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Cross-Border Collective Bargaining and Transnational Social Dialogue

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Werner Eichhorst (IZA)
Michael J. Kendzia (IZA)
Barbara Vandeweghe (IDEA Consult)

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DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT
ECONOMIC AND SCIENTIFIC POLICY **A**



Cross-border collective bargaining and transnational social dialogue

EMPL



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

EMPLOYMENT AND SOCIAL AFFAIRS

**Cross-border collective bargaining and
transnational social dialogue**

STUDY

Abstract

The present study analyses cross-border collective bargaining and transnational social dialogue across the EU and aims to survey its impact at the European level. Therefore, the study discusses the current prevailing EU legislative framework as well as the latest developments within this area. By mapping the social partnership across the EU, it is shown that the system of industrial relations differs from Member State to Member State, in particular between the EU-15 and the EU-12 Member States. The study also finds that in practice cross-border collective bargaining plays only a minor role, while transnational social dialogue including international and European framework agreements has been developing significantly during recent years, although no legal framework for such transnational texts exists thus so far. Similarly, it is noted that European Works Councils constitute effective motors within the development process of transnational social dialogue. The study concludes with a discussion on further advancement of EU legislation and the formulation of practical policy recommendations for the European Parliament.

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AUTHORS

Werner Eichhorst (IZA)
Michael J. Kendzia (IZA)
Barbara Vandeweghe (IDEA Consult)

RESPONSIBLE ADMINISTRATOR

Ms. Laurence SMAJDA
European Parliament
DG Internal Policies of the Union
Policy Department A - Economic and Scientific Policy
B-1047 Brussels
E-mail Poldep-Economy-Science@europarl.europa.eu

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ABOUT THE EDITOR

To contact the Policy Department or to subscribe to its newsletter please write to: Poldep-Economy-Science@europarl.europa.eu

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LIST OF ABBREVIATIONS

CEC	European Confederation of Executives and Managerial Staff
CEEMET	Council of European Employers of the Metal, Engineering and Technology-based Industries
CEEP	European Centre of Employers and Enterprises providing Public services
CSR	Corporate Social Responsibility
ECJ	European Court of Justice
EFA	European framework agreement
EFFAT	European Federation of Food, Agriculture and Tourism Trade Unions
EIFs	European industry federations
EMCEF	European Mine, Chemical and Energy Workers' Federation
EMF	European Metalworkers' Federation
EMU	European Monetary Union
EPSU	European Federation of Public Service Unions
Epsucob@	EPSU's collective bargaining network
ETUC	European Trade Union Confederation
ETUF: TCL	European Trade Union Federation: Textiles, Clothing and Leather
Eucob@n	European collective bargaining network
EU-12	The 12 Member States which joined the European Union after 1 May 2004
EU-15	The 15 Member States which were members of the EU before the enlargement on 1 May 2004

EWC	European Works Council
GUF	Global Union Federation
IFA	International framework agreement
ILO	International Labour Organization
IRTUC	Interregional Trade Union Councils
MEB	Multi-employer bargaining
MNC	Multinational company
OECD	Organisation for Economic Co-operation and Development
PWD	Posting of Workers Directive
SE	Societas Europaea (European Company)
SEB	Single-employer bargaining
TAW	Temporary agency work
TCA	Transnational company agreements
TFEU	Treaty on the Functioning of the European Union
UEAPME	European Association of Craft, Small and Medium-Sized Enterprises
UNI Europa Finance	Union Network International Europe Financial Services
UNI Europa Graphical	Union Network International Europe Graphical Sector

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EXECUTIVE SUMMARY

Various forms of collective bargaining exist across the EU

Collective bargaining is a process between unions and employers regulating the terms and employment conditions of employers. However, there is no homogeneous definition for collective bargaining across EU Member States and a fully-fledged definition of cross-border collective bargaining and transnational social dialogue does not exist in the EU either.

Within this study, transnational social dialogue constitutes the consultation procedure between social partners at various levels of industrial relations addressing softer issues. Nevertheless, cross-border collective bargaining is interpreted as a relatively narrow concept describing agreements on wages and working conditions.

In contrast to collective agreements, which are negotiated by national social partners, transnational agreements are not legally binding. Cross-border collective bargaining in Europe resulted from the European Monetary Union (EMU) and was put in place to avoid a race to the bottom concerning wage costs of different national trade unions in an attempt to increase international competitiveness.

However, the role of cross-border collective bargaining is rather limited. On the one hand, this is due to the fact that cross-border collective bargaining is a unilateral approach and there is no evidence of the engagement of employers in terms of any coordinating of wages. On the other hand, a great diversity of collective bargaining systems in Europe exists. This is especially true within countries with single-employer bargaining.

In general, bargaining can take place in various forms. It occurs, for instance, between trade unions and individual companies (single-employer bargaining) or between union federations and employer associations (multi-employer bargaining). This means trade unions which like to bargain at the sectoral level are sometimes faced with structures of company-level bargaining. Thus, the coordination of collective bargaining at the European level has become more and more intricate. Also, the enforceability of the agreed positions is an issue, since most of the initiatives are of voluntary nature.

With regard to transnational social dialogue, there is evidence of a trend regarding the increasing number of transnational company agreements, such as international and European framework agreements, which are concluded between single employers signed at the global and European company level. Nor are these transnational collective agreements subject to any restriction as to substantive content or legislative procedure.

Recent directives strengthen the common internal market of the EU

The current state of play of EU policies on labour regulation can be found in the Social Agenda 2005–2010 of the European Commission, which shall help facilitate transnational collective bargaining by initiating the concept of an optional legal framework for transnational collective bargaining. It should be stressed that the study differs explicitly between cross-border collective bargaining and transnational social dialogue. Nevertheless both concepts share an overlapping area of European framework agreements, which include binding elements.

However, neither the proposal of an optional legal framework for transnational collective bargaining nor the statement of the European Commission on the lack of a legal framework exhibit concrete action with regard to the establishment of a legal framework for cross-border collective bargaining and transnational social dialogue.

The cases of Laval, Viking and Ruffert show that within the recent debate on the posting of workers, the freedom of movement of workers and the freedom of services market interests seem to get the upper hand regarding the right to take industrial action.

Transposing European legal instruments into national law may enhance the effectiveness of current initiatives. Recent directives such as the Posting of Workers Directive and the Directive on Parental Leave play an essential part of the EU's approach to a further integration of the European Union by strengthening the common internal market.

Social partnership facilitates the solution of problems

European social partners possess the right to be consulted by the Commission, and may also decide to negotiate binding agreements. The institutional basis for that kind of social dialogue is part of the Treaty on the Functioning of the European Union (TFEU). To date, European social dialogue has been inserted into over 300 joint texts by the European social partners. As shown in the last section the European Commission financially supports social partnership across the EU, for example in terms of capacity-building and translation help.

The results of European cross-industry social partnership have been in a continual process of exchange. A certain number of agreements have since concluded after the legal possibility was made by the European treaties in 1993. This in turn led to several outcomes, such as agreements on parental leave, part-time work and fixed-term contracts. European Works Councils are bodies representing the European employees of a company which inform and consult workers at the transnational level. Since their numbers have increased significantly since 2000, they have become an ever more important body within the system of industrial relation in Europe.

The case of the European Works Councils Directive shows a strong facilitating role of the social partners opening up an opportunity to renegotiate an otherwise blocked directive and is a good example of successful informal trilogue between the Commission, Council and Parliament. Nonetheless, there is no underlying automatism concerning the further development of social partnership across the EU.

The systems of industrial relations differ significantly across the EU

A great diversity of national systems of industrial relations exists in Europe. Hence, it is difficult to ensure uniform commitment from social partners at all levels. A clear descent of the coverage by collective agreements can be observed between Western and Eastern European states.

Especially in the EU-12 Member States social partner organisations do not exist or are still in a nascent phase. A significant characteristic of the European model is that social dialogue plays a crucial role not only at the national but also at the EU level. However, the core problem remains the effective participation of employers in cross-border collective bargaining.

In order to set up guidelines for European transnational agreements, several European sectoral union organisations have begun establishing institutions for transnational union cooperation. The EU promotes the exchange of experiences of the social partners by allocating financial help, a continual monitoring process and conductive studies concerning transnational company agreements. In addition, an expert group has been established to discuss key issues of the topic.

Transnational company agreements help promote European values at a global level

International framework agreements promote core labour standards and Corporate Social Responsibility. Yet workers are also interested in spreading other issues, such as health and safety, with the help of international framework agreements.

International and European framework agreements have a certain influence on workers, although they are on a voluntary basis.

However, transnational company agreements are the most innovative way to deal with human resource issues and are able to transpose European values at a global level. Improving the ownership of these agreements constitutes an important challenge for the future, which could be achieved by establishing concrete mandates.

European Works Councils are drivers of transnational social dialogue

European Works Councils have dramatically changed the landscape of social dialogue in Europe by imposing several directions. They are effective drivers in the development process of transnational social dialogue.

Two types of European Works Councils exist. The first includes employer's representatives, but the second type does not.

The increasing number of European Works Councils and their great participation in signing European and international company agreements makes them drivers in the development of transnational social dialogue. However, the mandate of European Workers Councils in terms of signing transnational framework agreements should be cleared.

Six key recommendations

Social partners as potential allies of the legislative process

Both cross-border collective bargaining and transnational social dialogue result from the ongoing process of Europeanisation and can help establishing a common denominator in terms of social standards and values.

The results of European cross-industry social partnership have been in a continual process of exchange. Recent directives such as the Posting of Workers Directive and the Directive on Parental Leave have contributed to furthering the integration of the European Union by strengthening the common internal market. The case of the European Works Councils Directive showed a strong facilitating role of the social partners opening up an opportunity to renegotiate an otherwise blocked directive.

The kind of exchange of views and a close cooperation between the social partners and EU institutions might therefore serve as a preliminary stage of the following legislative process. But still, the structure of social partnership is not well developed in all Member States of the EU. This could undermine the further exchange process in the near future, since no common underlying automatism concerning the development of social partnership across the EU exists.

The example of the European Works Councils has shown a strong facilitating role of the social partners. The social partners effectively helped draft a compromise outside formal social dialogue. The role of the social partners has grown in importance. They have been effective actors within the framework of the social dialogue where they are asked to negotiate on regulatory dossiers and establish agreements that can either be implemented via national collective bargaining or become European law later on by way of a transposition into a directive.

In this respect the social partners can help formulate European legislation so that the influence of other actors, such as the European Parliament, is reduced. In addition, the social partners are able to relaunch European legislation which is blocked in the decision making process by formulating a feasible compromise. Therefore, the social partners should be seen as potential allies of the European Parliament in view of transnational social policy.

Further investigation of cross-border collective bargaining and transnational social dialogue

Outside the Commission's agenda, the Parliament can only try to raise awareness and suggest action by reports and resolutions. The role of the European Parliament is heavily constrained in the area of transnational social dialogue and cross-border collective bargaining.

A further observation and monitoring ought to be in the interest of the Parliament, since the Europeanisation leads to new forms of information and consultation at the EU level. At present, the impact of cross-border collective bargaining is rather restricted due to the missing commitment of the employers to engage in cross-border collective bargaining. But new cross-border networks are developing and a later cross-border bargaining of wages and working conditions at the EU level cannot be excluded. However, the outcome of cross-border collective bargaining is muted.

As regards transnational social dialogue, the number of these agreements has been increased over the last decade. It appears to be an appropriate tool to spread the notion of core labour standards and Corporate Social Responsibility. Thus, transnational social dialogue can be interpreted as milestones with regard to the promotion of core labour standards and Corporate Social Responsibility.

Globalisation led to a certain imbalance between the scope of global actors (like multinational companies) and social actors (like trade unions). Hence, these agreements can also be interpreted as new and innovative instruments which cope with a further intensification of globalisation. But still, it is true to say that these agreements are in a legal no man's land and therefore it is unforeseeable from a labour law perspective in which direction transnational company agreements will move. Further investigation of cross-border collective bargaining and transnational company agreements could help assess their contribution to the system of industrial relations in Europe.

Raising awareness of European Works Councils as contributors in the development process of transnational company agreements

European Works Councils are transnational bodies with growing importance. Similarly, they have changed the landscape of social dialogue in Europe and are responsible for the signing of European and mixed transnational agreements.

Together with European companies (SEs) they build a strong base for cross-border trade union cooperation, since they have proven to be a practical way of ensuring a space of dialogue and thus constitute effective contributors in the development process of transnational company agreements.

A possible approach to the enforcement of transnational company agreements could be to create a European rule on the standing of workers' representative bodies. According to labour law experts, the European Works Councils Directive entails such a rule, though it is not yet clear, whether such a provision could also comprise transnational company agreements concluded in the margin of European Works Councils activities. However, the European Parliament should respect the growing importance of European Works Councils within transnational social dialogue across the EU.

Providing support in initiating social partnership

The European Parliament should further fully support the autonomy of the social partners. At the EU level, the European Parliament should therefore help establish widely social partnership, in particular with regard to Central and Eastern European Member States.

The variety of national systems of industrial relations is due to historic and cultural sources and should not be ignored. Yet, to ensure cooperation between national unions and employers' organisations across the EU the European Parliament should further fund social dialogue in view of arranging meetings between the social partners. In addition, an exchange with experts groups on a regular basis can be useful to install organisations.

The existing budget lines to promote social partnership should not be expanded, because the support of expert meetings and translation help seems to be sufficient. The European Parliament has autonomous budget lines on social dialogue and should be committed to upholding the financial back-up of the exchange of social partners.

The European Parliament should further call for a wide debate between EU stakeholders. It should also favour an effective dialogue between Parliament and the stakeholders to form a 'transnational social dialogue pact' with continual meetings and realistic targets, since the European Parliament seems to have more interest in binding legislation than the European Commission.

Modifying regulations on international private law

At present, private international law is highly harmonised by regulation of the EU, but clear rules to decide about the signing and commitment of transnational social dialogue do not yet exist. Given the deadlock at the European level regarding a more binding character of transnational agreements, the European Parliament should rather help improve and modify the regulations on private international law which could be seen as a pragmatic solution.

Hence, the European Parliament should contribute to improving and modifying the regulations on international private law (Brussels I and Rome I). Furthermore, the Parliament could address the creation of new rules. This could entail a private international law solution or (even more ambitious) a revised version of the Ales Report.

Strengthening the European level could be a good idea, although the role of the European Parliament to create a possible legal framework is restricted. This would then imply additional private international law rules safeguarding recognition and interaction with national rules. The European Parliament can help advance European legislation according to the TFEU by consulting properly prior to the initiative proposed by the European Commission. But still, this task will be very demanding.

Putting transnational social dialogue in a perspective

Advancing cross-border collective bargaining and transnational social dialogue is a challenging task. Interaction between employers and trade unions at the European level is an emerging policy area. Major progress can only be achieved if there is sufficient support from the European social partners themselves. Hence, the role of both the European Commission and the European Parliament is quite restricted. Currently, there is no widespread consensus regarding the establishment of a binding European institutional framework for collective bargaining.

In this context, pushing for a European directive on collective bargaining is not a viable strategy. However, both the Commission and the Parliament should stimulate and support the development of social dialogue at the European level which has in some circumstances helped achieving European solutions to political issues. However, generally speaking, social partner agreements cannot replace European legislation.

1. INTRODUCTION AND OVERVIEW

KEY FINDINGS

- Collective bargaining is a process between unions and employers regulating the terms and employment conditions of employers. However, there is no homogeneous definition for collective bargaining across EU Member States. A fully-fledged definition of cross-border collective bargaining and transnational social dialogue does not exist in the EU either.
- Cross-border collective bargaining in Europe resulted from the European Monetary Union and was put in place to avoid a race to the bottom concerning wage costs of different national trade unions in an attempt to increase international competitiveness.
- Cross-border collective bargaining is interpreted here as a relatively narrow concept describing legally binding agreements on wages and working conditions.
- Transnational social dialogue constitutes the consultation procedure between social partners at various levels of industrial relations addressing softer issues.
- In contrast to collective agreements, which are negotiated by national social partners, transnational company agreements, such as international and European framework agreements, which are concluded between single employers, are signed at the global or European company level and European Works Councils.
- These transnational collective agreements are not subject to any restriction either as to substantive content or legislative procedure. That is, they do not have a legally binding character.
- The Europeanisation of collective bargaining can be interpreted as a multi-dimensional process influenced by national and European developments and by general economic or sector-specific variables.

1.1 Conceptualisation and definition

A clear distinction has to be made between social dialogue and collective bargaining. In general, collective bargaining can be interpreted as the process between unions and employers aiming at setting out the terms and conditions of employment of employers. In particular, collective agreements settle core issues such as wages and working time, and specify the rights and responsibilities of trade unions.

The Community Charter of the Fundamental Social Rights of Workers constitutes the fundamental right of collective bargaining. Article 156 of the Treaty on the Functioning of European Union (TFEU) states that the

'Commission shall encourage cooperation between the Member States and facilitate the coordination of their action in all social policy fields under this Chapter, particularly in matters relating to the right of association and collective bargaining between employers and workers.'

However, the borderlines between collective bargaining and social dialogue are not always clear. The reason for this is predominantly the wide range of different national structures of bargaining in the EU (da Costa, I. and Rehfeldt, U.). For instance, Member States such as Belgium and Germany have different concepts of collective bargaining. In Germany the systems comprises a rather limited amount of bargaining topics such as wages and working time with some elements of training. In Belgium, France and the Netherlands collective labour agreements include wages and further conditions of employment (e.g., working time, restructuring and retirement issues, among others). This means that all negotiations that lead to a certain agreement belong to collective bargaining in Belgium.

Collective bargaining refers to the negotiation process between workers and employers and the application of the content to govern the terms and conditions of employment relationship (Windmuller, J. P. et al.).

Not only does the definition differ from Member State to Member State, but so too, does the impact of such a collective agreement. This includes the questions of whether they have a binding effect on employment contracts, or whether they encompass those partners signing them or all employers.¹

In the present study, cross-border collective bargaining takes place at the regional and intersectoral level – mostly between national and sectoral trade unions and employers. This form of collective bargaining aims at coordinating collective bargaining on wages, working time and training. Those initiatives, for example the Doorn Group or the engagement of the European Metalworkers' Federation, lead to recommendations and joint opinions. Both the influence and the dissemination of cross-border collective bargaining are rather limited and will be discussed in a later section.

Visser suggests a narrow definition and clearly differs social dialogue from collective bargaining. According to him, social dialogue “is not the same as bargaining, but provides a setting for more efficient bargaining by helping to separate bargaining over the state of the world from bargaining over the division of costs and benefits” (Visser, J.: 184). That means social dialogue is a first step to help understand each other in terms of a framework of reference which can later result in collective bargaining where social partners engage in negotiation of their positions. This approach was endorsed by the European Union High Level Group on Industrial Relations, which interpreted social dialogue as an elaboration process in which intentions and capacities of each actor are explained (Ishikawa, J.).

According to the definition of Eurofound, social dialogue “is used in the term European social dialogue to describe the institutionalised consultation procedure involving the European social partners. The term is also used to describe the processes between social partners at various levels of industrial relations” (Eurofound, 2010b).

In order to explain transnational social dialogue, it should be noted that the EU itself constitutes a transnational construction. From the European perspective, social dialogue is a wider expression than collective bargaining and needs to be differentiated from tripartite concertation and consultation (see Table 1). Tripartite concertation is an exchange between the social partners and European public authorities, whereas consultation of the social partners focuses primarily on the activities regarding common committees and consultations. Thus, social dialogue refers only to bipartite work between employers and workers representatives. When European public authorities take part in the discussion, social partners prefer to talk of tripartite concertation.

¹ European Commission, ‘Transnational agreements and texts negotiated or adopted at company level: European developments and perspectives. The case of agreements and texts on anticipating and managing change’, Background document for the facilitation of a meeting of the Restructuring Forum devoted to transnational agreements at company level, Brussels, July 2008.

At the European level the European Commission differs between a bipartite dialogue consisting of European employers and trade unions organisations and a tripartite dialogue including not only the social partner, but also public authorities (Eurofound, 2010g).

Table 1: Classification of the terms used

Dimension	Cross-border collective bargaining	Transnational social dialogue
Independent area	<ul style="list-style-type: none"> - Regional and intersectoral - Coordination of collective bargaining on wage/working time/training - National/sectoral trade unions and employers - Doorn Group, European Metalworkers' Federation - Recommendation, joint opinion 	<ul style="list-style-type: none"> - National/sectoral and intersectoral - Trade unions, European Trade Union Confederation, European Industry Federations, Global Union Federations - Businesseurope, European Association of Craft, Small and Medium-Sized Enterprises (UEAPME), European Centre of Employers and Enterprises providing Public services (CEEP) and other employers organisations - Multinational companies, and European Works Councils - Joint declarations, declaration of interest, consultation and exchange of information - Code of conduct - International and European framework agreements not including provisions to implement the content (no binding character)
Overlap area	<ul style="list-style-type: none"> - European framework agreements including provisions and a calendar to implement the content, e.g. European framework agreements regulating enterprise restructuring (i.e., with a binding character) - European Industry Federations, employers organisation 	

The International Labour Organization (ILO), however, uses a far broader term. According to the ILO, social dialogue comprises

'all types of negotiations, consultation or simply exchange of information between, or among, representatives of governments, employers and workers on issues of common interest in relation to economic and social policy. It can exist as a tripartite process, with the government as an official party to the dialogue or it may consist of bipartite relations only between labour and management (or trade unions and employers' organisations), with or without indirect government involvement. Concertation can be informal or institutionalised, and often it is a combination of the two. It can take place at the national, regional or at enterprise level. It can be inter-professional, sectoral or a combination of all of these' (ILO, 2007).

The definition of the ILO is broader and takes into account the different combinations serving nearly as a synonym for the system of industrial relations.

European social dialogue takes place at the sectoral, intersectoral and company level. An in-depth analysis of the different level of transnational social dialogue and its outcome takes place in section 4. Table 2 provides a general overview of European social dialogue.

Table 2: European social dialogue at a glance

European social dialogue		
Intersectoral social dialogue	Sectoral social dialogue	European Works Councils, International Framework Agreements, European Framework Agreements, Societas Europaea (SEs)
National social dialogue		
Cross industry	Sectoral	Company

As Table 2 shows, European social dialogue takes place at cross-industry, sectoral and company level. National social dialogue is linked with all levels and has therefore a strong impact on all forms of social dialogue at the European level. Social dialogue issues address only “soft issues”, unlike “hard issues” such as wages and working time, which are considered to be issues of collective bargaining. Transnational company agreements (TCAs), encompassing international and European framework agreements, can be concluded between a transnational company and an international union federation in order to ensure fundamental rights, such as the ILO’s core labour standards and Corporate Social Responsibility (CSR) initiatives in all locations of the company. The ILO’s core labour standards include (ITC, 2010):

- freedom of association and the effective recognition of the right to collective bargaining,
- the elimination of forced or compulsory labour,
- the abolition of child labour,
- and the elimination of discrimination.

A very active transnational bargaining is currently taking place in companies. International and European framework agreements (IFAs) deal in general with more human resources related aspects within the EU, especially with, among others, restructuring, management of change, equal opportunities, mobility and training.

Since these agreements do not refer to wages and working time, the concluded agreements do not belong to collective bargaining but to negotiation, or rather social dialogue, at company level (as shown in Table 1). Consequently, the social partners in 2006 agreed on continuing gathering and exchanging information on the subject.² To date, a number of questions are open, such as the transparency, the signatories, their legal effects, as well as dispute resolutions.

² European Commission, ‘Transnational agreements and texts negotiated or adopted at company level: European developments and perspectives. The case of agreements and texts on anticipating and managing change’, Background document for the facilitation of a meeting of the Restructuring Forum devoted to transnational agreements at company level, Brussels, July 2008.

Similarly, the scope of application for the term social dialogue is broader and leaves more space for further discourse. Hence, to a certain extent cross-border collective bargaining can be seen as a part of transnational social dialogue when European Framework Agreements are concluded, for instance with regard to the regulation of enterprise restructuring, which entails provisions with a binding calendar to implement the content.

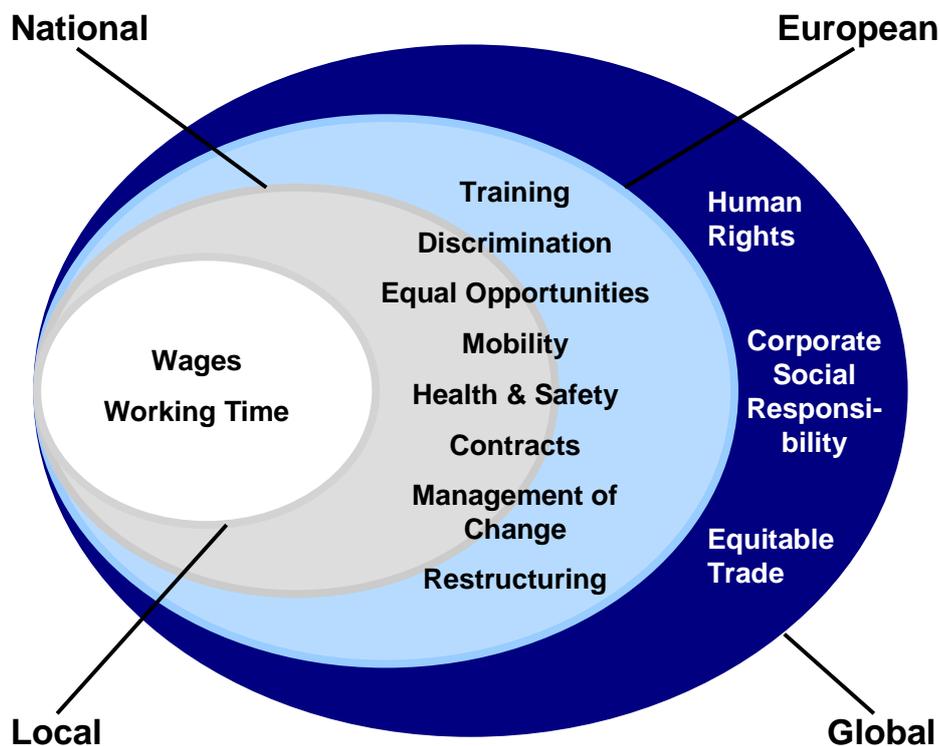
So despite the attempt to clearly delimit both expressions, the boundaries between collective bargaining and transnational social dialogue remain blurred and even overlap exists (see Table 1 and Figure 1).

In addition, da Costa and Rehfeldt treat cross-border collective bargaining and transnational collective bargaining as synonyms, which are defined as

‘collective bargaining practices, between employer and employee representatives, that aim at reaching transnational agreements (European, global or other international level, such as North or South American, Asian, African, and bilateral) regardless of the nature of the agreements (whether reached or not), the content of which can be just symbolic or extremely far-reaching’ (Da Costa, I. and Rehfeldt, U.: 44).

In order to make a clear distinction of the terms, it appears to be useful, on the one hand, to differ between the content and the quality of each text, and on the other hand, to clearly define all signatories involved in the consultation or negotiation process.

Figure 1: Cross-border collective bargaining and transnational social dialogue



Source: Pichot, E. (2009).

Figure 1 displays all different dimensions of cross-border collective bargaining and transnational social dialogue. As one can see, wages and working time relate to the local level, whereas the issues training and mobility, health and safety, management of change as well as restructuring etc. belong to the national as well as European context. The core labour standards and Corporate Social Responsibility relate to the global level.

1.2 Main driving forces and historic development

Cross-border collective bargaining resulted from the European Monetary Union (EMU) to avoid a race to the bottom concerning union wage costs because of international competitiveness. The creation of the EMU and the requirements and constraints regarding the coordination of collective bargaining can be seen as the main driver to developing wage coordination at the EU level (Crouch, C.; Marginson, P. and Traxler, F.). The EMU resulted from an on-going process of economic integration triggered by the Treaty of Rome and accelerated by the further integration of the European market. After the introduction of the EMU the prospects for collective bargaining changed. In the 1970s transnational union cooperation with regard to collective bargaining had already started to occur when unions from the metal sector began to institutionalise the exchange of information and policy coordination. Hence, the transnational coordination of collective bargaining can be seen as a part of the Europeanisation process (Glassner, V. and Pochet, P., 2011b).

In general, two different objectives concerning wage policy coordination can be distinguished. First, macroeconomic imbalances between European Monetary Union Member States result from different business cycles. This leads to diverging wage dynamics, which, according to trade unions, calls for a coordination of national wage policies. Second, in order to avoid competition between wages, various national unions agreed on wage bargaining coordination. Consequently at the cross-industry level, the European Trade Union Confederation adopted a resolution on this issue in 2000. Earlier at the sectoral level, the European Metalworkers' Federation, together with the European Trade Union Federation: Textiles, Clothing and Leather (ETUF: TCL), adopted guidelines for their national bargainers during the 1990s. Furthermore, at the transnational level the Doorn Group, a network of trade unions from Belgium, Germany, Luxembourg and the Netherlands was established in 1998 (see Box 1) (Glassner, V. and Pochet, P., 2011a). The Doorn Group can be regarded as an early form of cross-border collective bargaining in Europe.

Box 1: The Doorn Group

The Doorn Group constitutes an interregional initiative in view of cross-border coordination of collective bargaining. Its purpose is to avoid wage competition and to agree on strategies to help increase salaries. The group was named after the Dutch town of Doorn, where representatives of major sectoral unions, including the EMF and ETUF: TCL, met between 4-5 September 1998 in order to discuss trends in collective bargaining and the impact of the European Monetary Union. The reason for the group was a new national law (in 1996) in Belgium, that limited collectively agreed pay increases to a so-called 'wage standard' based on anticipated pay trend in France, Germany and the Netherlands. The result of this meeting, the Doorn Declaration, emphasised the need for cross-border coordination of collective bargaining in the European Monetary Union. It was the first time unions from different European countries had set up joint bargaining guidelines. As a consequence, a transnational working group was formed to exchange information on present developments in collective bargaining on a regularly basis. This led to a close cooperation network, including a database that enables them to monitor agreements reached and assess them. The Doorn Group has been an early pioneer in transnational trade union coordination of collective bargaining policy. It also encouraged the European Trade Union Confederation to engage in cross-border bargaining coordination across the EU.

Source: Eurofound (2009d).

The emergence of European social dialogue in the 1980s originates with an initiative by the President of the Commission of that time, Jacques Delors. The idea was that development of a common European market should be accompanied by a European social platform. A meeting outside Brussels took place in January 1985 between the leading heads of the national organisations affiliated to the Union of Industrial and Employers Confederations of Europe (UNICE), CEEP as well as ETUC. All participants agreed on further action regarding European social dialogue.

In 1986, with the Single European Act European, social dialogue became part of the EC Treaty (Article 118B EC). Further meetings and negotiations in Maastricht and Amsterdam highlighted the legal importance of the European social partners. In Maastricht the negotiations between the social partners led to a protocol on social policy which was added to the Treaty of the European Union. All Member States, apart from the United Kingdom, accepted the agreement, which mapped the structure of European social dialogue. Subsequently, a revised Social Chapter was incorporated in the Treaty of Amsterdam in 1997.

At present, Articles 154 and 155 TFEU build the basis for the consultation of the social partners by the Commission, including the opportunity to leave social regulation to employers' and workers' organisations. If the Commission wishes to take action in the area of social policy, it should, according to Article 154 TFEU, first consult the social partners (Eurofound, 2010g).

Regarding the International and European Framework Agreements, public concern was rising during the 1970s, since the influence of multinational companies had been continually increasing. Against this background, the Organisation for Economic Co-operation and Development (OECD) adopted 'Guidelines for Multinational Enterprises' in 1976. This was followed by the 'Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy' of the ILO in 1977, with updated versions in 2000 and 2006.

Currently, there is not any European legislation on International and European Framework Agreements at the company level — only on collective bargaining and tripartite consultation at the inter-sector and sector levels. However, the development of transnational social dialogue at the company level is an ongoing process in Europe.

The Social Agenda 2005–2010 of the European Commission proposed a preparation of an 'optional framework agreement' for transnational collective bargaining at the company level (Da Costa, I. and Rehfeldt, U.) which constitutes a central issue of the survey and shall be discussed later on.

Moreover, globalisation led to an imbalance between the scope of global activities of multinational companies and terms and conditions of employment that are mainly negotiated at the national level. Hence, International and European Framework Agreements can be regarded as a possibility to overcome this imbalance (Papadakis, K. et al.).

2. INDUSTRIAL RELATIONS IN THE EU

KEY FINDINGS

- A great diversity of national systems of industrial relations exists in Europe. Hence, it is difficult to ensure uniform commitment from social partners at all levels.
- A clear decrease in the coverage by collective agreements can be observed between Western and Eastern European states. In the EU-12 Member States, social partner organisations, in particular at the sectoral level, do not exist or are still in a nascent phase.
- Collective bargaining, in particular at the sectoral level, and social dialogue are no consistent patterns in the EU-12 Member States in which single-employer bargaining dominates. In contrast, within the EU-15 Member States multi-employer bargaining is widely spread.
- A significant characteristic of the European model is that social dialogue plays a crucial role not only at the national but also at the EU level. However, the core problem remains the effective participation of employers in cross-border collective bargaining and transnational social dialogue.
- At the company level there is an increasing number of international and European framework agreements. European framework agreements deal with restructuring, anticipation of change, training and mobility, whereas international framework agreements include core labour standards and Corporate Social Responsibility.
- In order to set up guidelines for European transnational agreements, several European sectoral union organisations have begun establishing institutions for transnational union cooperation.
- The EU promotes the exchange of experiences of the social partners by allocating financial help, a continual monitoring process and the conduction of studies concerning transnational company agreements. In addition, an expert group has been established to discuss key issues of the topic.

2.1 The institutional structure of European social dialogue

There is no universally agreed definition of social dialogue. A lot of different understandings of “social dialogue” exist in Europe. Social dialogue generally describes negotiation, consultation or information-sharing. It can take place with or without the involvement of public authorities (Ishikawa, J.) Collective agreements constitute agreements which are signed between single employers or their organisations and organisations of workers, such as trade unions. In general, collective agreements set out the content of individual contracts of employment and structure the employer-employee relationship (see Table 3). Many different European collective agreements have so far been signed within the framework of Article 155 TFEU as well as at the company level.

National collective agreements still dominate across all Member States’ systems of industrial relations. Today they perform a central role in EU employment and industrial relations. European social dialogue can be set out as follows: interconfederal/intersectoral or cross-industry agreements between the social partners concluded at the European level.

These agreements encompass the framework agreements on parental leave, part-time work and fixed-term work as well as the agreement on telework (Eurofound, 2010f). Six organisations that are involved in cross-industry social dialogue can be distinguished:³

- European Trade Union Confederation (ETUC)
- Confederation of European Business (BusinessEurope)
- European Center of Employers and Enterprises providing Public services (CEEP)
- European Association of Craft, Small and Medium-Sized Enterprises (UEAPME)
- Eurocadres
- European Confederation of Executives and Managerial Staff (CEC)

Eurocadres constitutes the Council of Professional and Managerial Staff in Europe.

Table 3: Different levels of European social dialogue

Level	Actors	Outcome
Cross-industry	European Trade Union Confederation, European Center of Employers and Enterprises providing Public services, BusinessEurope	Agreement, autonomous agreement, recommendation, joint opinion, exchange of information
Multi-sector	European trade union federations, employers organisation	Voluntary agreement, joint opinion
Sectoral	European trade union federations, employers organisation	Agreement, autonomous agreement, recommendation, joint opinion
Multinational companies	National trade unions, European industry federations, employers, European Works Councils	European framework agreements, international framework agreements, exchange of information
Regional	National trade unions, sectoral trade unions, European Trade Union Confederation, European industry federations	Exchange of information, common guidelines
National	National trade unions, sectoral trade unions, employers	Autonomous agreement, exchange of information, joint opinion, consultation

Source: Glassner, V. and Pochet, P. (2011b).

³ European Commission, 'Cross-industry social dialogue', <http://ec.europa.eu/social/main.jsp?catId=479&langId=en>.

Multi-sector agreements are negotiated and concluded by the European social partners from different sectors (e.g., the workers' health protection through the good handling and use of crystalline silica and products containing it). European sectoral agreements are signed by European trade union federations and employers organisations (e.g., agreement on working time and arrangements reached in different sectors of the transport industry). Agreements at multinational company level comprise agreements between companies based in several Member States in the EU and European Works Councils and also in certain cases European industry federations (Eurofound, 2010f).

With the Commission decision to set up sectoral dialogue committees at the European level in 1998, the Commission laid the foundation to a permanent body for consultation and negotiation between the social partners in the sector (Commission decision of 20 May 1998 – 98/500/EC). All relevant social partner organisations need to apply to the European Commission. To join this committee the following criteria must be met. First, the organisation has to be related to a certain sector and organised at the European level. Second, all organisations have to be an integral part of Member States' social partner structures and thus do have the capacity to negotiate agreements, which will then be representative for various Member States. Third, they also have distinct structures which guarantee the participation in the committee's work.

These kind of committees at the European sectoral level consist of an equal number of employers' and workers' representatives and are chaired either by one of the social partners or by a person announced by the Commission. Each committee has its own rules of procedure, and at least once a year a plenary meeting takes place. The organisation of the meetings as well as the setting of the agenda is managed by the different secretariats of the social partners in coordination with the Commission.⁴

On the employer side, sectoral organisation primarily focuses on promoting trade issues and lobbying for business interests. They are not engaged with their equivalent organisations, such as the European industry federations. The European Commission strives for fostering such engagement by establishing those sectoral social dialogue committees (Eurofound, 2007b).

The main outcomes of transnational social dialogue at company level are international framework agreements, which are signed by multinational companies and global union federations. Also, there are European framework agreements which are signed by multinational companies and world councils or European Works Councils (Bé, D.). Papadakis et al. define international framework agreements as follows:

'a formal ongoing relationship between the multinational enterprise and the global union federation which can solve problems and work in the interests of both parties. They are meant to promote a number of principles of labour relations and conditions of work — notably in the area of freedom of association and collective bargaining — and to organise a common labour relations framework at cross-border level, that is, across the worldwide operations of the multinational company, often covering not only the operations of the multinational company's subsidiaries but also those of its subcontractors and suppliers.'

⁴ European Commission, 'Sectoral social dialogue', <http://ec.europa.eu/social/main.jsp?catId=480&langId=en>.

European social dialogue at regional level has already been described in the study (e.g., the Doorn Group and meetings between different national trade unions). This kind of dialogue represents the process of cross-border collective bargaining in Europe. However, due to the missing commitment from the employer's side to engage actively in those rounds, the scope of cross-border collective bargaining is limited to an exchange of information and the preparation of common guidelines and thus more or less to social dialogue.

As already mentioned in this study, social dialogue at the national level, refers primarily to the cooperation between workers' and employers' organisations and encompasses a wide range of issues from labour relations to other social and economic challenges. Social dialogue at the national level has become an element of "good governance" in many European countries. Moreover, the tripartite social dialogue can contribute to a more productive and competitive economy (Ishikawa, J.).

In any case, none of the EU collective agreements is subject to restrictions as to content or legislative procedure. It should be noted that EU collective agreements may be concluded outside the procedure of Article 155 TFEU, which means that European social dialogue does not depend on any EU law (Eurofound, 2010f). In section four, particular attention will be paid to the increasing number of transnational framework agreements.

In contrast to collective agreements, which are negotiated by national social partners, transnational agreements are not legally binding. This means these agreements cannot be enforced – as is the case with national agreements. Consequently, the social partners need to rely on the good will of the signatory parties (Glassner, V. and Pochet, P., 2011a), which can be described as "gentlemen's agreement". Finally, it should be noted that collective agreements in general can be seen as a highly complex and multi-party relationship.

But contrary to trade unions in Member States, the European Trade Union Confederation is unable to force employers to bargain at the European level. This can be regarded as a crucial part of the analysis because in this way, cross-border collective bargaining at the EU level is effectively hampered by the employers. Thus, the core issue remains the effective participation of employers in cross-border collective bargaining and transnational social dialogue (Bercusson, B.).

2.2 Mapping of social partnership across EU Member States

In order to map social partnership in the EU, the percentage of workers covered by any collective agreement compared to all workers can be shown because the percentage of all workers covered by collective agreements across the European Union differs widely from Member State to Member State. This is due to the existence of different national systems of collective bargaining across Member States. Particularly EU-12 Member States (mainly from Eastern Europe) are likely to have a lower degree of social partnership and thus a less sophisticated system of industrial relations than the EU-15 Member States.

Hence, the influence of national trade unions also significantly differs across the European Union. Important in this context is that "existing structures and cultures of industrial relations at national level are a key determining factor and may have a conducive or inhibitory effect" (Platzer, H.-W. et al.: 97) with regard to cross-border collective bargaining and transnational social dialogue.

A balance of economic power between employers and workers, which exists partly through collective action of trade unions and employers' organisations at the national level, has so far not been achieved by the social partners at the EU level (Bercusson, B.).

Employees in Central and Eastern European Member States still bargain with the government and not with the employer, which is due to the fact that during the communistic era of those states, the government was more or less also the employer. Therefore, social dialogue for them equals collective bargaining and means that trade unions and employers in those states still involve the government in the dialogue.

The state set the terms and conditions of employment during the communist period by establishing wage funds in enterprises and wage scales. Independent unions or employers did not exist in the Member States of the EU-12. In Hungary and Poland only to a certain extent exceptions could be observed due to a limited version of collective bargaining (Hethy, L.).

However, it can be argued that in general before 1989, collective bargaining did not exist in Central and East European countries. Compared with their situation after the Second World War, collective bargaining in Western Europe has been setting the terms of conditions of employment.

Another attribute that varies across EU Member States is the fact that single-employer bargaining overweighs in Central and Eastern European states, whereas in Western European states, multi-employer bargaining is dominant. The basic principle is that employers are more powerful than unions, since they are in charge of the resources, such as budget control. When both parties agree on a certain compromise, then this text will become a collective agreement.

The advantages resulting from such an agreement are protection for the employees and a guarantee of social peace for the employer, and efficient and reliable structures for the state. After 1989, as a result of the democratisation process in Central and Eastern European states, a change in the mechanism of collective bargaining was expected, but in practice, collective bargaining is still very much regulated and several aspects of the communistic period can be seen in today's structure of collective bargaining. As a consequence, Central and Eastern European states still share essential trends as regards to collective bargaining.

As figure 2 shows, collective bargaining coverage is generally far lower in Central and Eastern European states than in Western European ones. The only exception is Slovenia, where the system of industrial relations resembles the system in Austria, which includes the membership of the chamber of commerce by employers. The low coverage in these countries is due to the decentralised structure of collective bargaining and, in addition, the low level of organisation of both employees and employers. Usually this is explained by a strong legal intervention of the state, an absence of social partners as well as by the single-employer bargaining (Trif, A.).

Not only amongst the organisational degree of trade unions is there a wide range of different structures, but also employer organisations in the 27 EU Member States vary greatly. In some countries mergers have taken place aiming at adapting to the changing environment due to a competitive and increasingly globalised market, while in countries of the EU-12 new employer organisations were founded (Eurofound, 2010c).

Figure 2: Collective bargaining coverage in 2006



Source: European Commission, 'Industrial Relations in Europe 2008', Luxembourg 2008. No data was available for Ireland. Data on Estonia, Latvia, Lithuania, Malta, Romania and Slovenia refer to 2005.

A great diversity of labour law systems exists across the EU

This is particularly true for the schemes of employee involvement in management’s decision making. In some countries, for instance, Austria, Germany, Luxembourg and the Netherlands, systems with a dual structure including a scheme of employee involvement of management’s decision making exist that is independent from trade unions. In other countries, such as France, Greece, Portugal and Spain workers’ participation is based on two pillars: both the trade unions and a body elected by all employees. In the Nordic countries workers’ participation is an exclusive right of the trade unions.

Another situation can be observed in Ireland and the UK, where employees (or rather trade unions) have not been involved in any kind of management’s decision at all but this is also changing. While some states have a certain participation of employees at management decisions, in some states also co-determination exists. In other words, a diverse structure with regard to the system of industrial relations in the EU exists. Establishing a uniform model — being the same across the EU — is a relatively unrealistic goal, since this kind of approach would ignore the different cultural and historical reasons for the existence of such a diversified system of industrial relations across the EU (Weiss, M.).

In the UK wages are only negotiated at the company level (Glassner, V. and Pochet, P., 2011b). There is also a difference between the first group (e.g., states such as the Czech Republic, Hungary, Poland and Slovakia) and the second group (candidate states, such as Croatia, FYROM and Montenegro) with regard to trade union density. Within the first group the density is higher compared to the density of the second wave states. The reason for this is that some of the EU-12 Member States quickly adopted a very Western-oriented model. Thus, different mixtures of Western models were introduced.

The Czech Republic, for example, did not have works councils until a German-style of works councils was introduced - but without bargaining power (which is the case in German works councils). In most Eastern European states the problem is more a lack of resources than a lack of mandates. In recent years trade union membership has decreased in the Czech Republic, Estonia, Lithuania, Poland and Slovakia, whilst in Belgium, Cyprus, Greece, Italy and Spain membership of unions has been rising (European Commission, 2010).

Multi-employer and single-employer bargaining

In some sectors of EU-12 Member States organisations of employers are still very weakly developed, and the creation of structures in newly emerging sectors such as information technology, is difficult. There are programmes that aim at building up social dialogue in Eastern European countries, but the outcomes are still limited. There is also a development of multi-employer (MEB) and single-employer bargaining (SEB) (Papadakis, K.).

On the one hand, trade unions and employers' association negotiate (multi-employer bargaining) and on the other hand, bargaining takes only place between single companies and unions, employee representatives or individual employees (single-employer bargaining) (Glassner, V. and Pochet, P., 2011b). Approximately two thirds of all European employees are covered by collective agreements. Yet the number of sector agreements, as well as company-level agreements, is increasing.

Recent years have shown that the extent of bargaining coverage is highly dependent on the dissemination of multi-employer bargaining, which needs organisations of employers with a clear mandate to conclude agreements with their counterpart.

It is generally true to say that lower wages constitute a greater problem in Member States with a system of single-employer bargaining — the decentralised bargaining approach. A wider degree of collective bargaining coverage tends to generate higher wages (European Commission, 2010).

Union density

The level of union membership within each industry differs between Member States. When observing union strength, the level of union density — defined as the proportion of employees who are union members — can serve as a general indicator. Due to the fact that these figures are produced in some countries by unions themselves, they should be considered as estimates which may not be precise.

Union density is weighted by the numbers employed in the different Member States, with an EU average of 23% - see Table 4. This is due to relatively large EU Member States with low proportions such as France (8%), Germany (20%), Poland (15%) and Spain (16%).

Denmark, Finland and Sweden have the highest union density, with around 70% of all employees in unions. Low averages are found in the newer EU Member States in Central and Eastern Europe. Seven out of 10 states have a degree that is lower than the EU average, including the largest country, Poland. Only Romania (34%) and Slovenia (41%) are in the top half of the table (Fulton, L.).

Table 4: Union density and bargaining level in the European Union 2008

Country	Union density	Predominance level of collective bargaining	Country	Union density	Predominance level of collective bargaining
Austria	32	MEB	Bulgaria	20	SEB
Belgium	54	MEB	Czech Rep.	21	SEB
Denmark	67	MEB	Cyprus	55	MEB
Finland	74	MEB	Estonia	10	SEB
France	8	MEB	Hungary	17	SEB
Germany	20	MEB	Latvia	14	SEB
Greece	23	MEB	Lithuania	9	SEB
Ireland	34	MEB	Malta	48	SEB
Italy	33	MEB	Poland	15	SEB
Luxembourg	40	MEB	Romania	34	SEB
Netherlands	22	MEB	Slovakia	20	MEB
Portugal	20	MEB	Slovenia	41	MEB
Spain	16	MEB			
Sweden	71	MEB			
UK	27	SEB			

Source: Union density: Fulton, L. with data from Eurostat 2008; Predominance level of collective bargaining: Marginson, P. and Traxler, F.

Note: The figure for average union density in the EU is weighted according to the number of employees in employment in each state in 2008 produced by Eurostat; MEB: Multi-employer bargaining (between union federations and employer associations); SEB: Single-employer bargaining (between trade unions and individual companies); Union density: The proportion of workers who are union members.

Not only is there a division between Western and Eastern EU Member States concerning trade union density, there is also a clear difference between multi-employer bargaining and single-employer bargaining – with the result that multi-employer bargaining mostly occurs in Eastern Member States. Therefore, two different labour market regimes divide the EU. The first regime is characterised by multi-employer bargaining, a high degree of bargaining coverage and high wages. The second regime comprises single-employer bargaining, rather low wages and low coverage. This division is marked by the former course of the iron curtain (Marginson, P. and Traxler, F.).

With regard to the system of industrial relations in the EU, it could be said that diversity describes the reality of the system to a large degree. However, the organisation of social partners, collective bargaining and industrial action varies from Member State to Member State (European Commission, 2010e). The impact of the social partners on the shape of the general outcomes is especially very low in EU Member States in Central and Eastern Europe (Eurofound, 2007c).

2.3 The European coordination of collective bargaining

The European coordination of collective bargaining deals with national and sub-national levels of collective bargaining within the EU. As highlighted before, cross-border collective bargaining coordination takes place at inter-regional and sectoral levels. The European Metalworkers' Federation was the first European industry federation to develop a policy of sectoral coordination of collective bargaining (see Table 5). This initiative led to a pattern of the coordination of collective bargaining in other sectors of the economy.

The European Trade Union Confederation built up a "committee for the coordination of collective bargaining" in order to establish guidelines on the coordination of collective bargaining, defining three major goals. First, the coordination should reflect wage bargaining developments and influence the macroeconomic dialogue at the EU level. Second, coordination should help avoid social and wage dumping and wage divergence. Third, it should contribute to achieving an upward convergence of living standards in the EU (Eurofound, 2009e). In general, one can say that the cross-border coordination of collective bargaining at the transnational level can be described as a more or less union-driven process — to the very contrary of European social dialogue, that is, employers are not interested in coordinating the process of the determining of wages and working conditions at the transnational level (Glassner, V. and Pochet, P., 2011b). The role of the European Metalworkers' Federation is crucial regarding the development of coordinated European collective bargaining, since the metalworking sector often sets the pattern for collective bargaining in Member States.

The top-down approach constitutes the centralised way of transnational bargaining coordination and is closely related to European institutions by the European Trade Union Confederation. In addition, the affiliated European industry federations can be seen as a platform for the cross-border exchange of collective bargaining information.

The bottom-up approach is related to initiatives from national trade unions. Hence, the member organisations are relatively autonomous with regard to possible cooperation with unions from other nations. These models of cooperation are often promoted by EU funding, which will be further discussed in this section (Glassner, V. and Pochet, P., 2011a).

The wage-setting dimension is in particular relevant for the cross-border dimension of collective bargaining in export-oriented manufacturing. To improve the implementation of common bargaining guidelines and principles, various European industry federations started establishing institutions for transnational union cooperation in collective bargaining. At the European level a system for the electronic exchange of bargaining information was established. The European Collective Bargaining Network (Eucob@n) was introduced by European international frameworks from the metal, textiles and chemical sector (Glassner, V. and Pochet, P., 2011b).

In addition to international framework agreements, several European sectoral union organisations have begun setting up guidelines for European transnational agreements.⁵

However, the example of cross-border coordination of collective bargaining is still not well established among trade unions. Therefore, it is considered as a “learning process” by trade union actors. Several elements of coordination have not developed into general social norms but are already subject to change (Glassner, V.).

Table 5: The coordination model of the metal sector

Dimension	Level	Content
Centralised, top-down elements	European industry federation bargaining coordination strategies	<ul style="list-style-type: none"> – Formalised structure of decision-making, e.g. internal committees, working or steering groups on collective bargaining. – Common rules and guidelines, e.g. EMF’s European Coordination Rule. – Coordination instrument for wage bargaining, e.g. bargaining formula, qualitative aspects. – Database on developments in collective bargaining, in particular wage developments. – Electronic exchange systems on day-to-day collective bargaining and European social policy information. – Monitoring and reporting system. – Cooperation in collective bargaining with other sectors, integrated cross-sectoral systems of collective bargaining coordination. – Common demands on qualitative collective bargaining topics, i.e. common demand on training.
Decentralised, bottom-up elements	Inter-union coordination and cooperation	<ul style="list-style-type: none"> – Form of the most important collective bargaining initiatives: networks, projects, cooperation. – Most important issues. – Functioning and proceedings of the collective bargaining initiatives: regularity of meetings, information exchange, exchange of international union representatives etc.
Process of political learning — top-down and	Inter-union decision-making and cooperation	<ul style="list-style-type: none"> – Best practice, exchange of information and experts from other national union organisations of the same or other sectors.

⁵ European Commission, ‘Mapping of transnational texts negotiated at corporate level’, EMPL F2 EP/bp 2008 (D) 14511, Brussels, 2 July 2008.

Dimension	Level	Content
bottom-up processes	European Industry Federation bargaining coordination strategies	– Best practice, exchange of information and experts from other European Industry Federations, formal or informal inter-sectoral co-operations on the coordination of collective bargaining.

Source: Glassner, V.

The transnational collective bargaining networks were established in order to institutionalise information exchange and cooperation in the area of collective bargaining between unions from neighbouring EU Member States. One of the most active transnational bargaining networks is the one between North Rhine-Westphalia, in Germany, Belgium and the Netherlands.

Also at the European level, is the 'Eucob@n' (European Collective Bargaining Network) in place. In 2009 the European Federation of Food, Agriculture and Tourism Trade Unions (EFFAT) also took part in the Eucob@n system (see Table 6). The European Public Sector Union (EPSU) also established its own system with its members and called it Epsucob@. The coordination of non-wage related topics such as working time, training, pension entitlements and gender equality have since become more and more a topic of discussion in collective bargaining.

However, two main obstacles hamper the development of transnational coordination of collective bargaining by European unions. First, national systems of industrial relations influence the effectiveness of bargaining coordination on transnational level significantly. Second, the comparability of transnational results of collective bargaining is restricted, which is due to the differences of national systems of industrial relations and bargaining practices.

For instance, decreasing sectoral collective bargaining leads to lower collective bargaining coverage, which in turn inhibits the coordination of wage policy at the transnational level. Also, weak structures for collective bargaining hamper the control of trade unions. In most Central and Eastern European states wage-setting is at the company level, where workers' participation is (still) very weak. In addition, in Southern and Eastern EU Member States, with the exception of Slovenia, a coordination of sectoral bargaining does not exist either. One obstacle amongst others is the different pattern of collective bargaining systems in terms of multi-employer and single-employer bargaining (Glassner, V. and Pochet, P., 2011b).

Table 6: Coordination of collective bargaining by European trade unions

Trade union	Inter-sectoral European system for information exchange	Wage bargaining coordination instrument: based on inflation and productivity (year of adoption)	Formal instrument for coordination of qualitative ('non-wage') bargaining issues (year of adoption)	Institutions for cross-border coordination of CB enhancing cooperation between national unions (date of establishment)
European Trade Union Confederation	–	Guideline for the coordination of collective bargaining (2000)	Various resolutions on issues such as training, gender equality, wage equality etc.	–
European Metal-workers' Federation	Eucob@n	European coordination rule (1998)	Working Time Charter (1998) First Common Demand on Training (2005) Second Common Demand on Precarious Employment (2009)	Transnational bargaining networks (1997): i) Belgium, Luxembourg, Netherlands, and North Rhine-Westphalia (Germany), ii) Denmark, Germany (coastal states) and Sweden, iii) France and Frankfurt (Germany) and iv) Austria, Baden-Württemberg (Germany), Bavaria (Germany), Czech Republic, Hungary, Slovakia, Slovenia and Switzerland
European Mine, Chemical and Energy Workers' Federation	Eucob@n	–	Resolution on working time	–
European Trade Union Federation Textiles, Clothing and Leather	Eucob@n	European coordination rule (based on EMF rule)	Resolutions on working time, early retirement, gender equality, capacity	–

Trade union	Inter-sectoral European system for information exchange	Wage bargaining coordination instrument: based on inflation and productivity (year of adoption)	Formal instrument for coordination of qualitative ('non-wage') bargaining issues (year of adoption)	Institutions for cross-border coordination of CB enhancing cooperation between national unions (date of establishment)
			building of social partners in the textiles sector	
European Federation of Food, Agriculture and Tourism Trade Unions	Eucob@n	European wage guideline	Resolutions on working time, training, trade union rights etc.	–
Union Network International Europe Graphical Sector	–	Wage bargaining coordination rule	Common criteria for the analysis of professional skills	Collective bargaining network at UNI Graphical (early 1990s)
Union Network International Europe Financial Services	–	–	Resolutions on training, gender equality etc.	UNI Finance Collective Bargaining Coordination Network (2002)
European public sector union	Epsucob@ collective bargaining network	European wage bargaining coordination rule	Resolutions on working time, gender equality, training, equal pay, trade union rights etc.	Collective bargaining network energy sector in Central and Western Europe (2008)

Source: Glassner, V.; Pochet, P.(2011a). EIF participates in Eucob@n, - = does not participate; ^bAnnual reporting on CB developments in member countries carried out separately by respective EIFs.

The best known example is the Doorn Group. It also helped the European Trade Union Confederation to set up cross-border bargaining coordination across the wider EU. Today the ETUC promotes inter-regional trade union councils (IRTUC) in similar areas with regard to the economic, territorial, monetary and social situation. Since most approaches refer to a voluntary basis, enforceability constitutes a challenge concerning the coordination of collective bargaining (Eurofound, 2009e). According to Eurofound (2009e):

'A major problem with the European trade unions' policy of coordination of collective bargaining is that, so far, this is a wholly unilateral initiative. There is no evidence of an employer response to engage with such an exercise in wages, or any other form of coordination. As with the European social dialogue, the question is how to stimulate an employer response with a view to developing an operational EU industrial relations system of coordinated collective bargaining.'

Finally, it should be noted that the employers are reluctant to the coordination of collective bargaining at the EU level.

2.4 Transnational company agreements

The European Commission (SEC 2008) interprets a transnational company agreement as

'an agreement comprising reciprocal commitments the scope of which extends to the territory of several States and which has been concluded by one or more representatives of a company or a group of companies on the one hand, and one or more workers' organisations on the other hand, and which covers working and employment conditions and/or relations between employers and workers or their representatives'.⁶

The first European framework agreement was signed in 1996, when the European Works Council came into effect. Subsequently, the development of European Works Councils went hand in hand with the expansion of European framework agreements and also to International Framework agreements which have been mainly negotiated with companies based in Europe. After 1998 European framework agreements spread further peaking first in 2001. Since then a stable development of the conclusion of European and international framework agreements can be observed (Conchon, A. et al.).

Companies with their headquarters in France, such as Danone and Accor, were the first to conclude transnational agreements, in 1988. After that, American, Belgian, Italian, Swedish, as well as German companies, all followed. Since then the conclusion of agreements with multinational companies has increased.

International and national union federations constitute the signing parties of global agreements. Nevertheless, European Works Councils are responsible for European and mixed transnational agreements. For example, in 2007 European Works Councils have signed all in all 71 out of 88 European and mixed transnational agreements. Hence, it seems that European Works Councils play a leading role regarding the signing of transnational agreements that entail European issues.⁷

⁶ EC staff working document on "The role of transnational company agreements in the context of increasing international integration" (SEC 2008).

⁷ European Commission, 'Mapping of transnational texts negotiated at corporate level', EMPL F2 EP/bp 2008 (D) 14511, Brussels, 2 July 2008.

According to the Commission, most transnational texts dealing with Europe, for example European framework agreements, contain the following information:

- health and safety at work, equality in employment, and data protection,
- restructuring, work organisation, training and mobility,
- the principles behind human resources policy and Corporate Social Responsibility⁸).

Workers' representatives can either come from European or international trade union federations as well as from European Works Councils or national unions. A combination of some of them is also feasible. As a consequence, transnational company agreements lead to a complex construction which is difficult to classify both from a national law and a private international law perspective (Van Hoek, A.A.H. and Hendrickx, F.)

The complex field of the transnational company agreements and their inclusion in private international law will be further discussed in section 5. Moreover, practical solutions or rather scenarios will be discussed taking into account various approaches from both national and private international law.

Corporate Social Responsibility serves as a mechanism of self-regulation within companies on a voluntary basis. It aims to ensure that all company efforts taken comply with international norms and ethical standards. In 2010 the European Parliament adopted a resolution (2009/2201(INI)) on Corporate Social Responsibility in international trade agreements. Furthermore, the European Parliament called on the Commission to incorporate Corporate Social Responsibility into multilateral trade policies.

According to the European Commission assessment on Corporate Social Responsibility in 2010, it is also

expected to support smart, sustainable and inclusive growth as stated in the Europe 2020 Strategy. Indeed, Corporate Social Responsibility was, adopted by ever more companies, investors and business schools in the first decade of the 21st century, while civil society, academia and the media also became increasingly familiar with the topic.⁹

The advantages and disadvantages from the employers' side for engaging in transnational company agreements will be described in the following section. Transnational company agreements are seen by some employers as good vehicles for a more in-depth social dialogue providing a platform function due to communication and cooperation with trade union or workers' representatives. Some agreements constitute reactions due to cases of labour conflict (frequently in locations outside Europe), whereas some result from requests by trade unions and can therefore be seen as instruments to generate stability and peace.

In addition, they can serve as an early-warning system which is able to undermine trade union campaigns and thus can also help control precarious situations before becoming public. According to several employers, transnational company agreements provide an overall collaboration framework which can enhance labour relations. Companies can avoid pressure from NGOs and consumer groups by signing transnational company agreements. Another reason for engaging in those agreements is the positive "social score" that can be attained and which eases access to financial or public procurement markets.

Reasons against engaging in transnational company agreements also exist according to employers'. Some of them cannot see any clear advantages to signing transnational company agreements. These companies argue that the risks would outweigh the potential advantages.

⁸ European Commission, 'The role of transnational company agreements in the context of increasing international integration', Commission Staff Working Document SEC(2008)2155, 2 July 2008, Brussels.

Also, many companies fear a negative impact on national collective bargaining and a potential conflict with union representation rights. Other companies are concerned with the potential implications of such agreements. Therefore, alternatives such as codes of conduct or other declarations are preferred by some member organisations of *BusinessEurope*. Some companies, however, prefer to tackle these issues at the national level to make sure that no local party is ignored. Similarly, uncertainty with regard to expiry dates of such documents as well as the risk of additional demands when it comes to renegotiating are reported by the employers (ITC).

Table 7 provides an overview of the different and common motivations of trade unions and employers to signing transnational company agreements. Both parties agree that these agreements help establish social dialogue at all levels – especially at the international level – and they are able to reinforce corporate structures. They not only solve potential difficulties by creating an early warning system, but they also provide a channel of communication within the company. The legally binding character of such agreements is heavily debated and will be discussed in section 5.

Table 7: Motivations of trade unions and multinational companies

Actor	Motivation	Legal issues
Trade unions	<ul style="list-style-type: none"> - Recognition of trade unions as legitimate partners - Regulation and establishment of core labour standards - Implementation of Corporate Social responsibility - Attempt to stop the decline of membership 	<ul style="list-style-type: none"> - Representativeness - Mandate - Enforcement - Liability
Multinational companies	<ul style="list-style-type: none"> - Raising competitiveness - Better risk management by providing implementation measures - Social peace - Coherent framework for Corporate Social Responsibility 	<ul style="list-style-type: none"> - Conflict resolution
Both parties	<ul style="list-style-type: none"> - Development of social dialogue at all levels, especially at international level - Reinforcement of corporate structure - Solving potential difficulties by creating an early warning system - Providing a channel of communication 	<ul style="list-style-type: none"> - The legally binding character of codes of conduct and international framework agreements is still controversial and thus strongly debated

Source: Schömann, I.

⁹ European Commission, 'Corporate Social Responsibility. National Public Policies in the European Union, Brussels, November 2010.

This kind of transnational negotiation in companies has been taking place since 2000, both with European and global scope. During that time already 200 agreements in around 100 companies have been concluded. All companies together employ approximately 10 million workers. Transnational company agreements serve to anticipate and manage change. In Europe they often address concrete restructuring events in order to avoid redundancies and to accompany certain measures. They aim at organising a socially responsible management of potential restructuring. International framework agreements address restructuring on a world scale (Pichot, E. 2011). Examples of agreements that addressed concrete restructuring events can be found at Air France-KLM, ArevaT&D/Alstom/Schneider, Ford and General Motors Europe. These agreements include guarantees linked with transfers and redeployment, such as the maintenance of terms and conditions, pension rights, job security, right to return, sourcing or investments. They also contain accompanying measures, such as training, part-time work, support to mobility, outplacement as well as the first right to recruitment. At the same time, procedural rules defining the role of employee representatives in management and restructuring are part of such an agreement addressing concrete restructuring events (see box 2).

Other agreements deal with the organisation of a socially responsible management of potential restructuring. Companies with those agreements include ArcelorMittal, Danone, RWE and Unilever. These agreements address how to avoid redundancies, the safeguarding of facilities and employment by providing training, renewal of machinery during downturns and preserving critical skills and key contractors. Accompanying measures include part-time work, outplacement, training, support to mobility, as well as site rehabilitation. Similarly, procedural rules are set out dealing with the information and consultation in management of restructuring.

Box 2: Example of Club Méditerranée

The negotiations were initiated by the company and led to a signed agreement by IUF and EFFAT – but not the European Works Council. The agreement covers Côte D'Ivoire, Egypt, the EU, Mauritius, Morocco, Senegal, Switzerland, Tunisia and Turkey. It aims at encouraging transnational mobility of Club Med service personnel for seasonal work where there is no local workforce and declares adherence to ILO core conventions. Pay, working times and other working conditions for seasonal workers must not be less favourable than for the employees in the establishment. However, the agreement cannot limit legislation rights or local customs. A provision sets out the evaluation of the working conditions of the seasonal workers in one or more facilities by a representative of IUF/EFFAT. Club Méditerranée bears the respective costs. A joint committee is also in place to monitor the working conditions of seasonal workers. In case of problems or disputes, an employee can contact the committee, whose signatories meet and try to find a joint solution. This process of consultation is obligatory and prior to further steps. The agreement is filed with the European Commission's Directorate General for Employment and Social Affairs and the International Labour Office in Geneva. EFFAT negotiated this agreement together with the European Works Councils as an observer.

Source: Ahlberg, K.

Examples for agreements addressing the anticipation of change, employment and skills involve Alstom, Areva, Dexia, GDFSuez and Thales. Those agreements include the development of skills by a competence review, career paths, training programmes and validation.

Also, they attempt to encourage mobility by information on offers and support internal mobility. Other content includes procedural rules for the strategic dialogue and provisions regarding the recruitment policy (see box 3).

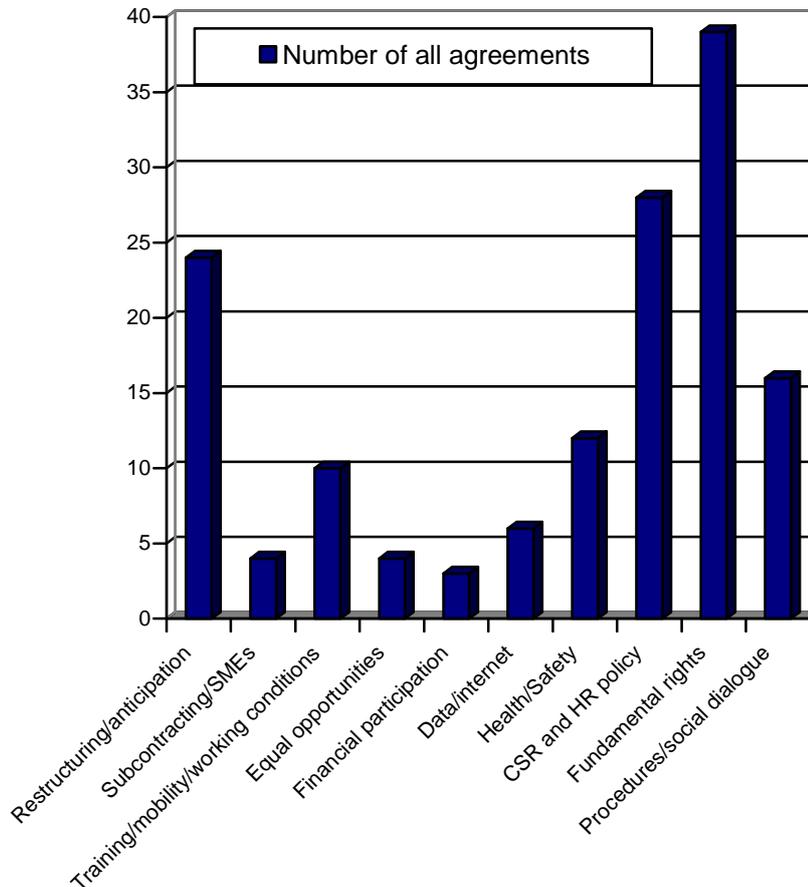
Agreements addressing restructuring in a global context can be found at EDF, ENI, Lukoil, Renault and Rhodia. They deal with the protection of employment through training, mobility and anticipation, also with social management of restructuring and procedural rules such as information and consultation (Pichot, E. 2011).

Box 3: The example of GE Plastics

The agreement of GE Plastics deals with a pre-employment screening of people linked with the company. The agreement was signed by GE Plastics Europe management and the EWC. An external company is responsible for checking the background of new staff, current employees, acquired employees and contract/contingent workers, including a screening against “government watch list”, check of criminal history, as well as a credit check. In case any part of the agreement is in conflict with local EU legislation. It also includes guidelines for the use of telephone, internet and email. A violation of the guidelines results in disciplinary measures or discharge.

Source: Ahlberg, K.

Figure 3: Area of transnational company agreements until 2007



Source: Pichot, E. (2009).

As figure 3 shows, most transnational company agreements contain provisions regarding fundamental rights (such as core labour standards, Corporate Social Responsibility and Human Resource policy). It should be added that most of these agreements are international framework agreements. Texts encompassing procedures and social dialogue are made up to a large degree of European framework agreements with only a minor share of mixed and global agreements. Pure European framework agreements are those which contain restructuring, subcontracting and training.

2.5 Promoting common objectives

As already outlined in this section, the system of industrial relations differs enormously throughout the EU. In order to support EU Member States, in particular the new MS, on their way to a fully-fledged system of industrial relations, the role of EU funding needs to be discussed. The starting point is utmost diversity between the different Member States. Due to enlargement this kind of diversity has recently increased. The differences with regard to labour law and the systems of industrial relations have become more and more evident with the integration of Central and Eastern European states.

This originates from the different historical and cultural development of each Member State. This, in turn, cannot — and should not — be changed by central institutions. The EU, as a transnational construction and supranational entity, should not attempt to harmonise this variety of structures to form a uniform system. Therefore, since the beginning of the EU the European actors strived for establishing minimum-conditions by applying a specific legislative instrument — the directive.

In order to agree on such directives, the role played by peak organisations of both the workers and employers cannot be underestimated. With only defining the purpose to be achieved and the formulation of some cornerstones, Member States that have to implement those directives still have a specific scope how to integrate these rules into existing national law. At the same time, the European Union had the aim of establishing one single market including the guarantee of the free movement of workers, the free movement of capital and goods, the freedom of residence as well as the freedom of services. To avoid wage competition between companies from Member States with lower working conditions and labour standards providing their services in high-wage countries, the Posting of Workers Directive came into being in 1996.

The posting of workers has to be seen as a very important element with regard to the cross-border provision of services in the EU. According to the Posting of Workers Directive, essential employment protection standards in the host country have to be met. The debate showed - and to a certain extent still shows - the challenges the EU is currently facing. On the one hand, the EU attempts to promote and establish a free market. On the other hand, the EU is in favour of a decent social balance including social protection. Again, as discussed in the next section, the Services Directive, also known as the Bolkestein Directive, could have been interpreted as an important milestone of the Lisbon Agenda in 2000. The agreement on the directive was reached after a contentious debate and constitutes an appropriate example of the influence of the European Parliament (Weiss, M.).

2.6 The role of EU funding

The engagement of the social partners depends on the political balance of power - in particular with regard to EU institutions. Thus, social partners face the issue of regulation if the European Commission initiates, if Member States take action via the Council and if the European Parliament endorses this (Bercusson, B.). Yet according to the TFEU, the European Commission should take a neutral role with regard to the stimulation of transnational social dialogue.

Community financial support can be given to social dialogue initiatives, for instance in the key area of capacity-building for social partner organisations,¹⁰ since social dialogue can be seen as an instrument to safeguard the smooth functioning of labour markets laid down in Articles 154 and 155 of the TFEU. As already explained in this section, transnational social dialogue is closely linked to European Social Partners that represent both sides of industry — management and labour (Employers' resource centre, 2011b).

The EU promotes the exchange of experience of the social partners by guaranteeing financial help, a continual monitoring process and the conducting of studies concerning transnational company agreements. An expert group¹¹ has been established to discuss key issues of the topic. For the European Metalworkers' Federation, for instance, in terms of social dialogue the support from the European Commission is very important. The Commission argued that the largest sector in Europe needed to have sectoral social dialogue. That is the reason why for many years an informal social dialogue has existed with representatives of the European Commission and which helped create confidence between both parties. The role played by the Commission is also relevant, since, for example, on the employees' side (representatives of the trade unions) not everyone is able to speak English, whereas managers are in many cases used to speaking English on the basis of their profession. Therefore, supportive action from the Commission, for instance by offering translation help, is important for the employees but not so relevant for the employers.

The EU sectoral level has been extended to a wide range of sectors with EU sectoral committees. Since 1998 many committees have been established which were funded by the European Commission. Furthermore, the Commission conducts studies for the EU-27 on the social partner organisations in certain sectors. In addition, the social partners work independently.

The European Commission already supports social dialogue at the EU level by various initiatives. In this context, it can be mentioned that the Commission has set up a database in order to collect data with regard to transnational company agreements. At the same time, two budget lines as well as the mentioned expert group are in place. Moreover, the EU already helps social partners by translation programmes, on-demand seminars and mentoring programmes.

¹⁰ European Commission, 'Social dialogue', <http://ec.europa.eu/social/main.jsp?catId=329&langId=en>.

¹¹ The third meeting of the Expert Group on transnational company agreements took place on 7 May 2010. This meeting consisted of 55 participants: 39 permanent members, 6 permanent observers and 10 speakers and ad-hoc experts encompassing different governments, social partners' experts, institutional experts from the European Parliament and ILO, academics and consultants, company actors as well as representatives from the European Commission. European Commission, 'Third meeting of the Expert Group on transnational company agreements of 7 May 2010, Minutes (EMPL F2 EP), Brussels, 28 October 2010.

The translation fund is designated to translate EU social dialogue texts in 23 languages for member federations of *BusinessEurope*, the European Association of Craft, Small and Medium-Sized Enterprises (UEAPME), the European Centre of Employers and Enterprises providing Public Services (CEEP) and European Trade Union Confederation as well as European sectoral organisations/industry federations. In order to be funded, social partners have to apply to the European Trade Union Confederation and *BusinessEurope* and indicate the text they would like to have translated. The budgetary responsibility is divided between the European Trade Union Confederation (all in all 12 languages) and *BusinessEurope* (11 languages).

The on-demand seminar fund is available for 29 states. The one day seminars are linked to EU social dialogue issues/agreements and cover travel expenses for 30 participants including interpretation, translation and meeting rooms. Not only member federations of *BusinessEurope*, the European Association of Craft, Small and Medium-Sized Enterprises (UEAPME), and the European Centre of Employers and Enterprises providing Public services (CEEP) but also Croatia and Turkey can apply. Organisations that would like to be funded by the programme can contact *BusinessEurope* which examines the entitlement of the organisation.

A mentoring programme for 14 states funds observation places for experts to EU social dialogue meetings in Brussels and covers the reimbursement of experts' travel and accommodation costs. Experts can apply from employers' organisations linked to *BusinessEurope*, the European Association of Craft, Small and Medium-Sized Enterprises (UEAPME), and the European Centre of Employers and Enterprises providing Public services (CEEP) from Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, Slovenia and Turkey (Employers' resource centre, 2011a).

These texts are generally joint agreements such as framework agreements, and framework of actions and joint declarations, among others. Once they are translated, they are published both on the resource centre websites of the ETUC (<http://resourcecentre.etuc.org>) and on the resource centre websites of the employers (www.erc-online.eu).

In order to assess the engagement of the European Commission to help ensure a kind of infrastructure of social partnership across the EU, it should be noted that a wide range of measures already exists aimed at establishing a healthy or rather stable environment for the social partners.

In terms of an evaluation of the measures used and the role of the EU funding itself, it should be clear, that EU funding constitutes an intervention with regard to the organisation of employers and workers at the EU level. Taking into account that no social partner should take advantage of any stakeholder, it is recommended not to expand EU funding at the EU level. This also means that the current system of EU funding, as designed above, is considered to be sufficiently supported by the Commission and the budget authority of both the European Parliament and Council.

The EU 2020 strategy recognises European social dialogue as a relevant contributor to two flagship initiatives which are the 'An industrial policy for the globalisation era' initiative as well as the 'An agenda for new skills and jobs'. The EU 2020 initiative 'Youth on the move' is also closely linked to the involvement of social partners. Furthermore, the initiative 'Innovation Union' clearly refers to European social dialogue (Conchon, A. et al.).

Moreover, as a reaction to the initiative 'An industrial policy for the globalisation era' the European Parliament stressed the importance that sustainable development should also be based on an intense dialogue with employees and workers.¹²

It remains clear that without any EU funding, in particular with regard to social partner organisations from Central and Eastern European states, the promotion of transnational social dialogue and thus initiatives of the EU 2020 strategy of the European Commission would be seriously affected.

¹² European Parliament resolution of 9 March 2011 on an Industrial Policy for the Globalised Era (2010/2095(INI)).

3. RECORD OF LEGISLATIVE ACHIEVEMENTS

KEY FINDINGS

- Articles 154 and 155 TFEU form the political framework for European social dialogue.
- The current state of play of EU policies on labour regulation can be found in the Social Agenda 2005–2010 of the European Commission, which helps facilitate transnational collective bargaining by initiating the concept of an ‘optional legal framework for transnational collective bargaining’.
- However, neither the proposal of an optional legal framework for transnational collective bargaining nor the statement of the European Commission on the lack of a legal framework exhibit concrete action with regard to the establishment of a legal framework for cross-border collective bargaining and transnational social dialogue.
- Transposing European legal instruments into national law may enhance the effectiveness of current initiatives.
- Recent directives such as the Posting of Workers Directive and the Directive on Parental Leave play an essential part of the EU’s approach to a further integration of the European Union.
- European Works Councils are bodies representing the European employees of a company which inform and consult workers at the transnational level and they become more and more influential.
- The case of the European Works Councils Directive shows a strong facilitating role of the social partners opening up an opportunity to renegotiate an otherwise blocked directive and it is a good example of successful informal trilogue between the Commission, the Council and the Parliament.

3.1 The roles played by European institutions and Member States

Both Articles 154 and 155 TFEU form the political framework for European social dialogue. The first Article states that “before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Union action’ as well as ‘on the content of the envisaged proposal”.

Moreover, Article 155 says that social dialogue “at Union level may lead to contractual relations, including agreements’ that ‘shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or [...] at the joint request of the signatory parties, by a Council decision on a proposal from the Commission”. However, this framework neither covers transnational social dialogue nor collective bargaining at the enterprise level (Bé, D.), which is of greatest importance in this study and will be further discussed in detail in section 5.

To enhance the working of a European labour market, the Commission announced that it would help facilitate transnational collective bargaining. This has been supported by the European Parliament.

Before initiating the concept of an 'optional legal framework for transnational collective bargaining' in its Social Agenda 2005-2010, the Commission recognised that there was a growing number of agreements (well over 100) at the transnational company level, covering issues such as health and safety, restructuring and training. It noted that in some cases a legal basis was given to the agreements at national level. However, the practice varied widely and most agreements operate in a legal grey area.

With the growth of transnational businesses, the continuing pressures of takeovers and mergers and the extension and development of European Works Councils, the Commission believed that transnational bargaining would become more common. As a result, the Commission argued that a legal framework might become necessary to regulate such issues as defining the actors entitled to negotiate, the form and content of agreements, the legal effect of agreements, links to national and sectoral agreements as well as the right to collective action. With the following announcement, the Commission initiated a discussion on setting up an 'optional legal framework' for transnational collective bargaining¹³.

Providing an *optional framework for transnational collective bargaining* at either enterprise level or sectoral level could support companies and sectors to handle challenges dealing with issues such as work organisation, employment, working conditions, training. It will give the social partners a basis for increasing their capacity to act at transnational level. [...]

The Commission plans to adopt a proposal designed to make it possible for the social partners to formalise the nature and results of *transnational collective bargaining*. The existence of this resource is essential but its use will remain optional and will depend entirely on the will of the social partners.

Such an approach was anchored in the 'partnership for change' priority advocated by the Lisbon Strategy and has to be seen in the context of social dialogue as it has developed over the last 20 years, and in particular recently.

After the Commission's sole specific proposal in its Social Agenda for 2005–2010 on transnational collective bargaining, the issue has been abandoned for a while. The Commission's Green Paper of November 2006¹⁴ and its legislative programme for 2007¹⁵ do not even mention cross-border social dialogue or transnational collective bargaining.

With the Commission's announcement of its intention in the Social Agenda to conduct a study and to consult the social partners on the elaboration of an 'optional legal framework' for transnational collective bargaining, the group of experts submitted its report in 2006¹⁶ backing the adoption of such an optional framework through a directive on the establishment of a European system of transnational collective bargaining by complementing the existing national systems.

¹³ European Commission, 'Communication from the Commission on the Social Agenda', COM (2005) 33 final, Brussels, 9 February 2005.

¹⁴ European Commission, 'Modernising labour law to meet the challenges of the 21st century', Green Paper, COM (2006) 708 final, Brussels, 22 November 2006.

¹⁵ European Commission, 'Commission legislative and work programme 2007', Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, COM (2006) 629 final, Brussels, 24 October 2006.

¹⁶ European Commission, 'Transnational collective bargaining: Past, present and future', Brussels, February 2006.

The report, along with the first analysis of existing International Framework Agreements and the European Framework Agreements, was presented and discussed during a seminar organised by the Commission with the representatives of the social partners in May 2006 (Telljohann, V. et al.). The representatives of the union organisations were in favour of such an optional framework whereas the majority of employers present at the seminar were opposed to it. They all agreed, however, on the need to have more information on the subject.

In a conference organised by the Commission on 27 November 2006, a survey conducted by the Directorate General Employment and Social Affairs on international framework agreements and European framework agreements was presented. The employer representatives again expressed a strong opposition to any legal framework on transnational collective bargaining — even if it were to be 'optional'. The European Trade Union Confederation on the other hand, expressed its conditional support.

It was only in 2008 that the Commission pointed again to the fundamental shortcoming of outcomes of transnational negotiations that lack a legal framework¹⁷. However, despite the acknowledged importance of transnational company negotiations, no concrete action has been undertaken by the Commission to establish a legal framework for transnational collective bargaining. In addition, no specific reference has been made to cross-border collective bargaining or transnational social dialogue in the EU-2020 Strategy, laid out in 'Europe 2020: A strategy for smart, sustainable and inclusive growth', Communication from the Commission, COM (2010) 2020 final, Brussels, 3 March 2010.

In the following, some core legislative acts or directives that have had a certain impact on the topic of cross-border collective bargaining or transnational social dialogue are discussed. A directive requires Member States to achieve a particular result by setting only minimum standards without dictating the means of achieving that result. This not only allows for tailoring these standards to fit with national traditions, laws and practices in Member States, but also to go beyond them in order to offer more protection than minimum standards require.

Transposing European legal instruments into national law in this way may engage national parliaments, political parties, social partners and other stakeholders in an ongoing debate on cross-border collective bargaining and transnational social dialogue and practices and thus may enhance the effectiveness of current initiatives (Glassner, V. and Pochet, P., 2011a).

3.2 Directives on information and consultation of employees

The rights pertaining to information and consultation of the workforce under Community law are currently some of the most fragmented in the EU legislative body (ETUI, 2010a). In total more than 15 directives deal with information and consultation in some kind of a general or specific sense. In this regard, two directives are discussed: the directive on European Works Councils (94/45/EC) and the European framework directive on information and consultation (2002/14/EC).

¹⁷ European Commission, 'The role of transnational company agreements in the context of increasing international integration', Commission Staff Working Document, Brussels, 2 June 2008.

The European Works Council's Directive and its recast¹⁸

European Works Councils are bodies representing the European employees of a company. The European Works Councils representatives inform and consult workers at the transnational level by management on the progress of the business and any significant decision that could affect them.

Directive 94/45/EC¹⁹ introduced the right to establish European Works Councils in undertakings or groups of undertakings employing at least 1000 employees in the European Union and the other countries of the European Economic Area (Iceland, Liechtenstein and Norway) with at least 150 employees in each of two or more Member States. At the moment, some 900 European Works Councils represent over 15 million employees (European Commission, 2010b/ETUC, 2008).

After 1994 the European Parliament repeatedly called for a modification of core provisions in order to improve information and consultation in the event of reorganisations and with respect to improving the working conditions of European Works Councils. In the subsequent process, which also involved the social partners, the European Parliament was effectively able to influence the legislative substance of the recast EWC Directive.

The story, however, was a protracted one. By 1999 the Commission had already announced its willingness to review the directive on the establishment of the European Works Council 94/45/EC and started consultations with the European social partners. At the same time, the negotiations were characterised by widely differing positions between the institutions (Eichhorst, W. et al.).

After consulting the European social partners²⁰ and carrying out an impact assessment²¹, the Commission submitted a proposal in 2008 to recast the directive²². The European Trade Union Confederation, which had always called for a revision, pushed the negotiations forward by agreeing upon the recast.

Consequently, the social partners were able to draw up a document (the Joint Advice of 29 August 2008), which had to be adopted by the Council and the Parliament. Subsequently, the new directive²³ was adopted by the European Parliament and the Council in 2009, with some amendments, which have mainly been suggested by the European social partners.²⁴

¹⁸ The European Works Council's Directive 1994/45/EC and its recast 2009/38/EC.

¹⁹ Directive 94/45/EC on the establishment of a European Works Council was adopted by the Council on 22 September 1994. On 15 December 1997 the Council adopted Directive 97/74/EC extending the application of Directive 94/45/EC to the United Kingdom.

²⁰ Commission of the European Communities, 'European Works Councils: Consultation of the European social partners on the revision of Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees', C(2008)660 of 20.02.2008.

²¹ Commission of the European Communities, 'Commission staff working document accompanying the proposal for a directive of the European Parliament and the Council on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (recasting). Impact assessment', SEC(2008)2166 of 02.07.2008.

²² Commission of the European Communities, 'Proposal for a European Parliament and Council Directive on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees', COM(2008)419 of 02.07.2008.

²³ Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and community-scale groups of undertakings for the purpose of informing and consulting employees, OJ 16.5.2009 p28.

²⁴ European Commission, 'Implementation of Recast Directive 2009/38/EC on European Works Councils', Report of the Group of Experts, December 2010.

The case of the European Works Councils shows a strong facilitating role of the social partners opening up an opportunity to renegotiate an otherwise blocked directive. The social partners effectively helped draft a compromise on a 'recast' directive outside formal social dialogue. Furthermore, the European Works Council 'recast' is a good example of successful informal trilogue between the Commission, the Council and the Parliament (Eichhorst, W. et al.).

This measure amends the former directive in a number of important ways. The concepts of information, consultation and the meaning of a transnational matter are clarified:

- Information is defined as the transmission of data by the employer to employee representatives in order to enable them to examine the subject matter. Information must be given in good time and in such a manner as to enable the representatives to understand the possible impact and prepare for consultation.
- Consultation is defined as the establishment of dialogue and exchange of views between employee representatives and management at such time and in such a manner as to enable the employee representatives to express an opinion within a reasonable time before a decision is taken.
- The new definition explains that a matter will be considered transnational if at least two Member States are involved.

The recast European Works Councils Directive (2009/38/EC) must be transposed into national legislation across all EU Member States by 5 June 2011.

From 6 June 2011, when Member states will have finished transposing its provisions in their legal order, European Works Councils will be established and operated within the framework of recast Directive 2009/38/EC.

Directive for the establishment of a general framework for informing and consulting employees in companies in the EU²⁵

The closure of the Renault factory in Vilvoorde, Belgium, in February 1997 was one of the catalysts which led to a Commission initiative on information and consultation of workers' representatives. As a consequence, European employers' organisations refused to engage in any social dialogue at all.

The framework directive on information and consultation emerged in March 2002 after long and painful negotiations among the institutions (Papadakis, K.). The directive gives all organisations (both private and public) a framework for informing and consulting employees in the European Community.

Both the European Commission and the European Parliament assess the right of information and consultation in the approximation of national systems across the EU. Thus, Directive 2002/14/EC has a significant impact in Member States which had not had a general, permanent statutory system of information and consultation.

The European Commission stresses that it is too early for a comprehensive evidence-based research and that it does not currently envisage amending the directive, but wants to promote full and effective transposition and enforcement. At the moment, no revision or recast exercise of Directive 2002/14/EC is foreseen.

²⁵ Directive for the establishment of a general framework for informing and consulting employees in companies in the EU 2002/14/EC.

3.3 Directives in the framework of the free provision of services

The Posting of Workers Directive²⁶

The posting of workers is an essential component of the cross-border provision of services in the EU. Without the possibility to post workers to perform specific technical functions under given economic and logistic conditions, most undertakings would be unable to offer services across borders (Eichhorst, W. et al.).

On the one hand, posting is important in view of the development of companies with regard to market entry and internationalisation. On the other hand, posting can be used as a versatile instrument, in order to reduce labour shortages (e.g., in times of economic growth).

The free movement of workers and the freedom of service aim at promoting a common market within the EU. However, there are differences regarding the free movement of workers and the posting of workers (Blanpain, R. and Baker, J.).

First, the free movement of workers includes free access to the labour market for all workers, who also face equal treatment as national workers. Second, the posting of workers under the Posting of Workers Directive (PWD) encompasses the access to the labour market for companies sending their own employees abroad, in order to provide services to their customers on-site or to their foreign subsidiaries. Also, posting belongs to temporary work agencies that provide workers to foreign-user companies.²⁷

However, the posting of workers raises complex legal, social and economic issues to the extent that their work is performed, on a temporary basis, in a Member State other than the one where the employment relationship was originally established.

The Posting of Workers Directive established a common framework for the provision of transnational services within the EU. It identifies a “hard core” of national rules in the host country to be applied to posted workers, while safeguarding the potentially improved conditions which employees may be granted through law or collective bargaining in the country where they habitually work.

The implementation of the Posting of Workers Directive has been fraught with several difficulties, particularly regarding its implementation and interpretation in different Member States. This is mainly due to some judgments of the European Court of Justice (ECJ) questioning the regulatory status quo of the Services Directive.

Whereas the original directive had been regarded for many years as a piece of legislation safeguarding national autonomy in extending binding national provisions of host countries on posted workers, the Member States’ room to manoeuvre was curtailed by a sequence of ECJ cases (Viking, Rüffert, Laval, Luxembourg).

These cases highlighted some crucial deficiencies of the Posting of Workers Directive. The major issue once more was the balance between business rights of free provision of services within the EU on the one hand and the social protection of workers on the other, as well as Member States’ ability to define their own territorial labour legislation when dealing with increased cross-border mobility of workers and companies.

²⁶ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

²⁷ European Commission, ‘Study on the economic and social effects associated with the phenomenon of posting of workers in the EU’, Brussels, March 2011.

To clarify and re-strengthen the directive, the European Parliament called for a modification of the Posting of Workers Directive in order to allow for better protection of posted and local workers through stronger national competences to ensure equal pay for equal work at the same place.

The European Parliament would like to re-establish a clear national authority for defining national provisions of the host country to be applied to posted workers. Yet the European Commission has hitherto been reluctant to embark on this track, as it believes there is an insufficient Member States demand for a revision of the directive. Nevertheless, major European trade unions support the Parliament's position (Eichhorst, W. et al.).

The Services Directive²⁸

The Services Directive, also referred to as the Bolkestein Directive²⁹, was seen as an important kick-start to the Lisbon Agenda in 2000. The directive is certainly one of the most heavily debated regulatory projects of the recent period — and in fact this directive is also the prime example of substantial influence exerted by the European Parliament.

The directive, which aims at establishing a single market for services within the EU, was harshly criticised by left-wing European politicians, who complained that it would lead to competition between workers in different parts of Europe, resulting in social dumping.

While the European Commission had originally proposed a far-reaching directive, which would liberalise the provision of services in the EU by applying country of origin regulation for a wide range of services and legal areas, in particular labour law, the Parliament was effectively able to limit the scope and impact of the Services Directive (Eichhorst, W. et al.).

The crucial 'country of origin principle' has been dropped from the key Article and replaced by a clause on the 'freedom to provide services'. The Parliament also effectively limited the directive's scope. It now covers fewer services than the original text, for example, a range of services provided to businesses and consumers, such as legal and tax advice, management consultation, real estate services, construction, trade services, tourism and leisure services.

However, the directive does not deal with labour law or the posting of workers within the EU (which are matters specifically dealt in another EU law – the Posting of Workers Directive) and some services are excluded from its scope (such as financial services and healthcare).

The proposal was finally adopted as Directive 2006/123/EC. The directive makes it easier for businesses in one Member State to establish a business in another Member State by reducing administrative formalities and allowing online registration of businesses through one or several points of single contact in each Member State.

²⁸ The Directive 2006/123/EC of the European Parliament and of the council of 12 December 2006 on services in the internal market.

²⁹ Drafted under the leadership of the former European Commissioner for the Internal Market, Frits Bolkestein.

3.4 Directives on working conditions

The Directive on Parental Leave³⁰

The first European social dialogue agreement on parental leave was reached in 1996 and incorporated into a directive binding on all Member States (except the United Kingdom), and was the first of the European social dialogue inter-sectoral agreements. The directive requires Member States to ensure that employers give a minimum of three months unpaid leave to both mothers and fathers after the birth of a child. Also adoptive parents of children up to eight years old must have the same right

In 2008 the social partners agreed to undertake joint action to achieve the aims of the Parental Leave Directive. The parties worked for six months on amending the original text before coming up with the provisions of a revised framework agreement. By March 2009 negotiations had been successfully completed (Eurofound, 2009b).

The revised Directive was adopted on 30 November 2009 and came into force on 8 March 2010. It gives each working parent the right to a minimum four months leave after the birth or adoption of a child.

At least one of the four months cannot be transferred to the other parent — meaning it will be lost if not taken — offering incentives to fathers to take the leave. The new Directive also provides for better protection against discrimination and a smoother return to work. It puts into effect an agreement between European employers and trade union organisations³¹ whose Member States have until March 2012 to transpose its provisions into national law.

The Working Time Directive³²

The EU Working Time Directive creates the right for EU workers to a minimum number of holidays each year, paid breaks, and rest of at least 11 hours in any 24 hours period while restricting excessive night work, and a default right to work no more than 48 hours per week.

It was issued as an update on an earlier version on 22nd June 2000. With excessive working time being a major cause of stress, depression and illness, the purpose of the directive is to protect health and safety.

The renewal of the Working Time Directive is another heavily disputed issue. The Commission put forward an amending legislative proposal in 2004, proposing amendments concerning the opt-out, the reference period and the treatment of on-call working time.

However, this draft directive was finally rejected in April 2009 after around five years of protracted negotiations and three rounds of conciliation. Different opinions between the Commission and the European Parliament regarding on-call working time could not be resolved. Hence, the European Parliament and the Council could not find a compromise on three crucial points: the opt-out clause, on-call time and multiple contracts.

³⁰ Parental Leave Directive (96/34/EC) of 3rd June 1996 implementing the framework agreement on parental leave concluded by the Social Partners, UNICE, CEEP and the ETUC on the 14th December 1995 (extended to the UK by Council Directive 97/75/EC of 15th December 1997 with 15th December 1999 as the operative date).

³¹ <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1854&format=HTML&aged=1&language=EN&guiLanguage=en>.

³² Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.

President Barroso announced to the European Parliament in September 2009 that the Commission would make a new proposal to amend Directive 2003/88/EC in 2010. The European Commission is currently still reviewing the Directive by means of a two-stage consultation of the social partners at the EU level and a detailed impact assessment.

In December 2010 the Commission adopted a second-stage consultation paper asking workers and employers representatives for their views on possible changes to the directive. It also adopted a report on how the current working time rules are being implemented in the Member States and made available an independent study on the social and economic impact of the Directive³³.

The Directive on Temporary Agency Work³⁴

The EU Temporary and Agency Workers Directive agreed in November 2008 to guarantee those working through employment agencies equal pay and conditions with employees in the same business that do the same work.

It is the third piece of legislation in the European Union's employment law package to protect atypical working (the others being for part-time workers and fixed-term workers). The core of this directive is equal rights on 'basic working and employment conditions'. Although it was proposed in 2002, Danish, German, Irish and UK governments had blocked its enactment until 2008.

The Posting of Workers Directive and the Directive on Temporary Agency Work (TAW) share common areas but the application of the Posting of Workers Directive takes precedence over the Directive on Temporary Agency Work when dealing with cross-border activities of temporary work agencies.

3.5 Coordination of Social Security

The coordination of social security rights and the portability of supplementary pension rights play an important role in view of the freedom of movement — one of the core principles of the EU. Hence, the Community legislation on social security coordination contains the provisions that mobile workers and their families should benefit (with some exceptions) from social security coverage in the country in which the person concerned works and must pay corresponding contributions.

However, national social security schemes differ to a large degree within the EU. EU law provides the workers with the right to export their social security rights, which means that benefits acquired under the legislation of a Member State must be paid without any reduction, modification or suspension — even if the person concerned resides in another Member State.

The practical implementation of this basic principle requires good cooperation and coordination between Member States. A legal barrier exists in the EU framework on social security regarding occupational pensions. At present, changing job or country often means losing occupational pension benefits in some Member States. The difficulties in transferring these benefits from one country to another create some serious obstacles to labour mobility.

³³ Deloitte Study (December 2010) to support an Impact Assessment on Further action at European level regarding Directive 2003/88/EC and the evolution of working time organisation.

³⁴ The Directive on Temporary Agency Work 2008/104/EC.

A certain number of steps have been taken in order to strengthen the portability of occupational pensions. For instance, the amended Proposal for a Directive on minimum requirements for enhancing worker mobility by improving the acquisition and preservation of supplementary pension rights was adopted in October 2007. The proposed directive aims to guarantee mobile workers improved access and better preservation of their supplementary pension rights.

It focuses on the setting of minimum requirements for better access to pension rights and preservation of rights, so that mobile workers are not disadvantaged. The ongoing Commission work on the 'portability directive' is greatly needed.

EU regulations currently focus most notably on long-term mobility (i.e., at least one year) and on an increasing part of migrant workers, for example in the service and construction section. Workers within these sectors often have only short-term contracts and thus frequently change their jobs. The hurdles for short-term mobility may be very different from those experienced by the more classical type of migrant workers who decide to emigrate and work for a longer period in another Member State (Bonin, H. et al.).

3.6 The effects of the Laval, Viking and Rüffert cases

As noted above, the freedom of movement of workers (Art. 39 TFEU) is a very important principle of the European Union and one of its founding principles. The reason is that without the free movement of workers a common market cannot be created (Bonin, H. et al.).

Under EU law the right of freedom to provide services and the right to strike³⁵ may both be regarded as fundamental rights, which Member States must guarantee. However, given that the exercise of one of these rights may impede or limit the exercise of the other, the challenge is to devise a robust interpretation of the concept of fundamental freedoms that allows room for both to be applied.

Whether EU law allows for the social partners to take collective industrial action was the subject of litigation in two cases referred to the ECJ at the end of 2005: the Viking case, referred by the English Court of Appeal, and the Laval case, referred by the Swedish Labour Court.

The two decisions of the ECJ on the cases caused political controversy over the role of collective labour actions in the EU industrial market. Far from settling a long-standing contentious issue, it appears that the ECJ has brought opposing interests, that is, the rights of employers to freely move their business and the rights of workers and their representatives to undertake actions protecting common work interests, into sharper conflict (Blanpain, R. and Swiatkowski, A.M.).

³⁵ Enshrined in Article 28 of the Charter of Fundamental Rights of the European Union, 'Right of collective bargaining and action'.

Box 3: The Viking case

Viking Line is a Finnish passenger shipping company which owned and operated a ferry, Rosella, under a Finnish flag and with a predominantly Finnish crew, who benefited from a collective agreement negotiated by the Finnish Seamen's Union. Legal proceedings started when Viking decided that it would be better off if Rosella was registered as an Estonian ship, crewed by Estonian seafarers with cheaper terms and conditions of employment. Together with the Laval case, the Viking case was considered by the Advocates General in May 2007, who took the view that industrial action was subject to treaty rights for exercising freedom of services and that such an action which restricts this freedom must be objectively justified.

Source: Eurofound (2010a).

Both cases, Viking and Laval, are about trade unions taking action against social dumping: in the Viking case against the re-flagging of a Finnish ship to Estonia with the aim of applying lower standards to the seamen on the ship; in the Laval case against the application of Latvian wages and working conditions on Latvian workers employed by a Latvian company on a Swedish construction site. In both cases the right to take collective action to protect workers against social dumping was recognised by the ECJ as a fundamental right which forms an integral part of the general principles of Community law. However, the Court made the exercise of this right subject to certain restrictions, which led in both cases to a negative judgement regarding the collective bargaining and action strategies at stake. This has caused much unrest among trade unions and their members around Europe and especially in the states and sectors most closely concerned (ETUC, 2008a).

Box 4: The Laval case

The Laval case originates with a Latvian company, Laval un Partneri, operating in Vaxholm in Sweden, which wanted to pay lower wages to the Latvian construction workers building a Swedish school near Stockholm. As it is standard practice in the Swedish industrial relations system the Swedish unions then started negotiations with Laval with the intention of having a collective agreement signed on wages and other working conditions, which are always negotiated on a case-by-case basis. Since Laval wanted to take advantage of Latvia's lower wages, it signed a collective agreement there. Following the failure of the Swedish negotiations, the Swedish trade unions began industrial action with a blockade against Laval, which was supported by other Swedish trade unions. After this, Laval was declared bankrupt, and they brought the case before a Swedish court, which referred the case to the European Court of Justice. The Swedish blockade was declared illegal because the judges did not find that the blockade was necessary according to their interpretation of the principle of proportionality and disturbed the free movement for services as mentioned in European treaties and in the Posting of Workers Directive. The ECJ stated that although Article 3 of the Posted workers Directive entailed a right to certain standards to posted workers, these rights required either a law or applicable collective agreements. Yet in Sweden no statutory minimum wage was in place nor were collective agreements somehow applicable. Consequently industrial action to impose certain standards, in the absence of legally enforceable national provisions, could not be justified under EU law unless it is justified 'only on grounds of public policy, public security or public health' which was stipulated in the 18.12.07 judgement.

Source: Eurofound (2010a) and ETUI (2010b).

According to ETUI (2010b), the Posting of Workers Directive is to be understood as a 'minimum directive' because it lays down minimum working conditions that Member States have to ensure without ruling out the provision of higher standards of protection. In the Laval case the European Court of Justice established a radical change to this interpretation saying that the Posting of Workers Directive limits the level of protection guaranteed to posted workers. Neither the host Member State nor the social partners can ask for more favourable conditions going beyond the mandatory rules for minimum protection set forth in the directive. This is now often referred to as a switch from 'a minimum' to 'a maximum' directive (ETUI, 2010b).

Box 5: The Rüffert case

In Lower Saxony, in Germany, a company won a tender for construction work at a prison. The German company subcontracted the work to a Polish company. The 53 Polish workers only received less than a half of the wages paid to their German colleagues working on the site. As a result, the government of Lower Saxony annulled the contract and imposed financial penalties on the company. In this case the ECJ decided that the Public Procurement Act (*Landesvergabegesetz*) in Lower Saxony did not comply with European law, TFEU and the Posting of Workers Directive. Therefore, the scope of the act was limited and thus the workers on the private construction site did not enjoy protection. Once again the Court stressed the need for justifying the restriction of the freedom to provide services.

Source: Warneck, W.

3.7 Concluding remarks

All three cases have in fact shaken the foundations of labour rights in the European Union, which were made under the Nice Treaty and remain in force as long as no changes in EU law occur. Parts of the European labour movement set their hopes on the Lisbon treaty (which entered into force on 1 December 2009), making the Charter of Fundamental Rights legally binding. However, market interests took priority over the right to take industrial action.

This was made clear by Commission Vice-President Margot Wallstrom in October 2007 when she said

'As regards the relationship between fundamental rights and the four fundamental freedoms (free movement of persons, goods, services, and capital), the European Court of Justice has developed clear principles. In the Commission's view, this case-law will not be affected in any way by making the Charter legally binding.'

In the period since the judgement a wealth of articles and assessments by academics and others has been published. The last word on how to interpret all three cases from both legal and political perspective has certainly not yet been said, and the current position does not offer a final interpretation.

The results of European cross-industry social partnership have been in a continual process of exchange. Meanwhile, a certain amount of joint texts, for example agreements, were concluded after the legal possibility was made by European treaties in 1993. This, as already noted, led to several outcomes, such as agreements on parental leave, part-time work and fixed-term contracts (European Commission, 2011).

European social partners possess the right to be consulted by the Commission, and may also decide to negotiate binding agreements. The institutional basis for that kind of social dialogue is part of the TFEU. To date, European social dialogue has flown into over 300 joint texts by the European social partners. As shown in the last chapter, the European Commission financially supports social partnership across the EU in terms of capacity-building and translation help (European Commission, 2011).

The latest study on the posting of workers found that the general labour market effects of posting are small by analysing its impact on unemployment rate, overall employment as well as the brain drain or brain gain. Yet in sectors where posting is widely spread, for example the construction sector, effects can be found. In addition, a possible limited impact on wages and working conditions could be observed, both in the sending (upward) and receiving (downward) countries. However, the authors of this study argue that this observation was not evidence based (European Commission, 2011).

As analysed with the cases of Laval, Viking as well as Ruffert, within the recent debate on the posting of workers, the freedom of movement of workers and the freedom of services market interests seem to get the upper hand in view of the right to take industrial action.

Finally, the transferability of occupational pensions is a complex and difficult task and a major aspect of transnational as well as intranational mobility of workers, but it is not within the social partner's remit. Hence, the transferability of occupational pensions applies primarily to EU institutions.

4. WHAT HAS BEEN ACHIEVED SO FAR?

KEY FINDINGS

- Due to the rather passive role of employers, cross-border collective bargaining is mainly driven by trade unions. Yet, its outcome remains muted.
- Transnational company agreements are the most innovative way to deal with human resource issues and serve to transpose European values so the European social model can serve as a worldwide role model.
- European and international framework agreements promote core labour standards and Corporate Social Responsibility. Yet workers are also interested in spreading other issues, such as health and safety.
- International and European framework agreements do have a certain influence on workers, although they are signed on a voluntary basis. Most agreements deal with anticipation of change and restructuring.
- International framework agreements constitute recognition of social partnership at the global level. Similarly, they can serve as a stepping stone of social dialogue between the management and the workforce of multinational companies. In addition, they are able to overcome legal gaps by self-regulation.
- Transnational company agreements can be seen as a proactive method to influence both industrial relations and social dialogue not only in Europe but also at the global level.
- Improving the ownership of these agreements constitutes an important challenge for the future, which could be achieved by an establishment of concrete mandates.

4.1 Review of cross-border collective bargaining

As already noted, the Europeanisation of collective bargaining can be interpreted as a multi-dimensional process that is influenced by both national and European developments as well as by general economic or sector-specific variables. The starting point was in the 1970s, when unions from the metal sector began to institutionalise the exchange of information and policy coordination. As a consequence, the transnational coordination of collective bargaining constitutes a part of the Europeanisation process.

As the report shows, there have been two reasons for trade unions to engage in cross-border collective bargaining. On the one hand, different business cycles which lead to diverging wages dynamics, and on the other hand, in order to avoid competition between wages, various national unions agreed on wage bargaining coordination. With the establishment of the Doorn Group, a network of trade unions from four different countries in Europe, an early form of cross-border collective bargaining in the EU was set in place.

At present, the European industry federations can be seen as a platform for the cross-border exchange of collective bargaining information. Other forms of cooperation between national unions from other Member States are often funded by the European Commission. The developed coordination of cross-border collective bargaining makes the metal sector the frontrunner amongst all other sectors in Europe.

European and national unions established various institutions and instruments for the cross-border coordination of collective bargaining by improving the implementation of common bargaining guidelines and principles.

In addition, a system for the electronic exchange of bargaining information was established at the European level: the European Collective Bargaining Network (Eucob@n). This can be interpreted as a further step to promote comprehension and improve mutual understanding. However, the example of cross-border coordination of collective bargaining is still not well-differentiated and wide spread. As it is still considered as a 'learning process' by trade unions themselves, from a practical perspective one should not expect too much, since its impact so far has been limited.

Employers do not favour any initiative towards a cross-border coordination of collective bargaining policy that resembles the approach of the unions. Therefore, national employers' associations are mainly interested in an exchange of information and not on collective bargaining at the EU level. A possible explanation for the intention of the employers to avoid the coordination of collective bargaining can be that employers are able to benefit from lower production costs in other countries and that they can adapt their value chain according to the specific factor endowment of each country (Marginson, P. and Schulten, T.).

The different systems of industrial relations in the EU imply various forms of social partnership across the EU. Nonetheless, since the employers are not willing to negotiate wages and working conditions at a cross-border or rather European level, the outcome of the coordination of cross-border collective bargaining is limited.

Yet as we have seen, several networks with regard to information and consultation are in place. In order to assess the impact of cross-border collective bargaining, the study confirms the findings of a previous evaluation which states that the dimension and outcome of this transnational approach still remains muted. It is possible that the cross-border networks one day are able to communicate common bargaining interests across the EU which would then facilitate agreements at the EU level (Arrowsmith, J. and Marginson, P.).

4.2 Review of transnational company agreements

Due to the wide range of agreements, it is a challenging task to assess the effect of the agreements. Moreover, the analysis cannot be reduced to one notion or rather one concept of transnational company agreements, since transnational company agreements deal with many topics and the signatory parties differ greatly. Amongst the most common are 'agreement', 'framework agreements', 'global agreement', 'European agreement', and 'group agreement', which deal with various kinds of issues. Rather seldom are the expressions 'principles', 'guidelines', 'charters', 'European charters', 'declarations', 'code of conduct', 'convention'.³⁶

The European Commission evaluates international framework agreements on a regularly basis. Important effects of these agreements have already been observed, in particular with regard to restructuring and equal opportunities. With the establishment of expert groups on transnational company agreements, representatives of different companies are able to present their views and experiences. In this way, the concrete impact of transnational company agreements can be analysed. These expert groups are also a possibility for the Member States to participate in the negotiation process.

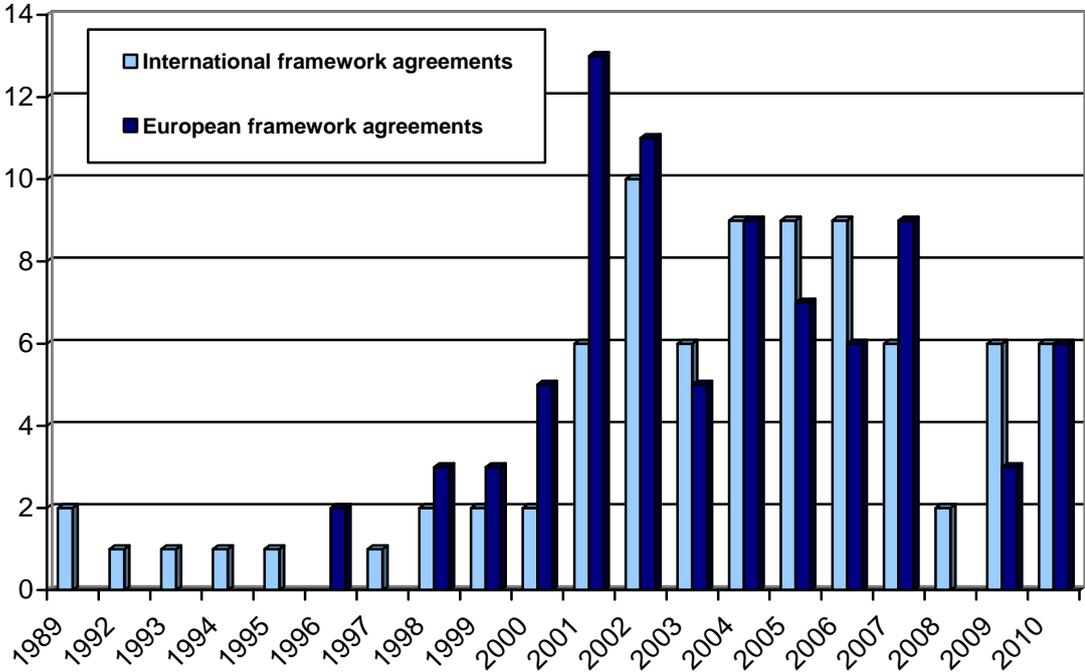
³⁶ European Commission, 'Mapping of transnational texts negotiated at corporate level', EMPL F2 EP/bp 2008 (D) 14511, Brussels, 2 July 2008.

According to the employers' view, stimulation of transnational social dialogue can be useful, provided that there are some institutional guarantees so that international framework agreements are not only window dressing. Transnational company agreements are the most innovative way to deal with human resource issues and are serving to transpose European values. Until last year all international framework agreements had been concluded by EU companies. Thus, one can say that employment issues have been extended beyond EU borders by worldwide companies concluding those agreements.

Compared to the United States, where the right to be a member of a trade union is in question, or Asia where often restrictive labour law hampers the development of strong trade unions, the European social model can serve as a role model regarding social dialogue. International framework agreements can help spread the idea of transnational social dialogue worldwide.

However, international framework agreements are a voluntary exercise, but the simple fact that international framework agreements exist, shows that they have an influence. Today there are approximately 200 transnational company agreements in place with around 100 companies that are involved which is due to several companies signing more than one agreement. Nearly 80 of them are so-called international framework agreements whereas the rest belongs to European framework agreements or mixed agreements. Since the majority of transnational framework agreements are signed by companies with their headquarters based in France and Germany, they can be seen as a rather European-focused process. A clear distinction between European and international agreements is difficult to make, because the value chain of multinational operating companies is often global (ITC 2010).

Figure 4: Number of transnational company agreements (until 2010)



Source: Telljohann, V. et al.

Nevertheless, international framework agreements are instruments which concern only one employer and not the entire sector (Papadakis, K.). International framework agreements are signed by multinational companies in the EU. However, companies outside the EU are also interested in signing agreements. Those agreements promote core labour standards, but workers are also interested in spreading other issues like health and safety. The question arises, how to further develop the content of international framework agreements in order to go beyond core labour standards. Before 2010 only 20 agreements had been signed out of Europe, which means that transnational framework agreements can be considered as a rather European phenomenon.

However, several studies on a wide range of transnational company agreements display the positive impact of transnational company agreements on core labour standards, working conditions as well as the participation of trade unions (Schömann, I. et al.; Papadakis, K.; Telljohann, V. et al.).

The latest developments of transnational framework agreements are outlined as follows, according to the European Commission. New texts on restructuring took place at Mahle where a social plan was created due to the closure of Volvera. Here Italian RSU and trade unions as well as European Works Councils were involved. At GDF-Suez a European agreement on jobs and skills planning was conducted by French trade unions and members of SNB, the European Federation of Public Service Unions (EPSU), and the European Mine, Chemical and Energy Workers' Federation (EMCEF).

At DHL a social plan for relocation at Brussels was conducted by the employer, Belgian trade unions by the support of European trade unions and the International Transport Workers' Federation (ITF). In the case of the airline AirFrance/KLM a text between the company and the European Works Council was drafted regarding the European reorganisation of sales agencies in airports.

Further texts concerning specific issues were agreed on. For example, Areva signed an amendment with regard to 2006 European agreement on equal opportunities together with European Metalworkers' Federation. Also with the European Metalworkers' Federation, the French company Thales signed a European framework agreement on annual activity discussion.

Moreover, new global texts were composed between the French company Rhodia and the international federation of chemical, energy, mine and general workers' unions (ICEM) in view of an addition to a 2008 Corporate Social Responsibility framework agreement. Also, Unilever and the international union federation (IUF) signed a global agreement on working conditions of Pakistan Lipton workers.

Other new initiatives comprise on-going EU funded projects of social partners such as workshops with ITC-ILO and employers organisations, a guide of good practices for transnational agreements in the chemical sector with CFE-CGC Chimie and CEC. Here also the review of EWC involvement in CSR policies in the energy sector including EPSU should be mentioned.³⁷

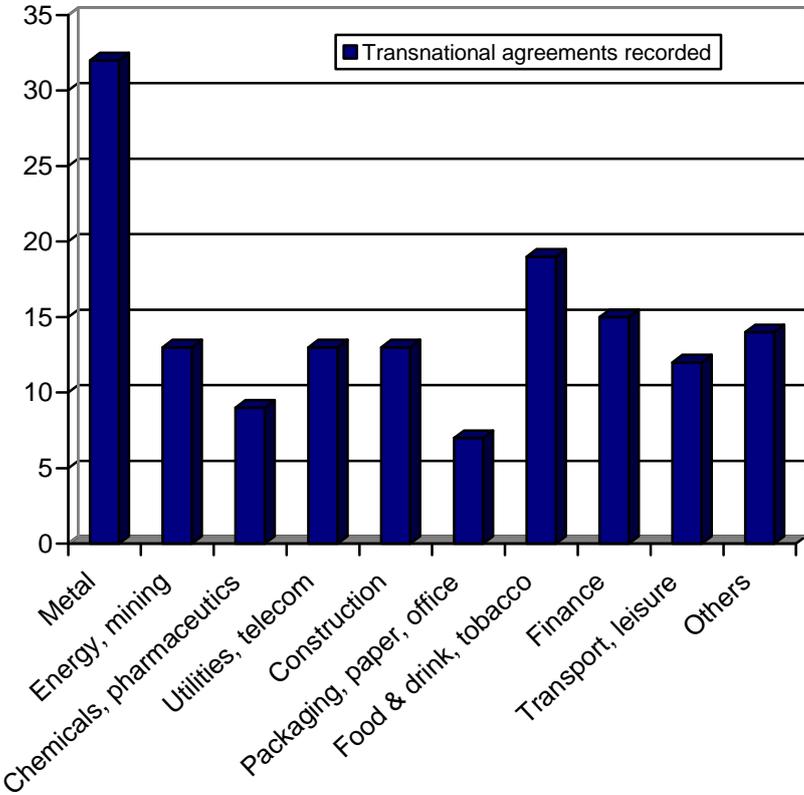
The Thales agreement from 2009 is a European framework agreement concerning professional development and was concluded between the management of the company and the European Metalworkers' Federation. The agreement contains a professional development plan for each employee with regards to job and career path information, training as well as equality of opportunity. Also, the company agreed on providing an annual report on this to the trade unions.

³⁷ European Commission, 'Transnational company agreements. Latest developments', Expert group on transnational company agreements, Brussels, 7 May 2010.

Another relevant agreement in this context was signed by ArcelorMittal and EMF (since it constitutes the most recent agreement during the crisis) and included issues related to the management and anticipation of change. The core of the agreement constitutes a provision dealing with employment issues such as no compulsory dismissals and socially responsible solutions. Also, the payment of short-time work is protected (Eurofound, 2010c).

However, international framework agreements are often considered as European initiatives aimed at implementing fundamental labour rights (Daugareilh, I.). Globalisation has led to a mismatch between the scope of global actors (such as multinational companies) and social actors (such as trade unions). Yet most activities of multinational companies are only regulated at the national level due to the absence of a multilateral framework. So, since the late 1980s there has been an ongoing debate on cross-border instruments (Papadakis, K.).

Figure 5: Overview of the sectors involved from 2000 to 2007



Source: Pichot, E. (2009).

As shown above, most agreements have been concluded in the metal sector, consisting of 16 European framework agreements, three mixed agreements and 13 international agreements. In the financial sector all agreements signed had an exclusively European character, whereas other sectors such as energy and mining, utilities and telecom, food and drink, and tobacco, as well as transport and leisure, contain European, mixed and international framework agreements. The sector packaging, paper and office contains solely international agreements. Within the construction sector, the vast majority of agreements deal with international texts, while the rest belongs to European framework agreements.

Transnational dialogue at company level is based on stable actors on the employers' side, but on versatile actors on the employees' side due to global union federations (GUF), European industry federations and European Works Councils, national trade unions, and national works councils. Yet no legal framework at international or EU level exists. The role of such a possible (optional) legal framework will be discussed later on within the report (see chapter 5). Transnational dialogue at company level has only limited effects both on suppliers and subsidiaries. In any case, international and European framework agreements reflect to a high degree traditions of European industrial relations. That implies a concentration of these agreements in social market economies with traditional collective interest representations. Therefore, the EU at present faces on a high level various legal and industrial relations cultures within its Member States (Eurofound, 2010c).

To conclude, International framework agreements constitute recognition of social partnership at global level. Similarly, they can serve as a stepping stone of social dialogue between the management and the workforce of multinational operating companies. In addition, they are able to overcome legal gaps by self-regulation (Schömann, I.).

Therefore, transnational company agreements can be seen as a proactive method to influence companywide both industrial relations and social dialogue not only in Europe, but also at a global level (Conchon, A. et al.). At the same time, transnational company agreements lead to a mutual understanding and to confidence in social dialogue. It can be further regarded as a useful instrument to accept change and understand challenges a company is facing. Also, they can contribute to shaping a common corporate identity. Despite the legal uncertainty of these agreements, concrete social results can be found especially with regard to restructuring (Pichot, E., 2009). Furthermore, they can in fact serve as an early warning system and a channel for communication within a company.

4.3 The role of European companies (SEs)

The relatively new form of European company, *Societas Europaea* (SE), is appropriate for companies that are doing business at the European level. Hence, European Commission regulation is relevant and applicable in the Members States and not national law.

The precondition to register such an SE is a concluded agreement for employee involvement pursuant to Article 4 of the Council Directive.³⁸ Although not every SE is economically active, that is, many SEs are so-called "shelf companies", which are for sale and do not employ anyone (Eurofound, 2010c).

Together with Directive 2001/86/EC, the European Company Statute (Council Regulation (EC) 2157/2001 on the statute for a European company (SE)) established the SE in the EU. Both the regulation and the directive had to be implemented within the Member States until 8 October 2004. Companies which strive to become an SE need to negotiate with a so-called special negotiating body (SNB) that consists of representatives of the employees depending on the total number of employees in each Member State. Until June 2010 around 588 SEs were in place, but only one quarter of them is involved in real economic activities, since many of the SEs are "shelf" companies that are for sale and based in the Czech Republic. Most of the normal SEs operate in Germany. Only half of all SEs do have more than 500 employees (Eurofound, 2010e).

³⁸ Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees.

The special negotiating body (SNB) serves to either conclude an agreement in order to set up a European Works Council under the 1994 EWC Directive (Directive 94/45/EC) or to found a body in the European Company. In this case, the special negotiating body and the management of the SE sets up a 'representative body' which equals an European Works Council or an alternative in the sense of an information and consultation procedure (Eurofound, 2007d). European companies can thus operate on a transnational basis within the borders of the EU with the same corporate regime.

4.4 Addressing the economic crisis

In general one can say that the economic crisis faced European industrial relations including all actors and institutions with unprecedented challenges. Against this context, the crisis has shown that industrial relations are able to mitigate the effects of the recession, though the impact differed from Member State to Member State. Generally, industrial relations in Europe have proven to be resistant even under enormous economic pressure. Both trade unions and employers' organisations have shown to be reliable contacts for several governments. Not only monetary and fiscal stimulus led to an improvement of the economic situation, but also the behaviour of social partners helped limit negative social consequences. The crisis displayed that the European industrial relations system, in spite of its broad variety in terms of company, sectoral, cross-industry, national as well as European level, gave evidence of the stability of the European social model.

In the vast majority of Member States, the cross-industry social partners strived for a consensus with regard to measures aiming at addressing the crisis. At sectoral level traditional practices dominated and company-level agreements were more widespread across Member States. Sector-level negotiations took mainly place in countries with existing and long lasting multi-employer bargaining arrangements. In some Member States, for the first time social partner agreements were negotiated at cross-industry level especially in Central and Eastern European countries, where governments or employers would have previously acted on their own. Another trend observed during the crisis was the long-lasting development towards decentralisation (European Commission, 2010).

Box 6: Case of close cooperation between EMF and CEEMET

The close cooperation between the European Metalworkers' Federation (EMF) and the Council of European Employers of Metal, Engineering and Technology-Based Industries (CEEMET) led to the implementation of a joint ad hoc working group. By establishing this new social dialogue committee by the two representations of both employers' and employees created a durable institution that was also supported by the European Commission. Thus, both groups were accepted as representatives of the sector. The new committee aims at shaping the structure of a social dialogue tool which helps contribute to ensuring both a competitive manufacturing sector and sustainable employment. The first meeting of that newly arranged group took place in January 2010.

Source: Eurofound (2010c).

During the crisis many cases of negotiated solutions and common responses took place between the social partners. Beside agreements on short-time work, another very important area was the mitigation of planned workforce reductions by supporting redundant workers. In many countries consensual approaches took place due to restructuring. Trade unions took part in many cases of compromises.

Therefore, it seems that the economic downturn and the following restructuring measures led to an enhanced company-level dialogue. In Hungary, for instance, consultation practices improved during the recession. In order to address the crisis and its impact, representative of the companies and employee representatives met to discuss and estimate the economic situation. Similarly, for instance, in Latvia where the degree of collective bargaining and its coverage is still very low, the recession led to higher frequency of dialogue between employer and employees. This in turn often resulted in consensus on employment preservation by pay cuts or unpaid holidays. A similar development has taken place in Lithuania (Eurofound, 2010c).

Box 7: Denmark's Action Plan for Corporate Social Responsibility

The Danish government agreed on an 'Action Plan for Corporate Social Responsibility' in May 2008, which aimed at promoting CSR among all Danish enterprises domestically as well as internationally. The plan itself encompassed around 30 initiatives in four areas such as promoting business-driven social responsibilities and business' social responsibility through government activities as well as two other areas. With this initiative Denmark plays a leading role in terms of publishing a CSR strategy. The advantages comprise a concentration on existing measures and instruments as well as a clear formulation of the priorities. Three core elements can be identified. First, it contains an intelligent mix of CSR instruments. Second, CSR is interpreted as mean to enhance competitiveness. Third, Denmark itself is a strong contributor to international CSR initiatives.

Source: European Commission, 'Corporate Social Responsibility. National Public Policies in the European Union, Brussels, November 2010.

Therefore, an intensified tripartite dialogue in some countries, for example, Malta and Slovenia, occurred. These forms of negotiation often resulted in tripartite agreements on measures to address the crisis in Member States such as Estonia, Lithuania, the Netherlands, Poland, Romania and Spain (Eurofound, 2010c).

International framework agreements have already been promoting the recognition of workers at the global level. In addition, international framework agreements helped improve possibilities for workers organisations at the local level. They also managed to generate a win-win situation during the crisis and to mitigate the negative impact of restructuring the employment.

4.5 Barriers and challenges

As already stated within chapter two, a further proceeding regarding cross-border collective bargaining and transnational social dialogue is far from being realised. Due to different patterns of collective bargaining and a great diversity of systems of industrial relations across the EU, a common and homogenous approach with regard to the implementation of certain procedures will be very difficult.

Another barrier to the coordination of collective bargaining is the great diversity of social partnership across the EU, especially with regard to the new Member States. Here, EU funding can help overcome the substantial lack of structures and organisations.

Despite of the growing importance of transnational company agreements, neither concrete action has been undertaken by the European Commission in order to set up a potential legal framework for transnational collective bargaining nor has any specific reference been made within the EU-2020 Strategy which was laid out by the Commission.³⁹

The question arises, if a barrier exists in this context? In any case, one should take into account that international framework agreements reflect recognition of both social partners at global level which can help to transpose European values worldwide.

Moreover, transnational company agreements overcome a lack of regulation in way of self-regulation. The application of directives as seen within recent developments at the European level seems to be a successful way to implement minimum standards across the EU.

To date, the European Commission has set up a database consisting of different agreements reached and thus promotes collective bargaining. The Commission also strengthens social partnership via EU funding, but this does not automatically mean that the Commission fosters a legal framework for transnational company agreements. Improving the ownership of transnational company agreements constitutes the most important challenge for the future.

Also, the situation of European Works Councils needs to be clarified, in order to avoid conflicts with national trade unions. The following chapter therefore analyses a further advancement of EU legislation.

³⁹ European Commission, 'Europe 2020: A strategy for smart, sustainable and inclusive growth', Communication from the Commission, COM (2010) 2020 final, Brussels, 3 March 2010.

5. FURTHER ADVANCEMENT OF EU LEGISLATION

KEY FINDINGS

- European Works Councils have dramatically changed the landscape of social dialogue in Europe by imposing several directions. They are effective motors in the development process of transnational social dialogue, since they sign almost all European and mixed agreements as well as one third of all global agreements.
- The Ales Report commissioned by the European Commission has constituted a first academic reflection on this topic. The authors proposed an optional legal framework in 2006. While the trade unions were receptive for the proposal of an optional legal framework, BusinessEurope rejected it.
- The discussion in terms of an EU legal framework must not evade national law which is in place. However, private international law is highly harmonised by regulation of the EU, but clear rules to decide about collective agreements do not yet exist.
- Despite the acknowledged importance of transnational company negotiations, no concrete action has been undertaken by the Commission to establish a legal framework for transnational collective bargaining. In addition, no specific reference has been made to cross-border collective bargaining or transnational social dialogue in the EU-2020 Strategy.
- Even the status of transnational company agreements is still not clear. To date, they have not been tested in front of a court. Thus, questions with regard to their status and their enforceability are still open. In order to overcome this legal uncertainty, some experts argue that it would be helpful to set out what law was applicable when it comes to a legal dispute
- A policy recommendation for the European Parliament should address the creation of new rules. But still, the legal link between European and national levels will be highly complicated.

5.1 The role of European Works Councils

European Works Councils have dramatically changed the landscape of social dialogue in Europe. They are responsible for European and mixed transnational agreements, while international and national union federations constitute the signing parties of global agreements. In general, two main types of European Works Councils exist. The first type includes employer's representatives, and the second type does not have any representatives from the employer's side.

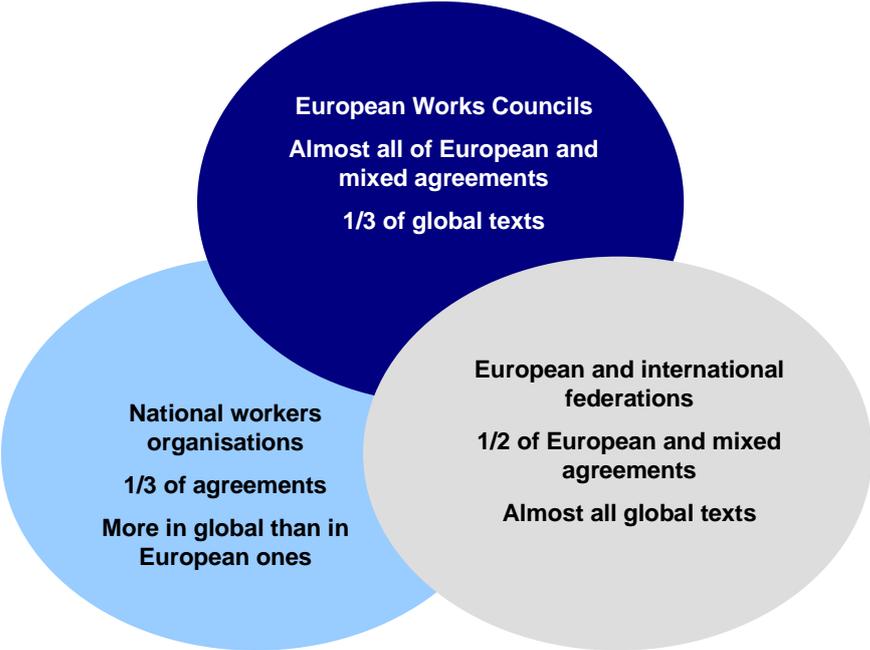
Again, as for instance in 2007 when European Works Councils signed 71 out of 88 European and mixed transnational agreements, it can be assumed, that European Works Councils play a growing role in the area of the signing of transnational agreements that entail European issues (European Commission, 2008c). Not only European Works Councils, but also European companies (*Societas Europaea*, SE) build a base for cross-border trade union cooperation. Until the middle of October 2009, for instance, already 928 European Works Councils in 886 transnational companies had been installed (Eurofound, 2009c).

Currently the European Commission is consulting European Social Partners on the Review of the Working Time Directive. This initiative has been launched in 2004 and failed to reach an agreement, since differences occurred between the European Parliament, the Council and individual Member States. However, some European industry federations insist on any kind of collective bargaining to be dealt with by trade unions and not works councils. The reason is that works councils do not constitute union institutions. They are interpreted more or less as employers' institutions. One federation fears that if works councils got the mandate to bargain this would lead to a loss of power and their role would be reduced to a talking shop.

The European Works Councils Directive is one of the core legislative acts in this entire area. European Works Councils are elected to be informed and consulted — not to bargain. Still the right to bargain and to conclude binding regulations belong to the social partners. The idea can be to keep them as facilitators of information, but trade unions seem not willing to retreat from bargaining. The role of European Works Councils is therefore questioned by trade unions. In turn, for BusinessEurope, European Works Councils form a practical way of ensuring a space of dialogue. The role of trade unions within those European Works Councils varies a lot, but again, the function of European Works Councils remains information and consultation, not bargaining.

However, European Works Councils constitute an institution for transnational information and consultation. They are able to contribute to the initiatives set by Europe 2020 and thus represent effective motors in the development process of transnational social dialogue. (Conchon, A. et al.). A possible approach to the enforcement of transnational company agreements could be to create a European rule on the standing of workers' representative bodies. According to labour law experts, the European Works Councils Directive entails such a rule, though it is not yet clear, whether such a provision could also comprise transnational company agreements concluded in the margin of European Works Councils activities (European Commission, 2009).

Figure 6: Signatories on employee side



Source: Pichot, E., 2009.

The EU's recast European Works Councils Directive (2009/38/EC) must be transposed into national legislation across all EU Member States by 5 June 2011. As from 6 June 2011, when Member states will have finished transposing its provisions in their legal order, European Works Councils will be established and operate within the framework of recast Directive 2009/38/EC.

As one can see, most European and mixed agreements are signed by European Works Councils and even one third of all global agreements are signed by them. National workers organisations are responsible of signing approximately one third of all transnational company agreements, whereas the main part constitutes global texts. European and international federations sign half of all European and mixed agreements and almost all at global level.

In summary, the trend of internationalisation and the increasing negotiations at the European Works Councils level seem to reflect a process of reconstituting collective bargaining, in order to adapt cross-border collective bargaining to the needs of the companies. The trend of decentralisation affects trade unions enormously, since they are mainly organised at national level. The capacity of European Works Councils as regards their impact of the Europeanisation depends on the organisation of the company and the workplace in various countries as well as a preparedness to set up effective cross-border networks. The question, whether European Works Councils will be able to open the door to European collective bargaining, is not easy to answer. However, the latest development shows that trade unions can come knocking at the door of 'European collective bargaining', but still, it is the management that holds the key in its hands (Arrowsmith, J. and Marginson, P.).

5.2 Discussing the need for a EU legal framework

The Treaty of Lisbon already entails provisions for social dialogue at the European level. In 2005, the European Commission asked for an optional legal framework which was then referred to the Ales Report published in 2006⁴⁰ (European Commission, 2006). The Ales Report was the first academic reflection on this issue. The trade unions were receptive for the proposal of an optional legal framework, whereas BusinessEurope rejected it.

The Ales Report endorsed the position of the necessity of an optional framework. According to the authors of the report, the reasons for such an optional framework can be found by the insufficiency of the current legal framework. Critics argue that the claim that 'transnational collective agreements do not exist de iure and are not going to exist without a legal framework' (European Commission, 2006), would go too far and note that these agreements can be legally covered by way of private international law. Furthermore, a rectification of the legal insecurity is proposed.

Nevertheless, the current practice leads to disagreements between European trade unions and the European Works Councils. The Ales Report doubts the legal status or rather representativeness of the European Works Councils as negotiating body. Also the already mentioned recast of the Directive did not change the terms of this state. The report disqualifies the European Works Councils as a legitimate actor in the process of bargaining, although European Works Councils constitute a core element (as figure has shown) as regards the signing of European and mixed agreements as well as one third of global texts (Dorssemont, F.).

⁴⁰ European Commission, 'Transnational collective bargaining: Past, present and future', Brussels, February 2006.

Box 8: The Ales Report

Under the coordination of Edoardo Ales, Professor of Labour Law and Social Security Law at University of Cassino, a group of experts was asked by the European Commission Employment and Social Affairs DG to draft a report, in order to provide a comprehensive overview of the current developments in transnational collective bargaining in Europe. Furthermore, the group should suggest actions to overcome obstacles and to support further the development of transnational collective bargaining. The report identified a lack a legally binding and thus effective instrument and a lack of formal legitimacy to enter collective bargaining which was due to an unclear relationship among levels of decision making. According to the experts, the development of an optional legal framework which establishes a transnational collective bargaining system would represent a possible solution. The proposal for an optional legal framework on transnational collective bargaining was based on negotiating bodies within which these agreements should be concluded. These agreements would not themselves have a legally binding effect, but acquire such an effect indirectly through their implementation by managerial decisions adopted by all national companies in a sector. These decisions should then be filed in a monitoring system at sectoral level and be recognised as legally binding in each EU Member State.

Source: European Commission, 'Transnational collective bargaining: Past, present and future', Brussels, February 2006.

To discuss the need for transnational collective agreements governed by EU law it should be taken into account that the EU, in fact, is a transnational project. In order to answer the question, whether there is scope for an autonomous rule-making at the EU level, different approaches from the perspective of labour law should be analysed. But first, in simple terms, one can also argue that there is no need to ensure that collective agreements are made, since they are already concluded. However, in order to solve problems that might occur, for example dispute resolution, a framework might be helpful to guarantee a binding character of the agreements reached.

At the same time, trade unions try to avoid that transnational collective agreements could affect the agreements reached at national level. Hence, trade unions prevent a strengthening of the European Works Councils. While multi-national companies tend to create their own system of industrial relations, they try not to be involved in systems at national level. Such a procedure undermines de facto the functioning of the system of industrial relations at national level and enforces the shift from the sectoral to the company level.

Anyhow, the transnational dimension of industrial relations developed outside and thus without any autonomous juridical framework, but the actors are highly differentiated on the workers' side, on the employers' side they are mainly multinational companies. In general, one can say that transnational company agreements are promoted much more by employers than by employees. Most of which contain soft issues such as code of conduct, joint declarations. According to it some European Industry Federations fear that one day a lot of transnational collective agreements could be in place, but still with a very weak outcome. On large building sites, for example, such agreements already exist, but subcontractors are reluctant to sign those agreements.

Most employer federations do not favour more regulation; instead more enforcement of the existing regulation is demanded. In this context, social dialogue can play an important role when it comes to addressing deficits and finding solutions on issues which have not been on the political agenda for a long time. The autonomy of the social partners can be seen as the basis for European social dialogue. In order not to undermine the idea of social dialogue, employer federations argue that it should remain a voluntary and at the same time independent approach. They also point out that EU funding could help bring social partners in Eastern and Western Member States together and overcome potential barriers such as the low organisation level of workers in Eastern European Member States.

Yet, a compulsory framework is questionable, since one cannot oblige companies and sectors to bargain collectively. If the social partners agree on institutionalising an optional legal framework, then this could help advance European legislation in case that regulation is blocked via Council or Parliament. If the social partners do not agree on a framework, then it will be very difficult to implement such a framework. Since a framework would need the support of national authorities and social partners, the realisation of a legal framework is not very likely. Considering this, a policy recommendation for the European Parliament could involve the possible creation of new rules. This need for a substantive solution will be discussed in the following section.

5.3 The private international law solution

Despite the acknowledged importance of transnational company negotiations, no concrete action has been undertaken by the Commission to establish a legal framework for transnational collective bargaining. In addition, no specific reference has been made to cross-border collective bargaining or transnational social dialogue in the EU-2020 Strategy, laid out in.⁴¹

Even the status of transnational company agreements is still not clear. To date, they have not been tested in front of a court. Thus, questions with regard to their status and their enforceability are still open. In order to overcome this legal uncertainty, some experts argue that it would be helpful to set out what law was applicable when it comes to a legal dispute (ITC 2010).

Table 8: Legal structure of a transnational company agreement

Level	Management level/workers participation/employment contract
EU	Central management of the headquarter of a multinational company
National	Local management, local unions/Works Councils
National	Individual contract of employment

Source: van Hoek, A.A.H.

⁴¹ European Commission, 'Europe 2020: A strategy for smart, sustainable and inclusive growth', Communication from the Commission, COM (2010) 2020 final, Brussels, 3 March 2010.

In the case of a possible solution the role of national law must be consulted. If both sides, management and workforce, do not agree on the implementation of transnational company agreements, this does not mean that they will remain in a legal vacuum. Experts in labour law argue that these agreements will inevitably be covered by legal frameworks of private international law.

That kind of framework constitutes a common law framework and tends to establish a connection between the transnational phenomenon of company agreements and national legal systems. That means the agreements could be submitted to laws that have not been adopted for regulating transnational issues. Nonetheless, an attempt to integrate the transnational agreements into a compulsory framework depends on the willingness of both social partners to agree on this (Dorssemont, F.).

At present, transnational collective agreements do not fit in the existing legislative framework. Hence, the question arises, whether collective agreements should be treated as contracts or not. If it is not a contract, further legal uncertainty exists. If it is a contract, then private international rules should be applied which in turn leads to changes in Rome I and Brussels I. Rome I encompasses applicable law with regard to contracts and Brussels I deals with international jurisdiction in civil and commercial matters (European Commission, 2010).

The uncertainties with regard to legitimacy and representativeness of the parties involved can also be interpreted as the preference of the parties for a non-binding character. The vast majority of companies consider these kinds of agreements as mere declarations of intent displaying the company's strategy or policy. This informal way of implementing certain guidelines is preferred by the companies (ITC, 2010).

Four scenarios for the further development can be drafted. First, everything stays as it is and the question how to clarify legal uncertainties of collective agreements will be left to national systems. According to this scenario, transnational company agreements would remain gentlemen's agreement. However, experts also recommend that 'companies should treat these agreements as if they were legal text, with regard to both content and execution, and subject them to the same legal scrutiny and due diligence as any other legal text.' (ITC 2010).

The second scenario would be that private international law is modified in order to cope with transnational collective agreements. Third, obstacles in the existing national labour law are removed, to recognise transnational collective agreements as collective agreements at national level. In order to ensure an effect on individual contracts an expert group discussing the international private law aspect concluded that a possible solution would be to integrate transnational collective agreements at national level. To do so, all parties involved need an appropriate mandate from national bodies. The fourth scenario would be to impose a common European system of regulation. This could be a revised version of the Ales Report.

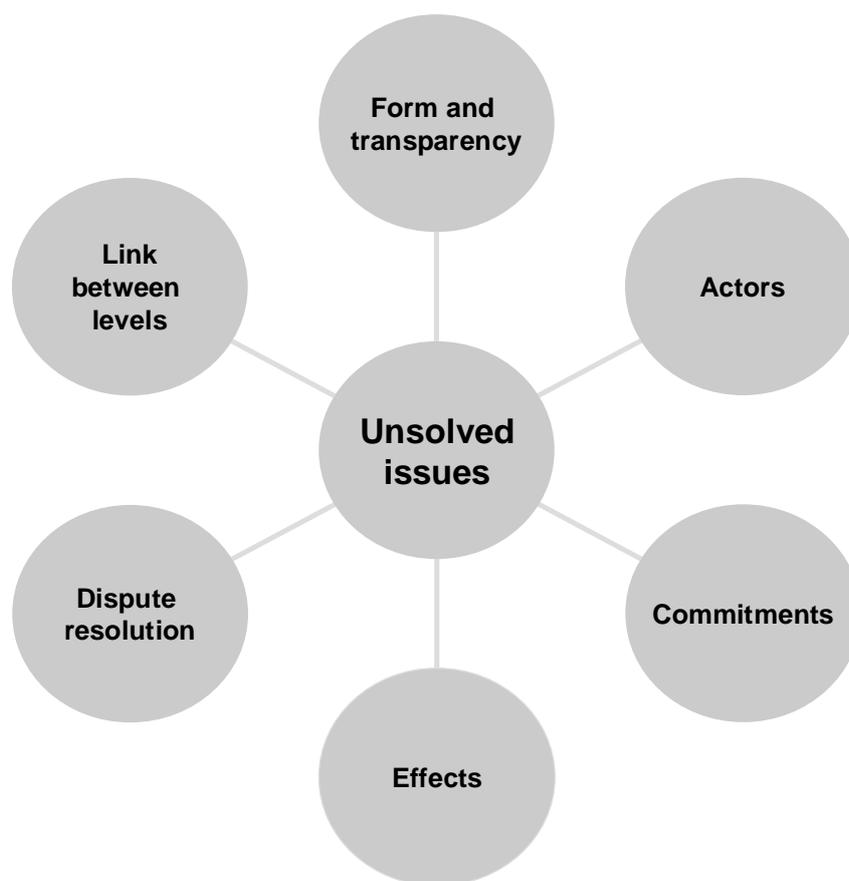
Nevertheless, according to representatives of employers' federations, the likelihood to impose the suggestions of the Ales Report 'an optional legal framework' is marginal. Such kind of legal framework would be too intrusive and too complicated.

As stated before, the legal link between European and national levels will be highly complicated. To enforce the content of transnational collective agreements the question arises, whether transnational collective agreements do have a contractual character. Both Brussels I and Rome I entail provisions regarding individual labour contracts, but transnational collective agreements do not constitute an individual labour contract. Furthermore, Rome I deals with law applying to contractual obligation which leans onto the autonomy of the involved parties (Van Hoek, A.A.H. and Hendrickx, F.).

The study commissioned by the European Commission investigating the international private law solution states that

‘under the current diversity, any binding effect of the transnational collective agreement on national industrial relations will have to respect the national rules which define those industrial relations. [...] The consequence of this is that transnational company agreements will have to be ratified by national social partners and implemented in conformity with national standards. Only a superimposed European system may be able to change that, but this option seems unfeasible. Accordingly, the transnational collective agreement (and consequently the enforcement thereof) is split up in a European, obligatory part and set of national implementation measures’ (Van Hoek, A.A.H. and Hendrickx, F).

Figure 7: Unsolved issues as regards transnational company agreements



Source: Pichot, E. (2009).

However, even labour law experts state that the ‘issue of enforcement of transnational collective agreements is very complicated. [...] It remains unclear how transnational collective agreements can be enforced at the national level’ (Van Hoek, A.A.H. and Hendrickx, F.). Against this context, the European Parliament’s influence on the further development of this possible solution remains limited. The issue should be further discussed and accompanied, for instance, by supporting meetings of experts groups or studies of academic experts in labour law. The Parliament should concentrate on observing the development and further evaluate its outcome.

In summary, many questions with regard to a possible legal framework for transnational company agreements remain open as the following figure shows. Not only is it unclear the role of the different actors signing those agreements. Also the link between national and EU level is still not clarified in terms of a potential incorporation of transnational company agreements into national law. Furthermore, the dispute resolution has also remained unsolved, since there was no case taken to court. Last but not least, since the commitment of the parties is not legally binding the quality of the impact of transnational company agreements on all facilities of a company remains to be seen.

6. POLICY RECOMMENDATIONS

KEY FINDINGS

- The case of the European Works Councils Directive stressed the facilitating role of the social partners in Europe. A similar exchange of views and a close cooperation between the social partners and EU institutions might serve as a preliminary stage of the following legislative process. Therefore, the social partners should be seen as potential allies of the European Parliament in view of transnational social policy.
- Globalisation led to a certain imbalance between the scope of global actors and social actors. Hence, European or international framework agreements can also be interpreted as innovative instruments which cope with a further intensification of globalisation. However, these agreements are in a legal no man's land. Further investigation of cross-border collective bargaining and transnational social dialogue could help assess their contribution on the system of industrial relations in Europe.
- A possible approach to the enforcement of transnational company agreements could be to create a European rule on the standing of workers' representative bodies. However, the European Parliament should raise awareness of the growing importance of European Works Councils within transnational social dialogue across the EU.
- The European Parliament should further fully respect the autonomy of the social partners. At the EU level, the European Parliament should therefore help establish structures of social partnership, in particular with regard to Central and Eastern European Member States.
- The European Parliament should contribute to improving and modifying the existing regulations on international private law. Therefore, the European Parliament should address the creation of new rules. This could entail a private international law solution or (even more ambitious) a revised version of the Ales Report.
- Advancing cross-border collective bargaining and transnational social dialogue is a challenging task. Major progress can only be achieved if there is sufficient support from the European social partners themselves.

Social partners as potential allies of the legislative process

Both cross-border collective bargaining and transnational social dialogue result from the ongoing process of Europeanisation and can help establishing a common denominator in terms of social standards and values. The results of European cross-industry social partnership have been in a continual process of exchange. Recent directives such as the Posting of Workers Directive and the Directive on Parental Leave have contributed to furthering the integration of the European Union by strengthening the common internal market. The case of the European Works Councils Directive showed a strong facilitating role of the social partners opening up an opportunity to renegotiate an otherwise blocked directive.

The kind of exchange of views and a close cooperation between the social partners and EU institutions might therefore serve as a preliminary stage of the following legislative process. But still, the structure of social partnership is not well developed in all Member States of the EU. This could undermine the further exchange process in the near future, since no common underlying automatism concerning the development of social partnership across the EU exists.

The example of the European Works Councils has shown a strong facilitating role of the social partners. The social partners effectively helped draft a compromise outside formal social dialogue. The role of the social partners has grown in importance. They have been effective actors within the framework of the social dialogue where they are asked to negotiate on regulatory dossiers and establish agreements that can either be implemented via national collective bargaining or become European law later on by way of a transposition into a directive.

In this respect the social partners can help formulate European legislation so that the influence of other actors, such as the European Parliament, is reduced. In addition, the social partners are able to relaunch European legislation which is blocked in the decision making process by formulating a feasible compromise. Therefore, the social partners should be seen as potential allies of the European Parliament in view of transnational social policy.

Further investigation of cross-border collective bargaining and transnational social dialogue

Outside the Commission's agenda, the Parliament can only try to raise awareness and suggest action by reports and resolutions. The role of the European Parliament is heavily constrained in the area of transnational social dialogue and cross-border collective bargaining.

A further observation and monitoring ought to be in the interest of the Parliament, since the Europeanisation leads to new forms of information and consultation at the EU level. At present, the impact of cross-border collective bargaining is rather restricted due to the missing commitment of the employers to engage in cross-border collective bargaining. But new cross-border networks are developing and a later cross-border bargaining of wages and working conditions at the EU level cannot be excluded. However, the outcome of cross-border collective bargaining is muted.

As regards transnational social dialogue, the number of these agreements has been increased over the last decade. It appears to be an appropriate tool to spread the notion of core labour standards and Corporate Social Responsibility. Thus, transnational social dialogue can be interpreted as milestones with regard to the promotion of core labour standards and Corporate Social Responsibility.

Globalisation led to a certain imbalance between the scope of global actors (like multinational companies) and social actors (like trade unions). Hence, these agreements can also be interpreted as new and innovative instruments which cope with a further intensification of globalisation. But still, it is true to say that these agreements are in a legal no man's land and therefore it is unforeseeable from a labour law perspective in which direction transnational company agreements will move. Further investigation of cross-border collective bargaining and transnational company agreements could help assess their contribution to the system of industrial relations in Europe.

Raising awareness of European Works Councils as contributors in the development process of transnational company agreements

European Works Councils are transnational bodies with growing importance. Similarly, they have changed the landscape of social dialogue in Europe and are responsible for the signing of European and mixed transnational agreements.

Together with European companies (SEs) they build a strong base for cross-border trade union cooperation, since they have proven to be a practical way of ensuring a space of dialogue and thus constitute effective contributors in the development process of transnational company agreements.

A possible approach to the enforcement of transnational company agreements could be to create a European rule on the standing of workers' representative bodies. According to labour law experts, the European Works Councils Directive entails such a rule, though it is not yet clear, whether such a provision could also comprise transnational company agreements concluded in the margin of European Works Councils activities. However, the European Parliament should respect the growing importance of European Works Councils within transnational social dialogue across the EU.

Providing support in initiating social partnership

The European Parliament should further fully support the autonomy of the social partners. At the EU level, the European Parliament should therefore help establish widely social partnership, in particular with regard to Central and Eastern European Member States.

The variety of national systems of industrial relations is due to historic and cultural sources and should not be ignored. Yet, to ensure cooperation between national unions and employers' organisations across the EU the European Parliament should further fund social dialogue in view of arranging meetings between the social partners. In addition, an exchange with experts groups on a regular basis can be useful to install organisations.

The existing budget lines to promote social partnership should not be expanded, because the support of expert meetings and translation help seems to be sufficient. The European Parliament has autonomous budget lines on social dialogue and should be committed to upholding the financial back-up of the exchange of social partners.

The European Parliament should further call for a wide debate between EU stakeholders. It should also favour an effective dialogue between Parliament and the stakeholders to form a 'transnational social dialogue pact' with continual meetings and realistic targets, since the European Parliament seems to have more interest in binding legislation than the European Commission.

Modifying regulations on international private law

At present, private international law is highly harmonised by regulation of the EU, but clear rules to decide about the signing and commitment of transnational social dialogue do not yet exist. Given the deadlock at the European level regarding a more binding character of transnational agreements, the European Parliament should rather help improve and modify the regulations on private international law which could be seen as a pragmatic solution.

Hence, the European Parliament should contribute to improving and modifying the regulations on international private law (Brussels I and Rome I). Furthermore, the Parliament could address the creation of new rules. This could entail a private international law solution or (even more ambitious) a revised version of the Ales Report.

Strengthening the European level could be a good idea, although the role of the European Parliament to create a possible legal framework is restricted. This would then imply additional private international law rules safeguarding recognition and interaction with national rules. The European Parliament can help advance European legislation according to the TFEU by consulting properly prior to the initiative proposed by the European Commission. But still, this task will be very demanding.

Putting transnational social dialogue in a perspective

Advancing cross-border collective bargaining and transnational social dialogue is a challenging task. Interaction between employers and trade unions at the European level is an emerging policy area. Major progress can only be achieved if there is sufficient support from the European social partners themselves. Hence, the role of both the European Commission and the European Parliament is quite restricted. Currently, there is no widespread consensus regarding the establishment of a binding European institutional framework for collective bargaining.

In this context, pushing for a European directive on collective bargaining is not a viable strategy. However, both the Commission and the Parliament should stimulate and support the development of social dialogue at the European level which has in some circumstances helped achieving European solutions to political issues. However, generally speaking, social partner agreements cannot replace European legislation.

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