (For an historical perspective see B.Veneziani, Italy, in A. A. Blum (ed.), International handbook of industrial relations — Contemporary developments and research, Greenwood press, Westport, Connecticut, 1981, p. 303).

The legal framework built up by the Italian constitution has favoured the birth and development of a network of collective relations in a context of complete freedom. The constitutional guarantee has implemented and favoured trade union pluralism and activity, collective bargaining procedure and structures.

Collective negotiation is above all a far-reaching and complete process which aims at reaching a lasting compromise. The right to negotiate collectively according to Italian legal theory is an individual right which must be performed only by a group and the rationale of this theoretical approach is in the concept of "collective interest", i.e. an interest which is not a mere total of each individual interest represented by a worker's organisation, but its synthesis.

The actors are not indicated by any statute and can be, on the workers' side, groups — permanent or not — of workers, traditional unions, associations, works councils and, on the employers' side, single employersor groups of employers, or employers' associations). They are free to start or not to start negotiation, to choose the content of agreement, the levels (national, branch, company, territorial) of negotiating procedure, the relationships between different levels, the relationship with the state.

This is the reason why some observers speak about the "weak institutionalisation' of collective bargaining (G. P. Cella, Regulation in Italian industrial relations, in P.Lange and M. Regini (eds), State market and social regulation. New perspective on Italy, Cambridge, Cambridge UP, 1989) and the others emphasise that there exists a dense network of shared understandings and a common adherence to the rules of the game (A. Ferner, R. Hyman, Italy: Between political exchange and microcorporatism, in A. Ferner, R. Hyman (eds.), Industrial relations in the New Europe, Blackwell, Oxford, 1995, p. 524).

2. TRADE UNIONS, EMPLOYERS' ASSOCIATIONS, COLLECTIVE AGREEMENTS AND PRIVATE LAW

The second consequences of the lack of legal regulations in this field is that the whole trade union phenomenon must be framed within civil code rules. Italian trade unions and employers' associations are non-recognised de facto associations, lacking therefore legal personality. They are regulated by arts. 36, 37, 38 of the Italian civil code and they cannot, even if they request it, obtain recognition and legal personality, like other private associations, according to art. 12 ff. of the civil code, because of the mandatory recognition procedure established in art. 39 of the Constitution.

According to art. 36 of the civil code the internal rules and administration of associations not recognised as legal persons shall be governed by agreements between the members (i.e. by the associations' statute-book and by-laws) and such associations may be represented in legal proceedings in the person of those on whom the presidency or control is conferred by the said agreements.

Art. 37 states that

"The contributions made by the members and the goods obtained with those contributions shall constitute the common fund of the association. As long as the associations remains in existence, individual members may not demand the division of the common fund nor claim a share thereof should they leave".

Art. 38 states

"In respect to the obligations entered into by persons representing the associations, third parties shall be entitled to assert their claims on the common fund"

and jointly on the personal patrimony of the persons who have acted in the name of the association (i.e. not of all members.).

The framework of the civil code is relevant from different aspects dealing, above all, with the freedom of the internal life of the unions, which is regulated only by the agreements freely decided by the members. The problem of internal democracy must be an internal affairs of the trade union body.

The second aspect is that unions and employers' associations can conclude collective agreements that are legally enforceable by them, as far as the obligatory part is concerned, "although the courts have tended in the past to interpret rather restrictively the provision of art.

36, para. 2, of the Civil code recognising *de facto* for associations a limited capacity to act in front of the courts" (T. Treu, Italy, in R. Blanpain (ed.), International encyclopaedia of labor law and industrial relations, Kluwer, Deventer, 1998, p. 159).

Treu underlines that "the normative part of the collective agreement cannot be enforced by the trade union, because according to the prevailing (but questionable) opinion, it entails rights only on the individual workers covered by the agreement and can therefore be enforced only on their initiative" (p. 159). But a full trial capacity of the unions has been admitted by art. 28 of the Statuto dei lavoratori (Act n. 300 of 1970) which enables them to sue in their name of the employers only in the case of anti-union activity, i.e.

"whenever the employer indulges in behaviour designed to deny or to limit the exercise of a trade union freedom and activity, as well as the right to strike".

The local bodies of the national trade unions involved can go to the court and ask for an order to stop such behaviour and to annul its effect.

This rule is a huge weapon in the hands of the unions, but legal theorists have specified how it must used, essentially when the employer's behaviour attacks *'the birth*' of a conflict and not when it is opposing '*within* a conflict.' This means essentially that it is not forbidden behaviour if the employer refuses to bargain collectively. It is controversial whether art. 28 can be used in the case of the violation of union rights deriving from collective agreements. But in some cases it has been used to condemn employers not respecting the right to information provided by collective agreements.

2.1. Intervening parties in the bargaining

National collective agreements are negotiated by general actors according to the system of representation of interests of workers and employers.

Organised labour in Italy has been divided into main confederations with different social strengths and structured along two lines, so-called vertical and horizontal lines, converging at the top into a confederation, which has the task of planning negotiating strategy. The vertical structures stipulate branch agreements — for instance for the textile, metal and vehicle sectors — with the assistance of Confederations, even though national unions affiliated to the Confeder-

ation are independent organisms. Horizontal structures aggregate all workers and/or vertical structures in each geographic area: national (Confederation) regional, provincial and also local (at decentralised levels). All horizontal structures are responsible for the representativeness of the general political and social interests of the workers in their area of competence, also from the perspective of coordinating the bargaining policies and actions of different affiliated bodies.

On the employers' side the associations reproduce by and large the same dual structure as the unions. Private employers are grouped into three main Confederations acting as bargaining agents, one for each major branch of the economy: Confindustria for the industrial sector, Confcommercio for commerce, Confagricoltura for agriculture. Confapi, which is a separate confederation, organises small and medium-size industrial firms. Artisans are also represented by separate organisations. Some powerful federations on the employers' side exist in the metalworking industries like Federmeccanica, and Federtessile for textile industries.

Confindustria even today is involved in handling procedures and bargaining issues of general concern or in giving guidelines acting as the common representative of the employers vis à vis the political powers that be. Provincial employers' associations act essentially at enterprise level in assisting individual firms at the bargaining table and in the administration of agreements and relative disputes, providing technical services in social and economic matters.

2.2. Structure of collective bargaining

The national collective agreement covers all the terms and conditions of each individual labour contract. It is a sort of "profession's code" and the quality of its norm is largely dependent on several variables: inflation, technical innovations, the strategy of the unions. The national branch agreement plays a function of "generalisation" of the results obtained at the decentralised levels. But that is not all, because in some cases, e.g. in the banking sector, a national agreement has introduced innovations as regards, for instance, the changing job classification system, productivity wages to be fixed at enterprise level following criteria set at branch level, job consultation about the strategy of the company and the definition and control of extending an agreement.

Normally an "archetypal" model of branch national agreement (as is that, for instance, in the metal and vehicle industries) is structured

in a 'general' part and several sections: the first section dealing with the system of industrial relations (right to information, equal opportunity, internal mobility, home work, studies and research groups), the second section dealing with trade union rights (staff meetings, the right to post up notices, premises for trade union delegations, union dues); the third section with rules of the employment contract common for all categories of workers. The 'special' part deals with the terms and conditions referring to blue collars (1st section), white collars (2nd section) and cadres (3rd section).

A more complicated situation is at the plant level on the employees' side, given the recent changes that have occurred in the law and industrial relations.

First of all, the general agreement between the major Confederations of 1991 — modified into the Tripartite Agreement of 1993 — has reformed the system of representativeness at workplace and plant level, indicating a new model of worker representation, the "Unitary representatives" (RSU). The new model combines the two types of 'presumed' (based on affiliation of an already major confederation) and 'proven' (by an electoral result) representativeness. In fact the model creates a delicate balance between the part of representativeness elected by all workers (2/3), which should respond only to them, and the part reserved to unions as such (1/3).

According to the Tripartite agreement of 23 July 1993: "the legitimisation to conduct negotiations at undertaking level on the topics deferred to it from the national collective agreement is attributed to the RSU and the trade unions' territorial organisations of the workers who are members of the same unions that stipulated the same Collective national agreement, in the ways prescribed by this" (para. e)).

This joint contractual responsibility is a kind of compromise between the attempt by the traditional union to control industrial relations and the bargaining round at plant level, which is still dependent on the national level, and the desire of the employers to have liable counterparts (territorial unions) in so far as they are responsible to national unions.

On the legal side, art. 19 of the 'Statuto dei lavoratori' (Act no. 300 of 20 May 1970) stated that the representativeness of the unions in undertakings could also be recognised to independent unions which "have signed national or provincial agreements applied in the productive unit" (para. b), art. 19 of the old formula). This rule was reformulated in June 1995 by two popular referendums, one of which abolished the words "national or provincial". So the article was amended to allow the setting up of union structures at the workplace

regardless of the degree of representativeness of the unions involved as long as they are parties "to the collective agreements applied in the productive unit".

Therefore the system is simplified from the viewpoint of the employee now that representativeness at the workplace can be acquired also by using bargaining strength at that level.

The history of this legislative reform shows the preference of the Italian system of industrial relations for single-channel representation.

In this framework the territorial bargaining level is also important, even though less widespread, because it depends on the economic structure of each Italian region: territorial agreements are in agriculture, the building industry and in some trade sectors. The topics discussed are linked to the particular features of the economic region and type of employment.

Also tripartite institutions exist for dealing with labour market issues, the impact of company restructuring, training and retraining.

3. THE BINDING EFFECT OF COLLECTIVE AGREEMENTS. NORMATIVE AND OBLIGATORY PART

A collective agreement — according to the general theory of civil obligations — belongs to the legal category of "normative contracts", i.e. it does not contain an immediate exchange of goods but indicates the content (terms and conditions) of future individual labour contracts. *Ratione subiecti* one of two parties must be a collective entity (a group of workers, normally a union), on the other side there may be a single employer, as usually happens in the case of plant or company-level bargaining.

The obligatory part deals with obligations arising between the contracting parties. Case law distinguishes between three types of obligations: the duty to implement the agreement, the duty to influence the members of the organisation participating in the agreement in order to apply its normative part; the peace obligation. The importance of this part is increasing as a result of the strategy of the unions which are engaged not so much in the topics concerning wages and the workforce but in the mobility of workers, employment, and managerial powers at plant level.

The duty of implementation is the essence of the agreement (of any agreement): it must coincide with its minimum legal content; the

duty to exert influence is a natural part of the agreement and requires the parties using every means to induce members to live up to the agreement. Legal opinion has asserted that the clause of industrial peace for a definite period and concerning specific matters can be recognised only if the parties have explicitly decided so in the agreement signed. In the absence of an explicit clause the agreement plays the role of a provisional compromise which settles an existing conflict but is not binding for the future.

As for the normative part, the parties enjoy full and complete autonomy in predetermining terms and conditions to be incorporated into individual labour contracts.

3.1. Relationship between the collective agreement and the individual employment contract

In a legal order such as Italy's which celebrates the triumph of collective and individual private autonomy, the most delicate and crucial point for the survival of the collective bargaining structure is the *relationship between collective and individual labour contracts*. According to some labour law theorists the linkage is embedded in the general principle of 'inderogability in peius' of the collective agreement by the individual parties. The reason is rooted in the circumstance that collective parties have received the power to represent individuals affiliated through an ad hoc mandate or, as a rule, through affiliation to the organisation. But the normative effect of the normative part stems from art. 2077 of the civil code which, although enacted in the 1942 only for corporative collective agreements having a 'public' nature and an erga omnes effect, has been held by case law as being applicable also to current collective agreements of a private nature and binding only on the contracting parties.

According to this rule

"Non-conforming provisions in individual labour contracts pre- or post-dating the collective agreement shall be automatically replaced by those of the collective agreement except where it contains provisions that are more favourable to the workers"(art. 2077, 2nd para.).

The trend of case law has been analysed by legal scholars as a point of reference and was confirmed by the legislator in Act no. 533 of 11 August 1973, with art. 6 renewing art. 2113 of the Civil code stating that:

"Waivers and arrangements with regards to workers' rights founded on irrevocable provisions of the law and contracts or collective agreements" concerning individual employment relationships shall be invalid.

In this way the clauses of current collective agreements, declared irrevocable by the contracting collective parties, shall be included in individual labour contracts irrespective of the parties' will. Legal doctrine has debated the issue of the concept, enshrined in art. 2077, of 'more favourable treatment', i.e. when the conditions laid down in the individual contract of employment are more favourable than those resulting from the collective agreement. Different trends in case law have tried to solve the problem, one of the most recent considering as comparable the entire regulation of certain matters (holidays etc.) judging as prevailing the one which, as a whole, is most favourable to the employees (Court of Cassation of 13 May 1995, no. 5244; Court of Cassation of 8 September 1999, no. 9545).

4. THE PERSONAL SCOPE OF COLLECTIVE AGREEMENTS

The collective agreement — the real backbone of the system of industrial relations in Italy — is a part of private law. Its prescriptive function (its so-called normative part) is to regulate the content of individual employment contracts.

From the legal point of view a collective agreement is legally binding only for employers and workers who are members of the unions that stipulated the agreements. This marks a radical difference with respect to the collective model described in art. 39 of the Constitution, which is generally binding (so-called erga omnes), but not operative in practice due to lack of legislation implementing the constitutional norm. So collective agreements are binding only on the parties to the agreements — trade unions, employers' associations or individual employer — and, in principle, on the individual employers and workers belonging to the associations that have negotiated them.

4.1. The role of case law

In practice, however, the Italian case law of the Court of Cassation has stated that also an employer who is a member of an employers' association which has stipulated the collective agreement is obliged to apply the negotiated rules to all workers in the firm, even

if they do not belong to the stipulating unions, if the workers want. (Cass. 8 August 1978). However, is highly improbable that an employer, bound by a collective agreement as a member of the employers' association participating in the agreements, or having concluded or accepted the agreement personally, would discriminate among workers by applying it only to unionised workers. This opinion is supported legally, in fact, by art. 15 of law no. 300 of 1970 (Statuto dei lavoratori) which forbids any discriminatory measure on the grounds of union activity or affiliation.

A further trend in case-law in this field is the case where the courts have judged that an employer who is not a member of an association and is not legally bound by a collective agreement according to private law has in any case spontaneously applied it to all workers. The judge has applied civil law principles holding that the employer is bound by the agreement 'per acta concludentia'.

The same conclusion is generally applicable to so-called 'distributive agreements', i.e. whose content is to distribute normative and economic benefits to all workers. But it is no longer applicable to agreements, especially at company level, containing restrictive or pejorative clauses, e.g. on the choice of employees to be laid-off or on night-shift work for women workers.

A second but no less important method for extending the private collective agreement has been adopted by case law through an interpretation of art. 36 (para. 1) of the Italian constitution. It states

"The worker shall be entitled to remuneration in proportion to the quantity and quality of his work in every case, sufficient to enable him and his family to live a free and decent life" .

This was linked to art. 2099 (para. 2) of the Civil code on remuneration:

"In the absence of corporative rules or agreement between the parties, the remuneration shall be decided by the court after taking the advice, where appropriate, of the professional associations".

According to the strategy of case law:

— art. 36 of the Constitution was not considered as a 'programmatic' rule, requiring implementation through ordinary legislation, but was immediately operative (Court of Cassation, 5 February 1958, no. 338). It was the first constitutional provision to recognise a horizontal effect between private parties in the employment relationship;

— the judge has the power to intervene, stating that the clauses of the contract of individual employment fixing a wage contrary to the constitutional provision, i.e. one which is insufficient or not proportional, are null and void;

— the total nullity of clauses on wages are considered equivalent to their absence and it requires the intervention of the court over the lack of agreement between the individual parties on the issue. Consequently art. 2099 requires judicial intervention based on equity, taking into account "the advice..., of the professional associations". It has been a trend of case law to refer to the amount of wages stipulated in the collective agreements that is applicable to the category to which employer and worker belong, or to a 'similar' category, even though both individual parties are not bound by it.

The courts have followed this rationale considering that the wage determined in a collective agreement mirrors some practical experience and the equilibrium between conflicting interests, which is a valid criterion for every decision based on equity.

Of course, the last effect of this trend of the Italian courts is that private collective agreements enlarge the personal scope of applicability of a private contract. It becomes applicable beyond the natural body of worker members of the stipulating union. Previous research (M. L. De Cristofaro, La giusta retribuzione, Il Mulino, Bologna,1971) has pointed out that the technique of using the link between art. 36 and art. 2099 of the Civil code is not unique. First instance judges have decided not to consider collective bargaining clauses on wages as a unique indicator for their decision on equity, but have assumed some other 'objective' elements — like the cost of living, familiar conditions for the worker, the economic efficiency of the enterprise etc.. The idea is that the collective agreement fixes just the 'minimum' terms and conditions of employment, which can be integrated by substantial elements suggested by the material conditions and locus where the work is performed.

It must be underlined that the effect of the extension is limited only to the wage clauses of the agreement and can be questioned by the individual worker by individual proceedings (generally at the termination of employment relationship).

4.2. The role of the legislation

The extension of the personal scope of collective agreements is still an issue in the trade union/political debate in Italy. The attempt

was made by Italian legislation through law no. 741 of 14 July 1959 which enacted a legal mechanism through which the general effect was not attributed to the collective agreements themselves but to governmental decrees. This path was precluded by the Italian Constitutional Court when another similar law was passed renewing the powers of the government to incorporate collective agreements. That mechanism made permanent a system of extension that was intolerable in the light of art. 39 which contains a different legal means for extending collective agreements (Constitutional Court, 19 December 1962, no. 106)

In any case, the problem of the extension of the effects of collective bargaining is still present in the strategy of the legislators who continue to consider the collective agreement as a tool for regulating in general individual and collective labour relations. But this *protective* function is aimed at equalizing labour market conditions in a dual economy between the north and south of Italy. It must remembered that some observers propose to enact a legal minimum wage to guarantee basic protection for the weakest sectors of the labour market. Collective bargaining should intervene by controlling wages in the remaining areas of the working population.

a) The *protective* function of the labour market has been clear since the beginning of the 1970s, when it art. 36 of the Statuto dei Lavoratori (law no. 300 of 1970) was introduced into the legal order.

It states:

"In the provisions for state grants made under current legislation to undertakings carrying on an organised economic activity and in the specifications attached to the performance of public workers contracts, a specific clause shall be inserted making it compulsory for the recipient or the contractor to apply conditions or have conditions applied to the workers employed that are at least as advantageous as those arising out of the collective industrial agreements for the relevant categories and area.

Such an obligation shall be complied with both while the work is being performed and at later stages throughout the time that the employer enjoys the benefit of the financial and credit facilities granted by the state under the relevant provision of legislation".

The Italian Constitutional Court has extended the scope of this rule also to public service utility companies (Constitutional Court, 19 June 1998, no. 226).

Violation of this clause entails sanctions of the public administration, including the possible revocation of the benefits and, in the most

serious cases or in cases of a second violation, the exclusion of the offender from any further concession or benefits or from any execution of public works.

The provision imposing on the employer-contractor the duty to respect the collective agreement has been qualified by the judges as a clause *'for the benefit of third parties'* (art. 1411 of the Civil code). A major consequence is that workers have a subjective right to all the conditions implied in the collective contract (Cassation, 13 August 1997, no. 7566; Cassation, 25 July 1998, no. 7333).

b) Along the same lines, a very recent law (art. 7, para. 5, of the Financial Statute 2001, law of 23 December 2000, no. 388) gives fiscal credit to employers planning to hire new workers, only if they apply collective agreements. A further example is art. 22, para. 3 of the law of 25 July 1998 no. 286 which states that, to avoid competition among employers, the economic and normative terms and conditions of employment of non-European Community immigrant workers must not be lower than those guaranteed to Italian workers in collective agreements.

c) Art.12, para. 6, of law no. 83 of 11 March 1970 regulating the public service of placement in agriculture and industry directs the office granting the authorisation to hire and to indicate the collective wages and conditions in force for the particular job in question. Some labour lawyers observe that "According to a majority opinion, this indication does not imply any extension of the agreement beyond the area of union and employers' association membership, but only applies to the individual labour relationship if not contradicted by the parties involved "(Treu, in Blanpain, p. 191).

d) A different mechanism is present in the same context where the agreements between collective parties are recognised as being capable of reproducing effects valid for all employees concerned — or more often for all employees of the company — if there is no specific will to the contrary on the workers' part.

In these cases the function of the collective agreement is still protective but it is meant to indicate the ways of applying legal provisions. This occurs e.g. when a plant-level agreement decides how managerial prerogatives must be used, as in the case of the use of audio-visual equipment and of personal searches carried out on employees (articles 4 and 6 of law no. 300).

In particular, it is the power of control over work and over the workers in general that is limited by the statute. The law, in fact,

forbids the use of remote-control devices (tv, monitors) for checking on workers allowing for their use only in cases where they are necessary for organisational, productive and safety reasons. Their installation and use are, in any case, subject to collective bargaining with factory councils and the agreement in practice is applied to all employees of the firm, regardless of whether they are members of the union that signed the agreement.

The unilateral and totally discretional power of the employer, which was not subject to any type of limitation in the past, has thus been reshaped. Therefore, industrial democracy here still means only a kind of control over certain aspects of the way a firm operates and has not yet become an example of joint management in the real sense of the world.

e) An interesting case is given by the so-called *solidarity contracts*. Born via collective agreements as an experimental instrument aimed at the protection of employment and at avoiding redundancies during factory crises or business reorganisations, solidarity contracts are regulated by law no. 863 of 1984.

The law provides for two types: the first is aimed at protecting employment levels, the second at raising them. The legal framework has been modified and supplemented by the following laws which tried to increase the use of this type of instrument (laws 236/1993 and 610/1996).

The aim of protecting employment (that is, of avoiding or reducing staff redundancies) is achieved through the stipulation of a plant-level collective agreement between employer and union members of the most representative national Confederations. The collective agreement — defined as 'internal' or 'defensive' — is stipulated at factory level and provides for a reduction in working hours with a corresponding reduction in wages, which may be daily, weekly or monthly. Its effectiveness is, according to case law, binding towards everybody whether or not they are members of the union that signed the contract. As a matter of fact, for the workers affected by the reduction in working hours and wages a specific 'extraordinary redundancy fund' is provided for (Cassa integrazione guadagni) and comes under the national social security system (INPS).

The second type of solidarity contract — the so-called 'external' or 'expansive' contract — is stipulated in the factory and agreed upon with the trade unions which adhere to the most representative national confederations. Unlike the first kind, its aim is to increase the number of staff and therefore employment. It involves a perma-

nent reduction in working hours and wages and the taking on of personnel on open-term contracts. Unlike the provisions for the 'internal' type, the worker involved in an external or expansive contract does not receive any wage compensation.

As we have seen, the model of solidarity agreement is a typical example of a collective contract, according to the civil code, but it is considered legally binding on all workers. Some examples show this model has spread recently in the Italian system of labour relations, especially after 1973, as a consequence of a period in which the Italian economy, following a phase of relative prosperity throughout the 1960s, began to face economic crises and serious difficulties affecting both the labour market and workers' incomes.

The interest of public authorities and trade unions was evidently focused on the restructuring of the firms and the ensuing reduction in employment and working hours.

On this subject workers and their representatives have been offered a certain degree of control over crisis management, thanks to legislation which does not provide a model of industrial democracy in the classic sense of the term. The law speaks only of an invitation to both parties to bargain at plant level; while there is no obligation for the employer to bargain.

Collective bargaining is requested to perform a new function at enterprise level — so-called 'administrative' or 'management' collective bargaining. Through this plant-level strategy the decisional power of management is limited as regards the crisis of the firm. Legal scholars speaks about a sort of 'proceduralisation', nevertheless the workers' council's powers concern only the social effects of the restructuring procedure of the firm, but they do not affect the decision which still remains in the hands of the head of the firm.

Once again collective bargaining alone is seen as the technical means for bringing about a special kind of industrial democracy.

It is also the case of agreements producing general effects because they are a part of a more complex administrative procedure: agreements on lay-offs and mobility, as regards criteria for the selection of employees (law no. 223 of 23 July 1991), agreements on part-time regulation (law 863/1984); enterprises transfer where the crisis of a firm makes it necessary to transfer its property and this in turn affects the mobility of workers (art. 47 of law no. 428 of 29 December 1990).

In general, in all these cases the function endowed by law to plant-level agreements is not to stipulate general and abstract rules for the

future individual employment relations, but rather to provide for a personnel management policy (collective dismissals, lay-offs, with the intervention of a public fund like the Cassa integrazione guadagni). Collective agreements in this specific situation do not distribute economic benefits but sacrifices and more frequently, if the statutes authorise it, they also derogate legal rules.

The importance of consultation and of a joint examination by workers' representatives or provincial unions, as requested by the law, is a presupposition of the lawfulness of management policy. The subject matter of the agreement is not the discretional power of the employer in decisions relating to the firm but their social consequences on the workers' destiny.

This system seems to solve the question of extending the efficacy of an agreement to all workers whether they are unionised or not, since decisions relating to the firm are seen still as the outcome of the free power of the employer. In fact, despite conditioning through trade union bargaining, it still remains relatively free.

But the problem of the general scope of application is still questionable.

Courts have been called to support this trend to recognise the general effects for company-wide agreements, containing restrictive clauses such as lay-offs or a reduction in working hours. Often they have declared that these agreements can bind individual employees, regardless of their union affiliation arguing from the representative character of the unions, from the "individuality" of the collective interests of employees within the company (Cassation 2 May 1990, no. 3707) (Treu, Blanpain, p. 192). On the other hand, another judicial trend stresses the point in rather the opposite way: a collective agreement only binds the members of the stipulating union, arguing that the latter is legitimised to make agreements on the basis of the legal mandate received only by his workers at the moment of their becoming members (Cassation 24 February 1990, no. 1403).

4.3. The functional integration between the law and collective autonomy

In other words, it is evident how the collective agreement is more and more interwoven with the law. Recent developments in the legal framework have favoured the integration between public law and private collective contracts insofar as the former has involved the

latter in the administration of public and private interests in the labour market.

The collective agreement is no longer the mere self-regulation of private collective interests. It finds its roots in its multiple functions, not only in collective private autonomy, but also in statutes. In other words public lawmakers find the collective agreement a more suitable and flexible tool, open to innovative solutions that are closer to specific situations and problems .

Some examples of the "functional integration" between law and collective autonomy are visible: 1) in the case of *derogative* functions, i.e. when legislation authorises collective parties to derogate a quasi-obligatory rule of law; 2) in the case of its *supplementary* function, when law allows for the possibility of the agreement supplementing legal provisions, 3) in the case of a *supplementary* legal clause to be applied only when they are lacking in collective agreements, 4) in the case of *parallelism* of institutions acting on the same matters, as in the case where laws authorise a collective agreement to regulate one particular topic. But at same time the law sets up an administrative public body a) to check whether the imperative norms are respected and b) to substitute the private parties when there is no agreement.

5. THE STRUCTURE AND PROCEDURE OF COLLECTIVE BARGAINING

5.1. The structure

In a general context of informality or weak institutionalisation of collective relations, collective bargaining plays an important role in the social end economic structure of Italian industrial relations. This is particularly true with regard to the rules governing the life and activities of both unions and of employment relationships. The actual structure of collective bargaining is a result of a long process which began at the end of the corporatist regime with the collapse of Fascism. The tendency of labour and management to veer towards a highly centralised system of bargaining, as existed under the fascist regime, gained strength because of the post-war economic situation.

The inevitable desire of confederations to control their affiliates through a centralised strategy was a key factor which would have ensured the continuance of nationwide agreements. This is generally what occurs in all periods of time when an economic crisis requires

a centralised system of government of industrial relations. Between 1945 and 1962 the structure of collective bargaining was based on industry-wide negotiations involving employers' associations and the three major Confederations, even though some symptoms of informal plant-level bargaining, led by unions and sometimes, though rarely, by works councils, were present. National agreements were signed at the level of main industries (metalworking and vehicles, textiles, agriculture etc.).

This phase of the bargaining model known as "exclusive or closed national bargaining" corresponded to a "distributive function" of the contract, namely, to distribute the gains and losses between conflicting parties. But the turning point of the system was 1962 when the need for greater flexibility in negotiation became evident and a supplementary function was developed by the agreements at the enterprise level. According to a special "Protocol of intentions" — signed by two state-controlled corporations IRI and ENI represented by their associations — plant-level agreements supplemented those applying to the whole industry and were legally coordinated with those national contracts. Items particularly suitable for being dealt with at a decentralised level were incentive wages, job evaluation, production bonuses and wage rates from those classifications not dealt with at industry level.

In 1968-69 some changes occurred in this closely articulated system, the economic recession affected the whole country, the 'hot autumn' opened with heavy and partly uncontrolled pressure from the unions in the form of wildcat strikes. Strikes were called for by independent groups of workers acting also as collective bargaining partners on the workers' side. But the new philosophy of negotiations pervaded the whole structure: it started from the assumption that increased technology suggested increased managerial control over the organisation of work but, at the same time, it created greater challenges involving working conditions. This meant that a collective agreement might settle a conflict but did not prevent a subsequent one.

The consequence of this new trend is that even today industry-wide collective bargaining is considered more rigid than plant-level bargaining, and is obviously much less responsive to economic and technological changes. Since then the outpouring of social tensions can be seen in the presence of two channels of negotiation which are no longer legally and structurally coordinated. The history of changes in the internal structure of the collective system shows all the precarious balance between different levels of agreements and their reciprocal relations which have altered over the years. The whole order is

open to the influence of technological changes and the organisation of the entire economic sector which has led to an evolution in the physiognomy of the bargaining structure. From 1975 to 1990 — a long period of recession in Italy — the system was recentralised, as is shown by some major interconfederal agreements on labour costs and productivity (1975 and 1977). In 1983 the era of 'political' bargaining began with the state concerning the control of the dynamics of labour costs ('A tripartite Agreement' as part of the 'social concerted agreement model') and to some extent the relations between enterprise and national bargaining levels.

History shows also how the Italian system tends "towards structural bipolarism at two major levels" (Cella-Treu, in EC Report, p. 122). But what is important to point out is that in Italy at the moment there exists a multiplicity of negotiating tables: interconfederal, sectoral, company, and at times territorial. All levels are the output of the strategy of both parties of the labour market and their collective autonomy which has enjoyed the freedom and the guarantee provided for by art. 39 Cost.

This situation poses the problem of coordination among the levels, the rule of the games for parties in negotiating procedure, the role of the actors and the content of each level.

All aspects have been regulated now in the Tripartite agreement of July 23 1993, called by legal doctrine the "Constitution of industrial relations", because it is a cornerstone of Italy's strategy to bring the Italian system up to European standards. In fact, it was the first tripartite agreement on incomes policy and employment, labour market strategy and support for the economy.

But it has also reshaped the structure of the bargaining system. A special chapter is dedicated to this item and calls for two bargaining levels:

a) industry-wide national collective agreements and

b) a second level of decentralised company or territorial agreements, when fragmentation of a specific industry sector makes plant-level impractical.

The interconfederal role is still alive as a source of political guideline, the locus of political mediation among different sectoral unions and a forum for concerted agreement with government.

The whole ideology of industrial relations has been deeply affected by the philosophy of the tripartite agreements: incomes policy is

an economic framework conditioning the pace of collective agreement rounds. The old system of wage indexation was replaced by a new idea of preventive control of inflation, which is founded on the rate of the forecast rate of inflation, which is periodically corrected if the real inflation rate is different.

The two levels of bargaining are regulated according to decisions taken autonomously by the parties of the labour market:

— the duration of normative terms and conditions lasts four years;

— the duration of provisions governing wages is valid for two years. This second different duration is a substitute for the old wage indexing system, abolished in a previous interconfederal agreement of July 1992.

So the new ideology backing the agreement reveals how the "architecture of the bargaining building" has been reshaped:

1) the "economic effect" (and not only those effects stemming from wage increases) is set by industry-wide collective agreements with reference, among other things, to the forecast inflation rate;

2) every two years this negotiation will take into account any differences between forecast and real inflation;

3) a decentralised collective agreement concerns "issues and institutions that are different and not repetitive as opposed to those of an economic nature fixed by national collective bargaining", and are linked to productivity, quality and income goals in the company or territorial ambits;

4) The tripartite agreement of 1993 fixes the "links" between the different bargaining levels:

a) the national level decides on the matters and topics to be bargained at lower levels;

b) the enterprise level deals with "all aspects of social effects connected to company transformations caused by technological innovations, the reorganisational and restructuring processes which influence work, security and employment". It is stated also that all matters must be managed "in terms of the procedure for disclosure, consultation, verification or bargaining as provided for by the laws, by the national labour contracts, by collective agreements and by current bargaining practice".

Research has shown that, in the last few years, our country has been involved in a rather huge decentralisation of bargaining levels. In the early 1990s more than 20% of enterprises stipulated agreements even though — according some other figures — a dangerous shift towards individual bargaining cannot be underestimated. Recent bargaining trends have shown a stronger attitude towards participation procedures or "administrative functions" and the "joint regulations" of rules and norms on conflict resolutions. The management policies are mainly oriented towards labour flexibility and human resource management strategy. According to some empirical research the majority of companies (almost 70%) accepts and tries to involve trade union representatives in management decisions. (S. Negrelli, I rapporti di lavoro tra azione collettiva e dimensione individuale, Cesos, Roma, 1994.)

5.2. The collective bargaining procedure

The Tripartite agreement of 1993 also established a number of procedural rules to support the collective bargaining procedure as such. The rules aimed at formalising the behaviour of the parties and supporting their autonomy, without wasting negotiation and conflict resource. In some ways it reflects the consolidated habit of unions and employers, parties meet three months before the agreement expires, formally the renewal means the stipulation of a new contract, but substantially the new agreement does not substitute in toto the previous one, but only modifies some terms and conditions.

5.2.1. Cooling off period, arbitration and ultra-activity

The proposals for modifications are part of a negotiating platform presented by the unions, but only very rarely and very recently have the employers' associations done the same. That platform is normally submitted to be modified or approved, at a special plant meeting (a right established by art. 20 of law no. 300) open to all worker members irrespective of whether or not they belong to unions. The platforms for national bargaining are most often influenced by, and geared towards, the result reached in the previous plant bargaining, which is transmitted to the employers' associations, and is meant to be the content of a rigid mandate, binding the negotiators. The preparation of the claims, beyond plant level, is done separately by the unions affiliated to the major confederations, but the final draft is common,

and the delegation is unitary (apart some recent cases of interunion tensions).

To ease negotiation the procedure has introduced a (4 month) cooling-off period, during which neither party may begin a dispute.

A special "bargaining vacancy compensation" was set up by the 1993 Agreement to penalise both parties if they adopt a strategy of delaying the renewal of the contract. It is given to all workers after a period of three months from the date of expiry of the national agreement — "starting from the following month or from the date of presentation of the platform if following" — till the date of the renewal of the new agreement. The amount of 'vacancy compensation' for the first three months is 30% of the forecast inflation rate and goes up to 50% if the bargaining vacancy lasts more than 6 months.

In all major bargaining disputes a traditional and increasingly important factor of the whole bargaining strategy, for both conflicting actors, has been the settlement of the dispute by mediation by the Ministry of labour or by its peripheral organs — provincial and regional organs — or less frequently, by regional governments or by prefects. Mediation or conciliation can occur either by request of the parties or on the initiative of the public officials. The whole procedure is voluntary in access, and the parties are free to accept, but in fact they hardly have the option of refusing.

Union delegations report informally to their governing bodies on the major developments in negotiations and submit a tentative draft of agreement to a general meeting of workers in the plant for ratification. More recently the referendum is preferred to general meetings to verify workers' opinions.

According to some industrial relations practices, in a pluralist system of worker representation, some confederations or minor trade unions can be excluded from the bargaining table by others that are more powerful for ideological reasons or for lack of strength. But they can be admitted to sign the same text separately without modifying it. This agreement, according to prevalent opinion, is formally different from the previous one although it has the same content. From the legal point of view it a contract of adhesion, as the minor union signs a text already prepared and can only accept it.

As we have said before, the draft of the new agreement does not include a complete renewal but only some modification of the old one. The courts have stated that the renewal agreement is not a real contract in the proper sense of the term, but is only a "step of a

procedure" and is still not "able to bind parties.... because only the effective and verified conclusion of the contract can produce its juridical effects" (Trib. Rome 19.10.1971).

The complete text, resulting from the old agreement together with the new clauses, is prepared later, often after several months. The problem is given by the vacancy of collective regulation between the two agreements, the previous agreement having already expired and new one not yet completed. The consequence is that the employer can hypothetically not respect the contract and stipulate individual contracts containing less favourable terms and conditions for workers (except, of course, for those rights already previously acquired juridically by the worker, Cassation 1st July 1998 no. 6427; Cassation 23 April 1999 no. 4069).

Given the private nature of existing collective agreements, their effects, both normative and obligatory, do not operate *de jure* beyond termination (the so-called 'ultra-activity principle'). But some decisions state that an expired agreement still produces effects until its renewal (Cass. 22 April 1995, no. 4563).

In any case, some current agreements contain clauses stating ultra-activity (art. 36 of the national collective agreement for metalworking and vehicle industries).

A specific question is posed when a new collective contract, containing a retroactive clause, is less favourable for workers. The modification in pejus is admitted by case law also retroactively, unless the right guaranteed by the previous agreement has been legally acquired as a "property" of the workers (Cass. 5 July 1990, no. 7050; Cass. 18 December 1998 no. 2623).

5.2.2. Written form, application, interpretation

Collective agreements are normally stipulated in writing. Some opinions support the idea that the written form is a compulsory requirement which, if lacking, voids the contract. Some other opinions are against qualifying the written form as an ad substantiam requirement, which is, viceversa, a derogation to the general principle of a free form for private law acts, and in any case it must be imposed by a statute. According to the same case law, plant-level collective agreements stipulated orally and merely printed on special bulletins are legally binding. No doubts at all exist if both parties agreed autonomously to stipulate in writing.

The legal enforcement of the existing collective agreement is secured in a way basically similar to that of any private contract. In a trial the applicant has the burden of proof and must exhibit the collective contract (Cass. 9 June 1982 no. 3490). The reform of the labour procedural law introduced by law no. 533 of 11 August 1973 states that labour courts can, *sua sponte,* "ask the unions for the text of collective agreements, also those stipulated at plant level, which must be applied in the trial" (art. 425 of the Civil procedure code).

Collective or individual questions arising out of the interpretation or application of the agreements (disputes of rights) can be brought to the ordinary court by the individual workers and/or employer, if it concerns the normative part, or by trade unions and employers' associations or individual employers if it concerns the obligatory part of the agreement.

The problem of the interpretation of collective agreements has been questioned by labour law theory and case law. The Court of Cassation has stated that the existing agreement must be interpreted according to the rules (1362-1371) of the civil code regulating all types of private law contract. These rules suggest applying mainly the criterion of the "concrete comunis intentio of the parties" (the so-called subjective interpretation principle) and, only if this is lacking, the criterion which leads the judge to eliminate doubts and ambiguities (so-called objective criterion). The idea is that, according to the same higher Court, the judgement must be based on the principle of an equitable compromise between the conflicting interests of collective actors. (Cass. 3 November 1977 no. 4693). One predominant theory has supported the idea that the preferred criterion of interpretation must take into account what is objectively expressed in the text of the agreement, as the expression of the real will of the stipulating bodies at the moment they reached the agreement. This doctrine is based on art. 1366 of the Civil code which states that all private contracts "shall be interpreted according to the principle of good faith". In this respect the trend of the Court of Cassation has oscillated like a pendulum from the principle of searching for a common intent to the doctrine of a "search for a compromise between conflicting interests" and also the objective interpretation (P. Curzio, Il contratto collettivo, Utet, Torino, 1984)

Conciliation procedures to settle on the interpretation and application of the agreement are established by a large majority on nationwide collective agreements, following a standardised pattern. Individual grievances are dealt with in the first instance by representatives of the enterprise together with shop delegates and factory councils. If

the procedure fails, the grievance is reported to the conciliation officer's provincial unions and to the corresponding territorial employers' associations.

6. COLLECTIVE BARGAINING IN THE PUBLIC EMPLOYMENT SECTOR

The three 'icons' of trade union law — collective bargaining, workers' organisation, conflict — have been increasingly regulated in the public employment sector in recent times in Italy, thanks to law no. 146/1990 on strikes in essential services and, above all, to civil service reform Decree no. 29 of 3 February 1993. This wide-ranging and complex reform, enacted by a legislative decree, has the intention of bringing labour legislation governing public employment as far as possible in line with the law applying to the private sector.

It has been a sort of "revolution" in a sector traditionally considered a "divided brother" of the private employment world. The intention of the legislator was to "privatise" public employees' sources of regulation. The decree not only recognises collective bargaining as the regulatory source of labour relations in the public sectors but extends to this also the rules fixed in the civil code to regulate private law relations, albeit adapting to the specificity of a relationship where the employer is a public body.

The reform makes an important step forward in shaping industrial and collective relations in Italy as regards relationships between the law and collective bargaining (and trade union freedom in general).

The private system of collective relations has been characterised by the protection of the Constitution: union freedom pluralism, freedom to take industrial action and freedom of collective bargaining . All these freedoms — guaranteed outside the enterprise perimeter — were enhanced and made effective only by the Statuto dei lavoratori (law no. 300/ 1970), a cornerstone for industrial democracy within the enterprise. The Statuto mirrors and legitimises a system of countervailing power at the workplace, which is a sensitive nerve in the industrial system. The idea of the legislator was to reproduce in Italy the philosophy of auxiliary legislation, i.e. a kind of public law supporting trade unions as an organisation, protecting rights and the dignity of the worker as a citizen and as a protagonist of union activity, without interfering in the internal affair of the organisation.

Legislative decree no. 29/1993 contains a more direct intervention to support unions and collective bargaining. It represents at the

same time a strong interference especially in the structure (levels) of collective bargaining, the quality of the contracting bodies, the issues, topics and the legal nature of agreements and their scope of application.

1) First of all, as we have already seen above, in the private sector, given the presence of the affirmation of trade union freedom in art. 39 of the Constitution, it has not been recognised that unions have a general right to negotiate, with a mutual obligation on the part of employers. This would have required legislative interference in the decisions relating to collective autonomy (who the partners are, which procedure is to be followed, the definition of a union etc.).

In the new reform of public employment the rationale is

"the extension to the public employment sphere of rules and provisions of the civil code and statutes regarding private employees in the enterprise" (art. 11, c. 4 lett.a of law no. 59/1997).

In fact, it is clearly assumed that, as regard personnel management decisions, public administrations act "with the powers and capabilities of a private employer" (art. 5, para. 2, of decree no. 165/2001). In other words, public managers, as regards contract of employment, do not use administrative acts of a public nature but the negotia of private law. So the terms and conditions of work for public employees are fixed by "individual and collective agreements" (art. 2, para. 1,lett.a, of law no. 421 of October 1992). The consequence is that in a new context collective agreements are no longer a phase of a more complex procedure aiming at producing an administrative act, but they are the expression of the private collective autonomy covered by art. 39, para. 1, of the Italian Constitution.

2) A collective agreement is also, for public industrial relations, a cornerstone of the whole system. It has a general competence in regulating "all topics related to the employment relationship and collective relations" (art. 40 of decree no.165/2001).

3) A first striking peculiarity of the architecture of the collective agreement in the public sector is given by the fact that it is the law which regulates the entire structure. Therefore the law indicates

a) levels: 1) national 'area' collective agreements, i.e. an area is a homogeneous sector . These sectors can be identified by agreement between trade unions and a special public agency which represents the public administration in the bargaining process (Aran); 2) Framework agreements, applicable to overall sectors or to some of those, if contracting parties decide that some topics must receive uniform regula-

tion; 3) supplementary collective bargaining, for local and peripheral branches of public administrations. The latter level, according to the law, deals with "the topics and within the limits" established by national collective agreements, indicating also who the protagonists of negotiation are and the procedures they have to follow.

The main difference compared to the private structure is that here is the law which suggests a physiognomy of collective bargaining (the number of the levels and internal coordination, the parties).

b) It is still the law which promotes a national level as coordinator of the whole system: supplementary and decentralised collective agreements are considered null and void, if they do not respect their own contractual competence assigned and imposed by the legislator (the private system does not provide for the same sanctions).

c) Legislation interferes with the bargaining procedure, establishing differences between the national sector and decentralised levels. On this point the public presence is more relevant: the Treasury and the Prime Minister are involved in fixing the limits for negotiators according to the budget. A special judiciary (the Corte dei Conti) checks whether the costs of bargaining are compatible with the programmed annual budget. Aran makes agreements following the directives from the Government, and recent experience — following the reform of 1993 — seems to demonstrate that directives are being strictly applied.

d) Legislation reform says that only 'representative' unions can be admitted by the Public Administration to collective bargaining. In other words, the legitimisation to negotiate is possessed only by the union which is qualified by the law as representative (art. 43 of decree no. 165/2001). Collective national agreements can be signed only by those unions which altogether obtain 51 per cent of the votes in elections and of members adhering to the unions (or 60 per cent, if only adherents are considered). In the private sector, contractual legitimisation does not stem from any specific legal qualification.

According to the law the bargaining agent at supplementary levels are the so-called 'unitary representatives '(RSU), recognised in the private and public sector as general workers and union representatives at decentralised level. A special national 1998 Framework Agreement provide for a parallel bargaining legitimisation both for the RSU and representatives of unions which have signed the collective agreement at sector level.

On the Public powers side, a special public agency has been set up which represents *ex lege* all Public Administration and which

leads all national negotiation and assists, if required, peripheral administration in supplementary bargaining rounds.

e) The law has provided for a special mechanism to ensure the general scope of collective bargaining. First of all it stems from the above-mentioned attribution ex lege of power to negotiate to ARAN, which acts on behalf of all Public bodies, and the legal effects of the agreement are binding for all represented public bodies. Secondly, according to the Constitutional Court (no. 309/1997), only public administrations are exclusively bound by the agreement, as much as they are obliged by law to conform their behaviour to what was agreed by ARAN.

The topics dealt with at decentralised levels are mainly wage incentives, working hours, overtime, the impact of technological innovation and transformation on job quality and the skills of employees, external mobility and transfer, vocational training, safety at work, equal opportunity, trade union rights. (L. Zoppoli, Ruolo e contenuti della contrattazione decentrata nel pubblico impiego, Lavoro e Informazione, 1996, 4, p. 11 ff).

7. COLLECTIVE AGREEMENTS AND COMPETITION LAW

In the Italian constitutional charter there is no explicit reference to freedom of competition. There is, though, a norm which guarantees 'freedom of private economic initiative' which, according to the same article, shall not however be developed so as to conflict with the good of society or in a manner detrimental to safety, liberty or human dignity.

The law — continues the same article — prescribes appropriate plans and checks in order that public and private enterprise may be directed and co-ordinated towards social ends (art. 41 of the Constitution).

But the Italian law protecting competition (no. 287 of 10 October 1990) does not contain any explicit provision about possible relations of its regulations with collective bargaining.

However, the absence of an explicit statute does not exclude a priori that collective agreements may be evaluated in the light of the law in question, since art. 2 of the above law forbids restrictive 'agreements' in the field of competition, including agreements or practices agreed 'upon undertakings'. It is therefore a question of verifying

whether collective agreements, stipulated by trade union organisations representing the workers and those representing the employers or by the trade unions and single employer may be considered agreements, and thus whether the organisations themselves can be considered enterprises in accordance with the above-mentioned law no. 287 of 1990.

As regards the former aspect it should be pointed out that the concept of an "understanding", as defined by case law and by the Italian Competition Authority, may refer to any type of behaviour which aims at altering the freedom of competition, irrespective of the means used or the choice of form.(Administrative tribunal of Lazio section I of 12 November 1993). This could therefore cover any type of understanding deriving from a wide range of manifestations of private wills by the parties.

Clearly, collective agreements could also theoretically be considered as "agreements" in the sense described above, since they are in any case agreements stipulated by two parties. It is also clear that, in actual fact, it all hinges on whether the social partners may be defined in terms of an "enterprise".

A careful analysis of the content of collective agreements, however, shows that such agreements contain, as we have stressed above, normative and obligatory clauses. But legal theorists have also added clauses that do not come within the two functions outlined before and have discovered so-called institutional clauses which set up particular bodies or institutions, such as pension funds, which arise out of the will of the collective bargaining parties and which must carry out specific tasks. Lastly, since the 1970s the collective agreements also at plant level have lost their distributive and acquisitive nature. Seen in this perspective — i.e. in terms of the restructuring of undertakings in crisis and thus in the terms of promotion of employment — the collective agreement has assumed a so-called procedural function. In other words the employer's power to manage the crisis of the undertaking is channelled through a specific procedure.

The concept of enterprise according to law no.287 of 1990 is a much wider concept which includes any person or body undertaking an activity of an economic nature capable of reducing, even potentially, the degree of competition, as long as the goods or services produced are offered on the market. By applying to this definition the consideration arising from case-law in the civil code (art. 2082 states that an entrepreneur is a person who is engaged professionally in economic activity organised for the purposes of production or ex-

change of property and services) one might conclude that, as regards the legislation on competition, one could speak of an "enterprise" when the activity carried out is aimed at producing wealth, which may mean not only the pursuance of profit but also simply outgoing costs equal to income.

If we analyse the decision of the Competition Authority we can see that it consider enterprises also as including category-based associations if, and insofar as, the associate members carry out entrepreneurial activities. But in this perspective it should pointed out that the Authority's decision refers to Trade associations, i.e. to associations concerned only with commercial relations, and not to employers' associations, which, on the contrary, are concerned with collective bargaining. If therefore these doubts exist as regards employers' associations — in the sense that they are set up for purposes of collective bargaining — there is all the more reason for such doubts existing in relation to trade unions.

Trade unions are considered — as we have seen above — as "not recognised associations" (art. 36 Civil code) and therefore the pursuance of an economic activity is not considered as one of their main activities. In other words legal theory admits that a trade union organisation may *also* carry out some form of economic activity as a *subsidiary* activity (i.e. a publishing house) and in this limited sense it considers them as enterprises in accordance with art. 2082 of the Civil code. But it does not allow that the protection of workers' interests may be in any way evaluated in economic terms, precisely because such protection is carried out for the purposes of solidarity.

It therefore follows that the social parties cannot be considered as "enterprises" in terms of the national legislation on competition.

The social partners are in no way involved in antitrust control either in terms of a possible restriction over their bargaining activities in accordance with the law on competition, or in term of some relationship with the Competition Authority which has been set up to deal with the administrative side of competition law.

As a part of the current debate on the reform of the Italian Welfare State and on the role to be played by supplementary forms of welfare, Community case-law (as Albany case) provides the occasion for analysing in greater depth the role of some pension funds within the national pension schemes also regulated by collective agreements in Italy and, above all, the possibility of their being considered as enterprises and, as such, as coming under competition law. In this case,

however, it should be pointed out that, in Italy, adhering to a pension fund is a just voluntary act .Thus the obligation of contribution for employers only arises if workers have decided to adhere. (B. Veneziani, G. Leone, Italy, in N. Bruun, J. Hellsten (eds.), Collective agreement and competition in the EU, DJOF Publishing, Copenhagen, 2001, p. 156).

Chapter 7

COLLECTIVE BARGAINING IN PORTUGAL

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1. STRUCTURE OF THE COLLECTIVE BARGAINING. PERSONAL RANGE (PUBLIC SERVICE?)

Collective bargaining aims at the conclusion of collective agreements (CCT's). CCT'S are foreseen by the Portuguese Constitution (article 56) and are understood as being a fundamental expression of the collective autonomy, concentrated on the trade unions, for the self-adjustment of the interests between opposite groups, mainly in the way that it is entrusted upon the interested parties, organised in the respective associations, the discipline of the labour relationships. Therefore, they comprise a regulation executed by the agreement in the professional and economic group, in which are defined the rules to be applicable to employees and employers in their individual employment relationships.

In Portugal it does not properly exist a structured system of bargaining (not even a prior compartmentalisation in geographic areas or in hierarchy of organisations, or just a definition of the professional and economic areas). Notwithstanding, it shall be distinguished three levels: the top level; the intermediate level, related to economic and professional sectors; and the base level, which refers to the enterprises.

Abbreviations: BTE (Bulletin of the Labour and Employment); CCT (collective agreement); CGTP (General Confederation of Portuguese Workers); CPT (labour process Code) IRCT (instruments of collective labour regulation); LRCT (Law of collective labour bargaining); PRT (Labour regulation directive); UGT (General Workers' Union).

On *top level* it does not exist an inter-confederation collective bargaining, between the 3 most important employers' confederations — by economic sector (industry, trade and agriculture) — and the 2 trade union confederations (ideologically separated[1]). On the top level, it is also important to make a reference to the tripartite social concertation (between the Government and the employers' confederations and trade union confederations), which, in Portugal, reaches a high level of formalisation and it is even foreseen by the Portuguese Constitution (article 92). Social concertation ends up by assuming great relevancy in collective bargaining by fixing references connected with wages and with certain questions of working time. The parameters of the wages set out in the various agreements of social concertation are not binding, although, in practice, they serve as an important guideline for subsequent collective bargaining.

In an *intermediate level* it must be considered sectorial collective bargaining that, by being of co-responsibility of the trade unions (trade unions and federations) and of the employers' associations, tend to embrace an economic sector. It is here that one of the biggest problems of collective bargaining in Portugal is raised: the structure of the organisation of the trade unions is, many times, made by reference to the occupation of the members and, when made by economic sectors, it is not coherent with the organisation of the employers association, which identify in a different way the economic sectors that they tend to represent. Nevertheless, there is still a considerable activity of collective bargaining on the level of the economic sectors, although this is not updated in what relates to the prevision of the professional categorisation.

On the *base level* there are several collective agreements referring to the enterprises or to a specific grouping of enterprises or to enterprises individually considered. This happens, mainly with the big companies and especially in the public sector. It is frequent that even in CCT's applicable to one enterprise, the intervening trade unions, which may exceed a group of ten, cannot occasionally find a joint bases.

As above mentioned, one cannot properly refer to a *system* because these forms of bargaining[2] are not articulated between them-

[1] CGTP is mainly of communist political orientation and UGT is mainly of socialist and social-democratic orientation.

[2] One should point out that they do not reach all the unionised workers of the sectors or companies in question, even if there are no parallel unions. Thus, for instance, the signed CCT's within a company or an economic sector may refer to just some unions (the professional staff's union or the worker's union).

selves. Preceding conditionings in what relates to collective bargaining do not exist. Notwithstanding, according to the law, there is some preference to apply agreements of entrepreneurial scope, based on the idea that they are closer to the realities and have better capacity of managing the specific characteristics of the productive units. LRCT includes a complex scheme for the solution of the questions laid down by the *conflict between two or more CCT's* capable of application to the same employment relationship.

Collective bargaining in the *Public Service* has a special regimen. The rights to bargain are exercised by the trade unions of the public service and its underlying subject is the establishment or the change of terms and conditions of employment in the Public Sector. According to the law (article 4), the Public Administration and the trade unions must assure the appraisal, discussion and resolution of the questions by placing them in a global and common perspective to all services and bodies and to all employees of the Public Sector. The principle of the public interest and the principle of the improvement of the social and economic conditions of the respective employees must be complied with. In the Public Sector the disputes can be settle in supplementary bargaining meetings. If an agreement is not reached, the Government can then take whatever decision it feels appropriate.

2. TYPES AND SPECIALITIES OF THE COLLECTIVE AGREEMENTS

CCT refers to an agreement concluded between employers (entrepreneurs and employers' associations) and trade unions for the purpose of regulating the working conditions that shall be in force for the categories embraced.

In what relates to the types of CCT'S (article 2 LRCT) it is called *agreements* the CCT'S entered into employers and trade unions and *collective contracts* the CCT'S entered into the employers' association and trade unions. This means that, in the *collective contracts* the signatory parties are not acting through any association; in the *agreements,* employers represent the enterprise side. LRCT distinguishes two types of agreements: *multi-employer agreements*, entered into between a grouping of employers for a grouping of enterprises and trade unions and *company-level agreements* entered into by the trade unions and an employer for just one enterprise.

Although they cannot be properly named collective bargaining agreements, the arbitration award (arbitration in order to settle a collective dispute) and the adoption agreement (contractual adoption after the publication of the collective agreement by employers and trade unions that did not sign them) have the same legal effects of the CCT's.

Lately, the doctrine has been paying attention to what has been named as the informal collective bargaining (i.e. bargaining agreements entered into between the enterprise structures of employees' representation, such as worker's commissions and trade union or intersindical commissions and the respective employers), which are foreseen by law to handle some matters in the enterprise field (lay off, collective dismissals, redundancies, agreed enterprise regulations and agreements to end a strike).

3. THE PARTIES: TRADE UNIONS, EMPLOYEES' REPRESENTATION AND OTHERS

According to the law, only the trade unions, the employers and employers' associations have the capacity to conclude CCT's (article 3 LRCT). The law also clarifies that only the trade union organisations and the employers' associations that are dully registered in accordance with the respective legal regimen can conclude collective bargaining agreements. Part of the doctrine considers that the workers' commissions should also be empowered to conclude collective agreements and the project of the future Labour Code foresees this possibility.

In the above referred informal collective bargaining it is possible to find instruments concluded between employers and representative structures of the employees in the company (workers' commissions, trade unions and intersindical commissions of the company).

In what refers to the rights to bargain in the Public Service, the law only states that they can be exercised by the trade unions that represent the employees in the public sector. The interlocutor is the Government, through the person responsible for the Public Service and the Ministry of Finances.

4. CONTENT OF THE BARGAINING. COMPETITION LAW (ALBANY CASE AND THE PENSION SCHEMES)

CCT'S usually distinguish between the *obligational clauses* from the *normative clauses*. These last — which are the ones that mainly characterise the CCT's — have the purpose of normatively establishing the working conditions, i.e the rules that the employment contracts entered into between the parties embraced by the agreement have to comply with. As so, CCT sets out the occupational categories and careers, duration of the working time period, working breaks and holidays, wages and further remunerations, as well as other matters which are not subjected to contractual provision such as safety and hygiene within the workplace. CCT's do not only establish the rules that will regulate the relationships between employers and employees by them included — *normative clauses*. They also set out the rules related to the concertation and relation between the employers' associations and the trade unions that concluded them (rules related to the revision of the CCT, interpretation, prevention and settlement of the disputes) and, mainly, the rule, implicit or not, of guarantee of social peace, while the CCT is in force (this is a point of discussion in the Portuguese Law). These clauses are those of obligational nature (*obligational clauses).*

For some part of the doctrine, there are clauses, which are in between the *normative clauses* and the *obligational clauses*. Such clauses cannot be considered as being strictly normative as they are not binding upon the contracts, meaning that they do not directly create rights to the employees in the context of the employment. They also do not simply create obligations, as their reach is different from the one of a simple compromise between the intervening associations. Therefore, and for example, all compromises of organisation nature connected to the enterprise made on the CCT (back up social structures such as nurseries and canteens, establishment of more than one day of weekly break, establishment of a career plan or a system of promotions, etc), exceeding although the mere legal effects of a compromise between the signatories, do not immediately create individual rights, contractual rights to working breaks, career or promotions, as they still depend on the materialisation or mediation of an act of the employers. To the employees that are damaged by the non compliance of these compromises it seems that they can only receive compensation, based on general legal terms, and this is due because the company did not put in force the organised mechanisms that should be able to materialise the benefits that were promised.

As clearly set out by article 5 of LRCT, collective bargaining agreements can regulate:

a) The relationship between the signatory parties, namely in what relates to the compliance of collective agreement and ways of settling the conflicts connected to its application and revision;

b) the rights and duties of both employees and employers bound by individual employment, namely those that the law forwards to collective agreements;

c) the procedures of settling the disputes that may emerge from individual employment contracts.

CCT's *cannot* legally (article 6 LRCT) regulate economic activities, namely as regards to the hours of business for enterprises, the fiscal system, and the price formation. They cannot also regulate and adjust the complementary benefits secured by the Social Security, as the Constitutional Court has ruled it is against the Constitution.

In what concerns the Public Service, the law is clear when it states that are subject of collective bargaining, the matters, which refer to the establishment or change of:

a) Wages and further remunerative benefits;

b) retirement pension schèmes;

c) benefits from social services and other complementary benefits;

d) formation, variation and termination of the employment;

e) careers of the general and special regimen and those that are integrated in a special body, including the wage levels;

f) working time period and working time schedule;

g) regimen of holidays, absences and leaves;

h) regimen of the rights of collective exercise;

i) conditions related to heath, safety and hygiene within the workplace;

j) vocational training and improvement;

k) disciplinary statute;

l) mobility regimen;

m) recruitment and selection regimen;

n) regimen of service classification.

The structure, powers and jurisdiction of the Public Administration cannot be subjected to collective bargaining.

5. BARGAINING PROCEDURE. CONSTITUTION OF THE BARGAINING COMMISSIONS, GOOD FAITH, WAGE LIMITS (INCOME POLICY)

The process of putting into practice unions' claims begins with a proposal, issued by one or more trade unions, with the purpose of concluding a collective agreement or to review an agreement already in force[3]. It is, thereby, instituted the bargaining process.

Bargaining is made by negotiators — usually professionals — and implies a procedure by stages, in which it exists a preliminary phase (definition of the matters in question, protocol in order to fix the places and a timetable for the bargaining meetings).

In the systems of trade unions' pluralism it is usually raised the question of which unions' representative structure shall present the proposals and conduct the bargaining procedure. According to the Portuguese system, and notwithstanding the fact that it is of unions' pluralism, it is not granted any preference to the most representative unions because it is given to all trade union associations the power to propose or to bargain. The associations can act individually or, more usually, together. It is not common to have several groups of bargaining (when trade union associations do not act jointly).

The *procedure* (article 16 and following LRCT) for bargaining can be described as follows. The proposal to conclude or review a CCT must be made in writing and must be presented to the other party that shall reply within 30 days. The reply must also be in writing and shall include a counterproposal in relation to all the clauses that are not accepted. Proposals and replies must be well grounded. If they are unfounded, the receiver may refuse bargaining further upon them.

The law stipulates the grounds that shall be included in the proposals and in the replies:

— Levels of prices at the consumer;

— productivity;

[3] Employers have the right to issue a proposal, but it seldom occurs.

— economic capacity;

— volume of sales;

— increase of responsibilities with the complementary remunerations;

— working conditions in force;

— number of employees included in each category;

— increase of the responsibilities with the pay scales.

In practice, it is frequent for the proposals and replies to have a succinct basis and it is usual for them not to comply with the legal requirements.

As, in general, the proposal is not accept by the party to which it is presented to, a period of bargaining begins, which shall start within the 15 days after the acknowledgment of the reply. The parties must define — themselves — the rules of the game for the bargaining, through what has been referred above as being the written protocol that will include the timetable and the regimen that shall rule the bargaining contacts.

It is considered that the parties involved have the duty to bargain, being forbidden the purely neglectful procedure or a response purely negative, and rules of good faith are also established in order to stimulate the transparency of the bargaining and to avoid any dilatory manoeuvres. Failure to negotiate has legal consequences, such as the immediate passage to the dispute phase, expressed in the request for *conciliation*. If dilatory acts or manoeuvres block the process of bargaining it is possible for the Government to issue a PRT.

The process of bargaining is developed through meetings that clarify the terms of the dispute, that identify the matters which can be subjected to agreement of the parties, being the respective clauses drafted [4], and in which controversial matters, mainly those concern the pay and its actualisations, are discussed. It is usual to have a several counterproposals, issued by both sides, in which the positions of the employers and the trade unions come near.

The lack of agreement, totally or partially, implies naturally the existence of a dispute that cannot be solved by a process of bargaining and which it is expressed by "a crisis in the direct bargaining". The

[4] One can only have a true definitiveness with a global and complete agreement on the matters in subject.

collective employment dispute, legally characterised by the breakdown of direct bargaining, can be solved by peaceful ways. They are *conciliation*, *mediation* and *arbitration*.

The *conciliation* (article 30 to 32 LRCT) is a process similar to bargaining, with the difference that the meetings have a special impulse from a third party. It because of this that this is called assisted bargaining. Conciliation can be promoted at any time by agreement of the parties or by the initiative of one of the parties with a prior notice of 8 days. The process is implemented by the conciliation services of the Employment Ministry, assisted, whenever required, by other state departments responsible for the sector of the activity. The services of conciliation usually act with the purpose of, in each point of dispute, clarify the situation, bringing the parties closer, exploring the possibilities of agreement. It is a process of peaceful settlement that on several times has ended successfully [5].

Mediation (article 33 LRCT) is a different process characterised by leaving to a third party the responsibility of finding a global solution for the case, by way of a *proposal* or a *recommendation*, which shall be accepted or refused by the interested parties. Mediation implies system in which the litigants are separated and in which the *mediator* may engage in any privileged contacts with the parties, in order to reach a settlement. The use of the mediation process requires the agreement of both parties being the mediator also chosen by agreement both of them. The proposal or recommendation shall be issued within 20 days and shall be accepted or refused by the interested parties

This process of settlement, in practice, has a very restrictive application if any application.

Arbitration is a *decision process* in which the parties entrust the solution of a dispute to a neutral party empowered to decide the matter through a decision, which is binding on both sides. Arbitration requires the agreement of the parties and is carried out by 3 arbitrators: two are designated by the parties (one for each party) and the third one is chosen by the arbitrators of the parties. Although arbitrators must be independent, what happens is that they do act upon the interests of the parties that they represent. Therefore, it is entrusted to the third arbitrator the power to make decisions as the arbitration award is taken by majority of the votes cast.

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[5] The newly revised law stipulates new forms of conciliation, which aim the settlement of disputes (article 31, 2 LRCT, *in fine).* Thus, conciliation is closer to the mediation hereinafter referred.

Arbitration (article 34 and 35 LRCT) has a long tradition and has taken upon an interesting development at the end of the corporative regimen and it is still considered to be a useful and peaceful way of settling employment disputes. It is not, however, usual to have settle disputes through this way.

A system of compulsory arbitration was implemented for cases of deadlock. The system, in practice, requires to be displayed through the preparation of list of arbitrators agreed by the Economic and Social Council, which has not been an easy task.

Limitations and legal blockings regarding wage increases were frequent and resulted from income policies in a strategy against inflation. Nowadays, there are no legal limits connected to wage policies or income policies, even though there can be pointed out some relevancy in random recommendations, agreed in social concertation (for other limits please refer to point above).

The Administration and trade union associations in *public services* must comply with the principles of good faith, acknowledging, as soon as possible, requests to attend meetings and to reply as soon as possible to the proposals of the other party. Each of the parties may ask to the other the required information in order to exercise the right to bargain (studies, statistics, etc.). General bargaining in the public service must begin on the 1 September, with the presentation from whatever party of a founded proposal. After that, a timetable for bargaining must be set out in order for the bargaining to end before the State budget is voted. The parties should give stated reasons for their proposals and counterproposals, and should reach a settlement within a reasonable timing. The meeting shall be documented, and the minutes shall include the points where an agreement was reached. The call for the meetings must be made in accordance with the legal requirements and with a prior notice of 5 days, unless other period is agreed upon.

6. THE PERFECTION OF THE AGREEMENT: REQUIREMENTS. IS IT MANDATORY THE OFFICIAL PUBLICATION OR OTHER PUBLICATION? IS IT NECESSARY THE WRITTEN FORM? DOES IT NEED TO BE REGISTERED IN ANY REGISTRATION OFFICE?

CCT's are a result of a bargaining process and it is relevant to underline that *conciliation* and *arbitration* have the same bargaining

nature, as the way of settling the dispute is through the common will of the parties involved. The settlement must be materialised in a *written document,* signed by the representatives of the parties (article 4 LRCT).

CCT'S are not subjected to governmental approval, requiring only to be *lodged* with the Ministry of Employment (article 24 LRCT) and must later be *published* in the *Bulletin of the Labour and Employment* (article 26 LRCT). The lodgement shall be refused if the essential requirements are not met, if the texts are not accompanied by the representation titles required [6] and if the minimum period of notice required in order to stabilise the IRCT's is not complied with (more or less one year).

The law (article 25 LRCT) establishes that only by an agreement of the parties, and as long as the lodgement is not made, can any change, formal or material, be made to the content of the collective agreements.

As set out by article 10 LRCT, the instruments of collective bargaining will enter into force after their publication, in the same terms as those applicable to the legal diplomas. It is understood that the date of the publication is the date of the distribution of the *Bulletin of the Labour and Employment*, in which the agreements are included.

In the public services, the agreement is signed by the parties and binds the Government to adopt all legal or administrative measures, within the maximum period of 180 days.

7. EFFECTIVENESS (EFFECTS AND SCOPE OF APPLICATION). *"ERGA OMNES"* EFFECTS. WHAT HAPPENS WHEN THE AGREEMENT EXPIRES? SHOULD IT BE GIVEN A NOTICE OF TERMINATION?

In what refers to the scope of application of CCT's it is important to separate the personnel coverage, from the geographical coverage, from the duration of collective agreements.

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[6] The representatives of local trade unions are the trade union officers who bear a credential with powers to negotiate or a written mandate signed by the relevant trade union officials, explicitly giving powers to negotiate and participate. The revocation of the mandate will only be effective after having been communicated to the relevant Public Administration services.

Personnel coverage. In relation to the normative clauses of the CCT's, *the principle of membership* rules that these clauses are only binding on the employment relationships existing between the employees and employers which are *members* of a signatory party (and, in relation to the later, are also binding on those that directly conclude CCT's — article 7 LRCT) [7]. As mentioned, trade unions, employers' associations and employers can adopt collective agreements already published. The adoption (article 28 LRCT) is made by an agreement entered into between the interested party and those should have been the other parties in the bargaining, if these had occurred. Therefore, an adoption may imply the extension of the scope of the CCT. Nevertheless, it is mainly through PE (extension directives issued by the Government broadening the scope of application of collective agreements to employees and employers that did not sign it) that it is achieved what it is called as the "erga omnes" effect. The *extension*, mentioned in article 27 LRCT, is an administrative procedure in which, by ministerial regulation, it is ruled that the scope of a specific CCT shall be applicable to the entities inside the same sector and to employees with the same occupation, notwithstanding the fact that they are not members of the signature parties, but as long as they perform the activity in the area and the scope previously defined. For areas outside the scope of a CCT there can also be issued extension directives regarding companies and employees of the pre-defined occupational and economic sector if no employers' associations or trade unions exist and if the social and economic conditions are met.

In practice, CCT's, even if it does not exist an extension directive, are usually applicable by the company to all of the employees embraced by the category, notwithstanding the fact if they are members or not of the signing trade unions [8, 9].

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[7] Concerning collective agreements between upper level trade unions (confederations) and intermediate level (federations, unions), these are applicable to the workers and employers who are members of the trade unions represented by the abovementioned unions. There are no registered cases of inter confederate agreements.

[8] We believe it is not a legal obligation emerging from the equality principle. The reasons for such application are practical reasons: if the companies didn't extend the collective bargaining agreements with the new benefits to the workers who are not part of any trade union, they would be encouraging those workers to join those unions so as to enjoy the same benefits. On the other hand, it would be more difficult to manage the personnel if they were not treated equally and the reasoning behind the agreement would be wasted.

[9] The statistics published by the MT use coverage ratios with high percentages. In a quick analysis of the V point, the *Personnel Map of 1998* (published in May 1998) indicates that of the 2 166 373 workers in mainland Portugal, 2 110 007 are covered by IRCT's. Even analyses made with lower numbers indicate a large coverage by IRCT's (more than two thirds) in the Portuguese workers universe.

It is possible to note several situations of conflict between collective agreements (article 14 LRCT) that are settle by the criterion of specificity of the agreements (if one of the agreements is a multi-employer agreement or a company-level agreement then it is this that prevails) and by the criterion of favourability towards the employee.

Geographical coverage. CCT's must expressly define the geographical area to which they are applicable. This area must correspond to a common area of representation covered by the signatories.

Duration. The general rule is that agreements are valid for whatever period is expressly agreed between the parties. In Portuguese Law there were minimum periods of validity (in principle 2 years and 12 months for the wage tariffs). Nowadays, CCT's may directly establish these periods. Indirectly there is always a minimum of validity in face of the duration obstacles connected with the prior notice of termination and the lodgement [10] CCT's sometimes look for retroactive effects, mainly in order to recover the erosion of the wages, even when the law establishes obstacles towards that retroactivity (article 6, point 1, *f)* LRCT). CCT's also have ultra-active effects because — in accordance with article 11, point 2 LRCT [11] — they are maintained in force till other instruments of collective regulation replace them.

The law is not clear in what relates to the need and effects of the termination with prior notice. According to the law (article 16, point 5 LRCT) it seems that it is required a new CCT proposal for the termination with prior notice to produce effects.

The termination with prior notice must respect the required stability of the CCT (article 16, point 2 LRCT). In certain circumstances there can always be a termination with prior notice., being the most expressive circumstance the one related to the transfer of undertakings (article 16, point 3 LRCT).

The maintenance in force of the CCT's as long as they are not replaced (ultra-active effects) has been raising some doubts. Can article 11, point 1 LRCT be understood as consecrating a perpetuation of the respective legal discipline? In accordance in the majority of the opinion, the provision has only the purpose to avoid a blank mean-

[10] The collective bargaining agreements can only be repudiated 10 months after it has been deposited. On the other hand, the deposit of a new convention must be refused if a 12-month period, referred to the previous deposit of the convention that must be altered or substituted, has not elapsed.

[11] As it will be demonstrated hereinafter, the meaning of this rule is controversial.

while bargaining is in process. The conventional compromise expressed by the limitation in terms of duration in not compatible with a perpetuation, based only upon the will of the parties that insist in attaching it to the old contract, made for a short period of time. Point 2 of article 11 LRCT has the only purpose of avoiding the normative blank, which would dramatise the revision process and the renegotiation of the collective agreements. In our opinion, post-effects will only be maintained as long as it is consider indispensable for the negotiation or the preservation of an adequate normative cover. In fact, if it were not like this, the termination of the validity of an IRCT would have no effect. It would constitute a very serious twist in the principle of the collective autonomy if it was admitted that the pre-establishment of the duration of the collective agreements had no effect in a way that — passing the period of validity — the system of collective relationship would be indefinitely maintained.

CCT's involve a creative act of legal rules because they establish the conditions that will be binding on the individual employment contracts and, therefore, work as a source of labour law. It is admitted that, in principle, the clauses set out in CCT's are the *minimum* of the employment conditions, allowing the employment contracts to establish more favourable conditions to the employees. These more favourable conditions, set out by law or by the CCT's, are not materialised in the contractual statute of the employee: the doctrine has been rejecting the thesis of the incorporation of the legal rules (as well as those of the CCT's) in the individual employment contracts.

In what concerns the continuity of the effects of the collective agreements, the general principle is the precaution of the acquired rights: "the employment conditions established by a collective instrument can only be reduced by another collective instrument if the respective text is, globally considered, more favourable" (article 15, point 1 LRCT). This means that it is only allowed to change a given benefit or advantage if the same is replaced by another one with the formal precautions above referred, being the acquired rights therefore harmed (article 15, point 2 LRCT), although it is safeguarded the fact that the employees will be globally treated in a more favourable way. Some part of the doctrine is of the opinion that it is valid for the CCT's to expressly reduce the working conditions established in previous instruments in a bigger extension when comparable to the one that results from the article 15 above mentioned.

8. MANAGEMENT OF THE COLLECTIVE AGREEMENT. WHO AND HOW SHOULD ONE BE RESPONSIBLE FOR THE APPLICATION, INTERPRETATION, DISPUTES, ETC. OF THE CONTENTS BEFORE A CLAIM IS PRESENTED BEFORE THE COURTS? IS THERE A JOINT COLLECTIVE-AGREEMENT COMMITTEE?

The processes of bargaining are outside the scope of the CCT's and, therefore, a reference should be made to the permanent bargaining. In fact, the results that emerge from collective bargaining make it a true institution that shall assure the permanent and direct contact between employers and trade unions. One example is the joint-collective agreement committees, foreseen by law, which are empowered to interpret the agreement's provisions. Unanimous decisions issued by these committees will have the same binding force of the CCT's. It can also be considered that the joint collective—agreement committees have the function of supplement the CCT.

It also happens that, on many times, the above mentioned permanent bargaining — still without legal prevision — are focused on the application and performance of the CCT or in the issuance of regulation instruments foreseen by them (careers regulation, social benefits, etc.).

It is also foreseen the *judicial interpretation of the IRCT's provisions*, with binding effects to all interested parties (article 183 and following CPT). It is given to its decision the amplified value of review (i.e. decision that uniforms the rulings of the Courts).

9. IMPUGNATION OF THE COLLECTIVE AGREEMENT. IS IT POSSIBLE TO JUDICIALLY CHALLENGE THE COLLECTIVE REGULATION OF THE AGREEMENT? WITH WHICH GROUNDS? ARE THERE ANY ALTERNATIVES TO THE COURTS, SUCH AS CONCILIATION BODIES AND CONCILIATION METHODS?

There are special employment collective disputes that can be settle by the Courts, although in practice it is not usual for the trade unions (or employers' associations) to go before them. The law foresees the situations in which the Courts may settle the employment collective disputes. In such perspective it is relevant the process of making IRCT's provisions voidable: article 43 LRCT establishes that trade unions and employers' associations (as well as employees and em-

ployers that may be interested) can present before the Courts legal suits, in which it is claimed that IRCT' provisions are avoidable because against the law.

The non judicial systems for the settlement of the disputes connected with the change of the CCT's (or with its conclusion) are the already mentioned bodies of conciliation working at the MT that represent an administrative assisted bargaining, and the mediation and arbitration systems legally foreseen in detail but which, in practice, do not achieve great results, due to the lack of interest of the parties. MT applies the normative possibilities of the PE in order to extend the scope of the CCT's to all employees of the embraced companies and to all employers of the included sector. While the extension directive still has the characteristics of the collective autonomy, the PRT, being a source exclusively prepared and issued by the Government, is of exceptional nature. It is only valid to issue a PRT when it is not possible to issue an extension directives and when of the following requirements are met: *non existence* of employers' associations or trade unions, consecutive *refusal* from one of the parties to bargain, *existence* of dilatory acts or manoeuvres that block the normal progress of the bargaining (article 36 LRCT). The Government has already issued PRT's in cases where there is a bargaining deadlock that is clearly outside the conditioning foreseen by the LRCT. This situation has not been very common in the last years and the project of the Labour Code will limit the Government powers.

10. OTHER RELEVANT QUESTIONS

10.1. Historic background

In Portugal, in the beginning of the XX century, CCT's were not of common use in the employment relationship's field, and this is due to the lack of strength of the associations and the weak industrialisation of the country. The legal doctrine of the time considered valid the conclusion of a CCT, even if there was no specific legal frame given to it. Nevertheless, it seems that the first instruments with some kind of similarity to the present collective agreements were concluded after the recognition of the right to strike (Diploma 6.12.1910) and had later their legal basis in the Diploma 10 415, of 27.12.1924.

Only with the corporative system, and after the Statute of the National Labour (Diploma 23 048, of 23.09.1933), were collective agreement concluded in a considerable number and started to have an

important role in the development and improvement of the working conditions. Hundreds of CCT's were signed because of the general provisions of the Statute of the National Labour, being the first detailed regulation issued by the Diploma 36 173, of 6.03.1947. This diploma offered a suitable legal frame for the CCT's but left unsolved the problems raised with the lack of interest of the employers to bargain, only possible to be removed by administrative pressures and the threat of settling the disputes at Governmental level, because trade unions operated in a very restrictive area and were not allowed to strike, which was in fact considered a crime. The diploma established a heavy administrative control mechanism of the legality and merits of the CCT's. Even during the corporative system, an important step was given with the publication of the Decree law 49 212, 28.08.1969, through which a true obligation to bargain was created and the respective duty was placed under the parties in dispute. Furthermore, peaceful ways of settling collective disputes were materialised and the system of arbitration and mediation was imposed. Although employees had not yet seen the right to strike recognised, trade unions were empowered with more mechanisms that would in the future allow them to conclude more favourable collective agreements. This improved the spirits of the employees, notwithstanding the further amendments that this diploma was later subjected to (Decree Law 492/70, 22.10). Immediately after the revolution of the 24 of April 1974, the inversion of the relations of strength between the social partners promoted the increase of the employment benefits through a large number of CCT's, which were not adequately guaranteed in terms of contents and form. With the Decree law 292/75, 16.06, the first legal diploma, after revolution, was issued, although its content was not thought in a very systematic way. This diploma has regulated the intervention of the Government in a very detailed way and some of its provisions can be included in a slowdown process in what related to employment benefits

Already in a phase of political stabilisation and in connection with the Portuguese Constitution, it was published the Decree law 164-A/76, 28.02, inspired in the principles of liberty and transparency of the collective relationships and in the reduction of the State intervention, diploma that was later subjected to some amendments (Decree law 887/76, 29.12, Decree law 353-G/77, 27.08).

The diploma presently in force (Decree law 519-C/79, 29.12, diploma which has been identified as LRCT) [12] is technically more

[12] Changed by the Decree law 87/89, 23.03, Decree law 209/92, 02.10 and by the Law 118/99, 11.09

effective and was issued with the purpose of granting the bargaining process to the parties and by reaffirming the collective autonomy, making nevertheless the social partners more aware of their duty to bargain.

On the other side, the diploma tries to improve the intervention of the Government in these questions. Lately, greater strength has been given to arbitration.

10.2. Present situation

There is a clear crisis in collective bargaining due to the difficulties that the social partners have to renew the agreements and reach a stetlement. It is in preparation a new Labour Code that, in this area, may introduce some dynamics in collective bargaining in order to find solutions to the *erga omnes* effects and that may empower workers' commissions to conclude collective agreements.

10.3. Legal diploma

The diploma presently in force is the Decree law 519-C/79, 29.12, amended by the Decree law 87/89, 23.03, Decree law 209/92, 02.10 and by the Law 118/99, 11.09. The diploma that establishes the terms and conditions of collective bargaining in Public services is the Law 13/98, 26.05

Chapter 8

THE STATUS AND FUNCTION OF COLLECTIVE AGREEMENTS IN THE UNITED KINGDOM

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1. INTRODUCTION — ON COLLECTIVE AGREEMENTS

For the United Kingdom commentator, it is important to stress, from the outset, the unique nature of the United Kingdom's approach to the phenomenon of the collective agreement. Thus, while it is clear that "England was the home of collective bargaining", yet "the English system of collective bargaining and the collective agreement to which it has given rise represent the exception to, rather than a pattern for, the majority of Western industrialised countries" [1].

In terms of possible classification, United Kingdom developments have rejected a role for the collective agreement as a regulatory instrument through the notion of "agency". Thus, theories such as those of Philipp Lotmar, set out in his work *Die Tarifverträge zwischen Arbeitgebern und Arbeitnehmern* (1900), have no relevance as an explanation of the effect of United Kingdom collective agreements. Even in the House of Lords case of *Heatons Transport Ltd v TGWU* [2], which has been described as "The judicial statement most favourable

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[1] F. Schmidt & A. C. Neal, *Collective Agreements and Collective Bargaining,* International Encyclopedia of Comparative Law (Tübingen, 1984), Vol XV, ch 12, para 66. Much of what follows in this report has been drawn from work done by the author in the course of co-writing the F. Schmidt & A. C. Neal volume, together with preparatory work for Alan C. Neal, "*The Collective Agreement as a Public Law Instrument",* in E. K. Banakas (ed), *United Kingdom Law in the 1980s* (London, 1988); and Alan C. Neal, "We Love You Social Dialogue – But Who Exactly Are You?", in Fondazione Giulio Pastore, *La contrattazione collettive europea: Profili giuridici ed economici* (Milan, 2001), pp. 113-127.

[2] [1973] AC 15.

to the view of the union as agent for its members", there is no suggestion of any general applicability of the theory of agency in this context [3].

Nor does the notion of "normative effect", as propounded by Hugo Sinzheimer at the beginning of the twentieth century in his influential work *Der korporative Arbeitsnormenvertrag* (1907-8), serve to establish the functioning of collectively agreed terms in the United Kingdom context.

By the same token, the notion of the collective agreement as some form of "third-party beneficiary contract", as formulated by Raynaud, in his *Le contrat collectif de travail* (1901), is inapplicable to a system where the doctrine of "privity of contract" plays such an important role in limiting the range of beneficiaries who may enforce the arrangements set down in a contract to which they are not directly party [4].

Any notion that the scope of a collective agreement should be subject to some form of "extension", along the lines, for example, of French developments, has also been rejected in the United Kingdom context. However, it should be mentioned that some limited extension has, in the past, been possible in two contexts: *(a)* under wartime legislation and through similar subsequent provisions [5]; and *(b)* by means of a procedure contained in legislation dating from 1939, which, in a much modified form, was eventually abolished by the Employment Act 1980 [6]. Modern United Kingdom labour law, however, no longer offers scope for such an extension technique.

It may thus be concluded that the United Kingdom picture in relation to the collective agreement is one of a-typicality in terms of modern developments within Western industrialised systems. Furthermore, as will be illustrated later in this report, the removal of the collective agreement from interference by the judiciary "enables the bargaining parties in England to reach agreements embodying the fruits of their negotiations without fear that these will be struck down or restrictively interpreted by the judges" [7].

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[3] P. Davies & M. Freedland, *Labour Law: Text and Materials* (2nd ed., London, 1984), p. 284.

[4] A situation which remains the case notwithstanding important recent adjustments in relation to the doctrine of privity of contract within the United Kingdom legal system by means of the Contracts (Rights of Third Parties) Act 1999.

[5] See on this O. Kahn-Freund, "Legislation through Adjudication. The Legal Aspect of Fair Wages Clauses and Recognised Conditions" (1948) 11 MLR 269 and 429, especially footnotes 5 and 6.

[6] Employment Protection Act 1975, s. 98 and Schedule 11, now repealed.

[7] F. Schmidt & A. C. Neal, *op. cit.,* para 339.

The reasons underlying such a course of development owe much to the particular context of the industrial relations system which has grown up in the United Kingdom, and it is to a consideration of that system that one must now turn.

2. THE NATIONAL CONTEXT: UNITED KINGDOM INDUSTRIAL RELATIONS

The United Kingdom system of industrial relations grew out of *de facto* power relationships between groups of workers and their employers. Indeed, the modern picture reveals the extent to which relationships and patterns of behaviour created over time by the labour movement in harness (sometimes harmonious, often conflictual) with industrial employers, continue to exert an important determining influence over the scope for future developments and changes.

This United Kingdom system has never had a "characterising" mould imposed upon it by the legislator, nor has it developed in response to any coherent ideology provided, for example, by Church or by political parties. Indeed, there has never existed in the United Kingdom the degree of detailed legal regulation for collective bargaining so often to be seen in countries where the very existence of a labour movement has in large part been due to intervention and support by the legislator. Nor are United Kingdom industrial relations characterised by the religious partitions evident, for example, in parts of Southern Europe. By the same token, fundamental political-party ties, such as those enjoyed by many North European labour movements, are absent from the United Kingdom picture. Instead, the United Kingdom industrial relations system is unique. It is an exception, whose blend of apparent structural anarchy, informal relationships, extra-legal regulation, and continuing *ad hoc* adaptation has fascinated observers, both at home and abroad. It is also a phenomenon which consistently amazes "rational" observers by its ability to give rise to, and subsequently disentangle itself from, the most remarkable and strange convolutions and difficulties.

Irrespective of political starting-point, observers have consistently commented upon the qualities of "differentness" which make the United Kingdom system of industrial relations a dangerous creature for purposes of comparative evaluation. Thus, for Hugh Clegg, commenting in 1979 upon the *locus* of bargaining, "workplace bargaining and trade union organization in the workplace ... are uniquely impor-

tant in contemporary Britain compared with the past or with countries overseas" [8].

To the Donovan Commission, concerned with influences upon the bargaining system during the mid-1960s, it appeared that, "Until recent times it was a distinctive feature of our system of industrial relations that the State remained aloof from the process of collective bargaining in private industry" [9].

As regards the product of bargaining, the Donovan Commission identified "the general practice in this country of allowing agreements to run for an indefinite period. In most other countries agreements run for a stipulated period"[10], while the late Sir Otto Kahn-Freund, noting the practical effects of collective bargaining and collective agreements, pointed out, as "a unique feature of British industrial relations", that, "provisions [in various pieces of legislation] never prevented an individual employer and employee from validly agreeing upon *eg* a wage lower than that laid down in the relevant collective agreement…" [11].

More generally, E.J.Hobsbawm, commenting from a comparative historical perspective, has made the point that, "In Britain, where the working class has been for almost a century far too strong to be wished away by the ruling classes, its movement has been enmeshed in the web of conciliation and collaboration more deeply, and far longer, than anywhere else" [12].

Even modern labour lawyers espouse this view, so that, for example, in the first (1979) edition of their important *Labour Law, Text and Materials,* Paul Davies & Mark Freedland felt able to comment that, "The British system of industrial relations follows a pattern common amongst industrialized nations in its reliance upon collective bargaining, although the particular forms of collective bargaining in Britain are perhaps peculiar to it" [13].

It has long been pointed out that a characteristic feature of United Kingdom industrial relations is that the State has not intervened in

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[8] H. Clegg, *The Changing System of Industrial Relations in Great Britain* (Oxford, 1979), p. 7.

[9] *Report of the Royal Commission on Trade Unions and Employers' Associations 1961-68,* Cmnd 3623, para. 39.

[10] *Ibid.,* para 60.

[11] O. Kahn-Freund, *Selected Writings* (London, 1978), p. 17.

[12] E. J. Hobsbawm, *Labouring Men: Studies in the History of Labour* (London, 1964), p. 336.

[13] P. Davies & M. Freedland, *Labour Law: Text and Materials* (1st ed., London, 1979), p. 29.

collective bargaining, either to give legal support to the position and status of parties to the bargaining, or to regulate in detail the procedures and content of their bargaining. This absence of use for the law as an instrument for regulating industrial relations is said to be unique. Furthermore, the law does not even recognise the product of collective bargaining as constituting an agreement backed by the legal support and sanctions normally available for agreements made freely between parties of full capacity. The notion of the collective agreement as a "gentlemen's agreement" is well known, and has been espoused by academic writers, the courts, and, now, the legislator. This approach of "legal abstentionism" has been said to have permeated through into the traditions of United Kingdom industrial relations and labour law, with the consequence that the law is even claimed by some to have no proper role to play in industrial relations.

However, the validity of the orthodox view stated above has been called into question in recent years. As the flood of legislative regulations impinging upon the collective bargaining process has swept across the plains of "free collective bargaining", as attempts by successive governments in the 1960s and 1970s to impose incomes policies restricted the scope of that freedom to bargain, and as public and governmental reaction to the extended use of the weapon of industrial conflict brought calls for restrictions upon the right to strike and to take other industrial action, even the most loyal adherents to the notion of "legal abstentionism" have found it an uphill struggle to maintain that posture in the face of developments since the publication of the Donovan Report in 1968.

In part, it may be conceded that the explosion of legislative activity relevant to the United Kingdom labour market came in response to a range of external pressures such as commitments to the standards established through the International Labour Organisation and entry into the (then) European Economic Community. So, too, widespread calls for anti-discrimination legislation during the late 1960s and early 1970s contributed to the introduction of statutorily-backed rights and duties in relation to decision-making on the criteria of sex and race [14].

Yet, the fact remains that, whatever judgment history may have to make upon the Industrial Relations Act 1971, that short-lived product of the 1970-74 Conservative government under Prime Minister Edward Heath, the enactment of that statute, with its attempt to

[14] Later to be complemented in respect of disability discrimination, and shortly to be extended to cover discrimination on the basis of age, religion or sexual orientation.

establish a legislative framework for collective labour relations and individual employment relationships, marked a fundamental shift in emphasis for labour market reforms in the United Kingdom. The law, with all of its virtues and imperfections, had entered the field of industrial relations. Since then, despite strenuous efforts to bring about a reversal, the law has remained a potent instrument of regulation and reform. Statute law, with its wealth of minute detail on dismissal, discrimination, sickness, discipline, lay-off, freedom of association, time-off from work, maternity rights, and health and safety at work, has been utilised by both Labour and Conservative governments over a quarter of a century to introduce change and, thereby, to influence the operation of collective bargaining and labour relations in the United Kingdom.

This is not, however, to say that coherent and comprehensive legislative regulation, of the kind envisaged in the Industrial Relations Act and such as is to be found in many other parts of the world, has been imposed over all stages of collective bargaining. However, the extent to which the phenomena which Kahn-Freund has described as "auxiliary" legislation have become more extensive, and the degree to which intervention by restrictive legislation into the sphere of industrial action and the organisation of trade unions themselves has been increasingly prevalent, indicate that this legislative surge has been significantly more important and long-lasting than many of its critics would have had us believe. In modern United Kingdom industrial relations, the importance of labour law is inescapably a phenomenon which (be one employer, worker, trade union, or academic commentator) one ignores at one's peril.

3. THE COVERAGE OF COLLECTIVE BARGAINING AND AGREEMENTS IN THE UNITED KINGDOM

3.1. As Reported by the Donovan Commission

In 1968, the report of the Donovan Commission offered an analysis of United Kingdom industrial relations as it appeared in the private sector in manufacturing industry. It is well known that the conclusion that

> "Britain has two systems of industrial relations. The one is the formal system embodied in the official institutions, the other is the informal system created by the actual behaviour of trade unions and employers' associations, of managers, shop stewards and workers",

has largely set the pattern against which studies of the United Kingdom system have been conducted for the past quarter of a century. The "formal system" was confirmed as being that identified by the Royal Commission on Labour of 1891, *ie*:

> "Powerful trades unions on the one side and powerful associations of employers on the other have been the means of bringing together in conference the representatives of both classes enabling each to appreciate the position of the other, and to understand the conditions subject to which their joint undertaking must be conducted ...",

while the "informal system" was said to be

> "…founded on reality, recognising that the organisations on both sides of industry are not strong. Central trade union organisation is weak, and employers' associations are weaker" [15].

The ensuing analysis of the Donovan Commission rested upon this conflict between the "formal" and the "informal" systems, and upon the inapplicability of most industry-wide agreements to effective industrial relations. The means of reform was perceived as being the factory-wide agreement, although, for a multi-plant company, a company agreement would suffice, given sufficient scope for factory-level negotiations.

3.2. Shifts away from the Donovan Pattern

During the 1970s, there was a shift away from this formal system of collective agreements to a single-employer system. Details of this shift are to be found in the data collected for the 1973 and the 1978 *New Earnings Surveys* (which contained specific questions on collective agreements), in the *Workplace Industrial Relations Survey,* and in a number of further surveys on the United Kingdom industrial system. Indeed, in a study of 970 manufacturing companies, Brown suggested that, by 1978, "…single employer bargaining has become the most important means of pay determination for two-thirds of manual workers. Among non-manual workers, single-employer arrangements now determine pay for almost three-quarters of employees" [16].

This finding was supported by Daniel & Millward, reporting on the *Workplace Industrial Relations Survey,* who found that 58% of

[15] Cmnd 3623, para 49.

[16] W. Brown, *The Changing Contours of British Industrial Relations* (Oxford, 1981), pp. 24-25.

those asked considered the basis for the most recent pay increase to have been as a direct result of collective bargaining. Of the total, 34% considered the most important level of collective agreements as being at a national and regional level; 13% at company level; and 10% at the plant or establishment level. However, far greater importance was attributed to plant bargaining in large workplaces, and the manufacturing sector regarded plant bargaining as the most important level of negotiation [17].

The only available comparative statistics on collective agreement coverage were provided by the 1973 and the 1978 *New Earnings Surveys.* These provided a breakdown of collective bargain type by industry sector and category of worker. The major trend, away from national-only bargaining, suggested by Daniel & Millward and by Brown was repeated in the *New Earnings Survey* data for all industries and types of worker. The type of collective bargain which showed an increase was the range of company/district/local bargains, or, frequently, no collective agreement at all. The general shifts were, however, quite small, and not as dramatic as those suggested by the surveys mentioned above.

3.3. The United Kingdom at the turn of the Millennium

The most recent data indicating the state of play for collective bargaining and collective agreements in the United Kingdom is contained in the results of the 1998 *Workplace Employee Relations Survey* [18]. This makes very clear the dramatic changes which occurred in relation to collective labour relations in the United Kingdom during the two decades following the arrival in office of a Conservative government under Prime Minister Margaret Thatcher in 1979 [19].

After outlining a number of substantial changes in the make-up of United Kingdom enterprises during this period — including the important observation that "in direct contrast to the situation in 1980, the majority of large private sector workplaces are now found in the service sector rather than in manufacturing" — the survey results indicate similarly dramatic changes in the pattern of industrial rela-

[17] W. W. Daniel & N. Millward, *Workplace Industrial Relations in Britain. The DE/PSI/ESRC Study* (London 1983), ch VIII.

[18] The data is presented and analysed in M. Cully, S. Woodland, A. O'Reilly & G. Dix, *Britain at Work: As depicted by the 1998 Workplace Employee Relations Survey* (London, 1999); and in the companion volume, N. Millward, A. Bryson & J. Forth, *All Change at Work?* (London 2000).

[19] See, in particular, the presentation in chapter 10 of *Britain at Work..., op. cit.*

tions and bargaining taking place at the same time. Thus, in respect of the employers' side, it is reported that:

> "Multi-employer bargaining, which had greatly diminished in importance in the 1980s, became even more of a rarity in the 1990s. Among workplaces with recognised trade unions, multi-employer negotiations affected the pay of some or all employees in 68 per cent of workplaces in 1980. In 1990 this had fallen to 60 per cent, but in 1998 it was down to 34 per cent. In all three broad sectors of the economy the fall over the whole period 1980 to 1998 was substantial: in public services the drop was from 81 to 47 per cent; in private manufacturing it was from 57 to 25 per cent; and, most dramatically, in private services, from 54 to just 12 per cent."

Indeed, so dramatic have the changes been that the overall conclusion offered is that the public sector emerged as the only major sector of the economy where multi-employer bargaining remained common in 1998, while private sector employers "had effectively abandoned acting jointly to regulate the terms and conditions of employment" [20].

Meanwhile, on the employee side, the survey results show that:

> "Having held steady from 1980 to 1984, union presence at workplace level fell sharply from 1984 to 1990 and did so again between 1990 and 1998. From 73 per cent of workplaces in 1980 and 1984, the proportion fell to 64 per cent in 1990 and then to 54 per cent in 1998" [21].

A similarly sharp decline in the density of trade union membership was reported, such that "this fell from 65 per cent in 1980 to 58 per cent in 1984 and to 47 per cent in 1990. By 1998 it was down to 36 per cent." At the same time, "After remaining stable in the early 1980s at roughly 65 per cent, the proportion of workplaces with recognised unions declined substantially from 1984 to 1990, a trend that continued through to 1998. The figure fell from 53 to 42 per cent in the most recent period" [22].

These trends, taken together, unsurprisingly led on to confirmation, in the modern United Kingdom industrial relations context, of a pattern of declining coverage of collective bargaining. Thus:

> "In the public sector, where pay review bodies replaced joint regulation for some major occupational groups and some

[20] *Ibid.,* p. 229.
[21] *Ibid.,* p. 234.
[22] *Ibid.*, p. 238.

> derecognition had also occurred, aggregate coverage fell from 80 per cent in 1990 to 63 per cent in 1998. In private manufacturing the fall was slight, from 51 per cent to 46 per cent of employees. Private services was the sector with the largest proportionate fall: from 33 per cent to 22 per cent" [23].

Looking at the picture overall, the authors of the survey results observe that:

> "Our survey series is at its most authoritative in documenting the decline in the institutions that exemplified the system of joint regulation that existed at the end of the 1970s. In 1998, the workplace coverage of multi-employer bargaining was half what it was in 1980. Trade union membership had nearly halved, while the recognition of trade unions by management for negotiating terms of employment had fallen by a third. Compulsory union membership arrangements had all but disappeared" [24]

The only ray of bright light appeared to come in the comment that, despite all this:

> "…while trade union representation was disappearing at an accelerating rate, not all of the indicators of union presence and activity suggest increasing weakness. Union representatives maintained their presence from 1990 onwards and the decline of full-time representatives that had occurred in the 1980s did not continue. Union representation continued to be associated with the existence of other channels of communication between employees and management, including general consultative councils and health and safety committees" [25].

4. THE LEGAL STATUS OF THE UNITED KINGDOM COLLECTIVE AGREEMENT

The collective agreement is one of only a very small number of bargains in English law for which special formalities have to be complied with. Nowadays, indeed, the collective agreement is regulated by statute, and owes its modern definition to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992. However, this has not always been the case, and it is only since the first introduction of a statutory definition in the 1971 Industrial Relations Act that the collective agreement has purportedly been

[23] *Ibid,* p. 242.
[24] *Ibid,* p. 246.
[25] *Ibidem.*

removed from the sphere of agreements in general — so that it no longer constitutes one of the group of bargains dealt with according to the usual rules of the Common Law.

That the collective agreement has been an important and widely accepted feature of employment relations for a long time cannot be denied [26]. However, even before assuming its modern statutory form, the collective agreement can hardly be said to have represented an issue giving rise to much discussion amongst lawyers [27]. Nevertheless, views put forward during the 1940s [28] were reconsidered during a later debate as to whether the collective agreement could be described as an agreement having contractual effect or not [29], and an extension of this debate during the 1960s was stimulated by the investigation of the Donovan Commission [30], appointed to look into the activities of trade unions and employers' associations in Great Britain.

A climax to legal analysis of the collective agreement was reached in 1969, when the Ford Motor Co attempted to obtain injunctive relief against a number of trade unions, on the basis of alleged breach of the procedural provisions in a collective agreement between the company and the defendant unions [31]. The decision of Geoffrey Lane J in this case — that the agreement in question could not give rise to the relief sought, since it had not been intended by the parties to it to be

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[26] For an early example, see SIDNEY & BEATRICE WEBB, *Industrial Democracy* (8th ed., 1906), p. 178: "So thoroughly has the Collective Bargaining been recognised in the building trades, that county court judges now usually hold that the "working rules" of the district are implied as part of the wage-contract, if no express stipulation has been made on the points therein dealt with. ... Precise statistics do not exist, but our impression is that, in all skilled trades, where men work in concert, on the employers' premises, ninety per cent of the workmen find, either their rate of wages or their hours of work, and often many other details, predetermined by a collective bargain in which they personally have taken no part, but in which their interests have been dealt with by representatives of their class."

[27] On the other hand, the issue of whether or not the collective agreement should be legally enforceable was not new. See, by way of example, *Industrial Democracy* (8th ed., 1906), p. 534, with reference to the Royal Commission on Labour: "Collective Bargaining thus implies, in its fullest development, compulsory Trade Unionism. It was the recognition of this fact which led to the remarkable proposal of the Duke of Devonshire, and some of the most eminent of his colleagues on the Labour Commission, to enable Trade Unions to enter into legally binding collective agreements on behalf of all their members."

[28] See O. KAHN-FREUND, "Collective Agreements" (1940) 4 MLR 225, and "Collective Agreements under War Legislation" (1943) 6 MLR 112.

[29] See A. FLANDERS & H. CLEGG (eds.) *The System of Industrial Relations in Great Britain. Its History, Law and Institutions* (Oxford, 1954).

[30] *Royal Commission on Trade Unions and Employers' Associations, 1965-68* (Chairman, Lord Donovan), Cmnd 3623.

[31] *Ford Motor Co Ltd v. Amalgamated Union of Engineering and Foundry Workers* [1969] 2 QB 303.

legally enforceable — together with broader *obiter* comments made about collective agreements in general, represented a strong expression of the currently prevailing wisdom in respect of the legal status of the collective agreement.

In the drafting of subsequent statutory provisions relating to collective agreements, it is clear that the views of Professor Kahn-Freund and the expression of the Common Law position adopted in the *Ford* decision have been the basis upon which the legislator has proceeded.

4.1. Legal definition of the collective agreement

4.1.1. Act common law before 1971

Prior to the coming into force of the Industrial Relations Act 1971, the collective agreement received its only legal treatment in accordance with the rules of the Common Law. The question was posed: had the common law requirements for creation of a contract between the parties been satisfactorily complied with? Perhaps surprisingly, it was not until the *Ford* case that this question received any form of open analysis before the courts, and a clear — if perhaps contentious — answer.

Despite this, however, it had been clear that the collective agreement was gradually developing into one of the accepted sources of norms for employment relationships in general — particularly as a source of terms for individual contracts of employment between employers and employees [32]. In addition, many of the procedures upon and around which the modern United Kingdom system of industrial relations operated emanated from the provisions contained in collective agreements between trade unions and employers [33].

Consequently, from a legal point of view, one might have expected the collective agreement to constitute a binding and legally enforceable agreement between the parties — particularly since the development of these agreements had been accompanied by an increasing formalisation of terminology and a growing incidence of

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[32] See, for example, the Employment Protection (Consolidation) Act 1978, s. 4(2), re-enacting the words first contained in the Contracts of Employment Act 1963, s 4(5). These provisions are now to be found in the Employment Rights Act 1996. See *infra*.

[33] See A. MARSH, *Disputes Procedures in British Industry* (Research Paper 2 for the Donovan Commission).

draughtsmanship by lawyers. The decision in the *Ford* case was, therefore, by no means a foregone conclusion.

Indeed, some controversy still exists as to the acceptability of this decision — particularly with regard to the approach adopted by Geoffrey Lane J. in reaching his decision. It was said that there was no "intention to create legal relations" between the parties. To get to this conclusion, Geoffrey Lane J. looked at a number of writings on the subject, and came to the view that: "certainly since 1954 the general climate of opinion on both sides of industry has overwhelmingly been in favour of no legal obligation from collective agreements." He then continued:

> "Agreements such as these, composed largely of optimistic aspirations, presenting grave problems of enforcement and reached against a background of opinion adverse to enforceability are, in my judgment, not contracts in the legal sense and are not enforceable at law. Without clear and express provision making them amenable to legal action, they remain in the realm of undertakings binding in honour" [34].

Thus, the failure to give "clear and express provisions making them amenable to legal action" was held to deprive the Ford agreements of the quality of being contracts at all. This was enough to decide the issue — although a question mark has been raised in respect of whether there is, in English law, a requirement that there be an "intention to create legal relations" which has to be shown before a contract can be established according to the rules of the Common Law [35].

The *Ford* decision is a first instance judgment, on an interlocutory matter, in which the more general comments concerning the "intention to create legal relations" in contracts may be viewed as *obiter dicta*. Nevertheless, it is the only reported authority (prior to the intervention of statute) directly on this point — the specific issue not having been dealt with in the earlier major labour relations cases of *Edwards v. Skyways* [36] and *NCB v Galley* [37].

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[34] [1969] 2 QB 303 at 330H-331A.

[35] See B. A. HEPPLE, "Intention to Create Legal Relations" (1970) 28 CLJ 122. According to Professor Kahn-Freund, the intention to create legal relations is "an indispensable element of contract-making as much as offer and acceptance and consideration" — see *Labour and the Law* (2nd ed., London, 1977), p. 126.

[36] [1964] 1 WLR 349.

[37] [1958] 1 WLR 16 (CA). Note, too, the subsequent comment in the Court of Appeal case of *Monterosso Shipping Co. Ltd.* v. *ITWF* [1982] ICR 675, to the effect that, "The essence of a contract — as distinct from a mere agreement — is that a contract is legally enforceable: whereas a mere agreement is not."

Indeed, in the few cases where the issue of "intention to create legal relations" has been raised, the general wisdom seems to have been that a distinction may be drawn between *(a)* "social and domestic agreements", for which there is a presumption that there is no intention to create legal relations between the parties; and *(b)* "commercial, *etc* agreements", where there is considered to be a presumption running the other way, *ie* that the parties to such agreements are presumed to have intended them to be legally enforceable [38]. Nevertheless, whether a clear "intention to create legal relations" is, indeed, necessary in order to establish a contract at common law, and, if it is, whether collective agreements should be treated as a class separate from contracts in general relating to commercial *etc* matters, remains a matter for debate in the light of the *Ford* decision.

If one considers the published views of various commentators on the subject, it is undeniable that the weight of opinion before 1971 falls on the side of the collective agreement not being amenable to legal regulation [39]. However, since 1971, a combination of the *Ford* judgment, statutory intervention, and a number of widely-held assumptions about the nature of collective agreements have given rise to a situation in which it would now be difficult to argue that collective agreements are inherently legally enforceable and sanctionable through the courts where a breach has occurred [40].

4.1.2. Under the Industrial Relations Act 1972-1974

Under the 1971 Industrial Relations Act, a statutory definition of "collective agreement" was set out for the first time. A "collective agreement" had to be either *an agreement* or *an arrangement* which was for *the time being in force.* It was therefore not essential to have

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[38] See *Balfour v. Balfour* [1919] 2 KB 571. Such a presumption is, however, rebuttable: see *Edwards v. Skyways* [1964] 1 WLR 349.

[39] See *inter alia*: O. KAHN-FREUND in (1940) 4 MLR 225 and (1943) 6 MLR 112 and in A. FLANDERS & H. CLEGG (eds.), *op. cit.* See also, O. KAHN-FREUND (ed.), *Labour Relations and the Law. A Comparative Study: British Institute Studies in International and Comparative Law No 2* (London, 1965), and the Report of the Donovan Commission (*supra*). However, a response by J. L. GAYLER, *Industrial Law* (London, 1955) goes the other way, and a consideration of the same issues by J. B. MCCARTNEY, "The Contractual or Non-Contractual Nature of Collective Agreements in Great Britain and in Eire", in O.KAHN-FREUND (ed.), *Labour Relations and the Law, op cit*, considers the matter to be an entirely open question.

[40] However, *contra* see J. B. CRONIN & R. P. GRIME, *Labour Law* (London, 1970), Ch. X, and N. SELWYN, "Collective Agreements and the Law", (1969) 32 MLR 377.

an agreement in writing, or, indeed, to have an agreement at all, since the looser term "arrangement" covered a very wide range of possibilities [41]. Such agreement or arrangement needed to be between particular parties — on the employee side, one or more "organisations of workers", and, on the employer side, one or more employers, one or more organisations of employers, or a combination of one or more employers and one or more organisations of employers.

In addition, certain subject matter was required: either there had to be a prescribing (wholly or in part) of the terms and conditions of employment of workers of one or more descriptions, or the agreement or arrangement had to relate to one or more of a list of items set out in the Act. These items included negotiating machinery in respect of terms and conditions of employment and other questions arising between employers and employees; negotiating rights; facilities for union officials; and procedures relating to dismissal, other disciplinary matters, and individual grievances.

Where a "collective agreement" existed, a number of legal consequences followed. If the agreement was in writing, s. 34 of the Industrial Relations Act 1971 laid down that, unless there was provision (however expressed) stating that it was intended not to be legally enforceable, the agreement should "be conclusively presumed to be intended by the parties to it to be a legally enforceable contract" [42].

It should be noted that the section did not provide that such a collective agreement *should be a legally enforceable contract,* only that the parties to it should be presumed to have had this *as their intention.* The important point is that, if there existed some other bar to the agreement's status as a contract at Common Law (*eg* it was void for uncertainty) [43], s. 34 would not assist a party seeking to establish that such a contract had been created. The effect of the section was entirely limited to reversing the consequences of the *Ford* decision on the "intention to create legal relations" point. This limitation was of some importance, since the Act provided for sanctions in the event of breach of a collective agreement.

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[41] The term has been said to be wide enough to include not only consensual agreements, but the "crystallised custom" and "inarticulate practices" which characterise much of United Kingdom industry. See C. DRAKE, *Labour Law* (2nd ed., London, 1973) section 531.

[42] S. 34(2) provided also that *part only* of the collective agreement could be covered by such an express provision.

[43] See, for example, O. KAHN-FREUND, *Labour and the Law, op. cit.*, p. 127, citing *Scammell v. Ouston* [1941] AC 251.

By virtue of s. 36, where there existed a collective agreement which was "a legally enforceable contract", it was made an unfair industrial practice (UIP) to break the agreement. It was also made a UIP not to take all such steps as were reasonably practicable to prevent any person acting on one's behalf from taking action contrary to an undertaking which one had given and which was contained in the collective agreement. Furthermore, in the case of an organisation, it was made a UIP not to prevent members of the organisation from taking any such action, or, where action had already been taken, not to secure that the action was not continued and that further such action did not occur. If, therefore, the collective agreement was *not* "a legally enforceable contract", no UIP could be committed. Although the 1971 Act legislated away the effect of the *Ford* decision in respect of the "intention to create legal relations" between parties to a collective agreement, it did no more.

It is possible, therefore, to summarise the situation under the Industrial Relations Act 1971 as follows: In order to create a collective agreement under the statutory provisions, it was necessary to have: (1) the proper parties; (2) the correct form (an agreement or arrangement); (3) the necessary validity (for the time being in force); and (4) the specified subject matter. Where such a collective agreement existed and it was made in writing, there was a conclusive presumption (in the absence of provision to the contrary) that the parties to that agreement intended it to have effect as a legally enforceable contract. This, however, did not necessarily mean that such an agreement *was* a contract, since there remained the possibility that this status could be denied because of a failure to comply with one of the other Common Law requirements for the formation of contracts (*eg* not sufficiently certain; lack of consideration, *etc*).

Where a collective agreement *did* constitute a legally enforceable contract, the Act provided for special sanctions in the case of breach — making such a breach a UIP, which could lead to an action before the courts and an award of damages. In addition, sanctions were provided for in the event of failure to take reasonable steps for the prevention of certain specified secondary actions.

Thus, during the currency of the Industrial Relations Act 1971 there were five possibilities:

(1) a collective agreement which satisfied all the statutory requirements, was a contract at Common Law, was in writing, and was therefore backed up by sanctions in accordance with the rules laid down by the Act;

(2) a collective agreement which satisfied all the statutory requirements, but was not in writing, and which, therefore, did not have the statutory presumption of taking effect as a legally enforceable contract. Presumably, this would be dealt with in a similar way to the agreement in the *Ford* case;

(3) a collective agreement which satisfied all the statutory requirements, was in writing, but which was expressly stated as being intended not to be legally enforceable. This would not constitute an enforceable contract at Common Law, and was therefore not amenable to legal treatment in the courts:

(4) a collective agreement which satisfied all the statutory requirements, but which failed to satisfy the requirements of the Common Law relating to the creation of contracts, thereby taking the agreement out of the sanction system created by the Act and depriving it of legal effect;

(5) an agreement which failed to satisfy one of the statutory requirements for the creation of a collective agreement, and which, therefore, could not be termed a "collective agreement". Such an agreement would be dealt with in accordance with the general rules of the Common Law, and would probably be caught by the decision in the *Ford* case [as with (2) above].

While the Industrial Relations Act was in force, the trade union movement in the United Kingdom adopted a policy of non-co-operation with the Conservative government of the day, and with its industrial legislation. This policy took the form of "non-recognition" by a majority of unions of the newly-created National Industrial Relations Court (NIRC) and a refusal to enter the register of trade unions in accordance with the provisions of the Act — thereby sacrificing a number of statutory immunities against legal liability.

In addition, collective agreements concluded during this period all tended to contain express provisions stating that they were intended by the parties to them not to have effect as legally enforceable contracts. The consequence of this was that the majority of collective agreements fell within the ambit of (3) above, and would not, therefore, have been amenable to legal treatment before the courts, *ie* there would be ample evidence to support a rebuttal of any presumption of legal enforceability[44].

[44] See, for and indication of the consequences arising out of such a rebuttal, the earlier case of *Edwards v. Skyways* [1964] 1 WLR 349.

4.1.3. Since the passing of the Trade Union and Labour Relations Act 1974

The Trade Union and Labour Relations Act 1974 (which repealed the Industrial Relations Act 1971) also made the collective agreement a creature of statute, and contained specific requirements for its formation. However, by comparison with the provisions in the Industrial Relations Act 1971, the definition of "collective agreement" was rather less complicated. That definition has now been set out in the Trade Union and Labour Relations (Consolidation) Act 1992, s. 178.

Once again, there is a requirement that a collective agreement be concluded between the proper parties — this time between, on the employee side, one or more trade unions, and on the employer side, one or more employers or employers' associations. The form required is that of an "agreement or arrangement", and, again, there is no requirement that this be in writing. Finally, there is a new list of items constituting the required subject matter, the scope of which is somewhat narrower than was that under the Industrial Relations Act[45]. The requirement that the agreement or arrangement be "for the time being in force" disappeared — although with what practical significance it is hard to see.

In essence, therefore, if the proper parties make an agreement or an arrangement concerning the specified subject matter, there will exist a "collective agreement" in accordance with the Trade Union and Labour Relations (Consolidation) Act 1992 definition. For such collective agreements, the position in respect of the intention to create legal relations was, once more, altered — this time, with the avowed intention of returning the position to that which prevailed in consequence of the *Ford* decision and before the intervention of the Industrial Relations Act.

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[45] S.178(2) lays down the following list:

(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 as between workers or groups of workers;
(d) matters of discipline;
(e) the membership or non-membership of a trade union on the part of a worker;
(f) facilities for officials of trade unions; and
(g) machinery for negotiation or consultation, and other procedures, relating to any of the foregoing matters, including the recognition of employers or employers associations of the right of a trade union to represent workers in any such negotiation or consultation or in the carrying out of such procedures.

Consequently, any modern collective agreement will be "conclusively presumed not to have been intended by the parties to be a legally enforceable contract" [46] unless it is a written collective agreement which contains a provision stating that the parties intend that it should be a legally enforceable contract. If such a statement of intention to create legal relations is included, then the collective agreement will be conclusively presumed to have been intended by the parties to be a legally enforceable contract.

Once again, it should be noted that the 1992 Act in no way provides that a collective agreement need necessarily be a contract at Common Law, and any party seeking to show the existence of a legally enforceable collective agreement will have to surmount the twin hurdles of the statutory requirements for the existence of a collective agreement and the Common Law requirements for the creation of contracts in general.

It would seem, therefore, that four possibilities are open under the provisions of the 1992 Act:

(1) a collective agreement which satisfies all the statutory requirements, and therefore attracts the presumption of an intention of the parties not to make it legally enforceable. This will not constitute a contract at Common Law, and is therefore not sanctionable through the courts;

(2) a collective agreement which satisfies all the statutory requirements, is in writing, and contains express provision to the effect that it is intended by the parties to it to take effect as a legally enforceable contract. If this agreement also satisfies the requirements of the Common Law respecting the creation of contracts, it will be enforceable through the courts;

(3) a collective agreement as in (2) above, which does not satisfy the requirements of the Common Law in relation to the creation of contracts. This will not be amenable to treatment in the courts;

(4) an agreement which fails to satisfy one of the requirements of the Act and therefore cannot be termed a "collective agreement". This does not attract the statutory presumption of non-legal enforceability, and will be dealt with in accordance with the rules of the Common Law regarding contract formation.

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[46] S. 179(1).

To date, therefore, in United Kingdom law, we have seen an unsuccessful attempt to have the collective agreement treated as a contract enforceable at Common Law (the *Ford* case); a period during which sanctions in the form of damages were available for breach of collective agreements which had been made in the form of legally enforceable contracts; and a return to a situation in which the majority of collective agreements attract the current statutory conclusive presumption that these are intended by the parties to them not to be legally enforceable contracts.

It now seems that there are only two situations where an agreement between a trade union and an employer or an employers' association can be subject to legal treatment in the courts and enforced there with the backing of legal sanctions. The first possibility is that of a collective agreement in writing which is expressed to be intended by the parties to it to take effect as a legally enforceable contract (in accordance with the Trade Union and Labour Relations (Consolidation) Act 1992, s. 179), and which satisfies the requirements of the Common Law for the creation of a contract. The second alternative is particularly interesting, for its occurrence was clearly not envisaged by the legislator, and its recognition could open the way for a new analysis of collective bargains in United Kingdom law. This is an agreement which fails to comply with the requirements set up by the 1992 Act for a "collective agreement" (because of the subject matter with which it deals), which is not caught by the doctrine in the *Ford* case, and which satisfies all the necessary requirements for a Common Law contract.

4.2. A non-statutory collective agreement?

What is primarily under consideration here is an agreement between a trade union and an employer or an employers' association which does not deal with one of the items set out in the Trade Union and Labour Relations (Consolidation) Act 1992, s. 178(2), and which, by reason of this, does not come within the statutory definition of "collective agreement".

If one starts from the basic assumption that *any* agreement on *any* matter between a trade union and an employer or an employers' association should be regarded as a collective agreement, the present definition in the United Kingdom legislation places a substantial degree of limitation on the scope of the collective agreement. It should be stressed at once that the fact of non-compliance with the statutory

formalities does not mean that an agreement will be invalid (void) — the point is that it will not be treated as a "collective agreement" for any statutory purposes. On the other hand, such an agreement may fall to be regulated through some other system of rules. Thus, legal rights which depend upon the existence of a "statutory collective agreement" [47] will not be available, although the same agreement may fall within the scope of the rules relating to contracts at Common Law (subject to the objections based upon the judgment in the *Ford* case). Alternatively, breach of the agreement may be made subject to other sanctions (social or industrial sanctions), *eg* through the instituting of a lock-out, or the calling of a strike. Indeed, it is this latter form of sanction which is generally considered to be the norm in the United Kingdom system of industrial relations.

How, then, is such an agreement to be dealt with? Three possible solutions may be canvassed:

(1) the agreement should be treated *eiusdem generis* with statutory collective agreements, and therefore subjected to the same system of rules as would be a statutory collective agreement;

(2) such an agreement should not be treated in accordance with the statutory regulatory system, but should be dealt with under the rules of the Common Law relating to contracts in general. This comes back to the question of whether a collective bargain which is not a statutory collective agreement can be regarded as a "contract" at all, and, as such, amenable to regulation under the Common Law rules;

(3) such an agreement is not amenable to any *legal* system of rules. However, disagreement about, or breach of, it will give rise to consequences flowing from a non-legal regulatory system, *eg* through the imposition of social sanctions, the taking of industrial action, or, perhaps, the expression of "moral disapproval" through media criticism, *etc*.

Having regard to the first option, there seems no proper basis for saying that collective agreement regulation by statute should be extended to cover agreements which do not conform with the statutory definition. Indeed, such non-conformity might equally well raise an argument to the contrary, *ie* that the very fact of falling outside the

[47] See, for example, Patents Act 1977, s. 40, certain provisions in which depend upon the existence of "a relevant collective agreement" defined by reference to the Trade Union and Labour Relations (Consolidation) Act 1992, s. 178.

statutory definition should necessarily give rise to non-statutory consequences. It would seem therefore, that the effective choice lies between the latter alternatives.

It has already been mentioned that the only case dealing directly with the contractual status of the collective agreement prior to legislative intervention was that of *Ford v. AEF*[48]. As regards other analyses of this issue, probably the most authoritative treatment remains that provided by the Donovan Commission[49]. That Report stated[50]:

> "In this country, collective agreements are not legally binding contracts. This is not because the law says that they are not contracts or that the parties to them may not give them the force of contracts. There is in fact nothing in the law to prevent employers or their associations and trade unions from giving legal force to their agreements. ... The fact is that nothing of this nature normally happens. That is does not happen is not as we have already said due to the law. 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" [51]

The Report then continued:

> "This lack of intention to make legally binding collective agreements or better perhaps this intention and policy that collective bargaining and collective agreements should remain outside the law, is one of the characteristic features of our system of industrial relations which distinguishes it from other comparable systems. It is deeply rooted in its structure. As we point out in Chapter III, collective bargaining is not in this country a series of easily distinguishable transactions comparable to the making of a number of contracts by two commercial firms. It is in fact a continuous process in which differences concerning the interpretation of an agreement merge imperceptibly into differences concerning claims to change its effect. Moreover even at industry level, a great deal of collective bargaining takes place through standing bodies, such as JICs and national or regional negotiating boards, and the agreement appears as a "resolution" or "decision" of that body variable at will, and variable in particular in light of such difficulties of interpretation as may arise. Such "bargaining" does not fit into the categories of the law of contract."

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[48] [1969] 2 QB 303.
[49] Cmnd 3623.
[50] *Ibid.,* ch VIII, para 470.
[51] *Ibid.,* para 47l.

It was asserted that [52]:

> "…It is a generally admitted fact that even procedure agreements are not contracts and this again for the reason that the parties to them do not intend to create legal obligations. This lack of intent is manifest from the style in which the agreements are expressed. To make them enforceable would in the first place require their redrafting, a task which could only be undertaken by or with the assistance of professional lawyers. And with procedure agreements, as with substantive agreements, the choice of the parties not to be legally bound is far from being arbitrary."

The Report then attempted to show reasons why the procedure agreements for the engineering and building industries showed "good reasons why the parties never intended these procedure agreements to operate as legal peace clauses". The conclusion reached was that [53]:

> "If therefore our existing collective agreements, or if our existing procedure agreements were to be made into legal contracts this would have to be done by a statute attaching the force of law to the terms of a bargain contrary to the wishes of the parties. This would be an unprecedented step and a step wholly at variance with the principles of the common law which apply to the law of contract. Since the law of contract exists to give effect to the wishes of the parties, some strong justification must be sought at the outset for a law designed to set those wishes aside and to impose on the parties a relationship which they do not desire. This measure would be tantamount to a new departure in the law of contract, and also to a breach with a long tradition of our industrial relations…"

Unfortunately, at no point in its Report did the Donovan Commission outline the analysis upon which it reached the conclusion that "in this country collective agreements are not legally binding contracts" [54]. All they say is that the parties "do not intend to make a legally binding contract and without both parties intending to be legally bound there can be no contract in a legal sense" — a statement which may be open to challenge, since it assumes, without qualifica-

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[52] *Ibid.,* para 473.

[53] *Ibid.,* para 474.

[54] The only basis for this appears to be what Professor Kahn-Freund has described as "the general view of all those who had given evidence" (see *Labour and the Law* (2nd ed.) p. 127, with references to the evidence of the Ministry of Labour, the TUC, and the CBI (footnotes 27-29)). It may be suggested that the notion of "the general view" of parties to a dispute proving decisive in relation to a question of law might come as something of a novelty to members of the judiciary sitting in such cases.

tion, the requirement in United Kingdom law of a clear intention to create legal relations [55].

It is clear, as Lord Stowell has stated, that contracts "must not be the sport of an idle hour, mere matters of pleasantry and badinage, never intended by the parties to have any serious effect whatever" [56]. This has led to a body of opinion which maintains that one of the elements required to show a contract in English law is "the intention of the parties to create legal relations" [57]. The problem raised by this is that: "…the very presence of consideration normally implies the existence of such an intention. ... To make a bargain is to assume liability and to invite the sanction of the courts" [58]. As outlined above, the development of this doctrine has led to the division of contracts into *(a)* "domestic and social agreements" [59] and *(b)* "commercial, *etc* agreements" [60].

Even if one accepts this classification, however, the decision in *Ford v. AEF* must be regarded as falling outside the normal framework, for, at first sight, collective agreements fall into the category of commercial agreements and one might expect them to be legally binding [61].

The Donovan Commission also questioned whether the collective agreement can be a contract at law, in the light of the assertion that it is often not certain enough to enforce as such. It was said that [62]:

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[55] See, for example, WILLISTON, *Contracts* (3rd ed), section 21; HANSON, "The Reform of Consideration", (1938) 54 LQR 233; UNGER, "Intent to Create Legal Relations, Mutuality and Consideration", (1956) 19 MLR 96; and HEPPLE *(supra)* in (1970) 28 CLJ 122. Cf. CHLOROS, "Comparative Aspects of the Intention to Create Legal Relations in Contract", (1958) 32 *Tulane Law Review* 107. The situation has recently been settled for modern purposes by the Court of Appeal decision in *Monterosso Shipping Co Ltd v. ITWF* [1982] ICR 675, where Lord Denning MR, in the course of holding that the operation of (what was then) Trade Union and Labour Relations Act 1974, s. 18 presumption served to deprive a collective agreement of the status "contract", stated that, "The essence of a contract — as distinct from a mere agreement — is that a contract is legally enforceable: whereas a mere agreement is not."

[56] *Dalrymple v. Dalrymple* (1811) 2 Hag Con 54, at 105.

[57] See, for example, POLLOCK, *Principles of Contract* (13th ed), p. 3; and the *Law Revision Committee Sixth Interim Report* p. 15.

[58] CHESHIRE & FIFOOT, *Law of Contract* (9th ed), p. 103.

[59] See, *inter alia*, *Pearce v. Merriman* [1904] 1 KB 80; *Balfour v. Balfour* [1919] 2 KB 571; *Simpkins v. Pays* [1955] 1 WLR 975; and *Jones v. Padavatton* [1969] 1 WLR 328.

[60] See, *inter alia*, *Heilbut Symonds v. Buckleton* [1913] AC 30; *Rose & Frank v. Crompton* [1923] 2 KB 261*; Jones v. Vernons Pools* [1938] 2 All ER 626; *NCB v. Galley* [1958] 1 WLR 16; and *Edwards v. Skyways* [1964]1 WLR 349. In addition, of course, there is the *Ford* case itself.

[61] CHESHIRE & FIFOOT, *op. cit.*, p. 111.

[62] Cmnd 3623, para 472.

> "…collective bargaining takes place at a number of levels simultaneously and in so far as it takes place at workshop or plant level it is fragmented and it is informal. That it is fragmented means from a legal point of view that it is difficult and perhaps often impossible to identify the "party" who made it on the workers' side, and that it is informal means that it would sometimes and probably very often be impossible for a court to receive evidence enabling it to ascertain the content of the "agreement" in a way required for its legal enforcement. In fact most of these "agreements" would probably, in the legal sense, be "void for uncertainty". Industry-wide bargaining and workshop or plant bargaining are, however, closely intertwined. To enforce one without the other would be to distort the effect of our collective bargaining system. That system is today a patchwork of formal agreements, informal agreements, and "custom and practice". No court asked to "enforce" a collective agreement could disentangle the "agreement" from the inarticulate practices which are its background."

Once more, however, there was no background analysis as to why these agreements should be "void for uncertainty". Indeed, it is submitted that, particularly where the agreement is in writing, there is some difficulty in maintaining this point of view[63].

It may be seen, therefore, that the bold assertion that the collective agreement in the United Kingdom is not a contract at Common Law and that the parties to it do not intend to make it a legally binding bargain is by no means as obvious a conclusion as has sometimes been maintained. Nevertheless, it has to be accepted that, nowadays, the cards are stacked heavily against successfully arguing that the non-statutory collective agreement is amenable to regulation in accordance with the rules of the Common Law.

If, therefore, one concludes that the non-statutory collective agreement does not lend itself to regulation by legal rules, it would seem that resort must be had to the final option. Consequently, where such a bargain falls outside the statutory framework of the Trade Union and Labour Relations (Consolidation) Act 1992, so that the parties to it cannot be subjected to legal sanctions in the event of breach, either compliance is encouraged through non-legal means, or there is no method of enforcing compliance with such agreements at all.

The generally accepted view seems to be that the "binding quality" of these agreements is achieved through extra-legal forms of

[63] The agreement in the *Ford* case, for example, was very clearly set out, and showed evidence of having been drafted by lawyers.

regulation or encouragement, *eg* industrial action, or the threat thereof. Thus, it may indeed be, as Professor Kahn-Freund has suggested, that the status of the collective agreement is not the important thing: "The question ... is not whether collective agreements are "binding" — of course they are and many say so in explicit terms — but whether the application of legal sanctions, damages, injunctions, *etc* is an expedient technique to give effect to this binding force" [64].

5. THE COLLECTIVE AGREEMENT AS A SOURCE OF TERMS FOR OTHER LEGAL INSTRUMENTS

Whatever the status of the collective agreement in the United Kingdom as regards the parties to its making, mention must also be made of the regulatory role of this agreement through incorporation of its terms into other legal instruments: most importantly, the individual contract of employment.

Although, as has already been mentioned, United Kingdom law knows nothing of notions such as "normative effect", it is, nevertheless, well accepted that provisions contained in collective agreements may find their way into the individual contracts of employment of workers by reason of express or implied "incorporation", according to Common Law contracting principles developed over many years [65].

The possibility that the collective agreement may constitute a source of terms for individual contracts between employers and their employees is indirectly recognised by statute in the United Kingdom. Thus, for example, Part I of the Employment Rights Act 1996 provides for a duty on the parts of employers to make available certain

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[64] *Labour and the Law (supra),* p. 128. Since the time of Kahn-Freund's writing, the issue of "legally enforceable" collective agreements in the United Kingdom was briefly re-awakened by Chapter 8 of a government Green Paper, published in July 1991 — *Industrial Relations in the 1990s: Proposals for further reform of industrial relations and trade union law* (Cm 1602) — although no measures directly concerning this point have since emerged. Since that time, there has been no serious proposal put forward to alter the well-established position set out above.

[65] The possibility of express incorporation is clearly illustrated in case-law, including the oft-cited Court of Appeal case of *National Coal Board v. Galley*, [1958] 1 WLR 16. Implied incorporation can be achieved in a variety of ways, as illustrated *inter alia* by the Court of Appeal case of *Sagar v. Ridehalgh,* [1931] 1 ch 310, and along the lines described in the old Industrial Tribunal case of *Joel v. Cammell Laird (Ship Repairers),* [1969] ITR 206, which, despite being a first instance decision, contains a particularly helpful statement of the basic principles which are to be observed in this context.

kinds of information to their employees — a provision reflecting the European-level requirements flowing from Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship. This duty may be fulfilled in various ways, and the statute specifically makes mention in s. 2(2) of the possibility that a statement provided by an employer in pursuance of this duty "may, for all or any of the particulars to be given by the statement, refer the employee to some document which is reasonably accessible to the employee". It is generally accepted that "some document" in this context may well include the terms of a collective agreement displayed in a suitably prominent manner and place [66].

There is, of course, something rather strange in the notion that valid legal effects may flow (*eg* in the context of an individual contract of employment) from a source which, of itself, is not of a legally enforceable kind (*eg* where the collective agreement is caught by the Trade Union and Labour Relations (Consolidation) Act 1992, s.179). However, this does not, to date, appear to have raised many judicial or academic eyebrows, since the doctrine of incorporation by means of which the term finds its way into the individual contract is regarded as resting essentially upon a fresh act of contractual volition by the parties to the individual contract. Nevertheless, the issue of "reviving" an unenforceable term has not been one upon which the courts have had to rule directly, although there seems, in principle, no reason why the parties at the individual level should not freely give effect to such a term as between themselves [67]. This role of the collective

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[66] Significantly, too, s. 2(3) makes explicit provision, in a narrow context, for the employer to make reference to "the provisions of any collective agreement directly affecting the terms and conditions of the employment which is reasonably accessible to the employee".

[67] It may also be observed, in passing, that the issue has been addressed in the case of *Monet v. Forward Trust Group Ltd* [1986] IRLR 43, the strange decision of Popplewell J in which was reversed by the Court of Appeal, [1986] IRLR 369. In the course of his judgment, LAWTON L. J. made reference to the earlier Court of Appeal decision in *Robertson v. British Gas Corpn* [1983] IRLR 302, in which KERR L. J. had stated (at 305) that: "It is true that collective agreements such as those in the present case create no legally enforceable obligation between the trade union and the employers. Either side can withdraw. But their terms are in this case incorporated into the individual contracts of employment, and it is only if and when those terms are varied collectively by agreement that the individual contracts of employment will also be varied. If the collective scheme is not varied by agreement, but by some unilateral abrogation or withdrawal or variation to which the other side does not agree, then it seems to me that the individual contracts of employment remain unaffected. This is another way of saying that the terms of the individual contracts are in part to be found in the agreed collective agreements as they exist from time to time, and, if these cease to exist as collective agreements,

agreement in the United Kingdom as a source of terms for other legal instruments thus stems essentially from principles of private law contracting.

6. SUMMARY AND IMPLICATIONS OF THE UNITED KINGDOM SITUATION

A few short comments may be made in summary. Perhaps most importantly, it has emerged that the United Kingdom legal system has not adopted, and does not appear to be disposed to adopting, any theoretical framework for the classification or functioning of collective agreements. This is in sharp contrast to many of the major Continental European legal systems, many of which developed sophisticated theoretical analyses during the early years of the twentieth century.

Where the legal system does touch the operation of the collective agreement, it is to isolate that phenomenon from the rules relating to contracts at large, and, indeed, in the most common case, to deprive the instrument of any status as a contract at law at all. This has been done, primarily, through use of the doctrine of "the intention to create legal relations", in a manner which is open to question but with results which have, nevertheless, now become the orthodox view on the matter of status for the collective agreement.

Nevertheless, this refusal by the legal system to categorise the normal collective agreement in the United Kingdom as a contract at law, and the general attitude of "abstention" which the law has been said to adopt in the field of industrial relations, may be highly misleading. In fact, the collective agreement is still a significant instrument for the determination of pay and other terms and conditions of work for a good proportion of the workforce in the United Kingdom. Collective agreements are being negotiated and applied every day, in many different circumstances throughout the land. Furthermore, those agreements which have been reached are generally respected, both by the parties to them and by those whose individual circumstances are intended to be regulated by them.

It is this stark contrast between the theoretical legal analysis and the practical operation of the collective agreement in the United

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then the terms, unless expressly varied between the individual and the employer, will remain as they were by reference to the last agreed collective agreement incorporated into the individual contracts."

Kingdom which highlights the dilemma facing a commentator in this particular national context. In the guise of strict legal analyst, one is led to the inescapable conclusion that the collective agreement in the United Kingdom is treated outside the normal framework of Common Law contracts, it does not operate in any sense as a "public law" instrument, and, indeed, it will normally not even qualify as a classical legal instrument at all. Yet, even on the basis of the brief outline offered here, it must be equally evident that the collective agreement has developed a highly effective and functionally important role within the United Kingdom industrial relations system. Indeed, the contrast serves to highlight the tension which is so often witnessed between the views of the lawyer and those of the industrial relations commentator when assessing the industrial relations system in the United Kingdom.

A number of observations follow from this paradoxical situation, some of which have major implications for the role of the United Kingdom collective agreement in a modern era of "social dialogue" within the framework of developments at the level of the European Union.

The first, and perhaps most immediately problematic, observation is that, in an era when the social policy regulatory mechanisms of the European Union are looking to afford opportunities to the social partners to develop and to implement legislation through collective agreements [68] , the United Kingdom possesses no suitable facility with which to achieve such an objective. In particular, the requirement for an instrument capable of delivering *erga omnes* effects is completely lacking, while none of the qualities of the current United Kingdom "collective agreement" under the Common Law would appear to be suited to the "public law instrument" needs of such an implementing vehicle.

Indeed, in the light of the trends highlighted earlier in this report, the very quality of "representativeness" of the United Kingdom parties to collective bargaining would, at the beginning of the twenty-first century, seem to be in question — particularly given the extent of trade union membership and presence as an indicator of participatory democracy on the employee side. The results of the most recent

[68] See, *inter alia*, NIKLAS BRUUN, *The Autonomy of Collective Agreement*, General Report presented to the VIIth E6uropean Regional Congress of the International Society for Labour Law and Social Security (Stockholm, September 2002), and ALAN C. NEAL, "We Love You Social Dialogue — But Who Exactly Are You?", in FONDAZIONE GIULIO PASTORE, *La contrattazione collettiva europea: Profili giuridici ed economici* (Rome, 2000), p. 113.

(1998) *Workplace Employee Relations Survey* hold little that could be interpreted as optimistic for the future health and robustness of "classical" collective bargaining in the United Kingdom. This, too, places a significant question-mark over the appropriateness of collective bargaining and the collective agreement for implementing social policy regulation — whether of a domestic kind or emanating from the level of the European Union.

Furthermore, many of the familiar features of a collective agreement "system" — such as fixed periods of validity for agreements, "peace obligations" operative during the validity of an agreement, and public or private mechanisms for dispute resolution in the course of administering the agreement — are simply not to be found in the United Kingdom context. This makes it particularly difficult to consider the prospects for adapting or opening up channels by which "collective agreements" might come to play a more significant role in the regulation of relations between workers and management in "the home of collective bargaining". Indeed, even the terminology utilised in this context can be misleading when translated directly into the framework of United Kingdom practice, without full regard to the "unique" character of that country's arrangements[69].

To what extent this state of affairs will prove to be a handicap in terms of future labour market regulation remains to be seen. What is clear, however, is that for a "model system" in relation to the phenomenon of the collective agreement, one needs to look elsewhere than to the United Kingdom.

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[69] See the discussion in ALAN C. NEAL, "We Love You Social Dialogue — But Who Exactly Are You?", *op. cit.*

Chapter 9

COLLECTIVE BARGAINING IN SWEDEN

Per Norberg [1] *and Ann Numhauser-Henning* [2], Lund

1. INTRODUCTION

This essay describes collective bargaining in Sweden. We focus on issues frequently addressed by means of collective bargaining and omit other parts of the labour law where official authorities play a more prominent role, for instance issues concerning the working environment.

The second section concerns Swedish industrial relations and the legal framework enclosing it. The third section deals with different forms of collective bargaining. Here we divide Swedish collective bargaining into four categories, each defined by the ultimate effect resulting from a failure to come to an agreement.

The fourth section concerns conflicts between Swedish collective bargaining and competition law. The wide area of allowed trade union activity and collective agreements reaching into the heart of managerial prerogatives give rise to potential conflicts with legislation regulating other issues.

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Lastly we make some concluding remarks and discuss them in section 5.

2. THE LEGAL FRAMEWORK AND INDUSTRIAL-RELATIONS BACKGROUND TO COLLECTIVE BARGAINING IN SWEDEN

This section gives a picture of the industrial relations background and the legal framework to collective bargaining in Sweden [3]. Section 2.1 describes the Swedish trade unions and their employer counterparts. The next section (2.2) concerns formal legal limitations to collective bargaining and other forms of trade union activity. There are minimal formal constraints on trade union activity.

Section 2.3 deals with collective agreements and their effects. Sweden lacks a system for *erga omnes* effects of collective agreements, but there are other principles of law which promotes the norms of central collective agreements reaching beyond its signatories and their members. Lastly section 2.4 deals with the administration of collective agreements.

2.1. Trade unions and employer organisations

The Swedish labour market is heavily organised. Virtually all sectors of society are unionised. The differences of unionisation rates between men and women, public employees and private employees, small companies and large companies, full-time workers, part-time workers and fixed-time workers are small, as is the difference of the unionisation rate between white-collar workers and blue-collar workers. The overall unionisation rate has been estimated at 80 % at the end of 1999, which is 5 % less than six years previously [4].

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[3] For a more comprehensive description of earlier developments, see for instance NUMHAUSER-HENNING, ANN, 'El modelo Sueco', y la Concertación Social, in OJEDA AVILÉS (ed.), *La Concertación Social tras la crisis*, Editorial Ariel 1990, 'El modelo Sueco' — Está cambiando?, in *Sociología del Trabajo* 14, Invierno 1991/92, Madrid 1992 and Las negociaciones colectivas y la flexibilización del derecho laboral, in OJEDA AVILÉS and HERMIDA URIARTE (eds.), *La negociación colectiva en América Latina*, Instituto Europea de Relaciones Industriales, Madrid 1993.

[4] KJELLBERG, ANDERS, *Fackliga organisationer och medlemmar i dagens Sverige* (Trade Unions and Members in Sweden of Today), second edition, Arkiv förlag, Lund 2001, p. 27.

The organisation level varies according to the age of the worker and the branch of industry. A problem for trade unionism in the future might be that young workers are less likely to belong to a trade union than older workers and that the workers of the new information technology seem to be the least interested in trade unionism. Only 39 % of the IT-workers under 30 years of age, working in one of the major cities, are members of a trade union. But the IT-sector is a special case and shows increasing rates of unionisation [5].

One other indicator pointing towards the trade unions loosing some of their dominance is the increasing numbers of persons joining the unemployment insurance funds directly (as opposed to joining them automatically through membership of a trade union) [6]. The average level of non-union members in the employment insurance system has risen to 10 % as compared to 6 % in 1993 [7].

The Swedish blue-collar workers are organised by trade unions affiliated to LO (*Landsorganisationen*, The Swedish Trade Union Confederation). With 2 million members it organises half of the Swedish workforce [8]. LO consist of affiliated unions organised mainly as nationwide industrial unions.

The two main central organisations of white-collar trade unions are TCO (*Tjänstemännens centralorganisation*, Swedish Confederation of Professional Employees) with 1.3 million members [9] and SACO *(Sveriges akademikers centralorganisation*, Swedish Confederation of Professional Associations) with 0.5 million members [10]. They were founded in the 1940s, have grown rapidly and have now reached the same level of union density as LO, about 80 %.

The SACO affiliates are mostly professional unions, i.e. organising everyone working in a certain profession, and 65 % of its

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[5] *Op. cit.,* pp. 315f.

[6] The trade unions operate the unemployment funds even though the state pays most of the costs involved. You can belong to an unemployment fund without belonging to the union, but it is socially not entirely accepted to do so.

[7] KJELLBERG, ANDERS, *Fackliga organisationer och medlemmar i dagens Sverige* (Trade Unions and Members in Sweden of Today), second edition, Arkiv förlag, Lund 2001, p. 108.

[8] The membership figure for 1999 was 2.066.455 members. Http://www.lo.se/demokratikongressen/ protokoll/ekonomi/ index.htm (2002.09.13).

[9] The membership figure for 2001 is 1.260.393, according to an internal information paper published on the Internet. Http://www.tco.netg.se/frameset.php (2002.09.13).

[10] The membership figure today is 514.000 according to their homepage. Http://www.saco.se/templates /saco/classroom/general.asp?id=2293&fromtopframe=1 (2002.09.13).

members work in the public sector. A university degree is often required for membership [11]. Many of TCO's affiliates are organised as nationwide industrial unions. The white-collar unions organising professional groups have formed negotiation cartels based on the industrial principle. They are designed to correspond to the employer organisations, and thus make central collective agreements on an industry-wide scale possible.

Both white-collar and blue-collar unions have several local branches and are active in most workplaces. These unions dominate their respective fields of activity. There is no union based on religion in Sweden. Swedish society has traditionally been homogenous and Protestant, so there has been no need for several forms of unionism from this aspect.

There are only two important unions operating outside the central organisations. One organises pilots and the other organises work-unit leaders. They have become important in their respective fields because they do not compete with any strong union affiliated to a large federation.

Firms belonging to employer organisations cover 77 % of all private sector employees [12]. This high figure may have a lot to do with the fact that Sweden has many large companies in relation to the size of its workforce and large companies are more likely to be members of employer organisations. Almost all of them have collective agreements. Furthermore, some non-organised employers have signed an individual collective agreement or substitute agreements (see section 3.1.1) with a trade union. This makes collective agreements reach 90 % of the private sector workers [13]. All public employers are 'organised' and have collective agreements.

The leading organisation on the employer side is the Confederation of Swedish Enterprise (*Svenskt näringsliv*). It was formed in 2001 when the Swedish Federation of Employers (*Svenska arbetsgivareföreningen SAF*) merged with another large industrial organisation. The state has an organisation The Swedish Agency for Government Employers (*Arbetsgivarverket*) designed to function as its

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[11] FAHLBECK, REINHOLD, *Nothing Succeeds Like Success*, Juristförlaget i Lund, Lund 1999, p. 16.

[12] KJELLBERG, ANDERS, *Arbetsgivarstrategier under hundra år* (Employer Strategies during 100 years), in STRØBY JENSEN, CARSTEN (ed.), *Arbejdsgivere i Norden* (Nordic Employers), Nord 2000:25, Copenhagen 2000, p. 206. The figure refers to the year 1995.

[13] *Op. cit.,* p. 211.

employer agent. The local and regional authorities each have a central organisation, which for example handles collective bargaining on their behalf. They are the Swedish Association of Local Authorities (*Kommunförbundet)* and The Swedish Federation of County Councils (*Landstingsförbundet*).

The high unionisation rate and the presence of dominant unions facing no or only insignificant competition, as workers' representatives create some necessary prerequisites for an industrial-relations system with Swedish characteristics. Simultaneously, the statutory laws regulating the Swedish labour-relations system create effects which clearly favour the status quo and thus the established organisations.

2.2. Definitions of trade unions and collective agreements

The concept of a trade union is not defined by any law in Sweden. The Courts apply general principles of civil law as regards the formation of organisations for a defined non-economic purpose. The formal requirements are thus low, they include elected officials that can represent the trade union and a charter, which must include normal trade union activity; there are for example no mandatory rules on registration.

The concept of a collective agreement is also purely formal and with no mandatory rules on registration. Section 23 of the Co-Determination Act (1976:580) defines a collective agreement as a written agreement between an employer or an employer's organisation and a trade union, which regulates working conditions or other aspects of the relation between employers and workers. These formal requirements are so low that it is possible to conclude collective agreements even unintentionally [14].

Since there is no official definition of a trade union, there can be no law regulating its field of activity. Instead, trade unions follow the general principles of law that apply to all voluntary organisations with a non-economic purpose, like political organisations, religious organisations or sporting organisations. In Sweden we call them 'idealistic' organisations. These principles have not been codified and the trade unions' insistence on keeping the state out of their internal affairs, are one important reason for this state of affairs [15].

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[14] See Labour Court case AD 1990 No. 67.

[15] Hemström, Carl, *Organisationernas rättsliga ställning* (The Judicial Status of Organisations), sixth edition, Norstedts juridik, Stockholm 2000, p. 32.

Any idealistic organisation defines its field of activity itself. A member may file a lawsuit in a District Court if the Board or the Convent makes a decision, which it is not entitled to do under the organisation charter. But the judicial review is only concerned with whether or not the decision of the organisation is formally legal. A trade union having a charter that includes vague concepts, for instance 'activities concerning workers' interest in general', can do pretty much what it wants.

The Supreme Court has tried a famous case involving The Electricians' Union, which had taken a collective home insurance policy covering all members [16]. Individual members could opt out of the insurance policy but would not be entitled to refund, because the cost of the insurance was not separable from the membership fee. Some members of the trade union wanted the decision to take the collective home insurance policy declared null and void, since it was outside the trade union's field of activity according to its own charter. It was clear that the charter did not expressly mention home insurance policies.

The District Court and the Court of Appeal declared the trade union's decision on the collective insurance policy void. But the Supreme Court reversed the outcome upholding the collective home insurance policy. It declared that a decision by an idealistic organisation must be manifestly alien to the purpose of the organisation if it is to be declared void. This ruling still stands and gives the trade unions scope to manoeuvre. There is a strong presumtion that whatever they do, though it might be inappropriate, it is nevertheless not manifestly alien to the purposes written into their charters.

2.3. Collective agreements and their effects

Collective agreements are binding only to the signatories, on the employee side, a trade union and on the employer side, an employer organisation or an individual employer. It is not possible to extend the binding effect of collective agreements through interference by state authorities declaring them generally binding, i.e. there is no *erga omnes* effect in Swedish law.

Though collective agreements cannot bind third parties they nevertheless often have a strong influence on them, 'a normative effect'. Since they are so all encompassing, an industry-wide collective agree-

[16] NJA 1987 p. 394.

ment can describe general principles of that particular branch of industry. Workers and employers outside the collective agreement are free to make individual contracts to the contrary, but if a clause is ambiguous or if an issue is unregulated by the individual contract, the collective agreement might be used for interpretation and to supplement the gaps of the individual agreement.

Moreover, legally, a non-union employee and an employer bound by a collective agreement are thus free to conclude individual contracts. However, if the employer, in doing so, fails to meet the conditions stated in the collective agreement, he or she is in breach of the collective agreement and may thus have to pay damages to the contracting trade union. The employer has a contractual obligation towards the trade union to apply the terms of the collective agreement also to non-union members, unless the collective agreement has explicit provisions to the contrary [17].

Collective agreements are binding in a hierarchical structure. A central collective agreement takes precedence over a local collective agreement and any collective agreement is binding upon the members of the organisations bound by it. This is regulated in Sections 26 and 27 of the Co-Determination Act (1976:580), and it is based on a strict principle of mutuality. Any legally binding effect on the worker side has its counterpart on the employer side.

Suppose there is a central agreement stipulating a maximum wage increase of 100 ? and a local collective agreement increasing the wage by 120 ?, and an individual contract increasing the wage by 150 ?. A Swedish employer can give a worker, who is a union member, a wage increase of 100 ?. Both the local agreement and the individual contract are void in the parts which come into conflict with the central collective agreement.

Swedish statutory law supports bargaining centralisation by giving central agreement precedence over local agreements. The most important nationwide central collective agreements are those entered into at industry-level [18]. They generally cover minimum

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[17] This was first stated in Labour Court case AD 1932 No. 95, which concerned whether or not the collectively agreed pay level was applicable to workers not attached to the trade union. The case still stands. Note that it is the trade union that owns the right to ask for the collective agreement to be fulfilled. They can ask for it to be applied to non-members in order to fight social dumping, but they can also choose to see the collectively agreed pay level as a membership benefit not to be given to outsiders.

[18] Malmberg, Jonas, The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions, in *Scandinavian Studies in Law*, Volume 43 (2002) p. 194.

wages, a minimum wage increase for each year, basic working conditions and insurance protection. Nowadays there are almost no provisions stipulating maximum wages or maximum wage increases. However, wages that were binding both ways were once common [19]. Central collective agreements are complemented by local collective agreements on enterprise level. There is no area exclusively reserved for the central agreements. Large parts of the annual wage increase are distributed among the individual workers in negotiations at local level.

Collective agreements on the central federative level are nowadays of little importance in Sweden [20], but central collective agreements binding several organisations at the industry level do exist. In the spring of 1997, twelve employer organisations representing different industries and eight trade unions belonging to all of the three major federations signed the *Industry Agreement* [21]. This collective agreement calls for co-ordinated bargaining in key branches of private industry on a scale never before witnessed in Sweden [22].

One interesting aspect of the Industry Agreement is that it brings together white-collar workers and blue-collar workers under the same collective agreement. This also applies to another central collective agreement, the *General Agreement on Employment Conditions* in the forestry industry. It concerns all employees in this industry. Apart from the employer branch organisation, it is signed by four trade unions, one representing each of the three major federations and the fourth being the independent union of work-unit leaders.

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[19] In the 1950s and 1960s Sweden had one of the most centralised pay bargaining systems in the world. There were two different types of pay tariffs. Minimum tariffs allowed for higher pay levels in the individual contract. The other tariff was called *normal (sic)* tariff. A normal tariff was binding both ways.

[20] One exception is the Agreement on Efficiency and Participation of 1982 (*Utvecklingsavtalet*). This collective agreement was concluded between LO and a cartel of trade unions representing white-collar workers in the private sector on the worker side, and the federative organisation representing private employers on the employer side.

[21] NYSTRÖM, BIRGITTA, *Regleringsformens och aktörernas ställning vid normeringen av framtidens svenska arbetsmarknad* (Actors and Forms of Regulations for the Future Swedish Labour Market), in *Normativa perspektiv — Festskrift till Anna Christensen* (Normative Perspectives — A Tribute to Anna Christensen), Juristförlaget i Lund, Lund 2000, p. 311. See also ELVANDER, NILS, *Industriavtalet och Saltsjöbadsavtalet — en jämförelse* (The Industry Agreement and the Saltsjöbaden Agreement — A Comparison) in *Arbetsmarknad & Arbetsliv*, Volume 8 (2002) pp. 191-204.

[22] FAHLBECK, REINHOLD, Industrial Relations and Collective Labour Law, in *Scandinavian Studies in Law*, Volume 43 (2002) p. 121.

The duration of the collective agreement is for the parties to decide — 2-3 years being a normal time span. The validity of a collective agreement can be subject to anything the parties agree on. The presence of a period of notice of termination is also a matter strictly for the parties. Statutory law which differentiates between trade unions with a collective agreement and trade unions without collective agreement always regards transitional periods when a mutual collective agreement is not in force, as if the parties were still bound by such an agreement.

An official Mediation Authority has balanced the relative freedom of contract since 2000. It has the authority to postpone industrial action and to call the parties to compulsory mediation. The parties can avoid its jurisdiction by creating collective agreements that meet certain material and formal criteria, the *Industry Agreement* presented above being one example (see further section 3.1.3).

Collective agreements on co-determination, on what have historically been managerial prerogatives, are given special legislative treatment in order to promote such agreements. Collective agreements on such co-determination cover the whole labour market [23]. If a trade union demands co-determination as one of the conditions for signing a collective agreement on wages and working conditions, and a collective agreement is subsequently concluded and the issue of co-determination remains unsolved, the trade union retains the right to resort to industrial action on this issue [24]. This so-called 'residual' right of industrial action has not been exercised to any considerable extent though [25].

Trade union influence outside the traditional core of collective bargaining can under some circumstances come into conflict with basic democratic principles. Suppose a local or central government is elected on a promise of substantial tax reductions. Should the public trade unions have the right to use collective bargaining to influence the government abstaining from the tax reductions? Suppose a newspaper decides to give priority to one issue and order its journalists to reduce their work on another. Should such managerial decisions be subject to collective bargaining?

Section 2 of the Co-Determination Act (1976:580) exempts both public and private employers engaging in activities of religious, sci-

[23] Edström, Örjan, Involvement of Employees in Private Enterprises, in *Scandinavian Studies in Law*, Volume 43 (2002) p. 180.

[24] This is stated in Sections 32 and 44 of the Co-Determination Act (1975:580).

[25] Numhauser-Henning, Ann, Labour Law, in Bogdan, Michael (ed), *Swedish Law in the New Millenium*, Nordstedts juridik, Stockholm 2000, p. 352.

entific, artistic or other 'idealistic' nature or employers engaged in activities of co-operative, trade unionism, political or other opinion-related activities. The exemption covers only the goals of the employer's activities and the managerial decisions directly connected to these goals. The two examples mentioned above would no doubt fall under the exemption, but the line is not easily drawn.

In the public sector it is said that the *goals, direction, quality and scope* of the different public sector activities fall within the exemption, but a lot of public decisions are of a mixed character. A decision to raise the teacher-pupil ratio can be described as an education quality issue. However, it is also important to the teachers, as it affects their working conditions and even their employment security. Such mixed decisions often fall outside the exemption and within the Co-Determination Act[26].

There are special collective agreements for the public sector dealing with the conflict between co-determination and political democracy. The most important collective agreement creates a special board called the Political Board, to deal with these issues. Its first decision came in 1995 and concerned workers in the prison system, who had given notice of planned industrial action demanding a collective agreement regulating their working time[27]. The Political Board stated that a reorganisation decided by the parliament would be frustrated if the trade union's demands were met. Decisions of the Political Board are not binding. They are recommendations which the parties to the agreement have agreed to accept. The ultimate risk the trade unions face in not doing so, is that of parliament enacting a special law if political democracy is at stake in the individual case.

2.4. The administration of collective agreements

The administration of collective agreements relies mainly on the industrial organisations themselves. Any judicial review has to be initiated by the parties concerned, i.e. an industrial organisation or an individual worker or employer. Sweden created a Labour Court with jurisdiction over collective agreements in 1928. Its jurisdiction was

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[26] See Labour Court case AD 1981 No. 125. A grand five-year plan adopted by a local parliament was considered to be a subject of negotiations according to the Co-Determination Act.

[27] BERGQVIST, OLLE *et al., Medbestämmandelagen*, (The Co-Determination Act), Nordstedts juridik, Stockholm 1997, pp. 63f.

expanded in 1974 to include all conflicts concerning individual employment contracts, collective agreements and labour law[28].

The Labour Court is the last instance in all types of labour law cases. It is also the first instance if an employer or an industrial organisation initiate a lawsuit against a counterpart bound by a mutual collective agreement. It is a far-reaching duty to negotiate disputes in accordance with the Co-Determination Act which makes it possible with only one instance of judicial review (see section 3.2). Disputes have been negotiated both at the local level and at the central level before being presented to the Labour Court. During this process the factual and legal issues are illuminated to such a degree that one final court proceeding is deemed appropriate[29]. In fact, local and central collective negotiations are the normal way to handle any dispute on the content and interpretation of a collective agreement both in accordance with the law and to collectively agreed proceedings.

If an individual employee initiate a lawsuit against his or her employer it starts in a District Court. The employee might be unorganised or the trade union might have chosen not to support its member. The same applies to employers not bound by a collective agreement. The decision of the District Court can be appealed to the Labour Court.

The Labour Court judges can be divided into three groups. The first group consists of legally trained judges and judges with a special knowledge of the labour market. The second and third groups consist of judges appointed by the three major trade union federations on the worker side and The Confederation of Swedish Enterprise and the three organisations representing the public employers on the employer side.

If the trade union representatives and the employer representatives agree, they form the majority and can dictate the outcome. They have used this influence to create rules of interpretation, which strengthen the industrial organisations' power over the application of collective agreements. The signing parties 'owns' the collective agree-

[28] There are only few exceptions, for instance, if a labour issue arises in a bankruptcy proceeding. The full list of labour issues not adjudicated by the Labour Court is found in Chapter 1 Section 2 of Law (1974:371) on Legal Proceedings in Labour Cases.

[29] According to Chapter 4 Section 7 of Law (1974:371) on Legal Proceedings in Labour Cases, the Labour Court shall refuse to adjudicate a case if the negotiations required by the Co-Determination Act or by collective agreements are unfulfilled, unless the fulfilling of the negotiations has been hindered by an obstacle beyond the control of the party initiating the proceedings.

ments in a similar way to which two parties to a civil contract 'own' their agreement. If a common intent can be established it has precedence even over explicit provisions to the contrary. A trade union member or an unorganised worker whose duty to work is determined by a specific collective agreement can thus not rely on its wording creating a legal expectation concerning their rights or duties. If a provision in a central collective agreement seems unclear, the best legal advice is to call the employer organisation or the trade union and ask them to explain it.

A trade union has a legal right to represent its members. If an employer initiates a lawsuit against a union member, the trade union shall be called to the proceedings as well. If the trade union initiates a lawsuit on behalf of one of its members, the conflict formally concerns only the trade union and the employer.

The proceedings and the judgement of the Labour Court are open to the general public. A wish to keep some practises secret can be one reason for agreeing to solve some disputes through arbitration. However, no trade union and employer organisation have opted for arbitration as the general solution to collective disputes [30]. Notwithstanding, a lot of collective agreements stipulate arbitration for special issues. One such special issue might be the distribution of the local kitty among the individual workers. Another special issue might be conflicts regarding the right to keep a rented apartment provided by the employer after the employment relationship ends.

3. DIFFERENT CATEGORIES OF COLLECTIVE BARGAINING

Collective bargaining is immensely important in Sweden. We will present four different categories of collective bargaining. The legal and factual backgrounds to the bargaining process in the four situations are different. The crucial difference concerns what happens if the social partners disagree.

The first category is what we call the traditional core collective bargaining. If the social partners disagree they are free to take indus-

[30] Such a policy is possible in principle. There are however some issues that cannot be finally settled through a arbitration agreement entered into before the actual conflict materialise. See Chapter 1 Section 3 of Law (1974:371) on Legal Proceedings in Labour Cases. The exceptions are mostly concerned with different forms of discrimination issues.

trial action in order to make their counterpart budge. It is described in section 3.1.

The second category is collective bargaining according to the co-determination model (section 3.2). Such negotiations are closer to consultation than to proper negotiations. The trade unions are often under a collectively agreed peace obligation. Once there has been an exchange of views at the local level and, if the trade union so claims, at the central level, the employer is free to act as he or she deems appropriate within the scope of the employer prerogatives.

The third category is also based on the co-determination model, but these negotiations take place against a background of reinforced trade union influence. The two concepts of *priority of interpretation* and *trade union veto* are basically constructed in a similar way. If a conflict is not solved during the collective negotiations, the trade union's view will stand until the Labour Court, on the employer's request, has ruled otherwise. The legal rules applicable to such a conflict sets the frame for the negotiations (section 3.3).

The fourth category is collective bargaining based on semi-mandatory law. Almost every trade union has a problem balancing requests of benefits for their members against the risk that the employer must cease its activity due to an excessively high cost level. Pay bargaining, collective bargaining over benefits or legally created benefits, all give rise to such a balancing problem.

Semi-mandatory law is a legal technique frequently used by the Swedish legislator, giving the social partners the competence to derogate from mandatory provisions if the derogation is agreed upon in a collective agreement. In such a negotiation the employer must persuade the trade union that the derogation from the mandatory rule is in the best interest of their members. If no collective agreement is agreed upon, the law provides the final solution to the conflict of interest. This category of collective bargaining is described in section 3.4.

3.1. Traditional core collective bargaining

Collective bargaining aimed at concluding collective agreements regulating wages and working conditions is the traditional core of trade unionism. Historically the unions fought for their place in the industrial-relations system and it was through industrial action that they scored their first victories. Even today such negotiations are ultimately based on the threat of industrial action.

3.1.1. The right to resort to industrial action

There is no individual right to strike in Sweden. Only trade unions can declare strikes and only on issues not covered by collective agreements signed by them. However, they have a principal freedom to resort to industrial action in order to make their employer counterpart sign a collective agreement where none exists. Sigeman has characterised this right as 'extremely strong' in an international comparison[31]. This is a natural concomitant to a state non-intervention principle in such matters. Furthermore, since Sweden has neither a minimum legislation regarding wages nor a system of declaring collective agreements to be generally binding, the way to fight social dumping is first and foremost through ordinary collective agreements reaching as many employers and employees as possible.

The large employers have collective agreements either through their employer organisation or directly with the trade union. Reaching the small employers is more difficult. Substitute agreements are designed for unorganised companies with few or no employees. The basic mutual obligation is to follow the central agreement currently in force between the trade union and a specific employer organisation.

Think of a shop with two employees neither of them being a member of the trade union or wanting to join it. The trade union still has the right to initiate industrial action to force the employer to sign a collective agreement, most likely a substitute agreement. The choice of action could be a hiring boycott, i.e. that the members of the trade union are instructed not to work for the employer. Such primary action has little value in itself.

However, once there is a formal primary conflict other trade unions have the legal right to give their support through secondary action. Thus, for instance, the Transport Worker Union can tell their members not to handle any goods destined for this shop[32]. Such secondary action is the main tool to force small employers to sign col-

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[31] SIGEMAN, TORE, Insiders and Outsider in the Labour Market — Experiences of a Nordic Welfare State in a Labour Law Perspective, *Scandinavian Studies in Law* 38 (1999) p. 268.

[32] Section 41 p. 4 of the Co-Determination Act implicitly allows such action even when a collective agreement is in force and therefore a general peace obligation applies to the trade union involved in the secondary action. The secondary employer (a transportation company) must thus accept this boycott. Any retaliation is likely to be a breach of its peace obligation towards the trade union organising the secondary action.

lective agreements. This practice has come under the scrutiny of the European Court of Human Rights in the famous Gustafsson case. The restaurant owner Gustafsson claimed that being forced to sign a collective agreement in the form of a substitute agreement was an infringement of his negative right of association. However, the Court ruled that industrial action aimed at forcing Gustafsson into abiding by a collective agreement did not violate his negative right of association [33].

There have recently been some discussions on introducing a proportionality principle applying to industrial action [34]. No such principle has yet been introduced and it is highly unlikely that it will be introduced in the near future. Industrial action against small employers may seem out of proportion if regarded in isolation. However, if all small employers could compete freely by dumping wages, the whole collective bargaining system might come under pressure. Viewing the same cases in this context can make industrial action seem proportionate, even when the majority of the individual workers in the company being subject to the action oppose it.

In 2000 a rule prohibiting industrial action against the self-employed, or employers having only their family-members working for them, was inserted as Section 41 b of the Co-Determination Act [35]. This rule prohibits industrial action in order to force the employer to sign a collective agreement [36].

Another important situation where a risk of social dumping arises is when foreign employers bring their employees to Sweden to perform work. It has been dealt with by the Co-Determination Act and its rules on *Lex Britannia* [37]. Lex Britannia thus applies even when Swedish law otherwise does not apply, for instance to foreign ships temporarily visiting a Swedish port. It also applies to situations covered by the Council Directive 96/71/EC on the posting of workers. The law implementing this directive indicates statutory minimum

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[33] European Court of Human Rights, Gustafsson v Sweden, 25.4.1996, Reports of Judgements and Decisions 1996-II, p. 637.

[34] SOU 1998:141, *Medling och lönebildning* (Mediation and Wage Formation), pp. 26f, 60ff, 75f.

[35] Law (2000:166) on Changes of the Co-Determination Act.

[36] Another highly sensitive issue, in this particular situation, is whether or not the self-employed person also has a right to compete on price with workers doing similar tasks. For instance, he or she can do this by offering a large company to do a specific work for them at a low piece-rate. This central issue is not explicitly regulated by the new Section 41 b of the Co-Determination Act or in any other law.

[37] Law (1991:681) on Changes of the Co-Determination Act.

conditions in cases covered by it[38]. However, there are no statutory minimum wages in Sweden and this is where industrial action and Lex Britannia come into the picture.

In these cases, to combat inferior working conditions of a 'dumping' nature Swedish trade unions would initiate industrial action against the foreign employer in order to force him or her to sign the applicable Swedish collective agreement. Lex Britannia states that a collective agreement governed by the Swedish Co-Determination Act takes precedence over collective agreements governed by foreign law (Sec 31a) and that the legality of industrial action shall be governed by Swedish law alone (Sec 25a). The peace-obligation is also modified to cover only collective agreements governed by Swedish law (Sec 42). In short, the legislator helps the trade unions combat social dumping by legislating a general reinforcement of the Swedish trade unions' position in the collective bargaining system when they are dealing with foreign employers.

3.1.2. Industrial action in the public sector

Since 1965 the trade unions representing public employees have similar rights to take to industrial action as trade unions representing private employees[39]. The basic rules of the Co-Determination Act apply to public as well as private employees. There are also additional rules, for instance, if the work concerns the use of public authority[40]. All public employers have collective agreements, and the conflicts resulting in industrial action generally concern wages or working conditions when one collective agreement expires and a new one is to be negotiated.

The substantive right of public employees to resort to industrial action could lead to extensive damage to third parties, for instance hospital patients. This problem is mainly dealt with by the collectively agreed negotiation structures regulating the potential conflict between co-determination and political democracy (see section 2.3). A central board, created by the social partners, can thus review a planned industrial action. In 1995 the board found that the industrial action

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[38] Law (1999:678) on the Posting of Workers.

[39] EKLUND, RONNIE, Deregulation of Labour Law — The Swedish Case, *Juridisk tidskrift, vid.* Stockholms universitet 1998-1999 p. 538.

[40] Law (1994:260) on Public Employment lists the allowed forms of industrial action in this case in Section 23. The list includes ordinary strikes but secondary action to support issues not related to other public employers are prohibited.

planned by the trade union, representing the nurses, was designed to avoid unreasonably extensive damage to third parties. Even if the decision had gone the other way it would not have been binding. Decisions of the board are only recommendations. The ultimate solution to industrial actions with unacceptable consequences for third parties would be legislation.

Special laws are, however, alien to the Swedish industrial-relations system, since the Swedish trade unions prefer self-regulation to open government intervention. Collectively agreed negotiation structures (though they do not produce legally binding decisions) are often strong enough to secure responsible and proportional behaviour by the trade unions. There is only one instance in 1971 when the state actually intervened and through a law imposed a solution to a labour market conflict concerning the public sector. No such intervention has yet been made towards collective bargaining in the private sector.

3.1.3. Collective bargaining on wages

Sweden centralised collective bargaining in 1938 with the famous *Saltsjöbaden Agreement*. In the 1950s and 1960s Sweden had one of the most centralised wage bargaining systems in the world. Wages were set by central federal collective agreements every two or three years. The Swedish Trade Union Confederation (LO) and the Federation of Private Employers (SAF) made the first agreement covering blue-collar work in the private sector. Other unions followed suit and negotiated collective agreements on similar levels of wage increases. Historically, the centralised bargaining system's main benefit for the employer side was that it was used as a means of containing aggregate wage increases.

In the 1970s co-operation between the social partners was hampered by massive state intervention into labour law, introducing a number of acts, the most important being the 1974 Employment Protection Act and the 1976 Co-Determination Act. In the 1980s the employer side wanted to decentralise collective negotiations as far as possible. In 1983-1984 the system of central agreements at federative level gave way to a system with central agreements at industry level for the blue-collar workers of LO. This shift resulted in a breakdown in co-ordination. There was no national wage setter anymore. The LO unions competed with each other and with unions representing other groups. The issue of local control over wage distribution was highly controversial and in 1988 the Swedish Union of Clerical and Tech-

nical Employees in Industry (SIF) went on strike against its employer counterpart on this issue [41].

One important factor behind the central bargaining system losing its ability to contain wage increases was a phenomenon called wage drift. In the 1980s the total wage increase per year was 8-10 %, half of which was due to wage drift [42]. Wage drift took different forms. One was local wage negotiations, which gave increases on top of the central collective agreement. Provisions stipulating maximum pay in central collective agreements were routinely disregarded and started to give way to minimum provisions only.

Groups with little wage drift secured provisions of wage development guarantees in their central collective agreements, i.e. compensation clauses for wage drift. In order to apply such provisions the concept of wage drift had to be clarified. Should pay increases due to seniority pay in a company with an older and more experienced workforce be considered as wage drift? How should wage increases connected to improved productivity or a profit sharing scheme be regarded? Negotiations aimed at compensating wage drift thus reinforced a spiral where central and local wage increases fuelled each other between different branches of industry and the public sector. This leapfrogging led to various government interventions such as tax reductions and price control in return for moderate wage demands. This form of government intervention was on the whole not successful.

The government tried a new way of influencing the parties in the 1990s. They created the Rehnberg Group which was formally an ordinary mediation group, but the group's activities have been characterised as *de facto* re-inforced mediation by Elvander, Swedish professor of political science, containing elements of income policy as well [43].

The group focused on establishing a consensus around the need for wage restraint. This consensus was supposed to pave the way for new kinds of collective agreements without indexation and compensation provisions. A new way of bargaining evolved from this. Nowadays there is generally a central industry-wide collective agreement regulating basic working conditions and laying down mandatory levels of wage increases as well as minimum wages.

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[41] ELVANDER, NILS and HOLMLUND, BERTIL, *The Swedish Bargaining system in the melting Pot — Institutions, Norms, and Outcomes in the 1990s*, National Institute of Working Life, Stockholm 1997, p. 14.

[42] *Op. cit.,* p. 13.

[43] *Op. cit.,* p. 22.

Minimum wages generally increase less than the average wage level and are far below what might be considered a normal wage level. The new wages are set locally. For white-collar workers most of the centrally agreed wage increase goes to the local kitty and is negotiated and distributed at the local level. For blue-collar workers a mix between centrally agreed individual minimum wage-level increases and a local kitty is usual. The central agreement creates a peace obligation applicable to the local negotiations. Differences of opinion are in most cases to be solved through arbitration, not through industrial action.

Collective bargaining over wages illustrates a process of Swedish industrial relations described by Fahlbeck as *central decentralisation*[44]. It is decentralisation in the sense that important decisions are now being made at the local level. But it is central in the sense that the central organisations participate in the process and retain an important role.

The complexities of Swedish wage negotiations can be illustrated by the collective agreement between the Swedish Building Maintenance Union and its employer counterpart ALMEGA[45]. The employer has to form criteria for the individualisation of the "free" kitty. If there are no such criteria the central collective agreement explicitly states that everybody receives the same increase[46].

Such criteria are formulated unilaterally by the employer, subject only to the ordinary negotiations with the trade union required by the Co-Determination Act (see section 3.2). However, once the criteria are set the employer has to follow the criteria laid down. The local branch of the trade union can request to apply the employer's criteria and distribute the local kitty themselves to their members, but not to non-members[47]. A dispute as to whether or not a certain distribution of the local kitty is correct is decided by arbitration.

There is tension between binding central guidelines and genuinely free local negotiations. Sometimes the central collective agreement contains only vague guidelines for local negotiations, or none at all. In such cases the local negotiating parties have great freedom, but this

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[44] FAHLBECK, REINHOLD, Industrial Relations and Collective Labour Law, in *Scandinavian Studies in Law*, Volume 43 (2002) pp. 93f.

[45] The Employers' Organisation for Industrial and Service Companies.

[46] Collective Agreement for Building Maintenance Work Concluded Between the Swedish Building Maintenance Union and the Real Estate Employers Association (The employer organisations name before it joined Almega) valid 2001.03.01 to 2004.03.01, Section 14, note to the protocol.

[47] *Op. cit.* Section 14, note to the protocol.

freedom cannot be used unilaterally by the employer side. A disagreement with the local trade union will lead to central negotiations and ultimately to arbitration in accordance with most central collective agreements.

The actual amount of central control over local negotiations is very hard to quantify for an outsider. However, it is clear that the central level still plays an important role. If the central trade unions are dissatisfied with the outcome of the local negotiation procedures, including the final arbitration, they can refuse to enter into new collective agreements on the same principles. The central collective agreement creates a mutual peace obligation, which the employer side values highly. Few employers want local wage negotiations without a peace obligation, and the only way to obtain this is through a central collective agreement.

Today both the employer side and the trade union side continue to work to establish a consensus regarding national wage strategy issues. They try to agree upon the appropriate level of total wage increase to guide central negotiations and to be distributed locally according to the model of central decentralisation.

Keeping the total wage increase at the decided level relies to a large extent on the social partners themselves. Central collective agreements set minimum levels of wage increases and the employers are almost always free to pay more. It easy to see how wages could begin to rise fast if the labour market becomes overheated and local employers start to compete for workers. There is no legal or institutional framework designed to cope with such a situation.

Sweden has traditionally been characterised by a strong commitment to self-regulation for the social partners. Before 2000 there was a National Conciliator's Office. The parties had to give seven days' notice of planned industrial action and to present themselves at the negotiating table when summoned by the conciliator. However, the conciliator had no right to postpone industrial action [48]

An important official report from 1998 [49] suggested a new framework for industrial relations in Sweden. It was put forward at a time when Sweden already had successfully brought down the wage increase in collective agreements to an acceptable level from a strictly national perspective.

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[48] NUMHAUSER-HENNING, ANN, Labour Law, in Bogdan, Michael (ed.), *Swedish Law in the New Millenium*, Nordstedts juridik, Stockholm 2000, pp. 352f.

[49] SOU 1998:141, *Medling och lönebildning* (Mediation and Wage Formation),

The official report foresaw annual wage increases at 3.7% for the years 1998-2000[50]. Though acceptable from an isolated national perspective, it was estimated to be 1% above the average of those EU nations adopting the Euro. This may not seem much, but the government is actively preparing Sweden for the common currency. Once Sweden adopts the Euro it cannot keep increasing its wage levels more than the other Member States sharing the common currency. Devaluation or depreciation has traditionally been Sweden's way of balancing too high industrial cost-increases. The government considered it essential that the wage-formation process should be finely tuned to reach results comparable to those of the Member States sharing the Euro before we forfeited these currency options.

The report was followed by new legislation. The proposition[51] argued for a more active state role in the labour market. The actual legal changes were modest, however. A Mediation Authority was created. Mediation was made compulsory regardless of the parties' wishes. The Mediation Authority was also given the right to postpone industrial actions for two weeks and the period of notice for industrial action was extended from seven days to seven working days. This new and reinforced mediation system is only semi-mandatory (see section 3.4). Thus it can be replaced by mediation structures created by collective agreements. Such collective agreements must be registered with the Mediation Authority and must include inter alia, a time frame for mediation, the appointment of mediators, and provisions concerning the mediators' authority.

The *Industry Agreement* (see section 2.3) concluded in 1997 is based on such principles and was signed well before the Mediation Authority was created. It binds twelve employer organisations and eight trade unions, organising both blue-collar workers and white-collar workers. Several other trade unions and employer organisations followed suit and created their own collectively agreed bargaining and mediation system to avoid being subject to the Mediation Authority.

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[50] *Op. cit.* pp. 227 and 229.

[51] Prop. 1999/2000:32. A proposition is a document where the government explains the proposed legislation to the parliament. It contains a lot of detailed information on how the proposed legislation is supposed to work and is a really important legal source in the Swedish legal system.

3.2. General collective bargaining according to the codetermination model

The basic law dealing with all aspects of collective labour law is the Co-Determination Act (1976:580). It applies to all sectors of the labour market. This act contains two main sets of rules. One comprises what might be called the basic rules on collective bargaining (only just presented in section 3.1), which have been transferred from earlier legislation on peaceful industrial relations with minor additions or amendments. The second set of rules concerns co-determination at work, first introduced as a result of the Act itself[52].

The Co-Determination Act does not give the employees any individual rights. Their influence is to be channelled through the trade unions. Creating individual rights, which make a membership of the trade union less necessary for the workers, could ultimately lead to weaker unions. This is why Sweden has deliberately avoided creating a two-tier labour-relations structure, where a second tier of work councils or other workplace-based arrangements independent of the trade union, compete with (or complement) the trade unions' activities.

Sweden still works hard to preserve its single-channel model of labour relations, where all activities representing the workers are channelled through the trade unions that have collective agreements. For instance, the law implementing the EC Directive on European Work Councils requires companies bound by collective agreements (i.e. virtually every company big enough to fall under the directive) to allow the trade union to appoint the members of the Work Council representing the Swedish workers[53].

There are two levels of negotiation and representational rights in the Co-Determination Act. One is the general right of negotiations applying to all trade unions that have at least one member hired by the employer. The other is the right to primary negotiations, part of the co-determination rules applying in principle only to trade unions that have a collective agreement with the employer.

The general right of negotiations is regulated in Section 10 of the Co-Determination Act. It consists of a right to meet with the employer and exchange views on 'any matter relating to the relationship

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[52] See further, for instance, NUMHAUSER-HENNING, ANN, Labour Law, in Bogdan, Michael (ed.), *Swedish Law in the New Millenium*, Nordstedts juridik, Stockholm 2000, pp. 331ff.

[53] Law (1996:359) on European Work Councils, Section 16.

between the employer and any member of the organisation who is or has been employed by that employer'. This general right to negotiations underlies every kind of collective bargaining in the traditional sense. However, as regards trade unions without a collective agreement with the employer, the general right to negotiations can of course also be used as regards issues within the realm of managerial prerogatives. It is also used for negotiating any dispute of rights at local and then central level.

As a principle, only a trade union 'related' to the employer by a collective agreement comes under the specific rules on co-determination in the Co-Determination Act. According to Section 11 of the Co-Determination Act there is a 'primary duty of negotiation' towards these unions. The essence of this duty is that the employer must initiate and carry out negotiations before making important alterations in his activities or as regards the employment conditions of individual employees [54]. Moreover, the employer is (apart from exceptional cases) required to defer his decision until negotiations have been completed at local and — if so requested by the trade union — at central level. There is however no obligation to reach an agreement. Once the union's legal rights are exhausted the employer is free to make the decision he or she originally intended to make. Fahlbeck therefore considers the name given to the Co-Determination Act to be a misnomer. A true description of this central part of the Act would be based on words such as consultation [55].

The right to primary negotiations covers a much wider area than the traditional core of collective bargaining and reaches all kinds of managerial decisions within the managerial prerogatives [56]. Thus, the trade unions are to be consulted by the management on every important decision. Negotiations are supposed to be a normal feature in the running of a company. It is not something the employer shall resort to only when there is a conflict between the management and the workers. In one case, concerning installations of new machines at a vinegar factory, the Labour Court ruled that the company should pay

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[54] However, should an issue be of 'individual concern' to a employee who belongs to an organisation in relation to which the employer is not bound by collective agreement, the employer is duty-bound to negotiate this issue in accordance with Sections 11 and 12 with his or her organisation. The concept of 'individual concern' is to be interpreted narrowly. The employer's decision must concern none other than this particular individual.

[55] FAHLBECK, REINHOLD, *Labour and Employment Law in Sweden*, Juristförlaget i Lund, Lund 1997 p. 19.

[56] EDSTRÖM, ÖRJAN, Involvement of Employees in Private Enterprises, in *Scandinavian Studies in Law*, Volume 43 (2002) p. 178.

damages for failing to negotiate this important managerial decision with the trade union. The union admitted in the Labour Court that the workers regarded the new machines, and the new working practices they entailed, as a substantial improvement of their working conditions. Such a fact mitigates the damages the company has to pay, but it will never erase them[57].

If a managerial decision seems trivial or follows a well established routine the employer is exempt from the duty to invite to negotiations. In such cases the employer still has a duty to negotiate upon the trade union's request (Sec 12).

The rules on primary negotiations in the Co-Determination Act also implement Directive 98/59/EC on collective redundancies and Directive 2001/23/EC on the transfer of undertakings. In cases where the EC Directives apply and when there is no organisation with collective agreement, the employer must negotiate with every union represented at the workplace.

Breaches of the provisions of the Co-Determination Act are regarded as torts and the culprit has to pay damages, which include non-economic damage.

3.3. Collective bargaining based on reinforced trade union influence

There are some important special situations where a trade union with a collective agreement attains co-determination in the true sense of the word. The most important provisions of individual employment contracts are those on pay and on the duty of the employee to perform work. Those provisions are often heavily influenced by collective agreements. If there is a dispute concerning pay or the duty to perform work and the collective agreement form a central part of the parties agreed duties, the trade union has 'priority of interpretation' according to Sections 34 and 35 of the Co-Determination Act. Once the trade union has declared that it uses this priority the employer has to act in accordance with the trade union's interpretation until the Labour Court upon the employer's request has ruled otherwise.

There are some safety valves. The first is that the trade union's interpretation of the pay level must not be unreasonable. The second is that if there is a manifestly urgent need to get a job done, the

[57] Labour Court case AD 1980 No. 63.

employer has a right to rely on his or her own interpretation of the employees' duty to perform work, until the issue is settled by the Labour Court.

Another important situation of true co-determination for trade unions with a collective agreement is the union right of veto. According to Section 38 of the Co-Determination Act, the veto right applies to situations where employers intend to contract someone to perform work on their behalf or in their business without that person being employed by them. This means that the veto right applies for instance to work being entrusted to persons hired from work agencies.

If a trade union uses its veto in good faith, the employer must abide by it until the Labour Court has ruled otherwise. There is a safety valve if there is a manifestly urgent need to let the work begin before negotiations are completed or before the Labour Court has made its decision.

A trade union veto is only possible in the situations listed in Section 39. That is when the contracting leads to a law or a collective agreement being circumvented, or the arrangement otherwise is in violation of what is generally accepted by the parties in the particular bargaining sector. The trade union must thus provide a solid, just cause to impose a veto on the employer. The trade union cannot impose a veto simply because it is in their members' best interest [58].

A normal way of handling temporary work given to outside contractors is to make a list of companies that fulfil the requirements of Section 39 of the Co-Determination Act. The employers are free to use companies on the list, but have to call for negotiations if they wish to contract a non-listed company [59]. Being on such a list is an important competitive advantage, because an employer is far more likely to choose a company on the list than to investigate whether or not a non-listed company can be contracted and then negotiate with the union on the basis of this investigation.

3.4. Collective bargaining based on semi-mandatory legislation

The importance of collective bargaining is enhanced by semi-mandatory legislation. This legislative technique is based on public

[58] Numhauser-Henning, Ann, Labour Law, in Bogdan, Michael (ed.), *Swedish Law in the New Millenium*, Nordstedts juridik, Stockholm 2000, p. 354.

[59] Norberg, Per, *Arbetsrätt och konkurrensrätt* (Labour Law and Competition Law), p. 427.

regulation laying down in principle mandatory minimum standards on a high level. Provisions in individual contracts between employers and employees are void as far as they are in conflict with the minimum standard. However, a semi-mandatory rule gives the social partners the competence to derogate from the otherwise mandatory provisions if the derogation is agreed upon in a collective agreement. We will illustrate this with two examples from the Employment Protection Act (1982:80), which covers both public and private workers.

Section 7 of the Act requires a just cause (or objective ground) for dismissals of open-ended contracts. The basic rules for fixed-term contracts are the opposite. Such a contract ceases without prior notice when the time agreed upon expires and the employer need not show just cause for declining to offer the employee continued employment. In order to stop employers from organising their businesses on the basis of fixed-term workers, the Employment Protection Act exhaustively lists the situations where fixed term contracts are allowed. These rules are only semi-mandatory, however. The semi-mandatory construction means that in reality there is freedom of contract on the collective level with regard to the use of fixed-term contracts as long as a trade union and an employer agree by means of a collective agreement. [60].

Another important situation of semi-mandatory legislation are the rules concerning dismissals due to redundancy. We have already stated that Section 7 of the Employment Protection Act requires just cause (or objective ground) for dismissals of open-ended contracts. In reality the requirement of a just cause is a mere formality in cases concerning dismissals on economic grounds since it is a part of the managerial prerogatives to decide upon business needs. Every dismissal, which forms a part of a restructuring scheme designed to raise the profit level of the company, is thus regarded as just. Thus, economically motivated, just dismissals can (and frequently do) occur in highly profitable companies [61].

The social protection arises through other measures. The main statutory protection for the employees comes from strict rules regarding the choice of persons to be dismissed (Section 22 of the Employ-

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[60] See further, for instance, NUMHAUSER-HENNING, ANN, Fixed-term Work in the Nordic Labour Law, in *Scandinavian Studies in Law*, Volume 43 (2002) p. 292.

[61] RÖNNMAR, MIA, Redundant Because of Lack of Competence? Swedish Employees in the Knowledge Society, *The International Journal of Comparative Labour Law and Industrial Relations* 2001 p. 124.

ment Protection Act). These rules are (with minor modifications) based on seniority — the 'last in first out' principle. The group to choose from is also determined by Section 22. It consists of the whole plant and every worker who works on a task regulated by the applicable collective agreement.

However, these rules are also semi-mandatory. The freedom of contract of the social partners is virtually unlimited as long as they agree. The parties to the collective agreement can thus agree on the relevant factors for dismissals deviating from the Act. The Labour Court will normally not question the collectively agreed balancing of such factors. In fact, it does not even require that the social partners explicitly state the objectively verifiable criteria behind their choice of workers to be dismissed until a legal dispute commences. This freedom is often used to pick the workers who have to leave, individually, in a collective agreement at local level [62].

Collective agreements concerning employment protection in redundancy situations, are binding for the entire workforce and can thus be applied both to trade union members and to non-union members. The trade union's right to make agreements on behalf of non-union members is not balanced by a duty of fair representation. Instead, the limits are set by statutory laws on different forms of discrimination and by a general principle of law referring to good practices on the labour market [63].

Most dismissals in Sweden are due to economic reasons [64]. Collective agreements, making use of the semi-mandatory character of the law, are an important feature. If the company makes a healthy profit the trade unions try to extract severance pay, paid education and training and other forms of benefits for the dismissed employees. In fact, the majority of the labour market sectors possess severance payment schemes drawn up in accordance with collective agreements [65]. However, if the company is in a dire economic situation, the trade union's primary goal might well be just to save some extra jobs. Companies that experience long periods of decline risk ending up with a very old workforce if every reduction of the workforce is to follow the strict

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[62] CALLEMAN, CATHARINA, *Turordning vid uppsägning* (The Choice of Persons to be Dismissed in Redundancy Situations), pp. 292f.

[63] *Op. cit.,* p. 369. See also the Labour Court case AD 2002 No. 37.

[64] RÖNNMAR, MIA, Redundant Because of Lack of Competence? Swedish Employees in the Knowledge Society*, The International Journal of Comparative Labour Law and Industrial Relations* 2001 p. 124.

[65] SIGEMAN, TORE, Employment Protection in Scandinavian law, in *Scandinavian Studies in Law*, Volume 43 (2002) p. 274.

seniority rules of statutory law. There is no other way out of this problem than to sign collective agreements in redundancy situations. Therefore any company operating in Sweden ought to ensure from the outset that they have a constructive relationship with the trade unions.

Since 1997 collective agreements deviating from the rules of fixed-term employment and dismissals due to redundancy can be entered into at any level, even plant-level, provided there is a 'collective-agreement relationship' established between the parties on the central level beforehand. Earlier, such deviations required a collective agreement at central level.

Semi-mandatory rules are frequent in Swedish labour law[66]. The Working Time Act (1982:673) and The Workplace Union Representatives Act (1974:358) are two examples of legislation with several semi-mandatory provisions. European Union Directives in the labour area generally contain minimum standards, which must be guaranteed to each individual worker. In these situations Sweden often implies the Directive by a semi-mandatory law with the restriction that any derogation in a collective agreement is void if it fails to live up to the standard provided by the Directive at issue.

The extra freedom and flexibility a collective agreement can bring in relation to semi-manadatory statutory law is one of the features which explain the strength of the collective agreements and the trade unions in Sweden[67].

4. COLLECTIVE BARGAINING AND COMPETITION LAW

As in the other EU Member States, it is unusual to find collective agreements appearing in competition law practice and jurisprudence in Sweden. But according to the COLCOM-Report, the Swedish and the Finnish competition authorities seem to be the most active (or maybe the least inactive) authorities in this field in the 1990s[68].

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[66] Compare NIELSEN, RUTH, *European Labour Law*, p. 93. "Sweden is probably the single country where this kind of interaction between statutory legislation and legislation by means of collective bargaining is most developed."

[67] On the 'flexibility function' of collective agreements, see for instance BRUUN, NIKLAS, *The Autonomy of Collective Agreement,* report to the European Regional Congress of Labour Law and Social Security held in Stockholm 4-6 September 2002, congress proceedings.

[68] BRUUN, NIKLAS and HELLSTEN, JARI (eds.), *Collective Agreement and Competition in the EU — The Report of the COLCOM-project*, DJØF Publishing, Co-

The present Swedish competition law is modelled on the EC competition law. There is an explicit labour market exemption covering agreements between employers and employees relating to wages and other conditions of employment [69]. This exception has remained unchanged since the first proper competition law, the 1953 Anti-Trust Act [70]. Collective agreements on the traditional core subjects of trade union activity are uncontroversial and are obviously exempted from the competition rules.

However, we have seen that Swedish trade unions are active outside the core of traditional collective bargaining. Here conflicts with the competition law might arise. To illustrate this we will present two Swedish competition cases. The first case is presented in section 4.1 and concerns trade unions signing home insurance policies on behalf of their members. The competition problem arises because of the large number of trade union members in Sweden. It is not linked to unionism as such. Any equally large organisation negotiating any contract for goods or services on behalf of its members will create similar competition problems.

The second case (section 4.2) concerns a provision of a collective agreement prohibiting work being contracted out to independent contractors. This provision concerns an issue traditionally governed by the employer's managerial prerogatives. On the one hand, this type of restriction can under some circumstances create serious competition problems, but on the other, the workers have a clear interest in the restriction since it gives them increased security of employment.

4.1. The home insurance policy of the Swedish Trade Union Confederation

We have seen in section 2.2, that a Swedish trade union is free, in principal, to choose its fields of activity as long as it does not commit acts which are manifestly contrary to its charter. The Swedish Trade Union Confederation (LO) used this freedom to sign a frame-

penhagen 2001, pp. 65f. The countries studied are Austria, Belgium, Denmark, Finland, France, Germany, Italy, The Netherlands, Spain, Sweden, and the United Kingdom.

[69] Competition Law 1993:20, Section 2.

[70] Act (1953:603) to Counteract Restraints of Competition in Business in Certain Instances. The Act (1956:245) Concerning the Obligation to Submit Information as to Conditions of Price and Competition, may also be seen as a part of the first Swedish Anti-Trust Act. See BERNITZ, ULF, *Commercial Law* (*Marknadsrätt*), Juristoch samhällsvetareförbundets förlags AB, Stockholm 1969, p. 423.

work for collective home insurance policies for rented dwellings on behalf of its members with an insurance company called Folksam. The agreement gave the LO-affiliates an option to collectively insure its members on the terms agreed at the federative level. Three affiliates made use of this opportunity. A competitor of Folksam demanded that the Swedish Competition Authority stop this practice.

The Swedish Competition Authority investigated the case and concluded that a trade union is not an undertaking when buying insurance protection for its members [71]. Since the competition law applies only to undertakings, this finding was sufficient to clear the agreement from the prohibition of cartels. This prohibition applies to contracts between at least two parties classified as undertakings.

This was not enough to clear the agreement, though. Folksam was the largest provider of home insurance for rented dwellings, and its market share had grown significantly and reached 41.3 %. Thus, the question arose of possible abuse of a dominant position. However, the Competition Authority concluded that Folksam was not strong enough to act independently of their competitors, and that its actions therefore could not amount to an abuse of a dominant position [72].

Suppose all LO-affiliates would have used their options to conclude collective home insurance policies with Folksam. In such a situation it is quite possible that the Swedish Competition Authority would have ordered Folksam to terminate or to modify their agreement with LO.

4.2. The collectively agreed ban on contracting out delivery of newspapers

The second example of a conflict between collective agreements and competition law concerns the delivery of newspapers. The companies in this sector restructured their business in the 1960s and 1970s. They dismissed workers and gave their work to independent contractors. The Transport Workers' Union reacted, and in 1976 they entered into an industry-wide collective agreement prohibiting contracting out delivery of newspapers to independent contractors.

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[71] Decision of the Swedish Competition Authority, Filing Number (*diarienummer*) 533/1995.

[72] For a deeper analysis of the competition problems in this case see EDWARDSSON, EVA, The Competition Law, Collectively Agreed Home Insurance, and the Stevedoring Monopoly (*Konkurrenslagen, kollektiva hemförsäkringar och stuverimonopolet*), *Juridisk tidskrift* vid Stockholms universitet 1997-1998 pp. 952-983.

A company in the business had one employee who had his own firm specialising in various kinds of deliveries and serving 30-40 customers. Both the employer and this employee wanted his newspaper delivery job moved to his firm and they acted accordingly. The trade union took the dispute to the Labour Court and asked it to declare that this contracting violated the prohibition in the central collective agreement[73]. The employer wanted the Labour Court to deny this request, since the prohibition in the collective agreement was void according to the competition law.

The Labour Court stated that the collectively agreed prohibition on contracting out did not concern wages or working conditions and thus was not exempt from Swedish competition law. Having found the competition law applicable, the principal issue became whether or not this provision of the central collective agreement resulted in an appreciable reduction of the competition on the relevant market. The Labour Court found no appreciable reduction of competition and thus declared the existence of a violation of the collective agreement on the employer side.

The former employee had also taken the dispute to the Swedish Competition Authority, which decided on the case a year after the decision of the Labour Court. The Competition Authority concluded that the prohibition in the collective agreement reduced competition to an appreciable extent, especially by making it impossible for new firms to start on a small scale, and that this provision of the collective agreement was void. They ordered the employer organisation and its individual members to stop applying the provision[74].

5. CONCLUDING REMARKS

The Swedish labour-relations system shows some characteristics different from the main EU continental model of labour relations. It is characterised by strong organisations which totally dominate their respective fields of action, still high unionisation rates and collective agreements reaching the vast majority of workers according to the contract principle and without any *erga omnes* mechanisms. At least since the 1970s the state has actively nursed this environment by promoting a single channel labour-relations model, creating incen-

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[73] Labour Court case AD 1998 No. 112.

[74] Decision of the Swedish Competition Authority, Filing Number (*diarienummer*) 555/1996.

tives for the workers to belong to the trade unions and for companies to have collective agreements with them. Established trade unions 'related' to the employer by a collective agreement are given a number of privileges in statutory law, for instance as regards co-determination. Moreover, semi-mandatory rules are frequent and may only be derogated from by means of collective agreements. An important effect of semi-mandatory legislation is that the special dimension of flexibility it provides thus requires collective bargaining.

Another important characteristic is the high degree of autonomy given to the social partners in the bargaining process, concluding and enforcing collective agreements. In Sweden collective agreements are assessed as a primary private law contract in contrast with many other Europeans states, where public law elements of collective labour law are considerably stronger. Thus, in Sweden there are few statutory restrictions on the social partners even when they deal with truly important matters. Sweden's need to keep inflation down has not yet resulted in any major state intervention in the collective bargaining system. Wage restraint is mainly to be achieved by collectively agreed negotiation structures. This was recently demonstrated by the reform of the mediation system, leaving huge sectors abiding to certain collective 'peace' agreements entirely outside the scope of its authority. The sensitive issue of the protection of third parties in industrial conflicts in the public sector has also been solved mainly by collectively agreed bargaining structures. Legal intervention is seen as a last resort and not put to use to any considerable extent.

However, the basically 'private law contract' character of Swedish collective labour law may produce clashes as regards Community law and its implementation. With Bruun we could say that the latter 'is not … a primarily private law, autonomy system, but an integrated element of a modern system of a partly corporative governance of the labour market' [75]. Developments (the 'regulatory' function given to the social partners at European level after the Amsterdam Treaty by Articles 137-139 EC, as well as the fact that various legislative measures at European level explicitly open up for national implementation using agreement between employer and employee representatives) could be seen to harmonise quite well with the Swedish labour-market model at first glance. However, the results of social dialogue within Community law still generally require complementary statutory measures, at Community or national level. To protect the indi-

[75] Bruun, Niklas, *The Autonomy of Collective Agreement*, report to the European Regional Congress of Labour Law and Social Security held in Stockholm 4-6 September 2002, congress proceedings p. 36.

vidual's right, the use of collective agreements as instruments of implementation does not absolve the Member State from taking full responsibility for guaranteeing full coverage of the Directive, etc. The semi-mandatory technique frequently used in Sweden to implement Directives seems to address these issues adequately. Where the traditional autonomy of the social partners is more demanding — as is the case with wage setting — statutory intervention is considerably less attractive, though. To implement the rules on minimum legislation in the Posting Directive, Sweden thus relies on *Lex Britannia*, leaving it to the trade unions to combat social dumping by means of collective bargaining and industrial action in a legal setting which seems to open for discriminatory practices towards foreign employers. The statute-based immunity for collective agreements explicitly stated in national competition law may also — in combination with extensive collective bargaining rights within the area of managerial prerogatives — occasionally produce conflicts with Community law.

Chapter 10

COLLECTIVE BARGAINING IN SPAIN

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1. THE COLLECTIVE BARGAINING STRUCTURE

Although the expression "collective bargaining structure" does not have a unequivocal meaning, nor is it defined as such by national legislators, we use the term to refer to the levels on which collective bargaining is done and which, in the end, give rise to a complex network of arrangements, agreements and collective agreements. This complexity results from the existence of bargaining units on different levels, which may reach various agreements among themselves, causing conflicts. Thus, rules must be established to sort out this concurrence. State law, by organising the concurrence of agreements, establishes "preferential units" to regulate certain matters. However, this is the sole purpose since, based on the principle of neutrality and respect for the freedom of the contractual parties, collective agreements have the scope that the parties determine (art. 83.1 of the Ley del Estatuto de Trabajadores, or "Workers' Statute", henceforth LET).

However, the legislator authorises the most representative trade unions and employers' associations, on the national or regional level, to establish the collective bargaining structure via interprofessional or via collective agreements (art. 83.2 LET). This option, if exercised, limits the authorised parties' recognised capacity to decide the scope of the collective agreement that is to be bargained. If there is an

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interprofessional agreement about collective bargaining activity that refers to organisational or structural aspects, then the parties' recognised freedom is limited, and the selection of the bargaining unit is predetermined or at least bound to certain conditions.

These provisions contained in the 1980 Ley del Estatuto de Trabajadores (LET) meant, without a doubt, a radical shift in the trend seen up until then, insofar as the law predetermined bargaining units. However, this legal innovation was not enough to modify the collective bargaining system, characterised by weak articulation and, above all, the fragmentation of bargaining units, which caused the same issue to be bargained on different levels.

To a certain extent, the legislative reform of 1994 helped put an end to this inertia. In addition to promoting collective bargaining as a regulatory source, on the enterprise level it also — and more importantly — modified the rules of concurrence between collective agreements (art. 84 LET). Thus, although it states that "a collective agreement, during its period of validity, cannot be affected by that which is laid out in agreements of a different scope", it identifies two possible exceptions: first, by allowing an interprofessional (cross-industry) agreement or a framework agreement to establish different rules about concurrence between agreements of different scopes and the principles of complementarity of the different bargaining units (art. 83.2 LET); and second, by allowing that supra-enterprise level agreements may affect what is stipulated in others of a higher level, save for certain issues — trial period, hiring methods, occupational categories, disciplinary matters, minimum rules regarding safety and health in the workplace and geographical mobility.

If the reformist legislator's intention was to modify the bargaining structure, consolidated some time ago, the new standards about how the concurrence of agreements should be sorted out indeed make allowances for greater territorial and functional decentralisation. The adopted solution, however, limits the applicability of multi-industry and framework agreements as regards the organisation of the collective bargaining structure, a legal authority that corresponds to the most representative trade union and employer's associations. At the same time, far from resolving the excessive fragmentation of bargaining units, it exacerbates in this congenital defect.

On the socio-political front, the new legal framework regarding the concurrence of agreements protects the creation of a collective framework of a regional scope, although it does not guarantee it. Without a doubt, it facilitates the decentralisation of collective bar-

gaining, but it does not predetermine a bargaining structure. Unsatisfied with the effects of decentralisation, the most representative national unions and employers' organisations signed in 1997 the "Interconfederate Agreement on Collective Bargaining", — AINC — with the tacit goal of avoiding any negative consequences that might derive from the new collective bargaining system. Said Agreement, of obligational applicability, opts for a centralised structure, with the national-level sectoral agreement as the typical bargaining unit, where the regulation of matters reserved to said level would be exhausted, adding other ones. This does not mean that in the regulation of some matters, a national sectoral agreement cannot be bargained on a lower level for its posterior development, or that other agreements might even directly be bargained on lower levels. At any rate, lower-level bargaining — territorial and company — would be tied to the national sector agreement, in order to achieve systematic, articulated bargaining in the corresponding sector.

All this was merely a earnest attempt to organise the collective bargaining structure in our country, given its — already advanced — purely obligational applicability, since attaining the sought-after objective would involve a strong commitment on behalf of the lower-level territorial organisations, hence the AINC's fragility when it comes to applying it. The prognosis advanced by the additional regulation of the AINC is not, then, surprising, in the sense that the "rationalisation of the objectives in this Agreement, designed to procure the development of a particular model on this matter, and relating to the contents of the collective agreements, may call for the corresponding legislative modifications." A prognosis that we feel is totally accurate, even if, despite existing plans, no reform has yet been tackled, to this or any other respect.

When the AINC expired, faced with the government's plan to reform the legal framework of collective bargaining, the most representative national trade and employers' unions signed a new "Interconfederate Agreement on Collective Bargaining" — AINC 2002. It was quite different in content from the first one, as no express mention was made to the bargaining structure. In addition to general considerations about business competitiveness and employment, a series of criteria were established regarding wages, employment and health and safety in the workplace. As for the bargaining procedure, insisting on the obligational nature of the agreement, it stipulated that the signing confederations "shall establish with the respective organisations in their sectors or branches, without reducing the collective autonomy of the parties, the most appropriate mechanisms and chan-

nels by which they can assume the agreed behaviour and adjust their behaviour to it." Having overcome the temporary scope of that agreement, once again the social agents have signed, for this year, an "Interconfederate Agreement on Collective Bargaining" — ANC 2003 — on similar terms as the previous one, that is, without expressly determining the collective bargaining structure.

In short, Spanish labour law does not have a structure for collective labour bargaining, according to the different levels, nor does it establish a clear preference for any one of them. The bargaining units are freely constituted by the bargaining parties, and the rules about the concurrence of agreements even allow that a supra-enterprise level agreement may affect what is stipulated in another valid higher-level agreement. The latter exception encroaches on the bargaining structure's organization through multi-industry or framework agreements. Meanwhile, the legislator is not addressing this matter, the bargaining inertia continues and, save for very specific sectors, the structure has not been modified — an insufficiently homogenous structure with no general criteria that was consolidated in past decades and still suffers from the abovementioned defects.

Unlike collective bargaining for other workers, collective bargaining for government employees, recognised by Law 9/1987 of June 12 and reformed by Law 7/1990 of July 19, has notable specificities. For one, the rules that dictate bargaining structure are radically different. For instance, the bargaining units are not freely determined by the parties; on the contrary, they are established *ex lege*, forming "bargaining tables" (art. 31.1 Law 9/1987). First, one "General Bargaining Table" must be set up on the government administration level and another in each region and local body. Then, "Sectoral Bargaining Tables" are set up for collective bargaining and to determine the working conditions of people who work in non-university public centres, employees of the Postal and Telegraph Service and Post Office Bank, public health institutions, the justice department, social security and civil servants of universities and the central and institutional administration. This is not, however, a closed list of sector bargaining, as the General Table can decide to set up other Sectoral Tables to attend to the number and peculiarities of specific groups of government employees.

In principle, each bargaining unit has full authority to determine the working conditions of the civil servants from the corresponding area; however, the Sectoral Tables' authority is "residual", as it extends to all subjects who have not been the object of a General Table decision.

2. TYPES OF AGREEMENTS

Collective agreements can be classified in many different ways. To begin with, we can distinguish — as we have already mentioned — collective agreements for regular workers from agreements for civil servants, each having a different legal framework.

With respect to the first group, we must also differentiate between statutory collective agreements; that is, those bargained according to the requirements laid out in Title II of the LET, and — *contrario sensu* — extra-statutory collective agreements, both with constitutional foundation (Art 37.1 EC). Statutory collective agreements are regulatory, being an objective source of law (Art. 3.1.b LET) and of general or *erga omnes* applicability, binding all employers and workers included in their scope during the entire period of their validity (Art. 82.3 LET). Extra-statutory collective agreements are contractual in nature, which means they cannot be applied to create objective law, forming — on the other hand — simple subjective rights protected by common law, subject to the general rules about agreements and extending their effects to the contractual parties as well as the workers and employers directly represented by them.

Another interesting perspective when it comes to determining the types of agreements is their scope. There are company agreements or lower-level agreements, sectoral agreements, interprofessional agreements and occupational agreements. On the company level, the company is usually the bargaining unit, although it is possible to bargain agreements on lower levels, such as the workplaces of medium- to large-sized companies, or agreements that are applied to a group of undertakings. On the supra-enterprise level, it is sectoral agreements can be bargained on different territorial levels, with a high number of provincial agreements — at least in some sectors — which are gradually substituting regional or national agreements. Interprofessional agreements exceed the scope of a sector, establishing common criteria for the development of collective bargaining on lower levels (art. 83.2 LET). Or, they can even regulate specific matters to provide common regulation (art. 83.3 LET). Occupational agreements are applicable to a group of workers who belong to the same occupational category, hold the same job position, have the same qualifications or belong to a certain division or department. These agreements are bargained on the level of a specific enterprise or branch of activity.

Finally, considering their function or content, in addition to the general agreement that establishes working conditions for a company or branch of activity, we can identify framework agreements, gener-

ally interprofessional in nature, which organise collective bargaining and distribute its contents. They are "flexible agreements": that is, they provide rules or general guidelines for the bargaining structure and the content of the agreements. Then there are agreements about specific matters, specialised in content, whose final goal is to establish a specific regulation either directly or indirectly. The latter are imposed without the need to be included in a posterior agreement of a lower level, although they may be fleshed out or completed on lower levels. At any rate, it is not uncommon to find "mixed" agreements, since together with framework rules they include directly applicable regulation for some matters.

Regardless of the different contractual methods that can be derived depending on the reference criteria used, the state legislator, when enumerating the rules about legitimacy to bargain, opts to simplify them as much as possible, differentiating between — on one hand — company or lower-level agreements and — on the other — supra-enterprise agreements.

3. THE BARGAINING PARTIES

Collective agreements are the result of bargaining carried out by representatives of two groups, the workers and the employers. Therefore, there are two bargaining parties in a collective agreement: the workers' representatives and the employers' representatives. The agreement capacity of the both groups is recognised in 37.1 EC.

However, statutory collective bargaining — that which is granted general or *erga omnes* applicability — acknowledges the capacity of specific representative structures and not others. When the legislator specifies the legal authority required to validly bargain a statutory agreement (art. 87 LET), the agreement capacity of the authorised subjects is assumed. Thus, recognised as having bargaining capacity are, on the workers' side, their legal representatives — workers' representatives and members of the workers' committee, as well as the trade unions and its legally constituted federations and confederations — and on the employers' side, their associations, federations or confederations.

In the context of statutory collective bargaining, in addition to agreement-making capacity, both bargaining parties must demonstrate legal authority to bargain. To bargain a *company or lower-level agreement*, on the workers' side, the "workers' committee, workers' representatives, where applicable, or trade union representatives, where

applicable" are authorised, as long as the latter together make up the majority of the committee members (art. 87.1 LET). There is, then, a double recognition, both in favour of the legal or unitary workers' representatives and the union representatives, though conditions are imposed on the latter, without any rules giving preference or priority to either group over the other. However, the opposing party does need to recognise one of them as a delegate. Whether it is one or another depends on the decision of the representatives themselves, their "real" representation capacity or the bargaining inertia or dynamic, although the unionisation of the unitary delegations facilitates agreement between the two delegations. On the employers' side, the legally authorised subject is the employer, either directly or via a representative.

When it comes to bargaining a *supra-enterprise statutory agreement*, the authorisation rules are different from the previous ones. On the workers' side, only the unions are legally authorised, and specifically (art. 87.2 LET):

a) The most representative trade unions operating on the national level, as well as in their respective scopes, affiliated union entities, federated or confederated. In this respect, the most representative national unions are considered to be those that have, in said scope, 10 percent or more of the total number of workers' representatives, members of the workers' committees and members of the bodies that represent civil servants in public administrations [art. 6.2a LOLS], and likewise, "by radiation" those unions that are affiliated, federated, or confederated to one of the most representative national union organisations.

b) The most representative trade unions on the regional (Autonomous Community) level for agreements that do not transcend said scope, as well as in their respective scopes, those entities that are affiliated, federated and confederated to the same. On the regional level, the most representative unions are those that have at least 15 percent of the total number of workers' delegates, members of workers' committees and members of the bodies that represent civil servants in public administrations [art 7.1.a) of the Ley Orgánica de Libertad Sindical, or "Trade Union Freedom Act", henceforth, LOLS], and likewise, "by radiation", those unions that are affiliated, federated or confederated to one of the most representative regional union organisations [art. 7.1.b LOLS].

c) Those trade unions that have at minimum 10 percent of the members of the workers' committee or personnel delegates in the geographical and functional scope of the agreement.

On the other hand, on the supra-enterprise level, those employers' associations representing at least 10 percent of the employers from the geographical scope of the agreement are legally authorised to bargain, as long as they represent an equal percent of workers affected by the agreement (art. 87.3 LET).

Only in the case of national collective agreements, legal authorisation is extended to the most representative regional trade unions and the regional employers' associations that have in said scope a minimum of 15 percent of employers and workers, unless they are part of national federations or confederations (art. 85.4 LET). As no further specifications are made, by this "additional path" the participation of unions and employers' associations is possible without representatives in the functional scope of the agreement within their own region, since the legislator has not considered that eventuality, something which does not fail to attract our attention.

Although the scopes analysed are the most common ones, we must not forget the principle of free election by the bargaining units. Thus, it is required to specify legal authorisation in two cases: occupational agreements and group enterprise agreements.

In the case of occupational agreements, legal authorisation for workers that belong to a specific category or occupational group or who have the same area of expertise or occupational qualifications is granted to the trade union representatives for this scope, designated by express agreement of said workers (art. 87.1, second paragraph *in fine*, LET). The fact that the legal entitlement of union representatives is recognised *ex lege* does not deprive the unitary bodies of representation (workers' representatives and workers' committees) — if the bargaining is not on a supra-enterprise level — of the generic authority to bargain collective agreements below the company level, although these organs represent all personnel and not just workers who belong to the occupational category.

When it comes to bargaining a statutory collective agreement for a group of enterprises, as case law allows, the doctrinal and case law debate is centred on deciding whether the company agreement bargaining rules should be applied to these agreements, or if the rules for sectoral agreements should be applied. In principle, being that this specific bargaining unit is not envisaged in Title III of the LET, and therefore the legal status of the group is not recognised, we must conclude that we are dealing with a supra-enterprise bargaining unit, although surely the application of the rules for bargaining supra-enterprise agreements remit to the sectoral agreements, giving the

trade unions and employers' organisations the legal authority to bargain them. As the employers' group is characterised by economic and management unity, the bargaining mediation of employers' associations is deemed unsuitable. Thus, case law has turned to so-called "mixed criteria", applying the rules for legal entitlement to bargain company agreements to the employers' representatives, relegating the prominence of the employers' associations and the authorisation rules for supra-enterprise agreements to the workers' representatives [Constitutional Court ruling (STC) of 14 June 1999 —-AR. 5216—- and 21 November 21 1999 — Ar. 528/2000 —].

4. THE CONTENT OF COLLECTIVE BARGAINING

In principle, with the only common limit being "respect for the laws", the bargaining parties are recognised as having full liberty to determine the content of the bargaining, regulating economic, labour and union issues as well as, in general, a number of others that affect working conditions and the scope of individual and collective employment relationships (art. 85.1 LET). This rule opens up an extensive panorama of possible content for the agreement, implicitly recognising the agreement's dynamism and flexibility to adapt to the needs of the company or sector whose working conditions it regulates. As for the global content of the agreement, we must distinguish between "regulatory clauses", "obligational clauses" and "delimiting clauses."

4.1. Regulatory clauses

With the goal of establishing a general, abstract regulation of the employment relationships included in its scope, the collective agreement includes regulatory content comprised, on one hand, "of the general, formal agreements that comprise it as a legal standard" and on the other, "the particular agreements that regulate the working conditions of employers and workers contained in its scope" [Supreme Court ruling (STS) of 21 December 1994 —Art. 103436—]. This material content reaches, in accordance with article 85.1 of the LET:

— The conditions that affect individual employment relationships — "labour-related matters or matters of an economic nature (…) and several others that affect employment conditions" — including the typical ones regarding occupational structures, wages and working time, duration, termination and expiration of the employment contract, disciplinary issues, health and safety in the workplace, etc.

— The conditions that affect collective employment relationships — "union-related matters (…) and in general, several others that affect the relationship between workers and their representative organisations with the employer and employers' organisations" — including guarantees of legal representation, mechanisms of worker participation in management and the amplification of union rights or the collection of dues or the union bargaining levy.

— Supplementary social security arrangements, whose bargaining is authorised by article 39.2 of the Social Security Law (LGSS), and in general, all matters that affect workers' social situation, including subsidies, housing, childcare, transportation, etc.

4.2. Obligational clauses

Besides the regulatory content, collective agreements can also include clauses of a obligational nature, whose objective is to guarantee the applicability of a collective agreement by laying down rights and obligations for the parties to the agreement. In this sense, article 82.2 of the LET refers to the possibility of "regulating industrial peace through the agreed obligations", protecting certain pacts through the renunciation of the right to strike or engage in other conflictive acts while the agreement is in force, as constitutional case law has confirmed (SSTC 11/1981 and 198/1983), or also by establishing rules to resolve any disputes that should arise during its validity. Article 91 of the LET refers to this when it provides for the establishment of mediation and arbitration procedures to resolve disputes deriving from the application and interpretation of collective agreements.

Thus, the obligational content consists of obligations that the bargaining parties assume, limited in applicability to themselves, both positive — rights and obligations to collaborate, participate and administrate the agreement — as well as negative — refraining from acts that could impede the validity of the agreement's regulatory content. In short, the goal is to ensure the faithful execution of what has been agreed via mechanisms of cooperation and collaboration between the signing parties (STC 184/1991).

4.3. Delimiting clauses

The parties have the freedom to determine the content, but it is also their responsibility to identify the agreement they sign and make

it recognisable. These identification rules are contained in article 85.3 of the LET, which identifies a "minimum content" that coincides with what are traditionally called delimiting clauses or configuration rules; which are as follows:

— "The determination of the parties that agree to it", which makes indirect reference to the legally authorised subjects in relation to articles 87 and 88 of the LET.

— "The personal, functional, territorial and temporal scope of the agreement;" that is, the bargaining unit the agreement is made for and its validity.

— The manner, conditions and period of notice for denouncing the agreement.

— The designation of a joint Committee and the determination of procedures to settle disputes within it.

— Finally, the LET obliges bargaining parties to establish as a minimum content of supra-enterprise collective agreements "the conditions and procedures for the non-application of the wage scheme established by the same, with respect to the companies included in the scope of the agreement"; these are the so-called salary "get-out clauses." In reality, it is more a legal recommendation than an obligation establishing the minimum content of the agreement, as failure to comply does not render the agreement null and void (art. 82.3, paragraph three, LET).

As we were explaining earlier, the bargaining content is subject to legal limits. In effect, collective agreements should respect the mandatory law minimums (art. 3.3 LET). In other words, they cannot be oblivious to either the rules of absolutely mandatory law — inaccessible in any sense to the parties — or the rules of relatively mandatory law, both the maximums as well as the minimums. By the same token, in the hierarchy of sources of employment relationships, the collective agreement takes precedence over individual autonomy [art. 3.1.c LET]. This prevents not only the agreement's application from being excluded by contract (STS of 16 June 1998 — Art. 5398 —), it also prevents the rules established in collective agreements from being substituted via a mass generalisation of individual agreements (STS of 18 April 1994 — Art. 3254 —). However, collective agreements must comply with the most favourable conditions of contractual origin which, because they belong to the individual sphere of the worker, are inaccessible collectively, without hindering the practice of compensating for existing conditions when applying pay increases, for example.

At any rate, collective bargaining should respect the fundamental rights recognised in the Constitution. Therefore, the collective agreement, insofar as it has statutory status and falls within the system of sources, must satisfy the rules of a greater hierarchical level and observe the set of fundamental rights contained in the Constitution (STC 177/1998 and STC 28/1992). The principles of equality and non-discrimination (art. 14 EC) have also been expressly recognised on the professional level [articles 4.2.c) and 17.1 LET], as stipulated by constitutional case law pertaining to the content of collective bargaining, which has ruled that the collective agreement must respect the irrevocable requirements of the right to equality and non-discrimination (STC 85/1994, among others). However, they must have the necessary modulations or particularities to make their regulation compatible with the justification of values deriving from the principle of autonomy of freedom (STC 2/1998). The compatibility of the principle of equality with different regulations within the agreement itself is generally recognised, so it cannot be said that distinctions within the agreement are contrary, per se, to the principle of equality. It must be examined whether the difference is reasonable or not, and whether it is acceptable for the legal system, in the light of general considerations about the content and scope of equality (STC 177/1988). Thus, to justify differences in how working conditions are treated, reasonable values and interests are taken into account, including the type of work rendered, performance, the company's economic capacity, etc. (STS of July 22, 1997 — Art. 8669 —), for which, in short, not all differentiation is discriminatory (STC of 24 October 1995 — Art. 8669 —), only that which is arbitrary and unjustified.

5. BARGAINING PROCEDURE

The legislator, after establishing rules that determine the legal authority to bargain statutory collective agreements according to their scope, determines the procedure for the bargaining process, leaving little manoeuvring room for the bargaining parties. The excessive formality of the established system has been criticised, although it surely allows for greater legal security in the approval of the collective regulation.

5.1. Beginning of the bargaining process

The representatives of the workers or employers instigating the bargaining should communicate this to the other party, in general

after denouncing the previous agreement. Whoever takes the initiative must send written notice to the other party, requesting that bargaining be commenced, giving proof of their legal authority, the scopes of the agreement — personal, functional, territorial and temporal — and the issues to be bargained. A copy of this notice should be sent, for registration purposes, to the labour authority that corresponds to the territorial scope of the agreement (art. 89.1 LET). This registration obligation does not affect the "essence of the bargaining procedure", thus "its eventual breach does not always and necessarily have to lead to the cancellation of the collective agreement" (STC of 14 February 1996 — Art. 1017—).

The party receiving the notice has one month to answer the offer, also in writing and in a well-reasoned manner, especially when the possibility of bargaining is denied. *Ex lege*, the receiving party is obliged to bargain and can only give a negative response in two cases (art. 89.1, second paragraph, LET):

— When there is "cause established by law or agreement", for instance, if the instigating party or the party that receives the communication lacks legal authority; or if the communication was not made in the due manner or fails to comply with the terms established in a previous agreement about validity, form and periods for denouncing the agreement.

— When "it does not have to do with revising an already-expired agreement", because there is no obligation to bargain while a collective agreement of the same scope is in force. Exceptions would be the eventualities laid out in articles 83.2 and 84, paragraph two, of the LET; that is, the possibility that through a framework agreement the concurrence between agreements of different scopes is authorised, allowing an agreement in force to be revised or a supra-enterprise agreement to affect the terms of another higher-level agreement.

The legislator supplements the reciprocal duty of bargaining, stressing its compliance "under the principle of good faith" (art. 89.1, paragraph three, LET), which means that in this initial phase, a willingness to bargain must demonstrated, even by immediately initiating the bargaining process.

5.2. The bargaining committee: creation, designation, bargaining and the adoption of agreements

Once the communication instigating the bargaining is received, and if the response by the receiving party is affirmative, the parties

have a maximum of one month to establish the bargaining committee: also in one month's time, the parties may set up a bargaining calendar or plan to be followed (art. 89.2 LET).

It is the responsibility of the bargaining parties to designate the members of the bargaining committee. Although they have total freedom to do so, they may not exceed the maximum number of representatives stipulated by the scope of the agreement (art. 88.1 LET). For company or lower-level agreements, the committee is made up, on one hand, of the employer or his or her representatives, and on the other, the workers' representatives who are legally entitled to bargain; that is, the legal representatives or union representatives, alternatively. The number of members of the bargaining committee is limited to 15 on each side.

The make-up of the bargaining committee, which — although it is not stated expressly — must be joint, should respect the maximum number of representatives for each side and uphold the right of all those legally authorised to participate in the bargaining, determining the distribution of positions in accordance with the criteria of proportionality, measured by trade union influence (STC of 31 October 1995 — Art. 7937 —). As much freedom as the legislator has given the bargaining parties, it goes against article 28.1 of the Constitution to establish the number of members or a specific distribution "with the sole intention of making it possible for a trade union delegation to do something (…) that its level of representation in the company would not allow it to do." (STC 137/1991).

If there is agreement between the parties, they will designate a bargaining committee president (art. 88.2 LET), whose role will be to moderate and maintain order in the sessions, without having any other decision-making powers. If the person elected to this position does not belong to one of the delegations, he or she will have a voice but not a vote in the meetings of the bargaining body; conversely, when the president meets the condition of being a member of the bargaining committee, he or she will logically have both a voice and a vote. In the event that it is decided not to elect a president, the parties shall assign, during the constitutive session of the committee, the procedures to be used to moderate the sessions and sign the corresponding minutes, a representative from each party and a secretary (art. 88.4 LET). The figure of secretary is, therefore, compulsory, and can either be a member of the bargaining committee or not, for having the role of signing the minutes, assuming that he or she has previously drawn them up.

During the bargaining period, the parties have the duty, as we have previously mentioned, to bargain in accordance with the principle of good faith, which does not oblige them to reach an agreement, although they *are* required to make a serious and real attempt to reach one (STC of 9 March 1998 —Art. 2372). To this respect, the 2003 Interconfederate Act for Collective Bargaining —AINC 2003— stipulates, among other general criteria pertaining to the bargaining process, some recommendations "enshrined" by the principle of good faith, for instance: to exchange information that facilitates interlocution in the bargaining process; for both parties to keep the bargaining as open as reasonably possible; to formulate proposals and alternatives in writing, especially when faced with difficult situations; or to turn to national or regional alternative dispute authorities when there are substantial differences blocking the bargaining. Any action or behaviour that hampers the bargaining is considered at odds with the principle of good faith, and if violent acts occur, either against persons as well as property, the bargaining in process will be immediately suspended until these actions cease (art. 89.1, last paragraph, LET).

During the course of bargaining, provisional pre-agreements or commitments may be reached. However, these are susceptible to modification as the bargaining progresses, as only the final agreement in its totality gives rise to the collective agreement. In order for an agreement to be reached, the bargaining committee requires the favourable vote of the majority of each one of the delegations (art. 89.3 LET) if the agreement is to be statutory, or, in other words, generally applicable. Exceptionally, in order to get around the prohibition of concurrence between agreements in force, the collective agreement that wishes to influence the provisions of another higher-level agreement must be agreed with "the backing of the majorities required to constitute the bargaining committee in the corresponding bargaining unit" (art. 84, paragraph two, LET).

The signing of the text bargained by the meeting of affected workers or the members of the employer's association or associations involved is not a legal obligation. But it is a different matter if the bargaining committee imposes conditions on the validity of the agreements reached by holding a referendum, the social partners seeking reinforce their legitimacy through the signing of the recipients; if this is the case, while the agreement is pending ratification, it will have only have the validity of a pre-agreement. Once it is ratified, that agreement will take effect from the date of its signing or from the date that the parties set (STS of 11 July 2000 —Art. 6628—).

6. THE PERFECTION OF THE AGREEMENT: FORMAL REQUIREMENTS AND PROCESSING

The legislator does not grant, without any further requirements, statutory status and general applicability to the collective agreement reached by the bargaining committee. In order for collective agreement to be statutory, a series of formal requirements must be met. The definitive agreement must be formalized "in writing, under penalty of nullity" (art. 90.1 LET) and signed by the bargaining parties (art. 90.2 LET). The validity of the verbal agreement is not recognised, although it is made with the favourable vote of the majority of each of the delegations. This is because the written form is a *ad solemnitatem* requirement which, apart from leaving record of the full content of the agreement, it facilitates general knowledge thereof, and can be used to bring about its compliance.

The text of the agreement, within 15 days from the moment it is signed by the bargaining parties, shall be presented to the proper legal authority — national or regional, depending on its territorial scope — for its registration. Once this formality is completed, they will send it to "the public body in charge of mediation, arbitration and conciliation competence for its deposit" (art. 90.2 LET). To this end there is a Central Registry in the Labour Directorate as well as a Registry of agreements in each one of the Provincial and Regional Directorates (art. 1 RD 1040/1981). It is the bargaining committee's responsibility, then, to register the collective agreement and present the additional documentation required (art. 1040/1981), after which the Administration deposits it. There is no deadline for completing this last step. Both the registry and the deposit are public, and the labour authority can check the legality of the agreement and even, where appropriate, legally challenge the agreement (art. 90.5 LET).

From the moment the collective agreement is presented in the registry, the same labour authority that oversees the registration has 10 days to order its "free" publication in the Official State Bulletin corresponding to the territorial scope of the agreement. When it is officially published, the agreement will come into force, although it will have effects from the date agreed by the bargaining parties; thus, salary clauses will be applied retroactively, in general since the end of the previous agreement. The obligatory official publication of the agreement being totally coherent, since its regulatory nature and general applicability are recognised, it stands out, however, that its direct application is not guaranteed by the jurisdictional bodies. This is be-

cause for agreements not published in the Official State Bulletin, a priori, the principle *iura novit curia* does not fully come into play, and the parties must identify and provide the agreement text (STS of 20 November 2000 —Art. 1423—). However, this last jurisprudential assertion must be evaluated on its own terms, since the constitutional right to effective judicial protection (art. 24.1 EC) demands that the applicability of the *iura novit curia* principle be recognised for all officially published agreements, "at least for the judicial bodies whose jurisdiction does not exceed the territorial scope of the same (STC 151/1994)."

In short, in order for the collective agreement to be valid and applicable, a valid agreement between the bargaining parties is not sufficient; the required formalities stipulated by the legislator must also be met. Principally, the written form and the registration and publication of the agreement —not so much the deposit— are required for the compliance of its content to be enforceable.

7. EFFECTS OF THE AGREEMENT: APPLICABILITY AND VALIDITY

Collective agreements that are bargained, agreed, formalised, registered and published in keeping with Title II of the LET "oblige all employers and workers included in their scope and during their entire validity" (art. 82.3 LET).

Regulatory legal applicability is recognised *ex lege* for statutory collective agreements, which means they are immediately and automatically applied to all employment relationships included in their scope (STC 177/1988), without specifying the aid of contractualisation techniques or the complement of individual wills (STC 58/1985). The collective agreement is, however, subordinated to mandatory labour laws, so that if the collective agreement observes the legal minimums of mandatory law it will have preferential application over the law; that is, the agreement will prevail over the law if it is more favourable.

As for real legal standards, their observance cannot be left up to one of the parties; the regulatory character of the agreement makes it impossible for inferior conditions to be established in an employment contract. It also prohibits workers from waiving rights recognised in the collective agreement. In other words, what is decided in an agreement cannot be modified even if an individual accepts an

offer made by the company, because if the autonomy of the individual will of the workers was allowed to prevail over collective autonomy, the collective bargaining system would collapse. Likewise, recognition of legal applicability prevents an administrative order from making an exception and authorising the non-application of provisions contained in the collective agreement, as otherwise this would mean ignorance of the agreement's binding force and even the principles guaranteed in article 9.3 of the Spanish Constitution (STC 92/1992).

Moreover, said legal applicability has *erga omnes* scope. Given the representativity of the bargainers, the statutory agreement is generally applicable. This means that, the scope of the agreement freely determined, it binds all employers and workers, although they do not belong to the signing associations or trade unions, applying the employment relationships of said scope to all of them. Finally, to determine the scope of the agreement, its duration must be decided. The bargaining parties can freely set the validity period, as the law does not stipulate a minimum or maximum time limit. They can even opt to establish different periods for each subject or uniform group of subjects within the same agreement (art. 86, 1 LET). Since the bargaining parties are also authorised to indicate an effective date for the agreement, which can even be before it comes into force, it is common to agree that the economic conditions of the new agreement are to be applied as of the expiration of the previous agreement or, looking to the future, for salary conditions to be agreed for a shorter period of time than the period established for the overall duration of the agreement. In the first case, when the agreement establish a specific effective date for backdating salary-related matters, it is applicable "to all workers who on said date were rendering their services to the company, even if the contracts had expired before the publication of the agreement" (STS of 22 July 1997 —Art. 5710—).

No matter how feasible it is to agree on the indefinite duration of an agreement, what usually occurs in the Spanish collective bargaining system is that a deadline or conclusion term is set. When this time comes, the validity of the agreement does not automatically expire, since this would require express denouncement following the terms established in the agreement itself. In effect, if not denounced, "collective agreements are renewed year after year" (art. 86.2 LET). However, it is possible to agree to the contrary; that is, to agree to a shorter or longer extension period than the one stipulated by law. The parties can even agree to indefinite renewal as long as there is no

denouncement or even a tacit or automatic denouncement when it expires. The denouncement should be made by one of the parties that bargained the agreement, with full authority (STS of 21 May 1997 —Art. 4279—). It must be directed to the other party to the bargaining, not to the administrative authority that registered the agreement, although the authorities do need to receive a copy (art. 2 RD 1041/1981). The denouncement has to be made expressly, which means that it must be either formalised in writing, or at least by unequivocal action on behalf of the denouncing party, as long as the recipient is made aware of this. As they form part of the minimum content of the agreement, the bargaining parties are obliged to establish the form, conditions, and period of denouncement [art. 85.3.d LET]. They can even give notice *ante tempus* if the parties so agree to it or by applying the *rebus sic stantibus* clause.

In principle, the denouncement of the agreement only means — until an express agreement is reached — that its obligational clauses are rendered invalid. The regulatory content of the agreement remains intact, unless it has been agreed otherwise (art. 86.3 LET); an agreement to the contrary that can exclude the extension of the regulatory content and also agree to the continuity of the obligational clauses as long this is not prohibited by law (STS of 12 April 1995 —Art. 3084—). The extension or "ultra-activity" of the regulatory content aims to cover any legal gaps, albeit temporary ones, without ruling out the possibility of establishing bargaining units of a different scope, especially when bargaining is interrupted to sign a new, revised or substituting agreement, or to apply a higher-level agreement (STS of 6 November 1998 —Art. 9822—).

At any rate, a collective agreement that follows a previous one "repeals the latter in its entirety, except for aspects that it expressly maintains" (art. 86.4 LET). Thus, "it can make stipulations about rights recognised in the previous one (applying) in said event, in its entirety, what is regulated to the new collective agreement" (art. 82.4 LET). Thus, application of the principle of regulatory succession is recognised, there being no obligation or mandate to respect more favourable conditions in the previous agreement, unless the new agreement opts to maintain guarantees *ad personam*; moreover, the principle of modernity can result in a reduction of rights (STS of 21 February 2000).

8. ADMINISTRATION OF THE AGREEMENT: FUNCTIONS OF THE JOINT COMMITTEES AND AUTONOMOUS MEANS TO SETTLE DISPUTES REGARDING APPLICATION AND INTERPRETATION

Normally, the application of what is established in a collective agreement requires actions additional to the bargaining, at times because the agreement itself demands this, to be able to implement what has been agreed, and other times because doubts arise as to the interpretation of clauses in the agreement. This supplementary step is known as "administration of the collective agreement", the joint agreement committee being the body responsible for this function. As we have mentioned, part of the minimum obligatory content of the agreement is to designate a joint committee with representatives from the bargaining parties "to hear as many questions that are conferred to it" and determine the procedures to settle disputes within the committee itself [art. 85.3.e LET] This body can exercise a variety of functions, including generic ones relating to the development and execution of the agreement: interpretation and application of the agreement clauses, adaptation of these to unanticipated problems, clarification of what has been agreed, etc., but not to introduce modifications or alterations to the agreement, nor tackle bargaining towards the future (STS of 28 January 2000 —Art. 1320—). In order for it to have bargaining authority this must be stipulated in the agreement (STS of 9 July 1999 —Art. 4883—) and it must not infringe upon the rights of legal authority recognised in article 87 of the LET (STC 184/1991).

The functions of application and interpretation of the agreement conferred to the joint committee (art. 91 LET) are subject to the scope of the agreement itself. This means that the committee cannot, when exercising these functions, "rule against the provisions of the agreement that establish it. If not, the adopted resolution shall be sanctioned as null and void " (STS of 25 March 1992 —Art. 1874—). The joint committee's interpretative role becomes even more important when the agreement expressly makes it compulsory to bring the dispute to the committee's knowledge, as a pre-procedural step (STS of 8 November 1994 —Art. 8600—). This does not mean, however, that the right to effective judicial protection is undermined (STC 217/1991).

In its hermeneutic activity, the joint committee must follow the rules of legal interpretation, without forgetting that they are dealing with a standard produced by an agreement, which means the rules of legal interpretation (art. 3.1 STC) should be integrated with the agree-

ment interpretation criteria (art. 1281 *et seq.* STC). Thus, as the objective is "to find out the parties' will to establish the scope and content of the agreed and determine which obligations each shall have" (STS of 29 June 1999 —Art. 5231—), when the terms are clear and reflect the will of the parties, the mere literal application will be the applicable rule (STS of 2 February 2000 —Art. 1603—). If the clauses have several possible interpretations, the interpretation most likely to make them effective should be chosen (STS of 8 November 1994 —Art. 8600—). At any rate, jurisprudence requires the collective agreement to be interpreted as a whole, and does not permit its clauses to be interpreted separately (STS of 19 January 1998 —Art. 741).

In addition to the joint committee's knowledge and resolution of questions derived from the application and interpretation of the agreements, the legislator provides for the possibility that via interprofessional agreements or agreements about specific matters, extrajudicial procedures can be established, "such as mediation and arbitration", to solve such disputes (art. 91, paragraph two, LET). In principle, these autonomous resolution procedures are stipulated to settle collective disputes, but "they can also be used in disputes of an individual nature, when the parties expressly submit to them" (art. 91, last paragraph, LET). Most important, at any rate, is that the agreements reached through mediation and the arbitrator's ruling have the legal effectiveness of statutory collective agreements, as long as those who have adopted the agreement or have signed the arbitration commitment have the legal authority that permits them to agree, in the scope of the dispute, to a statutory collective agreement (art. 91, paragraph three, LET). As a consequence of this, the agreements reached and the rulings pronounced in this context can be challenged in accordance with the grounds and judicial procedures for challenging agreements. That is, specifically, as per articles 161 *et seq.* of the Labour Procedure Act (henceforth, LPL); the arbitrator's rulings can be challenged when the requirements and formalities required for arbitral action have not been met and when the ruling refers to points not subject to its decision (art. 91, paragraph four, LET).

Surely, there are several sectoral agreements and collective agreements, especially on the regional and national levels, on this matter. Standing out on the national level is the 2nd Agreement for the Extrajudicial Resolution of Labour Disputes (ASEC-II), in force until 31 December 2004, for the resolution of, among others, collective disputes deriving from the interpretation and application of sectoral agreements above the regional level or, if they are company agreements, when the firm has workplaces in more than one region.

Apart from these autonomous procedures, disputes regarding the application and interpretation of the agreement are settled "by the proper jurisdiction" (art. 91, paragraph one, LET), which even has the authority to revise the interpretation made by the joint committee. Said authority is conferred on labour jurisdiction [art. 1 and 2.1) LPL], in accordance with special rules of procedure for "collective disputes" (art. 151 *et seq.* LPL). It is imperative, then, before filing the claim, for the disputing parties to make an attempt at conciliation, either before the corresponding administrative service or the body set up by the collective agreement for the knowledge and resolution of this type of disputes, the intervention of the joint committee being valid when this is expressly stipulated in the agreement (STS of 8 November 1994 —Art. 8600—).

9. CHALLENGING THE COLLECTIVE AGREEMENT

Collective agreements can be challenged before the labour jurisdiction bodies [art. 2.m) LPL] through a double channel.

Judicial challenges may be officially considered by the labour authorities if they deem that a particular agreement "violates current legislation or seriously infringes upon the interests of third parties" (art. 90.5 LET). As they are made aware of the agreement when it is registered and deposited, if the labour authorities feel there are grounds for illegality or observe damages to a third party —not potential or hypothetical but real and serious damages, not necessarily caused with *animus nocendi*, which affects a judicially-protected interest and cannot be rectified other than by the partial or total nullity of the collective agreement [STS of 11 March 1997 (Art. 2309)] — they may send a communication to the Court having jurisdiction over the scope of the agreement (art. 6,7, and 8 LPL), bringing the challenge of the agreement or any of its clauses. The Law does not stipulate a preclusive time period for the official judicial challenge, which means that it can be made while the agreement is in force, before or after the registration and publication procedures are completed (STS of March 31, 1995 —Art. 2352—).

The procedure in place for these purposes is that of "challenging agreements", a rule contained in articles 161 to 164 of the LPL. The official communication sent by the labour authorities will specify the grounds for the challenge. If it is the agreement's illegality, it will specify which of its rules and main points it considers to be violated, making succinct reference to the legal foundations for its illegality

and providing a list of the delegations that comprise the agreement bargaining committee (art. 162.1 LPL). When damages are alleged, in addition to this list, it will also provide another list of the claimant parties that are allegedly damaged, also indicating which of their interests it is trying to protect (art. 162.2 LPL). Once said communication is presented in the required manner, the labour authorities' intervention is over, and the proceedings continue with the delegations that make up the agreement bargaining committee and, where applicable, the claimant third parties whose interests have allegedly been infringed upon (art. 162.4 LPL), the Public Prosecutor's Office, which is always a party to these proceedings (art. 162.6 LPL) and the Public Prosecutor who is summoned when there are no claimants (art. 162.5 LPL).

In the event that the agreement has not yet been registered, the workers' representatives (legal or union) or the employers who maintain its illegality, or the third parties claiming to be damaged can contact the labour authorities to request its challenge (art. 161.2 LPL). Once the parties' request has been addressed — that is, once the official communication has been issued to the Court — the labour authorities' intervention is over, and proceedings continue with the presence of the claimants, without summoning the Public Prosecutor. If the labour authorities do not respond to the request in a period of 15 days, or they dismiss it because they do not find grounds for illegality or cause of damage, the challenge of the collective agreement "can be directly challenged by those authorised to do so, following the steps of the collective dispute process" (art. 161.3 LPL). It must be pointed out, then, that the labour authorities' refusal to challenge the agreement does not justify attempts aimed at revising the dismissive administrative act. Rather, the interested parties should turn to the proper jurisdiction in defence of their rights (STS of 12 June 1995 —Art. 5824—).

If the collective agreement has already been registered, the interested parties authorised to directly challenge it may do so without administrative intervention (art. 161.3 LPL).

Directly challenging the agreement via the legal procedures for collective bargaining disputes is, therefore, another alternative. Parties legally entitled to challenge the agreement —active legal authority— are, on one side, the legal or union representative bodies of the interested workers, trade unions and employers' associations — they must only have a direct relationship with the object of the dispute, if the challenge is based on grounds for illegality —, and on the other side, the third parties whose interests have been severely damaged,

when the reason for challenging the agreement is that it is damaging. It is important to point out that, to this end, the workers and employers included in the scope of the agreement are not considered third parties (art. 163.2 LPL). Passive legal authority is possessed by "all delegations that make up the agreement bargaining committee" (art. 163.2 LPL). The Public Prosecutor's Office will always be a party to these proceedings.

Resulting from the judicial challenge, the claim may be allowed or dismissed. If it is allowed, the contract may be declared completely null, in which case the parties must bargain a new agreement. Or, partial nullity may be declared, adopting "measures leading to the objective of rectifying the alleged anomalies upon a hearing of the parties" (art. 90.5 LET). This includes — we can deduce — the possibility of substituting them. Likewise, when the ruling overturns all or part of the challenged collective agreement and it has already been published, this ruling will also be published in the "Official Bulletin" it would have appeared in.

One final question: workers cannot directly challenge the agreement, without this limitation going against their right to effective judicial protection (STC 88/2001), since the worker can take action, through ordinary procedure, against specific actions by the employer protected in the agreement, soliciting the non-application of a certain clause of the agreement, considering it null. The fact that, where applicable, reparation of the damage involves rendering a clause of the agreement null "does not obstruct the interested worker's (right) to action via jurisdictional routes of defence which, although not expressly indicated in the procedural rules, are implicit in them, given the exigencies of the right to effective judicial protection" (STC 81/1990).

Part II

COLLECTIVE BARGAINING AT EUROPEAN LEVEL

Chapter 11

SOCIAL DIALOGUE AND COORDINATION OF COLLECTIVE BARGAINING AT EUROPEAN LEVEL

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1. THE "EUROPEANIZATION" PROCESS

The relations between the industrial relations actors at European have institutionalised gradually since the founding of the European project with the European Coal and Steel Community in 1952 and the European Economic Community in 1957. Distinctions in development and "Europeanisation" can be made between the interprofessional and sectoral level, different economic sectors and, importantly, the employers' organisations and the trade unions own structures and agendas. Within the context of deeper social and economic integration, effective and efficient links between the European and the national level industrial relations actors and structures are extremely important. Europeanisation of industrial relations necessitates those national industrial relations actors consider the wider implications of their actions, and take into account the development of European level common structures. Equally, European level actors must have strong relationships with national actors to ensure that common European agreements and policies are implemented rather than contradicted. In order to effectively build such a European industrial relations system, the actors at the different economic levels (interprofessional, sectoral and company) have autonomous but interdependent roles to play. This paper considers this interdependence as far as the interface between social dialogue at European level and the coordination of collective bargaining in the light of increased EU integration and enlargement.

Much research on the European social dialogue focuses on the outputs of the process rather than the process itself, and then uses

these outputs to present an argument on the potential outcomes of the European social dialogue. As Stüger and Marcher (2002) argue more research is necessary on *how* the social dialogue actually functions and *what* problems the actors have encountered. Scholars remain significantly divided. For example from the "so-called" Euro-pessimist view, Keller and Sörries (1999b) are convinced that it is reasonable to assume that the considerable gap between economic and social integration will not be bridged in the future by corporatist arrangements. Keller (2001: 174) even thinks that "we can see the few available outcomes [of social dialogue] neither as a sustainable basis for more substantial negotiations between the social partners nor as the seeds of a European industrial relations system". Indeed Keller believes that the view frequently expressed in the literature that the social protocol has "considerable potential to bring about European-level bargaining" (e.g. Molitor 1997: 295) is incorrect. However, the alternative argued by so-called Euro-optimists is that the European social dialogue is an element of the general construction process involved in building a European industrial relations system (Falkner 1998, Teague and Grahl 1992). Ultimately, most scholars are convinced that the net impact of agreements depends to a large extent on the outputs of European social dialogue, and their means of implementation; as a consequence, particularly in the case of the latest agreement on teleworking, the ability of the European organisations to control their affiliates is crucial.

As a result of the progress made since the social partners" agreement in 1991, and within the framework of the European employment strategy, the macroeconomic dialogue and the Lisbon strategy, new competences have been proposed for the social dialogue and dovetailing between European and national policy arenas has placed pressure on the social partners to strengthen their internal structures and consultation procedures. Therefore, in focusing on the dynamics between the European social dialogue and the coordination of national (and sub-national) collective bargaining, this paper outlines the nature and development of the European organisations, and then reviews the social dialogue (at interprofessional and sectoral level) and the strategy to coordinate collective bargaining.

2. EUROPEAN ORGANISATIONS AND SOCIAL DIALOGUE

Over the years, many definitions of "European social dialogue" have emerged and many continue to influence research. For instance, Braud (1998) provides an overview of the current framework and

different bodies of "EU social dialogue" in the broadest sense (including consultation by EU institutions, autonomous debate, and even negotiations — see also European Commission 1996a). Others take a narrower view of "EU social dialogue" (e.g. Bailacq 2000; Lapeyre 2000; and Nunin 2001). On the other hand, Lo Faro (2000) uses the term "European collective bargaining" throughout his analysis (and in the subtitle), it is clear from the book's introduction that its usage is specifically in relation to the procedures established in the social chapter of the Treaty, providing the general framework for the EU social dialogue.

For the purpose of this paper, the definition adopted by the Commission with reference to the "Agreement on Social Policy" is used, i.e. social dialogue leading to legally or contractually binding framework agreements. This is also the definition of "social dialogue" that the EU social partners themselves adhered to in relation to their joint Declaration for the Laeken Summit under the Belgian Presidency in 2001 (ETUC, UNICE and CEEP, Joint contribution by the social partners to the Laeken European Council, 7 December 2001). The EU social partners also witnessed that the term "social dialogue" has progressively been used to designate any type of activity involving the social partners. They therefore insist on the importance of making a clear distinction between three different types of activities involving the social partners:

- *Tripartite concertation* to designate exchanges between the social partners and European public authorities,
- *Consultation of the social partners* to designate the activities of advisory committees and official consultations in the spirit of article 137 of the Treaty,
- *Social dialogue* to designate bipartite work by the social partners, whether or not prompted by the Commission's official consultations based on article 137 and 138 of the Treaty.

The central European organisations in terms of the social dialogue are: the employers' associations — UNICE (private sector) and CEEP (public sector) — the ETUC and the European Commission. At sectoral level, it is largely the affiliates of these peak organisations which have conducted and participated in European negotiations, although in some sectors other organisations have been considered representative by the Commission. At interprofessional level, the Commission invited European peak organisations to participate in a number of informal and formal institutional arrangements before 1985 (e.g. Standing Committee on Employment established in 1974). However, it was

in 1985 that Jacques Delors, the current President of the Commission, initiated an informal dialogue between the two sides of industry at Val Duchesse outside Brussels within the context of the emerging social dimension of European integration. As a result of this development the social dialogue's institutionalisation has markedly intensified during the past 15 years, with the formalisation of relations between the interprofessional actors in the Maastricht Social Protocol of 1991.

At sectoral level, the development of sector-specific policy and technical committees and working groups by the European Commission since the 1950s has given the formation of European sectoral organisations a slightly different history. This sub-systemic participation of the social partners reflects the asymmetrical Europeanisation of different economic sectors, for instance the first sectoral joint advisory committee was established in the agricultural sector between the Employers' Group of the Committee of Agricultural Organisations in the European Economic Community (GEOPA-COPA) and the European Federation of Agricultural Workers' Unions (EFA) in 1963 (EIRO 1999). Informal or quasi-formal arrangements existed in many sectors before the Commission reformed the system and introduced the sectoral social dialogue committees in 1998, of which there are currently 27 covering sectors as diverse as sea fishing and personal services and composed of European sectoral social partners (European Commission 2002).

Through the 1990s, the interprofessional and sectoral routes were brought into line, politically at least, following the Maastricht Social Protocol and with the development of European policy orientations on social dialogue at interprofessional and sectoral levels. They may be considered complementary forums and tools for the social partners and the European institutions to regulate the labour market and tackle common concerns in a consensual manner. However, they remain autonomous of each other and this has occasionally been one of their greatest strengths. For instance, when interprofessional negotiations on a framework agreement on the rights of temporary workers failed in May 2001, the sectoral committee responsible for temporary agency workers (composed of UNI-Europa for the workers and CIETT-Europe representing the temporary agencies) were able to reach consensus on the issue and presented a joint position on the content of a potential Directive, which was then drafted by the Commission. However, it should be noted that the joint position, despite being political rather than binding, was considerably less progressive in comparison to the ETUC's bargaining position in the interprofessional dialogue.

Moreover, the European institutions, explicitly the Commission, have increasingly taken on roles traditionally accredited to national governments and legislatures in terms of environmental regulation of the industrial relations arena and the use of coercion to support the process (Hoffmann et al 2002). The Delors-led Commission in the late 1980s was responsible for choosing and inviting participants to the European social dialogue at interprofessional level, equally it was the Commission which appointed those organisations which represent at European level the national organisations in the sectors concerned. Therefore, when discussing the development of European social dialogue, one cannot ignore the activism of the Commission and parsticularly, Jacques Delors, as they provided the constructive context in which the ETUC, UNICE and CEEP were able to draft their 1991 agreement, which was taken virtually wholesale into the Maastricht Treaty (Dølvik 1998). Crucially, the Commission's enthusiasm on social matters convinced the national employers' organisations within UNICE to participate as a means of having more power over the direction of "social Europe", and it was this change in tack that opened the way to the social agreement (Branch and Greenwood 2001).

Lyon-Caen (1972) foresaw that the Commission would be a catalyst for social dialogue, at least in an initial phase. More recently, Nunin (2001) underlines how the social dialogue seems to have been a useful instrument for the Commission to overcome the regulatory *impasses* as regards social policy at the European institutional level. On the other hand, Gobin (1997) considers the social dialogue as a kind of "scapegoat", allowing the Commission to shift legislative responsibilities onto the social partners (see Kowalsky 2000 and Dølvik 1999). Moreover, Lo Faro (2000) considers ongoing European collective bargaining to be not a real product of collective autonomy but rather as an alternative Community source of regulation and legitimacy. It was the Community's own regulatory difficulties rather than presumed supranational collective autonomy which lay behind the inception of collective bargaining as a Community decision-making process. Moreover, Lo Faro believes that the institutionalisation of European collective bargaining — with its substantive limitations — has corresponded to the ambitions of institutional actors to overcome, at least partially, the regulatory problems of the Community (Streeck (1994) argues the contrary). However, an alternative direction could be found through autonomous social dialogue at the European level (European Commission 1999). This is a development which has been started in part with the results in the telework negotiations, and which is likely to continue given the fact that the EU

social partners have been recently given the right to develop their own "bargaining" agenda for the years to come.

As a result of the informal manner that organisations were included in the social dialogue, the issue of representativeness has been pivotal and controversial since the start of Commission-organised negotiations and discussions between the social partners and the European institutions, and neither of the social partners have been unaffected (Jacobs and Ojeda Avilés 1999; IST 1999; and Bailacq 2000). As informal structures have been formalised and the power of the social partners has been consolidated *vis à vis* legislative functions, the issue has gained in importance and questions about the legitimacy of actors to represent the labour market have been posed, in the early years of the social dialogue these challenges to representativeness came largely from other labour market actors, but with the expansion of EU competences into core social policy areas other actors have demanded official participation in EU decision-making (e.g. social NGOs), and this poses a slightly different challenge to the social partners. That said, according to Degryse (2000), the largest challenges to the European social partners are to be located in the representation of craftworkers, the self-employed, managerial staff and family businesses.

In an early attempt to clarify the conditions of participation, the Commission published a Communication in 1993 on the representativeness of the social partners at European level. This laid down for the first time the criteria that labour market actors would have to comply with if they wished to participate in negotiations within the interprofessional social dialogue. Three criteria were selected: a) organisations must be cross-industry or related to certain sectors and be organised at the European level, b) organisations must be composed of organisations which are an integral and recognised part of national social partner structures, with the capacity to negotiate agreements and are representative of all the member states (as far as possible), and finally c) organisations were required to have adequate structures to participate in consultation processes (European Commission 1993). On the basis of these criteria it was deemed that the 3 peak organisations (ETUC, UNICE and CEEP) were the most representative at European level, while other organisations considered to have a role to play in consultation but not during negotiations were included in an appendix.

The structures and actors involved in the European social dialogue were evaluated in 1996 by the Commission, at which point a whole range of concerned parties were consulted on the running and effectiveness of the European social dialogue. The consultation con-

cluded with the publication of a Communication on the European social dialogue (European Commission 1996). Subsequent communications further addressed the issue of representativeness, particularly in relation to the sectoral social dialogue (European Commission 1998; 2002); the major change, which has occurred in the requirements, has been a weakening of the geographical dimension. Thus, currently a "European social partner" must have members in *several* member states (European Commission 1998). This weak term has opened the door for many different interpretations.

Moreover, in the intervening years representatives of a number of different sections of the economy and labour market have argued that they are poorly or not at all represented by the current set of representative European social partners but have a right to participate too. There are different routes available to such actors, including the legal right to challenge the representativeness of participants before the European Court of Justice, and the use of moral and political pressure.

There is a growing mass of literature focused on the development of labour market actors at the European level, although the majority is dedicated to the development of European level worker organisations rather than employers' associations (Hoffmann et al 2002). This may be due to a number of factors, including, importantly, the political and social orientation and sympathies of scholars. The development of European trade unions and employers' organisations has neither been a quick nor an easy process.

Organised business interests have long been a substantial political and lobbying force at European level, however national employers have traditionally seen their European organisations as interest representatives, or "trade associations" (Van Waarden 1995), rather than as potential or proto-social partners. On the other side, trade unions took longer to develop European level organisations for a number of reasons, including differences along ideological and confessional lines (see Gabaglio and Hoffmann 1998). Fundamentally, unlike capital actors, trade unions traditionally act within the borders of national labour markets and national institutional frameworks, which has meant that the incentives to build transnational alliances have come as an indirect coercive result of the Europeanisation of the economy and the consequent weakening of the trade unions' monopoly on the supply of labour (Strøby Jensen et al 1995). A significant issue for both organisations has been the degree to which national affiliates have delegated competences to the central organisations, which have allowed the accumulation of power at the European level; this process

is still very much underway and is highly significant in the debate about the effectiveness of the social dialogue. Therefore, it is important to present the development of both sides in more detail considering the obstacles and challenges faced by national actors at the European level.

The European organisations will be presented thematically according to the variables identified by Van Waarden (1995) and used to analyse the power of national organisations: cohesion of the associational structure (is there competition or consensus between organisations?); the representativeness of individual affiliates (in terms of comprehensiveness of membership coverage and density); and finally, the capacity to control affiliates behaviour and thus, guarantee industrial peace as well as strife.

3. DEVELOPMENT OF EUROPEAN TRADE UNION ORGANISATIONS

The trade unions realised relatively early on that a policy geared to representing workers' interests within national borders is less and less able to meet the new challenges inherent in the process of European integration. However, the transnationalisation of trade union organisation has been characterised by confessional and ideological fragmentation, as has trade unionism in many countries. In the post-war years three international confederations were established, representing Communist, Christian and Social-Democratic labour movements (Ebbinghaus and Visser 2000, Degryse 2000b). The development of the ETUC, as a regional trade union organisation, must be considered in the light of these divisions and may be considered the product of reconciliation between the different groups (Dølvik 1997, Gabaglio and Hoffmann 1998). In 1978, Oesterheld and Olle argued that two phases could be identified in the internationalisation of trade union structures; the first phase (1950-73) was characterised by the development of regional subdivisions of the three international trade union confederations. The second phase was characterised by the development of unitary European trade union structures, which reconciled the divisions and tensions between the three strains of European trade unionism — i.e. the creation of the European Metalworkers Federation in 1971 and the ETUC in 1973, on the basis of unitary structures. This process of reconciliation was symbolically advanced in 1999 when the French former-Communist trade union *Confédération Générale du Travail* (CGT) joined the ETUC (Degryse 2000). It is worth noting that while many may overlook this

ideological dimension today, the persistence of European level organisations based on ideological or confessional grounds continues to have an impact on the composition of the actors involved in some areas of the European social dialogue. For instance, in the public sector there are sectoral overlaps in competence between the larger unitary European Public Services Union (EPSU) and the Christian public servants union (Eurofedop), although both federations' affiliates are members of ETUC-affiliated confederations.

The only other interprofessional trade union organisations at European level are the Confederation of European Independent Trade Unions (CESI) and the European Confederation of Executives and Managerial Staff (CEC). According to the representativeness studies conducted by the Commission CESI does not constitute a representative European social partner, as it has affiliates in only 5 member states, of which only a few are considered to be national social partners (IST 1999). Meanwhile, CEC has been recognised by the ETUC as a relevant trade union organisation in issues of concern to managerial and professional staff. Therefore, in 1999 CEC and Eurocadres (representing professional and managerial staff with ETUC affiliation) came to a cooperation agreement over the European social dialogue, which revolved around the creation of a liaison committee between the two organisations based on mutual recognition and extensive consultation on social dialogue.

At the sectoral level, national affiliates of the ETUC's member confederations are organised in the 11 European industry federations (see Table 1). Little comparative research exists on the development of European sectoral organisations; to date a number of studies have been conducted on the development of sectoral social dialogue and therefore, some evaluations on the development of the sectoral social partners have been incorporated, but further research is necessary.

Ideally the EIFs provide a crucial bridge to the national level providing coordination between national and European level bargaining agendas since the sectoral level remains the most important bargaining level in the majority of EU countries (Eichhorst et al 2001; Traxler et al 2001). Therefore, the integration of the EIFs into the ETUC's decision-making structures in 1991 was a key prerequisite to the creation of effect lines of communication between the European social dialogue and the national collective bargaining systems.

Thus, in terms of cohesion of the associational structures, the ETUC has internalised many of the conflicting interests present in European trade unionism, and through the agreement with CEC has

Table 1
European Industry Federation

Name	*Founded in*
European Transport Workers' Federation (ETF)	1968
European Federation of Building and Woodworkers (EFBWW)	1958
European Trade Union Federation: Textile, Clothing and Leather (ETUF-TCL)	1964
European Metalworkers' Federation (EMF)	1971
European Federation of Public Service Unions (EPSU)	1978
European Trade Union Committee for Education (ETUCE)	1975
European Federation of Journalists (EFJ)	1988
European Entertainment Alliance (EEA)	1993
European Mine, Chemicals and Energy Federation (EMCEF)	1996
European Federation of Food, Agriculture and Tourism Trade Unions (EFFAT)	2000
UNI-Europa	2000

European Trade Union Institute (ETUI).

integrated the only other representative organisation into the decision-making framework to provide more unity. The internal decision-making processes are designed to reach consensus among the affiliates and their interests, although on certain issues (e.g. 35 hour week) consensus was highly elusive.

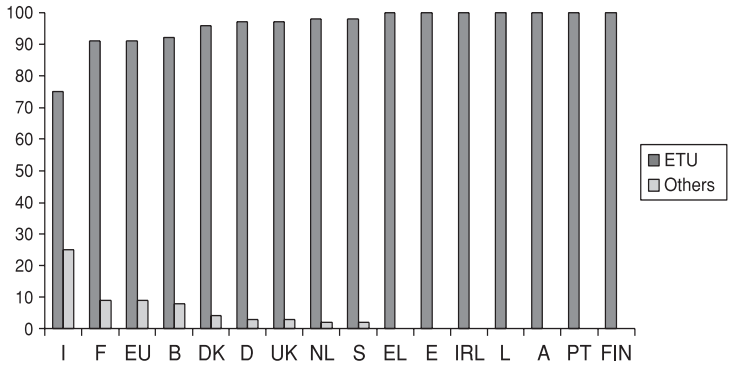
At sectoral level, the widespread process of privatisation has had a particularly strong impact on the cohesion of the union actors, as public sector workers have become private sector workers in a differentiated fashion throughout Europe. Consequently, in some sectoral social dialogues there are overlapping competences between EIFs, with consequences in terms of conflict within the ETUC (e.g. the production and distribution of electricity sector there are overlaps between EMCEF and EPSU: IST 2001). The current trend in trade union mergers has also had an impact on the changing composition of the EIFs (e.g. German union IG Metall represent workers in the ETUC-TCL and EMF, while Ver.di represents workers in EPSU and UNI-Europa).

Turning to the issue of representativeness, the ETUC's geographical coverage has gradually extended following the wave of reform in central and eastern Europe; the first unions from central and eastern Europe were affiliated to the ETUC in 1995. At present the ETUC organises 76 trade union confederations from 35 countries. Eight organisations from six countries have observer status. In addition to the 11 European industry federations (EIFs), other trade-union struc-

tures such as Eurocadres and FERPA (European Federation of Retired and Older People) also operate under the aegis of ETUC.

Table 2

National trade unions that belong to a European Trade union organisation (%)

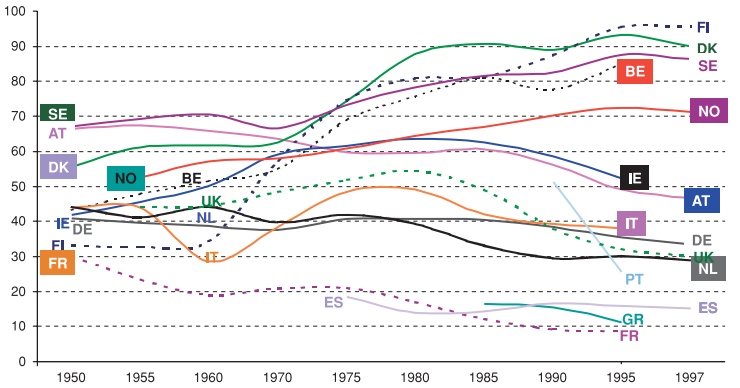


European Trade Union Institute (ETUI).
Source: European Commission 2000b.

As table 2 indicates, the ETUC currently represents approximately 90% of unionised employees in the EU, although in a small number of countries (notably Italy and France) other trade unions exist which are not members of the ETUC. In 2002, the third largest confederation in Belgium confederation of liberal trade unions (CGSLB) finally joined the ETUC. Thus, in terms of the comprehensiveness of union members, the ETUC is unquestionably representative. However, the issue of density requires a little more explanation, as Table 3 indicates density has consistently fallen in the majority of EU states in the last 30 years.

Since the late 1970s the trade union movement across Europe have been challenged by significant shifts in the structure of national economies bringing the reality of long-term unemployment and social exclusion to many countries, which challenge the social institutions of member states (*post-industrialisation*, see Pierson 1998), and have directly affected traditional trade union heartlands. As a result, "… the aggregate trends in the EU and in most member states indicate a receding tide of collective action of labour, if measured by its immediate results for workers (jobs, wages or social equality), its expression (strike action) or resources (membership levels)' (Dølvik and Visser 2001: 14).

Table 3
Evolution of trade union density (%)



European Trade Union Institute (ETUI).
Source: Ebbinghaus and Visser 2000.

Moreover, if the aggregate figures are further dissected a number of conclusions can be drawn; firstly, men are more likely to be organised in trade unions than women. Secondly, union density is much lower among younger than among older workers. Thirdly, white-collar workers exhibit a lower union density than their blue-collar counterparts. Fourthly, union density rates are relatively low among foreign workers and those belonging to ethnic minorities (although accurate and comparable figures are difficult to access). Fifthly, there are substantial differences in sectoral union densities, which are generally higher in the public than in the private sector. In private services — the sector in which employment is expanding — unionisation tends to be relatively low. Equally, sectors dominated by small and medium sized enterprises (SMEs) tend to be under-represented. The challenge for trade unions stems from the fact that the average enterprise size in Europe is decreasing, and SMEs are consequently increasing in economic importance. Meanwhile, with the decline of large-scale manufacturing firms unionisation rates are also declining across Europe (except those countries operating the *Ghent system* of union administrated unemployment insurance, Blaschke 2000), and trade unions have found SMEs notoriously difficult in terms of recruitment and organisation. A number of different factors for this have been posed including that traditional culture of trade unionism (focused on the stereotypical white, blue-collar, male, manufacturing worker), the nature of small workforces themselves, where loyalty is tied easier to the workplace than an external actor like a trade union, the financial costs involved in a large-scale recruitment drive focused

on SMEs and the diversity of SMEs' workforces (e.g. higher rates of female labour market participation and, in many cases, family employment). Finally, those countries in which the *Ghent system* operates — Belgium, Sweden and Denmark — have not followed the general trend and have maintained high-density rates (Waddington and Hoffmann 2001; Hoffmann et al 2002). As a consequence, this has had an impact on the representativeness of the trade union movement as a whole *vis à vis* social dialogue, and more particularly an influence on the delegation of power and resources from national confederations to the ETUC, as many national union movements are concerned about the longevity of accumulated resources (or in the case of the Netherlands, in dire financial straits).

According to Dølvik and Visser (2001), it is only recently that international trade union activity has changed from being primarily a foreign policy role of the international secretariat in national trade union offices to an element of everyday life. Therefore, as regards the last variable on the ability to control affiliates and the ETUC's participation in the social dialogue. Moreover, Gobin (1997) and Dølvik (1999) stress the fact that the ETUC is not currently in a position to commit its affiliates to agreements and to enforce application, both authors criticise the lack of financial resources available for ETUC functions which prevents it from playing to full effect its role as "actor" in the social dialogue. Martin (1996: 22) offers an explanation for this national reluctance arguing that the traditional excuses of "organisational inertia, language and cultural barriers, and the institutional diversity that made common understandings difficult" do not adequately explain the relationship between national affiliates and the ETUC. Rather he argues that "many national unions, notably the British and German, refused any significant transfer of authority and resources even to their national confederations. Moreover, there were (and are) perceived conflicts of interests among national labour movements (especially North and South). In addition, many (though not all) made the strategic judgement that declining resources could better used to influence national governments and their positions in the European arena than to influence European institutions directly' (Martin 1996: 22). Meanwhile, Sörries (1999) refers to the different stages of development of thinking on the trade union side in relation to the EU social dialogue. Only since the early 1990s, have the different actors seen European integration as an important objective in national social debates. However, as a result of their heritage, intervention has usually been approached from the perspective of national industrial relations systems. According to Martin and Ross (1999) it was largely in response to invitations by the European institutions for

European-level union participation that the tide changed, rather than an organic shift. This European-level enticement came with the development of the social dimension of the EC from the 1970s onwards, and the overtures of the Commission in terms of formal and informal participation in policy-making. Keller (2001) and Sörries (1999) are amongst the few researchers to have looked at the individual sectoral federations as far as the connection between the sectoral social dialogue and the coordination of collective bargaining policy, and their predictions in terms of ability to control outputs could be considered realistic or pessimistic, in that they emphasis the obstacles in the way of effective coordination between the two processes. For many the weakness of the EU social dialogue largely stems from the inherent weaknesses of the unions. Such union weaknesses include fundamental political differences on European integration, but more specifically divergent perceptions of the purpose of social dialogue and the prospects for collective agreements at European level have also been highlighted (e.g. Lecher and Platzer 1998; Keller and Sörries 1997). This is evident from the fact that employers are able to refuse to negotiate, with few adverse consequences, whereas the trade union movement requires the dialogue to pursue its demands (Degryse 2000b).

In conclusion, European trade union organisation is dominated by the ETUC, which itself is the product of a long process of reconciliation between nationally diverse trade union traditions. It has been as much a process of *rapprochement* at the national level as at the European level. However, the ETUC is also framed within the context of declining trade union power in the vast majority of the countries it represents and is thus substantially weakened by the different agendas of the member organisations and their willingness (or lack of) to substantially increase the resources available to the ETUC. Moreover, considering the adversity of the situation in some cases, it is worth commenting on the achievements of the ETUC. As Martin and Ross (1999: 353) conclude, "the confluence of these initiatives and Europeanising union actors" efforts, in the larger context of post-1985 integration, was enough to produce a significant degree of union Europeanization.

4. DEVELOPMENT OF EUROPEAN EMPLOYERS' ASSOCIATIONS

In 1981, Schmitter and Streeck addressed the nature of business interest organisation. Until that point the subject had been largely ig-

nored by the research world, while the nature of labour interest organisation had been the subject of far more attention. It has been suggested that a tacit agreement between different theoretical paradigms had been reached on the unimportance of business interest associations; although, Schmitter and Streeck (1981; 1999) argued that little empirical evidence supported this assumption. The need to reverse this research asymmetry was at the base of Schmitter and Streeck's research, in which they advocated that empirical data and analysis was essential to have a full understanding of *why*, *when* and *how* business interests have been articulated. In recent years, there have been a number of contributions on the issue of organised business interests in Europe (Sadowski and Jacobi 1991; Kohler-Koch 1994; Crouch and Traxler 1995; Greenwood 1997; Green Cowles 1998). Schmitter and Streeck's data has provided scope for further research. However, with the exception of Pochet and Arcq (1996; 1997; 1998; 1999; 2000), few have consistently addressed the development of the European peak organisations within the context of the social dialogue. This section will consider the peak organisations according to the same criteria as the development of European trade union organisations: cohesion, representativeness and control.

In 1999, the *Institut des Sciences du Travail* at the Catholic University of Louvain was commissioned to investigate the representativeness of the potential European social partner organisations. They produced studies on seven different employers' organisations or trade associations. In terms of cohesion of associational structure, the Union of Industrial and Employers' Confederations of Europe (UNICE) was established in 1958 alongside the EEC and is currently the most important employer organisation at European level in the private sector, while the European Center of Enterprises with Public Participation and of Enterprises with General Economic Interest (CEEP) is the most important organisation in the public sector, established in 1961. However, the groups represented in the other five organisations give some indications about the weaknesses of the two large organisations to effectively represent all employers (most importantly, SMEs).

Traditionally, UNICE and CEEP were primarily lobbying and coordination associations for their national affiliates *vis à vis* the European institutions (both the EU and the Council of Europe — Pochet and Arcq 1996). Since 1991 and the institutionalisation of the social dialogue, they may be considered as "mixed" associations, meaning they have competences in terms of representing their members' social, economic, technical and commercial interests (Van Waarden 1995).

CEEP is organised through 13 national sections[1], rather than individual national affiliates, which is unusual in comparison to other European employers' organisations; national interests are presented in a unitary manner in the European level structure (IST 1999).

Meanwhile, in contrast to UNICE (since 1991), which is composed of national peak organisations from the private sector, many of UNICE's members do not have equivalent national competences vis à vis collective bargaining *per se* and some have even more limited powers in relation to social affairs (e.g. the Confederation of British Industry). The European employers' organisations, as the European trade unions, constitute a common structure for very different national organisations; representing associations from those countries (e.g. Austria, Sweden and Germany) in which the employers' organisations are cohesive and able to present a united front, their interests and working methods must be reconciled with those of associations from the least cohesive systems in which associational competition is strongly entrenched (e.g. the UK) (van Waarden 1995). This has caused multiple tensions especially in the last 20 years, as member organisations have stressed that the UNICE Secretariat have no mandate to conclude agreements, and the different positions on this issue have led to disharmony within the organisation's structures. In 1998, Pochet and Arcq (1998: 180) commented that "internal divisions and poor communication between the national and European levels still hamper the efficacy of the employers" organisation', as regards social issues.

As mentioned above, not only are the two central peak organisations attempting to reconcile the different national interests, they are also defending their position in terms of associational competition — most strongly from the organised SME interests. This issue has previously been prone to legal problems, but appears to have been settled politically for the moment, via the Commission's guidelines on participation in the interprofessional social dialogue (European Commission 1993b). Despite the Commission's guidelines, the legal scope of agreements *vis-à-vis* small and medium-size businesses is of interest in terms of cohesion of employers' organisation. It is a contentious issue given the long absence of their main representatives on the employer side (European Association of Craft, Small and Medium Sized Enterprises — UEAPME) from the negotiating table, as a result of conflict with UNICE, which itself organises SMEs in a asymmetrical manner according to the composition of the national employers' organisations.

[1] Including a common national section for the Benelux.

The issue was initially dealt with in the UEAPME-case to the European Court of Justice (T-135/96 UEAPME versus Council) in relation to the Parental Leave Directive, in which the employers argued that the Directive should not apply to SMEs since they were excluded from the negotiations. In the short term, the ECJ interpretation settled the issue, although, according to Jacobs and Ojeda Avilés (1999), the judgment is both clear and opaque. It was argued that the SME employers were given adequate notice and consultation by the Commission in relation to the development of legislation on parental leave, but the ECJ did not rule out future challenges against EU Directives based on framework agreements between the social partners by organisations which can successfully prove to be insufficiently represented by the organisations sitting around the negotiating table (EIRO 1998). In any case, it led to a subsequent political agreement between UNICE and UEAPME, which outlined the composition of the employers' representation at the negotiation table with a view to adequately representing small and medium-size enterprises, which can be seen as a reflection of the importance of SMEs generally to the European economy — Table 4 (Pochet and Arcq 1998; 1999). The amalgamation of UEAMPE and EUROPMI in July 1999 has concentrated the representation of SMEs' interests and strengthened the merged organisation in relation to UNICE. However, these measures are currently inadequate, since the relevant committee within UNICE on SME issues has, according to SME representatives, taken on a dormant character.

Table 4

Size of enterprises in the EU: 1998

	Number of enterprise (000s)	*Number of employees (000s)*	*Average number of employees per enterprise*	*Added value per employees (€ 000s)*
Micro-enterprises (0-10)	18 040	38 360	2	30
Small enterprises (10-49)	1 130	21 320	20	50
Medium enterprises (50-249)	160	14 870	90	95
Large enterprises (250 <)	38	38 680	1 010	90

European Trade Union Institute (ETUI).
Source: European Commission 2000b.

If we consider the sectoral dynamics of SMEs, it is clear that it is sections of the growing service economy and the construction industry which are dominated by SMEs. In 1997, 88.8% of construction and 76.6% of trade and catering staff (HORECA) were employed by SMEs in comparison to 77.3% of employees in other services and 66% of all workers on average (European Commission 2001). An indication of the strength of UEAMPE can be seen in the joint ETUC/UEAMPE declaration on small companies in May 2001, which indicates that UEAMPE is increasingly recognised as the legitimate voice of SMEs by both the accredited trade unions and employers' organisations. It also indicates a new development in the relations between the trade unions and SME-representatives, which is characterised at the national level by cooperation agreements between trade unions and SME employers' organisations in some countries aiming to increase the profile of SME issues *vis à vis* the employers' confederal organisations which tend to be dominated by wealthy *global players* (e.g. between the Mittelstand and DGB in Germany).

Meanwhile, despite the fact that responsibility for the sectoral social dialogue falls to the European Industry Federations, employers' associations have not developed similar sectoral structures and as shall be explored further this has hindered the overall development of sectoral social dialogue (Pochet and Arcq 1998). There are a large number of sectoral organisations based around the EU institutions, but the majority tend to prefer to either leave all matters connected with social policy and the social dialogue to UNICE (e.g. in the metalworking sector), or prefer to develop informal relationships with the trade unions outside the contractual framework of the sectoral social dialogue (e.g. Intergraf representing enterprises in the graphical sector). If they choose the former strategy, preferring to concentrate their efforts on lobbying and traditional interest representation, they leave the trade unions without bargaining partners, while the latter means agreements have no legal strength *per se*. In general the attitudes of European employers' organisations at the sectoral level tend to depend on the nature of the sector, in terms of the size of average enterprise and the distance between employer and worker. For instance in the construction or hairdressing sectors, employers are often trained builders or hairdressers respectively and therefore, their appreciation of the needs and concerns of workers is perhaps easier to gain.

To attempt to develop the structures at the sectoral level and ensure channels of communication and consultation, vertically and horizontally, UNICE created the European Employers Network in 1993, which aims to coordinate national sectoral employers' organisations

on social issues (Pochet and Arcq 1996). However as the title implies it is relatively informal and therefore lacks the institutionalised benefits that the EIFs have on the trade union side. Alternatively, in the course of the European social dialogue, prominent European sectoral employers federations have been integrated into the negotiating bodies which develop UNICE's common position (e.g. Eurocommerce and GEOPA, representing commercial and agricultural enterprises respectively in the case of negotiations in advance of the agreement on fixed term contracts).

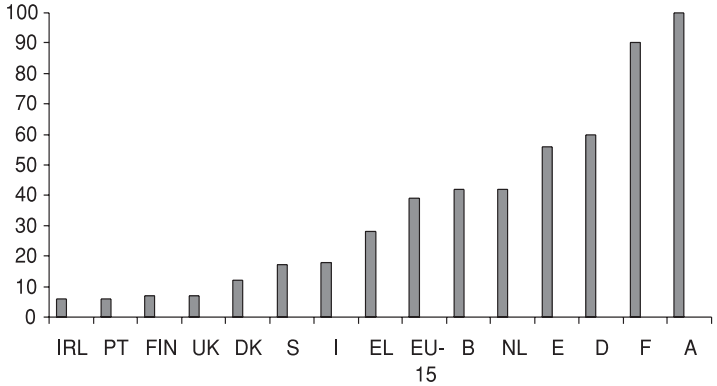
Therefore, in terms of overall cohesion, there are serious concerns about the level of cohesion between private sector European employers' organisations at interprofessional level, although the conclusion of an agreement between UNICE and UEAMPE has improved the situation and reduced the level of open conflict between different organisations. At the sectoral level, the lack of cohesion and coherent involvement of sectoral employers' organisations/representatives has been a key cause of concern for the future of sectoral social dialogue.

When assessing the strength and number of organised business interest associations researchers have generally used density indicators, measuring the difference between actual and potential members (Traxler 1995; 2000). There are two possible ways to measure the density of business interest associations, via: 1) the number of firms, or 2) the number of employees covered (firm size). Using EU data sources, a view from the first means of calculating representativeness (Table 5), indicates that the comprehensiveness of membership is limited in terms of the number of potential member firms. On average, UNICE and CEEP the only European social partners on the employer side represent around 40% of firms. However, there is a clear division between those countries in which van Waarden's research confirmed that employers' organisations were stable and cohesive social partners (e.g. Austria) and those at the opposite end of the scale (e.g. UK). That said, in all European countries employers' organisations are under-pressure in terms of member retention as increasing numbers of firms decide that it is in their interests to avoid associational commitments, this is of particular concern in eastern Germany as it is threatening the stability of German industrial relations and more generally in the countries of central and eastern Europe.

However, it is essential to combine the first measurement with a calculation of the density in terms of the number of employees covered. Table 6 gives this data with regards membership of UNICE. While it represents approximately 60% of the applicable workforce, this data confirms the importance of SMEs and particularly their

Table 5

Porcentage of firms that belong to a European social partners' organisation



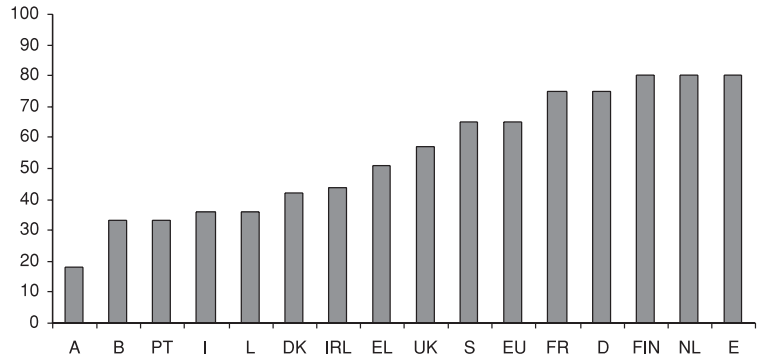
European Trade Union Institute (ETUI).
Source: European Commission 2000b.

European organisations. For instance, according to IST data (1999), UEAMPE affiliates account for over 50% of Austrian, 30% of Belgian and 20% of British workers.

As a consequence of these findings, it is clear that the issue of representativeness in terms of the employers' organisations remains, and likely to continue to be, contentious despite cooperation agree-

Table 6

Firms which are members of UNICE: % of paid labour force



European Trade Union Institute (ETUI).
Source: European Commission 2000b: 10.

ments. Although it must be noted that there have never been challenges to CEEP's representation of public sector employers.

Finally, considering the discussion thus far, it is clear that there are a number of challenges in terms of control for the employers' organisations, meaning the capability of the central organisations to conclude agreements and ensure they are observed. Until recently, UNICE's decision-making structures, as regards social issues, were relatively undeveloped and characterised by multiple veto points. For instance all decisions, whether on starting negotiations or concluding them were taken under unanimous procedures; a review of the voting system has introduced qualified majority voting to the procedures to initiate negotiations, whilst maintaining unanimity as the condition for concluding agreements (Degryse 2000). It will be interesting to examine in the long-term if this change leads to more agreements and eases the process, or if it has the effect of allowing discussions to develop and then stall as universal agreement is elusive.

Moreover, there is substantial evidence of national employers' organisations contradicting agreements concluded at the European level. For instance, Pochet and Arcq (1998) cite the example from Spain of the EU agreement on part-time work. At national level, the Spanish employers' organisation (CEOE) vetoed a national agreement between the trade unions (UGT and CC.OO.) and the government on the implementation of the EU Agreement, despite their support for the agreement at EU level. This can either be explained as poor communication between the decision-making levels or confused and conflicting agendas being used at different levels. Regardless it undermines the central EU organisations' claims to be able to conclude and implement EU agreements, and raises concerns about the new direction of social dialogue as exhibited in the telework agreement (i.e. voluntary implementation by the signatory parties).

In conclusion, it is possible to differentiate between the employers and the trade unions using these analytical criteria. The trade unions have managed to create unified structures (both at interprofessional and sectoral levels), which internalise conflict and institutionalise consensus-building structures between different national trade unions; however, declining trade union presence in the labour market as a whole should be remembered. In terms of social policy issues at least, the central employers' organisations have not been able to create unified structures, meaning that in terms of associational competition at European level there remain key concerns about the representation of SME interests and the strength, in some cases, and total absence of sectoral structures, in others. However, on an optimistic point, there

has been a gaugeable albeit slow development and adaptation of the structures of social dialogue by employer actors.

The following section will consider how the powers of the European industrial relations organisations impact on the social dialogue as a process. In the first instance, the current state of scholarly thinking shall be presented in relation to the interprofessional social dialogue and subsequently the sectoral social dialogue will be evaluated, with particular focus on the role played by the social partners.

5. EVALUATION OF EUROPEAN INTERPROFESSIONAL SOCIAL DIALOGUE

The literature focusing on the strengths and weaknesses of the EU interprofessional social dialogue, to date, can be divided into six categories: legal/constitutional arguments; organisational problems within the structures of the parties (including the relationship to their affiliates); the power relations between the parties and the interpretation by the parties of the objectives of the dialogue; the substantive issues dealt with to date (or rather those that remain unconsidered); and the input of the EU institutions, particularly the link to the European Parliament (see Hoffmann et al 2002). For the purposes of this paper, as stated, focus shall be placed on the European social partners' role/impact.

A relatively comprehensive overview of the legal and constitutional problems is presented by Jacobs and Ojeda Avilés (1999), who review the issues arising from the conceptual base and procedures of the EU social dialogue. They address a number of issues, including the voting procedures in the Council of Ministers (e.g. the differences in negotiating behaviour when the subject matter of the agreement requires unanimity or qualified majority) and the related importance of subsidiarity (see also Dølvik 1999), the relationship with the Council of Ministers (i.e. the checks made by the Commission and the Council when assenting to the incorporation of an agreement into a directive), and the ambiguous relationship between the EU social dialogue and the parties and the democratic scrutiny rights of the European Parliament (particularly looking at the legal possibilities for the EP to overcome its' restricted mandate in the area). They also review the ambiguous relationship with ECOSOC and the need to redefine its role, ambiguous in the sense that the social partners are present in both arena and it has been suggested that the social dialogue will eventually make the ECOSOC defunct. The role of the Commission is also important but controversial (see below). In the margins

of this legal debate floats the question of the "representativeness" of the social partners, as discussed above in general terms and in relation to SME participation and managerial and professional staff (see Jacobs and Ojeda Avilés 1999, IST 1999 and Bailacq 2000).

In addition, many scholars see the internal organisation of the interprofessional social partners as a cause of weakness both in building a more effective EU social dialogue, and for the actors themselves. In exploring this weakness, authors have made reference to organisational features, such as weak internal cohesion and central authority, and scant resources (Dølvik 1999; Ebbinghaus and Visser 1994: 242), and the internal voting procedures to initiate negotiations and adopt concluded agreements (Jacobs and Ojeda Avilés 1999; Pochet and Arcq 1999).

Fundamentally, most authors highlight the power relationship between the EU social partners and their affiliates (see, for instance, Lecher and Platzer 1998; Pochet and Arcq 1998; Dølvik 1999; Bailacq 2000). As regards the relationship between national and EU social partners, Streeck (1997a) argues that regulating via framework collective agreements offers affiliates of European peak associations of business and labour an opportunity to block legislation that could diminish their standing and upset their mutual relations in the respective national systems. This debate has primarily focused on the employee side of the equation. Thus, Euro-corporatism in effect safeguards the diversity of national institutions, especially the various national corporatist arrangements. In addition, Streeck (1997a) pleads for closer involvement of the "social partners" in European social policy-making, represented by organisations that in turn represent national peak associations, as the best way of protecting national corporatist arrangements from a possible statist agenda on the part of the Commission and the Member States in the Council. If this is a valid concern we should not be surprised that EU actors have had problems convincing their affiliates of the "added value" of EU social dialogue and its products. According to Freyssinet et al (1998), the role of national social actors (governments, trade unions, and employers) as regards European integration was until the 1990s relatively weak due to attitudinal differences. Only since the early 1990s, have the different actors seen European integration as an important objective in national social debates. Future development of the roles of national actors towards EU social dialogue will most likely depend on their attitudes towards, and the development of, national tripartite social dialogue focusing on European issues and, secondly, the internal mobilisation of the actors (creation of EU departments inside

national and sub-national organisations, alliances between national and regional level organisations, etc.).

The sudden establishment of this Euro-corporatism with the Maastricht Treaty (signed 1991) has given rise to conflicting interpretations of the role played by the Maastricht Social Agreement in influencing the perceptions, strategies, and behaviour of the political and organisational actors involved (Dølvik 1999). The agreement led to the emergence of a (unequal) power relationship between the major players (that is, ETUC and UNICE; for an extensive analysis of UNICE's impact so far see Matyja 1999). The weakness of the trade unions has resulted in considerable resistance from the employers' side to negotiate unless threatened with legislation (Gobin 1997; Dølvik 1999; Pochet and Arcq 1999; 2000; and Nunin 2001).

Moreover, the substantive issues addressed have a concrete impact on the priority national organisations give the social dialogue. Blanpain (2001), Dølvik (2000) and Weiss (2001) see major difficulties arising from the fact that discussion of a number of issues — such as pay, freedom of association, and collective action — is excluded within the scope of the dialogue. In particular, the preclusion of transnational rights to industrial action may be considered a central weakness of the current approach to the EU social dialogue, as it removes one the trade unions key sources of power from the equation (Dølvik 2000). Until the social partners were given increased room for manoeuvre in the aftermath of the Laeken Summit (2001), the delimitation of potential issues meant that the legal relevance of agreements was conditional on the observance of predefined limits as to the content, which had been defined by the EU institutions (Lo Faro 2000); it will be interesting to gauge if the range of issues covered will increase overtime with the development of autonomous social dialogue and a social partner-defined work programme. Since, as Degryse (2000a; 2000b) argues, the issues negotiated so far have largely been related to "employment" in the narrowest sense. Issues of a "macro-economic nature" as well as social issues, such as social exclusion, poverty, and immigration, which would be crucial in a coherent European social model, have not been addressed. Concerning the latter issues, he pleads for integration of the civil dialogue into the social dialogue, which could provide added value. However, there are real dilemmas surrounding the expansion of the social dialogue as regards issues and actors, for instance the increased number of veto points involved in reaching agreement and the likelihood of lowest common denominator based agreements versus the greater representative strength of any consensus reached.

Following the earlier reference to the (restricted) role of the European Parliament, it is interesting to note the absence of a strong tie between the social partners, in particular the ETUC and European political groups, a tie which is fundamental in many national industrial relations systems (Degryse 2000b). The frustration of the European Parliament has long concerned the ETUC: for instance in 1997, Vice-Secretary General Jean Lapeyre argued that in its post-negotiation reflections, the ETUC had stressed the need for the European Parliament to play a fuller role in proposing legislation on fundamental social rights. This should be seen as a mechanism in the dynamic between collectively agreed and statutory provisions, which the ETUC considers of fundamental importance. Significantly, any issue considered for the social dialogue should be assessed to ensure that collective bargaining is the most appropriate route.

Following this assessment of the key strengths and weaknesses of the interprofessional social dialogue, especially focusing on the participants, it is essential to briefly evaluate the results and impact of the process. Scholars have tended to group into three main areas of research: (i) analyses and impressions of the general conceptual framework and the agreements at EU level; (ii) descriptions of the results achieved so far; and (iii) analyses of the agreements and their impact on national level (although these are still few and far between).

The first group are often legal analyses: Lyon-Caen's study (1972) for the European Commission could be considered as visionary, since it was written in a period in which Community social policy and labour law were undeveloped and the ETUC was not formally existing yet. He concluded that there was a need for collective bargaining at community level which he considered as the heart of any industrial relations system. It is interesting that the negative and positive facets of European collective bargaining, which he identified, are still of concern and in a number of respects remain unresolved: for instance, legal problems with the content of agreements (which, according to Lyon-Caen, should have been decided autonomously by the parties within the margins set by public order, although he considered "pay" a non-negotiable item at the Community level); the conclusion of agreements (questions of the representativeness of the concluding parties); and implementation (e.g. the hierarchy of norms as established by Treaty; recognition by the Member States; extension of implementation). Despite the variety of legal problems, Lyon-Caen did not plead for the establishment of a unified European statute for collective agreements and warned against over-regulation. Instead, he proposed the development of a "code of conduct for collective bar-

gaining at Community level", with chapters on resolution of implementation conflicts (a crucial issue for the social dialogue today) and the interdependence of interprofessional and sectoral social dialogue. However, based on a detailed and comprehensive legal analysis, Deinert (1999) concludes that the legal void has not been filled. Rather, he argues, that "the law on European collective agreements" could be described as unwritten law, which has both advantages and disadvantages for the actors, the process and its outcomes. Crucially, the development of informal norms has always preceded legal structures. More recently, Franssen (2002) scrutinises every aspect of the procedure of the EU social dialogue ranging from the parties involved to the conclusion of framework agreements and their enforcement. On this latter issue of enforcement, it is interesting how little research has been undertaken on the national implementation and impact of EU agreements, whether sectorally or at interprofessional level. Does this lack of research interest reflect the importance accredited to the process by national actors too?

Table 7

Porcentage of firms that belong to a European social partners' organisation

Agrement	Parental Leave (agreement 12/1995, Directive 96/34/EC, 3/6/1996, OJL 145, 19/6/96: 4-9)
	Part-Time Work (agreement 6/1997; Directive 97/81/EC, 15/12/97; OJL 014, 20/1/98: 9-14)
	Working Time in Agricultural Sector (agreement 6/1997; voluntary implementation)
	Working Time in Sea Transport (agreement 9/1998, Directive 63/99/EC, 21/6/99, OJL 167: 33-37)
	Fixed Time Contracts (agreement 3/1999; Directive 70/99/EC, 28&6/99, OJL 175, 10/7/99: 43-48)
	Working Time in Civil Aviation (agreement; Directive 2000/78/EC, 27/1/2000, OJL 302, 01/12/2000:37)
	Telework (agreement 7/2000; voluntary implementation)
Legislation	European Works Councils (Directive 94/45/EC, 22/9/94, OJL 254, 30/9/94:64)
	Reversal of Burden of Proof (Directive 97/80/EC, 15/12/97, OJL 014, 20/01/98:6)
Failure	Negotiations on Temporary Agency Work (Started June 2000 — broke-down March 2001)

European Trade Union Institute (ETUI).
Source: European Commission 2000b.

Concerning the impact of the EU framework agreements (see Table 7) in general, Dølvik (1999) agrees that tangible results are relatively limited; there is general consensus amongst observers that those obtained were done so through the use of the "negotiate or we will legislate" formula, which has often been the main incentive for UNICE to accept negotiations (Gobin 1997, Keller 2001, Keller and Sörries 1999a, and Nunin 2001). Meanwhile, Lo Faro (2000) distinguishes between two types of European collective bargaining, but draws a similar conclusion from both. On the one hand, there is "inconsequential collective bargaining" (or "weak" agreements, where reference is made to European collective agreements implemented in accordance with the procedures and practices specific to management and labour and the member states) and, on the other, "tied collective bargaining" (or "strong" agreements, where European collective agreements are implemented through Council Decisions). Lo Faro's conclusion was that only the latter has played a significant role within the Community legal order, which reflects poorly on the ability of the social partners to control the process overall (as argued above). Consequently, the only way out of the impasse between the two forms would be through a radical institutional reform that would bring the Community legal order into line with its stated intentions. Hall (1994) also predicted uncertainty, particularly when using the voluntary route of implementation via national collective bargaining, which would lead to an "indirect and almost inevitably patchy impact"; a result unacceptable since in principle EU instruments should provide 100% coverage of the workforce (Keller and Sörries 1999b). According to Keller and Sörries (1999b: 119), "an implicit prerequisite would either be a very highly centralised national bargaining system including the participating associations/confederations on both sides or, alternatively, close, strict co-ordination of sectoral bargaining'. This must be seen in connection with the absence of an "*erga omnes*-procedure" [2] in several states, and the implications of enlargement of the EU (see Table 8).

Jacobs and Ojeda Avilés (1999) have been more positive on this since they considered that although the text of Article 139 suggests that binding force will vary depending on each member state's provisions, the underlying aim is to ensure that European agreements receive treatment equal to those concluded at national level. They note that it is customary in Europe to consider a collective agreement

[2] A legal declaration that makes collective agreements binding in general and extends the content of the agreement beyond the membership of the signatory parties.

Table 8

Trade union rate of organisation and collective agreement coverage (1999; branch and enterprise)

Country	*Rate of organisation (% of employed)*	*Coverage*
Finland	80	95
Greece	30*	95
Austria	45	90
Slovenia	43	90
Belgium	55	90
Italy	38	90
France	10	85
Sweden	80	80
Portugal	25	80
Denmark	80	75**
Germany	30	74
Netherlands	28	70
Spain	18	70
Slovakia	38	48
Ireland	45	45
Czech Republic	30	45
UK	30	35
Poland	30	30
Hungary	25	30
Estonia	12	20
Lithuania	10	8***

* Only private economy.
** Difference: due to those employed outside the collective contract.
*** Almost exclusively in the public sector.

Source: H. Kohl (2001) (WSI-Tarifarchiv; einblick 1/00 (DGB-Funktionärsorgan); F. Draus, Social Dialogue in EU candidate counytries (2000), own calculations.

as more than merely a recommendation to the affiliate membership, and rather as a binding legal agreement; this prompts national actors to directly incorporate European agreements into the everyday activities and practice of industrial relations actors, with regard to collective bargaining. Also Deinert (1999) heavily criticises those who wish to discourage the EU social partners by laying down that their agreements have *a priori* no effect whatsoever, since such preclusions could halt the negotiation of future agreements. These differing conclusions will be directly tested by the results of the implementation of the recently concluded framework agreement on telework, which will appear in 2005.

As for the impact of individual agreements, this seems to be rarely touched upon in the literature; few authors have devoted their re-

search to in-depth, comprehensive, and comparative analysis of agreements. In terms of the interprofessional agreements, Clauwaert and Harger (2000) provide an overview of how the most important features of the Parental Leave Agreement/Directive have been implemented by the 15 Member States, via legislation or collective agreement. The conclusion was that the implementation of the Parental Leave Agreement would have significant legal implications in the various Member States, but that this effect was minimised by the absence of an accompanying change in social trends and attitudes, leading to more men choosing to take parental leave [3]. Concerning the Fixed-Term Work Agreement, Blanpain (1999) concluded that, even before the deadline for implementation has passed, the agreement would only have a marginal impact, because it was based on "the Community's lowest common denominator". Alternatively, Vigneau et al (1999) provide thorough and sometimes innovative analyses of the negotiations leading to the conclusion of this framework agreement, the agreement itself, its interpretation and relationship to EC law, the implications of the Directive for national laws, with the emphasis on the principles of non-discrimination and non-abuse, as well as comments by representatives of the parties to the framework agreement.

6. EVALUATION OF SECTORAL SOCIAL DIALOGUE

The emergence of sectoral structures at European level has quite a different history from the development of interprofessional structures. While this section reviews the process, many of the points made above *vis à vis* strengths and weaknesses are as applicable to the sectoral social dialogue as to the interprofessional social dialogue. One significant difference should be stated at the outset, in virtually all European countries, it is at the sectoral level that wages and working conditions are agreed between national social partners, whether these are framework agreements or tight prescriptions. Therefore the powers available to the affiliates of sectoral organisations at European level have the potential to be stronger in terms of mandate than interprofessional social partners. It is this link with national negotiators in which many scholars have seen as a crucial means of coordinating collective bargaining policies in an increasingly economically interdependent Europe.

[3] A similar analysis on the part-time Directive/agreement is available (Clauwaert 2002) and an interim version on the implementation of the Fixed-term Directive/Agreement is near finalisation.

However, as a number of research projects have concluded this function of the sectoral social dialogue is underdeveloped and in general the process has not yielded the potential fruits (Weber 2001, Nunin 2001). Unfortunately, despite the fact that the decisions taken in the sectoral social dialogue have an impact on approximately 70 million workers (European Commission 1996), and the process is decades-older than its interprofessional sibling, "very little is commonly known about the actors involved, its outcomes and even less about the impact of discussions and actions at Member State level" (Weber 2001: 129). In the context of EMU, a new policy strategy has emerged in the trade unions to coordinate collective bargaining to avoid social and wage dumping (Mermet 2002, Dufresne 2002), and attention has turned to the sectoral social dialogue as a forum for national negotiators to meet and learn from each other (Nunin 2001).

To offer a little historical perspective, the emergence of sectoral joint committees surrounding the Commission from the 1950s (e.g. 1955 in the coal and steel community, 1963 in agriculture and 1965 in road transport), bringing together representatives from both sides of industry along with the Commission to discuss legislative proposals and policies, marked the first substantial steps towards the sectoral social dialogue as we know it today (see Table 9). These early structures indicate the importance of certain policy areas to the European integration process as a whole. Despite the fact that these committees were composed of Commission-appointed representatives rather than open to the most representative organisations in a transparent manner, the large number of joint opinions created suggests they were constructive forums. An example of this productivity is the sectoral agreement in the agricultural sector on working time in 1997. Alongside the joint committees, sectoral representatives were also present in informal groups on common issues (e.g. established in 1975 on saving banks).

In 1998 the Commission overhauled these two types of committee organisation to create a common framework through the establishment of sectoral social dialogue committees (European Commission 1998), which were endowed with the rights and powers available to the social partners under Article 139. To some scholars, this marked less of a substantive change than an attempt to reinvigorate a flailing process, as Keller and Sörries (1999) argued, the Commission was attempting to put "old wine in new bottles". The continuing absence of key economic sectors (e.g. metalworking) from the process has been cited as an example of failure to reinvigorate the sectoral social dialogue. However, in a small number of sectors in which neither joint commit-

Table 9
Sectoral Social Dialogue Committees (SSDCs)

Sector	*Workers*	*Employers*
Agriculture	EFFAT	GEOPA–COPA
Air transport	ECE; ETF	ACI Europe; AEA; ERA; IACA
Banking	UNI–Europa	EACB; ESBG; FBE
Cleaning	UNI–Europa	EFCI
Commerce	UNI–Europa	EUROCOMMERCE
Construction	EFBWW	FIEC
Culture	EEA	PEARLE*
Electricity	EMCEF; EPSU	EURELECTRIC
Footwear	ETUF–TCL	CEC
Furniture	EFBWW	UEA
Hotels & catering tourism	EFFAT	HOTREC
Inland waterways	ETF	ESO/OEB; UINF
Insurance	UNI–Europa	ACME; BIPAR; CEA
Mining	EMCEF	APEP; CECSO
Personal services	UNI–Europa	CIC Europe
Postal services	UNI–Europa	POSTEUROP
Private security	UNI–Europa	CoESS
Railways	ETF	CER
Road transport	ETF	IRU
Sea fishing	ETF	EUROPECHE/COGECA
Sea transport	ETF	ECSA
Sugar	EFFAT	CEFS
Tanning	ETUF–TCL	COTANCE
Telecommunications	UNI–Europa	ETNO
Temporary work	UNI–Europa	CIETT Europe
Textiles/clothing	ETUF–TCL	EURATEX
Wood	EFBWW	CEI–Bois

Source: European Commission 2002

tees nor informal groups existed, notably personal services and temporary work, the new committees certainly generated new opportunities for the social partners to meet and create common actions.

The large number of sectoral social dialogue committees and their very different productivity rates, in terms of joint endeavours, have allowed researchers to investigate what constitutes a successful social dialogue committee and what has hindered fruitful dialogue. In her analysis, Weber (2001: 130) considers the port and maritime sector and the private security sector, arguing the fundamental importance of "positive interactions between personalities in the negotiation teams". Both committees have been trail-blazers in terms of output and scope, with the first Article-139 based agreement in the maritime sector and extensive joint programmes in the private security sector. Gennard et al (2000) analysed the difficulties of social dialogue in the

graphics sector and showed that many of the problems identified in the intersectoral dialogue (such as differences between national affiliated unions, management opposition, and the resources available), are also identifiable in sectoral initiatives (see also Keller and Sörries 1997: 109 and 1999a: 91; as well as Sörries 1999 and Keller 2001). According to Pochet and Arcq (1998), crucially, there is a lack of sectoral representation in UNICE's structure, unlike the ETUC, as a result of the inclination of employers' organisations to avoid the development of sectoral regulation. This organisational discrepancy led Keller and Sörries (1997: 91; 1999a) to agree with Traxler's conclusion (1996a) that currently UNICE is not in a position to standardise the sectoral interests of European firms. The recently established informal network of sectoral business associations within UNICE (called the "European Employers' Network") might bring progress in this regard. Keller and Sörries (1997: 109) doubt that this will occur, however, since they think that sectoral Euro-associations, regarding themselves as trade associations, will hesitate to take on the responsibilities of an employers' organisation (see also Martin and Ross 1999: 152; and Streeck 1994: 167). According to Grahl and Teague (1991: 60), the trade union side is also not without fault since they consider that a "lack of resources coupled with differences over strategy and policy has resulted in many of the trade union industrial committees losing their way, neither meeting the needs of trade unions at sectoral level nor making an effective input into the institutional structure of the Community". Martin and Ross (1999) see a major reason for the low level of sectoral social dialogue in the fact that the Commission's efforts to overcome the employers' resistance are quite feeble. Keller and Sörries (1999b) argue, however, for a more sophisticated system of industrial relations that could secure additional momentum from the sectoral level, as a result of their conviction that interprofessional dialogue should take only limited credit for the development of European industrial relations. For Keller and Sörries (1999b: 98) the necessary basic legal provisions for future progress in the EU sectoral dialogue are missing, something which should be settled by a major revision of the Treaty on European Union with a view to narrowing the gap between economic and social integration (Blanpain 2001; Weiss 2001). In any case, heterogeneity across the different sectors also needs to be overcome, as shown by Sörries (1999) in his analysis of the EU sectoral social dialogue in the construction, telecommunications, and hotels and catering sectors.

In light of the implications of EU enlargement, and based on the comparative study by Draus (2000), debates at the Bratislava confer-

ence on social dialogue in the central and eastern European accession countries confirmed the weaknesses of sectoral social dialogue frameworks in a number of the candidate countries, existing mainly as a result of the absence of adequate structures and representative social partners (ETUC et al 2001; also Vaughan-Whitehead 2000: 396; Kohl et al 2000a: 413; ILO and EU 2001). In many candidate countries, mixed messages are being received from different European and international organisations on the development of national industrial relations at different levels, with some organisations promoting sectoral structures whilst their counterparts advocate bargaining decentralisation. Ultimately, the actions of multi-national companies and willingness to participate in sectoral structures is crucial to the emergence of full-functioning industrial relations systems. At the moment, it is questionable how the enlargement countries could contribute positively to the sectoral social dialogue, except through representation at the negotiation table. However, UNICE representatives consider that the absence of sectoral agreements in these countries does not necessarily pose major problems: for instance, in some countries there are systems within the framework of which sectoral organisations do not want to negotiate an agreement for the entire sector, but intervene to assist in the negotiation of agreements at individual companies (de Liedekerke 2001: 30). De Liedekerke argues that there is no universal model of social dialogue and that the social partners in each country are best placed to determine which system suits them.

Following a historical, descriptive, and analytical exploration of the sectoral social dialogue, which allows contextualisation and definition of the problems faced, Keller and Sörries (1999b: 85) identify a number of reasons for the particular importance of EU sectoral social dialogue. These include the ability to address specific aspects of sectoral restructuring, including the social consequences of EMU; since in many countries national bargaining takes place at the sectoral level (the latter point is also considered in Keller and Sörries 1997: 91).

Therefore, the following section will consider the trade union process aiming to coordinate national collective bargaining systems in Europe.

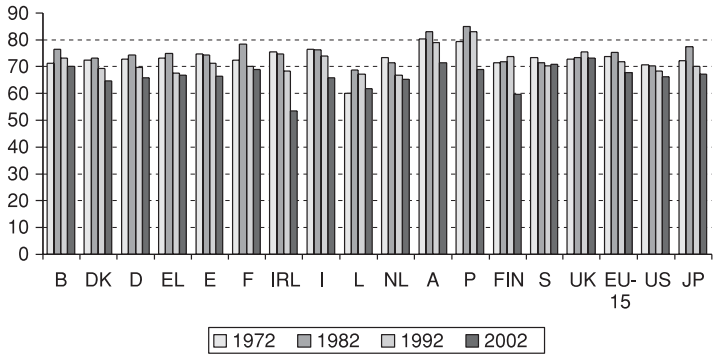
7. COORDINATION OF COLLECTIVE BARGAINING AND SOCIAL DIALOGUE

In 1999, the ETUC Congress adopted a resolution on the Europeanisation of industrial relations; a key pillar of the adopted strategy

was the coordination of collective bargaining and the strengthening of links with the social dialogue. While the implementation of this resolution was left to the European industry federations, the ETUC assigned itself the role of horizontal coordinator. Importantly, the roots of this strategic decision are firmly embedded in the perceived threats to national collective bargaining systems from the process of European economic integration, particularly economic and monetary union, and the institutional framework emerging responsible for economic policies in Europe (supranational monetary policy, largely national fiscal policy and increasingly sub-national wage policies). The general fear is that under the conditions of tighter economic policy coordination (see previous section) and the impracticality of a common wage policy at European level, wages in Europe will become "functional equivalents" to other economic policy adjustments in times of crisis, generating social and wage dumping and broader regime competition (for further discussion, see Streeck 1995b; Crouch 2000).

Table 10

Adjusted wage share: total economy, % of GDP at factor cost



European Trade Union Institute (ETUI).
Source: European Commission 2001b.

At the macroeconomic level, many researchers point to the fact that the wage share in Europe has consistently declined in the past thirty years as evidence to support the existence of social dumping, or more precisely wage dumping. The European wage share has fallen more rapidly than the American wage share over the past 30 years, which may be attributed to the internal competitiveness of the European internal market (see Table 10). During the 1980s, the decline in

employment as well as wage moderation policies may explain this trend. However, by the end of the 1990s, while employment increased, the wage share continued to fall drawing calls for the end of wage moderation policies in the name of socio-economic standards. Such developments threaten the very basis of many European collective bargaining systems, for instance the Rehn-Meidner model of wage solidarity (Schulten 2001a). However, there are significant differences in opinion about whether coordination is actually possible between such different systems by actors under pressure from European and global pressures.

If we look at actual developments in industrial relations in Europe since 1996, we have to recognise that some important steps have been taken in the direction of the gradual creation of a European system of industrial relations at the national and sectoral level. We have already mentioned the fact that the social partners have been increasingly confronted by pressures to adjust their bargaining policies to conform with the economic and monetary dynamics stemming from the national convergence programmes adopted by many governments in order to proceed with the implementation of EMU. In effect, in all the EU Member States that declared their willingness to participate in EMU, national government policies on taxation, public spending, investment, and inflation inevitably affected the collective bargaining process at all levels, including wage determination mechanisms. A clear example is provided by Belgium, where after the failure of tripartite negotiations on a social pact (the so-called "Future Pact for Employment") (Serroyen and Delcroix 1996), the government adopted in July 1996 a law reforming the wage bargaining system (law on preventive safeguarding of competitiveness and the promotion of employment) for 1997–1998. The new law made it possible to negotiate wage increases up to a maximum based on the average wage increase in Belgium's three main trading partners: Germany, France, and the Netherlands. This maximum is then used as the ceiling for all talks at lower bargaining levels (i.e. sectoral and company). In this way, a "European wage area" has been *de facto* put in place (Pochet 1999a). The unilateral decision by the Belgian government to link wage increases to wage developments in its three neighbouring countries had the foreseeable consequence of prompting the trade unions of the four countries to hold meetings to exchange information and to co-ordinate their wage bargaining strategies. Thus, since 1997 the so-called Doorn Group (made up of confederations and the largest sectoral federations from the Benelux and Germany) has met regularly, and since 1998 has pursued common bargaining norms and mutual learning (Mermet 2002).

In December 2000 the ETUC adopted the first resolution on the coordination of collective bargaining. The fruit of many years of work within the Collective Bargaining Coordination Committee and at the European Trade Union Institute (ETUI), this step was intended to launch a process of information exchange and coordination at the level of the ETUC on the basis of coordination initiatives taken at the level of the European industry federations and other trade union groups (Doorn Group, Interregional trade union committees, etc.). It was not intended to replace these initiatives but to supply an overview of the strategies and a common framework to strengthen coordination in the future. Thanks to this initiative, the debate on wages which takes place in other forums (Macro-economic dialogue, Broad Economic Policy Guidelines, dialogue with the European Central Bank, etc.) gained a new form of underpinning. Seeking, in particular, to reverse the notion of wage restraint, understood as a pay increase well below, in real terms, the gains in productivity, the Resolution seeks to increase the share of labour productivity gains allocated to wage increases. In order to put in place this ambitious strategy at European level, but also to counter any form of wage dumping in the context of the single currency, the ETUC has developed a system of exchange of information, which is the first stage in a strategy of collective bargaining coordination. The guideline adopted is based on the sum of inflation plus productivity at macro-economic level and was adopted by most of the European sectoral federations in different forms adapted to the specific features of the various sectors.

The guideline and the pay developments observed are evidence of a highly responsible attitude on the part of the European social partners. The pay developments of the years 2000 to 2002 thus remain within the framework of stability and growth but also significantly increase the purchasing power of wage-earners. Evaluation of the qualitative aspects, meanwhile, does not enable us to ascertain whether or not the improvements are significant. The reduction of working time seems to have declined in importance as a topic, while the problem of training and retirement would now seem to be a more important component of collective bargaining in European countries than was the case in the past.

For the time being, coordination is taking place more at the level of the exchange of information among affiliates, and also via the ex post annual monitoring of collective bargaining outcomes by the ETUC and the industry federations. However, it is already contributing to developing a joint analytical framework of the collective bargaining results, one which is not imposed by outside

agents on the social partners (BEPGs, macroeconomic dialogue, ECB, etc.)

On the practical dynamics of collective bargaining coordination, Hall and Franzese (1998: 509) argue that the ability of actors to co-ordinate their actions is determined by their organisational framework, and the nature of how five different "nested sets of strategic interactions" interlock, i.e.: 1) Each dyad of negotiators (employers and employees); 2) Each negotiator and the rank and file of their respective organisation; 3) Negotiators and their counterparts in different dyads; 4) Negotiators collectively and the economic policy authorities; 5) Policy-makers controlling monetary policy and fiscal policy. Thus, coordination of these different interfaces necessitates both horizontal and vertical forms of coordination, where the horizontal dimension refers to the synchronisation of bargaining in the different sectors and occupations and the vertical refers to the level of compliance among the rank and file (Traxler 1999). Importantly, in Traxler's opinion, "economy-wide co-ordination proves to be effective only if the problem of vertical co-ordination can be overcome" (Traxler 1999: 122). He believes that European co-ordination can be achieved in one of three ways: "The first way is through voluntary co-ordination, which takes place within a rather decentralised framework so that the problems of vertical co-ordination emerge only on a relatively limited scale. The second way is compliance of the rank-and-file to be enforced by the state. Third the performance of voluntary, central-level forms of coordination (i.e. inter-associational, intra-associational and state sponsored coordination) comes close to the performance of pattern bargaining when they are combined with a high degree of bargaining governability" (Traxler 1999: 122). As a result of the importance of horizontal and vertical dimensions, sectoral social dialogue and to an extent the interprofessional social dialogue provide important venues for trade unionists to interact across borders.

Like Traxler, Ebbinghaus and Visser (1994) address the necessary conditions for effective transnational co-ordination. In their opinion, co-ordination presupposes that "the trade unions derive mutual benefit from co-operation, possess appropriate information about the conduct of non-members of the cartel, and can detect and sanction any excesses" (Ebbinghaus and Visser 1994: 231). Keller (2001) argues that "voluntary co-ordination of pay bargaining is a realistic alternative [to centralised European negotiations and decentralised systems at company level], since legal adaptations can be ruled out at least in the short and medium term." He takes this to mean that,

under changed circumstances, "the original purpose of collective bargaining" ["to take wages out of competition"] should be preserved by means of "European co-ordination of national collective bargaining". Teague (2000a) supports Keller's assertion that currently coordinated national bargaining may be more realistic than European peak-level bargaining, but does not discount the development of European level bargaining in the future, with coordination providing the mutual learning necessary to make such a development practical.

Until now only a few studies have been conducted to evaluate the practical experience of coordination in the different sectors, but this largely due to the novelty of the strategy. Pochet (1999a) comes to the following conclusion: "An assessment of measures actually taken so far to comply with these guidelines reveals somewhat limited results. One group of countries (Austria, Belgium, Germany, and the Netherlands) is making real efforts to implement the [European Metalworkers' Federation's] recommendations. A second group, the Scandinavian countries, accepts the recommendations but would like to interpret them more flexibly. Finally, Italy, Spain, Greece, Ireland, and the United Kingdom together with France accept the recommendations in principle but have taken no steps to implement them' (Pochet 1999a: 272). In a more recent analysis looking at Belgium and Germany, however, Schulten (2001) states that co-ordination has not yet become established practice in these countries. In Belgium's case, according to Oste, the main reason is the law on the maintenance of competitiveness. This provision, also described as a "wage norm", "is clearly in contradiction to European solidarity" since it "explicitly links future wage developments to pay movements in Belgium's three reference states with the explicit goal of remaining competitive" (Oste *et al* 2001: 91).

The evaluations conducted thus far reveal a number of inherent problems with the coordination process. Schulten's conclusions (2001b) on the EMF strategy may be summarised as three problems: a) contradictions between national and European logics of collective bargaining; b) different interpretations of the common norms; and c) the structural weaknesses of the EIFs in comparison to their affiliates. In relation to the sectoral social dialogue, Keller (2001) has also emphasised these weaknesses, but as Ebbinghaus and Visser (1994) suggest the process is still very young. The building up of networks, as analysed in Gollbach and Schulten (2000), is a precondition for stronger coordination and, according to Ebbinghaus and Visser, a step towards the development of a transnational bargaining cartel in which networks create mutual learning and common approaches to the com-

mon challenges. Thus in effect fulfilling the aspirations emphasised by Jacobi (1995; 1996) by rebalancing the power relations between the employers and trade unions. However, substantive research into the different bargaining partnerships reveals a massive variety in content and method (Gollbach 2000; 2001). In their research on the potential and actual developments, Marginson and Sisson (1996) stress that the differences sectorally are likely to engender increased differences not between the European countries but between sectors nationally, which may have implications for national bargaining systems' conceptual bases. These differences are all the more striking to Pochet (1999) who emphases the absence of national horizontal coordination in some EU member states (e.g. France, the UK). However, if developed the dual processes of social dialogue could provide a counterweight to these sectoral differences.

Therefore, to conclude, the process of Europeanisation through the coordination of collective bargaining policies remains in its infancy. This is a particular problem for trade unions, which organise nationally-demarcated labour markets despite the fact that as a result of economic integration the demarcations of the national economies have largely disintegrated. The causes behind the unease in the literature about the motivations for and results of the coordination process indicate the magnitude of the dilemma facing trade unions' traditional goals.

8. CONCLUSION: WHAT DOES THE FUTURE HOLD?

This paper has presented and analysed the actors involved in the social dialogue at interprofessional and sectoral levels, and reflected on the current and potential interface between the social dialogue and the trade unions' initiatives to coordinate national and subnational bargaining strategies. The aim of this dovetailing is to build a functioning European industrial relations system in which the different levels interact effectively. However, both Degimbe (1999) and Theodossis (2000) are convinced that the future of social dialogue will depend largely on the good will of the parties concerned, initiating negotiations while overcoming their differences (internal and external). Theodossis (2000) also discusses whether it would be useful to link the right to collective bargaining with an obligation on all parties to negotiate (with penalties in case of refusal). This was attempted tentatively in the EWC Directive. In any case, the parties' goodwill and their ability to overcome current and future obstacles will, according to Degimbe (1999), determine whether the

EU social partners achieve harmonisation in the social policy arena comparable to that in the monetary, commercial, and economic policy arenas. A serious test case will thereby be the implementation of the in November 2002 concluded voluntary work programme 2003-2005 for the EU social dialogue concluded between the EU social partners.

Jacobs and Ojeda Avilés (1999) acknowledge that through the Agreement on Social Policy (ASP) a new legislative structure was created, which was incorporated in the European Treaties by virtue of the Treaty of Amsterdam. The future of the social dialogue will depend on how legal structures, among other factors, will relate to this new constitutional dimension (see also Hall 1994; Blanpain 2001). Kowalsky (2000) is convinced that the establishment of a well-functioning system of European industrial relations (including a well-developed European collective bargaining policy) will remain an important method of social integration, within the framework of which the limits and capabilities of the different contractual and legislative methods have to be clearly demarcated. A decisive step towards this European industrial relations system would also be taken if the national trade unions were able to co-ordinate their collective bargaining capacity on a European sectoral basis.

Regarding the European social dialogue's future prospects: Nunin (2001) considers that institutional dilemmas related to the enlargement of the EU to central and eastern Europe should not obscure the emerging social problems connected to the process. The recent integration of central and eastern European social partners in the EU social partners' organisations has been highlighted by Nunin as an appropriate means of impressing on them the importance of social dialogue within the legal and institutional dimensions of the Community's *acquis* (see also Vaughan-Whitehead 2000: 394; Kohl et al 2000a: 413). This crucial and interactive role of the social partners at both EU and national level in the development of EU social dialogue was stressed at a first major conference between European Commission and EU and national social partners in Warsaw in 1999 (European Commission 1999); as was cross-border co-operation between the social partners of these countries, which was considered vital. According to Vaughan-Whitehead, the effective involvement of social partners from CEECs in national (and EU) social dialogue is hampered by the lack of representativeness of some social partners, the sheer number of organisations in some countries, and imbalances between their parallel roles at the relevant levels (European Commission 1999: 17; Draus 2000). In addition,

Boda and Neumann (2000: 432) add the lack or inadequacy of the necessary expertise. According to Pochet and Arcq (1998: 183) another weakness has been the continuing divergence between UNICE and ETUC as regards perceptions of the process; ETUC sees enlargement as a means of furthering the European model of economic and social development, whereas UNICE warns "against the temptation of imposing systems in those countries which would not suit their needs". This difference has been approached through joint ventures, such as the recent so-called "Bratislava conference" of 16 and 17 March 2001, which could be considered a milestone (ETUC et al 2001). This conference also witnessed the EU social partners' commitment to involving social partners from the candidate countries in the EU social dialogue process, called for by EU officials and scholars (Vaughan-Whitehead 2000; Tóth and Langewiesche 2000: 382). The ETUC has begun to implement this commitment through the incorporation of a representative from the CEECs in the telework negotiations' delegation.

From a global perspective, Degryse (2000b) urges the EU social partners to approach Europe and its social model (including social dialogue) not as an "island" in the world, as some EU actors occasionally do; on the contrary, EU social actors should internationally promote the European social model to commercial organisations and other regions of the world and pursue its' objectives and principles within organisations such as the ILO, WTO, UNDP, and OECD. Degryse considers this to be the real future of European social policy. To this end the effective interweaving of national and European level industrial relations processes are a fundamental means of ensuring that the system is able to withstand pressures from European economic integration and the wider processes of globalisation and other regions of the world and social partners may be able to draw lessons. However, currently there is still a long and winding road to follow before these processes are either individually effective or mutually supportive, and incentives must be provided to all parties to ensure that support continues through the developmental stages.

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Chapter 12

EUROPEAN SOCIAL CONCERTATION

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1. INTRODUCTION

From the very onset of the European Communities in the 1950s the social partners (the organisations of employers and the trade unions, or also called "management and labour") saw themselves bestowed with a consultative role.

The consultative process is formally built into the Community's own structure by a number of joint committees and consultative procedures through which the Commission prepares its policies and actions, for example the Economic and Social Committee (ESC) [1], the Standing Committee on Employment as well as a growing number of specialised joint committees bringing together employers and unions in more specific sectors, such as coal mining, steel, inland transport, agriculture, fisheries, textile and so on. Other joint advisory committees deal with specific items like safety, hygiene and health protection at work, equal opportunities for women and men, free movement for workers and vocational training.

Moreover trade unions, employers and governments are represented in the European Social Fund Committee as well as in the governing bodies of the European Centre for the development of vocational training (CEDEFOP, Tessaloniki), the European Foundation for the improvement of living and working conditions (Dublin) and in the European Centre for Industrial Relations (Florence).

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[1] T. Jenkins, The Economic and Social Committee and social integration, in ETUI European Trade Union Yearbook, 1995, Brussels, 1996, p. 283.

The very existence of the EU has encouraged trade unions and employers to build confederations at European level. The three major examples are — on the employers' side — the European Employers' Association (UNICE) and the European Federation of Public Enterprises (CEEP) and — on the trade unions side — the European Trade Union Confederation (ETUC). All with their networks of affiliated organisations and specialised committees.

In the mid and late 1970s, so-called tripartite summit conferences were held between the social partners, the Commission and the Council of Ministers of the EU to confront the difficult economic problems of the EU countries. These conferences did not produce concrete results and the relations between the social partners at EU level grew increasingly strained, so that by about 1980 the frequent contacts had almost ceased.

Thanks to the initiative of the former president of the European Commission, Jacques Delors, the representatives of management and labour by 1985 started to meet again, this time not around a bargaining table but in the cosy rooms of the Brussels castle of Val Duchesse, away from any publicity.

This series of talks under the ambitious heading 'social dialogue' was intended to move away from the paralysis in the European social policy, which had resulted from the negative approach of the British Prime Minister Margareth Thatcher. The talks in Val Duchesse were successful in reviving the European social policy, although they resulted only in the publication of common orientations or joint opinions.

This sociale dialogue also produced the draft for the new social provisions for the EC Treaty, which were initially laid down in the Agreement on Social Policy (ASP) attached to the Treaty of Maastricht (1992). By virtue of the Treaty of Amsterdam of 1997, that came into force on the 1st of May, 1999, the ASP has been inserted into the Treaty of the European Community (Art. 138-139). So the informal social dialogue started at Val Duchesse, was formalised to a considerable extent.

The new provisions have considerably enlarged the influence of the social partners on the decision-making process within the EU, in two ways.

Firstly, Art. 138 EC Treaty charges the Commission with the task of promoting the consultation of the social partners. Before making any proposal for action in the social field the Commission must con-

sult the social partners "on the possible direction of Community action".

The social partners have six weeks within which to respond to this initial consultation. Once this period has elapsed, the Commission will, if it deems Community action to be necessary, publish a second consultation document on the content of any proposed legislation.

Then the social partners have another six weeks within which they may issue a recommendation or an opinion.

Finally — and this is the most original provision — if on the occasion of this second round of consultations the social partners inform the Commission that they themselves want to take on the matter, the Commission is bound to interrupt its envisaged action for at least 9 months and to give way to the social partners.

Secondly, Art. 139 EC Treaty provides that the social partners at EU level may enter into contractual relations (agreements). If they do so they may offer their agreement to the Council of Ministers with the request to promote its implementation.

Alternatively the social partners may prefer to leave the implementation of their agreement to "the procedures and practices specific to management and labour and the Member States."

Art. 139 EC Treaty is a clear legal basis for the conclusion of EU-wide collective agreements, perhaps even for strikes to this end.

The conclusion of EU-wide collective agreements had been debated among scholars for a very long time, but until a few years ago no such agreements could be concluded. Until some ten years ago trade unions only seldom showed any intention of concluding transnational collective agreements. And when incidentally they asked for transnational negotiations, the employers were not slow to refuse them.

However, after the ratification of the ASP attached to the Treaty of Maastricht (1992) the Commission started to direct the social dialogue to various "dossiers" which had been blocked in the Council of Ministers [2].

And so the European social dialogue process until now has brought forward four general agreements on the items of

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[2] See the Commission communication concerning the aplication of the Agreement on Social Policy, COM (93) 600 final.

— parental leave (Agreement of December 14, 1995);

— part-time work (Agreement of June 6, 1997);

— fixed-term contracts of employment (Agreement of March 18, 1999);

— telework (Agreement of July 16, 2002)

The first three of these agreements were subsequently offered to the Council of Ministers which moulded them into Directives [3]. The fourth agreement will be implemented over the alternative route: by the procedures and practices specific to management and labour and the Member States.

It is not difficult to play down the importance of the results yielded so far in the European Social Dialogue. From a material point of view these agreements are perhaps not all that interesting because they do not deal with the core of labour law and they often codify workers' rights that were already recognised in most Member States. However, as Prof. Wheelers writes: "The importance of such victories as rules on part-time employment being achieved through Social Dialogue, or the beginnings of international collective bargaining in Europe, is that they demonstrate that it is possible to take collective action across national boundaries. This demonstration effect is more powerful than any arguments of trade union leaders or tomes written by academics. Once you have seen someone ride a bicycle you cannot be persuaded that it is impossible" [4].

Moreover, these exercises are interesting from a formal point of view. They provide the negotiators, both on employers' and workers' sides, with useful experiences about all aspects of collective bargaining at multinational level — strategies, ambushes, etc. And thanks to the fact that these first four agreements are now on the table, we see more clearly than before the many formal questions resulting from the procedural arrangements, which are laid down in Art. 137-139 of the EC Treaty.

Meanwhile the social partners also have had the first experiences of what may happen if they do not start the process of European collective bargaining on a specific issue or if they do start it but fail to reach an agreement.

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[3] Directive 96/34/EC of June 3, 1996, OJ L 145/4 of 19.6.1996, Directive 97/81/EC of December 15, 1997, OJ 1998, L 14/9 of 20.1.1998 and Directive 1999/70/EC of June 28, 1999, OJ L 175/43 of 10.7.1999.

[4] H. N. Wheeler, The Future of the American Labor Movement, Cambridge, UK, 2002, p. 191.

The employers refused to negotiate in the Social Dialogue on the European Works Councils and on the item of workers' information and consultation and subsequently have had to accept that these issues became subject of Directives of the Council of Ministers. The European social partners did negociate on an agreement on temporary agency work, but they failed to reach an agreement on this issue. This item is now subject to a proposal for a Directive.

It is very important to see the Commission reacting on failures to negotiate in the social dialogue by pushing forward its own proposals. Because only if that stays the line the employers will realise that they cannot simply refuse collective bargaining in the social dialogue, which they otherwise might be inclined to do. Given the absence of industrial muscle of the trade unions in the European Social Dialogue this is one of the few effective pressures, which can be brought to bear on employers in the present circumstances. Employers are prepared to bargain with the unions if they really have reason to fear that otherwise the lawmakers will step in. Bargaining with the unions then becomes a means of keeping regulatory power at least to a certain extent in one's own hand. Bercusson [5] calls this procedure: 'Bargaining in the shadow of the law'. Blanpain [6] coined it: Damocles bargaining.

One of the problems for the social partners here is the problem, that voting on social policy matters in the competent institutions of the EC is still a complicated matter. Issues are divided on two lines: unanimity voting without co-decisionmaking of the EP and qualified majority voring with codecsisionmaking of the EP.

In the aforementioned paragraph the preparedness of the European legislator to enact social regulations was considered one of the few effective pressures on employers to bring them to negotiations and the conclusion of collective agreements with the unions. Therefore employers will assess the chances of such social regulations to be adopted.

Quite evidently their negotiating behaviour will be influenced by the answer on the question whether a subject matter needs a unanimity vote in the Council of Ministers or a qualified majority vote.

If an issue is to be decided by unanimity, the chances of no decision being taken by the Council are greater than in case the Council votes by qualified majority.

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[5] Bercusson, European Labour Law, London, 1996, p. 538.

[6] R. Blanpain in R. Blanpain/C. Engels, Comparative Labour Law and Industrial Relations in Industrialized Market Economies, The Hague, 2001, p. 173.

However, is some cases it may be uncertain whether a subject matter requires unanimity or qualified majority voting. This uncertainty [7] may encourage the employers to prefer bargaining in the European social dialogue.

Another possible kind of pressure is in switching an unsuccessful European social dialogue at the interprofessional level to the sectoral level.

It should not be overlooked that the European social dialogue is not confined to the inter-sectoral (interprofessional) level. The sectoral European social dialogue dates back to the 1950s when it started in the coal and steel sectors, and to the 1960s when the first joint sectoral committees were established. With the new emphasis on the social dialogue the Commission is now highlighting the prominent part the sectoral social dialogue has to play [8]. In 1998 the Commission issued a Decision on the establishment of Sectoral Dialogue Committees [9]. Essentially it does not much more than offering a general framework for the setting up of sectoral committees and bringing the existing Joint Committees under this new label. Not too ambitious an approach!

The sectoral dialogue produced its first results in the agricultural sector (the most recent agreement was concluded between COPA and EFA/ETUC on July 24, 1997) Later agreements about working time were concluded in the railways (1998), merchant shipping (1988) and in civil aviation (2000).

The agreement in agriculture was given the shape of a 'recommendation' to the national social partners in agriculture and not turned into a Directive.

Yet, the agreements in transport industry are implemented by way of a decision of the Council [10].

One could imagine more issues appropriate for sectoral collective bargaining such as working conditions in road transport[11], supple-

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[7] C. ENGELS/L. SALAS, Arbeidsrecht en de Europese Unie, in R. Blanpain (*et al.),* Europa na het Verdrag van Amsterdam, Leuven, 1998, p. 200-201.

[8] For a summary of the results thus far of the European sectoral Social Dialogue in the various sectors see BLANPAIN, European Labour Law, The Hague, 2000, p. 27-28.

[9] Commission Decision C (1998) 2334, OJ L 225 of 12.08.1998, p. 27-28.

[10] Directive 1999/63/EC of June 21 1999, OJ L 167/33 of 2.7.1999; Directive 2000/79/EC of November 27, 2000, OJ L 302/57 of 1.12.2000.

[11] L. VAN HERK, Arbeidsvoorwaardenvorming op Europees niveau, Utrecht, 1998; A.T.J.M. JACOBS/E.J.M. VAN HERK, Sociale aspecten van de Europese liberalisering van het beroepsgoederenvervoer over de weg, SEW 1995, p. 155.

mentary pensions schemes, the exchange of civil servants, etc. One of the most likely playfields for sectoral European collective bargaining could the professional football sport [12], which has serious problems with the implementation of the EC Directive on fixed term contracts [13].

The social dialogue could also take the shape of a cross-border Eurregional social dialogue, in which issues could be tackled like incomes, social security and taxation of frontier workers. However, in this respects developments are still on a very low level with only in the field of manpower policies the first positive developments (Euress) [14].

Perhaps de introduction of the Euro may presently give an impetus to European collective bargaining [15].

The introduction of the Euro will make wages and other cost structures in the various branches of industry more transparent. What does the handling of containers cost in the port of Antwerp, what in Rotterdam? What causes the differences? What role social costs are playing in it? How can cost structures be improved? More often than before employers will put pressure on the trade unions to accept reductions in social costs to improve competitiveness.

For the trade unions this will be a reason to cooperate more closely with colleagues from abroad to prevent a bidding down of collective bargaining incomes between the participating countries, as sought by the employers.

All this is not new [16], but the game will be played more sharply and more directly than before as some of the traditional ways to maintain competitiveness — adjusting exchange rate, state subsidies, etc. — are no longer permitted in the European Union. All this will bring about more international coordination inside the European Union of the strategies of management and labour.

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[12] See R. C. Branco Martins in the Dutch legal magazine Arbeid Integraal 2002, p. 183.

[13] Directive 1999/70/EC of June 28, 1999, OJ L 175/43 of 10.7.1999.

[14] R. Blanpain in R. Blanpain/C. Engels, Comparative Labour Law and Industrial Relations in Industrialised Market Economies, The Hague, 2001, p. 175.

[15] B. Veneziani, Dal dialogo sociale alla contrattazione colletiva nella fase della transformazione istituzionale dell'unione europea, in Rivista Giuridica del Lavoro e delle Previdenza Sociale, 1998, p. 239; M. Biagi, The European Monetary Union and Industrial Relations, in IJCLLIR, vol. 16, no. 1, 2000, p. 41.

[16] See the ETUC-Guidelines for collective bargaining and prospects for the development of the Social Dialogue, Brussels 1993.

Recent affirmations of this trend are:

* the summit meeting in Doorn (The Netherlands) on September 5, 1998, between the trade union federations of Belgium, Luxemburg, The Netherlands and Germany "to attune their wages policies";
* the declaration of principle on the bargaining policy of the construction trade unions in Europe (1998);
* a joint declaration as well as a cooperation agreement of the construction workers trade unions from Belgium, The Netherlands and Germany on measures to seek harmonisation of working conditions in the building industry (2000);
* the European Metal Workers' Federation (EMF) defined a reference framework for national collective bargaining which included the minimum wage levels which must be respected by the affiliated trade unions (1997);
* the same organisation adopted a Charter on Working Time, which lays down common standards in order to guarantee that working time does not become a matter for competition at European level (1998);
* the inclusion of a representative of the Dutch trade unions in the workers' delegation negotiating the German collective agreement in the engineering industry in Nordrheinwestfalen and vise versa;
* the European Federation of Public Service Unions (EPSU) agreed in April 2000 to put into place a framework for joint collective action, which it hopes could pave the way to a coordinated system of collective bargaining in Europe's public services (2000);
* the ETUC's executive committee welcomed and endorsed a guideline on the coordination of wage bargaining (2000).

In short, collective bargaining has finally entered the era in which it will acquire a European dimension. To our view this is a irreversable development, which urges us all the more to come to terms with its many legal aspects.

With the European Social Dialogue now emerging as another form of legislative machinery, the legal aspects of this institution are coming to the surface [17]. Many questions are closely connected to the very

[17] See Commission communication concerning the Development of the Social Dialogue at Community level: COM (96) 448 final.

wording of the articles 137-139 of the EC Treaty, which leave much room for doubts and various interpretations.

Measured on all commonly accepted sociological definitions of collective agreements, the European agreements concluded so far can be regarded as collective agreements. However, are they, from a legal point of view, valid collective agreements and what legal effects do they produce?

In many EU Member States specific rules on collective agreements exists — rules concerning the concluding parties, the decision making procedures, the forms and contents, the binding effect of collective agreements, etc. The validity and the legal effects of national collective agreement have to be measured on these rules. However, for European collective agreements very few such rules have ever been formulated.

So long as European collective agreements are emerging with the actual frequency of an average of one each year, the need for specific rules on European collective agreements may be obsolete. Once the number of European collective agreements and of legal conflicts on the validity and the binding effects of those agreements are on the rise substantially, the adoption of a much more precise regulatory framework for European collective agreements may become inevitably. In the absence of specific European legal rules, the question arises what legal rules should apply to collective agreements at European level. According to Blanpain [18] there is no doubt that there are insufficient European general principles of law to deal satisfactorily with legal problems, which accompany a European collective agreement. One day a truly European regulatory framework will be indispensable. Franssen has recently delineated a number of contours for such a regulatory framework [19]. The question is, who should establish such a framework? The institutions of the EU or the social partners themselves (as happened almost a century ago in Denmark).

2. THE CONSULTATION PROCEDURE WITHIN THE FRAMEWORK OF THE EUROPEAN SOCIAL DIALOGUE

Art. 138 (1) EC Treaty charges the European Commission to promote the consultation of management and labour at Community

[18] R. Blanpain, European Labour Law, The Hague, 2000, p. 428

[19] E. Franssen, Legal Aspects of the European Social Dialogue, Antwerpen, 2002.

level. The Commission "shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties."

According to the Commission these "relevant measures" include the organisation of meetings, support for joint studies or working groups and support for technical assistance [20]. Moreover I could imagine topics like performing secretarial tasks, providing interpreters, covering the costs of meetings, organising research, informing the public, training negotiators, etc. The Commission may do so by its own services (DG V, for instance), by supporting institutes like the European Trade Union Institute, or by the setting up and the financing of an independent permanent secretariat for the European Social Dialogue. Since a number of years the budget of the European Union includes some budget headings under which the European organisations of management and labour receive financial support.

Franssen [21] submits that it flows from the words "balanced support" in the text of Art. 138 (1) EC Treaty, that every organisation which falls under the concept of management and labour in Art. 138 (1) should qualify for this support. This does not mean that every organisation must be treated alike, but that there must be no arbitrary distinctions between the organisations.

She also points at the possibility that financial aid might endanger the independence of management and labour from the public authorities and suggests that workers' and employers' organisations should not receive any financial aid anymore from the Commission as soon as a genuine European system of collective bargaining has developed.

Art. 138 (2) EC Treaty states that the social partners shall be consulted on "any proposal in the social policy field". Over the last ten years the Commission effectively followed this consultation procedure on a number of occasions: European Works Councils, burden of proof in sex discrimination matters, parental leave, part-time work, sexual harassment, information and consultation rights of employees, supplementary pensions for migrant workers, etc. How broad is this concept? The Commission itself intends to consult systematically the inter-sectoral social partners" organizations on all developments in the economic and social policy field. Sectoral social partners' organizations shall, according to the Commission, be consulted on more specified issues, relating to their sector [22].

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[20] COM (93) 600 final, par. 38.
[21] Franssen, *op. cit.,* p. 78.
[22] COM (98) 322 final, para. 3.1 and 3.2.

Franssen[23] suggests that this norm embraces all Community initiatives and proposals which have a social or socio-economic significance. This are not only proposals on the basis of Title XI (Art. 137 and 141), but also measures implementing Art. 42, Art. 125-130 and Art. 158-162 EC Treaty.

To my view it should be realised that the more the scope of the consultation under Art. 138(2) EC Treaty is widened the more it becomes a duplication of the consultation of the ESC. I return to that question later.

By stating that the Commission shall promote the consultation of "management and labour", Art. 138 EC Treaty brings us to the very difficult question of "who are management and labour?" This is generally called the problem of representativeness.

The problem of representativeness at European level is not new. It emerged at the very start of the European Communities, when the Treaties as well as secondary Community law provided for a wide range of institutions in which the organisations of employers and workers were represented (see para. 1). Each time these seats have to be filled, the question arises: Which organisation is entitled to occupy the seat? The answer to this question is not a uniform one. Each institution has its own procedure for the composition of the seats, to be found in a wide variety of documents, such as in the EC Treaty, in Regulations of the Council of Ministers, decisions of the Commission, etc. The members of all those bodies are appointed on the basis of these rules.

In view of the vagueness and arbitrary character of various provisions, it is no wonder that sometimes disagreements have risen as to what is the proper representation of management and labour and more specifically what is the position of a particular organisation. In the past 40 years, it was possible to overcome disagreements most of the time and to distribute the seats to the satisfaction of the various organisations concerned. Sometimes dissatisfaction may have persisted without this resulting in a formal challenge to the decision taken. However, at other times, dissatisfaction led to real problems.

The first and only court action was provoked in the mid-1970s and concerned the new appointments to the Consultative Committee of the ECSC. The Council had failed to include the French trade union confederation CFDT, at that time the second largest French confederation of trade unions, among the representative organisations designated to draw up lists of candidates for the Consultative Com-

[23] Franssen, *op. cit.,* p. 81-82.

mittee. This confederation then lodged an application with the Court of Justice of the EC requesting the annulment of the Council's decision [24]. The CFDT lost the case.

Since the Agreement on Social Policy attached to the Treaty of Maastricht has given "management" and "labour" a more prominent role in the development of the social policy of the European Union, the question: Who are "management and labour"? has become more crucial. However, the Social Dialogue provisions (Art. 138 and Art. 139 EC Treaty) are extremely vague on this point, speaking about 'management' and 'labour' without defining those terms.

In the application of Arts. 138 and 139 EC Treaty the Commission adopted a dual approach. For the sake of the consultation rounds, mentioned in Art. 138 (1) it pursues a policy of wide-ranging consultations which cover all European or, where appropriate, national organisations which might be affected by the Community's social policy [25].

However, within the framework of the Art. 138 (2) EC the Commission undertakes formal consultations only with those social partners that meet specific criteria. The consulted organizations should:

— be cross-industry or relate to specific sectors or categories and be organized at European level;

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

— have adequate structures to ensure their effective participation in the consultative process.

The Commission listed these criteria in its Communication of 1993 [26] and confirmed them in later communications on the Social Dialogue [27].

The consultation procedure, laid down in art. 138 (2) EC Treaty is effectuated by the European Commission as follows [28]: The Com-

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[24] Case 66/76 (CFDT/Council), CJEC 17 February 1977, ECR 1977, p. 305.
[25] COM (93) 600 final.
[26] COM (93) 600 final, point 24.
[27] Communication of the Commission: Adapting and promoting the social dialogue at Community level, COM(98) 322 final. The Annex I to this Communication gives the actual list of organisations meeting the Commissions' criteria.
[28] COM (93) 600 final, para. 19; COM (96) 448 final, para. 65; COM (98) 322 final, p. 9.

mission normally starts it up by sending a letter to the social partners in which it asks for their opinion. The social partners subsequently send a letter back to the Commission in which they give their views on the possible direction of Community action. However, this view can also be given in an ad hoc meeting between the Commission and social partners which so desire. According to the Commission this first stage of consultation should no longer take than 6 weeks, but in particular cases this deadline can be adapted.

After this first round of consultations the Commission may proceed to a second phase, which will be initiated with sending out a second letter in which the Commission sets out the content of the planned proposal. Again within a period of six weeks the social partners may deliver to the Commission in writing, and where they so wish through an ad hoc meeting, their comments on the Commissions' second letter.

The time limits for consultation are not precisely laid down in the Treaty or secondary European law and my be challenged in the EC Court of Justice (see para. 7). So far, the social partners have remained more or less within the limits posed by the Commission.

A final important question is whether the Commission is under an obligation to press forward its own proposals if the social partners are given negative comments during the first or second consultation rounds, if the social partners abstain from negotiating on the issue in the European Social Dialogue or if they fail to reach an agreement.

It is unquestioned that the Commission is not obliged to proceed from the first phase to the second phase of consultation [29] nor from the second phase to a formal proposal.

Although, as we said already (para. 1), it seems wise that the Commission presses forward its proposals in those cases, from a legal point of view the Commission is not under an absolute obligation to do so.

The same applies to that other instrument the Commission can use: to change the forum of bargaining from the interprofessional European Social Dialogue to the sectorial European Social Dialogue.

In both cases the Commission may invoke a margin of discretion. F the use of this margin of discretion the Commission is responsible to the European Parliament.

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[29] COM (93) 600 final, para. 19.

3. THE CONCLUSION OF AGREEMENTS WITHIN THE FRAMEWORK OF THE EUROPEAN SOCIAL DIALOGUE.

One of the most innovative provisions in the "constitution"of the European Union is art. 138 (4) EC Treaty, which states that the social partners may inform the Commission of their desire to engage in the process of negotiating an agreement, which may not exceed nine months' duration, unless an extension is jointly agreed by the social partners and the Commission.

According to Bercusson [30] the nine-month duration does not explicitly preclude a parallel process of social policy formulation by the Commission. 'It might even be that such a 'twin-track' process would impart a certain dynamism to both Commission and social partners'. I disagree. Although the text of this provision does not say it expressly, its meaning cannot be otherwise than that the European Commission shall interrupt its endeavours to propose actions of the official institutions of the EU in the social policy field to give way to agreements of the social partners on this point. In my view Bercussons' 'twin track' process is only acceptable if the social partners themselves invite the Commission to continue its social policy formulation or if the social partners that have informed the Commission of their wish to initiate the process under Art. 138 (4) EC Treaty are not duly representative.

On this very moment the question "who are the European social partners acquires a much greater importance. For it no longer is about a consultation with no strings attached, but it is on stopping the official European policymaking and legislative machinery to give priority to collective bargaining by the social partners. Obviously, this stopping effect cannot be effectuated by any sample of organizations belonging to the entire wide rang of all European or, where appropriate, national organisations which might be affected by the Community's social policy.

Up till now the Commission seems to be satisfied, that on all topics which require all-sectoral negotiations, this stopping effect can be effectuated by the three umbrella organisations, UNICE, CEEP and ETUC [31]. Solely representatives of — on the trade union's side — the ETUC and — on the employers' side — the UNICE and CEEP (Public enterprises) — have sat around the table of the Social Dia-

[30] BERCUSSON, *op. cit.,* p. 542.
[31] COM (96) 449 final, p. 14.

logue. The European Commission recognised "that there is a substantial body of experience behind the social dialogue established between the UNICE, CEEP and ETUC" [32]. Yet, these organisations do not represent all trade unions and employers organisations in the Member States of the EU with aspirations to be included in all-sectoral European collective bargaining. Others have lobbied to be included in these negotiations, such as

— on the employers' side: the UEAPME (organisation of small and medium sized enterprises), COPA (the organisation of farmers) and CEMR (public sector municipalities and regions), Eurocommerce and SEPLIS (Liberal professions);

— on the trade unions' side: the CEC (confederation of higher personnel) as well as Eurocadres.

However the Commission believes that only the social partners themselves can develop their own dialogue and negotiating structures and it can not impose participants on a freely undertaken negotiation [33].

The question of representativity has its own particularities when the social dialogue is held at sectoral level. As organisatorial fragmentation and boundary disputes are much wider spread at sectoral level than at inter-sectoral (interprofessional) level, it may be difficult to establish which parties should be involved in a specific sectoral social dialogue.

The conclusion of agreements under the social dialogue must be approved within ETUC, UNICE and CEEP by certain bodies. However, what bodies and what majorities are required for the endorsement of the agreements? The rulebooks of those organisations may provide us with detailed information on that point. All the aforementioned organisations have adapted their rule books in recent years to meet the requirements to conclude Euro-Agreements. Some of these developments have been described already [34], but more research needs to be done on questions which arise when organisations got divided on the policies to pursue. Who then is able to push through decisions, with what majority? Are the opponents bound to the decision, etc.?

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[32] Communication of the Commission, concerning the aplication of the Agreement on Social Policy, COM (93) 600 final, point 25; G. Gobin, The ETUC and collective bargaining at European level, in E. Gabaglio/R. Hoffmann, The ETUC in the mirror of Industrial Relations Research, ETUI, Brussels, 1998, p. 243.

[33] See COM (93) 600 final and COM (96) 448 final.

[34] Bercusson, 1996: 570 for information on the ETUC; Franssen, *op. cit.,* p. 200-201.

What will be the new situation with the UNICE/UEAPME agreement of cooperation (see para. 4.2). What are the answers on the same questions as regards the social dialogue at sectorial level?

Three out of the four inter-sectoral Euro-Agreements, that up till now have been concluded, have been submitted to the European Commission by the signatory parties to be implemented by a decision of the Council. The signatory parties did not need to do so. They could have taken the alternative route of implementation, indicated in Art. 139 (2), that is, implementation in accordance with the procedures and practices specific to management and labour and the Member States.

The choice in favour of implementation by a Council decision must have been made in unison by all the signatory parties — the ETUC, UNICE and CEEP — since the Treaty requires for this route a "joint request". Presumably these decisions are taken within the ETUC, UNICE and CEEP by the same bodies and with the same majorities as those required for the endorsement of the agreements themselves.

4. IMPLEMENTATION OF EURO-AGREEMENTS VIA DECISION OF THE COUNCIL

4.1. General observations

Art. 139 (2) EC Treaty states, that "agreements concluded at Community level shall be implemented

* either in accordance with the procedures and practices specific to management and labour and the Member States, or
* in matters covered by Article 137, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission.

It seems appropriate to start our exploration of these two ways of implementation of Euro-agreements with the latter, since up till now the majority of the agreements concluded between the European social partners have been implemented via this route.

The possibility to use this route of implementation is not limited to Euro-agreements, which originated in the consultation procedure, mentioned in Art. 138 EC Treaty. Also spontaneously concluded agreements can be implemented by a decision of the Council[35].

[35] BERCUSSON, *op. cit.,* p. 566-567.

Moreover, the possibility to use this route is not limited to European inter-sectoral agreements, which cover all employers and employees. Also sectoral, regional and even European company agreements may be implemented by way of a Council decision [36].

Euro-agreements may only be implemented by a decision of the Council if there has been a joint request of the signatory parties. The request must be directed to the European Commission.

The European Commission [37] appears to have reserved for itself the discretion not to present a proposal for a decision to implement a Euro-agreement to the Council. Some authors agree with this opinion [38]. The ESC [39] however, took the view that it is up to the social partners to decide whether their collective agreement should be put to the Council. The Commission has no discretion; if there is a joint request by the signatory parties, the Commission must propose it. I agree with the ESC. Of course the Commission can make a negative assessment, but it should present the proposal together with its assessment to the Council. The Commission, however, cannot sit in judgment and take the decision itself.

The Council, once it is jointly requested by the social partners, is certainly not under a strict obligation to implement a Euro-agreement, although the opposite opinion is sometimes derived from a literal interpretation of the text of Art. 139 EC Treaty.

In my view this route of implementation of Euro-Agreements is very much comparable with the mechanism of extension erga omnes of collective agreements known in the national collective bargaining systems of many EU Member-States. In most of these systems the public authorities have reserved themselves a certain room for maneuver. They may refuse extension erga omnes on grounds of legality or expediency as regards the contents of the agreement or because of a lack of representativeness of the signatory parties. In some countries they may even decide to only partially grant extension erga omnes (viz. by excluding certain clauses from the extension) or to exempt certain enterprises. All this indicates that it would be highly contrary to existing traditions of labour law in the EU [40] to conclude on a purely literal reading of the text of Art. 139 EC Treaty, that the Council is

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[36] R. Blanpain, European Labour Law, The Hague 2000, p. 435.
[37] COM (93) 600 final, par. 39.
[38] Franssen, *op. cit.,* pp. 208-213.
[39] See B. Bercusson, pp. 566-567.
[40] See A.T.J.M. Jacobs, Het recht op collectief onderhandelen, Alphen a/d Rijn, 1986, pp. 226-231.

under an inescapable obligation to implement a Euro-agreement by a Directive or Regulation.

On they other hand it would be too great an affront to the prestige of the social partners to allow the Council to decide arbitrarily on a request for implementation. The truth lies — as so often — somewhere in the middle, but in this arena it is unclear just where the middle is. The Treaty offers a vacuum in this field which ultimately may be filled by the European Court of Justice. If at any time the Council refuses to implement a Euro-agreement to the satisfaction of the signatory parties, they may have recourse to the Court, which then will have to establish certain criteria. The Court would be well advised to derive such criteria from the principles which many Member States have in common on the limitation of the executive power in its handling of requests for the extension erga omnes of collective agreements.

This view that the Council is not bound to an axiomatic implementation of Euro-agreements, has already been confirmed by the handling of the first cases in which Euro-Agreements have been implemented by Council decisions. Both the Commission[41] and Council checked the Agreements on:

a) the representative status of the signatory parties as well as their mandate;

b) the legality of the clauses of the framework agreement, amongst others in relation to the Community Charter of Fundamental rights (and notably its anti-discrimination provision) and to the Convention on Fundamental Human Rights;

c) the compatibility with the principles of subsidiarity and proportionality;

d) the compatibility with the provisions on SMEs;

e) their contribution of the realisation of the social aims of Art. 137 EC Treaty.

4.2. The representativeness check

The European Commission, before transmitting a Euro-agreement to the Council for a decision, examines the issue of representativeness carefully. In all cases up to now the Commission ultimately reached

[41] See COM (93) 600 final, para. 36.

the conclusion that the organisations involved in the Euro-Agreements fulfilled the criteria of representativeness necessary to render the agreement valid[42]. To mollify the outsiders the Commission organised meetings of all organisations who had been consulted on the initiative but were not party to the negotiations, to inform them fully about the agreements[43].

However, already in the procedures on the implementation of the Framework Agreement on Parental Leave certain social partners have criticised the fact that they were not party to the negotiations. They questioned the validity of this Agreement and whether it is applicable to them. UEAPME referred this question to the EC Court of Justice and asked for the annulment of the Directive that implemented the Agreement[44]. UEAPME lost the case.

In this case the EC Court of First Instance affirmed that the Commission and the Council are under a duty to verify that the signatories to the agreement are truly representative. Although there is no real legal basis for it to be found in the Treaty, the Court based this on the principle of democracy on which the European Union is founded.

In my view this representativeness check is consistent with the national law of those Member States that are familiar with the extension erga omnes of collective agreements. In all those countries representativeness of the signatories is in one way or the other an important aspect. At the European level it should not be otherwise. After the decision of the Council the Euro-agreement will also apply on those employers and workers who are not a member (directly or indirectly) of the signatory parties. This is only acceptable if the signatory parties are representing the majority of the persons concerned. However, the very problem is: how to measure representativeness?

In early writings more than one author has expressed the idea that this measuring comes down on an assessment of the representativeness of each signatory party. This has led to the inverse assumption that if one of the representative organisations is lacking the Euro-Agreement would not stand the test of representativeness.

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[42] The Commission, in its explanatory memorandums accompanying its proposals for Council Directives, explicitly stated that the three organizations which had concluded the agreements "....fulfil the conditions of representativeness", see a.o. COM (96) 26 final, point 14 and COM(97) 392 final, point 19.

[43] COM (96) 26 final.

[44] Case T-135/96, UEAPME v Council, Judgment of the Court of First Instance of June, 17, 1998, [1998] ECR I-2235.

All this is corrected by the judgement of the EC Court of First Instance in the UEAPME case. The Court denied that every organisation of labour and management, recognised as "representative" by the Commission for its consultation under art. 138(2) EC Treaty also has the right to participate in the negotiations of the social partners, leading to Euro-agreements under art. 139 EC Treaty. If it comes to the question whether a Euro-agreement can be implemented by a decision of the Council the real test is whether, having regard to the content of the agreement in question, the signatories, taken together, are sufficiently representative to justify such a Council decision.

This judgment shows that the represtativeness check in this aspect is not about single organisations. It is about the totality of the organisations.

Having further inquired whether the representativeness of the totality of the signatory parties had effectively been tested by the Commission and the Council and whether the verification made was satisfactorily, the Court formulated as its own criterion that the various signatory parties should represent all categories of workers and enterprises at European level, regarding the fact that the subject matter was an all-industry agreement covering all types of working relations.

The Court then performed this verification itself as far as the employers side was concerned. It established that the 'cumulative representativity' of the signatory parties — UNICE and CEEP — of the contested agreement on parental leave agreement was sufficient.

The Court dismissed the claim made by UEAPME that taking into account the number of SMEs it represents, it should have been included among the signatory parties. The Court emphasised that, on the employers side the number of SMEs cannot be decisive since the majority of the SMEs represented by UEAPME does not employ one single employee. This assertion was not sufficiently refuted by UEAPME.

Initially UEAPME did not accept the ruling of the EC Court of First Instance and appealed to EC Court of Justice *in pleno*. In the meantime it had filed a fresh complaint against the second Social Dialogue Agreement, turned into a Directive, the one on Part-time Work. It was based on the same grounds[45]. However, by the beginning of 1999 both cases were dropped. UEAPME had entered into negotiations with UNICE and both confederations came to an agree-

[45] Case T-55/98.

ment (the Cooperation Agreement between UNICE and UEAPME) under which UEAPME in future will participate in the Social Dialogue negotiations as member of the UNICE-delegation.

Now that UEAPME has put an end to all pending legal proceedings we cannot expect in the short run new court rulings on the matter. So the first UEAPME-ruling will be the only beacon in the forseeable future, which justifies a more thorough assessment of its contents. Blanpain [46] has strongly criticised the judgment in the UEAPME-case. He asked: 'How can the Court refuse UEAPME at the table of negotiations, since it organizes the larger part of the SMEs?' The answer is, that the Court in its counting method eliminated the enterprises, which do not employ one single employee. I think this is correct because such enterprises are not directly affected by employment regulations.

In the UEAPME-case the EC Court of First Instance formulated as its own criterion that the various signatory parties to an ill-industry agreement covering all types on working relations, should represent all categories of workers and enterprises at European level. It quite remarkably asserted that had CEEP not been among the signatory parties this would really have destroyed the sufficient representativity of the signatory parties. Because then, one particular category of undertakings, that of the public sector, would have been wholly without representation [47]

This reasoning of the Court seriously puts into question whether the three aforementioned all-industry Euro-Agreements are truly all-industry agreements and thus also covering the public service sector. If they are covering the public service [48] then the question of the representativeness should be raised in respect to the public service. Since the employers' side of the Euro Social Dialogue (UNICE and CEEP) does not represent the civil service employers. This means that if we would apply the observations of the Court on the necessity of CEEP as signatory partner, then we have to conclude, that the Euro-Agreements that have been turned into directives are not binding for civil service employers and employees.

A second observation regards the way of counting the representativeness of signatory parties to Euro-Agreements on the trade union side. In principle two ways of counting are possible:

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[46] R. BLANPAIN, in BLANPAIN/ENGELS, *op. cit.,* p. 161.

[47] Cons. 102-104

[48] R. BLANPAIN, European Labour Law, The Hague, 2000, p. 433 believes, that the inter-sectoral European agreements cannot aply to the public sector sensu stricto.

$$A.\quad \frac{\text{All the members of trade unions directly or indirectly affiliated to the ETUC employed by all employers directly or indirectly affiliated to UNICE and CEEP}}{\text{All workers covered by the agreement}}$$

or

$$B.\quad \frac{\text{All the workers employed by all employers directly or indirectly affiliated to UNICE and CEEP}}{\text{All workers covered by the agreement}}$$

From a democratic point of view the first method would be advisable. However, with a view on the low degree of unionisation in most European Member States the first method would mean that intersectoral Euro-Agreements and most sectoral Euro-Agreements would never qualify for implementation by Council decision!

The Commission has apparently chosen the second method. See for example the Euro Agreement on the Organisation of Working Time of Mobile Staff in Civil Aviation, where the Commission has actually counted all the staff the employers covered by the signatory parties to the agreement.

Besides the representativity check, the Commission also checks whether the signatory parties were sufficiently mandated by their national affiliates. This stands to reason [49]. If the signatory parties were not sufficiently mandated by their national affiliates to conclude a Euro-Agreement it would be questionable whether the will of the national affiliates is reflected in the Euro-Agreement. Mandate has been a regular condition required in national law on collective agreements.

However, the way in which the Commission is performing this check leaves questions with regard to the method and the consistency in which it is done. Franssen argues that the mandate check should touch a broader aspect, viz. the internal-decision making procedures within the European social partners. Otherwise it would be just for show [50]

[49] See also R. Blanpain, European Labour Law, The Hague, 2000, p. 431.
[50] Franssen, *op. cit.,* p. 200.

4.3. The legality check

The next check the Commission and the Council are applying is the check on the legality of the contents of the Euro-agreement, which should be implemented by a Council decision. This test on legality includes a test to the fundamental human rights since fundamental rights form an integral part of EU law.

A test on the legality seems to be justified as the Council should not act against its competences and against community law. I think therefore that in principle nobody can have any objections against the check of legality of the contents [51], but in practice it may be delicate.

Opinions of the Commission and of the Court on the legality of clauses are valuable but not authoritative. Only the EC Court of Justice is competent to give authoritative rulings.

And certainly the Commission opinion about the legality of clauses of an Euro-Agreement can not be more than an advisory opinion. The Council may differ on that matter and take its own decision. Hence it is necessary that the Commission should always forward the request of the social partners to the Council and never itself take a decision.

It is conceivable that the Commission or the Council asks in advance an opinion on the legality of certain points to the EC Court of Justice [52]. This seems notably worthwhile on capital issues.

Such a capital issue in my eyes is the question whether Euro-Agreements containing topics mentioned in Art. 137(6) EC Treaty — pay, the right of association and the right to strike/ impose lockouts — can be implemented via Council decision.

According to the words of Art. 139(2) EC Treaty, a Council decision is only possible if the matters, covered by the agreement, are within the scope of Art. 137 EC Treaty. So, if the social partners want their agreement to be implemented by Council decision, they have to stick to the matters mentioned in Art. 137 EC Treaty. Although Art. 137 mentions large parts of the traditional fields of social policy, it excludes in section 6 notably 3 points: pay, the right of association and the right to strike/impose lockouts.

However, these subjects are often the heart of collective agreements at national level.

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[51] Franssen, *op. cit.,* p. 203-204.

[52] See for instance Opinion 2/94 of March 28, 1996 [1996] ECR I-1759 on the question whether the Community has the competence to accede to the ECHR.

The European Commission [53] appears to state that any matters relating to pay, the right of association, the right to strike and the right to impose lock-outs should be excluded from the provisions of Euro-Agreements presented for implementation by a decision of the Council. Also most scholars [54] agree that a European-level agreement on these topics cannot form the subject of a Council decision under the second limb of Art. 139 (2) EC Treaty. Piazolo [55] explains that if this was possible then the Council could easily introduce legislation on these topics through the backdoor of implementing European Collective Agreements.

However, other authors have an opposite opinion. Bercusson [56] emphasises that Art. 137(6) only excludes these matters from the provisions of the application of the other sections of Article 137, implicitly allowing for such matters to be dealt with under Art. 138 and Art. 139 EC Treaty.

Also Franssen [57] holds that even if the European agreement covers the subjects mentioned in Art. 137(6) it can nevertheless be implemented by Council Decision. She argues that the real cause for the exclusion of the art. 137(6) topics is the wish of the national social partners to have no interference from Community (= Council) legislation in their core business. However under Art. 139 EC Treaty it is not the Community legislator but the social partners' organisations at European level.

My problem with that positive point of view is: if these issues can be included in the agreements, with what majority — unanimity of qualified majority — should the Council adopt decisions to implement Euro-Agreements containing those art. 137 (6) issues? One may solve that problem by staying on the safe side and rule: unanimity. Nevertheless this point of doubt proves that the positive point of view is not completely in harmony with the structure of Art. 137 EC Treaty.

4.4. The expediency check

From the first cases in which the Council has taken decisions under Art. 139 (2) EC Treaty to turn Euro-Agreements into Directives it

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[53] COM (93) 600 final, par. 6(b); COM (98) 322, p. 16.

[54] Heppe 1993, p. 158; R. Blanpain/C. Engels, op. cit.; J. Schwarze (ed. EU Kommentar, Baden-Baden, 2000, p. 1478.

[55] K. Piazolo, Der Soziale Dialog nach dem Abkommen ueber die Sozialpolitiek und den Vertrag von Amsterdam, Frankfurt a/Main, 1999, p. 127-128.

[56] B. Bercusson, *op. cit.,* p. 547/553.

[57] Franssen, *op. cit.,* pp. 185-186.

has become clear, that the Commission and the Court have also measured the Euro-Agreement to the principles of subsidiarity and proportionality, its contribution to the realisation of the social aims of Art. 137 EC Treaty and to its compatibility with the provisions on SMEs. All these tests can be considered as tests on expediency. Such tests are quite delicate.

I think that in a politicized environment we cannot dispute the right of the Commission to express its opinions on this point. It is even its task. However, this again can never be more than advisory opinions. And a negative opinion should never lead the Commission to not forward the request of the social partners to the Council.

It is up to the Council to give its final judgments over these checks. And indeed the Council could, on the basis of these checks decide not to take the decision to implement the Euro-Agreement. The Council is not a rubber stamp instrument of the social partners. If it lends its support to a Euro-Agreement it can do so only if it is persuaded of the political wisdom.

On the other hand: if the Council refuses to take a decision to implement the Euro-Agreement, this does not encroach on the freedom of the Euro social partners to seek the implementation of the agreement over the voluntary route. Any decision of the Council not to implement the Euro-Agreements on grounds of expediency may be contested in the EC Court of Justice. However, the Court should leave the Council considerable discretion for this expediency check and only annul the Council decision in case of abuse or arbitrariness.

4.5. The Council decisions to implement Euro-Agreements

Recognising that the Commission and the Council can make a number of checks on Euro-Agreements presented to be implemented by a Council decision leads to the question whether the Commission and the Council can make amendments to the text of a Euro-Agreement or may implement it selectively.

Thus far, the agreements, produced by the European Social Dialogue, were implemented by Directives of the Council without any alteration in the text of the Agreement being made or without the exclusion of any of its sections. Already on one occasion the Council brought forward, that it has accepted that it could not modify the agreement, it nevertheless expressed its concern "about certain ele-

ments of the content, which some Member States felt were the responsibility of national authorities or concerned procedural and institutional matters" [58].

The European Commission holds the view that the Council has no opportunity to amend the agreement [59]. Also Blanpain believes that the Council has to accept or reject the text of the agreement as a whole and that it cannot change the content or retain only a part of the agreement, unless the contracting parties and Commission agree [60]. Franssen p. 217-222

Bercusson [61] speaks of 'ambiguity' and asks: 'How much are the Member States (= Council?, AJ) and the Commission entitled to vary the agreements at EC level? He apparently believes that Council has only the power to refrain from adoption of a Directive to implement the agreement and that the Council is unauthorised to amend the text of the agreement. Also Franssen denies the Council the right to amend the text of Euro-Agreement.

I endorse that view. If the Council is only prepared to implement with its decision an amended agreement, it should refrain form taking a decision and indicate to the social partners what amendments are deemed necessary to obtain its decision. It is then to the social partners themselves to see whether they are inclined to adapt the concluded agreement in order to obtain its implementation by Council decision, or to lead the implementation of an unaltered agreement over the alternative route, via procedures and practices specific to management and labour and the Member States.

Another question is whether the Council may exclude certain enterprises or certain sectors from its decision to implement a Euro-Agreement. The Dutch Minister has such a power when he is extending a collective agreement erga omnes but this because the Dutch legislation explicitly opens that possibility. I cannot read from the text of Art. 139 EC Treaty a similar power for the Council. Here again I would suggest, that if the Council is only prepared to implement with its decision an agreement from which certain sectors, categories or enterprises are exempted, that it should refrain form taking a decision and indicate to the social partners what exemptions are deemed necessary to obtain its decision. It is then to the social partners themselves to see whether they are inclined to adapt the conclud-

[58] See COM (96) 448, final, p. 13.
[59] COM (93) 600, par. 38.
[60] R. Blanpain, European Labour Law, The Hague, 2000, p. 435.
[61] Bercusson, *op. cit.,* pp. 543-549.

ed agreement in order to obtain its implementation by Council decision, or to lead the implementation of an unaltered agreement over the alternative route, via procedures and practices specific to management and labour and the Member States.

By stating that Euro-Agreements may be "implemented by a Council decision", Article 139(2) EC Treaty opens the question: what type of "decision" this should be. Art 249 EC Treaty sums up the common types of instruments used in EU law: regulations, directives, decisions, recommendations and opinions. However, the catalogue of Art. 249 is not exhaustive. Other instruments may be used as well, like Conventions and acts sui generis.

The Council, taking a decision based upon Art. 139(2) should choose from this variety of instruments the instrument that is most suitable to implement the Euro-Agremeent. Most of the times this instrument will be the Directive and in fact all Euro Agreements implemented by way of a Council decision up till now where indeed turned into a Directive.

The Commission clearly considers a Directive the proper instrument of implementation [62]. This is endorsed by Blanpain [63], who, writing about the first Agreement on Parental leave, considered a directive "the logical path" since it is a framework agreement leaving much to be filled in at national level.

However, although I disagree with Birk [64] who thinks that for reasons of efficiency a Regulation would be the most appropriate instrument, I will not completely exclude that in some cases a Regulation may be a more preferable choice. For instance, material health and safety norms should be in the form of a Regulation.

Franssen rejects the implementation by way of a Council decision (in the meaning of Art. 249 EC Treaty) [65]. I agree that this instrument will seldom be suitable as it normally is issued for the application to a limited number of specified or identifiable natural or legal persons, but again, it cannot be excluded that in some special cases this may be a suitable instrument.

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[62] See COM (96) 26 final, point 33; COM (97) 392 final, point 42; COM (98) 662 final, point 27; COM (99) 203 final, point 46; COM (2000) 3982, point 28; consideration nr. 11 to Directive 96/34/EC and consideration nr 14 to Directive 97/81/EC.

[63] R. Blanpain, European Labour Law, The Hague, 2000, p. 436.

[64] R. Birk, Vereinbarungen der Sozialpartners im Rahmen des Sozialen Dialogs und ihre Durchfuehrung. In: EuZW, vol. 8, no. 15, 1997, p. 459.

[65] Franssen, *op. cit.,* p. 228.

Most scholars [66] believe that the "decision" to be taken by the Council should not be a mere Recommendation or an Opinion, as such instruments do not have any binding force. Again, I largely endorse this view, but will not completely exclude the usefulness of Recommendations and Opinions. It is imaginable that the social partners conclude agreements only in the form of a recommendation but that they like to have a Recommendation or an Opinion of the Council to elevate the status of their agreement.

In taking a decision to implement a Euro-Agreement the Council has to determine whether the subject matter requires unanimity in the Council of Ministers or allows for approval by a qualified majority. The text of Art. 139 EC Treaty, last line, has linked this to the voting procedures of Art. 137 EC Treaty.

The problem now is the ambiguity of Art. 137 EC Treaty which enumerates a number of issues of social policy on which unanimity in the Council is required (section 3) as well as a number of issues that can be voted with qualified majority (section 1).

Various social topics may be as easily classified under section 1 as under section 3 as under section 6 of this Article.

To give an example: it is arguable, that the Agreement on Parental Leave could be implemented by a Council decision taken by qualified majority as it is about 'working conditions' (Art. 137 (s 1). Yet, it is equally arguable that this agreement needed a vote by unanimity (Art. 137 (3) as this Directive also touches 'social security' and 'social protection of the workers' (see sections 8 and 4 of its clause 2) [67].

The lists of items which require a qualified majority and those which require unanimity will be reshuffled a little bit when the Treaty of Nice enters into force, but as both lists will continue to exist side by side the problem will not fade away.

What majority in the Council is required if a Euro-Agreement at the same time contains issues which can be dealt with by qualified majority and issues for which unanimity is needed?

The wording of the sentence of Art. 139 (2) EC Treaty where it reads "that the Council shall act by qualified majority, except where the agreement in question contains one or more provisions relating to one of the areas referred to in Art. 137 (3), in which case it shall act

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[66] Bercusson, *op. cit.,* pp. 543-549; Franssen, *op. cit.,* p. 228.
[67] Franssen, *op. cit.,* p. 217.

unanimously", seems to point at a split voting procedure. Blanpain [68] appears to agree with that.

A nasty consequence, however, of this opinion could be, that a part of a Euro-Agreement is adopted and another part not when it would to obtain unanimity. This would contravene the earlier conclusion that the Council should not implement only a part of a Euro-Agreement. Bercusson [69] thinks that so-called 'mixed agreements' are subject to unanimity. Franssen appears to be inspired by the old canon 'accessorium sequitur principale'. She believes that the Council will look at the core provisions of the Euro Agreement. If these core provisions cover one or more of the issues mentioned in Art. 137 (3) EC Treaty the Council will adopt a decision by unanimity voting. Otherwise it will use the qualified majority voring procedure [70].

The Council by taking a decision must also decide with what delay the agreement should be implemented by the Member States.

In the three Directive implementing the inter-sectoral Euro-Agreements the Member States have been given two years for the implementation of the Agreement by way of legal and administrative provisions with another year in case of particular difficulties or implementation by collective agreements [Art 2 (2)].

Why one year extra in case implementation must come from the national social partners? What is meant by 'particular difficulties'? Also economic reasons?

All of a sudden it appears that the Council does not necessarily transfer all the rigidities of the legally binding force of its own Regulations and Directives when it comes to Euro-Agreements?

4.6. The role of the EP and the ESC

A very thorny issue is undoubtedly the involvement of the European Parliament (EP) and of the Economic and Social Committee (ESC) if Euro-Agreements are implemented by way of a Council decision.

The relation of the European Parliament to the social dialogue is somewhat pitiful. On the one hand the Treaty of Amsterdam has

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[68] R. Blanpain in European Labour Law, The Hague, 2000, p. 115.
[69] Bercusson, *op. cit.,* p. 550.
[70] Franssen, *op. cit.,* p. 217.

enhanced the influence of the European Parliament as a legislator in the social area. On the other hand, if the social dialogue is effectively producing agreements, the EP is to a large extent outflanked. It is questionable whether the EP has even the right to be consulted on proposals of the Commission to the Council to implement agreements concluded in the social dialogue. Fortunately the Commission is so wise to consult the EP on a voluntary basis. From the outset the Commission promised to 'inform' the EP[71] and it has kept this promise on all the occasions that Euro-Agreements have been presented to the Commission to be turned into Directives[72]. The Commission as a rule sends the Agreement to the EP together with its proposal to the Council and the explanatory memorandum. And in all the previous occasions the EP has indeed used this opportunity to pronounce itself over the Euro-Agreement and the proposals of the Commission[73]. However, the European Parliament clearly is 'not amused' that its role in the legislative process is much more restricted in case the social partners seize the initiative than when it is itself playing the game with the Council of Ministers[74]. Obviously, the EP cannot amend the agreement. It can only bless the agreement or raise objections, but that's all. It has no power to stop a Euro-agreement of becoming an Euro-Directive like it has such a power vis-à-vis classic Directives adopted by the Council with qualified majority voting procedure.

However, one may assume that the European Parliament — lawmakers by profession and certainly by ambition — will, at the end of the day, not be content merely to be informed on Euro-Agreements on their way to acquiring the status of Directives.

One day the EP may turn to the European Court of Justice to establish whether it possesses any co-decision-making power in this procedure. It may argue that these decisions are apparently based on the voting procedures laid down in Art. 137 and that, according to para 2 of this Article, Parliament should be involved in this lawmaking procedure according to Art. 251 when the issues of Art. 137(1) are involved. This argument may be countered by the argument that in none of the national labour laws of the Member States are parliaments involved in the procedures of extending collective agreements erga omnes. Where this procedure exists, it is always the business of the executive power. On this argument may be answered that the

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[71] See COM (93) 600 final.

[72] See OJ 1996 C 224 and OJ 1997 C 286; see also BERCUSSON, *op. cit.,* p. 567-568.

[73] See Opinion of March 15, 1996.

[74] See EP resolution OJ 1997 C 286.

executive powers acquired this competence from parliaments and can be held responsible to parliament for using it. The Council of Ministers did not receive this power from the EP, nor is it responsible to the EP for using this power.

Franssen [75] has argued that it is undesirable that the EP is not involved in the procedure of Art. 139 (2) EC Treaty. When the Agreement covers subjects of Art. 137(1) EC Treaty, the EP should have a strong role in the decision making process, analogous to its role in the procedure of Art. 251 EC Treaty (with the difference that the EP cannot amend the European agreement).

Since the very beginning of the EU the ESC has been the institutionalised representative of all sections of economic and social life (see Art. 257-262 EC Treaty). At first sight the institutionalisation of the European Social Dialogue in Art. 138-139 EC Treaty seems to have created a kind of duplication of the ESC. Still there are differences:

— the ESC is involved in more topics than just in collective bargaining;

— the seats in the ESC are filled by representatives of the national federations and not of the European federations;

— 1/3 of the members of the ESC are given to the group called Miscellaneous Activities, which embraces representatives from farmers' organizations, small businesses, the crafts sector, co-operatives and non-profit associations, science, the professions, consumers' organizations, environmental organisations, family organisations as well as organisations representing women and persons with disabilities.

Therefore many members of the ESC will appreciate a consultative role if the Euro Agreement is implemented by way of a decision of the Council. This consultation is not mandatory, since art. 137 (2) EC Treaty does not require that the ESC should be consulted. However, from the outset the Commission promised to 'inform' the ESC [76] and it has kept this promise on all the occasions that Euro-Agreements have been presented to the Commission to be turned into Directives [77]. The Commission as a rule sends the Agreement to the ESC together with its proposal to the Council and the explanatory mem-

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[75] Franssen, *op. cit.,* pp. 233-235/240.

[76] See COM (93) 600 final.

[77] See OJ 1996 C 224 and OJ 1997 C 286; see also Bercusson, *op. cit.,* pp. 567-568.

orandum. And in previous occasions the ESC has indeed used this opportunity to pronounce itself over the Euro-Agreement and the proposals of the Commission [78].

Franssen [79] has advocated that the Commission should be obliged to ask the advise of the ESC each time it proposes the Council to turn an Euro-Agreement into a Directive and I agree. Nevertheless one has to recognise that the added value of such consultation cannot be very high as the main groups in the ESC are all affiliated to UNICE and ETUC, which have been involved in the social dialogue. Therefore, because of the formalisation of the European Social Dialogue the ESC will have to redefine its role. The result may be, that the ESC is to content itself with an advisory role in economic or socio-economic issues which are not appropriate for collective bargaining [80].

4.7. The interpretation of Euro-Agreements, implemented by a Council decision

Sooner or later questions will arise about the interpretation of agreements produced by the European Social Dialogue. Mindful of Kahn-Freund's word that "the power to interprete is the power to destroy", the social partners may try to hold grip on the interpretation of Euro-Agreements. Of course, the contracting parties themselves may elaborate their proper arrangements to settle interpretation problems [81]. For instance by creating a Joint Committee for this purpose, as they did in the Agreement on fixed term employment contracts. Yet, this cannot prevent third parties to approach national courts and even the European Court of Justice for this sake. In those cases the courts may give interpretations contrary to the intentions of (one of) the social partners that concluded the Euro-Agreement.

In the first agreement on Parental Leave the social partners apparently tried to tackle this problem with the following provision: 'Without prejudice to the respective role of the Commission, national courts and the Court of Justice, any matter relating to the interpretation of this Agreement at European level should, in the first instance, be referred by the Commission to the signatory parties who will give

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[78] See opinion of 15 March 1996.

[79] Franssen, *op. cit.,* p. 235-237/240.

[80] A.T.J.M. Jacobs, From the Belgian National Labour Council to the European Social Dialogue, in C. Engels/M. Weiss, Labour Law and Industrial Relations at the Turn of the Century (Liber Amicorum Blanpain, Deventer, 1998, p. 313.

[81] R. Blanpain, European Labour Law, The Hague, 2000, p. 436.

an opinion' (Clause 4.6). Such opinions, obviously, can only have an indicative nature and are not binding on third persons. Final binding decisions on the interpretation of Euro-Agreements, turned into Directives, can only be made by the EC Court of Justice [82].

5. IMPLEMENTATION OF EURO-AGREEMENTS VIA THE VOLUNTARY ROUTE

Besides the implementation of Euro-Agreements via "decision" of the Council, Art. 139 EC Treaty offers a secondary route for their implementation: the implementation via the procedures and practices specific to management and labour and the Member States. The European Commission called this the "voluntary route" [83].

At first sight the most tempting advantage of the voluntary route is the virtual absence of any State control on representativeness and the content of the collective agreements. The social partners cannot be forced to sit together with parties they do not like and they are free to negotiate even on issues not covered in Art. 137. They need not endure any censure from the Commission or Council as regards the legality or the expediency of their Euro-Agreement and have nothing to fear from the interpretation of their Agreement by the EC Court of Justice. These are indeed the attractions of the voluntary route.

However, the main disadvantage of the voluntary route is that it cannot guarantee a general and uniform binding effect of the Euro-agreement in all the EU Member States. But how much of a problem is that?

It goes without doubt that the EU agreement via the voluntary route may acquire binding force in most Member States[84]. This may be realised in the first place when the national social partners take over the contents of the Euro-agreement in their own collective agreements. Such transposition may be expected from the national social partners who are directly affiliated to the Euro social partners that have signed the Euro agreement. Blanpain believes that the binding effect of the Euro-Agreement on the members of contracting parties

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[82] R. BLANPAIN, European Labour Law, The Hague, 2000, p. 434.

[83] COM (93) 600, par. 37.

[84] A. OJEDA-AVILES, Sind Europaeische Tarifvertraege 'blosze Empfehlungen'?, in T. KLEBE, P. WEDDE, M. WOLMERATH (eds.), Recht und soziale Arbeitswelt, Festschrift fuer Wolfgang Daeubler zum 60. Geburtstag, Frankfurt am Main, 1999, p. 519-542.

will depend on the by-laws of UNICE and ETUC. The obligations resulting from those by-laws may eventually be sanctioned by disciplinary measures in case of non-compliance. At any rate, there is no legal obligation whatsoever for any association to put a European collective agreement on the national negotiating table, nor is there an obligation of result, namely that there should be a collective agreement at national level [85].

I am more optimistic about the binding effect of the Euro-Agreement on the members of the contracting parties. Art. 139 EC Treaty literally says: "Agreements concluded at Community level shall be implemented" [86]. This imposes on the affiliates of the contracting parties quite a strong obligation to transpose the contents of the Euro-agreement into their own collective agreements, even if they have voted against the Euro-agreement on the meeting of their Euro-organisation. If the Euro-organisation has signed the Euro-agreement nevertheless in complete accordance with its internal procedures, all the affiliates must be considered bound by the agreements according to the classic legal theories on agency and mandate. They may be expected to contribute to the implementation of the agreement by transposing them in their own national collective agreements. This cannot be seen as a violation of their right to free collective bargaining as they have freely undertaken to be an affiliate of the Euro-organisation, which was correctly mandated to conclude the Euro-agreement. Being affiliate of the Euro-organisation entails active and bona fides cooperation to the implementation of Euro-Agreements. If they don't like to give their cooperation to the implementation of Euro-Agreements they should be consistent and leave the Euro-organisation.

To my view the problem is not so much the binding of the affiliates of the signatory parties to Euro-Agreement. The problem resides in the binding of the affiliates of the affiliates.

The organisations, which are directly affiliated to ETUC and UNICE, are often not themselves signatory parties to collective agreements. Their affiliates may be parties to collective agreements, but can they be held obliged to cooperate in the transposition of Euro-Agreements? Certainly, the national organisations, affiliated to ETUC and UNICE may be expected to put pressure on their affiliates to transpose the Euro Agreement in the collective agreements to which

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[85] R. BLANPAIN, European Labour Law, The Hague 2000, p. 433.

[86] For the legal history of the word 'shall' in this respect see BERCUSSON, *op. cit.,* p. 543-544. See also B. BÖDDING, *op. cit.,* p. 97; FRANSSEN, *op. cit.,* p. 129.

they are a party. I have no problem in recognising here a 'chain of responsibilities', but it is not certain that in each jurisdiction of the EU this will be enough to create legal binding effects.

Moreover, even if the national affiliates are cooperative in transposing the Euro-agreement in their national agreements, there is no guarantee that the Euro-agreement acquires directly binding effects on all the employment relationships. In most EU Member States collective agreements have only direct binding effect on the employment contracts of the (unionised members of the) staff of the employers which are affiliated to the employers associations. Outsiders are in principle not bound. This means that in all EU Member States a more or less substantial number of employees are not covered by any collective agreement at all.

Yet a number of EU Member States have a mechanism in force to have collective agreement extended to all enterprises of the sector with all their staff[87]. National social partners are under a moral obligation to request the help of this mechanism to further promote the implementation of the Euro-Agreement and Governments are under a similar obligation to make this mechanism operative to implement Euro-Agreements. However, not all Member States are offering such a mechanism.

In the Member States where such mechanism is lacking the implementation of the Euro-agreement might further be promoted

a) by parliament which may take over the contents to of the Euro-Agreement in a statute or

b) by the judiciary which may use all the available legal constructions to give directly binding effect to the contents of a Euro-agreement.

But in the end of the day one may well end up with the conclusion that notwithstanding all these legal techniques many employees, working within the scope of the Euro agreement, are not legally benefiting from the contents of the Euro-agreement, implemented via the voluntary road.

What then is the position? Can the courts be seized over this lack of implementation? As far as the social partners and the authorities have existing legal instruments at their disposal, the courts can re-

[87] Such mechanism is known in Germany, France, Finland and the Benelux countries. In France, Belgium and Luxemburg even all-sector agreements may be extended *erga omnes.*

quire them to effectively use those instruments in order to implement Euro-agreements. That is my interpretation of the word "shall" in Art. 137 (2) EC Treaty. But if those instruments are not available in the toolbox of a national industrial relations system, can the courts then require their creation and subsequent application.

In Declaration No. 27 to Art. 139 EC Treaty [88] the High Contracting Parties to the EC Treaty have explained that "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".

The problem of this Declaration, however, is, that it seems to contradict the wording of art. 139 EC Treaty. The words 'shall' and 'and' in this article, 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.

Apart from action in court one can imagine industrial action as a means to coerce the implementation of Euro-Agreements via the voluntary route. It is submitted that such industrial action should be considered as legal and should not be blocked by legal technics as the "peace obligation". Still, up until now we have not seen such industrial action occur, nor have there been law suits over them and therefore it is uncertain whether the court will support this opinion.

So, I agree with Blanpain [89], that 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'. In the end of the day the Euro-Agreement, implemented via the voluntary route, may be widely implemented, but it certainly will not be universally implemented in the EU. The weaker the trade unions are and the weaker the readiness of domestic lawmakers and judges is to support such an agreement, the weaker its binding force.

In fact, this may vary from one Member State to another and it is for sure that in one Member State citizens will have much more difficulties in invoking the legal effect of the Euro-Agreement than

[88] On this Declaration see Bercusson, *op. cit.,* pp. 568-569; Franssen, *op. cit.,* pp. 146-151.

[89] R. Blanpain, European Labour Law, The Hague, 2000, pp. 434.

in another [90]. On how much more difficulties we can only speculate at this moment. The recently concluded European Agreement on Telework which will not be turned into a Directive, may provide us with the much needed experiences in this field.

All this will create a very unbalanced situation. The Euro-Agreement will be applied intensively in certain Member States and in certain professional categories, while it will be applied less or even hardly at all in other Member States or other professional categories. Employees and employers alike may feel this to be unacceptable and complain that such a situation could lead to unfair competition. However, they then must take their own responsibility and improve the 'procedures and practices specific to management and labour and the Member States'. That's the way it is.

Another difficulty may be that the supremacy of a Euro-Agreement implemented via the voluntary route is not so clear. Euro-Agreements implemented by Directives are seen as State law, which suppresses private law, save when private law is more favourable to the workers. But a Euro-Agreement implemented via the voluntary route may be private law in some Member States, not having precedence over individual contracts or other collective agreements. A judge — who is not bound to a clear hierarchy of sources — may be tempted to see a national collective agreement as a lex specialis overriding a lex generalis like a Euro-Agreement! Nowhere it is written that a Euro-Agreement is a "higher" source, that suppresses a lower source.

A last weakness of the voluntary road may be found in the question of the interpretation. Like all collective agreements, Euro-Agreements may easily be ambiguous, punctuated with flexible terms to make its contents more acceptable to employers. Very often an employer's refusal to respect employees' rights is not based on a point-blank refusal by the employer to apply a collective agreement but it is a refusal to recognise a certain interpretation of an agreement.

While the interpretation of a Euro-Agreement implemented by a Council decision will be standardised through judgments of the European Court of Justice, this cannot be expected from the interpretation of a Euro-agreement implemented via the voluntary route. It may be interpreted by mechanisms provided for by the contracting parties themselves or by domestic courts, but always without the possibility of requests for preliminary rulings by the European Court

[90] A. Ojeda-Aviles, European collective bargaining: A Triumph of the Will? IJCLLIR, 1993, p. 279.

of Justice [91] Therefore no uniformity of interpretation of these agreements is guaranteed.

6. COMPARATIVE ASSESSMENT OF THE TWO ROUTES OF IMPLEMENTATION

It is beyond doubt, that the implementation of Euro-Agreements is much better secured via a decision of the EU Council of Ministers than via the voluntary route. However it might appear that the social partners must pay a price for opting the easiest way of implementation. The run the risk of the interference of outsiders with respect to their representativeness and the content and the interpretation of their agreements. The implementation of Euro-Agreements via the voluntary route escapes such interference, but the binding force of the Euro-Agreement is less securely guaranteed. There are no roses without thorns, as the proverb goes.

We should leave both routes of implementation offered in Art. 139 (2) EC Treaty with all their advantages and disadvantages and not try to keep only the advantages and explain away the disadvantages by all sorts of interpretations of the Treaty texts.

We should accept the disadvantages of the voluntary route, because this voluntarism, this autonomy, produces the most attractive advantages of this avenue: no State interference in the content and the interpretation of the agreement nor with the representativeness of the signatory parties. That makes this voluntary route especially appropriate for experimental and adventurous new developments in labour relations, which are not yet ripe to be digested by the political institutions of the EU.

We owe the recognition of the treasure of voluntarism to the writings of Kahn-Freund in which he explained why British unions never pressed for legislation to secure the binding force of collective agreements: "Does it not show how much the unions are determined to reject legal intervention even if it would be in their favour, just like the Trojans who feared the Greeks even when they carried presents [92].

Both routes for implementing Euro-Agreements have their roots in the national systems of industrial relations of the Member States.

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[91] See R. Blanpain/C. Engels, Comparative Labour Law and Industrial Relations in Industrialised Market Economies, The Hague, 1995, p. 294.

[92] O. Kahn-Freund, Labour and the Law, London, 1977.

The voluntary system notably in Britain and Italy, the route of implementation by a decision of the EU Council of Ministers is derived from the procedure of extension *erga omnes,* known in France, Germany and the Benelux countries.

It has been a productive idea to have these two archetypes enshrined in the social paragraphs of the "Constitution" of the European Union. They can easily exist alongside each other and may used alternatively by the social partners according to their needs and wishes.

If we try to harmonise the two routes of implementation into one and single route attended only by advantages and not by disadvantages, we may well discover that at the end of the day a very valuable diversity has been lost.

7. RECOURSE TO THE COURT

In this paper a number of aspects of the European Social Dialogue have been indicated, which are debatable and over which on one day or another the European Court of Justice may be requested to give its judgment. Therefore the access of the social partners to the EC Court of Justice is important.

That the European social partners have only a weak locus standi in the European judiciary came most noticeably to the surface in the already mentioned UEAPME case. UEAPME challenged its exclusion from those negotiations on inter-sectoral Euro-Agrements by bringing cases under Art. 230 EC Treaty, which gives the EC Court of Justice the power to review the legality of acts carried out by the Council or the Commission and, eventually, to annul those acts. UEAPME requested the annulment of the decision of the Council to implement the Euro-Agreement on Parental Leave.

However, access to the Court under Article 230 EC Treaty is largely limited to the institutions of the EU (Commission/Council/EP) and the Member States. Although any natural or legal person too can request the Court to revision under this Article, this only applies to acts by which they are directly and individually concerned. Directives or Regulations of the EU are seldom regarded as such. Thus it was clear from the start that UEAPME was going to have difficulties in having its locus standi recognised.

Fortunately in the UEAPME case the EC Court of First Instance overcame the narrow wording of Art. 230. It argued: if a 'particular representation of this organisation... is necessary in order to raise the

collective representativity of the signatories to the required level'... then such an organisation 'must be regarded as directly and individually concerned by that measure' [93].

Thus, thanks to the generosity of the EC Court of First Instance, the access of UEAPME was not blocked. However, the Court's grounds were somewhat flimsy, and it remains to be seen whether in future appeal cases the full Court will uphold this reasoning.

The question thus remains: is the access to the European Court of organisations which are seeking recognition as an European social partner sufficiently guaranteed on the basis of the actuel text of Art. 230?

It is to be recommended, that the elevation of the social partners to co-lawmakers within the EU should be matched by a more privileged locus standi of the European social partners under Art. 230 EC Treaty. The ETUC has already proposed that the European social partners be granted the right to submit cases to the EC Court of Justice concerning EU institutions, which have failed to fulfill or infringe a Treaty obligation (Articles 230 and 232 EC Treaty) [94].

This proposal was not adopted in the final text of the Treaty of Nice, although — in my view — it is only a modest proposal to remedy an unsatisfactory situation.

The present situation bears a great resemblance to the conflicts that came up in the past between the European Parliament and the Council of Ministers. Such conflicts too raised locus standi problems, as prior to 1992 the European Parliament was not included among the institutions mentioned in art. 230 EC Treaty. The situation was ultimately remedied, firstly (1990) by a favorable judgment of the Court itself [95] and then by an amendment of the EC Treaty by the Treaty of Maastricht (1992), which created the actual third section of Art. 230 EC Treaty, which entitles the European Parliament [96] to bring an action before the Court of Justice for the purpose of protecting its prerogatives.

There are striking similarities between the position of the EP before 1992 and the present position of the European social partners.

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[93] See Consideration 90 in the UEAPME decision.

[94] See the Resolution "ETUC position on the IGC negotiations on a reform of the EU Treaty", adopted by the ETUC Executive Committee on 15-16 June 2000; see http.://www.etuc.org

[95] Case C 70/88, European Parliament vs. Council of the European Communities, 22 May 19990, ECR, p. I-2,041.

[96] As well as the Court of Auditors and the European Central Bank.

The European social partners have also been given an official role in the EU legislative process. Since 1992 they have had a legal right to be consulted, they have a right of priority in legislating on social affairs and their agreements can be turned into EU legislation. Such prerogatives call for an explicit protection in Art. 230 EC Treaty not less than that accorded to the European Parliament, the Court of Auditors and the European Central Bank.

Another procedure of the EC Court of Justice is laid down in Art. 234 EC Treaty, which empowers the Court to give preliminary rulings concerning the interpretation of the Treaty and of Acts of Community institutions at the request of courts in the Member States. It is often invoked — also in the field of social law — during the course of a domestic lawsuit if the domestic judge is requested to test the national law against EU law. In these proceedings, the litigants in the original domestic dispute as well as the EC Commission and the Member States are invited to present their observations to the Court. Not so, however, the (European) social partners.

Nevertheless, the preliminary ruling of the EC Court of Justice may have a huge impact on the social law of the EU and thus strongly affect the role of the social partners. In the Albany case[97], for example, the Court had to deal with the very compatibility of the results of national collective bargaining with the EU system of anti-trust law. It is clear that the exclusion of the social partners of this procedure creates a risk of unbalanced case law.

This omission will become even more obvious when in the future, the EC Court of Justice is requested to give its interpretation of acts made by the EU that have their origin in agreements concluded by the European social partners.

The ETUC once observed: 'Several highly important cases dealt with by the EC Court of Justice underscore the untenable situation in continuing to exclude the trade unions from the possibility of intervening in the ECJ procedures or having access to the relevant information' [98].

The ETUC has proposed that the European social partners can directly intervene and are therefore recognised as 'privileged applicants' giving them access to the relevant information and the pro-

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[97] Joined cases C-67/96, C-115/97 and C-219/97, Albany, [1999] ECR I-5751.

[98] See the Resolution "ETUC position on the IGC-negotiations on a reform of the EU Treaty", adopted by the ETUC Executive Committee on 15-16 June 2000, see http://www.etuc.org

ceedings and with the right to actively intervene (e.g. by way of written observations)[99]. Art 37 of the Statute of the Court [protocol B to the Treaty] already opens this possibility and indeed has been applied already effectively to allow social partners' organisations make their pitch[100].

So my recommendation would be that, indeed, such a right should be generously recognised to the social partners.

The third major procedure before the EC Court of Justice is the so-called infraction/infringement procedure of Art. 226-229 EC Treaty. Under this procedure, a case can be brought (either by the EC Commission or a Member State) because of alleged non-compliance of the domestic law of a Member State with the law of the European Union. If the Court finds that a Member State has failed to fulfill an obligation under the EC Treaty, the State will be required to take the necessary steps to comply with the judgment of the Court.

In the past, all Member States have been the subject of infraction proceedings, albeit some more frequently than others. This possibility is used quite frequently (in the field of social policy as well) by the Commission to force Member States to implement the rules and decisions of European institutions.

Normally, the Commission does not approach the Court immediately. It gradually mounts its pressure on the Member States to implement European law. However, if they stubbornly fail to comply, the Commission will finally take them to the EC Court of Justice under art. 226 EC Treaty.

Often it is only after having started up the infraction procedure that the Member State will effectively correct its negligence in the fulfillment of its obligations. If such corrections are to the satisfaction of the Commission, the case is dropped. The registers of the Court show a great number of such cases; proof of the preventive effect of this procedure. If the case is not dropped the Court continues its investigation of the case.

However, does such useful procedures allow the European social partners a say? Formally, there is no place for them. They are not a party to the case. The parties are the Commission on the one hand and

[99] See the Resolution "ETUC position on the IGC negotiations on a reform of the EU Treaty", adopted by the ETUC Executive Committee on 15-16 June 2000; see http.://www.etuc.org

[100] See ordinance of the President of the Fourth Chamber of the Tribunal of First Instance of March 18, 1997, in the case T 135/96.

the Member States on the other hand. The case is pleaded by their legal councils. Other Member States may make observations. The Commission may have consulted the national social partners during its studies, but that is not a necessity nor does it in any way guarantee that the final position of the Commission reflects the opinions of the European social partners.

The procedure of Art. 226 is notably different from the procedures in the framework of the ILO and the European Social Charter of the Council of Europe. There, the national social parties are formally in a position to be consulted and to present their observations about the compliance of their State with the international documents. Those well-established and functional traditions are themselves an argument to improve the involvement of the European social partners in the supervisory process in relation to the implementation of EU social law.

This is not all, however. If the Directive is, in fact, a conversion of a Euro-agreement into a Directive under Art. 139 EC Treaty, the European social partners have a vested interest in controlling its implementation by the Member States. They should not be dependent of the judgments and policies of the European Commission. This vested interest should thus entitle the European social partners to a right of their own to bring infraction procedures before the Court.

It stands to reason that they should only be allowed to do so after having completed an investigating procedure comparable to the one at the moment practised by the European Commission.

8. CONCLUSIONS

In a way it is amazing that the European Social Dialogue has already come so far. In the preceding decades labour lawyers were very sceptical that anything such as a European Social Dialogue producing agreements might ever be possible. Much reference was made to the institutional deficiencies of the social partners at the European level (Blanpain 1977:79).

As a consequence until quite recently the European social dialogue has been of a purely consultative nature. The social partners were informed and consulted about proposed measures of the European authorities. Occassionally they participated in the monitoring and evaluation of the measures already taken. Later they also issued "recommendations", "resolutions", "joint opinions", "joint resoluti-

ons", etc. on important policy matters. However, until 1995 real "agreements" intended to bind employers and employees in the Member States were virtually non-existent. With half a dozen European agreements concluded since then this picture has changed.

Yet, many observers still are full of doubts as to the future of the European social dialogue. Some contest the need for such a high centralised level of regulation now that the trend is towards deregulation and decentralisation. Firms and workers are expected to be flexible and are badly served by the inflexibility that often characterises central regulations.

And indeed, such objections may well prevent numerous issues from being negotiated by "management and labour" at European level. Employers will forcefully resist any deals on those issues.

The European social dialogue is emerging in an epoch in which the trade unions all over the industrialised world are confronted with a decreasing membership among the working population. In a number of countries employers' associations too have difficulties in convincing managers of the use of collective agreements especially when they are concluded on a high level.

On the other hand, the real world is not merely made up of decentralisation, fragmentation and flexibilisation. It is also filled with centralisation, like the multinationalisation of business, and with "grand designs", such as fundamental rights and minimum standards.

So there is room for a number of issues to be resolved at a European bargaining table.

However, the more this European bargaining table is being used, the more the legal problems created by the process of the European Social Dialogue come to the surface. Some are of a mere technical character such as the indication of the applicable law and the competent judge. It is submitted that these problems should be tackled with pragmatism.

Other problems, such as the issue of representativeness, have a strategical and political impact on the power of labour and management.

And there are problems with a constitutional character too, such as the relationship between the social dialogue and the European Parliament and between the European social rules and the national social rules.

The Agreement on Social Policy, whose provisions were later incorporated in the European Treaties by virtue of the Treaty of

Amsterdam, has created a new legislative structure, which contravenes the most classic ideas of attribution of powers in modern democracies, which hark back to Montesquieu. In those days corporatism was on the wane, to be completely abolished and outlawed in the French Revolution. The philosophies, which led to the French Revolution already earlier inspired the constitutional model of the United States of America.

The Constitution of the United States in no way imposes on the federal Administration a regular consultation of the social partners on proposals in the social policy field, as does Art. 138 (1-3) EC Treaty, let alone that it would temporarily stop the federal Administration of proceeding with its own intentions as soon the social partners signal their intention to bargain on an issue.

And finally the U.S. Constitution does not provide for a mechanism under which agreements between the social partners may be given a binding force comparable with a statute.

So the system of European Social Concertation as it was born under the Treaties of Maastricht and Amsterdam have created a sociopolitical model completely different from the American. This system has certainly become one of the main characteristics of the European Social Model.

With the Treaty of Amsterdam corporatism is back on stage, more prominent and more powerful than it has ever been since 200 years.

The legal orde has still to come to terms with this new constitutional phenomenon. If that will ever happen!

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Chapter 13

EUROPEAN WORKS COUNCIL AGREEMENTS: TYPES, CONTENTS AND FUNCTIONS, LEGAL NATURE

Thomas Blanke

1. EUROPEAN WORKS COUNCILS: THE EUROPEAN UNION'S FIRST COLLECTIVE LABOUR LAW INSTITUTION

Directive 94/45/EC "on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purpose of informing and consulting employees" of 22 September 1994 [1] and its transposition to the legal systems of the Member States along the lines of the Directive (the EC Member States and three countries from the European Economic Area: Iceland, Liechtenstein and Norway) has created for the first time a Community-level collective labour law institution. The establishment of European works councils supplements the existing bodies that represent workers on the national level, but without reducing the form or authority of said national organs. Thus, in the second half of the Nineties the project "European works councils", a notion that can be traced back to the early Seventies, has finally become a reality [2].

The reason for this is, above all, a spectacular increase in pressure from problems caused by the dramatic growth of the internationali-

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[1] Official Journal of the EC (henceforth referred to as OJEC) num. L 254, p. 64.

[2] On the genetic history, cf. LERCHE, *Der Europäische Betriebsrat und der deutsche Wirtschaftsaussschuss*, 1997, pp. 88 *et seq.;* RADEMACHER, *Der Europäische Betriebsrat*, 1996, pp. 62 *et seq.;* SANDMANN, *Die Euro-Betriebsrats-Richtlinie 94/45/EG*, 1996, p. 17; BLANKE, *EBRG-Kommentar*, 1999, introduction, numbers 18 *et seq.*

sation and globalisation of firms. As a result of this process, workers' rights to information, consultation and participation — essential to be able to face dramatic socio-economic transformations — are becoming more and more inoperative, since it is increasingly common for crucial business decisions to be made outside the sphere where those national rights are valid. The creation of a single market on 1 January 1993 would have been difficult without a clear sign that a parallel social dimension ought to be constructed. The strictly negative attitude of Great Britain under the government of Margaret Thatcher and Major against any progress in social and labour-related matters forced the principle of unanimous decision-making in the social policy area to be abandoned in the Council. The withdrawal of that principle took place with the *Maastricht Treaty*[3] and was completed with the inclusion of the authority of European social partners, within the framework of "social dialogue" in EC social and labour legislation via protocol and the Agreement on Social Policy dated 7-2-1992[4].

By virtue of the Treaty of Amsterdam, the Social Policy Agreement of the Maastricht Treaty was included in the European Union Treaty (articles 136 *et seq.* of the European Union Treaty). Later, by Council Directive 97/74/EC of 15 December 1997, the Directive's area of validity about the European works council 94/45/EC was extended to the United Kingdom[5]. Currently the Directive has been transposed in all member countries[6]. However, the Grand-Duchy of Luxemburg did not fulfil, as per the Law of 28 July 2000, its obligation to make that transposition, until after the European Court of Justice (ECJ) ruling of 21 October 1999[7], following proceedings for violating the Treaty initiated at the request of the Commission. In Italy there is still no law relating to sanctions and jurisdiction to accompany the Agreement about social partners dated 6 November 1996. On the other hand, with a view to its much-awaited admittance

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[3] European Union Treaty of 7 February 1992 (OJEC num. L 293/61), which came into force on 1 November 1993 in accordance with article R paragraph 2.

[4] EG OJEC num. C 191 of 29-7-1992, pp. 1 *et seq.;* on the origin of this "miracle" (R. BLANPAIN) which certainly was "a well-prepared miracle" (general director GDV-Degimbe) cf. the detailed explanation made by DOLVIK, *Die Spitze des Eisbergs? Der EGB und die Entwicklung eines Euro-Korporatismus*, Münster, 199 pp. 159 *et seq.;* also HALL, *Industrielle Beziehungen und die soziale Dimension der europäischen Integration: vor und nach Maastricht*, in: IMÁN/FERNER (eds.), *New Frontiers in European Industrial Relations*, 1994, pp. 281 *et seq.*

[5] OJEC num. L 10, p. 22, of 16 January 1998.

[6] English, French and German versions of the transposition provisions at: http://europa.eu.int/en/comm/dg05/soc-dial/labour/di940045/index.htm.

[7] EU9911209N.

into the EU, the provisions of Directive 94/45/EC have already been transposed in Czech law [8].

2. TYPES OF EUROPEAN AGREEMENTS ON EUROPEAN WORKS COUNCILS, PURSUANT TO DIRECTIVE 94/45/EC AND GERMAN LAW ABOUT THE EUROPEAN WORKS COUNCIL

Directive 94/45/EC provides for the establishment of European works councils in Community-scale companies and groups of companies that employee at least 1,000 workers, of which in at least two Member States, each must employ at least 150 (article 2, paragraph 1a). As an alternative, decentralised procedures for informing and consulting workers may be established (article 6 paragraph 3). However, in practice this has rarely occurred. For this reason, from now on we will use the concept of "European works council" to refer to both forms of representation.

The Directive observes the principle of subsidiarity in several aspects: first, in that the details regarding of its transposition are left up to the member countries, either through the respective national legislation or by virtue of agreements between social partners [9]. The objective of this is to expressly avoid a "forced uniformisation" of the respective national cultures of industrial relations and their traditions of trade union and employer co-determination [10]. The principle of

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[8] KLEBE/KUNZ, *Europäische Betriebsräte — Erste Erfahrungen*, in WISSMANN (ed.), *Jarhrbuch des Arbeitsrechts* (henceforth, JarbR), 28 (2001), pp. 55 *et seq.* and p. 58.

[9] The principle of subsidiarity introduced with the Maastricht treaty and reflected in article 3.b, paragraph 2 TEC (Treaty on establishing the European Union, now article 5 TEC) refers, in accordance with its explicit content, only to this dimension of existing relationships between EC and national legislation, and not to the subsequent aspect of relationships between regional and national autonomy. The opposite is argued by KEMPEN, *Subsidiarietätsprinzip, europäisches Gemeinschaftsrecht und Tarifautonomie*, KritV 1994 pp. 13 *et seq.,* who deforms the perspective of European law relating to collective agreements; rightly against this is DÄUBLER, *Tarifvertragsrecht*, 3rd ed., 1994, numbers 1279 *et seq.;* with a sceptical attitude about giving greater relevance to the principle of subsidiarity, see also WEISS, *Die Bedeutung von Maastricht für die EG-Sozialpolitik*, in; DÄUBLER *et al.* (eds.), *Arbeit und Recht. Festschrift für Albert Gnade*, 1992, pp. 583 *et seq.* and 589.

[10] Depending on the case, the different Member States had to pass transposition provisions both as the State where the company's management is headquartered and as the State that remits to the corresponding workers' representatives. This explains why the different national transposition provisions are multiply intertwined, cf. I. SCHMIDT, *Betriebliche Arbeitnehmervertretung insbesondere im Euro-*

subsidiarity is also heeded insofar as the Directive on the European works council stipulates that the European bodies representing workers are to be established, first and foremost, through bargaining and agreement, for which in these cases the partners are exempt from much of the obligation to comply with the legal standards of the Directive and the national transposition provisions.

To this respect, the Directive envisages the European works council agreements as a specific type of agreement which, in accordance with the Community objectives of the Directive, have a transnational effect. Thus, European works council agreements can be either the establishment agreements laid out in articles 13 and 6 paragraph 2 of the Directive (including extension agreements), or agreements reached between representative workers' bodies established in this way and already in operation and the undertaking's central management (European works council agreements in the strict sense).

Below we will first present first the legal types of these agreements based on criteria pre-established by the Directive (2). Then we will take a look at what importance these agreements have in practice and what contents are regulated in them (3). After that we will clear up the general approach of the Directive (4) and we will finish by trying to define the nature and legal effects of these agreements (5).

2.1. Agreements for the establishment or extension of European works councils ("creation agreements"), as per articles 13 and 6 of the Directive

Depending on when they are signed, the Directive distinguishes between two types of voluntary agreements for the creation of European works councils: the type stipulated in article 13 of the Directive and the type described in article 6 of the same.

When the parties have signed a European works council agreement before the transposition period established in article 14 paragraph 1

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päischen Recht, RdA, 2001, special supplement 5, pp. 12 *et seq.,* 13; this made the coordination of transposition measures necessary to achieve notional unification, a task that the Member States entrusted to expert delegates and was coordinated by the European Commission, cf. BUSCHAK, *EU-Richtlinie zum Europäischen Betriebsrat, in: Arbeitsrecht im Betrieb* (henceforth, AiB), 1996, pp. 208 *et seq.;* in BLANKE, *EBRG-Kommentar,* 1999, Appendix I, pp. 345 *et seq.,* there is a chart of the national transposition provisions; exposition in KOLVENBACH, *Europäische Betriebsräte*, NZA 2000, pp. 518 *et seq.;* on the transpositions in Italy, France and Spain, cf. ZOPPOLI (ed.), *L'attuazione della Direttiva sui Comitati aziendali europei: un'analisi comparata*, 1998.

of the Directive has expired; that is, before 22-9-1996 (or, in keeping with article 4 paragraph 1 of the extension Directive, before 15-12-1999), the undertakings in question can avoid, as per article 13 of the Directive, the validity of the same. These agreements that *disqualify* the Directive's application must only comply, in keeping with article 13 paragraph 1 of the same, with the minimum requirements to be extended *to all the workers in all the Member States* and to envisage the *transnational information and consultation of workers*. In article 13 paragraph 2, the Directive also grants "the parties" the right to extend those agreements by virtue of a joint decision to this respect.

If by this date an agreement has not been signed, in accordance with article 13, the European works council should be constituted in line with the mandatory procedural provisions laid out in the Directive (agreement in accordance with article 6). In this case, the European legislator has opted for consensus and once again gives priority to solutions chosen through bargaining: an agreement that is reached in this way prevents a European works council from being set up by operation of law, as per the transposition provisions laid out in article 7 of the Directive in relation to the annex of the same. However, the minimum procedures and content (in accordance with article 5 paragraphs 3 and 1, article 1 paragraphs 1 and 2, article 6 paragraph 2 of the Directive) of those agreements are strictly predetermined by the Directive [11].

The parties to the agreement envisaged in article 13 paragraph 1 of the Directive may be, on the workers' side, both national workers' representative bodies as well as trade unions or also mixed organs of multinational composition made up of representatives, from unions or companies, elected or delegated by the workers [12]. On the other hand, for agreements stipulated in article 6 of the Directive, the first step is to establish, by the initiative of the workers or the company's central management, an agreement about the constitution of the European works council. This bargaining committee should be made up of at least one workers' representative from each member Country where the undertaking or group of undertakings has at least one establishment (article 5 paragraph 2 of the Directive).To date [13], in al-

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[11] I. SCHMIDT, RdA, 2001, special supplement 5, pp. 12 *et seq.,* 17 *et seq.* uses, to characterize these agreements as per article 6, the term "law-blocking" agreements, versus the "law-inhibiting" agreements laid out in article 13.

[12] Ch. MÜLLER, *EBRG-Kommentar*, 1997, §41 number 5; BLANKE, *EBRG-Kommentar,* 1999, §41 numbers 6 *et seq.* with empirical references; to this respect, also see section 3.1 further below.

[13] Article 13 of the Directive "truly introduces in European law, for the first time, something "revolutionarily new", says HEINZE, *Der europäische Betriebstrat*,

most all of the Member States' legal systems, there are no agreements of this type that go beyond the scope of validity of the respective national law [14]. The fact that the Directive expressly recognises their validity, and even attributes inhibiting effects of the law to them both in terms of Community law as well as national law, is a first step in the creation of a system of genuinely European collective agreements [15]. In view of the inhibiting character of Community law, the interpretive authority of the European Court of Justice, which is lacking in accordance with the content of article 234 TEC, is a shortcoming that should be addressed immediately [16].

2.2. Agreements between the European works council and the management: European works council agreements in the strict sense

a) Criteria established by the Directive on informing and consulting

Once the European works councils have been set up — whether it be via those mentioned agreements in keeping with articles 13 or 6 of the Directive, or in accordance with the applicable legal model subsidiarily laid out in article 7 with regard to the annex — its task will be to represent the interests of the workers in those Community-scale multinational companies when dealing with transnational matters. The Directive and its provisions for transposition to the Member States' legal systems do not indicate how this representation of inter-

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in: *Die Aktiengesellschaft (AG),* 1995, pp. 385 *et seq.* and 393; to this respect, the Spanish legal situation is clearly an exception, cf. SCHNELLE, *Der Europäische Betriebsrat in Spanien*, 1999.

[14] KÖRTGEN, *Der Tarifvertrag im Recht der Europäischen Gemeinschaft*, 1998, p. 172; DÄUBLER, *Mitbestimmung - ein Thema für Europa?*, in: *Kritische Justiz*, 1/1990, pp. 14 *et seq.* and 28 *et seq.;* according to Däubler, those agreements aimed at the establishment of European works councils or economic committees and "European collective agreements" were already permitted by EC law as per article 118b (now 139 paragraph 1) TEC; likewise DÄUBLER, *Die Vereinbarung zur Errichtung eines europäischen Betriebstrats*, FS Schaub, 1998, p. 95, 101 *et seq.;* of a different opinion about the meaning of the principle of subsidiarity, KEMPEN, KritV, 1994, 13 *et seq.,* 40, as well as in general for a lack of a "European collective agreement law" I. SCHMIDT, RdA, 2001, special supplement 5, pp. 12 *et seq.* and 15.

[15] SCHIEK, *Europäische Betriebsvereinbarungen*, RdA, 2001, pp. 218 *et seq.,* p. 228.

[16] HÖLAND, *Partnerschaftliche Setzung und Durchführung von Recht in der Europäischen Gemeinschaft*, in: *Zeitschrift für internationales und ausländisches Arbeits-und Sozialrecht (ZIAS)*, 1995, pp. 425 *et seq.,* 435.

ests should be made. They establish — especially in the subsidiarity rules mentioned in article 7 paragraph 1 in relation to the appendix of the Directive, which are applicable in the event that negotiations between the central management of the company and the workers' representatives is rejected, or that once three years have passed [17] these negotiations have not produced any results, and bring about the constitution of a European works council by operation of Law — only the minimum procedural and content requirements for the participation of European works councils that should comply with the subsidiarity provisions of the national transposition laws (article 7 paragraph 2) [18].

In accordance with this, the intervention of workers' representation bodies, envisaged in a legally binding way, is limited to a annual meeting with the central management, to inform and consult about the company's economic situation and its prospects (annex to the Directive, num. 2). Only in extraordinary cases which have considerable repercussions for the workers, or for example, when the undertaking, business or essential parts of these are going to be relocated or shut down, or in the case of mass dismissals, will an extra meeting will be held, upon request of the workers' representatives, to provide information and maintain communication with the company's management (annex to the Directive, num. 3). The workers' representatives should inform the workers of the company, in the proper manner, about the contents and results of the information provided by the central management and the consultations made with it. When a European works council is established by agreement between the parties, it will be possible to put aside —both in favour of and to the detriment of the workers— these minimum provisions about the intervention of the workers' representation body envisaged as a subsidiary solution.

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[17] 2 years in Norway, as per the Agreement on social partners in Norway, cf. BLANKE, *EBRG-Kommentar*, §21 number 20.

[18] For KRIMPHOVE, *Europäisches Arbeitsrecht*, 2nd ed., 2001, numbers 628 *et seq.,* in these cases — whether or not these occur depends solely on the behaviour of the company's management— and the "National rights about the internal forms of companies" should be applied. According to him, the subsidiarity provisions of the directive will only be applied in the event that these national provisions do not offer workers comparable protection. For this reason, always according to him, in these provisions we are "from the dogmatic point of view faced with a 'double' subsidiarity". In my opinion, this sceptical interpretation contradicts the content of article 7 paragraphs 1 and 2, which does not remit to national Rights about the internal form of companies, but to the subsidiarity provisions of national transposition laws which should be enacted in accordance with the highly detailed provisions in the directive's annex.

b) The purpose of informing and consulting

Informing and consulting the workers of the companies is not an end in itself. It makes it possible, before the company's management makes especially important decisions for the workers, for them to assert their interests and encourage that they be taken into account. According to legal reason 12 of the Directive, this is particularly necessary when the decisions that affect the workers are made outside the Member State where they work. The Directive demands that the workers or their representatives be informed with adequate advance notice and extension, before the company's management makes decisions that affect them (legal reasons 19 and 20). This is a precondition for an exchange of opinions between the parties, invested with real content which can lead to, where appropriate, practical consequences. Thus, it is hoped that "social dialogue" between the parties in community-scale undertakings will be promoted (legal reason 3).

c) Attending to the workers' interests via the signing of agreements

The way in which, when appropriate, workers' interests are taken into consideration is not legally predetermined. This may be determined by the unilateral decision of the management. However, many times it is the product of an agreement reached by the company's management and the workers' representatives. Even when the Directive —unlike what occurs with other provisions of Community law, such as the Directive on mass dismissals [19] or the Directive on the transfer of undertakings [20], which also provide for the participation of workers' representatives in company matters through information and consultation — does not expressly stipulate it, the sense and objective of the European works councils' intervention is, here also, for an understanding to be reached with the company's central management about the content of the decision to be made which adopts the form

[19] 75/129/EC of 17-2-1975, OJEC L 048/29 of 22-2-1975, consolidated by directive 98/59, OJEC L 225/16 of 12-8-1998. According to article 2 paragraph 1 of the directive, consulting before a mass dismissal is to be made "with a view to reaching an agreement."

[20] 77/187/EC of 14-2-1977, OJEC K 61/26 of 5-3-1977, consolidated by Directive 2001/23/EC of 12-3-2001. OJEC L 82/16 of 22-3-2001. Article 6 paragraph 2 of the directive on the transfer of undertakings requires that if companies should decide to transfer, the transferor and the transferee must consult the workers' representatives about any measures that might affect the workers "with the goal of reaching an agreement."

of an agreement [21]. In this case we would be dealing with «European works council agreements» in the strict sense.

Going beyond the Directive, in its §§41, 17 *et seq.*, the German transposition law (Law on European Works Councils, EBRG) envisages, in addition to establishment and extension agreements, the possibility of other agreements between the European works council and the central management. This is the case, for example, of the modification of agreements, in accordance with articles 13 and 6 of the Directive, to adapt them to structural modifications in the company and modifications in the number of workers made at a later date (§§41 paragraph 4, 18 paragraph 1 number 6 EBRG) and agreements between the central management and the European works council by operation of Law about the periodicity and place for information and consultation meetings, as laid out in §27 paragraph 1 sentence 3 EBRG, and about the bargaining of an establishment agreement as per article 6 of the Directive (§17 EBRG) in accordance with §37 EBRG [22].

In virtue of these regulations and the objective of workers' participation laid out in the Directive, the European works council agreements in the strict sense between the European works council and the central management are generally considered in the German debate as legal on principle. And this — despite the weak assumption that the contents of agreements of this type are fair, whose compliance cannot be forced legally or in fact — also when they are not only limited to "formal" matters such as questions related to management, the assumption of costs, the intervention of experts, etc. but they are also extended to matters that require regulating which affect the working conditions of the workers of Community-scale undertakings and group of undertakings [23]. Even so, it is widely debated whether in the establishment agreement, the European works council can also be granted real co-determination rights [24]. Those that think this is not possible

[21] Cf. SCHIEK, RdA, 2001, pp. 218 *et seq.,* 228 *et seq.*

[22] The European works council, by operation of law, has, as stipulated in §37 EBRG (coinciding with numbers 1 *et seq.* of the directive annex), the right and responsibility to make a decision four years after the meeting where conversations with the central management were initiated about the bargaining of a European works council agreement. If a positive decision is made, the European works council will have, in addition to its function as a European works council, the legal status of a bargaining committee, cf. BLANKE, *Anhang II:*EBRG, in: DÜWELL (ed.), *Betriebsverfassungsgestz*, 2002, §37 number 1.

[23] SCHIEK, RdA, 2001, pp. 218 *et seq.,* 223; with certain doubts DÄUBLER, *Die Vereinbarung zur Errichtung eines Europäischen Betriebsrats*, FS Schaub, 1998, pp. 95 *et seq.,* 111.

[24] This is indeed possible, given the ample autonomy to reach agreements and the idea of participation underlying the directive and the German law of transpo-

back up their negative opinion either by mentioning the purpose of the Directive and the EBRG, which does not indicate the creation of a co-determination code, or by arguing that the concession of real co-determination of rights is not supported by the concession of powers in article 2 paragraph 2 of the Social Policy Agreement (now: article 137 paragraphs 1, 2 TEC: information and consultation), unlike that laid out in article 2 paragraph 3 of the Social Policy Agreement (now: article 137 paragraph 3 TEC: co-determination)[25].

3. THE PRACTICAL RELEVANCE OF EUROPEAN WORKS COUNCIL AGREEMENTS: NUMBER AND ESSENTIAL CONTENT

3.1. Agreements for the establishment and extension of European works councils in accordance with article 13 of the Directive

Currently, there are detailed evaluations of the agreements destined to the creation of European works councils, especially corresponding to the initial phase of this first collective labour law institution in Europe. During this phase, the agreements referred to in article 13 of the Directive have been favoured. As a result, the Community rules and the national transposition provisions have almost never been applied ("inhibiting" agreements of the Law). The following explanation refers, unless otherwise indicated, to empirical studies corresponding to that period.

a) Number and type

The practical applicability of the Directive has been evidenced by the signing of approximately 400 European works council agreements,

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sition, argues BLANKE, *EBRG-Kommentar*, 1999, §18 number 12; the same conclusion is reached, although without providing clear support, by KRIMPHOVE, *Europäisches Arbeitsrecht,* 2nd ed., 2001, number 666; on the legality by principle of the concession of co-determination rights, see (regardless of the problems of union policy) DKK-DÄUBLER, *BetrVG-Kommentar*, 8th ed., 2002, §18 EBRG number 13; of a different opinion, SCHIEK, RdA, 2001, pp. 218 *et seq.,* 234; JOST, in RICHARD/WLOTZKE (eds.), *Münchener Handbuch zum Arbeitsrecht*, 2nd ed., 2000, §366 number 103.

[25] On this debate over the legal basis of the directive, cf. GOOS, *Kommt der Europäische Betriebstrat?,* NZA, 1994, pp. 776 *et seq.;* HEINZE, AG 1995, pp. 385 *et seq.,* 393 *et seq.*

in accordance with article 13 of the Directive, before the transposition period to national legal systems expired on 22-9-1996. Companies' eagerness to enter into voluntary agreements, in order to avoid the validity of the mandatory rules contained in the transposition provisions, is shown by the fact that a third of these "agreements provided for in article 12" were signed immediately before "the doors were closed" in September 1996 [26]. Since then, up to the end of 2001, 280 new agreements have been signed, mostly in accordance with article 6 of the Directive; that is, through bargaining with the bargaining committee [27]. Each year there are approximately 60 new agreements. As such, right now there are, in the over 1,850 undertakings and groups of undertakings subject to the Directive, approximately 700 European works councils.

In short, it is worth highlighting that of the approximately 700 European works councils that currently exist, almost all of them are based on the so-called "voluntary" agreements, most of these being agreements in accordance with article 13 signed before 22-9-1996. There are European works councils in approximately 40 percent of the undertakings and groups of undertakings subject to the Directive. This relatively high rate of coverage gives a good mark to the application of the principle of subsidiarity sought by the Directive.

b) Undertakings and workers subject to the Directive

The undertakings and groups of undertakings required to establish European works councils employ around 16 million workers, that is, approximately 10 percent of the workers in the European Union. Until now, European works councils have mainly been set up *in large groups of companies with over 10,000 workers*. Thus, *approximately 10 million workers, or approximately 66 percent* [28] *of workers in the European Union*, are represented by European works councils.

The country with the most companies required to set up European works councils is Germany (414), followed by the United States (237),

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[26] Cf. MARGINSON/GILMAN/JAKOBI/KRIEGER, *Negotiating European Works Councils: An Analysis of Agreements under Article 13*, in: EUROPEAN FOUNDATION FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS IN THE EUROPEAN COMMISSION (ed.), 1998, p. 14; for a more summarised version, MARGINSON; *EWC Agreements Under Review: Arrangements in Companies Based in Four Countries Compared,* in *TRANSFER,* 3/1999, pp. 256 *et seq.*

[27] LECHER/PLATZER/RÜB/JUNZ, JArbR, 38/2001, pp. 55 *et seq.,* 59.

[28] 66 percent in the original; the author must have meant 6 percent (translator's note).

Great Britain (237), France (148), the Netherlands (112), Sweden (99) and Switzerland (94)[29]. Thus, many groups of undertakings or undertakings subject to the Directive have their central management located outside the 18 member States in the sense of the Directive[30]. The distribution by sectors of the companies required to establish European works councils shows the following: the most affected are the metalworking and electronics industry (550; there is a European works council for 220 of them)[31], followed by the chemical industry, the service sector, the construction industry and the food and beverage industry.

c) Distribution of European works council agreements by countries and sectors

According to the study made by the European Foundation in Dublin in 1998[32], 64 percent of all agreements signed until that moment affected multinational companies with head offices in Germany (89 companies in total), Great Britain (58), the United States (59) and France (42). The highest percentage with respect to European works council agreements in proportion to the companies subject to the Directive is reached by Belgium, with 80 percent (17 companies). In Finland, Sweden and Norway, that percentage was between 40 and 50 percent, while in France, Germany and Italy it was around 33 percent. It was clearly lower, at 20 percent or less, in Denmark, the Netherlands and Spain[33].

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[29] Data taken from KLEBE/JUNZ, JarbR, 38/2001, pp. 55 *et seq.,* 59.

[30] This makes one think that there has been a widespread acceptance of the intentions of the directive, even beyond the circle of the Member States. It is evident that in multinational companies, the interest in employment relationships based on cooperation is more widespread than what might be expected in virtue of the different traditions, in part highly loaded with disputes, in the cultures of national co-determination. This is also shown by the fact that the geographic scope of the European works council agreements is frequently extended far beyond the circle of the Member States. Four agreements are extended to all the branches and thus establish real workers' committees in the entire group on an international scale.

[31] Of the 220 European works councils in the metalworking industry, 71 are coordinated by the German metalworkers' union (IG Metall) by delegation of the European Federation of Metalworkers' Unions (EMB). Among them there are also workers' committees that have their headquarters outside the EU, for example Compaq, Ford and General Motors.

[32] MARGINSON *et al.,* 1998; summarised in MARGINSON, *TRANSFER*, 3/1999, pp. 256 *et seq.*

[33] The disproportionately high number of agreements signed in British companies is especially striking: in that country, despite the fact that the directive was not applicable at first due to the opting-out of the Thatcher government, European

The sector where most European works council agreements were signed was the metalworking industry (35 %) followed by the chemical industry (17 %) and the food and beverage sector (12 %). All in all, in the production sectors, notably more European works council agreements were signed (80%) than in the service sector (13%). Of the service sector agreements, more were signed in the banking and financial services branch (in both cases there were agreements in roughly 25% of affected companies), while in the commercial sector, European works council agreements were only signed in one out of 10 affected multinational companies. This disparity between the production and service sectors with respect to the frequency of European works council agreements gives us a clear idea of the differences in the degrees of organization of the respective trade unions and the strategies and influence possibilities of the same, as well as differences in corporate identity in each area. If we compare the distribution of the European works council agreement by sectors with the corresponding countries, detailed conclusions can be drawn about the relative influence and industrial strategy of the trade unions and companies in each country in each sector (thus, for instance, in Germany, a disproportionately higher number of agreements have been signed in the metalworking and chemical industries, whereas relatively few have been signed in the food and beverage industry)[34].

d) The model of participation of the European workers' representation bodies, according to the conception of the Directive and in the agreements

The opening-up of procedures and contents of the criteria established by the Directive essentially rests on two reasons. First, attention has been given to the demands with the greatest possible flexibility presented by the workers. This group had already rejected the obligatory establishment of a European works council in the company

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works council agreements have been signed, pursuant to article 13, in over 50 percent of the affected undertakings. The reason for this percentage, much higher than the corresponding percentage in, for instance, German and French companies (30 percent in both cases), probably lies in the fact that insecurity reigned in British companies, due to the lack of workers' representation structures in Great Britain, as to how the bargaining committee should be formed after the closing date. The irrelevance of the Government's negative attitude on social policy faced with the directive is also shown by the fact that 63 percent of all agreements signed according to article 13 before the directive was extended to Great Britain and Northern Ireland included establishments or undertakings located in Great Britain.

[34] Cf. MARGINSON *et al.,* 1998, p. 11.

headquarters as a single model of representation for the workers. Second, it was necessary to leave some manoeuvring room for the transposition of the Directive to the legal systems of each Member State, so the Directive could be adapted to each national tradition with respect to employment relations and especially the co-determination of workers.

In practice, it has been shown that the first reason was, to a large extent, unreal: in approximately 90% of the agreements, central European works councils are provided for. This is how important the second reason has taken on: the type of European works council adjusts, to a large extent, to the national co-determination culture prevailing in the headquarters of each undertaking or group of undertakings [35].

The subsidiary requirements laid out in article 7 in relation to the annex of the Directive about the "European works council by operation of Law" to be established in the event that all attempts at bargaining conclude without producing any result, follow the German-

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[35] Cf. the empirical analysis of 386 European works council agreements of a total of 25 countries in MARGINSON *et al.,* 1998; also the database of the European Trade Union Federation regarding 353 agreements and their assessment by: DAVID, *Guide de présentation de la base de dones de accords sur les Comités d'Enterprise Européens et Radioscopie de 353 accords de mise en place d'instances européennes d'information et de consultation*, a paper by the Unité d'Assistance Technique of the European Trade Union Federation, Brussels, December 1997; other demonstrations and analyses of the agreements according to article 13 can be seen in: WILLS, *Making the best of it? Managerial attitudes towards, and experiences of, European works councils in UK-owned multinational firms,* Department of Geography, University of Southampton, Highfield, Southampton, S0171BJ, January 1998; idem, *The Experience and Implications of European Works Councils in the UK*, loc. cit, January 1998; with regard to Nordic countries, cf. KNUDSEN/BRUÑI, *European Works Councils in the Nordic Countries: An Opportunity and a Challenge for Trade Unionism,* in the *European Journal of Industrial Relations*, 1998, pp. 131 *et seq.;* EUROPÄISCHE KOMMISSION (ed.), *Soziales Europa*, supplement 5/95, with 51 agreements, texts and analyses; GEISSLER completes the agreements published in *Soziales Europa*, supplement 5795, with 40 additional agreements, only texts; EUROPEAN FOUNDATION FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS IN THE EUROPEAN COMMISSION, Working Paper num. WP/96/65EN, Dublin, September 1996, with the provisional analyses of 111 agreements; numerous references to previous expositions and studies are contained in the works of Keller, Jaeger, Niedenhoff, Nagel, Lecher/Platzer, Gerstenberger-Sztana, Buschak, Fulton, Geissler/Krieger, Buchholz and Köstler, in: *WSI-Mitteilungen*, 8/1996 and by Danis/Hoffmann, Krieger/Benneton, Bélier, Dolvik, Fulton, Savoini, Richard and Gohde in: *TRANSFER*, 2/1995; about the types of co-determination cultures, cf. MARGINSON *et al.,* pp. 8 *et seq.;* on the forms of co-determination in the Member States, in detail, cf. PICHOT, *Employee representatives in Europe and their economic prerogatives, Report conducted for the European Commission*, with no indication of place, pp. 17 *et seq.,* and LECHER, *WSI-Mitteilungen*, 1998, pp. 258 *et seq.,* 259.

Dutch model, providing for a European works council made up solely workers' representatives. However, in practice, the Franco-Belgian model predominates in European works council agreements, by which, as a general rule, a representative from the central management assumes the role of president or director. Two-thirds of the agreements (almost all of them in Belgium, France, Great Britain, North America and Asia) stipulate a mixed European works council comprised of workers' representatives and employer's representatives. This is the case even in the over 40 percent of the agreements which affect undertakings whose main headquarters are located in countries within the German-Dutch legal area. The reason for this surprisingly sharp deviation from the model of subsidiary provisions, even in countries with representation bodies exclusively made up of representatives chosen by the personnel, probably lies, on one hand, in the employers' tendency to exert influence on the management of the European works council and to be able to control it, even if, on the other hand, this phenomenon can probably also be explained by the unions' desire to protect already existing, relatively strong national co-determination rights: the corporate composition of the European works council would stress, then, the peculiar status of this body, so that it is no longer seen as a competitor to the workers' national co-determination bodies [36].

e) Parts of the European works council agreements, number of members and composition of the European works councils

In the establishment of the European works councils during the so-called article 13 phase, that is, 22-9-1996 (or until 15-13-1999 in the case of companies that were required to establish them due to the amplification of its validity to Great Britain and Northern Ireland), the European and international trade union organizations carried out the main task of organization and coordination. This is reflected in the fact that almost half of the agreements (45%) were signed, on the workers' side, by trade unions [37]. In 34 percent of the cases, the European works council agreement was signed by members of workers' committees (including group enterprise committees and to some extent, already-existing European works councils) and in another

[36] See MARGINSON *et al.,* 1998, p. 20.

[37] This emphasises the huge real importance of unions in the process of setting up European works councils, and shows a striking comparison with the fact that neither the Directive nor, for example, the German EBRG provide for this trade union intervention.

37%, by other workers' representatives (in some cases in an additional manner).

Most of the agreements (51%) stipulated that the European works council would be made up of between 11 and 20 members. In 25% of the cases, the number of members was between 20 and 30, and in 18 percent, between 3 and 10 and in 6%, over 30. The minimum number of members was three workers' representatives and as many as 60, although in all cases, these numbers correlated with the size of the company. The chemical industry often has particularly large European works councils [38].

In most of the agreements according to article 13 that were analysed, the distribution of positions on the European works council is specified, in relation to the countries where the multinational company operates. To that end, two principles are followed: first, the number of positions per country is globally assigned in the agreement, and second, it depends on the number of workers in each State or branch. At times, the resulting distribution of positions it is later corrected by adding members corresponding to certain countries or business units (according to, for example, the country where the company has its headquarters or most of its employees, groups of States that otherwise wouldn't meet the minimum quorum of representatives, or independent representatives from specific business sectors). Pursuant to the Directive and all the national transposition provisions, in distributing the positions on the bargaining committee and the European works council, the principle of representativity is given priority over proportionality, thus assigning a position to each country where the multinational undertaking operates, regardless of its size [39]. The remaining positions are distributed depending on the number of workers in each member State. Given that in the national transposition provisions, the number of positions on the bargaining committee is set at a maximum of 31, this usually means, in the case of companies with workers in several of the 18 member States, that these bodies are much more multinational than they would be if they were composed according to the number of its workers in each country in a strictly proportional way. Against these predetermined legal criteria, the analysis of the available agreements according to article 13 reveal that the principle of proportionality has been applied much more than the principle of representativity [40].

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[38] MARGINSON *et al.,* 1998, p. 31; DAVID, 1997, p. 15.
[39] Cf. the chart offered by BLANKE, *EBRG-Kommentar*, 1999, pp. 353 and 360.
[40] MARGINSON *et al.,* 1998, p. 34 *et seq.*

It is not unusual (17%) for agreements to grant external participants the status of members of the European works council with equal rights. In nine out of every 10 cases, they are union delegates.

f) The European works councils' right to information, consultation and bargaining, type and frequency of meetings, operating expenses of European works councils

Almost all the agreements pursuant to article 13 expressly stress that their main objective is the information and consultation of workers. On some occasions, the concept of consultation is clarified, making reference in most cases to dialogue and the exchange of opinions [41]. Some agreements take this a bit further and, for example, include the right to make recommendations and proposals (4% of the agreements), or to grant the European works council bargaining powers for certain matters (2%).

The vast majority of agreements contain a list of issues which the European works council should be informed about, and about which an exchange of ideas should take place between the management and workers' representatives; this list of issues about which they should be informed adapts, more or less strictly, to the criteria pre-established by the Directive.

The same can be said about the type and frequency of meetings with the central management of the company. The vast majority of agreements (87%) stipulate that the European works council can meet with the central management once a year for information and consultation purposes, and provide for the possibility of an additional extra meeting when unusual events occur. In 13% of the agreements, two regular meetings a year are stipulated, plus one facultative extra meeting. It should be noted that in Nordic countries, and especially in the financial sector, two annual meetings have been agreed in almost twice as many (25%) cases than in the remaining countries or sectors. It is evident that in the financial services sector, European works councils are considered as an opportunity to create a transnational business culture [42].

Approximately 85 percent of the agreement expressly grant the European works council the right to an internal preparatory meeting

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[41] On the following: MARGINSON *et al.,* 1998, pp. 25 *et seq.;* DAVID, 1997, pp. 17 *et seq.*

[42] MARGINSON *et al.,* 1998, p. 52

without employers' representatives, and approximately 22 percent also grant it the right to a subsequent follow-up meeting. Over half of the agreements (62%) also provide for —especially for extra information and consultation meetings and for any contacts with the central management carried out between the two formal meetings— a smaller committee, made up of members of the European works council. When the European works council is comprised of both workers' and employers' representatives, the smaller committee should reflect this joint composition.

In 97% of the agreements, the management is expressly required to cover the expenses of the European works council's activities. Three-fourths of the agreements stipulate that the workers' representatives have the right to be exempt from carrying out their habitual tasks —while still getting paid— whenever necessary; 86% require the company's management to cover travel and accommodation expenses; 78 percent, the cost of translators and interpreters; and 50%, expenses derived from the intervention of an expert. Who must cover general office and administrative expenses is only mentioned in 22% of the agreements. In 10 % of the agreements, the European works council is allocated a budget which it is allowed to administer itself[43].

3.2. Establishment agreements in accordance with article 6 of the Directive

In addition to the 400 agreements pursuant to article 13, exhaustively studied and analysed, there are approximately 300 additional European works council agreements signed in accordance with article 6. For these, on the workers' side, a bargaining committee was required to participate, specifically set up to bargain the agreements with the company's central management and which, in accordance with the majority of transposition laws, it must be composed of workers' representatives of all the Member States where the undertaking or groups of undertakings has a business[44].

To date, there have been no detailed studies about agreements signed during this phase. The formalization of the bargaining procedure, greater than that which is stipulated for the signing of agree-

[43] MARGINSON *et al.,* 1998, pp. 72 *et seq.*

[44] On the differences between transposition provisions, see BLANKE, *EBRG-Kommentar*, 1999, §10 numbers 14 *et seq.,* and in the same text, Appendix I, table 5.

ment under article 13, draws out the agreement bargaining phase. Even so, the agreements pursuant to article 6 are usually drawn up in more detail than those signed according to article 13, and generally guarantee a higher level of rights for the workers. This especially affects the economic and material allowance of the European works councils, the frequency of their information and consultation meetings with the central management and the amplification of the spectrum of issues to be addressed in them in areas such as, for example, the environment, safety and health, training and ongoing training or equal opportunity, the express establishment of the European works council's right to hold additional meetings, especially preparatory and follow-up ones, or the express assignment of rights to receiving training [45].

3.3. Agreements between the European works council and the management: European works council agreements in the strict sense

Comparative studies on the orientation and way of working of European works councils [46] have shown that European works councils frequently evolve with surprising swiftness, going beyond the function of information and consultation assigned in the Directive, until they become real partners of the management during negotiations, having substantial influence on the company's decisions. In different specific cases, the activities of the European works councils go far beyond that of bargaining —which is often on the top of the agenda — of a set of agreements about "soft" issues such as, for instance, the establishment of a social charter or codes of conduct, safety and health in the workplace, equal opportunity, the right to receive information, trade union rights, etc. [47] Thus, for example, thanks to the intervention and mediation of the European works

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[45] Cf. KLEBE/KUNZ, JArbR 38, 2001, pp. 55 *et seq.,* 62; I have also confirmed this through my own experience in advising the setting-up of European works councils.

[46] Cf. in particular the examples gathered in LECHER/NAGEL/PLATZER (eds.), *Konstituierung der Europäischen Betriebsräte — Vom Informationsforum zum Akteur? Eine vergleichende Studie von acht Konzernen in den Ländern Deutschland, Frankreich, Großbritannien und Italien*, 1998; LECHER/PLATZER/RÜB/WEINER; *Europäische Betriebsräte — Perspektiven ihrer Entwicklung und Vernetzung. Eine Studie zur Europäisierung der Arbeitsbeziehungen*, 1999; LECHER/PLATZER/RÜB/WEINER, 2001; KLEBE/ROTH, *Die Gewerkschaften auf dem Weg zu einer internationalen Strategie? Am Beispel der Automobilindustrie, in: Arbeitstrecht im Betrieb* (AiB), 12/2000, pp. 749 *et seq.;* KLEBE/KUNZ, JarbR 38/2001, p. 55 *et seq.,* 63.

[47] Examples in KLEBE/KUNZ, JArbR 38/2001, pp. 55 *et seq.,* 63.

council, already planned relocations in production have been avoided or their importance and repercussion has been significantly reduced, outsourcing plans have been dropped, social plans have been negotiated, bargaining has been initiated on the concession of compensation to workers who perform their duties in their own homes and new joint bodies have been set up, such as, for example, the "European observatory" for the improvement of safety and health in the workplace in the Italian chemical and energy group ENI [48]. Especially in relation to intense company restructuring in the automobile industry, a series of spectacular agreements have been reached in recent years with the participation of European works councils, trade unions and company management, which among other things stipulate ample regulations designed to secure workers' rights, such as guarantees of acquired rights, prolongation of the compulsoriness of collective agreements or the right to return to work in the event of company split-ups or mergers. In BMW-Rover and the Vauxhall factory in Luton, already planned shut-downs have even been able to be avoided [49].

The prerequisite for the successful signing of these agreements has always been the intense involvement —even to the point of threatening and the carrying out of collective dispute measures [50] —of the corresponding trade unions. Thus, the European works councils' new role as the transnational partners of the central management of undertakings and groups of undertakings represents a big challenge for the coordination and collaboration of trade unions on the European scale. At the same time, progress made in this coordination and collaboration will have decisive influence on the chances for European works

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[48] Cf. the specific examples mentioned in LECHER/NAGEL/PLATZER (eds.), 1998; LECHER/PLATZER/RÜB/WEINER, 2001; KLEBE/ROTH, AiB, 12/2000, pp. 749 *et seq.;* KLEBE/KUNZ, JArbR, 38/2001, p. 55; SCHIEK, RdA, 2001, p. 218.

[49] KLEBE/ROTH, AiB, 12/2000, pp. 749 *et seq.;* KLEBE/KUNZ, JArbR 38/2001, pp. 55 *et seq.,* 63 *et seq.;* RÖPER, *Europäischer Streik bei GM-Europa*, EuroAS 5/2001, pp. 87 *et seq.*

[50] Negotiations about the European-scale framework agreement signed on 6-7-2000 on the occasion of the alliance between General Motors and Fiat — which in the case of outsourcing parts of the company stipulates, among other things, that the collective agreements will remain valid also for new hires, the subsistence of workers' representation bodies and the right to return to the previous employer— were accompanied by strikes in the Open factories in Bochum, Kaiserslauern and Rüsselsheim, cf. KLEBE/ROTH, AiB, 12/2000, pp. 749 *et seq.,* 753 *et seq.;* a bit later on, GM's planned closing of the British Vauxhall factory in Luton was prevented by a European-scale warning strike of over 40,000 workers in 6 European countries, and 5-3-2001 a framework agreement was signed between the management of GM-Europe and the European works council ("European workers forum") to guarantee an industrial site that satisfied, to a large extent, the workers' demands, cf. RÖPER, EuroAS, 5/2001, pp. 87 *et seq.*

councils to become partners of the company management, on equal footing with it.

Overall, praxis shows that the information and consultation of European works councils, despite their weak legal configuration, are more than just "rhetoric of participation": they can bring about an effective exertion of influence and practical intervention in the decision-making process, which have produced results perfectly comparable with the legally guaranteed co-determination of workers, for example according to the German Law model on the internal scheme of companies. This comparatively strong effectiveness of the weak participation rights of workers' representation bodies on the European level is surprising, and it contradicts the scepticism, widespread in Germany, about the harmonisation of worker co-determination. This requires explanation.

4. THE DIRECTIVE ON EUROPEAN WORKS COUNCILS' CONTRIBUTION TO EUROPEAN LEGAL HARMONIZATION: THE CREATION OF A EUROPEAN CULTURE OF BARGAINING AND CONCLUDING AGREEMENTS

4.1. The primacy of agreements in creating of European works councils: bargaining in the shadow of the law

The Directive on European works councils pursues the objective that as many European works councils as possible be constituted by way of agreements, rather than by legal coercion. To facilitate the achievement of this objective and accelerate the process of setting up European works councils, it stipulates that over the course of time, the freedom to configure constitution agreements left in the hands of private autonomy will be gradually reduced: in an initial phase, the Directive grants priority to agreements, barely regulated legally, made between the company's central management and the workers' representatives; in a second phase, there is only one binding procedure for bargaining, where they can be obliged to participate, but without setting material criteria. Only in the event that this bargaining fails does it establish the obligatory constitution of European works councils by operation of law, pre-establishing minimum obligatory criteria —both procedural as well as content-related— for the authorities of the councils. Thus, the Directive has created a bargaining model against a backdrop of gradually increasing legal pressure, which represents a major innovation from the

technical-legal point of view ("bargaining in the shadow of the law")[51]

4.2. The creation of a system of genuine European works council agreements in multinational companies, prior to national transposition legislation

The effect of this granting a position of privilege to solutions adopted by agreement is threefold. *First,* a culture of bargaining and consensus is thus established in Community-scale undertakings and groups of undertakings, with respect to the constitution of European works councils and communication with them, allowing a flexible configuration of the forms and contents of the workers' representative bodies and their participation, which can be modified in each case to adapt to the specific requirements of the companies. *Second*, the agreement practice initiated by the Directive anticipates the transposition of the Directive in each Member State and the obligatory nature of national transposition provisions, which will not be merely procedural. This legal configuration technique of the Directive produces a legal substratum that will later be legally codified with the corresponding provisions in the national transposition. Through this clever tactic of the Directive, the national transposition provisions find a pre-existing system of European works councils, set up by mutual agreement before said provisions come into force and become applicable. *Third*, the national transposition provisions find this material doted with a new —and thus far unknown— legal status: that derived from the existence of a tight network of transnational collective agreements, about whose legality and legal applicability there is no longer any doubt after the enactment of the Directive, unlike what occurred with the previous legal situation[52]. With this, the Directive gives life to European works councils and council agreements in what constitutes a genuinely European legal phenomenon, which only later will be included in the national legal systems of the member States, where they will then be assimilated into the institutions and types of traditional agreements seen in collective labour law.

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[51] MÜLLER, *EBRG-Kommentar*, 1997, introduction, number 16; BLANKE; *Recht und Praxis der Europäischen Betriebsräte. Zur Effektivität "weicher" Regulierung für die Integration der Arbeitsbeziehungen in Europa*, KJ, 4/1999, pp. 497 *et seq.;* HÖLAND, *Mitbestimmung in Europa,* 2nd ed., 2000, pp. 79 *et seq.;* LECHER/PLATZER/RÜB/WEINER, 2001.

[52] According to SCHIEK, RdA, 2001, pp. 218 *et seq.,* 228 an agreement of this type was "unlikely to be compatible with most codes"; Spain is an exception to this rule, cf. SCNELLE, *Der Europäische Betriebsrat in Spanien*, 1999.

4.3. The legal progress represented by the opening-up of fields of action and experience of practical cooperation: an attempted theoretical explanation

The fact that, occasionally, the European-scale participation of workers in multinational undertakings and group of undertakings clearly surpasses, *for practical purposes*, the average level of rights of formal, legally guaranteed participation corresponds *from the statutory point of view* with the objectives of the Directive and the national transposition laws. In accordance with these, the meaning and purpose of informing and consulting workers or their representatives consists of including, debating, seriously considering and taking into account the workers' point of view, as much as possible, in the business decision-making process. For this reason, the information should be provided with due notice, based on a written report, and the negotiations should take place during periodic meetings, which are held following detailed rules. These meetings will be attended by the persons responsible for making decisions as well as the workers' representatives, who will have the right to make their position known, and common minutes will be taken. Above all, the *objective* of exchanging opinions must be to reach a "consensus" or "agreement" on the disputed questions, even if neither one of these is always reached, or due to the lack of a compulsory agreement or conciliation procedure in the event of dispute, it is not possible to force them to be reached.

Whoever sees this attempt, related to the information and consultation of workers, as a "pious wish" that is irrelevant in practice is mistaken. In the case of intense disputes, where only "this or that" is possible and there is no room for compromise, whoever holds this opinion might think that the facts support their stance. But in everyday employment relationships, these extreme situations are rare. The most common occurrence is a multiform overlapping of actions and decisions that mutually influence each other, of already firmly-established routines, cooperation and innovation processes essentially grounded in trust. This foundation of trust and the resulting reciprocal recognition of this are the "social capital" that has nourished, from the Directive on collective dismissals 75/129/EEC of 17.2.1975 [53] to date, the opportunities and prospects of effective worker co-determination in European law.

In the German debate, both in the area of legal science as well as in industrial sociology, the following are mentioned as resources of

[53] OJEC L 048/29 of 22.2.1975, consolidated by Directive 98/59, OJEC 225/16 of 12.8.1998.

the power available to the workers' representative bodies: money, know-how, personnel, time, and especially, law [54]. However, trust is hardly ever mentioned as a criterion of any influence [55]. This might be due to the fact that it is very difficult to make this factor operative or determine it with much clarity. But this oversight leads to serious estimation errors. One of the most impressive demonstrations of this thesis is the process of social integration in Europe: without a fundamental paradigm shift in the configuration of the regulatory framework of employment relations, this process — and with it probably the entire unification process — is doomed to fail.

We would have to digress too far to describe this shift in general approach in further detail. Anyhow, it will suffice to mention a few key concepts. Instead of an orderly unification ("harmonisation") from the top down, regardless of the level of national regulation where this is done, or the opening-up of options like an "a la carte restaurant", a possibility has also been opened up for creating opportunities —also invested, when necessary, with the appropriate compulsoriness — for decentralised cooperation on the level of the affected agents themselves. With this instrumentalisation of a principle of subsidiarity, strictly understood, put to the service of the gradual construction of a "bargained Europeization" [56] the goal is to open up new fields of interaction for the employers' and trade union agents. In turn, it is hoped that this will encourage a praxis which, from the different viewpoints of the various participants in the process, could become a point of reference for the common experience, and thus for an intersubjectively shared story. In this way, and the theoretical justification for this can be found in the suppositions of Anthony Giddens' [57] theory of structuration, routines for action can be created — or at least this might be expected. These routines, being recursive, gradually produce stable structures, thus permitting, out of trust in their solidness, cooperative action. Weak rights of participation can thus be developed until they become quite effective opportunities to exert influence. In this fashion, on the long term, they will be able to favour the implementation of a co-determination praxis with a much greater

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[54] HÖLAND/REIM/BRECHT, *Flächentarifvertrag und Günstigkeitsprinzip: empirische Beobachtungen und rechtliche Betrachtungen der Anwendung von Flächentarifverträgen in Betrieben*, 2000, p. 194.

[55] But DEUTSCHMANN expressly asserts this in *Die Gesellschaftskritik der Industriesoziologie — ein Anachronosmus?*, in: *Leviathan*, 2001, pp. 58 *et seq.* and BECKERT, *Vertrauen und die performative Konstruktion von Märkten, in: Zeitschrift für Soziologie*, 2002, pp. 27 *et seq.*

[56] This is the name of the study by LECHER/PLATZER/RÜB/WEINER, 2001.

[57] *Die Konstitution der Gesellschaft*, Frankfurt, 1992.

potential for success than the one that would be possible via mere legal positionings regarding co-determination which, no matter how broad their scope, would barely have any life in them.

As for the evolution of European law, particularly in the field of collective co-determination, it must be admitted that this approach has proved to be the only successful one[58]. Certainly, this path is working to carry out of a specific task, affected by special problems and difficulties: that of integrating very heterogeneous structures, both in fact as well as legally, and different social and industrial agents, each one with its own traditions and ideologies. Whether or not a universal law of legal progress should be derived from this, especially in collective labour law, is a question that requires more detailed study. Here we shall refrain from making a decision, as in the approach that follows we will move in European terrain.

5. THE LEGAL NATURE OF EUROPEAN WORKS COUNCIL AGREEMENTS

5.1. The effect of the Directive on European works councils: there is no European law as such

Law relating to European works councils rests on Directive 94/45/EC, and therefore on a legal institution of secondary Community legislation. Unlike the regulation (§249 paragraph 2 TEC) it is not valid "directly in each Member State" but rather it "is compulsory only with respect to the objective to be reached, leaving national bodies to choose the corresponding forms and means" (§249 paragraph 3 TEC). Therefore, its transposition is made through the creation of a national law. It seems logical, then, to interpret European works council agreements as agreements solely based on the respective national law and to be determined by the different national legal traditions. In keeping with this, they are a kind of legal "chameleon" whose conditions and legal effects will deserve different judgment depending on the legal system of each of the 18 affected Member States. It is clear, however, that this way of looking at things does not adapt at all to the European Directives' function of helping bring the different Member States' legal systems closer together[59]. For that

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[58] CATTERO, *"Mitbestimmung" auf europäisch. Deutungsoffenheit, institutionelle Mythen und lose Kopplungen*, in: ABEL/ITTERMANN (eds.), *Mitbestimmung an den Grenzen?,* 2001, pp. 135 *et seq.,* 150.

[59] Cf. KRIMPHOVE, *Europäisches Arbeitsrecht*, 2nd ed., 2001, p. 78

reason, the determination of the legal character of the European works council agreements must pay due attention to the repercussions of European law on national law.

5.2. The harmonisation of national laws by European Directives: priority of European law, effectiveness mandate, interpretation in accordance with the Directives and the immediate applicability of the Directives

On principle, European Directives do not achieve legal compulsoriness as directly applicable legal rules until they are transposed to the corresponding national law. However, as European legal provisions, in the event of concurrence they have, also on principle, priority (of application) over national Law [60]. In addition, as instruments of legal harmonisation they establish, first of all, obligatory objectives based on their content and, secondly, they set strict maximum deadlines for their transposition to be made. The requirements for the transposition of Community Law to national law are subject to the effectiveness mandate derived from article 10 TEC and the interpretative principle of "*effet utile*" [61]. This mandate includes the duty to carry out the transposition within the established time period, in an complete, sufficiently determined and clear manner, omitting any arbitrary modifications. Also, the maxim of interpreting national Law by the ECJ in accordance with the Directives, or where appropriate, complementary [62], shows that the provisions of European Directives must be observed regardless of whether they are transposed or not. Transposition does not mean that the legal effects of the Directives run out in any way; on the contrary, they are still binding as rules, as a frame of reference for the transposition: the Directives establish a legally binding orientation framework that creates a legal connec-

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[60] ECJ, resolution of 15-7-1964. Law reports 6/64, Costa/E.N.E.L., collection 1964, 1253; ECJ, resolution of 17-12-1970, Law reports 11/70, international mercantile society, collection 1970, 1125; to this respect ALBERT, *Aktuelle arbeitsrechtliche Fragüen in der Rechtsprechung des EuGH*, RdA, 2001, special supplement 5, pp. 23 *et seq.;* KRIMPHOVE, *Europäisches Arbeitsrecht,* 2nd ed., 2001, p. 82 with references.

[61] HÖLAND, ZIAS, 1995, pp. 425 *et seq.,* 437 with extensive references taken from ECJ case law.

[62] Cf. especially the ECJ cases, resolution of 10-4-1984, law report 14/83, v. Colson and Camann ./. Land of North-Rhine Westphalia; ECJ, resolution of 10-4-1984, law report 79/83, Doris Harz ./. Deutsche Tradax GMBH; ECJ, resolution of 19-11-1991, law report C-6/90, Andrea Francowitch *et al.* ./. Republic of Italy; a detailed study of this is found in KRIMPHOVE, *Europäisches Arbeitsrecht*, 2nd ed., 2001, pp. 56 *et seq.;* SCHIEK, *Europäisches Arbeitsrecht*, 1997, pp. 34 *et seq.*

tion, of varying intensity depending on the case, between the national legal system and Community Law. Their dynamism revolves around the adjustment between concepts, procedures and legal institutions, both on the Community and national levels. Also, on occasion, as has occurred in a particularly visible way with the principle of equal pay for men and women [63] and the Directive on the transfer of undertakings [64], it is reflected in differences in interpretation between the ECJ and obstinately defended national legal systems, which in the case of said Directive 77/187/EC have even brought about a revision of its content [65].

Also, in the event that the transposition is not made as swiftly as expected, the European directives can, in some cases, take preference over national regulations and acquire direct legal binding force, in the specific way that that they can be followed in the respective national legal systems by subjective rights for citizens, claimable to the State [66].

5.3. The Directive as an instrument of legal harmonisation in collective labour law and the effect of the specific integration of the Directive on the European works council

So, with good reason it is said that the legislative instrument of the directive does not totally respect national autonomy, but only "to a large extent" [67]. The less the objectives of the European directives can be reached with the instrument provided by the respective national legal systems, the stronger is the influence of the criteria established in these directives about national law: in these cases, national law finds itself faced with the task of starting to develop the legal procedures and instruments that will allow the transposition of the

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[63] In reference to the insufficient German transposition provisions of directive 76/207/EC in cases of discrimination against women in the hiring process, ECJ resolution of 10-4-1984, Law report 14/83, Colson and Camann/Land of North-Rhine Westphalia; on the amount of "considerable sanctions" that English Law provides for in this case; ECJ, resolution of 9-11-1993, law report C-132/92, Birds Eye Walls Limited ./. E.M. Roberts; on the exigency that there be guilt and the limitation of the duty to compensate for damages stipulated in German Law, ECJ, resolution of 22-4-1997, law report C 180/95, Draehmpaehl ./. Urania, AP num. 13 about §611a BGB with notes by SCHLACHTER.

[64] ECJ, resolution of 14-4-1994, law report C-329/92 Christel Schmidt ./. Spar- und Leihkasse Kiel, collection I 1994, p. 1311.

[65] Directive 98/50/EC, OCEJ L 201 of 17-7-1998, p. 88.

[66] Details about this immediate legal effect of the Directive are found in KRIMPHOVE, *Europäisches Arbeitsrecht*, 2nd ed., 2001, pp. 56 *et seq.*

[67] KRIMPHOVE, *Europäisches Ar*beitsrecht, 2nd ed., 2001, p. 56

Directive[68]. This effect of legal integration of the European Directives is especially relevant in labour law in general and in collective labour law in particular, and within this latter category, more in labour relations law on the company level than in other areas. In light of the huge differences between national legal systems[69] in this area, it is difficult to expect that European provisions will have capacity to generate legal uniformisation. The national legal systems would be incapable of incorporating those foreign legal bodies. The consequences would be, on the contrary, "reactions of rejection" that would do more to favour the disintegration of different European national legal systems than to facilitate their harmonisation. Thus, at least for now, the European directive is, in this field, an instrument to bring the respective country laws closer together, for which there are no alternatives.

Moreover, the consequence of legally interpreting European works council agreements exclusively in the context of national legal systems would be that this European-scale institution of workers' representation and its praxis of establishing agreements would kaleidoscopically break up, depending on the national perspective of the corresponding observer and due to its necessary reciprocal overlapping[70] into casual constellations whose elements would be combined one way on certain occasions, and another way on others, and sometimes not combined at all. Because of the differences in the labour relations systems and their respective legal situations, the collective labour institutions of no two countries are ever identical, not even in legally "related" areas such as those of Germany and Austria, Belgium and France, Spain and Italy, Great Britain and Northern Ireland

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[68] In the case of the Directive on European works councils, this posed the significant problem, especially for the codes of Great Britain and North Ireland, of first developing the procedures that would allow the establishment of a general delegation of workers in companies. This difficulty should be attributed to the enormous willingness of British companies to set up European works councils in the UK by agreement before the Directive's application was extended to this country, cf. previous note 52.

[69] Of the vast number of comparative studies on the regulation of the enterprise level, we will mention only Pichot, *Arbeitnehmervertreter in Europa und ihre Befugnisse in Unternehmen*, in: Europäische Kommission (ed.), *Soziales Europa* 2/1996; European Trade Union Federation (ed.), *Die Arbeitnehmervertretung auf Betriebsebene in Europa*, Brussels, December 1998; Otting, *Betriebsverfassung in den Europäischen Gemeinschaften unter besonderer Berücksichtigung des Status einer Europaïschen Aktiengesellschaft*, doctoral thesis, Augsburg, 1981; Sandmann, *Die Euro-Betriebsrats-Richtlinie 94/95/EC*, 1996, pp. 32 *et seq.;* Rebhahn, *Das Kollektive Arbeitsrecht im Rechtsvergleich*, RdA, 2001, 763 *et seq.,* 770 *et seq.;* Krimphove, *Europäisches Arbeitsrecht*, 2nd ed., 2001. p. 407 *et seq.*

[70] To this respect, cf. the previous note 10.

or Sweden and Norway. This is especially true in the case of enterprise agreements which, as *sui generis* collective agreements, have subsidiary and secondary validity versus collective agreements (company and groups of companies [71]) only in Germany (and similarly, in Austria) [72]. True enough, in most Member States there are legal configurations (especially company agreements [73]) that can assume a similar function; but this does not occur in all cases [74].

Considering the lack of a sufficient common tradition of collective labour law in the Member States, also and particularly on the company level, the legal character of European works council agreements can not be determined from the visual angle of the various national legal systems. By the same token, nor can its legal character be determined based on the differences in national legal systems, by simply adding up the points that they have in common, or adopting

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[71] In accordance with German law, "enterprise agreements" are agreements between the employer and the body that represents the interests of the workers in the enterprise elected by them. They set working conditions directly, with binding statutory effects, not only for workers who belong to a trade union but also all employees of the company that are represented by the works council (§77 paragraph 3 of German law on the internal scheme of companies, BetrVG). The enterprise agreement is, on the enterprise level, the working equivalent of the collective agreement, although unlike the latter, its legal authority is democratic-representative and not based on belonging to an association or group. The legal authority of the collective agreement has, in the form of autonomy to establish economic and working conditions, a specific constitutional basis (article 9 paragraph 3 of German basic law) and a stronger supposition in favour of its justification, for which it is granted legal priority over enterprise agreements (§§77 paragraph 3, 87 paragraph 1 first sentence BetrVG). However, in practice this legal approach is being increasingly undermined. This is because there is a constant tendency to transfer to the enterprise level more bargaining and agreement-adoption powers: a phenomenon that is being seen all over Europe and which is reflected in the fact that more and more legal validity is attributed, both in national law as well as in European law, to the enterprise and the establishment as levels for collective labour regulation, cf. EUROPEAN COMMISSION, DG FOR EMPLOYMENT AND SOCIAL AFFAIRS UNIT EMPL/D.1, *Report of the High Level Group on Industrial Relations and Change in the European Union,* January 2002, pp. 25 and 26.

[72] About differences with respect to Germany, essentially based on individual employer's lack of capacity to sign agreements, and the corresponding capacity of workers' organisations as legal representative bodies, based on the fact that the law stipulates the "forced membership" of employees to these associations, cf. REBHAHN, *Rechtsvergleichendes zur Tarifbindung ohne Vergandmitgliedschaft,* RhA, 2002, 214.

[73] However, oftentimes they are not attributed any statutory effect, so that their binding *erga omnes* character must be obtained by another means, for example through dogmatic constructs such as the theory of representation and the supposition of an agreement in favour of third parties, via principles of equal treatment, declarations of universal binding force and possibilities of register; cf. for more details SCHIEK, RdA, 2001, pp. 218 *et seq.,* 225 *et seq.*

[74] For more details, see SCHIEK, RdA, 2001, pp. 218 *et seq.,* 225 *et seq.*

as an expressly European form just one of the different national legal systems.

5.4. What is the European legal nature of European works council agreements?

Instead of this, the legal classification of European collective agreements must examine the phenomenon, characteristic of the evolution of law in other fields as well, which consists of the fact that social reality is constantly creating new structures that transcend the canon of inherited legal institutions and which can no longer be conceptually understood by traditional legal categories. European collective labour law, an emerging field, must pay due attention to the fact that through the conception of "social dialogue" — developed in Community law in an increasingly systematic way and which has found its provisional keystone in the fundamental social law of article 27 of the (still) non-binding Charter of Fundamental Rights of the European Union [75] —an independent system has emerged, made up of different legal models for collective agreements. From the Directive on a general framework for collective dismissals 75/129/EEC of 17-12-1975 [76], to the directive on a general framework for informing and

[75] Article 27 of the Charter of Fundamental Rights of the European Union guarantees, as it title states, that "workers have the right to information and consultation within the undertaking" with the following content "workers and their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices." This regulation contains, in the form of criteria of "appropriate levels," significant qualitative determinations of the applicable requirements for information and consultation. The reference to Community law and the guarantees and practice of the different States is a limiting point, but at the same time it gives them positive value as forms of expression of a fundamental European social right. Thus, its legal character is reinforced significantly. The term "constitutional" excludes any interpretation by which rights to consultation and information laid out in the respective national laws are left up to the decision of the legislator of each Member State. Article 27 of the Community Charter of Fundamental Rights is not a weak version of the workers' co-determination contained in the German model of the internal schemes of companies aimed at the democratisation of existing power relations in companies. However, that fundamental right currently marks the climax in a tenacious legal evolution of Community law which has led to the deployment of a specifically European model of "social dialogue" through several channels that are also extended to the individual enterprise level. For more details on this, see Blanke; article 27, in: Bercusson (ed.), *Labour law in the new Charter of the EU. Interpreting fundamental social rights* (currently being published).

[76] OJEC L 048/29 OF 22-2-1975, consolidated by Directive 98/59, OJEC L 225/16 of 12-8-1998.

consulting workers 2002/14/EC of 11-3-2002 [77], this system is primarily limited to constituting the respective intra-State legal relationships, so the determination of its legal nature has not produced any problems of note.

This situation has been decisively modified by the Directive on European works councils and by the recently passed 2001/86/EC of 8-10-2001 [78] aimed at "supplementing the Statute for a European company with regard to the involvement of employees." These acts of Community law have initiated, prior to the national transposition legislation, a Community-scale praxis of agreement adoption by social partners, whose inhibiting legal effects as agreements pursuant to article 13 rest directly on the Directive on European works council agreements, and as such, should be regarded as private law agreements of European law [79]. At the same time, it obliged and obliges the Member States to recognise these agreements, as well as those made by the management of Community-scale companies and the bargaining committee as the representative body of workers of a multinational make-up, whose legally compulsoriness is also in accordance with national law. This presupposes the recognition of the Community scale of these agreements. The alternative is to develop a type of collective agreement in keeping with national law which has, however, transnational legal validity. This is the path that Spanish law seems to have adopted, which in article 13 paragraphs 1 and 2, in relation to the subsidiary rules of the Law of 10-4-1997 on the transposition of the Directive [80] defines the legal nature of the European works council agreements as collective agreements which, just like other collective agreements, must be sent to the proper labour authority for their registration, deposit and official publication, and which stipulates that they will be binding for all workplaces and companies belonging to Community-scale undertakings or groups of undertakings —also for those located in the remaining Member States — as well as for the workers of the same. In accordance with these provisions, these are, therefore, genuine European collective agreements applicable throughout Europe: a legal effect which, heeding the principle of territoriality of national legislation, is unlikely to be produced by virtue

[77] OCEJ L 80/29 of 23-3-2002.

[78] OCEJ L 294/22 of 10-11-2001; cf. the exposition of the draft in HERFS-ROTTGEN, *Arbeitnehmerbeteiligung in der Europäischen Gemeinschaft*, NZA 2001, pp. 424 *et seq.*

[79] On agreements pursuant to article 118b (now article 139 TEC), see DÄUBLER, *Tarifvertragsrecht*, 3rd ed., 1994, numbers 1729, 1731.

[80] An English translation of the law is found in BLANKE, *EBRG-Kommentar*, 1999, Appendix II, pp. 443 *et seq.*

of provisions of the individual States, but rather it presupposes that Directive 94/45/EC is considered as a European foundation by its own right for European works council agreements [81]. In the German debate, on the other hand, the legal character of European works council agreements has until now been judged on most occasions only in accordance to national law [82]. This interpretation misconstrues the special mission of the transnational praxis of agreement-adopting by social partners and the harmonising role of the European Directives, especially in collective labour law. For this reason, it needs to be rectified [83]. So the composition and legal authority of the workers' representative body, which, as a "bargaining committee", has the power to bargain and sign an agreement to establish a European works committee as well as to determine the scope of its future co-determination powers, escapes the regulatory capacity of each Member State. Likewise, the legal definition and configuration of the European works council agreements in terms of specific types of collective agreements, which deploy with statutory force [84] transnational legal effects on all the workers of a Community-scale undertaking, surpasses the authority and legislative authority of each individual State. For this reason, regardless of its positivisation in national transposition provisions, European works council agreements have at the same time a European legal character [85] whose exact profiles and implications have yet to be identified and clarified in the European political discourse.

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[81] This is BLANKE's argument, *EBRG-Kommentar*, 1999, appendix II, pp. 442 *et seq.*

[82] For example even BLANKE, *EBRG-Kommentar*, 1999, §17 number 13 with numerous references and BLANKE, Anhang II: EBRG, in: DÜWELL (ed.), *Betriebsverfassungsgesetz*, 2002, §17 number 9.

[83] In the German debate a problematisation of this point of view centred on the State has been explored — by SCHIEK, RdA, 2001, pp. 218 *et seq.* and SCHIEK, Einleitung G: *Europäische Kollektivvereinbarungen*, in: DÄUBLER (ed.), *Tarifvertragsrecht*, 4th ed. (currently being published) — which will permit a more in-depth treatment of the matter.

[84] The question of whether these collective agreement have statutory or merely obligational effects is controversial in the German legal situation based on the EBRG; cf. I. SCHMIDT, RdA, 2001, special supplement 5, pp. 12 *et seq.,* 17 *et seq.*: for lack of an express legal concession of powers, the European works council agreements lack statutory effects. On the other hand, the prevailing opinion affirms that European works council agreements do have statutory effects, since otherwise the effect of legal binding force could not be explained — which may also mean the reduction of rights — of these agreements for all of a company's workers, cf. BLANKE, *EBRG-Kommentar*, 1999, §17 number 14, §18 number 12, §41 numbers 35 *et seq.;* DKK-DÄUBLER, EBRG §18 number 14; a detailed analysis in SCHIEK, RdA, 2001, pp. 218 *et seq.*

[85] For SCHIEK, *Einleitung G: Europäische Kollektivvereinbarungen*, in: DÄUBLER (ed.), *Tarifvertragsrecht*, 4th ed. (currently being published), it is a "Europeised national labour law".

Chapter 14

APPLICABILITY OF EUROPEAN COLLECTIVE AGREEMENTS

Antonio Ojeda Avilés, Seville

1. AN ACCELERATED *MIS EN SCÈNE*

As if trying to announce the 10th anniversary of the Community Charter of Fundamental Social Rights, in 1998 the first European collective agreement is signed (henceforth, ECA) on the sector level, on the working time of seafarers, between the European Community Shipowners' Association and the European Transport Workers' Federation [1]. Prior to it, several framework agreements on the highest level between European social partners had cleared the way for these sector agreements, several of which already exist [2]. In the space of a few short years, the European collective bargaining panorama has changed drastically, perhaps rendering obsolete the opinions voiced with caution for so long about the applicability of those instruments. Thus, a revision of the subject is necessary, though of course it cannot be the final one. Not only do an considerable number of European intersectoral and sectoral agreements currently exist, the Commission has just updated its list of representative organisations in the various industries [3], and the European Trade Union Confederation (ETUC) seems to be comfortable with the new Helsinki statutes where it finds the basis needed for more standardised bargaining. The content of said collective agreements has also changed, as we will have the chance

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[1] Signed in Brussels on 30 September 1998.

[2] The most recent example — for the moment — is the European Agreement on Guidelines of Telework in Commerce, signed in Brussels on April 21, 2001 by EuroCommerce and Uni-Europa Commerce, whose dubious legal nature I will address further on.

[3] Paper by the Commission called *European Social Dialogue, a Force for Innovation and Change*, Brussels, 26 June 2002, COM (2002), 341 final, annex I.

to examine in the following pages. At the same time, the Commission is asking itself about the nature of the agreements that are inexorably appearing in multinational firms and European workers' delegations. In short, there is a new panorama, where employers have been quicker to organise than the trade unions [4] and there are as many as 27 sectoral dialogue committees, although bargaining itself is not without its difficulties [5].

Before moving on to reflect on questions directly related to the applicability of ECAs, we must make, then, a brief digression to discuss the origins and distinguishing features this new phenomenon, which is reaching maturity right before our very eyes.

1.1. The origins of European collective bargaining

It has been repeated *ad nauseum* that collective bargaining emerged on the Community level with sector agreements on working hours in agriculture, reached by the European joint committee for that industry from 1968 onward [6]. This gave rise to a more general-

[4] In the previously cited Commission paper (Annex I), there are 38 European employers' industry organisations, verses 12 European trade union organisations, most of them not affiliated to the ETUC, as consulted in article 138 TEC.

[5] In 1995 the Commission consulted the European social partners about a regulation of burden of proof in cases of gender-based discrimination, and it obtained separate opinions, for which it pronounced Directive 97/80/EC, actually based on the Social Policy Agreement annex of the Maastricht Treaty. Bargaining on labour flexibility, initiated in 1995, achieved both framework agreements on part-time work in 1997 and fixed-term work in 1999, but those referring to part-time employment companies failed in May 2001 after a long time attempting to reach an agreement, and on other matters there have been more failures than successes, as can be seen in the Commission consultations of 1996 (prevention of sexual harassment of employees in the workplace), 1997 (information and consultation of workers), and 2000 (three reviews: protection of workers versus the insolvency of the employer, protection against asbestos, and safety and health in the workplace for self-employed workers), which received separate opinions and resulted in Directives in most cases. For information about the current situation of the consultation about the protection of personal details and social aspects of company restructuring, see the chapters on European collective subjects and social dialogue in this book.

[6] It is the second oldest joint sectoral committee (1963; European Commission Decision 74/422/ECC, reformed by Decision 87/445/EEC), only preceded by the coal and steel committee (1955). Currently made up of representatives from EFFAT (trade unions) and GEOPA-COPA (employers' organisations). It is one of the 27 advisory committees of sectoral and bipartite character that comprise the institutional participation in the EU, the first of which can be seen in RIBAS J. J.; JONCZY, M. J. and SÉCHÉ, J., *Derecho Social Europeo*, Madrid, 1980, pp. 196-7. The agreements were signed in 1968, 1972, 1978 and 1981. The 1968 agreement establishes the working hours of permanent workers in agriculture, and the 1972 agreement for zootechnics.

ised acceptance of the validity of such agreements, usually considered as mere recommendations aimed at the national social partners [7]. The object of these joint committees is to formulate the sector's economic or commercial policies for relations between Member States and up against non-Community countries, no matter how often they take stances having indirect relevance to employment relationships [8]. In effect, the European Agricultural Trade Union Federation itself admitted, referring to these agreements, that they were intended as «European recommendations» in the sense given to framework agreements, setting objectives for national collective bargaining [9]. But as Bercusson has pointed out, the absence of an effective European employers' organisation in that sector and a lack of interest in developing something beyond vague joint opinions kept impeding the European Community's efforts to develop social dialogue on the sector level [10]. In reality, as Rocella and Treu have accurately pointed out, they were «joint recommendations,» forms resembling the bona fide collective agreement, significantly developed in a sector where Community authority has invested conspicuous resources, following lines of common economic policy, although still very much tributaries of national interests [11].

Also worthy of mention are the joint opinions signed between the main European confederations UNICE, CES and CEEP, baked by the European Commission in Val Duchesse. As a product of these tripartite meetings [12] during the summit, very interesting opinions were produced about questions ranging from employment (1986) and cross-industry advisory committees (1993) to occupational training (1995) without any intention of regulating working conditions in the sense that a collective agreement does [13]. As Lyon-Caen and Guarriello point out, the parties reach agreement not on a rule understood as binding,

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[7] Schnorr Von Carolsfeld, "I contratti collettivi in un'Europa integrata", *RivItDirLav* I (1993), 333. They do not have regulatory effects, he argued, because they do not have an immediate bearing on employment relationships, since applying the contract to the parties as such, being third parties, cannot be derived from the agreement.

[8] Rocella, M. and Treu, T. *Diritto del Lavoro della Comunità Europea*, Padova, 1995, p. 371.

[9] Bercusson, B., *European Labour Law*, London, 1996, p. 83-4.

[10] Bercusson, *ibid.*, p. 84.

[11] *Diritto del Lavoro*, p. 372.

[12] Backed by the European Union (European Social Action Programme of 1984), which, however, does not take part in them, refers to that kind of virtual tripartism where one party — usually the government — commits and finances, but remains formally on the sidelines.

[13] The Reports from 1986 to 1995, in MTAS, *El Diálogo Social en la Unión Europea*, Madrid, 1997, pp. 49 *et seq.*

but on an opinion [14]. Tripartism takes on new functions with the bi-annual meetings between the European confederations and the troika starting in 1997 and the social summits of Stockholm, Laeken and Barcelona (2001 and 2001). However, it does not bring them closer, but perhaps even drives them further away from the missions of collective bargaining.

Neither agreements on working hours in agriculture nor the opinions on specific aspects from the Val Duchesse meetings can be considered as the origins of what we know as European collective agreements. The argument for this conclusion stems from the absence of a will to regulate working conditions in what their own authors regarded as recommendations or reports, not to say pure and simple *desiderata*. And such a will could not have existed since one of the signing parties, the employers, had no organisations with bargaining power, nor were they willing to authorise a the UNICE or the CEEP to sign collective agreements. Even in the 1995 Framework Agreement on parental leave, specific authorisation had to be given to each confederation belonging to the UNICE [15,] a mandate that the British employers' association CBI refused, without any consequence at the time beyond preventing its application in the UK. It was only in 1987 that the Single European Act, with its incorporation of article 118 B and its support via the Commission of European social dialogue and collective agreements on this level, did the necessary phases for the emergence of European collective agreements start to appear. This was followed by the Community Charter of Fundamental Social Rights, pushed along by a powerful personality, Commissioner V. Papandreou, article 14 of which clearly states that the right to bargain and sign collective agreements implies that "relations based on agreements may be established between the two sides of industry at European level if they consider it desirable," and that these agreements can cover employment and working conditions and the corresponding social benefits.

In this brief digression about the antecedents, I should mention, as a major milestone, the Social Policy Agreement (SPA) reached in 1992 as an annex to the *Maastricht Treaty*, where the 11 signing countries declare their desire to continue along the route plotted by the 1989 Social Charter. The SPA proposes a trilogy of European

[14] G. and A. Lyon-Caen, *Droit Social International et Européene*, Paris, 1993, p. 333, and Guarrello, F., *Ordinamento comunitario e autonomia collettiva. Il dialogo sociale,* Milan, 1992, p. 375, cited by Rocella and Treu, *Diritto del lavor*o, p. 375.

[15] Agreement of 14 December 1995, based on the Social Policy Agreement, which initially excluded the United Kingdom and Northern Ireland.

collective agreements: those that *substitute* Community standards, those *reinforced* by Community standards, and those resulting from a *transposition* of Community standards [16]. Leaving out the latter type, for which the SPA confirms the possibility that national agreements may bring about the transposition of Community rules, a role questioned by the Court of Justice on several occasions [17], the other two types are true novelties in European social law, with more than a few problems when it comes to their application which seem to be getting worked out with practice, as we will see over the course of this article. Here I will only say that, although they might look like a single type of agreement, inserted in the process of the elaboration of a Community standard that will later be promulgated anyway, but in connection with the agreement, what we are really witnessing are two independent types, initially linked to the point of giving the impression that they comprise a single body with two elements. I will go into more detail on this later.

With the SPA, we already have all the necessary ingredients for European collective agreements to be made. We will still see two failed attempts at collective regulation on the basis of its mechanisms, when the Commission consults the European social partners about their willingness to bargain an agreement about European works councils and about burden of proof in cases of gender discrimination, and receives a negative reply in both cases, giving rise to Council Directives 94/45/EC and 97/80/EC, respectively [18].

The Amsterdam Treaty of October 1997 incorporates into ordinary law the typology of European collective agreements of the SPA (articles 137, 138 and 139 TEC), but it goes one step further: in the new article 136 TEC, express mention is made to the Community Charter of Fundamental Social Rights of 1989 and social dialogue becomes an objective of the Community and the Member States. The

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[16] Cf. my article "La negociación colectiva europea," *RH II* (1993), 1249 *et seq.*

[17] For example, in the ECJ sentence of 30 January 1985, Commission v. the Kingdom of Denmark C 148/83, with respect to the transposition of Directive 75/117, about pay equity between men and women. Also, ECJ rulings of 8 June 1982, Commission v. the Republic of Italy C 91/82; 10 June 1986, Commission v. the Republic of Italy C235/84; 21 October 1999, Commission v. Grand-Duchy of Luxembourg. Cf. on this issue, CASAS BAAMONDE, M. E., "Directivas comunitarias de origen convencional y ejecución convencional de las Directivas: el permiso parental," *Relaciones Laborales II* (1996), 85 *et seq.*

[18] More specifically, the statements of legal grounds for both indicate that "at the end of the second phase of the reviews, the social partners did not inform the Commission of their willingness to initiate the process that could lead to the signing of an agreement, as it is laid out in article 4 of the Agreement."

Nice Treaty of February 2001 does not introduce any significant novelties as far as European collective bargaining goes.

1.2. Distinguishing features

In my opinion, collective bargaining really takes off with two important Directives, the ones that emerged after, and based on, the SPA: the Directive on Working Time 93/104/EC, one of the few that managed to get passed in that period of renewed concern about social matters in the Community, and Directive 94/45/EC, on European works councils.

The former represents an important new twist in many ways: it meticulously and peremptorily regulates a number of questions about working time, which will earn the Council a lawsuit in the Court of Justice by a certain affected country [19]; it constantly remits to national or regional bargaining to determine certain aspects; also, it contains a mysterious article 14 that envisages the non-application of the Directive in the event that "other Community instruments" establish more specific regulations pertaining to particular professions or activities. Most likely, the individuals who drew up the Directive were not so clear, when they presented it, about which Community instruments it might be referring to. It is even feasible that they actually had other specific Directives in mind, of the type developed in 89/391 on matters relating to safety and health in the workplace. However, the Community strategy gave centre stage to collective bargaining for the regulation of working conditions, though we can't be sure if it was to scrupulously comply with the mandate of promoting social dialogue, to apply the principle of subsidiarity, or to back off on a particular subject — working conditions — about which it had always shown its mistrust. In my opinion, the Commission reacted to the new elements it did not have at its disposal before. Namely, the willingness to bargain that the employers' organisations had assumed since the SPA — the 11 signing countries free of the usual British ball and chain — showed them the Council's eagerness to pass Community laws that would have been unthinkable a short time earlier [20].

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[19] I am referring to the ECJ sentence of 12 November 1996, United Kingdom v. Council of the European Communities C84/94. The Directive about informing the worker 91/533, which precedes it, is also sufficiently specific, but the matter regulated does not allow it to be overly extensive.

[20] The most recent example is found with working hours for the highway transport sector: though industry federations in the area of aerial navigation and maritime transport had both reached agreements, the European highway transport

As for the latter, the European works councils started to persistently bargain all kinds of agreements about the progress of companies, theoretically aimed not so much at working conditions as at their *sustainability* in labour terms, real enterprise agreements whose characteristics deserve a specific chapter in this book. Here we will focus our attention on intersectoral (cross-industry) and sector agreements, which in a short time have made the following headway:

a) The first to appear, and the most abundant, are intersectoral ECAs of a framework variety, referring to a specific issue for all sectors and bargained by representatives from the European trade union confederations and employers' associations [21]. In turn, these can be subdivided according to their relationships with the Directives on the same subjects:

1. Framework ECAs with an accompanying Directive, which covers most of those mentioned [22].

2. Framework ECAs without an accompanying Directive, a group only made up, so far, by only one on telework, the most recent.

b) A bit later on, and as the result of negotiations between European industry federations, emerge the first sectoral agreements, initially as an extension of the Directive on Working Time, which as we have already seen, which proclaimed themselves to have subsidiary application against more specific Community provisions [23]. It is not long, however, before an autonomous sector agreement appears, on telework in European commerce [24]. These agreements can also be

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representatives failed in their attempts: "despite intense negotiations between social partners, it has not been possible to reach an agreement with respect to mobile workers in the highway transport sector," was the wording of the statement of reasons of Directive 2002/15/EC of 11 March, which as a result of this was passed by the Parliament and the Council.

[21] Framework Agreement on Parental Permission, of 14 December 1995, signed by CES, UNICE and CEEP; Framework Agreement on Part-time Work of 6 June 1997, signed by CES, UNICE and CEEP; Framework Agreement on Fixed-term Work of 18 March 1999, signed by CES, UNICE and CEEP.

[22] See previous note. Directive 96/34/EC on parental leave; Directive 97/81/EC on part-time work; and Directive 99/70/EC on temporary work.

[23] Sectoral ECA on the working time of seafarers of 30 September 1998, signed by the organisations European Community Shipowners' Associations and the European Transport Workers' Federation (ETF); Sectoral ECA on working hours for flight personnel in civil aviation, of 22 March 2000, signed by the organisations Association of European Airlines (AEA), European Transport Workers' Federation (ETF), European Rrgions Airline Association (ERA), European Cockpit Association (ECA) and International Air Carrier Association (IACA).

[24] Of 26 April 2001, signed by Eurocommerce and UniEuropa Commerce, already cited.

broken down into two categories, just as we have done with the intersectoral agreements.

1. Sectoral ECAs accompanied by a Community standard, also the majority here, these being ECAs deriving from the Directive on Working Time which in turn provoke the promulgation of other specific Directives [25].

2. Sectoral ECAs without an accompanying Community standard, for the time being only the one on telework in European commerce.

Needless to say, the biggest novelty in the recently described scenario is agreements that lack an accompanying Community standard, both in the category of framework agreements as well as in the sectoral agreement category.

Another noticeable trend in the group of European bargaining instruments and their "speculative" Community regulations — of these we should mention not only the accompanying ones, but also those passed after the failure of bargaining to reach an agreement — , I think it is important to point out the progressively detailed nature of their texts, as it can be seen by simply comparing the framework ECA on parental leave with Directive 2002/15/EC, which *punishes* the social partners of road transport for not having known, or wanted, to bring their negotiations to a successful conclusion.

2. THE MYSTERIES OF THE TREATY

2.1. How many types of collective European agreements?

Setting aside transposed national agreements, European to the extent to which they internalise a European-level rule, and whose consecration as valid instruments is found in article 137 TEC, there are still interpretative problems regarding what the Treaty was seeking in terms of purely European agreements. It has usually been admitted that articles 138 and 139 of the TEC allude to only one type of collective agreement, since the first remits to the second when the social partners decide to inform the Commission of their willingness to "initiate the process provided for in article 139". This phrase might

[25] Two to reinforce the ECA on the working time of seafarers: Directives 1999/63/EC and 1999/95/EC, due to the fact that the Agreement basically reproduces articles 1 to 12 of the OIT 180 agreement about seafarers, still not in force, and one for the ECA on working hours in civil aviation, Directive 2000/79/EC.

be interpreted to mean that it remits to the next article in its entirety, and consequently that it recognises a willingness to bargain an agreement, which would weaken the draft of the Community standard on the same matter, and the application of which could either be made via the social partners' own procedures or based on a Council decision adopted at the Commission's suggestion. There would be a continuum between these two articles, such that an agreement *substituting* a Community action would invariably be reinforced by another, giving the agreement a scope similar or identical to the thwarted Community standard. One gets the impression that the Treaty does not envisage that the signing parties to the agreement might fail to make a joint request for a reinforcing Community standard, since the offered alternative consists of applying the agreements through collective instruments. This is specified in Declaration 27, annex to the Treaty of Amsterdam, which indicates that the social partners' own procedures, alluded to in article 139, actually refer to collective bargaining subject to the regulations of each Member State, without each State being required to directly apply the agreements, enact their transposition rules, or even modify national legislation.

We could arrive at a somewhat more open interpretation, however, of the phrase "initiate the process provided for in article 139" if we consider that the remittance refers exclusively to the first section of this article, the part where it says that the dialogue between social partners may result in collective agreements. Thus, the second section would be "liberated" from it, in such a way that the application of the agreements concluded on the Community level could be done via internal collective bargaining or through the support of an EC decision. The tendential unity between the substituting agreements and the reinforced ones would thus be broken, and any other European collective agreement could be accompanied by an EC decision, not only the substituting agreements. The Commission's reiterated interest in publishing the lists of general and sector organisations that it considers to have representative authority will help facilitate the procedure of identifying which European agreements might seek to obtain the backing of Community law, which would not have much of a point if we knew in advance that only substituting agreements deserve this kind of support.

On the other hand, it is too easily understood that collective agreements can only substitute a Community standard. Article 138 fails to make such a clarification, as it always refers to "Community action," which could just as well mean a regulatory action as a merely administrative one.

The previously cited Declaration 27, in short, narrowly restricts the possibilities of European agreements, by specifying that they can only be applied via Community decision or internal collective bargaining. If article 139 says that the agreement can be applied through the social partners' own procedures, the Declaration at least seems to suggest that it is referring to internal agreements when it indicates that the direct State application of European agreements is not possible.

These and other shadowy parts of the TEC can and should be explained by the origins of its articles 138 and 139 and its Declaration 27. None of these saw the light in the Amsterdam Treaty of 1997. Rather, their origins can be traced to the Agreement on collective bargaining entered into on 31 October 1991 between CES, UNICE and CEEP [26], which was later included in the Social Policy Agreement annex of the 1992 Maastricht Treaty as a binding standard for 11 EC countries, and after that to the foundational Treaty via the Treaty of Amsterdam. Declaration 27 originated with the incorporation of the terms agreed upon by the European social partners in 1991 into the 1992 Social Policy Act [27]. The limitations of the current TEC consist, therefore, in the failure to anticipate the new forms that European collective bargaining was going take starting in the second half of the Nineties. The fact is, the TEC text derives from, I repeat, what was agreed by the social partners in 1991 when Commissioner Papandreou's regulatory thrust obliged the UNICE to accept, as a lesser evil, a bargained rule before an imposed rule [28]. Thus, in reality, the *intentio legis* of articles 138 and 139 is merely to prevent Community regulatory drafts initiated by the Commission from being brought to a good end by substituting them with agreements bargained by European social partners. This also explains the emphasis placed

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[26] The European organisations CES, CEEP and UNICE had reached the agreement on collective bargaining and Community regulation in the ad hoc group promoted by the Commissioner V. Papandreou, and is contained in articles 3 and 4 of the Social Policy Agreement "in almost exact terms": MOLINA GARCÍA, M., *La negociación colectiva en Europea. Entre el acuerdo colectivo y la norma negociada,* Tirant, Valencia, 2002, p. 37. The SPA contains "the substantial parts of the previous Agreement of 31 October 1991, signed by CES, UNICE and CEEP", indicate COLINA, M.; RAMÍREZ, J. M. and SALA, T., *Derecho Social Comunitario*, Tirant, Valencia, 1995, p. 559. The text of the 1991 Agreement on proposals for drawing up articles 118, 118A and 118B, in MTAS, *El Diálogo Social en la Unión Europea*, cited, pp. 85 *et seq.*

[27] It was about, as you will recall, the Declaration of the 11 High Contracting Parties relating to section 2 of article 4 of the Social Policy Agreement, added by the Treaty on European Union, Maastricht, 7 February 1992.

[28] It was also a personal bet between two energetic personalities, Commissioner Papandreou and the Secretary General of the UNICE, Tadeua Tyskiewicz, which ended with the transaction referred to in this article.

by article 138 on the *stimulated* emergence of said agreements, as an upshot of a Commission communication announcing its intention to initiate proceedings for a Community action. And as the bargained substitution can result in a mere neutralisation of the planned measure, the panorama is completed with the "strong" possibility of an accompanying decision, perhaps to dispel the doubts of the ceding authority.

This is the rigid scenario that is seen in the early years, as each time the Commission announces a project for a Community standard a substituting agreement is reached, which only pretends to establish a few general rules; a framework agreement. This is overcome with sectoral agreements on working hours, which in turn substitute Directive 93/104, as I have already mentioned. However, it is a much more autonomous substitution, in the sense that they neither avoid its existence — they only weaken its application for certain sectors — nor do they crop up as part of the stimulating procedure of the SPA, but rather on the basis of the standard on health and safety. Later, we will see new scenarios with the non-stimulated framework agreements — or, if another name is preferred, independent or ordinary — such as the one on telework, which are not reinforced by Community standards either, and Community standards passed after the failure of bargaining between the social partners, such as 2002/15/EC. Of course, the scene gets cloudier with the signing of certain instruments that call themselves agreements, but which only propose mere recommendations to the Commission or the national bargainers.

Fortunately for us, articles 138 and 139, as well as Declaration 27, are drawn up leaving sufficient room to make up from the described overflowing. Now seems like a good moment to identify the loopholes in both articles before moving on to other questions:

a) Substituting agreements of article 139.1 TEC do not require the backing of a Community decision in the sense stipulated in article 139.2.

b) European agreements do not necessarily need to be of the substituting variety to obtain the backing of a Community decision of article 139.2 TEC, in their application to the Member States.

c) The application of European agreements can also occur through collective bargaining, according to the rules of each Member State. This does not necessarily require the intervention of national or internal agreements, as we will discuss later on.

d) Neither the articles nor the Declaration mention ordinary agreements; that is, those that arise as an autonomous manifestation

of the European collective partners, without no intention of substituting a Community rule or being accompanied by one.

2.2. Collective European pseudo-agreements

Within the so-called European social dialogue, we mustn't limit ourselves to regulatory agreements, aimed at regulating working conditions or employment relationships between collective parties. We must take into consideration that the variety of instruments is sometimes much more extensive, including non-statutory types that we should keep separate from the agreements analysed here [29].

It could even be said that historically the non-legal instruments appear first, *stricto sensu* agreements being a quite recent offshoot, still in the minority. The number of joint options and recommendations signed by the European confederation and sector parties is very high [30], and have not dropped of late, a moment in which they accompany binding agreements.

Unfortunately, while the instruments called joint options or recommendations clearly show their nature of mere proposals to the Commission, Member States or national bargainers, or simple expressions of opinion, the ones that call themselves agreements do not always reflect in their articles the nature they are supposed to have — and it doesn't matter at this point if it is a 'self-executing' or an indirectly binding agreement — . I am not talking about the typical distinction within a collective instrument between its obligational and regulatory parts, since in reality this distinction is always artificial, although the first is aimed at the signing parties themselves with its compulsory clauses and in the second at the affiliates with the regu-

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[29] SCHNORR VON CAROLSFELD, G. warned about this in "I contratti collettivi in un 'Europa integrataa'", Rivista Italiana di Diritto del Lavoro I (1993), 328, that the reference in 118 B TEC (introduced by the European Single Act of 1986) that European social partners could have contractual relationships contrasts with article 4.1 of the SPA of 1992, which speaks of "contractual relationships, including agreements", which leads us to the conclusion that the concept of agreement is higher than that of contractual relations, and that only the former can result in the "integrated procedure" contained in arts. 3 and 4. According to the same author, agreement relations have an inferior legal nature and shall remit to the establishment of presuppositions to organise future bargaining, as well incentives for the development of pre-bargaining.

[30] The joint opinions, recommendations and statements of Val Duchesse and their continuators are already numerous, and they are not far behind commerce and agriculture sector agreements, to cite a few examples. In the Web sites of these organisations, especially the trade unions, the texts of most of these can be seen.

latory clauses. Even in agreements where only commitments for the signing parties are considered, the document has legal force. Instead, I am referring to other documents called ECAs whose clauses are so gentle that they resemble, if they are not identical to, joint options [31]. These are the so-called "new generation" texts (letters, codes of conduct, agreements), which express commitments to be applied on the long term [32]. And if they lack formal imperativeness, what we might call material imperativeness is worthless, which gives the signing parties the capacity to impose their mandates about employment relationships, which is the second element to be taken into account.

I will mention three recent examples of the confusion produced by these ambiguous terms:

— The Agreement (sic) about fundamental rights and principles at work [33] repeatedly indicates in its text to be referring to a joint statement, which seems to be different from joint *opinions,* if only in a tiny variation in the name. However, article 1 clears up the fog by saying that the signing parties recommend their national organisation members to encourage companies and workers in European commerce to comply, whenever possible, with the fundamental rights set forth in the OIT Agreements, in particular the elimination of hard labour, the abolition of child labour, the elimination of discrimination and the rights to unionisation and collective bargaining [34].

— The European agreement (sic) on guidelines for telework in commerce [35] offers a more complex content, as it contains useful delimitations for the regulatory mission — for example, telework has a definition that could come in handy when distinguishing between similar figures — , it shows the determined willingness of the signing parties to respect the principle of equality and proportionality between teleworkers and other comparable workers, and confirms the

[31] It is the content of the clauses, and not the formal or express attribution of binding effects which gives the ECA legal effects: "the question is whether it has compulsory effect, or if it serves to orient the legislator and the judge in acting on and interpreting the Directive.", as Arrigo; G. indicates in "A propósito dell comparazione nel diritto comunitario del lavoro," Il Dirittio del lavoro 1-2 (2002), p. 76.

[32] This is what the EC communication on *European social dialogue, a force for innovation and change*, ct., p. 18, calls them.

[33] *Agreement on Fundamental Rights and Principles at Work*, signed in Brussels on 6 August 1999 between EuroCommerce and Euro-FIET.

[34] It adds that the signing organisations will regularly debate about the application of the joint statement, and if necessary will make recommendations or carry out any pertinent actions (!).

[35] *European Agreement on Guidelines on Telework in Commerce*, signed in Brussels on 21 April 2001 by EuroCommerce and Uni-Europa Commerce.

teleworker's right to be informed of the basic terms of his or her contract. It also envisages the treatment of the workplace and teleworkers' right to communicate with their colleagues and participate in union acts and meetings, among other questions. Moreover, it contains a surprising article 5 that recommends national organisations, whether they decide to regulate telework separately or include it in existing agreements, to include the guidelines of the European agreement I am referring to. In addition, most of the labour rights are expressed with a "should be applied" or "should be assumed", which do not indicate they are compulsory. In my opinion, an Agreement like this would have to be classified as hybrid, part recommendation and part regulatory agreement, as it is not made sufficiently clear which parts are binding and which others are merely declarative.

— The recommendation framework agreement on the improvement of paid employment in agriculture of the Member States of the Union [36] contains numerous recommendations about working hours and other conditions for bargaining conducted on the national, regional or provincial level [37]. Its final declaration gives us an idea of its programmatic nature on the very long term: the signing of this Framework Recommendation Agreement by GEOPA/COPA and EFA/ETUC — it says — is the crucial first stage of the process of jointly improving the position of paid employees in agriculture. It represents an act of mutual trust by the signing parties and makes it much more probable that they will be able to successfully face the challenges they come up against on the eve of the third millennium.

Such ambiguities can be overcome, however, when the dubious collective instrument obtains the backing of a Community rule. The EC rule breathes life into what was born a weakling. In doing so it can say that some clauses are not sufficiently detailed, or that they have a provisional character, but we will always bet talking about a "collective" rule. I will return to this question in a moment.

The question takes on a new complexion when the signing parties do not ask the Community authorities to enact a back-up Community standard, or when the Council decides by majority or unanimously to reject the request, which means that the Agreement will have the binding effect deserving of it alone. Not only the kind of applicabil-

[36] Brussels, June 24 1997, signed by GEOPA/COPA and EFA/ETUC.

[37] "The annual working time established by national, regional or provincial agreements shall not exceed 1,827 hours per year," it says, for instance. Beyond its orientative or programmatic literalness, the omission of other levels of bargaining, like local or enterprise, are surprising in the Recommendation Framework Agreement.

ity, but even the very nature of these autonomous or ordinary agreements is under debate.

In the lines that follow I will take a look, first of all, at the legal situation of collective agreements accompanied by an EC regulation and secondly, at the possibility and applicability of those that do not have this backing.

3. REINFORCED AGREEMENTS

3.1. Do they always have to be stimulated by the Commission?

Article 138 TEC seems to suggest that always, in all cases, European collective agreements must originate as a response to a Community action initiative that the social partners decide to substitute, for whatever reason, with their own action. Thus, the Commission will consult with the social partners, and these will respond with an opinion or a recommendation in which they announce their willingness to initiate the process provided for in article 139. And this article states that the European social partners can reach agreements, and that the application of these can occur via procedures of their own or via a Council decision. Bearing in mind both articles, it seems that the panorama opens up on the way out, but not on the way in; in other words, there are two possibilities for applying the agreement, but they can only originate with a Commission initiative to which the social partners respond with their agreement. I have already mentioned that since its beginnings in the 1991 agreement, the intention of this procedure has been to substitute the planned Community standard through a collective regulation. Thus, it seems logical not only that the ECA emerges reactively, on the defence, but also that it is on the level of a Community rule owing to its compliance with the terms of article 139.

The meteoric evolution from that period until the present has surpassed the legislator's intention by far, giving a new dimension to the two TEC articles around which these ideas revolve. The interpretation of a standard cannot remain anchored in the historical moment when it came into being, but should be fuelled by the social reality of the moment when it is applied [38]. The two agreements on the working time of seafarers and civil aviation crews in the measure mentioned above have been spontaneous, not stimulated; and equally

[38] As the Spanish Civil Code states in article 3.1.

spontaneous has been the agreement on telework in commerce. The difference between the first two and the second lies in the fact that the former have obtained the backing of EC regulations, while the latter does not seem to have either requested or obtained it [39]. The trail has been blazed for the possibility of non-stimulated agreements, and it truly does seem logical in every way for the social parties, whether they be confederate or sectoral — although with even more reason, the latter — not to wait for the Commission to initiate preliminary steps if they deem it advisable to reach an agreement on some issue.

The interpretation of articles 138 and 139 TEC bring us to the same conclusion. If section 1 of article 138 orders the Commission to adopt all necessary provisions to facilitate dialogue between social partners, at the same time section 1 of the following article states that Community social dialogue can lead to agreements of this level. The spirit of this statement should not be interpreted as an imperative mandate to bargain, going against all the Community's philosophy of freedoms, but as the EC legislator's desire to see this practice flourish. Neither of the sections, as far as I understand them, envisages an incitement by the administration, although it comes from European levels; however, they do point out that the agreements are recognised even in the event that they are not guided by Community action. The fact that in another spot in article 138 a remittance is made to article 139, which I interpret as its section 1, does not necessarily imply that this section is, for that reason alone, confined to the opportunities offered by Commission initiatives, nor that all ECAs have to match the thirst for blocking incipient Community action. The invitation to bargain can in no way be understood as *sine qua non* legitimation, since this would mean a limit incompatible with the objective of social dialogue contained in article 136 TEC.

Thus, there is the possibility of non-stimulated ECAs; that is, agreements arising spontaneously from social dialogue, without any intervention whatsoever by the Commission. Both these as well as the stimulated agreements can obtain the backing of a Community regulation, as the contents of sections 1 and 2 of article 139 are independent, as we have seen. To clear up any possible doubts that this is so, we must only have a look at the back-up decisions, particularly the function they perform in the regulatory structure.

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[39] However, the Framework Agreement on Telework of 16 July 2002 was motivated by a reaction to the second phase of consultations by the Commission on the modernisation and development of employment relationships, with a formal invitation to social parties to initiate bargaining on telework, accepted in a similarly formal manner by the parties on 20 September 2001.

3.2. The accompanying Community decision

If the concept of Community action is ambiguous, for whose substitution bargaining is sometimes initiated by the social partners, equally or more so is the concept of Community "decision" announced to accompany certain European agreements, when the Council agrees to this a qualified majority or unanimously, depending on the case [40]. The doctrinal possibilities that arise around the SPA range from those who thought that the "decision" referred to the usual kind of rule found in European social laws, the Directive, to those who thought that it should be interpreted in its technical sense, as a Council Decision, as well as others who defended a new, different meaning for the word [41]. The main problem stemmed from the fact that the Directives granted *erga omnes* applicability to European agreements that could inhibit bargaining in certain cases and for certain countries where the effects of bargaining activity had been traditionally restricted to affiliates of the signing parties. The Decision, on its part, had no such pretensions, and its statutory character directed at specific targets allowed its applicability to be adjusted to the desires of the social partners, without it being any different, on the other hand, from other cases in which a Decision reached millions of people in the EU. In practice, we see that the Decisions described in the TEC are published in the OJEC and many of them have a plural, although not general, target: for instance, those referring to matters such as tenders, official announcements, subsidies, etc., whose field of application at times affects many Europeans [42]: their defining identity resides — argues Boulouis — in the absence of general scope [43].

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[40] The Commission, in its *Communication about the application of protocol on social policy,* COM (93) 600 final, dated 14 December 1993, carefully avoids commenting on the nature of this measure, at the most calling it a "legislative instrument" (p. 16).

[41] See the different doctrinal stances in my article "Los euroacuerdos reforzados y la naturaleza de la decisión del Consejo," *REDT* 62 (1993), pp. 855 to 867, and in Pérez de los Cobos Orihuel, F., *El derecho social comunitario en el tratado de la Union Europea*, Civitas, Madrid, 1994, pp. 150 *et seq.*

[42] This is the case, among many others, of the Council Decision 93/465/EEC (OJEC of 30 August) about the system of placing and use of the term "EC", which has no express target in its articles, although its is directed at European "manufacturers" in its annex. The Council Decision of 24 June 1992 (OCEJ of 26 August), about the European Year of Older People, aimed at "public and private operators", although it doesn't show a precise target in its articles either. Or Council Decision 93/379/EEC (OJEC of 2 July) on a multi-annual support program for small and medium-sized undertakings (SMU), with a diverse range of measures, without stipulating a specific target, although in the Annex it can be deduced that it is all SMUs as a whole.

[43] Boulouis, *Droit institutionnel des communautés européennes*, Paris, 1991, p. 181. For more details on the type of Decision, please refer to my article "Los euroacuerdos reforzados y la naturaleza de la decision del Consejo," cited above.

Since then, the Commission seems to have opted for symmetry in the type of accompanying regulation: if the ECA was substituting a Directive, it had to be another Directive that would reinforce it. Thus, the ECAs that have popped up in recent years as a reaction to the process for drawing-up Directives have been paired with Directives and only with Directives. This left the question of what would happen when the draft of the rule to be substituted was a Regulation or a Decision. Confirming the message of the facts, in 2002 the Commission seems to have adopted a broad position, imposing conditions on the responses to "the nature of the instrument used (Directive, Regulation or Decision)[44]. Now then: is disparity between the substituted Community rule and the reinforced one possible if, for example, the first is a draft of a Directive and the other a Decision? The identities of the two are not distinguished in the articles of the TEC, and there are reasons to respond favourably to the use of a variety of instruments. This depends on the function that the reinforcement standard should carry out.

3.3. Function of the Community accompanying rule

There are at least three official European Commission texts from which we can glean what we might call a real interpretation of the legislator's intention regarding the objective of the reinforcing standards: the EC Communication of 1990, on the application of protocol on Social Policy[45]; that of 1998, about adapting and promoting of social dialogue on the Community level[46], and that of 2002, about European social dialogue as a force for innovation and change[47]. Although they present differing opinions and state them *incidenter tantum,* for which reason they should only be regarded as a sporadic surfacing of thought, they *do* indicate the Commission's willingness to produce accompanying standards, ruling out any other possible directions. Of course, we are talking about official Commission announcements, so regardless of how they appear, they do have to be considered as firm and conclusive assertions.

The 1993 Communication insists that the Council's decision will be limited to making compulsory the provisions of the agreement

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[44] Commission communication on *European Social Dialogue, a Force for Innovation and Change*, cited, p. 19, referring to the follow-up of the application of the Council decision.

[45] Communication of 14 December 1993, COM (93) final.

[46] Communication of 20 May 1998, COM (98) 322.

[47] Communication of 26 June 2002, COM (2002) 341 final.

reached by the social partners [48]. By the same token, the 1998 Communication says at one point in its text: "It must be stressed that the Commission does not present a legislative proposal to the Council *to make an agreement binding* if it thinks that the signing parties are not sufficiently representative in relation to the object of the agreement" [49]. On its part, the 2002 Communication analyses the application of an ECA by Council decision, stating the following: "In that case, which is a *procedure for extending* agreements negotiated and concluded by the social partners, the Council is required to take a decision on the social partners' text without changing the substance" [50]. Thus, the latter document seems to show that the Commission has changed the meaning given to the accompanying standards. If this judgment seems too harsh and we don't believe there has really been a change in stance, but rather a certain degree inconsistence or wavering with respect to their function, we would have to admit that the Commission has expressed at least two equally valid opinions on the matter. The reinforcing regulation may be geared towards a vertical consolidation of the ECA, in the sense of giving it binding force, or it may be aiming for a horizontal consolidation or *erga omnes* applicability of the agreement. The Commission does not seem to have made up its mind, however, in acknowledging its role of making the ECA a source of law, something which has been the subject of lively debate in scientific doctrine [51]. A role of source of (public) law that neither corresponds to it nor is it necessary for it to be able to regulate working conditions in European enterprises.

As I said earlier, the Treaty does not specify the function assigned to these accompanying regulations. Most likely, the Commission's wavering in stating its opinion on the matter is due to fact that both functions are perfectly valid and possible. I will explain myself in a few brief words.

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[48] *Op. cit.,* p. 18.
[49] *Op. cit.,* p. 16.
[50] *Op. cit.,* p. 19.
[51] "Horizontal subsidiarity would turn the system of Community sources backwards, making the ECA the main source of social law, while heteronomous sources would serve to sanction, substitute and or/integrate the will of the parties," says GUARRIELLO, "Accordi di grupo e struttura di rappresentanza europea", *Giornale de Diritto del Lavoro e di Relazioni Industriali* 53 (1992), pp. 58-59. For a look at the different stances, see my article "La negociación colectiva europea," *Relaciones Laborales II* (1993), 1260 *et seq.* For the Commission, on its part, "on the mid-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" (*Communication about European Social Dialogue, A Force for Innovation and Change*, cit., p. 19).

The accompanying regulation has a primary effect, which consists of granting binding force, not understood as regulatory conversion, as an ECA does not turn into a Directive just because the accompanying regulation remits to its text, but understood as an obligating force for the States, which are required to transpose the Agreement through internal regulations or national collective bargaining. This is how everyone has viewed it from the beginning, and the Commission has overseen the internalisation of the reinforced agreements almost as if they were Directives. This resulted in the initial weakness of the negotiations and the very content of the early ECAs, which were of the framework variety and rather ambiguous, leaving several options open to adapt to national peculiarities. As I see it, the binding force borrows from German law the immediate and unappealable effectiveness of collective agreements [52]. But this binding force cannot be the same for European ECAs, which in the early Nineties couldn't dream of having immediate, compulsory application throughout Europe: even though at that time, the biggest detractors of this kind of applicability would be left out, as the United Kingdom had not signed the SPA and did not join it until the Amsterdam Treaty of 1997 [53]. Anyway, it was too early to assume that a framework agreement of these characteristics could be applied directly, and the Directive, with its own idiosyncrasies, could not give it this force either, although it could give it something very similar: the force of its internal application. An applicability that the ECA in itself does not have, being a private instrument, but which with the backing of the Community standard is tied to the national public powers. The final result is similar to binding effectiveness, as it obtains automatic, unappealable application for employment relationships, though not in a direct or self-executing way, but through the transposition standards and agreements.

The sectoral agreements that crop up in 1999, however, are no longer so weak or hazy, but very concrete, and the reinforcing norm is now seen as a carrier of a different validity: *erga omnes* applica-

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[52] Immediate application (unmittelbare Geltung) means that the regulatory part of the agreements is applied to employment relationships without the need of their being included in individual employment contracts, *as if* they were objective rules, and unappealable application of said party (zwingende Geltung) means that it is applied in this way even when the individual parties express they are against it or have established different clauses, although in this case the more favourable clauses would take precedence (*in melius*). Cf. KEMPEN, O. E. and ZACHERT, U.; *Tarifvertragsgesetz*, Bund Verlag, Köln, 1997, pp. 595 *et seq.*, commenting on article 4.1 TVG.

[53] On the need for contractual incorporation of conditions regulated by agreement, in British law, cf. DEAKIN, S. and MORRIS, G., *Labour Law,* Butterworths, London, 1998, p. 258 *et seq.*

tion, the obligation of Member States to guarantee the universal application — at least within the corresponding sector — of the European agreement clauses through the declaration of extension that the Community standard procures. However, the binding validity is threatened in part because of technical doubts raised by the application of national doctrine to an international instrument, and also because the European social partners slowly assert their power over the member organisations, as demonstrated in the Helsinki Conference of 1999, though with the disagreement of some national delegations. The explanation for general applicability can be found in Community law, essentially concerned with fair competition, under the parameters of which social dumping on these matters cannot be tolerated, and it seeks in the reinforcing regulation a means to impose a standard with the working conditions of the ECA.

In effect, granting general application to an ECA also implies an attempt to make it binding. I cannot imagine the extension of a collective instrument lacking in obligating power. Of course, we might envisage an ECA extended as a supplementary regulation, to be applied only when the national standards or agreements establish nothing to this respect, but so far agreements of this kind represent the minority, however important. What may indeed happen is, as it often occurs with the extension mechanism in the different national legal systems that have established this, the Community standard assumes that the collective instrument has in itself this obliging power, and adapts its intervention to this assumption. The European Commission can state in its Communication, therefore, that the reinforcing Directive serves to extend the application of an ECA to all workers and employers, even those not affiliated to the signing European organisations, an extension mechanism that respects the degree of binding force the instrument's authors intended it to have, as it is aware that all the elements necessary to deem that the social partners have enough power to impose application of ECAs themselves are already present.

Of course, the aforementioned raises two questions: one, whether the Commission really thinks as it says; and two, if the European social partners really have the power that it is assumed that they have. Save for an error or omission, I do not know of a Commission pronouncement where we can find traces of its thinking. It has heartily congratulated itself on the success of the implementation of new joint sectoral committees for social dialogue, and is striving to create bargaining forums on all levels, but it jealously guards its opinion on the legal and sociological power of the ECAs. On several occasions it has indicated the requirements that an ECA must meet to obtain the

backing of a Community standard, but it has not provided any clues to help us answer the following questions:

a) Sufficient representativity of the contracting parties.

b) Legality of each clause in the agreement.

c) Respect for provisions regarding small and medium-sized enterprises.

d) Mandate of the signing parties to conclude the agreement [54].

We find the clue of this confidence in bargaining power in another place, namely, from the social partners themselves. The social partners have learned to bargain at the cross-European level as a result of the first framework ECAs and the commitments assumed for the implementation of European works councils, from which 400 emerge as an immediate consequence of Directive 94/95/EC [55]. As a symptom of this confidence, there have already been agreements for which the Commission has not been asked to provide a reinforcing regulation. Without a doubt, this abstention might owe to the *erga omnes* applicability assigned to the mechanism, contrary and even strange to the normal situation of the various European countries; the declaration of extension is an unusual procedure where it exists [56], and only in Spain do the most representative collective agreements have, *ab initio*, general applicability. But it is also clear that they would not reject it if they were incapable of having some kind of impact on their own. There is intense sectoral bargaining currently underway which has still not produced any clear results, national trade unions are putting aside their mutual distrust and are reaching joint bargaining agreements on a decentralised national level [57], the attribution of European-level bargaining mandates has been regulated at least on the union side, etc.

This confirms, in my opinion, that for the first time ever we have European social partners with authority over their national organisations to socially impose the ECAs. The problem of whether they also have legal capacity to do so requires separate treatment, which we will see in the next section.

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[54] The first three requirements, in the cited Communication of 2002 on social dialogue, p. 18. The fourth appears next to the previous ones in the Communication on application of protocol on social policy of 1993, p. 17, and on adapting and promoting of social dialogue of 1998, p. 16.

[55] "There is a social dialogue developing rapidly in multinational enterprises," it stated in its Communication of 20 May 1998, p. 16.

[56] France, Germany, Spain.

[57] The Doorn Agreements, of 5 November 1998, between German, Dutch and Luxembourg-based trade unions about the coordination of their bargaining policies, in particular, on attuning their wage policies, exemplify my point. Other examples are analysed in different chapters of this book.

First we will wrap up what we have already seen with five reflections:

— One, that the Council's decision can perform different functions in its accompaniment of an ECA: to require all Member States to impose its application, extend its applicability to all workers and employers, or both.

— Two, that article 139 TEC adopts the concepts "decision" in a generic manner, which can be interpreted as both a Directive as a Decision or even a Regulation.

— Three, that the type of Council decision to be chosen in each case does not depend on the type of Community action the ECA responds to — it might not even be a legislative initiative — but on the function assigned with respect to this.

— Four, that each function has a type of decision best suited to achieving the expected result: A Directive, if it aims to apply the ECA through the Member States and with general applicability; a Regulation, if it is seeking general applicability and is directed at European workers and employers; and a Decision if it is seeking direct application, but only to workers and employers affiliated to the signing organisations.

— Five, that the selection of one standard or another will also depend on the legal base or Community power of reference expressed in an article of the TEC that gives the upholds the granted support [58].

4. ORDINARY AGREEMENTS

4.1. Phenomenology

The debate about the possibility of their existence, begun not so long ago [59], is now resolved by the presence of many European col-

[58] "The application of the Agreement contributes to the realization of the objectives laid out in article 136 of the Treaty," states, for example, the preambles to Directives 1999/70/EC, referring to the framework agreement on fixed-term work and 1999/63/EC, regarding the sector Agreement on the working time of seafarers. "The application of the agreement contributes to the realization of the objectives envisaged in article 1 of the Social Policy Agreement," reads the preamble of Directive 97/81/EC, referring to the Agreement on part-time work, which also cites the principles of subsidiarity and proportionality of article 3B of the Treaty.

[59] For Navarro Nieto, F., "La negociación colectiva en el Derecho comunitario del trabajo," *REDT* 102 (2000), 387, the collective agreement that he calls *extra legem*, aside from being possible, does not have to be subjected to the Commission's initiative, given that it is not going to be incorporated into Community legislative

lective agreements, both on the intersectoral and sectoral level. Not only have they emerged spontaneously, without any prodding by the Community, but they have not solicited a Council decision for an accompanying regulation either, despite meeting the Commission's requirements to request it, which we have just mentioned.

As an initial observation with respect to ordinary ECAs, it might be mentioned that their requirements do not necessarily have to be the same as the reinforced ECA. For example, they do not have to see to the protection of small and medium-sized enterprises, nor do the signing parties have to be sufficiently representative, and the legality of their clauses does not have to meet the requirements of Community law. The reason stems from the fact that, although they are indeed European collective instruments, there is still no Community rule about them, so their initial legal identity is that of international contracts subject to national laws applicable at any given time. Save for standards on legal authority contained in European Regulation 44/2001 and the rules on conflict of the laws of the Rome Convention, an ECA signed in Brussels will be subject to Belgium law for certain matters and the national laws of the States where it will have effects for other ones. This is why article 139 expressly points out that when a Community Agreement is not applied based on a Council Decision, it will be done through the social partners' and the Member States' own procedures and practices.

Gorelli, Valverde and Gordillo boil down into four the main technical problems with European bargaining [60]: a) who can be a bargaining subject; b) what bargaining procedure is to be followed; c) what is the imperativeness of this type of agreement; and d) problems of articulation and complementarity between the European agreement and the national regulation.

4.2. Binding force of ordinary European agreements, or common law agreements

The alternative to application via Council decision is application through the social partners' and Member States' own procedures and

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procedure. For his part, CASAS BAAMONDE, M. E., "La negociación colectiva europea como institución democrática (y sobre la representatividad de los 'interlocutores sociales europeos')," *Relaciones Laborales II* (1998), pp. 78-9, makes a somewhat more restrictive interpretation of the issue based on the European Court of Justice ruling of 17 June 1998, UEAPME T-135/96.

[60] GÓMEZ GORDILLO, R.; GORELLI HERNÁNDEZ, J. and VALVERDE ASENCIO, A., *Marco laboral y relaciones colectivas en la Unión Europea, Informe al Consejo Económico y Social de Andalucía,* Seville, 2002, pp. 32-3.

practices, as we have seen that article 139 TEC states. The Declaration of the 11 High Contracting Parties of the SPA said in 1992 that this method would consist of developing the content of ECAs through collective bargaining, in accordance with the rules of each Member State, which did not mean that the States had to apply the ECAs directly, transpose them with internal legislation, or modify their own legislation to adapt to them. Developing an ECA through collective bargaining subject to national norms did not seem to have any other sense than to transpose it through national agreements: [61] at the time, there had been no experience with anything different, since the only solid knowledge that could come close was the application of Directives through national agreements, and on the European level there were only the ambiguous processes developed in the Social Dialogue Committee [62]. It was not until years later that the question was raised of whether sectoral ECAs were possible, or if they were restricted by the Social Policy Agreement, to which the Commission was forced to answer as late as 1998 that nothing in this Agreement prevented it, either as a supplement to interprofessional agreements or as independent agreement for the sector in question [63] With such little bargaining experience, it is more than likely that both the partners as well as the Commission were thinking about general or framework agreements, as ambiguous as the Directives until then, only a bit more than joint statements and opinions made by the parties in the Val Duchesse dialogue and in sectoral committees. A basket with so few straws would be incapable of developing on its own without the support of a Directive, being the only possible alternative reinforcement to make the national agreements reach the employers and workers.

Under such restrictions, it is surprising that the Commission was open-minded enough to foresee the bargaining explosion that would come immediately after, and that was able to address it in a sustainable way. As early as 1993, its Communication on applying protocol to social policy [64] went further than a mere *coup de chapeau* to independent bargaining and provided the right setting to say that, if the social partners decide "to voluntarily apply" the ECA, "the terms of

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[61] Arrigo, G., *Il diritto del lavoro dell' Unione Eu*ropea, vol. I, Giuffré, Milan, 1998, p. 188.

[62] "The most active dialogue at cross-industry level has in recent years taken place within the Social Dialogue Committee where the three cross-industry organisations of general vocation, UNICE, CEEP and ETUC, conduct their autonomous dialogue," read the *Communication Adapting and Promoting the Social Dialogue at Community Level*, cited, p. 13.

[63] *Communication on Adapting and Promoting*, cited, p. 14.

[64] *Communication on Application of Protocol on Social Policy*, cited, p. 17.

said agreement will be binding for its members, and will affect them only, and only in accordance with their own practices and procedures in their respective Member States." The European Commission's manifesto could not be more clear or precise. Even the hasty limitation evident in the Declaration of the 11 Contractual Parties, of development through national agreements, is discreetly discarded in favour of a much broader expression, the voluntary application of ECAs, without specifying whether a second bargaining phase will be necessary on the national level or not. In the Declaration it is only emphatically stated that they will not have any sort of Community prerogative, such as, especially, *erga omnes* extension to all employers and workers in the Union. If in its diverse Communications on social dialogue, the Commission has established a series of requirements and effects, nothing said in them is applied to independent, free or ordinary ECA. The small legal scheme that has gradually developed along the lines of granting of general applicability is not enforceable for these, which are not going to receive such power, but rather the power that the legislation of each country gives them.

As far as being a common instrument, ordinary ECAs are held to the rules of International Private Law, with one characteristic: they are not any sort of civil contract, but collective contracts, and the initially applicable regulatory block would be the one dedicated to collective bargaining by each Member State. It is difficult for a commitment signed by trade union and employers' organisations on working conditions to be classified any other way in one of the Member States, although theoretically this could occur. Certain countries are very particular when it comes to classifying collective labour agreements, but even for these countries we might suggest a classification to this respect. Thus, Spain requires the intervening organisations to meet a number of conditions, a rather rigid bargaining procedure that involves communicating its start to the labour authorities and specifying its clauses in writing, depositing it in an *ad hoc* registry and publishing it in the official bulletin. However, such conditions are required for collective agreements with *erga omnes* applicability, very officialised since the time of the Franco dictatorship, but not for agreements of limited applicability, which are subject to the basic rules of the Spanish Civil Code. In this sense, practically in all the countries, recognition as an agreement has somewhat different requirements than the ones the EU uses to decide to issue a back-up regulation: the consent of the parties, the valid mandate of the represented parties, a legal regulation consistent with national regulations and perhaps a written form are demanded, and not whether it adapts to EU rules, respect for SMUs or the representative char-

acter of the parties[65]. Nor do the autonomous ECAs have to limit themselves to negotiable subjects indicated by the TEC in its article 137[66], since the exclusion of issues like wages or unionisation is derived from Community directives and, where applicable, back-up decisions for the related ECAs[67].

Consideration as collective instruments is accompanied, in many countries, by binding effects over individual employment contracts, in accordance with national law or case law. Throughout Europe the supercontractuality of collective bargaining is recognised with the exception of the United Kingdom.

4.3. The direct applicability of ECAs

Some of the ECAs currently in force have specifically indicated the transposition route for national agreements to be applied. As if they were collective directives, they appeal to a second phase of bargaining, this time in each country, to reach workers and employers[68]. I am not going to go into the problem of what happens

[65] The principles of freedom to bargain and mutual recognition, a determining factor in European collective bargaining, in the ruling UEAPME of the European Court of Justice, cited, substitute the recognition of the representativity made by the Commission with a view to the enactment of a reinforcing standard, but it raised other questions analysed by Gorelli Hernández, J., "El diálogo social en la Unión Europea: incidencia en el sistema de fuentes del Derecho," *Temas Laborales* 55 (2000), p. 64, and Sanguinetti Reynaud, W., "El papel de la autonomía colectiva en la construcción del espacio social europeo," *Carta Laboral* 35 (2000), p. 9.

[66] Its text has been modified by the Nice Treaty, article 2.9, but in substance it requires a majority to promulgate Directives relating to certain matters, and unanimity for others, also excluding the subjects of wages, unionisation, strike and lockout.

[67] Article 139 TEC remits to article 137 for types of Council approval for back-up decisions and has not been modified by the Nice Treaty to contain those produced in article 137, another example of the "internal analytical misalignment" denounced by Dueñas Herrero, L., *Los interlocutores sociales europeos*, Tirant, Valencia, 2002, 147 *et seq.*

[68] The Framework Agreement on Telework, of 16 July 2002, indicates in its clause 12 that, in the context of article 139 TEC, it will be applied by members of UNICE-UEAPME, CEEP and CES (and its liaison committee EUROCADRES-CEC) "in accordance with the specific procedures and practices for employers and workers in the Member States." In the doctrine that we might call classical, there is no other way of giving the ECA binding applicability that does not involve the backing of a Directive: "Agreements do not have regulatory effectiveness in themselves, in the sense that they do not immediately have a bearing on employment relationships whose conditions they discipline…only as sources of compulsory bonds, to be made effective with consensual measures, so discipline of the agreed working conditions is made by way of the internal contractual right."

when the national instruments do not transpose the content of the ECA, although in my opinion it would be impertinent to think of direct application, of consistent interpretation (Marleasing doctrine) or state liability (Wagner Miret doctrine): as the Communication on Protocol for Social Policy indicates, the applicability of ECAs will result from their own practices and procedures.

But most express this in another way, and the strengthening of European collective bargaining allows us to venture the possibility of direct application, which does not need any intermediary mechanisms. What we might call style clauses in the ECA precisely allude not to application through national agreements, but through European agreements: this here Agreement — repeat the texts — does not limit the social partners' right to enter into agreements, on the appropriate level, even on the European level, that adapt or supplement their provisions so that they take into account the specific necessities of the affected social partners [69]

This has been the situation in Europe for 80 years now, in the first third of the 20th century, when collective bargaining is taking root everywhere as the ideal instrument for achieving social peace. A short time before the legislator of each country proclaimed binding application for employment contracts, doctrine had found the legal explanation of "unappealability" in Common Law, especially in Germany and Italy, and had ended up fiercely defending two types of explanation: either the signing parties represented the will of the workers and employers according to the conferred mandate (theory of the mandate), or they did so by virtue of their belonging to the signing association (theory of association), but of course they had to accept what was agreed in their name, if it was outside of the granted pow-

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(SCHNORR VON CAROLSFELD, *op. cit.,* p. 330, interpreting article 4.2 SPA). "That is, in that case the Community collective agreement would continue to be a recommendational framework agreement, without any sort of legal effects, its application dependent on the inclusion of its content in the national collective bargaining of each Member State, in accordance with its respective regulatory legislations" (COLINA, M.; RAMÍREZ, J. M. and SALA, T., *Derecho Social Comunitario*, cited, p. 560. Under current law, says ZACHERT, U., "Europaische Tarifverträge — von korporatistischer zur autonomer Normsetzung?", in VV.AA., Tarifautonomie für ein neues Jahrhundert (Festschrift Schaub), Beck'sche, Munich, 1998, p. 827, European agreements lack immediate applicability and require transposition via national organisations. For this eminent specialist, the mandate to bargain conferred by national organisations can harm — at least in Germany — the constitutional protection of collective autonomy.

[69] Framework ECA of 14 December 1995, on parental leave, clause 4; Framework ECA of 6 June 1997, on part-time work, clause 6; Framework ECA of 18 March 1999, on fixed-term work, clause 8.

ers [70]. The key concept in both positions was the representation conferred to bargain and acquire commitments in the name of, respectively, the workers and the employers.

Well then: the worker and the employer join an organisation, which directly signs an agreement or delegates another organisation to do so on a higher level. Those that sign a national agreement crown a line of representations that connects them to the bases. One step higher up, the European collective agreement connects its signing parties with the European bases through the chain of affiliations. Under these premises, is it totally necessary for a national federation affiliated to the signing organisation of the ECA to bargain a collective agreement to ratify its conformity with it? My answer is: not if the mandate conferred to the European organisation is clear.

When presented with a case soliciting compliance of an ECA, the local court will have to examine several aspects. Let us suppose the question is the application of clause 9 of the Framework agreement on Telework, which says that the employer will allow the teleworker to meet with his or her colleague on a regular basis and access company information [71]. As an international agreement subject to the Rome Convention of 19 June 1980 [72], on legislation applicable to contractual obligations, the judge will have to prove the validity of the contract according to the legislation chosen by the parties (if this choice has not been expressed, the country with which they have the closest ties) as well as the agreement's applicability to the alleged place and subjects, which involves a judgment of its validity as a collective instrument in their own country — especially, respect for rules of public order — when what has been signed binds the parties of the lawsuit [73].

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[70] I have developed this argument in greater detail in my article "¿Son 'meras recomendaciones' los acuerdos colectivos europeos?" in *Relaciones Laborales*, vol. I (1998), pp. 298-317.

[71] A future example: as clause 12 of the same Agreement indicates, "its application will be made in the three years following the signing of the agreement," that is, no later than 16 June 2005.

[72] The contractual capacity of signing associations is governed, in my opinion, by the Agreement on recognition of the legal status of foreign companies, associations and foundations, Hague Conference on International Private Law, 1 June 1956.

[73] Useful for this is Carrillo del Pozo, L. F., *Alegación y prueba del Derecho extranjero en el ambito laboral y tutela judicial efectiva*, *REDT* 111 (2002), 451 *et seq.*: Luján Alcaraz, J., "La interpretación y aplicación del Derecho Comunitario por el juez español: la cuestion prejudicial en el orden social", *Aranzadi Social* 12 (1999), 9 *et seq.*; Fernández Domínguez, "Competencia judicial internacional y la Ley del contrato de trabajo en las relaciones internacionales", *Actualidad Laboral* III (1991), 533 *et seq.* On the subsidiary application of the *lex fori* for

It is pointless to say that the ECA only binds the affiliates [74], that is, that it will be regarded as a collective agreement of limited applicability. In Spain the ECAs signed by CES and UNICE, organisations to which the most representative national head offices belong, would have general applicability if they did not lack other requirements, such as registration and publication in the official bulletin [75], unless one of the following conditions had been met: either they were registered and published officially or at the request of a party [76], or if the local judge put the ECA on the level of a national agreement, just as the European citizen is on the same level as the national citizen for labour issues.

The doctrine has raised another specific question in terms of the application of the ECAs, especially because they can serve to lower the levels reached by agreements in force [77]. For that reason, Zachert proposes a special formulation of the most favourable standard principle, by virtue of which the ECA could only establish minimum conditions [78] opposed to national agreements. As far as Spain goes, given that an ECA of direct application is normally going to be considered as an agreement with limited applicability, the principle of the most favourable standard acts against agreements of general applicability, so the one with the better level of conditions for workers would prevail.

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lack of accreditation of the foreign law, SSTC 33/2002 of 11 February, and TS of 22 May 2001 (AR 6477).

[74] In countries like Spain, where there is no rule or common law doctrine on application when only one of the parties belongs to a signing organisation, the local court can do little except declare the ECA applicable, as neither by the conferred mandate nor by the representation held can it bind an employer or worker who has not shown his or her consent to it. Of course in Labour Law there are more measures of direct action to obtain application of the agreed terms.

[75] Similarly, PÉREZ DE LOS COBOS, *El Derecho Social Comunitario*, p. 148: the ECA is contractual in nature and is an extra-statutory agreement, but if at the European bargaining table the most representative Spanish organisations were represented and they had complied with the requirements laid out in articles 87 *et seq.* ET, the agreement would have *erga omnes* or statutory validity in Spain.

[76] Article 2.f of Royal Decree 1040/1981 of 22 May indicates as the object of registration in the agreement registry, "any other agreement, arbitration award or pact that has the legal effects of an agreement. Article 2.c also requires cross-industry agreements to be registered and on concrete matters of article 83 of the Workers' Statute, which refers to agreements drawn up by the most representative national or regional organisations, so that they can be considered as such to the ECAs, when said organisations are represented in them. The response would be different if article 83 strictly alluded to agreements signed on a national or regional level.

[77] This is the fear shown in Italy by ARRIGO, G., *A proposito della comparazione,* pp. 69 *et seq.*

[78] Europäische Tarifverträge, p. 827.

5. EUROPEAN ENTERPRISE AGREEMENTS

Without the stir produced by the intersectoral and sectoral ECA, the multinational enterprise agreements subject to the Directive 94-45-EC have flooded the European space in a short time, and will probably constitute in the near future the real channel through which continental industrial relations take shape. In principle referring to the creation of European works councils or alternative formulas, the matters assigned as the competencies of these committees is leading to important agreements with the management of multinational companies [79]. Their importance is proven by the swift appearance of ECJ doctrine in several rulings, of which we are interested in the one about Luxembourg: in the ECJ ruling of 21 October 1999, Commission v. the Grand-Duchy of Luxembourg C-430/98, the Member State defended itself of the accusation of not having duly transposed Directive 94/45/EC, saying that it had entrusted its application to collective bargaining and that most of the affected multinational firms had signed European works council agreements, except one or two of them, for which it had not deemed it necessary to enact a guaranteeing law. The ECJ found that precisely for this reason, the transposition of the Directive had not been totally safeguarded, and ruled against Luxembourg.

How these enterprise agreements fit in the context of European bargaining is one of the issues that remains to be settled. The Commission's Communications on social dialogue allude to intersectoral and sectoral agreements, but not to those of a lower level [80].

The appropriate place to debate these problems is in the chapter of this book on enterprise bargaining, to which I refer.

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[79] "Particularly with respect to mobility, pensions and equivalency of qualifications," says the Communication on European Social Dialogue of 26 June 2002, p. 11.

[80] It will have to be examined whether an agreement signed between social partners, representatives of certain occupational categories or sectors, is sufficient basis for the Commission to suspend its legislative action, says the Communication on Protocol for Social Policy of 14 December 1993, p. 15. However, PÉREZ DE LOS COBOS, *El Derecho Social Comunitario en el Tratado de la Unión Europea*, cited, pp. 157-8, considers that article 4 of the SPA (now article 139) is a precarious framework, but a framework after all, for regulating these European enterprise agreements.

This book, put together at the request of the COMISIÓN CONSULTIVA NACIONAL DE CONVENIOS COLECTIVOS, with the support of the Ministerio de Trabajo y Asuntos Sociales, is the first known study specifically on collective bargaining in the EU, following the publication by the ILO years ago of a work on collective bargaining in industrialised countries, which discussed European and other non-European countries. However, it was not an exhaustive treatment as this book is, for which a number of experts from the most important EU countries have participated, under the direction of Professor Antonio Ojeda Avilés.

This volume has two parts: in the first, in different chapters, several specialists present the most important characteristics of collective bargaining in each of the countries considered (Germany, Belgium, Finland, France, Netherlands, Italy, Portugal, the United Kingdom, Sweden and Spain); in the second part, other experts take a look at key issues of European collective bargaining.

This work was put together with the objective of being a useful tool for both the social partners and administrations as well as experts on this subject in universities and specialised institutes or other fields.

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