

Transnational collective bargaining in the European Union

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1 Introduction

In many European countries collective labour agreements play a crucial role in organising industrial relations. A research of the European Industrial Relations Observatory established that in the year 2002 more than 70% of the employees within the member states of the European Union ('Member States') at that time, excluding Greece, were, on average, covered by a collective labour agreement.¹ These collective labour agreements are all concluded regionally or nationally and are therefore limited by the rules and the jurisdiction of the country to which they apply. Clearly, as the integration of the Member States develops further and as globalisation is a fact nowadays, labour relations are becoming more and more international. As is, or at least should be, (collective) labour law.² Social partners, the key figures in collective labour law, could take advantage of the international opportunities presented to them. They could, for instance, enter into transnational collective labour agreements that apply within the entire European Union ('EU') or within a number of Member States. This brings us to this contribution's subject: transnational collective labour agreements having force in (part of) the EU.³ More in particular, this contribution tries to answer the questions (i) whether a new system should be developed for such transnational collective labour agreements and (ii) if so, whether the proposal to that effect which has been drafted by a group of experts in their 2006 report (the 'Expert

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

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

3 The term 'transnational collective labour agreement' used in this contribution is not a term defined by law. It is meant to describe the agreement in writing regarding or relating to working conditions and terms of employment concluded between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more employees' organisations on the other, and with an aim of having (legal) effect in more than one jurisdiction. This term is loosely based on the definition of collective agreement set out in article 2 of the 1951 ILO Recommendation R91 on collective agreements.

Report') forms a proper system.⁴ In order to answer these questions, section 2 will first analyse whether there is a need or demand for transnational collective labour agreements. Subsequently, section 3 deals with the topic whether the current legislation on transnational collective bargaining suffices. Thereafter, section 4 brings both analyses together and answers the question whether a new system on transnational collective agreements in the EU is required. It subsequently analyses the Expert Report and assesses whether the proposals set out in that Report seem an appropriate basis to proceed. Section 5 ends with some brief concluding remarks.

2 Is there a need or a demand for transnational collective labour agreements in the EU?

In order to answer this question, three developments will be discussed. First, it will be set out that changing challenges for and the role of the European social partners have led them to pursue autonomous transnational collective bargaining. This 'new' position of the European social partners is recognised and well received by the Community institutions and bodies. Subsequently, it will be established that transnational collective bargaining and transnational negotiations already exist in the EU.⁵ Finally, it will be argued that transnational collective bargaining in the EU seems to have advantages, outweighing its disadvantages.

2.1 Changing challenges for and role of the (European) social partners leading to autonomous transnational collective bargaining

The (European) social partners used to play a modest role at European level. Only since the mid nineteen eighties, due to an active approach of the (at that time) President of the Commission J. Delors, has their role gradually enhanced.⁶ Since about the year 2000, however, both the challenges for and the role of the social partners within the EU have changed significantly. There are at least four main developments.

4 E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future*, report for the European Commission, February 2006; hereinafter to be referred to as 'Expert Report'.

5 It is common to distinguish between collective negotiation, resulting in non-binding agreements, and collective bargaining, leading to binding collective agreements. Reference is made to the Expert Report, pages 8 and 9.

6 For an overview of the history of the position of the European social partners in the European Community, reference is made to E. Franssen, *Legal aspects of the European Social Dialogue*, Intersentia, Antwerp – Oxford – New York, 2002, chapter 3.

First, in March 2000, the Lisbon European Summit took place and brought about the so-called Lisbon Strategy. The Lisbon Strategy is a commitment to bring about economic, social and environmental renewal in the EU. In March 2000, the European Council in Lisbon drafted a ten-year strategy to make the EU the 'most competitive and dynamic knowledge-based economy in the world'.⁷ Under this strategy, a stronger economy will drive job creation alongside social and environmental policies that ensure sustainable development and social inclusion. The role the Commission has in mind for the social partners in this process is of great importance. In the year 2000 contribution of the Commission to the spring European Council meeting it stated that *'the social partners have a crucial role to play in helping to manage the transition to a knowledge based economy and society'*.⁸

Second, in the 2001 White Paper on European Governance the Commission observes a paradox in Europe: on the one hand Europeans want political leaders to find solutions for major problems, on the other hand they increasingly distrust institutions and politics, or are simply not interested in them.⁹ This is particularly the case at EU level. For that reason said White Paper assesses the way in which the Union uses the powers given by its citizens. It proposes opening up the policy-making process to get more people and organisations involved in shaping and delivering EU policy. It also promotes more openness, accountability and responsibility for everyone involved. In order to achieve this, the Union must, according to the Commission, better combine different policy making tools such as legislation, social dialogue, structural funding and action programmes.¹⁰ There should also be more involvement of the general public in shaping and implementing EU policy, in particular of the civil society.¹¹ Trade Unions and employers' organisations – as a part of the civil society – (should) have a particular role and influence within it. The EC Treaty requires the Commission to consult management and labour (being the European social partners) in preparing proposals in the social policy field, and they can enter into agreements that could subsequently be turned into Community law, as will be set out in further detail in section

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

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

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

10 COM (2001) 428, page 8.

11 COM (2001) 428, page 14. 'Civil society' includes social partners, non-governmental organisations, professional associations and alike.

3.1 below. The Commission thus requests the social partners to play a role in overcoming the European governance problem.¹²

Third, in January 2002 the High Level Group on Industrial Relations and Change of the European Union (the 'High Level Group') published its report on 'Industrial Relations and Industrial Change' (the 'Industrial Relations Report'). The Industrial Relations Report aims to outline the manner on which industrial relations actors,¹³ but also governments, the Commission and other policy-makers can respond to the altered challenges facing European societies and play their role in changing management through meaningful social dialogue and improved partnerships. These 'altered challenges' include globalisation, enlargement of the Union, shift from economic and monetary responsibility from national to European level, technological change and the transition to a knowledge economy, demographic trends (ageing, declining birth-rate and immigration), and changes in the labour market (a new balance between family, work and education).¹⁴ The High Level Group argues that these 'unprecedented' challenges are changing the role of and the problems to be addressed by the actors of industrial relations. It therefore requires the development of a new agenda for the industrial relations. This agenda should, among others, include (further) development of a general framework to enhance competitiveness and innovation with social cohesion, the possibility to adjust wages rapidly, new forms of flexible employment and working time and better working conditions and work organisation.¹⁵ Obviously, these are all subjects that directly involve the social partners.

Last, the Commission stated in its 2002 Communication 'the European Social Dialogue, a force for innovation and change'¹⁶ that the European social dialogue will be an important issue with regard to the enlargement of the

12 Improving European governance is an ongoing programme and is part of the EU's 'Better Regulation Strategy'. This strategy aims at simplifying and improving existing regulation, to better design new regulation and to reinforce the respect and the effectiveness of the rules. The strategy is, among others, based on reinforcing the dialogue between stakeholders and all regulators at the EU and national levels. Reference is made to ec.europa.eu/governance/better_regulation/index_en.htm.

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

14 Reference is made to pages 11-15 of the Industrial Relations Report.

15 Reference is made to pages 17-23 of the Industrial Relations Report.

16 COM (2002) 341, final.

Union. The Commission points out that the social dialogue 'is enshrined in the Treaty and forms an integral part of the *acquis communautaire*'.¹⁷ The social partner structure in the candidate countries should be strengthened. The social partners in the countries that were already part of the Union that day could assist them with this strengthening process. According to the Commission the social partners of the candidate countries have an important role to play in the context of the pre-accession strategy. This enlargement-process of the EU is the fourth step of the changing role of the social partners. Not only does the position of the social partners change due to the accession of new countries and are the social partners to play an important role in the pre-accession process, but their challenge remains in full force after said accession. The social partners can (and must) play an important role in the further development of these countries.¹⁸

These changes did not escape the large cross-industry social partners, the European Trade Union Confederation ('ETUC'), the Union of Industrial and Employers' Confederation ('UNICE'; recently renamed into BUSINESS-EUROPE), the European Association of Craft, Small and Medium Sized Enterprises ('UAPME') and the European Centre for Public Enterprises ('CEEP'). In their joint contribution to the Laeken European Council of 7 December 2001,¹⁹ they expressed their intent to reposition their role. Basically, they planned not to be fully dependent on the Community institutions anymore. Instead of solely acting after having been consulted by the Commission and to have their subsequent agreements exclusively implemented by a Council decision on the basis of the European social dialogue (see section 3.1 below), as they did before, the European social partners now rather take the initiative themselves and implement their agreements autonomously, with the instruments of industrial relations available to them at the national level.²⁰

This repositioning has been well received by both the Commission and the High Level Group. Recently, plans have been developed to further enhance the position of the European social partners. The European Constitution

17 COM (2002) 341, page 19.

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

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

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

had a specific role in mind for the social partners within the EU.²¹ Title VI of the European Constitution concerns 'the democratic life of the Union' and introduces the principle of representative democracy, the principle of participatory democracy and the role of the social partners herein. Article I-46 of the European Constitution, setting out the principle of participatory democracy, states that the institutions of the Union shall give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action. These institutions shall maintain an open and regular dialogue with representative associations and civil society, and shall carry out broad consultations with parties concerned. Article I-47 of the European Constitution stipulates that the EU recognises and promotes the role of the social partners at Union level. It shall furthermore facilitate dialogue between the social partners, respecting their autonomy. Given the fact that the European social partners can be 'representative associations' and are part of civil society as referred to in article I-46 of the European Constitution, they were to play an important role in the participatory democracy of the Union. As is known, the European Constitution is not ratified by France and the Netherlands due to the 'no' votes of their citizens. During the meeting of the European Council of 21 and 22 June 2007, it became clear that the European Constitution would not be ratified anymore.²² That, however, does not affect the fact that the Community institutions and the Member States wished to award an important role to the European social partners with regard to the democracy of the Union.

But equally the Treaty of Lisbon,²³ that is to take the place of the European Constitution, emphasises the importance of the European social partners. Article 11 of the amended Treaty on European Union repeats the principle of participatory democracy. An equivalent of article I-47 of the European Constitution is, however, lacking from the Treaty of Lisbon. That is not to say that the importance of the European social partners has diminished, as article 152 of the Treaty on the functioning of the European Union makes clear: 'The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy. The Tripartite Social Summit for Growth and Employment shall contribute to

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

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

23 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13 December 2007, OJ C 306, 17 December 2007, pages 1 ff. The Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union are to be found in, OJ C115, 9 May 2008, pages 1 ff.

social dialogue.' Although it is not certain that the Treaty of Lisbon will be ratified, as the Irish voters said 'no' to the ratification in a recent referendum,²⁴ the Treaty clearly recognises the continuing importance of the European social partners.

2.2 Europeanisation of collective bargaining already exists

Bargaining for transnational collective labour agreements can be witnessed at several levels, being company, sectoral and cross-industry level.

Multinational companies have on several occasions entered into collective bargaining with sectoral European trade unions on agreements that have international coverage. Two topics that in particular attract the interest of multinational companies are corporate social responsibility and restructuring.²⁵ The first examples of framework agreements reached between the aforementioned parties date back to the end of the 1980's. As from the year 2000, however, their number increased significantly. Up to and including 2005 approximately 35 framework agreements have been concluded.²⁶ But also the years 2006 and 2007 witnessed a number of transnational collective labour agreements at company-level. Examples are agreements concluded with the companies Schneider Electric, the Areva Group, PSA Peugeot Citroën and the Westdeutsche Allgemeine Zeitung Media Group.²⁷ Also notable are the international framework agreements concluded between the Suez Group on the one hand and the European Works Council Committee, French trade unions and ETUC on the other.²⁸ These agreements relate

24 Following this 'no' vote, the European Council expressed that it needed time to analyse the situation. Reference is made to the Presidency Conclusions of the Brussels European Council, 19/20 June 2008, 11018/08, page 1.

25 Expert Report, page 16.

26 An overview of results achieved between multinational companies and European sectoral trade unions can be found in the Expert Report, pages 24 ff. A word of caution is in place though. According to the Bundesvereinigung der Deutschen Arbeitgeberverbände, these framework agreements cannot be considered collective labour agreements with clearly defined obligations but rather 'an expression of common principles and/or objectives for a shared corporate culture.' See Bundesvereinigung der Deutschen Arbeitgeberverbände, Position on discussions on an optional European framework for transnational collective bargaining, Berlin, 6 November 2006, page 9, available at [www.bda-online.de/www/bda-online.nsf/id/48F1932D682E09E6C125728F005DAD69/\\$file/Stn-engl.pdf](http://www.bda-online.de/www/bda-online.nsf/id/48F1932D682E09E6C125728F005DAD69/$file/Stn-engl.pdf).

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

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

to topics that are normally dealt with nationally, including profit-sharing, job and skill requirements and equality and diversity. On occasion, as also appears from the aforementioned example involving the Suez Group, not only the multinational company and a sectoral European trade union execute the transnational collective labour agreement, but national trade unions as well. This has, according to the Expert Report, been the case in at least 8 transnational collective labour agreements.²⁹ In such cases, the transnational collective agreement is transposed into national collective agreements and submitted to the legislation of the countries in which the agreement has to take force.³⁰

The increasing number of transnational collective agreements concluded at enterprise level in recent years is not strictly limited to Europe. A study of the International Labour Organisation established that at the end of the year 2007 62 international framework agreements were concluded on a global level.³¹ Although this number of 62 may be small compared with the number of unilateral codes of conducts adopted by multinational enterprises, the pace at which the international framework agreements have spread in recent years is notable. In the period 1988 to 2002 only 23 international framework agreements were concluded, the other agreements were signed in the years that followed. If, instead of merely focusing on agreements signed by a global union federation on labour's side, one should look at all transnational agreements concluded between a multinational enterprise and an employees' organisation (including European Works Councils and European trade unions), the number of agreements concluded would amount to hundreds, most of them adopted in the last few years.³²

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

29 Expert Report, page 27. The Expert Report did not take into account the agreements concluded with the Suez Group, so the actual number exceeds 8.

30 Expert Report, page 27.

31 International framework agreements are negotiated instruments between multinational enterprises and global union federations, being international federations of national unions by sector of activity. See: K. Papadakis, Introduction, in: K. Papadakis, *Cross-Border Social Dialogue and Agreements: An emerging global industrial relations framework?*, International Labour Organisation, Geneva, 2008, page 2.

32 K. Papadakis, Introduction, pages 2 and 3.

market'.³³ The Commission therefore considered the development of negotiations at sectoral level 'a key issue' and noted that the sectoral potential for joint action and negotiation of agreements 'is by no means used to the full'.³⁴ For these reasons, the Commission established Sectoral Social Dialogue Committees ('SSD Committees') and thus confirmed the role and the representativeness of European employers' and employees' organisations.³⁵ The SSD Committees will, for the sector of activity for which they are established, (i) be consulted on developments on Community level having social implications and (ii) develop and promote the social dialogue at sectoral level.³⁶

The effort that the Commission has put in the further development of the sectoral social dialogue seems to have paid off. In the years following 1998, the SSD Committees have been very active.³⁷ In its 2002 Communication 'the European social dialogue, a force for innovation and change', the Commission noted that the sectoral social dialogue had grown and it wished 'to continue its support for the flourishing European sectoral social dialogue and to promote the establishment of further committees so that all main branches are covered'.³⁸ In 2003 the Directorate-General for Employment and Social Affairs of the Commission briefly set out the state of affairs in the sectoral dialogue in Europe, which at that moment consisted of 27 sectoral social dialogue committees.³⁹ The Directorate-General noted that, since the establishment of the SSD Committees, the social partners involved concluded approximately 230 commitments of different types and scale, such as opinions and common positions, declarations, guidelines and codes of conduct, charters, agreements etc.⁴⁰ Most of these commitments have been adopted to clarify the position of the social partners on a certain subject, but other

33 COM (1998) 322, page 14.

34 COM (1998) 322, page 14.

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

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

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

38 COM (2002) 341, page 16.

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

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

commitments have been implemented by a Council decision on the basis of articles 138 and 139 of the EC Treaty (which implementation method will be discussed in section 3.1 below). In 2006 the Directorate-General for Employment and Social Affairs of the Commission again conducted research on the development of the sectoral dialogue in Europe.⁴¹ According to this report, the sectoral social dialogue 'produces outcomes of practical importance and makes a significant contribution to the governance of the EU as a whole'.⁴² It notes that the SSD Committees have developed actions that enable them to respond flexibly in respect of their own needs and their sectors' interests. SSD Committees primarily seek action in three areas: (i) influencing their own members within the sector, (ii) ensuring that the sector's views are heard beyond the confines of the particular industry, and (iii) negotiating agreements for implementation.⁴³

At cross-industry level, the European social partners (UNICE (BUSINESS-EUROPE), CEEP, ETUC and UEAPME) issued a joint statement or entered into a framework agreement 40 times in the period between 1986 and August 2002.⁴⁴ Also in this case, the joint statements heavily outnumber the framework agreements. Still, besides issuing joint statements, the cross-industry European social partners entered into agreements as well. To date, they entered into 6 framework agreements. The first three agreements have been implemented by a Council decision by means of a directive and concern: the framework agreement on parental leave (implemented by the Directive of 3 June 1996),⁴⁵ the framework agreement relating to part-time work (implemented by the Directive of 15 December 1997)⁴⁶ and the framework agreement on fixed-term work (implemented by the Directive of 28 June 1999).⁴⁷ The most recent three agreements have been or will be implemented by the social partners themselves in accordance with the procedures and practices specific to management and labour and to the Member States. It concerns the year 2000 framework agreement on telework, the year 2004 framework

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

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

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

44 Amsterdam Institute for Advanced Labour Studies, *The European Social Dialogue: Development, Sectoral Variation and Prospects*, Report to the Ministry of Social Affairs and Employment, December 2002, page 32.

45 Council Directive 96/34/EC (OJ L 145, 19 June 1996, pages 4-9).

46 Council Directive 97/81/EC (OJ L 14, 20 January 1998, pages 9-14).

47 Council Directive 1999/70/EC (OJ L 175, 10 July 1999, pages 43-48).

agreement on work-related stress and the year 2007 framework agreement on harassment and violence at work.

2.3 Transnational collective bargaining in Europe has advantages, outweighing the disadvantages

Transnational collective bargaining offers certain advantages, which can be divided into institutional advantages and advantages for the parties and their members involved. On an institutional level, transnational collective bargaining, especially on a European-wide level, may, for instance, prove useful in case Community institutions are unable to make decisions. It may furthermore help to overcome regulatory shortcomings and it enhances the participation of civil society when drafting legislation (participatory democracy). Lo Faro argues that these institutional advantages are the main reason for the development of European collective bargaining, which, according to him, is 'mainly intended (...) as one of the Community's potential remedies to its decision-making bottlenecks and implementation problems in the field of labour law and social policy'.⁴⁸

But apart from these institutional advantages, transnational collective bargaining may also benefit the social partners themselves, and ultimately the employers and employees. Transnational collective bargaining may *i.a.* be a proper response to the Europeanisation and internationalisation of markets, simplifying cross-border labour and enabling the 'European Social State' to better compete with the rest of the world.⁴⁹ It may furthermore prevent social dumping, by establishing minimum social standards at European level, and can therefore be a proper tool to maintain a social Europe.⁵⁰ Transnational collective labour agreements may also be a proper tool to deal with common problems at the appropriate level, such as demographic trends (ageing, declining birth rates and immigration), changes in the labour market (a new balance between family, work and education), health and safety, working times etc.⁵¹ Moreover, it may also help to create

48 A. Lo Faro, *Regulating Social Europe: reality and myth of collective bargaining*, Hart Publishing, Oxford and Portland, 2000, page 52.

49 See for instance: W.E. Lecher and H.W. Platzer, *Global trends and the European context*, in W.E. Lecher and H.W. Platzer, *European Union – European Industrial Relations? Global challenges, national developments and transnational dynamics*, Routledge, London, 1998, page 12.

50 D. Lea, *European Social Dialogue and Industrial Relations – The view of the TUC*, in W.E. Lecher and H.W. Platzer, *European Union – European Industrial Relations? Global challenges, national developments and transnational dynamics*, Routledge, London, 1998, page 138.

51 H.W. Platzer, *Industrial Relations and European Integration*, in W.E. Lecher and H.W. Platzer, *European Union – European Industrial Relations? Global challenges, national developments and transnational dynamics*, Routledge, London, 1998, page 97.

a power equilibrium between trade unions on the one hand and employers and employers' organisations on the other. It is often argued that trade unions are somewhat lacking behind employers and employers' organisations, especially at transnational (European) level. Employers have, as a rule, better resources, can substitute capital for labour and have a greater mobility (capital has a greater mobility than labour).⁵² This employers' advantage could be countered by the trade unions through a well-oiled international network. Creating a transnational counterpower against multinational employers is often regarded as the most important reason for trade unions to engage in transnational collective bargaining.⁵³

Naturally, there are also (potential and real) disadvantages attached to (European) transnational collective bargaining. These can be divided into three categories: (i) fundamental arguments against (all) collective bargaining in general, (ii) fundamental arguments against (European) transnational collective bargaining and (iii) practical arguments against (European) transnational collective bargaining.

First, from an economical point of view, scholars have argued that trade unions and collective bargaining hinder economic development and lead to higher unemployment. These scholars favour a fully free market. They fundamentally object to any kind of collective bargaining. Since assessing these arguments in depth is beyond the scope of this contribution, it is simply assumed that, given the European-wide practice of collective bargaining, collective bargaining, in general, has advantages outweighing its disadvantages. Another potential fundamental objection against collective bargaining in general, which problem may even be clearer at transnational level than at national level, is the declining representativity level of the social partners. If (trade union) membership density continues to decline and drops under a critical level upon which the social partners cannot be considered representative anymore for the employers and the employees they are supposed to represent, or if for any other reason the same happens, collective bargaining as we know it will fail, both at national and trans-

52 H.W. Platzer, *Industrial Relations and European Integration*, page 95.

53 See, for instance, D. Gallin, *International framework agreements: A reassessment*, in: K. Papadakis, *Cross-Border Social Dialogue and Agreements: An emerging global industrial relations framework?*, International Labour Organisation, Geneva, 2008, pages 16 and 25. See also K. Papadakis, *Introduction*, pages 1, 4 and 5. In order to overcome the mismatch in powers between the multinational employers on one hand and of the trade unions on the other, it has been argued that the Commission needs to be actively involved in transnational collective bargaining. See S. Smismans, *The European social dialogue between constitutional and labour law*, *European Law Review*, 2007, volume 32, number 3, pages 356 and 357.

national level. The social partners cannot become separated from the people and the business, as the latter justify the powers of the social partners. In other words: if there are too few social partners' members, these social partners lack legitimation to bind employers and employees.⁵⁴ It is therefore imperative, when drafting a system on collective bargaining, to ascertain that there is an important material link between the social partners and the employers and employees they represent (representativity demands).⁵⁵

Second, some authors consider that *European* collective bargaining has inherent, fundamental disadvantages. They argue that European collective bargaining adversely affects competition in Europe, since it leads to common employment conditions throughout Europe, resulting in a weakened economy that creates fewer jobs. This argument is, in my view, based on a false assumption, since the goal of European-level collective bargaining is, (also) according to the employees' organisations,⁵⁶ not fully levelling out employment conditions throughout Europe. Instead, European bargaining should (and up to now: has) recognise(d) the differences in Europe and only should interfere when needed. That could, on occasion, include the laying of a 'minimum' foundation of employment conditions, in order to establish a socially acceptable minimum in countries where that otherwise would be absent, but will not (and cannot) crudely harmonise all employment conditions in the EU.

Last, there are many practical arguments raised against transnational (European) collective bargaining, such as:

- differences in the organisation, ideology and interest of Europe's national trade unions;
- limits of international solidarity of workers if strikes are needed;
- trade unions weaknesses to establish an autonomous transnational system of industrial relations;
- a lack of interest of employers and employers' organisations;

54 Bruun rightly argued that a mismatch between union density and coverage 'cannot in the long run be a sustainable situation. Such arrangements might lend stability to the system, but the legitimacy of such a system might be vulnerable in a crisis situation.' N. Bruun, *The Autonomy of Collective Agreement*, page 11, as can be found on www.juridicum.su.se/stockholmcongress2002/bruun_english.pdf.

55 See for the importance of representativity demands T. Jaspers, *Representativiteit: representeren of vertegenwoordigen?* [Representativity: representation or mandate?], ARA 2008/1, pages 4 ff.

56 W. Buschak and V. Kallenbach, *The European Trades Union Confederation*, in W.E. Lecher and H.W. Platzer, *European Union – European Industrial Relations? Global challenges, national developments and transnational dynamics*, Routledge, London, 1998, page 175.

- the risks and costs of coming to European collective bargaining; and
- differences in the legal systems of the different countries.

Although (some of) these practical disadvantages are real and not at all easily overcome, they do not fundamentally obstruct (European) transnational collective bargaining. All of these disadvantages are, as said, of a practical nature and are therefore potentially temporary. Especially when trade union membership remains on acceptable levels, the practical issues facing transnational collective bargaining can be tackled. Meaningful transnational collective bargaining may even give a boost to trade union membership, which could lead to stronger trade unions and more employees' solidarity when needed.

In consequence, there are a number of (institutional and other) advantages attached to transnational collective bargaining in the EU. Including the aforementioned assumption, there are no convincing fundamental objections against such bargaining, provided that the representativity of the social partners remains within acceptable levels. There are some practical issues, but these may be solved in time. Therefore, transnational collective bargaining in the EU seems worthwhile to pursue.

2.4 Conclusion

Given the above, the changing challenges for and role of the European social partners have led them to pursue an autonomous social dialogue, leading to agreements that are to be implemented autonomously, with the instruments of industrial relations available to them at the national level. Practice indeed shows that transnational collective bargaining is a fact nowadays, and has significantly developed since about the year 2000. This is logical, as transnational collective bargaining seems to have advantages, outweighing the disadvantages. Consequently, the question whether there is a need or demand for transnational collective labour agreements should be answered with: yes.

3 The current legal framework for transnational collective bargaining

There are two existing means for concluding (European) transnational collective agreements. First, these agreements may be the result of bargaining

in the so-called European social dialogue,⁵⁷ as has been the case with regard to the sectoral and cross-industry level transnational collective labour agreements referred to in section 2.2 above. Pursuant to article 139 of the EC Treaty these agreements can either be implemented by a Council decision or in accordance with the normal procedures and practices specific to management and labour and the Member State. This European social dialogue will be briefly explained in section 3.1 below. Second, transnational collective labour agreements can be concluded 'outside' the institutionalised European social dialogue, as has been the situation with regard to the company-level collective labour agreements that are mentioned above. This type of bargaining will be set out in section 3.2. In section 3.3 the question will be addressed whether these methods of transnational bargaining suffice.

3.1 Bargaining within the European social dialogue

Pursuant to article 138.2 of the EC Treaty, the Commission shall first consult the social partners before submitting proposals in the social policy field. Judging from the words used in this article (the Commission *shall* consult as opposed to *can* consult), this is not a discretionary power of the Commission, but an obligation. Unfortunately, the EC Treaty does not set out whom the social partners are that need to be consulted. In order to fill this lacuna, the Commission drafted a list who to consult. Following a research, the Commission in its 1993 Communication 'concerning the application of the Agreement on social policy' set out the criteria that organisations must meet.⁵⁸ They should: (1) be cross-industry or relate to specific sectors or categories and be organised at European level; (2) consist of organisations which are themselves an integral and recognised part of Member State social partner structures and with the capacity to negotiate agreements, and which are representative of all Member States, as far as possible; and (3) have adequate structures to ensure their effective participation in the consultation process. As a result of these criteria, today, there are about 50 organisations that are consulted in conformity with article 138 of the EC Treaty.⁵⁹

On the occasion of this consultation, the social partners are entitled to inform the Commission of their wish to enter into an agreement. Accord-

57 The 'European social dialogue' covers two aspects: (i) the negotiation and conclusion of agreements at Community level between European social partners and (ii) the cooperation between the Community institutions and the European social partners. The European social dialogue is often viewed within the context of articles 136-139 of the EC Treaty. See: E. Franssen, Legal aspects of the European Social Dialogue, page 3.

58 COM (1993) 600.

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

ing to the Court of First Instance, only the social partners that were among those parties consulted by the Commission and are admitted to the negotiation table by the other social partners involved are entitled to enter into such an agreement.⁶⁰ Although this has been a source of a long lasting debate, by now it seems clear that the social partners may also enter into negotiations without prior consultation being required.⁶¹ The agreements entered into by the social partners may either be implemented by a Council decision or in accordance with the procedures and practices specific to management and labour and to the Member States.

Should the social partners choose the first option, they must jointly request that the agreement be implemented by a Council decision on a proposal from the Commission (article 139.2 of the EC Treaty). In such case, the agreement must meet seven conditions, the first one deriving from the EC Treaty, the other ones imposed by the Commission.⁶² The first condition regards the content of the agreement. Pursuant to article 139.2 of the EC Treaty, an agreement can only be implemented by a Council decision if it concerns matters covered by article 137 EC Treaty. Secondly, the Commission verifies the representative status of the contracting parties: the signatory parties to the agreement have to be sufficiently representative. This criterion is also imposed by the Court of First instance, as it ruled that, before an agreement can be implemented by a Council decision, it must be ascertained 'whether, having regard to the content of the agreement in question, the signatories, taken together, are sufficiently representative'.⁶³ Assessing the European social partners' representativity is, however, not an easy task. There are no clear rules developed on this issue. Franssen and Jacobs rightly described representativity of the European social partners as 'one of the thorniest issues of the European social dialogue'.⁶⁴ Thirdly, the mandate of the contracting parties needs to be assessed. It needs to be established that they had a mandate from their national members to negotiate the agreement. Furthermore, the Commission assesses the legality of each clause in the collective agreement in relation to Community law. The agreement that is to be implemented may not contravene Community law. Fifthly, the Commis-

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

61 See on this debate: J. Hellsten, *Reviewing Social Competence of European Communities*, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements, Ministry of Labour, Helsinki 2004, Finland, page 102.

62 See COM (1993) 600. See also A.T.J.M. Jacobs and A. Ojeda-Aviles, *The European social dialogue – Some legal issues*. In: *A legal framework for European industrial relations*. Report by the ETUI Research Network on Transnational trade union rights, Brussels, June 1999, page 61.

63 UEAPME case, paragraph 90.

64 E. Franssen and A.T.J.M. Jacobs, *The question of representativity in the European social dialogue*, *Common Market Law Review* 1998, page 1297.

sion must be ensured that the provisions of the agreement do not impose administrative, financial and legal constraints in a way which holds back the creation and development of small and medium-sized undertakings (see also article 137.2 under (b) of the EC Treaty). Although the Commission claims to test an agreement only against the aforementioned criteria, practice betrays two further criteria. Although never stipulated explicitly, the Commission also seems to examine the political merits of the agreements; the agreement must pass a general test applied by the Commission on its content.⁶⁵ Finally, when deciding whether or not to implement an agreement by a Council decision, the Commission tests whether that decision meets the demands of the principle of subsidiarity. Consequently, it has to be established that (a) the objectives of the proposed action cannot sufficiently be achieved by the Member States and should therefore be achieved by the Community and (b) that the action does not go beyond what is necessary to achieve the objectives of the EC Treaty (article 5 of the EC Treaty).

After having performed these checks, the Commission will consider either or not to present the agreement for implementation to the Council. Should it decide not to do so, the Commission will immediately inform the signatory parties of the reason for its decision.⁶⁶ Should the Commission intent to present a proposal for a decision to implement the agreement to the Council, the Commission will provide the Council with an explanatory memorandum, giving its comments and assessment of the agreement concluded by the social partners.⁶⁷

The Commission has not allowed itself to alter the agreement. It will merely propose, following the above-mentioned examination of the agreement,

65 See A. Lo Faro, *Regulating Social Europe: reality and myth of collective bargaining*, page 114. See also J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, page 103.

66 COM (1993) 600, page 29. It should be noted that some view that the Commission cannot refuse to propose the agreement to the Council. In their view the Commission has merely a 'waitress' position. See, for example, B. Bercusson, *Democratic Legitimacy and European Labour Law*, *Industrial Law Journal*, Volume 28, Number 2, June 1999, page 162 and A.T.J.M. Jacobs, *European Social Concertation*, in: S.A. Fareso (ed.), *Collective bargaining in Europe*, Madrid, 2005, page 363. Other scholars simply agree with the Commission that it can refuse to propose to the Council the implementation of a European agreement. See, for example, L. Betten, *The Democratic Deficit of Participatory Democracy in Community Social Policy*, page 33. See also F. Dorsemont, *Contractual governance by management and labour in EC labour law*, in: A.A.H. van Hoek, T. Hol, O. Jansen, P. Rijpkema, R. Widdershoven (eds.), *Multilevel Governance in enforcement and Adjudication*, Intersentia, Antwerpen – Oxford, 2006, page 291. More importantly, the Court of First Instance clearly held in the UEAPME case that the Commission is under the obligation to verify the agreement, which seems to imply that the Commission can refuse to propose the agreement to the Council.

67 COM (1993) 600, page 29.

the adoption of a decision of the agreement as concluded. The Commission does not allow the Council to amend the agreement either. According to the Commission, the Council decision must be limited to 'making binding the provisions of the agreement concluded between the social partners, so the text of the agreement would not form part of the decision, but would be annexed thereto'.⁶⁸ If the Council would decide not to implement the agreement as concluded by the social partners, the Commission will withdraw its proposal for a decision. In such a case, the Commission will examine whether another legislative instrument in the area concerned would be appropriate.⁶⁹

Pursuant to the second paragraph of article 139.2 of the EC Treaty, the Council shall decide on the proposal by qualified majority, except where the agreement in question contains one or more provisions relating to one of the areas for which unanimity is required based on article 137.2 of the EC Treaty.⁷⁰ In that case, the Council shall act unanimously.⁷¹ The EC Treaty itself simply refers to a Council decision to implement an agreement; no choice has been made as to which legal instrument would be the most appropriate means for implementation. According to the Commission, the choice of legal instrument (directive, regulation or decision) depends on the content of the agreement at hand.⁷² To date, all agreements that have been implemented by a Council decision were implemented through a directive. The social partners could alternatively choose to implement the agreement 'in accordance with the procedures and practices specific to management and labour and the Member States' (article 139.2 of the EC Treaty), being the second implementation option. This provision is subject to a declaration ('the Declaration'):⁷³

68 COM (1993) 600, page 29.

69 COM (1993) 600, page 29.

70 Unanimity is required in the fields of: social security and social protection of workers, protection of workers where their employment contract is terminated, representation and collective defence of the interests of workers and employers, including co-determination and conditions of employment for third-country nationals legally residing in Community territory.

71 Some topics may prove difficult to classify, which can make it hard to determine whether a qualified majority suffices or that unanimity is required. Moreover, agreements that need to be implemented may contain topics to which the 'qualified majority rule' applies, but also topics that need unanimity. See for these difficulties A.T.J.M. Jacobs, *European Social Concertation*, pages 374 and 375.

72 COM (1996) 448, page 13.

73 Reference is made to the declaration regarding article 4(2) of the Protocol on Social Policy (14).

The 11 High Contracting Parties declare that the first of the arrangements for application of the agreements between management and labour at Community level referred to in Article 4(2) will consist in developing, by collective bargaining according to the rules of each Member State, the content of the agreements, and that consequently this arrangement implies no obligation on the Member States to apply the agreements directly or to work out rules for their transposition, nor any obligation to amend national legislation in force to facilitate their implementation.

Although the legal status of the Declaration is unclear (it is likely to be regarded as a non-binding and non-enforceable arrangement),⁷⁴ the content is certainly helpful to assess the scope of article 139.2 of the EC Treaty, since it derives directly from the 11 High Contracting Parties.

According to the text of article 139.2 of the EC Treaty and the Declaration, the social partners may implement the content of a European collective agreement by means of national procedures, in accordance with the rules of each Member State. The formal rules of implementation at national level thus depend on the national law of each Member State. As opposed to the implementation of agreements by a Council decision, there are no limitations to implementing an agreement in accordance with procedures and practices in the Member States as to subject matter. Consequently, the European social partners may enter into agreements on all subjects they like. According to the Declaration, however, the content of an agreement may not contravene the laws of the Member State in which it is to be implemented.⁷⁵ Obviously, the content may not violate Community legislation either.

The status of an agreement that is to be implemented in accordance with the procedures and practices specific to management and labour and the Member States is subject to debate. Some consider that the agreement has direct normative effect. Deinert, for instance, developed a theory on the

74 E. Franssen, *Legal aspects of the European Social Dialogue*, page 149. Also Szysczak and Toth argue that the Declaration has no legal effect. See, including references, J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, page 141.

75 According to Kapteyn and VerLoren van Themaat the Declaration is somewhat curious in this respect. According to them, it is obvious that agreements that have to be worked out on national level cannot 'oust national legislation.' P.J.G. Kapteyn and P. VerLoren van Themaat, *Introduction to the Law of the European Communities*, Kluwer Law International, London-The Hague-Boston, third edition 1998, page 1062.

'model of parallel status of effect'.⁷⁶ According to him, European collective agreements have normative effect because of article 139.2, first part, of the EC Treaty. He views that European collective agreements are automatically transferred into the Member States, and enjoy a legal status in that country equal to other (national) collective agreements in that country. The European collective agreements therefore have normative effect, according to Deinert, if and to extent that national collective agreements have such an effect as well within a jurisdiction. Most other scholars view that this is not the case. They argue that the European agreement can only have legal effect, after it has been implemented nationally by the (national) member organisations of the European social partners. They even observe that there is no legal obligation on these national members to actually implement the agreement reached.⁷⁷ That their agreements lack normative effect seems also the view of the European social partners. The European collective agreements reached in the past that were to be implemented by the mechanisms and practices of the Member States, have indeed been transposed actively in the different Member States by the national affiliates. This has been carried out in line with national industrial relation systems, more specifically through national and sectoral collective agreements, codes of conduct and legislation.⁷⁸

76 O. Deinert, *Self-Executing Collective Agreements in EC Law*, in: M. de Vos (ed.), *A Decade Beyond Maastricht: The European Social Dialogue Revisited*, Kluwer Law International, The Hague, 2003, page 43.

77 See also F. Dorssemont, *Some Reflections on the Origin, Problems and Perspectives of the European Social Dialogue*, in: M. de Vos (ed.), *A Decade Beyond Maastricht: The European Social Dialogue Revisited*, Kluwer Law International, The Hague, 2003, page 27. See also J. Rojot, A. Le Flanchec and C. Voynett-Fourboul, *European Collective Bargaining, new Prospects or much Ado about Little*, *The International Journal Of Comparative Labour Law And Industrial Relations*, volume 17, issue 3, 2001, page 353, in which they state: 'No obligation to see that this application [to implement on a national level by collective bargaining; author] is carried out weights on the Member States and the representative bodies having signed (...) have no power to see that it is either enforced or adopted in a national framework by their national constituents.' This text implies that the national members of the European social partners are not forced to implement an agreement. See furthermore C. Barnard, *EC Employment law*, Oxford University Press, 2006, page 90, who states: 'in case of an EC-level agreement, there is no obligation to bargain on these matters at national level nor to ensure that it applies to all workers'. The same view is expressed by Betten, Sciarra and Lyon-Caen, as referred to in J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, pages 140 and 142. Franssen stated: 'At present I see no other option than that the European organisations use their power of persuasion to influence each other and their national affiliates because EU legislation does not provide any solution to these problems.' See E. Franssen, *Implementation of European Collective Agreements: Some Troublesome Issues*, *Maastricht Journal of Comparative Law*, 1998, volume 5, page 62.

78 Reference is made to the EU press release on 11 October 2006, *Turning European Social dialogue into national action – workers and employers implement telework agreement*, as published on www.europe.eu.int/rapid/pressReleases.

3.2 Bargaining 'outside' the European social dialogue

The (European) social partners may also conclude transnational collective agreements 'outside' articles 138 and 139 of the EC Treaty. This, for instance, occurs if transnational collective labour agreements are concluded at company level. These types of transnational collective labour agreements must be considered 'national' transnational collective labour agreements, as they are nothing more and nothing less than agreements governed by national law or laws, having effect in different countries. They give rise to a number of difficulties. There are no specific rules on subjects like the procedure, the negotiating agents and the binding powers of such a transnational collective labour agreement:⁷⁹ it simply has no specific legal status. Its actual (national) status and effects must, in consequence, be determined by national law on a case-by-case basis, in accordance with the principles of private international law.⁸⁰

3.3 Do the current legal frameworks suffice?

The setting of articles 136-139 of the EC Treaty seems to strongly deviate from the 'usual' situation in the Member States concerning collective employment law. For one, the participants of the European social dialogue are not defined in the EC Treaty. It is odd that it is up to the Commission to single out the parties that qualify as 'management and labour', and who are consequently entitled to be consulted and to enter into bargaining within the European social dialogue. This is normally not the task of an executive body, such as the Commission, but rather of a legislative body. More importantly, the selection criteria applied by the Commission to appoint the European social partners involved, are not generally accepted. It is argued that the criteria exclude important social partners, who could have raised the level of representativity if they were entitled to participate in the European social dialogue.⁸¹ All in all, the question which parties constitute (or should constitute) the 'European social partners' is highly debatable. Furthermore, the European agreements reached in the European social dialogue lack direct normative effect. They either need to be implemented by a Council decision, or by national mechanisms and practices. This is obviously also out of the

79 Expert Report, page 27.

80 Expert Report, page 21.

81 For a critical view on the appointment of the European social partners by the Commission see: R. Blanpain, *Sociale partners en de Europese Unie; taak en legitimatie* [Social partners and the European Union; task and legitimacy], in Betten et al. (ed), *Ongelijkheidscompensatie als rode draad in het recht* (Liber Amicorum M.G. Rood) [Compensation of inequality as the red thread in law (Liber Amicorum M.G. Rood)], Deventer 1997, pages 290 ff.

ordinary when compared with most national collective labour agreements. But let us now scrutinise the two different implementation methods.

3.3.1 *Implementation by a Council decision*

Once an agreement concluded in the European social dialogue is implemented by a Council decision, it acquires 'Community status'. This gives a solid foundation to the agreement. In consequence, it will apply throughout the entire EU, with the same legal certainty as other EU legislative instruments have. At first glance, this system seems pretty solid and favourable to the European social partners. A closer look, however, reveals that this mechanism limits the European social partners. These limitations can be divided into limitations concerning the content of the agreement and limitations imposed on the agreement by the implementation procedure.

As explained, the EC Treaty itself imposes important limitations on contents to agreements that are to be implemented by a Council decision. The agreements must concern matters covered by article 137 of the EC Treaty, being the fields in which the Community shall support the activities of the Member States. The collective bargaining topics are therefore limited. This poses a limitation on the bargaining freedom of the European social partners; it limits their autonomy. The same occurs when the implementation process is considered. As stated, the agreement of the European social partners is subject to a number of tests, some of which may limit the social partners further in their collective autonomy. This is the case with regard to the test of the representative status of the contracting parties. There are no 'hard and fast rules' as to when social partners can be considered sufficiently representative. Consequently, the social partners do not know in advance whether their agreement will pass this test. The agreement reached must furthermore avoid imposing administrative, financial and legal constraints in a way which holds back the creation and development of small and medium-sized undertakings. This is a condition that is not to be found in the laws of the Member States, and may restrict the European social partners' room to draft agreements. The fact that the agreement is examined by the Commission on its (political) merits is an obvious limitation of the freedom to collective bargaining of the European social partners. In the end, the collective autonomy puts forward that the social partners are free to determine the working conditions themselves and consequently without 'political' intervention on the merits by the Commission or any

other Community institution.⁸² All agreements implemented by a Council decision must pass the subsidiarity test. Although this test is sensible when it comes to Community legislation, this is less the case in relation to the European social partners seq (if their fruits are not to be considered as substitutes of European legislation). On balance, given the collective autonomy of the European social partners, it should be up to them, and not to the Commission, to decide whether certain measures may be taken at international level or at national level.

From the above it can be derived that agreements implemented by a Council decision impose restrictions on the European social partners. These restrictions make sense, should the European social dialogue be viewed as a method to draft EU regulations, as merely a regulatory technique.⁸³ If, however, the agreements of the European social partners are to be considered 'proper' collective labour agreements, within the 'usual' meaning attributed hereto in the Member States, these limitations to the collective autonomy of the social partners are not acceptable.

3.3.2 *Implementation by national mechanisms and practices*

Implementation by national mechanisms and practices also suffers from a number of disadvantages. A fundamental disadvantage of this implementation technique is that the transnational collective labour agreement loses its 'transnational element' upon implementation, as it scatters into a number of national agreements. This negates the transnational element of the agreement concerned. But there are also practical disadvantages, including (i) the unclear binding effect of the agreement reached, (ii) the insufficiency of rules with regard to the requirements the European social partners have to meet, which may potentially lead to difficulties with regard to the implementation of the agreement and (iii) the difficulties that are in place concerning the effects of the agreement.

As previously mentioned, agreements that are to be implemented nationally lack a direct normative effect. The binding effects that such agreements do have are rather unclear and complicated, but in the end depend on national legislation of the Member State in which the agreement is to be imple-

82 Clear on this is Boonstra, who stated the following: 'autonomy implies that the social partners must be allowed to choose an appropriate procedure and that they should not be pressurised or forced to bargain in the shadow of state intervention.' K. Boonstra, Government Responsibility and Bargaining Scope within Article 4 of ILO Convention 98, page 461.

83 Which, according to Lo Faro, is indeed the case. A. Lo Faro, Regulating Social Europe: reality and myth of collective bargaining, page 161.

mented. Furthermore, as said, the EC Treaty is silent about any demands concerning the European social partners. Article 139.1 of the EC Treaty simply puts that 'management' and 'labour' may enter into agreements. These agreements shall, given article 139.2, first part, be implemented nationally. In deviation of the situation where agreements are to be implemented by a Council decision, there are neither checks on the representativity of the European social partners that entered into a transnational collective labour agreement, nor is their mandate assessed. This may conflict with some national laws. A number of Member States require a certain level of representativity of the social partners in order for them to enter into legally binding (national) collective labour agreements.⁸⁴ The fact that these demands are lacking at European level may conflict with the rules of the countries that have such requirements on national level. As a consequence, the implementation of that agreement may be barred in a certain Member State. Last, once a European agreement is implemented, it should have a 'real' impact within the jurisdiction of the Member States. This is not automatically the case. It depends on the implementation method used what the impact of an implemented agreement is. The implementation methods used with regard to the framework agreement on telework differed considerably, ranging from merely recommendations to proper collective labour agreements. But even when the European agreement is implemented by a collective labour agreement, a real impact is not guaranteed. A particular difficulty in that respect is the status of collective agreements in certain jurisdictions. For instance, in the United Kingdom and Ireland collective labour agreements do not bind by law. Consequently, the content of a European agreement may very well be implemented nationally, but individual parties in some Member States can easily deviate from this collective agreement, while the same parties in other jurisdictions are fully bound to its content. This lack of impact of the European agreement in some states, and in consequence the lack of that agreement's uniform applicability, seems to go against the grain of collective labour agreements, since uniform applicability leading to the elimination of social competition is 'the quintessence' of collective agreements.⁸⁵

To summarise, the implementation of a European agreement reached in the European social dialogue by national mechanisms and practices is rather

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

85 F. Dorssemont, *Some Reflections on the Origin, Problems and Perspectives of the European Social Dialogue*, page 7. See also Expert Report, page 15.

troublesome. Implementation is not always possible and it does not lead to the uniform applicability of the agreement concerned.

3.3.3 *Implementation outside the European social dialogue*

As previously explained, collective labour agreements concluded 'outside' the European social dialogue have (national) status and effects and must, in consequence, be determined by national law on a case-by-case basis, in accordance with the principles of private international law. This may prove troublesome. The status of such national transnational collective labour agreement, for example, does not necessarily have to be the same in all the jurisdictions in which it has force. The definition and criteria of a collective labour agreement may very well be different in each jurisdiction, as a result whereof an agreement that qualifies as a collective labour agreement in the country in which it was concluded, may very well not qualify as such in another jurisdiction to which it applies.⁸⁶ Its status can, therefore, vary from country to country. But even if the national transnational collective labour agreement would be recognised as such in each jurisdiction it has force, its *effects* would still differ from country to country. For example, some countries adhere to the rule that collective labour agreements apply to *all* employees (falling within the scope of applicability of the collective labour agreement) employed by the employer that is bound by the collective labour agreement, while other countries prescribe that collective labour agreements only directly apply to such employees who are a member of the trade union(s) that concluded the collective labour agreement concerned. These differences in status and effects of the national transnational collective labour agreement do not improve its legal certainty. Another problem a national transnational collective labour agreement faces regards applicable law. It is difficult to establish which law applies to the national transnational collective labour agreement. That is also the case with regard to the provisions that aim to regulate the employment conditions of individual employees. It is very well possible, if not likely, that the employment conditions of the employees working in the different countries in which the agreement has force are subject to different national laws. Pursuant to arti-

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

cle 6.2 of the Convention on the law applicable to contractual obligations,⁸⁷ the employment agreement is normally governed by the law of the country in which the employee habitually works. Even chosen law can, given article 6.1 of the Rome Convention, in principle not deviate from the mandatory provisions of the law of the country in which the employee habitually works. If the national transnational collective labour agreement is subject to the law of one country, its incorporation into the employment agreement of an employee working in another country may lead to a situation that to one and the same employment agreement two sets of law apply: the law of the country in which the employee is working, and the law of the country applicable to the collective labour agreement. This leads to complicated legal questions and certainly to uncertainty.

In practice, multinational companies concluding (national) transnational collective agreements with sectoral European trade unions try to work around these difficulties by transposing an international framework agreement into a national collective labour agreement submitted to the legislation of the country in which it is to apply.⁸⁸ Consequently, the implemented collective labour agreements acquire the status and effects as determined in the country of implementation. The law of that country applies as well. However, as a consequence the original transnational collective labour agreement has little meaning anymore, as the legal effects derive from the implemented national collective labour agreements. These agreements do not have a uniform effect, one of the typical aims of collective labour agreements. Moreover, this system can hardly be considered effective. This working around the above-mentioned difficulties is, in sum, a second best option. It would be much more effective to be able to conclude European transnational collective labour agreements.

3.3.4 *Conclusion*

The above shows that the legal means to base proper transnational collective bargaining on are insufficient. In consequence, a new system enabling genuine transnational collective bargaining is necessary, when such transnational bargaining indeed is pursued. This analysis is shared by the possible participants of transnational collective bargaining (European and national trade unions, European and national employers' organisations

87 The Rome Convention is to be replaced by a regulation. Reference is made to the Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), EC No 593/2008, OJ L 177, 4 July 2008, pages 6-16. The replacement will not affect the above analysis on the applicable law.

88 Expert Report, page 27.

and multinational companies). Among these possible participants there is a more or less common opinion that, should transnational collective bargaining be promoted, proper rules on transnational collective bargaining will have to be introduced.⁸⁹

4 Towards a European system of transnational collective bargaining

According to the above, there is (i) a need or demand for transnational collective agreements, while (ii) a new system enabling genuine transnational collective bargaining is required, when such transnational bargaining indeed is pursued. Consequently, there is in my opinion a need for the development of such a new system in the EU. This is also the view that can be witnessed in the legal literature.⁹⁰ It is nicely put by Blanpain, who criticises the lack of proper principles on which (European) transnational collective bargaining could be based: 'There is no doubt that there are insufficient European general principles of law to deal satisfactorily with the legal problems that accompany European collective agreements.'⁹¹

The conclusion that a new system enabling transnational collective bargaining should be developed is shared by the Commission. In its 2002 and its 2005 Communications it stated respectively:

Looking ahead and in the medium term, the development of the European social dialogue raises the question of *European collective agreements* as sources of law. The discussions on the forthcoming reform of the Treaty should take this into consideration.⁹²

89 O. Deinert, *Der europäische Kollektivvertrag* [The European collective labour agreement], Nomos Verlagsgesellschaft, Baden – Baden, 1999, pages 125-151.

90 See for example: M. Blank, *Collective Bargaining in the European Union – The standpoint of IG Metall*, in W.E. Lecher and H.W. Platzer, *European Union – European Industrial Relations? Global challenges, national developments and transnational dynamics*, Routledge, London, 1998, pages 166-167; W.E. Lecher and H.W. Platzer, *Global trends and the European context*, pages 7 and 8; F. Franssen, *De Europese sociale dialoog*, page 19; and A. Sobczak, *Legal dimensions of international framework agreements in the field of corporate social responsibility*, in: K. Papadakis, *Cross-Border Social Dialogue and Agreements: An emerging global industrial relations framework?*, International Labour Organisation, Geneva, 2008, pages 127 and 128.

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

92 Communication 'The European social dialogue, a force for innovation and change', COM (2002) 341, page 19.

Providing an optional framework for transnational collective bargaining at either enterprise level or sectoral level could support companies and sectors to handle challenges dealing with issues such as work organisation, employment, working conditions, training.⁹³

But it is not only the Commission that is keen on further developing transnational bargaining. This idea is also positively received by the European Economic and Social Committee. The Committee 'supports the objective set out by the Commission of promoting the social dialogue at enterprise and sectoral level, whilst taking greater account than has hitherto been the case of the fact that enterprises operate on a cross-frontier basis, with the result that voluntary agreements accordingly assume a cross-border importance.'⁹⁴

As a consequence of these developments, a group of experts led by Ales ('the experts') won a tender to draft a report on, amongst other things, the future of transnational collective bargaining. This report, 'Transnational Collective Bargaining: Past, Present and Future' (the aforementioned 'Expert Report'), was completed in February 2006.

4.1 The Expert Report

Drafting the Expert Report was not an easy task. It had to try to stay away from difficult questions relating to private international law, in order to design a workable system. But more importantly, the Expert Report had to reconcile the interests of many parties, including the parties currently involved in the European social dialogue and the European Works Council. That in itself was a tremendous challenge. The Expert Report is divided in two parts. The first part appraises the existing transnational tools in Europe; the second part defines the reasons and means to develop an optional framework for transnational collective bargaining at EU level.

In the first part, the experts of the Expert Report start to focus on the successes of the SSD Committees. They attribute these successes to: (i) the active presence of the EU institutions, (ii) the dialogue's further development on a voluntary basis and (iii) the establishment of a structured and representative bipartite body. However, they also observe that the effects of agreements concluded within the SSD Committees (in the context of the

⁹³ Communication from the Commission on the Social Agenda, COM (2005) 33, page 8.

⁹⁴ Opinion of the European Economic and Social Committee on the Communication from the Commission on the Social Agenda COM (2005) 33 final, SOC/200, 13 July 2005, paragraph 4.3.2.

European sectoral social dialogue) depend either on the initiative of European institutions or on social partners' action at national level. According to the experts, these conditions can hinder the further development of the European sectoral social dialogue in the view of: (i) assuming an autonomous relevance from national collective bargaining or EU institutions, (ii) guaranteeing a direct and homogeneous impact of agreements on working conditions, and (iii) introducing in SSD Committees bargaining agendas on hard topics. This is not advantageous, especially since the social partners themselves seem keen on concluding agreements with transnational effects, as they have requested the Commission on occasion to propose to the Council to implement these agreements by a Council decision.⁹⁵

Subsequently, the experts focus on company-level bargaining. They discuss the European Company and the European Works Council. They observe that the directives on these bodies may be an inspiring model for transnational collective bargaining. Strong points of these directives are: (i) the definition of a transnational dimension of collective negotiation leading to the establishment of a transnational contractual relation between the company and the special negotiating body, (ii) the conclusion of an agreement which has a transnational dimension and whose scope of application goes beyond the signatory parties, and (iii) the establishment of transnational representative bodies on the side of the employees. Weak points, however, are that: (i) the negotiation process and the agreement itself is limited to the establishment of an employees' representative body and (ii) the composition of the European Works Council is likely to produce consequences on (a) the legitimacy to go beyond information and consultation and to go to negotiation with the company and (b) the relation between the European Works Council and the trade unions.⁹⁶ The experts furthermore discuss framework agreements concluded between companies on the one hand and European Works Councils, international trade unions and/or national trade unions on the other. They observe that experience of transnational collective negotiations at company level show a need for a general legal framework in order to clarify: (i) the procedure, (ii) negotiating agents, and (iii) conditions for the binding effect of concluded agreements.⁹⁷ Transnational collective bargaining could, according to the experts, be very useful with regard to transnational restructurings.⁹⁸ Finally, EC directives may promote the use of transnational collective bargaining, principally with

95 Expert Report, pages 8-15.

96 Expert Report, pages 16-20.

97 Expert Report, pages 21-27.

98 Expert Report, pages 28-30.

regard to restructuring, working time, equal treatment and information and consultation.⁹⁹

The second part of the Expert Report begins with specifying the reasons for engaging in transnational collective bargaining. The experts state three *general* reasons. First, there is a lack of a specific and comprehensive legal framework with regard to transnational collective bargaining as far as: (i) the procedure, (ii) the negotiating agents, and (iii) the conditions for the binding effect of concluded agreements. This lacuna is likely to hamper further developments of the transnational dimension in the view of: (a) the autonomous role of the social partners and (b) the direct and homogeneous impact of agreements signed at transnational level which may also stimulate the parties to introduce more normative topics in the transnational bargaining agenda. Second, the transnational level may likely be the most appropriate level for collective bargaining. Third, transnational collective bargaining may prevent competition on labour standards (social dumping).¹⁰⁰ Subsequently, the experts discuss *specific* reasons for engaging in transnational collective bargaining. Basically, these specific reasons address the weaknesses of current, existing tools concerning transnational collective bargaining. First, there is a lack of rules concerning the legal status of a transnational collective agreement; such an agreement simply does not exist in international law. Furthermore, the international sources on which transnational collective bargaining is sometimes based are aimed at developing information and consultation rights through procedures or ad hoc bodies (SSD Committees and European Works Councils) rather than on transnational collective bargaining. Three, there is a variety of negotiating agents which all intend to play their role in transnational collective bargaining (SSD Committees, European Works Councils, European social partners and multinational companies). European social partners lack the disposal of legally binding and thus effective instruments, while European Works Councils lack the formal legitimacy to engage in (transnational) collective bargaining. Moreover, given the multitude of potential transnational collective bargaining agents, there is an unclear relationship among levels of decision-making which will lead to overlapping agreements, and potentially even to competition or conflict. Five, the existing transnational tools have not established a legally binding system of transnational regulation (which could be repaired by an optional legal framework establishing a transnational collective bargaining system). And last, transnational collective bargaining cannot rely on self-regulation,

99 Expert Report, pages 31 and 32.

100 Expert Report, pages 33 and 34.

as all social partners involved need either EU institution intervention or national transposition in order to create a direct binding effect of their collective agreement.¹⁰¹

The experts propose to create joint negotiating bodies within which transnational collective labour agreements can be concluded. The agreements themselves would not have a legally binding effect, but acquire such an effect through implementation by managerial decision adopted by all national companies in the relevant sector. The system should be set out in a directive providing for an optional framework for transnational collective bargaining on the basis of article 94 of the EC Treaty. The experts state that transnational collective bargaining must be complementary to national collective bargaining and that the bargaining agents must be clearly mentioned in the directive.

At sectoral-level, the initiative to set up a joint negotiating body activating transnational collective bargaining can be taken *jointly* by the European social partners that are considered representative in terms of the European social dialogue and that are representing both sides of the industry, either or not on the request of: (i) national organisations, (ii) a European Works Council (or representative body in the case of a European Company) and the management of a multinational company on subjects submitted to information and consultation, or (iii) a European Works Council for the insertion in the bargaining agenda of subjects submitted to information and consultation. The European (sectoral and cross-industry) social partners must negotiate on the framework agreement for the constitution of a joint negotiating body at sectoral level, composed of said social partners. The agreement must be drafted in writing and must at least define the functioning of the body and its decision-making procedure. The joint negotiating body should precisely define the bargaining agents and the bargaining procedures. In case the initiative to set up a joint negotiating body at sectoral-level derived from the European Works Council with or without the management of a multinational company, the body may integrate a role for a delegation of the European Works Council or the management in the joint negotiating body's procedures. Once established, transnational sectoral collective agreement may be concluded within the joint negotiating body at sectoral-level.

At company-level, the initiative to set up a joint negotiating body activating transnational collective bargaining can be taken *unilaterally* by the European employees' organisations on the request of (i) a European Works Coun-

101 Expert Report, pages 34-36.

cil (or representative body in the case of a European Company) and the management of a multinational company on subjects submitted to information and consultation, or (ii) the management of the multinational company or a group of such companies. The European (sectoral and cross-industry) employees organisations must negotiate with the management of the multinational company involved on the framework agreement for the constitution of a joint negotiating body at company-level. This body is composed of (i) said employees organisations, said management and the European Works Council in a mere consultative role in the case the European Works Council was involved in the request of setting up the body, or of (ii) said employees organisations and said management without the European Works Council in case the European Works Council was not involved in the request of setting up the body. The agreement must be drafted in writing and must at least define the functioning of the body and its decision-making procedure. The joint negotiating body should precisely define the bargaining agents and the bargaining procedures. Once established, transnational company collective agreement may be concluded within the joint negotiating body at company-level.

At both levels, the procedures of the joint negotiating bodies must make clear how the transnational collective agreements can be transposed into 'as many managerial decisions (binding according to the national laws or practices) as the companies of the sector adhering to employers' Sectoral or Multi-sectoral Organisations represented within the joint negotiating bodies at sectoral-level or as the companies of the group represented within the joint negotiating bodies at company-level'.¹⁰² These procedures must also provide for a specific bipartite control system. Within the system of transnational collective bargaining a voluntary and bipartite transnational collective disputes resolution system (on rights) must be in place and provisions on adequate enforcement procedures in the case of non-compliance. All collective agreements must be concluded in writing. A copy of each collective agreement should be available to the parties that can activate the optional framework. For that purpose, copies of the agreements must be transmitted to the Commission which, in turn, has to publish these on a designated website.¹⁰³

¹⁰² Expert Report, page 40.

¹⁰³ Expert Report, pages 37-41.

4.2 Receipt of the Expert Report by BUSINESSEUROPE and ETUC

The Expert Report is received quite differently by BUSINESSEUROPE on the one hand and ETUC on the other.¹⁰⁴ BUSINESSEUROPE formulated 6 reasons as to why the proposals outlined in the Expert Report should not be adopted. First, it sees no need for an optional framework for transnational collective bargaining, as the European social dialogue already permits transnational collective bargaining. In connection, BUSINESSEUROPE denies the existence of problems when implementing transnational texts, as the parties involved can rely on national procedures and rules for implementation. Second, it states that the current transnational social dialogue taking place in multinational enterprises does not constitute genuine bargaining and that the results reached are really no agreements at all. Furthermore, BUSINESSEUROPE argues that the European level is not the appropriate level to tackle common problems, as these problems are global rather than European. Besides, the EC Treaty would not provide for a legal basis for an optional framework for transnational collective bargaining. Fourth, according to BUSINESSEUROPE, introducing an optional framework on transnational collective bargaining would hinder the bargaining process, as the absence of regulations provides the parties involved with the room needed to develop this process. This room should not be restricted. Fifth, BUSINESSEUROPE fears that the introduction of a framework agreement for transnational collective bargaining will interfere with national industrial relations. Last, Community priority should in BUSINESSEUROPE's view rather be focussed on implementing social and employment policies than on debating a new framework that is not needed.¹⁰⁵

These arguments are in my opinion not overly convincing, and to some extent even inconsistent: on the one hand BUSINESSEUROPE denies the existence of transnational bargaining, while on the other it argues that the introduction of a framework agreement for transnational collective bargaining would hinder the further development of such bargaining.¹⁰⁶ Both the Expert Report and the recent ILO research establish a clear increase in transnational agreements concluded between multinational enterprises

104 This section is based on the article of D. Bé, A report on the European Commission initiative for a European framework for transnational collective bargaining, in: K. Papadakis, Cross-Border Social Dialogue and Agreements: An emerging global industrial relations framework?, International Labour Organisation, Geneva, 2008, pages 221-235.

105 A similar negative response on the Report can be found in the Position on discussions on an optional European framework for transnational collective bargaining, as published by the German Bundesvereinigung der Deutschen Arbeitgeberverbände.

106 D. Bé, A report on the European Commission initiative for a European framework for transnational collective bargaining, page 231.

and (transnational) trade unions as of about the year 2000. Consequently, some kind of transnational collective bargaining apparently exists.¹⁰⁷ Although it is true that the agreements reached in this process are not quite like national collective labour agreements, they are nonetheless considered relevant for the companies and the employees by the parties involved, and undeniably the result of bargaining or negotiating leading to an agreement. Furthermore, relying on national laws for implementation, as suggested by BUSINESSEUROPE, complicates matters severely, as substantiated in the preceding part of this contribution. That makes the arguments one, two and six raised by BUSINESSEUROPE little convincing. That the introduction of a framework agreement for transnational collective bargaining will hinder the further development of transnational bargaining obviously depends on the content of that framework (it should give ample room to the parties involved) and is, apart from that, highly debatable. In fact, it has been argued that the *absence* of a framework hinders the development of transnational collective bargaining.¹⁰⁸ BUSINESSEUROPE's fourth argument is therefore not overly strong. The same goes for the third argument. Although it may be true that the common problems facing the social partners are global rather than European in nature, but why not start in Europe to find a solution?¹⁰⁹ As a basis for a framework for transnational collective bargaining the experts took article 94 of the EC Treaty, which basis seems possible for the framework in its current form.¹¹⁰ The fifth argument of BUSINESSEUROPE against the proposals in the Expert Report – transnational collective bargaining should not interfere with national industrial relations – is an argument that should be taken seriously, although BUSINESSEUROPE fails to substantiate why there would be any of such unallowable interference when the proposals in the Expert Report were to be implemented. I, for one, do not see a real reason why such interference is to be expected.

107 See section 2.2.

108 Gallin, for instance, stated: 'International collective bargaining is only different in so far as there is no international framework, such as exists in most countries at national level, to provide a guaranteed legal status to any labour/management agreement reached at international level. Since such agreements are therefore entirely voluntary, they depend even more on the balance of power between the contracting parties at the time they are concluded. This is why there are strong and weak IFAs [international framework agreements; author], and this is also why there are so few of them' (emphasis added by author). D. Gallin, *International framework agreements: A reassessment*, page 26.

109 See Sobczak, who argues: 'To guarantee greater legal certainty than at present, a legal framework for transnational collective bargaining is necessary. Ideally, it should be adopted at international level, but European-wide may constitute a first step and this seems more attainable in the medium term.' A. Sobczak, *Legal dimensions of international framework agreements in the field of corporate social responsibility*, page 128.

110 See on the appropriateness of this legal basis: J. Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*, page 65.

ETUC supports the proposal for a framework on transnational collective bargaining. It should, according to ETUC, complement the existing framework for European social dialogue at inter-professional and sectoral level. ETUC views the framework on transnational collective bargaining as an initiative that meets an 'unquestionable need'.¹¹¹ ETUC did have a number of technical comments on the proposals set out in the Expert Report, such as on the binding character of the legal framework, the possible sanctions and means of recourse and actions intended to deal with potential conflicts of interests during bargaining.¹¹²

Given the mixed responses on the proposal for a framework on transnational collective bargaining, it is unlikely that the Commission proceeds at this point in time with the proposal. It is expected that the Commission takes stock of the situation, and indicates further steps in a communication.¹¹³

4.3 Evaluation of the Expert Report and a possible new direction to proceed

In my view, the Expert Report is very useful and gives a valuable analysis on transnational collective bargaining. As already follows from the previous sections of this contribution, I agree with the analysis in the Expert Report when it comes to transnational collective bargaining. I therefore subscribe to the point of view that a new system on transnational collective bargaining should be pursued. I also agree that current tools are insufficient when it comes to developing proper transnational collective bargaining and that a new system should be introduced by the European legislator. The arguments of the experts forwarded on that subject are convincing. I do, however, have doubts on the proposals on a legal framework on transnational collective bargaining forwarded in the Expert Report. I would not favour a system of transnational bargaining that – like the provisions on the European social dialogue – provides for an institutionalised collective bargaining system, not based on national industrial relations' traditions of the Member States.

111 European Trade Union Confederation, The coordination of collective bargaining 2007, resolution adopted in the meeting on 7 and 8 December 2006, paragraph 5.1. The document is available at: www.etuc.org/a/3170.

112 D. Bé, A report on the European Commission initiative for a European framework for transnational collective bargaining, pages 232 and 233.

113 D. Bé, A report on the European Commission initiative for a European framework for transnational collective bargaining, page 234.

In my opinion, the proposals 'copy' many of the flaws of institutionalised collective bargaining into the new system of bargaining in joint negotiating bodies. The joint negotiating bodies are comprised of the same European social partners that are active in the European social dialogue. That directly brings in the entire debate on the appropriateness of the selection criteria of the European social partners, as applied by the Commission (see section 3.3). This choice is therefore, in my opinion, unfortunate (although understandable from the position of the experts, who needed to reconcile the interests of all parties currently involved in the European social dialogue). This is especially the case as all representativity issues that have arisen in the European social dialogue – which are, as mentioned in section 3.1 above, difficult to solve – are even more 'painfully' present in the proposed system than in the bargaining system within the European social dialogue.¹¹⁴ After all, in the European social dialogue the legitimacy of the collective agreements is partially founded on the fact that either (i) the Commission or the Council can deny implementation of a European collective agreement after running a series of tests, or (ii) the national social partners implement the European collective labour agreement in accordance with the procedures and practices specific to management and labour and the Member States, meeting each State's specific representativity requirements. In the first case, part of the legitimacy of the European social dialogue is gained by the fact that two European institutions verify the agreement, in the second case, because the agreement is implemented in the same manner as national collective labour agreements. In the proposed system this additional legitimisation is not in place, as the transnational collective agreement is implemented by managerial decision. The entire legitimacy should therefore be derived from the representativity of the social partners, which seems not to be an overly solid foundation given the many critiques on that particular topic. Moreover, the facts that (i) the collective agreements concluded within the joint negotiating bodies have to be implemented by managerial decision¹¹⁵ and (ii) they lack uniform effect as they are binding 'according to the national laws or practices', which differ from country to country, are somewhat at odds with 'typical' national collective bargaining practices. In fact, they are not easy to reconcile with one of the principles that the experts (rightfully) hold dear:

114 And all these representativity issues are fully in place in the proposed system, as the experts argue that the European employers' and employees' organisations in the proposed system must satisfy the representativity test according to the UEAPME case. See Expert Report, page 37.

115 Implementing collective labour agreements by managerial decision is in itself rather peculiar. Why should management have the sole power to implement a collective agreement that is the fruit of bargaining between two parties? To some extent, it negates the collective element of the agreement reached. The probable reason for this system is to circumvent private international law aspects.

a direct and homogeneous impact of agreements.¹¹⁶ This is the same flaw that can be found back in collective bargaining within the European social dialogue.

The reason that these flaws are copied in is, in my view, because the experts wished to stick as closely to the European social dialogue as possible: the same parties (besides individual employers) can conclude collective labour agreements as in the European social dialogue, and bargaining in the proposed transnational bargaining system occurs in a similar surrounding as already existing in the sectoral European social dialogue (the joint negotiating body versus the SSD Committee). This is, in my view, an unfortunate choice. A new system of transnational collective bargaining should in my opinion not be based on a new form of the European social dialogue but should instead be more comparable to 'classical' collective bargaining as is in place in the Member States.

Neither collective bargaining within the European social dialogue, nor transnational collective bargaining in the new system proposed by the experts resembles national collective bargaining. This is rather clear with regard to the European social dialogue: 'Neither the Maastricht Treaty, nor its successor negotiated in Amsterdam in June 1997, offers any legal basis for collective bargaining in the 'classical' sense at European level.'¹¹⁷ But this is also clear with regard to the proposed new system, as the Expert Report neither touched on national laws, nor on the three classical rights recognised in national laws of the Member States: the freedom of association, the right to collective bargaining and the right to strike. Because of the gap between the current European collective bargaining system (within the European social dialogue) and the proposed new system on transnational collective bargaining on the one hand, and a new system somewhat comparable to the ones that exist in the Member States on the other, collective bargaining cannot fully offer all its advantages as set out above.¹¹⁸ That is not to say that the current system is of no relevance to 'genuine' European collective bargaining, since it is. It may be considered as a first step to a more classical manner of collective bargaining, or, as Platzer puts it:¹¹⁹

116 Expert Report, pages 15 and 34.

117 W.E. Lecher and H. W. Platzer, *Global trends and the European context*, page 8.

118 Or, as Lo Faro puts it with regard to the European social dialogue: '(...) the actual rules originally laid down by the ASP [Agreement on Social Policy; the predecessor of the current articles 136 - 139 of the EC Treaty; author] do not provide the conditions for fully developed bargaining activity by the social partners.' A. Lo Faro, *Regulating Social Europe: reality and myth of collective bargaining*, page 134.

119 H.W. Platzer, *Industrial Relations and European Integration*, page 85.

Even if the mode of regulation provided for in the Social Protocol [the predecessor of the current articles 136 - 139 of the EC Treaty; author] cannot currently be interpreted as offering a path towards European collective bargaining in its classical sense (among other things, because there is no appropriate European law laying down a corresponding autonomous norm-setting power), these processes of interaction and decision-making may be regarded as a 'playing ground' (Lechner 1996: 36ff) for further social and economic concertation and – in the longer term – for framework collective agreements.

Platzer thus pleads for a bargaining system that is comparable to national bargaining ('collective bargaining in its classical sense'), which is another system than is proposed in the Expert Report. Equally, Blank is in favour of a transnational collective bargaining system based on the classical rights and procedures in place in Member States like Germany.¹²⁰

If one looks at the more long-term prospect of cross-border European collective bargaining with the aim of cross-border agreements, it is evident that one indispensable precondition is the anchoring of collective rights at European level. This includes freedom of association, the right to collective bargaining and the right to strike, along with a legal framework – comparable with the German Collective Agreements Act (*Tarifvertragsgesetz*) – to establish the way in which collective agreements are to be implemented.

Also Bercusson calls for European collective bargaining closer akin to the traditions of the Member States. He argues that the European social dialogue was developed as a consequence of the failure of the legislative process in developing EC labour law. Therefore, collective bargaining in the European social dialogue is placed in a legislative perspective, rather than in the traditional perspective of industrial relations. He takes the opinion that such legislative perspective is erroneous: 'European labour law cannot afford to abandon national labour law systems, traditionally rooted also in an industrial relations model.'¹²¹ I have to agree with these opinions: a European collective bargaining model based on national traditions should be developed. That is the only way to tackle the problems surrounding col-

120 M. Blank, *Collective Bargaining in the European Union – The standpoint of IG Metall*, pages 166 and 167.

121 B. Bercusson, *Democratic Legitimacy and European Labour Law*, pages 164 and 165.

lective bargaining within the European social dialogue, flaws which are also, at least partially, 'copied in' in the proposals of the experts.¹²²

5 Concluding remarks

The observations of the previous sections lead to the conclusion that a proper system, enabling genuine transnational collective bargaining, may very well be worthwhile to pursue. The proposals from the experts, however, are in my view overly reliant on the procedures developed in the European social dialogue. The flaws of that system are therefore also present in the experts' proposals. That is unfortunate, as this may stand in the way of a further development of transnational collective bargaining. In my view, a European system on transnational collective bargaining would be best based on the traditions of national industrial relations of the Member States.¹²³ Such a system could improve Europe from both an economical and a social point of view.

122 In order to avoid possible misunderstanding, the aforementioned does not mean that the Expert Report is 'without value', because, on the contrary, it is highly valuable due to its clear assessments.

123 And that is a system I will try to develop in my doctoral thesis, which will be published later on this year.