

TRANSNATIONAL COLLECTIVE BARGAINING PAST, PRESENT AND FUTURE

Final Report



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by

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General Introduction

1. Objectives of the report.

Based on the Invitation to tender n. VT/2004/100 of the European Commission Employment and Social Affairs DG, this report is aimed at reaching the objectives the same tender laid down for the contractor, i.e. the University of Cassino which won the tender by a bid proposal drafted and presented by Prof. Edoardo Ales in November 2004.

These objective were the following:

(a) to provide a comprehensive overview of the current developments in transnational collective bargaining in Europe and to identify the main trends;

(b) to identify the practical and legal obstacles to the further development of transnational collective bargaining;

(c) to identify and suggest any actions that might be taken to overcome these obstacles and promote and support further development in the field of transnational collective bargaining;

(d) to provide the Commission with a sound knowledge basis to assess the need for the development of Community framework rules, complementing national collective bargaining and highlighting relevant aspects such rules would have to take into account.

Such objectives have been developed within the Social Agenda 2005 (COM(2005) 33 final) according to which:

"An optional European framework for transnational collective bargaining. (..).

In the EU, there is still considerable potential for facilitating improvements in quality and productivity through more intensive cooperation between economic players. Providing **an optional framework for transnational collective bargaining** at **either enterprise level** or **sectoral level**:

- a. could support companies and sectors to handle challenges dealing with issues such as **work organisation**, **employment**, **working conditions**, **training**.
- b. (b) It will give the social partners a basis for increasing their capacity to act at transnational level. It will provide an innovative tool to adapt to changing circumstances, and provide cost-effective transnational responses.

Such an approach is firmly anchored in the partnership for change priority advocated by the Lisbon strategy. **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**.".

The relevance of the subject dealt with by this report has been recently stressed also by the Opinion (SOC/200) the European Economic and Social Committee has delivered on the Social Agenda 2005 on July the 13th stating that:

"The EESC supports the objective set out by the Commission of promoting the social dialogue at enterprise and sectoral level, whilst taking greater account than has hitherto been the case of the fact that enterprises operate on a cross-frontier basis, with the result that voluntary agreements accordingly assume a cross-border importance. The EESC urges the Commission to discuss its proposed framework provisions, at the earliest possible stage, with the European social partners, to ascertain their views on the matter and to take account of these views".

2. Composition of the group.

As provided by the bid proposal the Group is composed by:

Edoardo Ales (Coordinator), Professor of Labour Law and Social Security Law, University of Cassino and LUISS – G. Carli – Italy.

Samuel Engblom, Deputy Head of Analysis, Swedish National Labour Market Board - Sweden.

Teun Jaspers, Professor of Labour Law and Social Security Law, University of Utrecht – The Netherlands.

Sylvaine Laulom, Lecturer in Law, University of Saint-Etienne - France.

Silvana Sciarra, Jean Monnet Professor of European Labour Law and Social Law, University of Florence – Italy.

André Sobczak, Researcher and Lecturer in Labour Law, Audencia Nantes School of Management – France.

Fernando Valdés dal-Ré, Professor of Labour Law and Social Security Law, Universidad Complutense, Madrid – Spain.

The Group has been joined by Prof. Ulrich Zachert, professor of Labour Law at the University of Hamburg (Germany) as external expert. We would like to thank him very much for his generous and constructive contribution.

3. Working method.

In order to issue a common position on the subject, the Group has always worked together, discussing and agreeing on each point of the report. All the members are responsible for the opinions expressed within it. This final report is the result of several drafts which have been discussed during two meetings hold in Rome (June $2^{nd} - 5^{th}$ and September $8^{th} - 11^{th}$) and by a continuous exchange of comments and amendments via e-mails.

A stating meeting with the Commission has been held in Brussels on April 11th.

European Social Partners – ETUC and UNICE – have been heard in order to provide relevant information on the state of art of transnational collective bargaining.

ETUC offered to the group a broad and exhaustive picture of current developments in TCB. The coordinating role of ETUC in the last 10 years has been mentioned and the issuing of guidelines to national organisations, particularly on wages and working time. The experience of the Doorn group has been quoted.

In particular, the necessity has been stressed to take into account the following aspects: a) who can negotiate a transnational collective agreement (taking into account that trade unions are present as "experts" supporting EWC); b) the relationship between agreements concluded at different levels (national, transnational); c) problems related to the representativity required for the signature of the agreement; quorum calculated on the percentages of workers covered by the agreement; all Trade Unions of the countries involved in TCB express their consent.

Reference has also been made to the Communication on Restructuring and on the need to involve unions in the merit of restructuring, rather than limiting information and consultation on "policies".

UNICE, referring to its two Position Papers (the first of 25 November 2004 and the second of 5 March 2005), has declared its opposition against any new framework of collective bargaining, even when it has an optional nature. UNICE has always taken the position that there is no need for an additional layer of EU collective bargaining over and above the existent ones. A change of the EWC directive has been rejected by UNICE as well.

In UNICE's view, the existing framework and system of European social dialogue is sufficient and functions satisfactory. If there is any need for an extension of negotiations, Social Partners will develop new forms by themselves. Anyhow there is no need for an intervention by the European Commission. It has to be left to the social partners to develop the social dialogue in a way they prefer. UNICE emphasised the autonomy of the Social Partners and the completely voluntary basis of any commitment of social partners on both levels (European and sectoral) and even on company level. The elaboration of commitments made in a transnational company has to be done at national level according to national law and national structures of collective bargaining. A (genuine) legally binding effect to "agreements" on European (sectoral or company) level is rejected by UNICE.

On the question if UNICE could imagine that an intermediary level between the sectoral social dialogue and the EWC (in order to explore possible synergies between the European sectoral level and the company level) could be desirable as a forum where issues with a transnational impact, such as restructuring of transnational enterprises, could be discussed or eventually settled, UNICE responded in the same way: there is no need of further instruments and there are no legal obstacles to use the existent frameworks and tools for this goal. Social partners already have a choice as to the tools/instruments they like to make use of.

In UNICE's view, art. 139 TEC provides for a satisfactory basis for any initiative of social partners to establish European regulations (on EU as well on European sectoral level) in the forms of agreements, joint opinions, codes or whatever.

In practice no deficiency as far as transnational tools are concerned has appeared.

4. Structure of the report.

The report is divided into two parts. The first is dedicated to an appraisal of existing transnational tools in Europe, the second to the definition of reasons and means to develop an optional framework for transnational collective bargaining at EU level.

5. Acknowledgments.

We would like to thank Mrs. Rosa Maria Morgillo, Head Secretary of the Department of Legal Studies, University of Cassino for the perfect organisation of meetings. Mrs. Antonella La Greca, Secretary of Bachelet Research Centre, LUISS – G. Carli, for the logistic support in Rome. Mr. Giorgio Verrecchia, Ph.D. University of Cassino, for its scientific contribution. Special thanks to Prof. Paolo Vigo, President of the University of Cassino for the support and to Prof. Gian Candido De Martin, Dean of the Political Sciences Faculty, LUISS – G. Carli, for the kind hospitality he offered for meetings held in Rome.

Part one - Transnational tools in Europe at present: an appraisal.

1. Historical background.

In the Seventies customary law accompanied the implementation of the social policy agenda and the adoption of the "structural" Directives introducing rights of information and consultation for workers' representatives. The Single European Act brought about social dialogue as a confirmation of what had already been experienced by the Commission in practicing information and consultation on an informal basis. The non-binding nature of social dialogue convinced all institutional and quasi-institutional actors that there was ground for consolidating such practices into legal procedures. The innovation introduced by the Maastricht Social Chapter had to do with the fact that some rules were enshrined in the Treaty and acquired a legal relevance different from customary law.

Thus, it is not irrelevant to underline that the Protocol on Social Policy attached to the Maastricht Treaty reproduced the contents of the first supranational agreement reached by the European Social Partners. Rather than signing a collective agreement in a strict legal sense, European Trade Unions and Employers' organisations reached a "political" agreement which was meant to put pressure on national governments dealing with important reforms of the Treaties.

The inclusion of the Social Chapter elaborated by European Social Partners during the Nineties within Title XI of the Treaty EC (hereafter TCE), indicates that social dialogue has to be considered as a substantive part of the European social model. Article 138 TEC provides the Commission with the task of promoting the consultation of management and labour and taking any relevant measure to facilitate their dialogue. Furthermore, according to art. 139, the dialogue between management and labour at "community level" may lead to contractual relations, including agreements.

Nevertheless, examples of *social dialogue at "community level"* are still rather limited and the contents of texts adopted differ from those existing in Member States. This is even more true if we confront "community" social dialogue products with *collective agreements* at national level, since these latter regulate core employment conditions whilst the former are mainly dealing with issues of a "softer" and non binding nature, offering guidelines and principles.

Under the current legal framework in the European Union (hereafter EU) two different phenomena have to be distinguished, both of which revealing problematic sides in their implementation. Indeed, there is a tension between purely voluntary collective sources either adopted by actors whose power to conclude collective agreements is not legally recognised at EU level or by actors that have such a power but decide to give only non-binding effect to their joint texts – namely those left to the autonomy of the European Social Partners – and agreements reached according to art. 139 in order to pre-empt the Commission's initiative on legislation.¹

¹ This is true for framework agreements that, at the joint request of signatory parties, have been transposed into Directives as, for example, the Parental leave (Council Directive 96/34/CE), the Part-time work (Council Directive 97/81/CE) and the Fixed-term work (Council Directive 99/70/CE) Framework agreements when it comes to their implementation at national level. Framework agreements such that one on Telework of 16.07.2002 and that one on Work related stress of 8.10.2004, which have not been transposed into a directive, maintain a still uncertain legal status and, by consequence, their impact at national level is difficult to be assessed in general terms.

The first of these categories is illustrated by the adoption of non-binding instruments such as guidelines, codes of conduct, framework agreements or policy orientations. As these instruments are not based on a legally recognised power to conclude collective agreements, these instruments will be referred to in this report as **transnational tools** derived from transnational collective *negotiation* in order to distinguish them from legally binding collective bargaining and agreements².

Existing experiences of transnational collective negotiation have sometimes been encouraged through legislation or other forms of intervention of the EU institutions, but there is still a lack of a general legal framework in this area. Other experiences find their sources in initiatives taken autonomously by Social Partners, who may sometimes feel the need for negotiated transnational norms regulating labour relations rather than to rely on market forces or on norms imposed by public authorities.

Whether they are encouraged by the EU institutions or not, the existing examples of transnational collective negotiation can be found both at the sectoral level and at the company level.

Therefore our report will be focused on these **transnational tools** developed and used at sectoral and cross-sectoral level as well as at company level as *a kind of* collective negotiation in transnational companies.

2. Transnational tools at sectoral level.

Collective relations at sectoral level in the EU existed for a long time. Between 1952 and 1974 in six sectors of common European economic policy "*comités paritaires*" have been established by the EC Commission (mines, agriculture, road transport, navigation, fishery and railways). They operated as consultative bodies for the same Commission in view of developing a socio-economic policy for "the EEC of the six".

During the Eighties and the early Nineties, in some other sectors *comités paritaires* have been founded (such as maritime transport, air transport, telecommunications and post) with the aim of contributing to the design and building up of a system of European professional relations and to support collective negotiations in these sectors.³

² Since the aim of this project is to assess the desirability and the suitability of a transnational *collective bargaining* system, unilateral initiatives cannot be considered relevant as such in our perspective. However, they are worth to be mentioned in the view of confirming European Trade Unions interest, at sectoral and cross-sectoral level, for the creation of a transnational dimension of cooperation and reciprocal support. This is the case of agreements reciprocally recognising rights to members when operating abroad, such as the 1997 agreement between German and British Trade Unions in the chemical sector, the 1998 agreements between Italian and German Trade Unions in the construction sector, the 2000 agreement between Austrian and German Trade Unions in the catering sector. This is the case of the Doorn Declaration of September 1998 aiming at establishing a mutual cooperation among Belgian, Dutch, Luxembourgian and German Sectoral and Crosssectoral Trade Unions, originally aiming at coordinating wage claims, then extended to professional training, life cycle, equal treatment and health and safety when the group has became permanent, joined by French Trade Unions. Last but not least, this is the case of the Cooperation Agreement of June 2000 signed by Belgian, Dutch and German Trade Unions in the construction sector which stimulate the development of "concrete actions" in the field of reciprocal exchange of information on national collective bargaining best practices, targeting of collective bargaining at national level, harmonisation of working conditions at transnational level.

³ Next to these "official" institutions, in some sectors Trade Unions and Employers' organisations have (with some assistance of the EC Commission) founded "informal groups" in order to create comprehensive mutual relations and trust between the actors.

2.1. The system of European sectoral social dialogue.

In 1996 the Commission stressed the importance of a European social dialogue not only at the inter-professional level, already stimulated by the Maastricht Social Protocol of 1991, but also at sectoral levels. By its decision⁴ the Commission established 9 Sectoral Social Dialogue Committees (hereafter SSD Committees), replacing the existing "comités paritaires".

Social Partners were unanimously supporting this decision even though Employers' organizations were somehow reluctant to give too much power to these European, transnational bodies. From their point of view social dialogue could better "contribute to mutual understanding and trust" and could be used as "an instrument to regulate and facilitate the necessary changes".

On the contrary, the European Trade Unions would have liked to see the European social dialogue as "bridging the interests of the employees and of the employers" in order to "develop a set of fair standards" to be applied all over the EU in the spirit of "co-operation and negotiations to the benefit of all associated organisations and their members".⁵

The ambitions of some Trade Unions went even further. At its collective bargaining conference in 1998, in a long term perspective, the European Metalworkers' Federation adopted a resolution stating that "European minimum standards (as to wages, maximum working time) should be introduced which should be raised progressively". The instrument of European framework agreements within the framework of the SSD committee was considered helpful to attain that goal.⁶

Since 1998, the Commission had established and recognised another 22 SSD Committees. Recently, also some traditional sectors have joined the group.⁷ So one can assume that the building up of European sectoral social dialogue has almost been concluded, since in about all sectors a SSD Committee has been established.

However, differences remain in the way of functioning and in the stage of development they have reached, since only some of them have gained importance as a medium of consultation and negotiation on issues that are of common interest for the sector concerned.⁸

⁴ Commission Decision of 20 May 1998, 98/500/EC, OJ L 225, 12.8.1998.

⁵ P. POCHET, A. DUFRESNE, C. DEGRYSE, D. JADOT, *Observatoire social européen, Rapport final "Dialogue social sectoriel"*, Contrat VC/2003/0400-SI2.365647, p. 37.

⁶ Source: Eiro, December 1998/Ge.

⁷ In December 2004 the chemical industry has established a Social Partners dialogue recognised as a SSD Committee by the Commission. In January 2005 the sector of the gas industry has applied for a recognition of an own SSD Committee. Since the expiry of the ECSC in 2002 the steel and metal industry is starting up a social dialogue structure. A separate committee should be established for the metal industry. Since the establishment of a SSD Committee in the sector of local and regional government (2003) even the sector of the public services is (partly) represented. In 33 sectors a SSD Committee has been established or is about to be established. Even a recently emerged new sector as agency work has joined the group of SSD Committees. Also "old" sectors as steel, mines and chemistry have their SSD Committees.

⁸ This has happened in sectors like the postal service (The Agreement on promoting employment of 29 October 1998; notably with the support of the European-level trade union federations and national employers); the civil aviation (the agreement on working time of 22 March 2000); the railways (the agreement on working conditions of 27 January 2004).

2.1.1. Legal structure of SSD Committees.

As far as the legal structure of SSD Committees is concerned, the source of reference is the 1998 Commission decision.⁹ According to this, SSD Committees are established on the basis of a *joint request* by Social Partners in the respective sectors, subject to representativity test by the Commission. Consequently, it is up to Social Partners at European level to take the initiative to apply for a "recognised" status as far as the SSD Committee is concerned. If they are assessed as *representative* by the Commission, they may form and establish a SSD Committee.¹⁰

SSD Committees are functioning as fully bipartite bodies, the maximum number of members being fixed at 40 in total. Parties have to be of a sectoral nature and organised at the European level. Both sides have to be composed by organisations belonging to the Social Partners' structures of the respective Member States, be representative in several, preferably all, Member States and endowed with the capacity to negotiate. Lastly they have to be structured in such a way that they can effectively participate in the work of the committees. Generally speaking, SSD Committees operate on the basis of mutual recognition.¹¹ According to the above mentioned 1998 Commission decision, SSD Committees are free to decide their own procedural rules. They are free as well to choose the subjects they like to deal with. They usually adopt a working programme, normally on an annual basis. At least one annual meeting dealing with more specific subjects must be called.

2.1.2. Composition and way of operating of SSD Committees.

SSD Committees are mostly composed by one European Trade Union and one European Employers' organisation,¹² which have a number of national organisations as members, also more than one per country. Since not all national Trade Unions and Employees' organisation are affiliated to these European organisations,¹³ not all of them are represented within SSD Committees.

⁹ Commission Decision of 20 May 1998, 98/500/EC, OJ L 225, 12.8.1998, p. 27.

¹⁰ By way of analogy one may state that this procedure may fall under the scope of the Tribunal of First Instance decision in the *UEAPME* case of 17 June 1998, T-135/96, 1998, II-2335. It could be useful just to recall that the recognition of the Social Partners competences to negotiate according to art. 139 ECT led the Commission to define the criteria of representativeness to select the organisations which were to be consulted. COM (93) 600 final, COM (96) 448 final, COM (98) 322 final. In order do be eligible for consultation, the Social Partners organisations must: be cross-industry, or relate to specific sectors or categories and be organised at European level; consist of organisations which are themselves an integral and recognised part of Member States social partner structures and with the capacity to negotiate agreements, and which are representative of all Member States, as far as possible; have adequate structures to ensure the effective participation in the consultation process.

¹¹ The Commission is assessing marginally whether the organisations requesting for taking part in the sectoral social dialogue, are meeting these criteria. If so, and that has been the case till now, the Commission issues the "recognition" of the SSD Committee.

¹² See Annex 1. Only in 8 sectors there are more than one representative employers' organisation and trade unions represented within the same SSD Committee. Basic agreements (see below in the text) usually provide for a detailed regulation on the composition of the Committee by listing the number of representatives for each organisation.

 $^{^{13}}$ As a matter of fact is worth to be reminded that the affiliation of national organizations representing management and labour to supranational organizations – be they European or cross-national – is based on the principle of freedom of association.

In some SSD Committees¹⁴ the way of operating is formalised by what we can call a *basic agreement*. Even if such agreements are not legally binding, in practice they constitute a reliable basis of functioning for SSD Committees. SSD Committees decide by consensus.

Most of the times managerial tasks, such as preparation of meetings, are recognised to a steering committee. In urgent cases this committee may draw up joint position papers that may circulate on behalf of the SSD Committee but only after consultation and approval of its members. In some sectors working groups dealing with specific topics have been established within the SSD Committee, always acting under its supervision.

SSD Committees are supposed to work in co-operation with the Commission, in particular DG Employment, Social Affairs and Equal Opportunities, securing, at the same time, their independency, even though with the support (also financial, according to the standard rules) of the Commission.

2.1.3. Functions of SSD Committees: from consultation to negotiation.

Although no specific restriction is provided as far as SSD Committees powers are concerned, they had been, also in the view of the Commission, primarily seen as agents for consultation on the economic and social developments in the various sectors that can contribute to a common policy of the EU. Nevertheless, in 1998, these consultations at sectoral levels were seen as "aiming at a certain harmonisation of the employment conditions and at a strengthening of the economic position and of the competitiveness of the sector concerned".¹⁵

In 2002, the sectoral level began to be considered by the Commission also as "the proper level for discussion on many issues linked to employment, working conditions, vocational training, industrial change, the knowledge society, demographic patterns, enlargement and globalisation".¹⁶

Such a growing interest for sectoral level can be partly motivated by the progressive shift of SSD Committees from a mere consultative into an also negotiating function.

This is confirmed by the fact that, although a recurring provision in some of the above mentioned basic agreements exclude collective negotiation resulting in binding agreements, there are relevant examples of (non binding) "agreements" reached in a SSD Committee.¹⁷

¹⁴ In the sectors of: Horeca, Telecommunications, Tobacco, Sugar, Commerce, Cleaning Industry, Woodworking.

¹⁵ Commission Communication, The Adaptation and the promotion of the social dialogue at European level, of 20 May 1998, COM(98) 322 final, p. 10.

¹⁶ Commission Communication, *The European social dialogue, a force for innovation and change*, of 26 June 2002 COM(2002) 341 final, p. 16.

¹⁷ Examples to be mentioned are: the agreement on certain aspects of the working time in the sea transport sector of 30 September 1998 (although conditionally); the agreement on the organisation of working times of Mobile Staff in Civil Aviation of 22 March 2000; the agreement on certain aspects of the working conditions of mobile workers assigned to interoperable cross-border services (railways) of 27 January 2004. A further example, even though no information on its follow up are available, is represented by the Framework agreement in the Postal Service of 1998, covering several activities related to employment issues, such as recruitment of young people in combination with promotion and careers for the employed workers, non-discrimination, improvement of health and safety, working time. In other sectors agreements have been concluded, mostly on the issue of working time and health and safety. To be mentioned: Railways on working

But, as explicitly stated by some of them, in order to become effective and to be able to be enforced, these "agreements" have to be implemented by national Social Partners in their industrial relations system.

More precisely, a provision shared by many basic agreements states that "the Social Partners undertake individually - and jointly, through sector-based social dialogue at all levels (European, national, regional, local and company) - to ensure the implementation of this Charter".¹⁸ Similarly, Social Partners "recommend to their respective member organisations to endorse this Joint Statement and to encourage its implementation" or "call on their respective member organisations to adopt this Code and to encourage its gradual/progressive implementation at company level".¹⁹

In the same perspective, we have to stress that some of the above mentioned "agreements" have gained binding effect by being transposed into a Directive. As a matter of fact, "agreements" reached within SSD Committees in the field of working time in sectors excluded from the Working Time Directive²⁰ have been traced back to art. 138 and 139 TEC, the respective SSD Committees being considered as operating as European Social Partners at "community level".

2.1.4. Results produced by SSD Committees.

The SSD Committee produce documents of a different kind: agreements, recommendations, codes of conduct (charters)²¹, common positions, opinions, declarations, guidelines. Generally speaking they can be divided into two main categories.

Into the first category we find documents aiming at influencing EU policy in the framework of the consultation procedures; the objective of the second category, characterised as mutual commitments, is directed to stimulate changes of and in the sector concerned. For the purpose of the present study, the second category is of higher interest because it may be linked to the topic of transnational negotiation.

Developments of the personal scope and of the range of subjects touched in the more recent commitments of SSD Committees show that joint action have extended to issues beyond the more traditional ones (such as forced or compulsory labour; child labour; non-discrimination; health and safety).

time (1998, renewed in 2004); Civil Aviation on working time (including leaves and health and safety protection (2000)).

¹⁸ See a Charter by the Social Partners in the European textile and clothing sector; Code of conduct of 10 July 1997.

¹⁹ See Agreements on Fundamental Rights and principles at work (Commerce, 1999); Code of Conduct for Footwear, 2000; Code of Conduct for Woodworking, 2002.

²⁰ Council Directive 1999/63/EC, OJ L 167, 2.7.1999 (working time in sea transport); Council Directive 2000/79/EC, OJ L 302, 1.12.2000 (working time in civil aviation) for sectors excluded by Council Directive 93/104/EC, OJ L 307, 13.12.1993, p. 18.

²¹ Often dealing with human rights/fundamental social rights: abolition of child labour, elimination of forced or compulsory labour, trade union rights, elimination of discrimination in respect of employment. See the Code of conduct in the Textile industry (1997); the sector of Commerce (1999); Footwear industry (2000); Leather industry (2000): expanding the scope to reasonable working time, decent conditions of employment and decent hourly pay; and the Woodwork sector (2002).

As an example the Code of conduct of the (European) Sugar Industry of 2003 refer to fundamental social rights such as freedom of association and effective right to collective bargaining, including the protection of those exercising trade union rights, as well to vocational and life long learning, to a constructive social dialogue, fair pay, working conditions and restructuring.²²

Overlooking the various instruments the SSD committees have used, it is obvious "agreements" are rather exceptional. The most common instrument are *joint opinions* (also called *common positions*²³) addressed to EU institutions. Like the term indicates these texts are of a more intentional, policy oriented nature; by purpose they lack legally binding effect. They deal with a great variety of subjects from economic topics of the sector (or even in general) to employment (referring to and in line with European social agendas, e.g. Lisbon Strategy), and also other social aspects of EU social policy, and finally a residual category containing issues such as employment conditions, health and safety, vocational training. They also deal with topics exposed to legislative activities or to EU social policy measures. In these *joint opinions* whether they are addressed either to the EU institutions or to the national public authorities, attention has been drawn to issues – relevant for the sector concerned - such as the future and the competitive position of the sector in a globalising world with reference to employment. They also can be addressed to national Social Partners in order to contribute to an improvement and a strengthening of the sector and of enterprises in the sector.

Declarations refer to topics as training, social dialogue itself, and themes like nondiscrimination and employment conditions. Mostly these declarations are addressed to Social Partners at national level.

The category of *recommendations*, is addressed, above all to EU institutions as well as to national governments and Social Partners (on national level), refers, above all, to employment conditions. More specifically they address issues of non-discrimination, training and working time.

In some SSD Committees' joint documents the issue of restructuring of the enterprise as part of major changes within the sector has been dealt with, mostly in connection with developments in the sector concerned, aiming at improving sector performances in the worldwide competition process (see below par. 2.3 Part one).

²² Code of Conduct: Corporate Social Responsibility in the European Sugar Industry, 2003. In more or less similar terms the Code of Conduct for the private security sector of 2003.

²³ This term has been used in the OSE-study, mentioned above. These terms are overlapping, but not completely.

Conclusion I

The success of SSD Committees could be measured by the number of Social Partners' joint texts, substantially increased to more than 225 till now. Although their commitments and aims show a great diversity,²⁴ this kind of acting seems to indicate that the relevance of transnational negotiation at sectoral level is growing, not only in the view of EU institutions but also in that of Social Partners.

On the basis of the analysis provided so far, one can argue that the success of European sectoral social dialogue is due to: (a) the active presence of EU institutions; (b) its further development on voluntary basis; (c) the establishment of a structured and representative bipartite body.

Nevertheless, as far as the binding effect of "agreements" reached under such procedure and the impact on working conditions, sectoral social dialogue still depends either on the initiative of EU institutions or on Social Partners action at national level.

In our opinion, these conditions can hamper the further development of European sectoral social dialogue in the view of: (a) assuming an autonomous relevance from national collective bargaining or EU institutions; (b) guaranteeing a direct and homogeneous impact of "agreements" on working conditions; (c) introducing in SSD Committee bargaining agenda more specific and even "hard" topics.

On the other hand, Social Partners' motivation towards such further developments is witnessed by the same relevant examples of "agreements" quoted above for which, in order to gain binding effect and secure their impact on working conditions, they have been obliged to rely on EU instruments or on national collective bargaining.

²⁴ As shown by Annex 2 of Commission Communication, Partnership for change in an enlarged Europe – Enhancing the contribution of European social dialogue, of 12 August 2004 COM(2004) 557.

3. Transnational tools at company level.

Transnational tools at company level have emerged more recently than at sectoral level, but for several reasons their development is likely to be at least as important since, in many cases, enterprises prefer to negotiate at company rather than at sectoral level, be it national or transnational.

As far as the transnational dimension is concerned, such an interest is mainly witnessed by developments occurring either in the view of corporate social responsibility (hereafter CSR) or of restructuring. By CSR, transnational companies want to gain a comparative advantage among their stakeholders, adopting norms in this field rather than developing binding rules; in case of restructuring, problems are often company measured, thus assuming a transnational dimension that can hardly be coped with at national or sectoral level.

One may say that in both perspectives a boosting role in the development of **transnational tools** at company level has been played by European Works Councils (hereafter EWC) established within transnational enterprises. In 2004, the same Commission drew the attention of the Social Partners on the development of possible synergies between the European social dialogue and the company level, by promoting a closer co-operation with EWC.²⁵

For this reason, before analysing existing transnational tools at company level (see below par. 2.2 Part one), we would like to highlight, by briefly going through the relevant EC Law sources, some crucial and critical points that, in our opinion, have to be taken into account in the view of any further development of transnational collective bargaining at that level.

3.1. EC directives with a transnational dimension "in action" at company level:

the case of EWC and SE directives and their effects.

In the Directive on EWC (hereafter EWC Directive)²⁶ and also in the *Societas Europaea* Directive (hereafter SE Directive)²⁷ the transnational dimension appears "in action" since both deal with transnational relationships.²⁸

Companies have a transnational dimension which is directly or indirectly defined by both directives.

²⁵ Commission Communication, Partnership for change in an enlarged Europe – Enhancing the contribution of European social dialogue, of 12 August 2004 COM(2004) 557.

²⁶ Council Directive 94/45/EC, OJ L 254, 30.9.1994, p. 64.

²⁷ Council Directive 2001/86/EC, OJ L 294, 10.11.2001, p. 22.

²⁸ For the sake of completeness, we have to stress that the term "transnational" is used also by the Directive concerning the posting of workers, albeit only in order to enumerates some transnational activities coming within its scope, i.e., - posting of workers under a contract concluded between the company making the posting and the party for whom the services are intended, on the company's account, to a Member State; - posting of workers to an establishment or to an undertaking owned by a group; - hiring out of a worker by a agency work company or placement agency to a user company established or operating in a Member State (Council Directive 96/71/EC OJ, L 108, 21.1.1997, p. 1, art. 3). Within this directive references are made here also to the "transnationalization of the employment relationship" (*whereas* n. 6) and to the fair competition "necessary for the promotion of the transnational provision of services" (*whereas* n. 5).

The Special Negotiating Body (hereafter SNB), the EWC or the employees' representative body in the SE, have a transnational composition reflecting the transnational structure of the company or of the SE.

The notion of "transnationality" is also used to define employers' obligations and competences of the employees' representative body. A definition of "transnational information and consultation" is also provided.²⁹

Furthermore, in the EWC Directive, "transnationality" is a condition for the validity of agreements reached before the same Directive comes into effect, since, according to art. 13, such agreements should cover the entire workforce and provide "for the transnational information and consultation of employees".

Last but not least, "transnational" refers to the impact of the agreement establishing a workers' representative body, in at least two different Member States (or better in an undertaking or group of undertakings located in at least two different Member States or in a European region or sector). Such a transnational impact depends, first of all, on the transnational nature of the parties, which have to be representative (under criteria to be defined at national level) of workers employed and of employers operating in at least two different Member States.

Within such a transnational dimension, the EWC Directive has stimulated (and the SE Directive is supposed to do the same, if the SE model will be successful) a transnational collective *negotiation* procedure at company level, even though for the limited purpose of establishing a transnational workers' representation body or an information and consultation procedure. It even goes further, because it opens up the possibility to negotiate on and to lay down in an agreement the issues the EWC has to be informed and consulted; so the EWC directive is really *establishing* a negotiation procedure.

Thus both directives shall provide a "transnational answer" to the main interconnected questions (who can negotiate? - on which issues? - which effects can be produced?) related to any negotiation system.

3.1.1. Negotiating agents.

As we have seen before (see above par. 1 Part one), a first relevant question concerning the development of a transnational collective bargaining system refers to the definition of its negotiating agents.

²⁹ The EWC shall be informed and consulted on matters which concern the Community-scale group of undertaking as a whole or those which concern its operations in at least two countries. The competence of employees' representative body is broader in SE since it refers "to questions which concern the SE itself and any of its subsidiaries or establishments situated in another Member States or which exceed the powers of the decision-making organ in a single State".

EWC and SE directives recognise transnational negotiating powers to the already mentioned SNB in order to define, among many other issues, the national composition³⁰ of EWC or of the representative body in SE.³¹

Although both directives provide for a *negotiation* procedure, there is *no obligation* to include Trade Unions within the SNB, since it is up to Member States to determine, according to their industrial relation system, the way members of SNB are chosen. It therefore depends on the law or the practice of the Member States whether Trade Unions are playing an effective role in the negotiations of the establishment of an EWC.

However, we have to stress that there is a substantial difference between the two sets of provisions as to whether members of the SNB must also be employees of the company. In the EWC Directive nothing is said on this point³², whereas the SE Directive³³ allows Member States to provide the possibility to admit in the SNB trade union officials coming from outside the company.

This difference could be considered as an implicit recognition, by more recent EC Law products, of the fruitful role Trade Unions may potentially play within *negotiation* process even though only aimed at establishing transnational representative bodies at company level. As a matter of fact, although different rules on the appointment to the SNB and to the EWC could have been provided - taking into account that the SNB has negotiating powers while the EWC has, according to the Directive, only information and consultation rights -,³⁴ in all Member States rules governing appointment to the EWC are identical to those used for the appointment within the SNB.³⁵ Thus witnessing the influence the composition of the SNB is playing on the composition of EWC.

To sum up, the role Trade Unions are able to play within this negotiation procedure and, consequently, within representative bodies established as a result, is doomed to vary

 ³⁰ Minimum requirement one representative per Member State in which the company has one or more controlled undertaking.
³¹ In case of agreements reached before the Directive comes into effect (the above mentioned art. 13

³¹ In case of agreements reached before the Directive comes into effect (the above mentioned art. 13 agreements), no specific requirement is provided regarding bargaining parties and procedures. On the other hand, the agreement should cover "the entire workforce", and "provide for the transnational information and consultation of employees". In this view such agreements represent an *ante litteram* kind of transnational negotiation, carried out within the "shadow" of EC Law in the sense that it is aimed at avoiding the application of the latter.

 $^{^{32}}$ For the sake of completeness, we have to remind that both EWC and SE directives provide that in cases a EWC or a representative body in the SE have to be established recurring to art. 7 and to additional provisions contained in the Annexes, members of both bodies must be workers employed within the company of the SE. Indeed, only in two cases out of 750 a EWC has been established without an agreement under art. 6, recurring to art. 7 procedure.

³³ Art. 3.2 b): "Member States may provide that such members may include representatives of Trade Unions whether or not they are employees of a participating company or concerned subsidiary or establishment".

 $^{^{34}}$ With the exception of renegotiating the agreement establishing the EWC, recognised by the Annex in art. 1 (f).

³⁵ COM (2000) 188 final, Report from the Commission to the European Parliament and the Council on the application of Directive on the establishment of a European works council. See M. CARLEY, P. MARGINSON, Negotiating European works Councils. A comparative study of Article 6 and Article 13 agreement, European Foundation for the Improvement of Living and Working Conditions, 2000, p. 25: "Over 80% of Article 6 agreements provide that employee representatives should be selected in accordance with national law and practice in all or some countries". See also, E. BETHOUX, Les comités d'entreprise européens en quête de légitimité, in Travail et Emploi, n. 98, 2004, p. 21.

considerably, since it is up to Member States to determine the way in which members of the above mentioned bodies are chosen.³⁶

3.1.2. Negotiation issues.

As far as the content of the negotiations is concerned, both directives provide a list of issues to be determined by the agreement establishing the representative body, but "without prejudice to the autonomy of the parties". Thus, the EWC-directive (and the SE-directive) is leaving the negotiating parties the power to go beyond that list of issues. Therefore the list of issues has an enumerative, anyhow a not exhaustive nature. So it is left to the parties to decide on the issues the EWC-agreement will cover.³⁷

3.1.3. Conflicts among levels of negotiation.

Taking into account the very specific objective of these agreements, the question of the relations with other agreements concluded at a different level is not really relevant. Both directives provide that the such agreements shall be *without prejudice* to employees' existing rights to information, consultation and participation laid down by national and EC Law.

3.1.4. Formal and procedural requirements.

As far as the formal and procedural requirements are concerned, both directives provide that agreements shall be in writing and define majority rules for the agreement to be concluded.³⁸

³⁶ "Hence, in all the countries which give the works council or elected representatives a major role in the representation of workers, notably as regards information and consultation of workers (or co-decision), it is they who appoint the members of the SNB (and of the EWC). Thus the central role is vested in the works council (or central council or group council) in Germany, Austria, Denmark, Finland, France, The Netherlands and Belgium while workforce delegates or shop stewards play a subsidiary role in Denmark and Belgium. The Trade Unions play a central role in appointing members in Italy, Germany, Portugal and Spain, jointly with the works councils. But they also have an indirect role, either because the trade union organisations draw up the lists of candidates (France, Spain), because they play an essential part in constituting the work councils or group council or because the members of the SNB must have been elected from the list prepared by the Trade Unions organisation (France) or appointed on a delegation basis (Belgium)". COM (2000) 188 final, *Report from the Commission to the European Parliament and the Council on the application of Directive on the establishment of a European works council.*

³⁷ Also the Annex has not to be conceived as a minimum threshold for the agreement. However, in practice, this is a negotiation in the shadow of the law or better "in the shadow of the Annex", since this latter is essential to reach a balance of power within the negotiation, taking into account that the SNB can refer to it in order to refuse less attractive management's proposals.

³⁸ According to the EWC directive, to conclude an agreement, the SNB shall act by the simple majority of its member, and the Directive also provides that a decision by the SNB to exclude the subsidiary requirements laid down by the Annex needs a two-thirds (qualified) majority. In the SE directive the voting rules are more complex and elaborated because of the "before-after" principle. First, there is always a double majority principle. The SNB shall take decisions by an absolute majority of its members, with a precision which cannot be found in the EWC directive, "provided that such a majority also represents an absolute majority of the employees". A two-third majority (representing at least two thirds of the employees, including the votes of members representing employees employed in at least two Member States) is also required when the agreement could undermine workers' rights (here when the result of the negotiations lead to a reduction of participation rights). A two-third majority is also necessary to decide not to open or to terminate the negotiation.

Conclusion II

If scrutinised in the view of constituting an inspiring model for the development of a transnational collective bargaining system, in our opinion, the transnational dimension provided by EWC and SE directives presents, at the same time, strong and weak points.

Strong points are: (a) the concrete definition of a transnational dimension of collective negotiation which leads to the establishment of transnational contractual relationship between management and SNB; (b) the conclusion of agreements *of a transnational dimension* whose personal scope of application is supposed to go even beyond the signatory parties;³⁹ (c) the establishment of transnational representative bodies on employees' side.

Weak points are: (a) the fact that such a negotiation process, transnational agreements included, is limited in its ends to the establishment of an employees' representative body; (b) the fact that the highly differentiated composition of EWC is likely to produce relevant consequences on: (b1) their legitimacy to go beyond information and consultation, negotiating with management (b2) Trade Unions aptitude towards the recognition of negotiating powers *to* EWC without a simultaneous formal recognition of Trade Unions role *within* them.

³⁹ In fact, in order to produce the *effect utile* of both directives, agreements concluded under art. 6 or 4 shall apply to the whole group of undertakings, all local management and all employees, irrespectively of the Member State in which the agreement has been signed. Moreover they are intended to apply in all countries involved.

3.2. Existing transnational tools at company level between EWC and Trade Unions:

from Joint Texts to Framework Agreements.

Experience shows that, once established, one of the main functions of EWC is to create a space where employees' representatives from different national industrial relations systems can meet and learn to understand how different the functioning and the role of employees' representation in the country involved can be. But after this preliminary stage, representatives may be able to agree on strategic objectives, to address common opinions or even present claims to the management.

Given the tradition and the dynamics of European social dialogue (see above par. 1 of Part one), companies' management may also be open to go beyond information and consultation and to negotiate *joint texts* or even "*agreements*".⁴⁰

In a situation characterized by the lack of a legal framework for transnational collective bargaining at company level, this kind of negotiations enables them to create trust and a common company culture⁴¹ and to develop first elements of a European HR-policy within the company in the view of harmonising certain social standards.

It is therefore interesting to state that the number of texts signed at transnational level by management, on the one side, and EWC, on the other side, has increased on a voluntary basis.

On the other hand, under the CSR movement, a growing number of companies adopts codes of conduct defining social rights for their own employees as well as for those of their subcontractors.⁴² The adoption of these codes is an answer to pressures created by different stakeholder groups, but it is also seen as an opportunity to reinforce company's competitiveness or from a perspective of risk management.⁴³ Furthermore, companies also operating in the USA are encouraged to elaborate codes of conduct by a local legislation that reduces companies' liability in case of its non-compliance with legal standards if they prove they have unilaterally taken internal appropriate measures to avoid such violations via a code of conduct and an implementation program.⁴⁴

Whereas, in the past, such codes of conduct have often been unilaterally adopted by management, information and consultation of employees' representatives (EWC in the majority of enterprises), imposed, as we have seen before, by the European social model, has led, also in this case, to the negotiation and the signature of *joint texts* defining issues referring to company's CSR.

Nevertheless, as prevented (see above par. 2.1), the identification of the appropriate partners (counterparts) within the negotiation process still represents a crucial question, since the very nature of effects produced by negotiations depends from it.

⁴⁰ As indicated above these agreements does not have per se legal effect in the sense that they can be enforced.

⁴¹ ETUC, UNICE, UEAPME & CEEP, Lessons learned on European Works Councils, 7 April 2005.

⁴² A. SOBCZAK, Codes of Conduct in Subcontracting Networks: A Labour Law perspective, in Journal of Business Ethics, 2003, Vol. 44, No. 2/3, pp. 225-234.

⁴³ Commission Communication, Corporate Social Responsibility: A Business Contribution to Sustainable Development, COM (2002) 347 final, Brussels, 2 July 2002.

⁴⁴ J. C. RUHNKA et H. BOERSTLER, Governmental Incentives for corporate self-regulation, in Journal of Business Ethics, 1998, Vol. 17, No. 3, pp. 309-326.

On the employer's side, from a legal point of view, the central management is not the employer either of the workers in the incorporated subsidiaries or of those in the subcontracting companies and thus cannot represent subsidiaries and subcontractors in the negotiation. Of course, it would be possible for the latter to give a mandate to the central management, but this is in fact not the case and it would indeed be particularly difficult as the configurations of companies' network are constantly changing⁴⁵.

In the EWC Directive this problem has been solved for the agreements creating the EWC or the information and consultation procedure insofar as it is the management of the controlling undertaking that has received the mandate to negotiate for all the subsidiaries. This provision could inspire a legal framework for transnational collective bargaining within European size groups. It seems, however, difficult to use such a legal mandate to negotiate in the name of other companies if the scope of application is not a group of undertakings but a network including subcontractors.

On the employees' side the question seems to be even more complicated since, three different options have been progressively adopted until now by transnational companies.

(A) A first option consists of the already mentioned negotiation between the management and the EWC.

Subjects and nature of provisions in *joint texts* concluded under this option vary considerably. According to a recent study of the European Industrial Relations Observatory (EIRO)⁴⁶, the most common topic addressed in these texts are social and trade union rights, CSR and the handling of company restructuring. Other topics covered include health and safety, skills training and gender equality. Most of them establish general frameworks for company policy. In a number of cases joint texts promote or require action on the issues concerned at lower levels within the organisation.

⁴⁵CSR policy on transnational company level does not include an overall joint and mandatory social policy setting for employment standards (conditions) at a transnational/European scale to be applied by all the plants all over the countries. CSR policy (as laid down in the codes) is a company policy usually imposed by the central management by managerial decision on the various subsidiaries of the transnational company and often controlled/monitored by the central management. Subcontractors, if they are bound at all by the company CSR policy, are mostly bound via clauses in the subcontracting contracts. So, as far as CSR is concerned, the problem seems not to be linked to the deficiency of the "command" structure of the company, but to the will of the companies not to define and impose general standards/norms on the subsidiaries.

⁴⁶ EIRO (2004): http://www.eiro.eurofound.ie/2004/11/study/tn0411101s.html

Company	Home country (sector)	Subject of agreement/text	Date
Bosch	Germany (engineering)	Basic principles of social responsibility	2004
Club Mediterranée	France (leisure)	Rights at work and mobility of employees	2004
DaimlerChrysler	Germany/USA (motor manufacturing)	Social responsibility principles	2002
Dexia	Belgium/France (finance)	Principles of social management	2002
Ford/Visteon	USA (motor manufacturing)	Social rights and social responsibility	2003
GEA	Germany (technology)	Principles of social responsibility	2003
General Electric Advanced	USA (plastics)	Use of electric communications systems	2002
Materials		Pre-employment screening	2004
General Motors Europe	USA (motor manufacturing)	Principles of social responsibility	2002
Leoni	Germany (wire and cables)	Social rights and industrial relationships	2003
Porr	Austria (construction)	Data protection	2004
Prym	Germany (buttons and fasteners)	Social rights and industrial relations	2004
Renault France (motor manufacturing)		Employees' fundamental rights	2004
Rheinmetall	Germany (engineering)	Code of conduct	2003
SCA	Sweden (paper and packaging)	Promotion of cooperation and social responsibility	2004
SKF	Sweden (engineering)	Code of conduct	2003
Triumph International	Germany (clothing)	Code of conduct	2002
Volkswagen Germany (motor manufacturing)		Social rights and industrial relationships	2002

Table 1: Agreements o	or joint texts signed	by EWC (2002-2004).
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Source: EIRO (2004)

The legal nature and binding effect of these joint texts depends, therefore, on the national law applicable according to the principles of private international law. This seems hardly compatible with the aim of creating common rules by the adoption of such texts concluded between management and EWC.

Despite of these legal problems, the number of joint texts negotiated between management and EWC on matters other than the constitution and the functioning of EWC has increased. Such a development underlines the relevance of the analysis on the legitimacy of EWC to go beyond the information and consultation procedures provided by the directive and to enter into a transnational negotiation process in the shadow of the law.

As previously underlined (see above par. 2.1), this legitimacy may be questioned because of the nature and the composition of the EWC. Besides the fact that the EWC directive does not recognize any competence to the EWC in the field of collective bargaining, a major problem

is that the EWC is not a trade union body whereas collective bargaining is in many Member States reserved to Trade Unions.

As we have stressed before, involvement of Trade Unions in the EWC depends indeed both on the national transposition of the directive and on the EWC agreements concluded within the SNB.

Debates are going on in several EU Member States, and some of them have already decided to enable employees' representatives that are elected by the workers to conclude collective agreements at company level if there are no Trade Union representatives (the so-called Czech Model) However, not all the Member States are ready to renounce to Trade Unions' monopoly to conclude collective agreements, making it difficult for EWC composed by non-union members to be the only actor in transnational collective bargaining at company level. This lack of legitimacy is even reinforced by the fact that EWC agreements do not always guarantee a composition of the EWC proportional to the workers represented.

Lastly, joint texts may at best cover companies' subsidiaries employees' in the EU whilst many important challenges in the field of CSR are either placed outside the EU or related to subcontractors.

(B) A second option is thus to negotiate with international sectoral unions and to conclude so-called *framework agreements*.

This option is retained by an increasing number of (transnational) companies.⁴⁷ The first examples of such framework agreements can be found at the end of the 1980s, but their number did not increase in a significant manner before 2000 when it started growing. Today, there are about 35 international framework agreements, most of them concluded by companies with a seat within the EU.

⁴⁷ N. HAMMER, *International Framework Agreements: Overview and Key Issues*, Paper presented at the Industrial Relations in Europe Conference, Utrecht, 26-28 August 2004.

Table 2:	International	Framework	Agreements	concluded	between
Transnationa	l Companies a	nd Internatio	nal Union Fed	erations.	

Company	Employees	Country	Sector	Union	Year
Danone	100,000	France	Food Processing	IUF	1988
Accor	147,000	France	Hotels	IUF	1995
IKEA	70,000	Sweden	Furniture	IFBWW	1998
Statoil	16,000	Norway	Oil Industry	ICEM	1998
Faber-Castell	6,000	Germany	Office Material	IFBWW	1999
Freudenberg	27,500	Germany	Chemical Industry	ICEM	2000
Hochtief	37,000	Germany	Construction	IFBWW	2000
Carrefour	383,000	France	Retail Industry	UNI	2001
Chiquita	26,000	USA	Agriculture	IUF	2001
OTE Telecom	18,500	Greece	Telecommunication	UNI	2001
Skanska	79,000	Sweden	Construction	IFBWW	2001
Telefonica	161,500	Spain	Telecommunication	UNI	2001
Merloni	20,000	Italy	Metal Industry	IMF	2002
Endesa	13,600	Spain	Power Industry	ICEM	2002
Ballast Nedam	7,800	Netherlands	Construction	IFBWW	2002
Fonterra	20,000	New Zealand	Dairy Industry	IUF	2002
Volkswagen	325,000	Germany	Auto Industry	IMF	2002
Norske Skog	11,000	Norway	Paper	ICEM	2002
AngloGold	64,900	South Africa	Mining	ICEM	2002
DaimlerChrysler	372,500	Germany	Auto Industry	IMF	2002
Eni	70,000	Italy	Energy	ICEM	2002
Leoni	18,000	Germany	Electrical/Automotive	IMF	2003
ISS	280,000	Danmark	Cleaning & Maintenance	UNI	2003
GEA	14,000	Germany	Engineering	IMF	2003
SKF	39,000	Sweden	Ball Bearing	IMF	2003
Rheinmetall	25,950	Germany	Defence / Auto /Electron.	IMF	2003
H&M	40,000	Sweden	Retail	UNI	2004
Bosch	225,900	Germany	Automotive / Electronics	IMF	2004
Prym	4,000	Germany	Metal Manufacturing	IMF	2004
SCA	46,000	Sweden	Paper Industry	ICEM	2004
Lukoil	150,000	Russia	Energy / Oil	ICEM	2004
Renault	130,700	France	Auto Industry	IMF	2004
Impregilo	13,000	Italy	Construction	IFBWW	2004

Company	Employees	Country	Sector	Union	Year
Electricité de France (EDF)	167,000	France	Energy Sector	ICEM / PSI	2005
Rhodia	20,000	France	Chemical Industry	ICEM	2005
Veidekke	5,000	Norway	Construction	IFBWW	2005
BMW	106,000	Germany	Auto Industry	IMF	2005
EADS	110,000	Netherlands	Aerospace	IMF	2005
Röchling	8,000	Germany	Auto industry, plastics	IMF	2005

Source: International Metalworkers Federation (2005):

http://www.imfmetal.org/main/index.cfm?n=47&l=2&c=10266

Most of these *framework agreements* are adopted under the umbrella of CSR and recognize fundamental social rights to the workers of the company and to those of its subcontractors. The most recent agreements also deal with issues such as restructuring, but also environmental protection.

If compared to unilateral codes of conduct adopted in this field, *framework agreements* include more precise definitions of the rights conferred and refer to the relevant ILO conventions. They always recognize the freedom of association which is not the case of all unilateral codes of conduct that have a tendency to concentrate on rights relevant for the media and the general public, avoiding reputation damages.

Framework agreements have a larger scope of application and almost systematically contain provisions on the way the rights are implemented within the subsidiaries and the subcontracting companies.

Some recent agreements provide for the creation of joint committees in charge of the interpretation of the agreement and habilitated to receive complaints.

Although these agreements are concluded between management's and employees' representatives, their consideration as collective agreements as defined by Labour Law in EU Member States may be questionable because parties in the negotiation process are situated at different levels: whilst representatives of management are at the company level, those of the employees are at the sectoral level.

Furthermore, international union federations not always have an explicit mandate to negotiate collective agreements in the name of their members. They may also suffer from a lack of experience in collective bargaining and of means to monitor the implementation of the agreements.

(C) A third option is to associate national unions to the negotiations with the management of the transnational company.

This option allows workers of each subsidiary to be represented by the relevant national union recognized as a legitimate agent in transnational collective bargaining.

Several international framework agreements have been simultaneously signed by the international unions and by the national unions of the country where the company has its seat. Among the above mentioned *framework agreements* (see Table 2), this has been the

case of those concluded at *Endesa*, *Eni*, *Faber Castell*, *Freudenberg*, *Hochtief*, *Impreglio*, *Norske Skog* and *Renault*.

In order to achieve a binding effect, the international framework agreement is transposed into a national collective agreement submitted to the legislation of the company's home country. The problem is the legal value this agreement will have in the other Member State in which subsidiaries of the company are operating.

In order to avoid this problem of private international law, it is possible to associate the national Trade unions of all the countries in which the company has a subsidiary. This procedure has been used in the 2005 *EDF* agreement on CSR⁴⁸, as the text has been signed both by international Trade Union federations and by a series of national Trade Unions.

If we were to argue that the central management of the head company has a mandate to represent the employers of all the subsidiaries, this option would transform the transnational agreement in several national agreements with the same content, whose legal value would be defined according to the national labour law of each country involved.

This third option would thus avoid the problems of the transnational nature of collective bargaining, but it certainly makes negotiations more complicated as a large number of partners have to be involved in the process. Furthermore, the necessary respect for different structures, cultures and traditions in collective bargaining, as they exist in all Member States would constitute another relevant obstacle.

Conclusion III

The three above mentioned actors that can operate, from the employees' side, within the different option just described, i.e. EWC, International Trade Union federations and national Trade Unions, have not to be considered as competitors, since they often cooperate.

Several international *framework agreements* have been signed by both international union federations and EWC. Among the above mentioned agreements, this has been the case at *Bosch, BMW, Daimler Chrysler, EADS, GEA, Leoni* and *Volkswagen*. Even if the EWC does not sign, the initiative of the negotiation often takes place within that body. In some cases, there are also three signatures representing the employees: EWC, international Trade Union federations and national Trade Unions which seems to give even more legitimacy.

Nevertheless, since the range of issues the EWC is dealing with has been expanded beyond the core issues of company performance and employment to topics as health and safety, equal opportunities, (vocational) training - topics that usually are the main issues for the SSD Committees -, synergies, overlapping and even conflicts are possible between these two levels.

All these different experiences of transnational collective negotiations at company level illustrate that there is a need for a general legal framework in order to clarify: (a) the procedure; (b) negotiating agents; (c) conditions for the binding effect of concluded agreements.

⁴⁸ <u>http://www.edf.com/54071d/Homecom/FichiersEN/pdf-res-va</u>

4. Transnational tools and restructuring.

Transnational negotiation is frequently mentioned in the context of restructuring. The idea is that agreements between Social Partners can be used both to improve the adaptability of firms facing rapidly changing circumstances both to manage restructuring with a view to avoid or mitigate negative consequences for workers and other stakeholders. This has been expressed in a 2003 *joint text* by the European cross-industry Social Partners:

"Adaptation to change is a constant phenomenon in the lives of companies and workers. Most of this adaptation does not entail job losses. However, a more farreaching restructuring may be necessary at certain times. The existence of a good social dialogue in a climate of confidence and a positive attitude to change are important factors to prevent of limit the negative social consequences."⁴⁹

Likewise, the Commission has, on several occasions, marked that it envisages a role for transnational collective bargaining in the area of restructuring. In its 2005 *Communication on Restructuring and Employment*,⁵⁰ the Commission takes the view that there is a need for more European social dialogue in this area, both on the cross-sectoral and sectoral level. In June 2005, the first meeting of the new *EU Restructuring Forum* has been hold, gathering representatives from European institutions, Member State governments, regional and local authorities and the Social Partners.⁵¹

The most important development, however, is that restructuring has become a common theme for joint texts, declarations, or agreements by Social Partners at sectoral level or between the management of multinational corporations and EWC.⁵² On some occasions, as we have seen before (see above par. 2.2 Part. One), restructuring agreements have been signed both by the EWC of the company and the sectoral trade union federation at the European level.

Most texts deal with a specific occasion of restructuring, such as a merger, a spin-off, a joint venture, a plant closure, or other staff reduction. Such texts can contain provisions regarding the continued employment and working conditions of existing employees, the adoption of the old employer's collective agreements by the new employer, or structures and procedures for information and consultation. They can also contain principles upon which restructuring should be based, for example the avoidance of forced redundancies, or commitments on the side of the employer concerning the continued operation of production sites or the continued sourcing of production to a company which has been spun-off.

The nature of restructuring in multinational companies, where sites in different countries are often in more or less open competition with each other, makes this a particularly interesting area for transnational negotiation. As we have seen before (see above par. 2.2 Part one), it is

⁴⁹ UNICE/UEAPME, CEEP and ETUC, Orientations for reference in managing change and its social consequences, 16 October 2003.

⁵⁰ COM(2005) 120 final. See also COM(2004) 557 final.

⁵¹ http://europa.eu.int/comm/employment_social/events/2005/restructuringforum/index_en.html

⁵² For an overview of joint text concluded by EWCs, see *European Works Councils Bulletin*, Issue 56, March/April 2005.

also in this field that EWC have come to take on a negotiating role, often with the support of sectoral Trade Unions.

An example of this is the European Framework Agreement concerning restructuring concluded in December 2004 by *GM Europe* management and the GM European Employees Forum (the EWC of GM's European subsidies) supported by the European Metalworkers' Federation (EMF). The agreement was reached after a European day of industrial action called by the EMF and the GM European Employees Forum, as a response to a management announcement that it was to cut 12.000 jobs in Europe.

Under the agreement, *GM* management accepted to refrain from closing plants and that forced redundancies were to be avoided by way of early retirement schemes, outsourcing and by making use of various national schemes which allow workers to receive training or other help to find new jobs. From the Trade Unions side, the agreement was an attempt to avoid that workers and unions would be played off against each other over borders.⁵³

Implementation of the agreement has been nonetheless left to the national level.⁵⁴

A further example is provided by 2000 *Ford* decision to spin-off its *Visteon* components division. An agreement was signed by management representatives, Ford EWC and Visteon employee representatives, regulating the transfer of employees to the new company by the same or equivalent conditions of employment, possibilities for staff to apply for positions at Ford, and the full adoption by the new company of all existing Ford collective agreements. Ford also made commitments concerning the continued sourcing of production to the new company.

The implementation of the agreement was, also in this case, left to the parties on the national level, with a joint working group set up by management and EWC to monitor the implementation of the agreement and take a decisions in the case of any dispute regarding its interpretation.

Conclusion IV

So far, agreements on restructuring have been reactive rather than proactive, dealing with specific occasions of restructuring.

An EU legal basis for transnational bargaining could contribute to facilitate agreements which can spread social risks of restructuring over time and over larger groups of workers and plants.⁵⁵

 ⁵³ The Copenhagen Declaration by trade union leaders from German *IG Metall*, Swedish Metall, CF and SIF, and EMF in respect of GM Europe restructuring. <u>http://www.metall.se/home/metall2/hom e.nsf/0/14f2b6a7004621aec1256f230024e21e?OpenDocument.</u>
⁵⁴ In March 2005, the company works council of GM's German subsidy *Opel* made concessions on pay and

⁵⁴ In March 2005, the company works council of GM's German subsidy *Opel* made concessions on pay and working time flexibility in return for commitment made on the part of management to produce a number of future GM models at the German plants.

⁵⁵ This could, for example, take the form of funds to be used for monetary support, retraining and intensified help in finding alternative employment in the event of restructuring, financed by contributions negotiated by Social Partners.

On a national basis this has been practiced in a lot of countries in the form of so called "social plans" or of arrangements in separate collective agreements dealing with these issues.⁵⁶ The same might happen at transnational level by envisaging the conclusion of "transnational social plans" that will not need further implementation at national level.

⁵⁶ In Sweden, such "adjustment agreements" cover white and blue collar workers in the private sector and in the central government sector. In France, the social plan to be adopted in case of restructuring is a unilateral act; workers' representatives have only information and consultation rights. However, there are so-called "*accords de méthode*" that may change the information and consultation procedures. These agreements may be concluded on the group level.

5. EC directives with a potential transnational dimension.

The development of an autonomous transnational legal framework seems to be even more desirable if we consider that there are other EC directives (apart from EWC and SE) in which a transnational dimension of collective bargaining could be developed.

The Collective redundancies,⁵⁷ the 1992 amended Transfer of undertaking,⁵⁸ and the Information and consultation⁵⁹ directives all provide for information and consultation of employees' representatives in case of restructuring in view *of reaching an agreement*.⁶⁰ Of course information, consultation and bargaining procedures are defined in details by national legislation, and workers' representatives involved in the process are indicated by national law. But the Collective redundancy and the Transfer of undertakings directives provide that the prescribed obligations shall be fulfilled independently of whether the decision regarding the restructuring is being taken by the national employer or by a controlling company located in another county (art. 2.1).

Furthermore, the same Information and consultation Directive provides, in a more general perspective, that consultation shall take place "at the *relevant level of management and representation*, depending on the subject under discussion" (art. 4.4 b). Here again it opens the possibility of transnational discussions and, in case, of transnational negotiation, if the level of management concerned by the decision is located in another Member State or if the decision could have implications in more than one country.

So one could argue that all the above mentioned directives, opening a space for information and consultation at transnational level, might led to a transnational collective negotiation process that could be developed if provided by an adequate legal instrument to be used for this purpose.

The same question concerning the development of a transnational dimension can be approached from a *second perspective*, in which we have to stress that some EC directives allow national Social Partners to derogate from EC Law standards by collective agreement, confirming, in this way, the interest of EU institutions for Social Partners involvement in the regulation of working conditions according to the subsidiarity principle.

A first relevant example is represented by the Working Time Directive⁶¹ which states, at art. 18, that "derogations may be made from Articles 3, 4, 5, 8, and 16 by means of collective agreements (...) at national or regional level or, in conformity with the rules laid down by them, by means of collective agreements (...) at a lower level". No reference is made to the transnational level which, on the contrary, might be profitably recalled in this field.

⁵⁷ Council Directive 98/59/EC, OJ L 255, 12.8.1998, p. 16.

⁵⁸ Council Directive 92/56/EC, OJ L 245, 28.8.1992, p. 3.

⁵⁹ Council Directive 2002/14/EC, OJ L 80, 23.3.2001, p. 29.

⁶⁰ In its judgement of 12 February 1985, concerning similar terms of the Collective Redundancies Directive, the European Court of Justice specified that: "(...) the directive does not affect the freedom of the employer to proceed or to carry out collective redundancies. Its only objective is to have these redundancies preceded by a consultation with the trade unions and by the information of the competent public authority (...)"(point 10) ECJ, 12 February 1985, C-284/83, *Dansk Metalarbejderforbund*, I-553. More recently ECJ specified that "article 2 of the Directive (on collective redundancies) imposes an obligation to negotiate" ECJ, 27 January 2005, C-188/03, *Junk*, and before C-383/92, *Commission v. United Kingdom*.

⁶¹ Council Directive 2003/88/EC, OJ L299, 18.11.2003, p. 9..

The Directive is now under revision. The Commission's proposal to modify it⁶² was critically examined by the EESC on 11 May 2005. The European Parliament gave its opinion at first reading on the same day.⁶³ The most controversial issues, not irrelevant for the arguments we put forward in the present report, have to do with the individual opt-out and with the definition of working time for on-call workers. It may be useful to underline that the Commission's proposals include several clauses in which derogation by collective agreements are envisaged. Although references are correctly made to national collective agreements, one could argue in favour of a supranational co-ordination of certain issues. An optional TCA could deal, to quote an example, with shared criteria to reconcile work and family life, or even with reference periods for the calculation of compensatory rest.

A second relevant example is represented by the Posted Workers Directive in which exemptions from the application of some of the principles provided within it are allowed only by means of national (mainly *erga omnes*) collective agreements (art. 3 parr. 3 and 8). In a *third perspective*, potentialities for the development of a transnational dimension can be found in two recent EC directives which refers to any *appropriate* level of collective bargaining, transnational included.

Anticipating the wording of art. 28 of the European Charter of Fundamental Rights which states that collective bargaining shall be carried on at any *appropriate* level, art. 11 of the Directive on Equal Treatment Irrespective of Race or Ethnic Origins⁶⁴ and art. 13 of the Directive on Equal Treatment in Employment and Occupation⁶⁵ provide that Social Partners, without any prejudice to their autonomy, may conclude at the *appropriate* (transnational included) level, agreements laying down anti-discrimination rules.

The same happens with the already mentioned Information and consultation Directive providing, in art. 5, that "Member States may entrust management and labour at the *appropriate level*, including at undertaking or establishment level, with defining freely at any time through negotiated agreement the practical arrangements for informing and consulting employees".

Conclusion V

All the above provided examples show that when it comes to a potentially transnational dimension of interests setting, the lack of a *structured transnational response* by EC Law represents a missing opportunity in the view of developing a reliable and uniform regulation of relevant social issues at the *appropriate* level (transnational in our case). Topics like restructuring, working time, equal treatment and information and consultation could be fruitfully dealt with in transnational agreements stimulated by existing EC directives yet potentially envisaging a transnational dimension.

⁶² SEC (2004) 1154.

⁶³ See now the Amended Proposal for a Directive amending Directive 2003/88 EC presented by the Commission on 31 May 2005 COM (2005) 246 final 2004/0209 (COD).

⁶⁴ Council Directive 2000/43/EC, OJ L 180, 19.7.2000, p. 22.

⁶⁵ Council Directive 2000/78/EC, OJ L 303, 2.12.2000, p. 16.

Part two - Transnational collective bargaining within a legal framework: Why and how.

1. Why should we have a legal framework on transnational collective bargaining? General and specific reasons for intervening at EU Level.

1.1. General reasons.

Part one of this report focused on the analysis of the *autonomous development of transnational collective sources*, at sectoral or cross-sectoral level and at company level. Since instruments used for this purpose are not provided by any specific legal source at EU or national level, we have referred to them as **transnational tools**. So, *prima facie*, they can be considered as a kind of "self-regulation" either by traditional Social Partners or by management and employees' representative bodies (EWC).

In a bottom-up perspective transnational tools, albeit outside the scope of art. 138 and 139 TCE, have been indirectly encouraged by EU initiatives - a Commission decision (SSD Committees) or a Council Directive (EWC).

Inputs coming from EU institutions have represented a precondition for the development of European sectoral social dialogue on a voluntary basis. The same can be said with reference to the company level in which *a kind of* transnational negotiation could develop mainly because of the transnational dimension of industrial relations produced by the EWC directive.

On the other hand, further relevant developments in a voluntary self-regulative perspective do not seem, at this stage, possible to envisage, at least in view of creating a transnational *collective bargaining* system.

In fact, as far as the binding effect of "agreements" and the impact on working conditions are concerned, transnational sectoral social dialogue still depends either on "spot" initiatives of EU institutions or on interventions of the Social Partners at national level (see above par. 1.1.3 Part one).

Even more complicate problems emerge from the company level since: (a) the only negotiation process underpinned by EC Law is limited in its ends to the establishment of a representative body or of a procedure of information and consultation; and (b) the highly differentiated composition of EWC is likely to produce relevant consequences on: (b1) their legitimacy to go beyond information and consultation, and to negotiate with management, (b2) Trade Unions and Employers' organisations aptitude towards the recognition of negotiating powers *to* EWC without a simultaneous formal recognition of Trade Unions role *within* them.

To sum up, the existing experiences of transnational collective negotiations at all levels illustrate that there is a lack of a specific and comprehensive legal framework as far as: (a) the procedure; (b) the negotiating agents; (c) the conditions for the binding effect of concluded agreements.

In our opinion, such a lacuna is likely to hamper further developments of the transnational dimension in the view of: (a) recognising to it an autonomous role in relation to national collective bargaining or EU institutions intervention (see above par. 1 Part one); (b) guaranteeing a direct and homogeneous impact of "agreements" signed at transnational level which may also stimulate the parties to introduce more normative topics into their transnational bargaining agenda.

Moreover, examples from EC Law show that the lack of a *structured transnational intervention* by EC Law represents a missing opportunity of developing, by collective bargaining, a reliable and uniform regulation of relevant social issues at the *appropriate* level (transnational in our case). Topics like restructuring, working time, equal treatment and information and consultation could be fruitfully dealt with in transnational agreements stimulated by existing EC directives yet potentially envisaging a transnational dimension (see above par. 4 Part one).

Last but not least, in our opinion, the complexity of norm setting in some areas of working conditions which can give rise to competition based on labour standards rather than on the quality of products, makes the definition of a specific legal framework within which transnational collective bargaining may develop highly recommended.

On the other hand, such a risk or even danger of distortion of competition has been, since the very beginning, a common ground for intervention by the EEC in the social field. So that it is not only our personal concern as labour lawyers but it should also be the concern of EU institutions and of European Social Partners to emphasise and promote transnational negotiations in such a perspective.

Social Partners' motivation towards such further developments is witnessed by the relevant examples of "agreements" quoted above (see par. 1.1.3 Part one).

In this view, European Trade Union federations, national Trade Unions and EWC have not to be considered as competitors in principle. Nevertheless, since the range of issues the EWC is dealing with has been expanded beyond the core issues of company performance to topics that usually are the main issues for the SSD Committees, synergies, overlapping and even conflicts can be expected between these two levels.

1.2. Specific reasons.

As we have just stressed, Part one of this report illustrates the vitality but also discloses the weaknesses of existing **transnational tools**. They do not allow the development of a transnational collective bargaining system with a more comprehensive scope. Furthermore, agreements originated by the procedure dealt with in Chapter XI TEC respond to different needs and should continue to be enhanced by EU institutions and Social Partners.

Some additional and punctual clarification of this statement may be useful for the understanding of our proposal (see below par. 1.2 Part two).

A. A first point that has to be developed is the lack of a legal status for transnational collective "agreements". We may say that, at present, transnational collective agreements just do not exist *de iure* and are not going to exist without a comprehensive and specific legal framework.

B. There is an **unclear status of sources** on which **transnational tools** are based (see above Part one). None of those sources has been established with the specific

purpose of creating a comprehensive transnational collective bargaining system. Some aimed at developing information and consultation (rights) through procedures or *ad hoc* bodies (SSD Committees and EWC) which have progressively gained a negotiating role just in order to fill, with a rather limited effect, the empty space of the transnational dimension.

C. There is a **variety of negotiating agents** which are now trying to gain mutual recognition at transnational level, both company and sectoral: SSD Committees, European Social Partners, EWC, transnational companies. In this view, we have to stress:

- I. as far as European Social Partners are concerned, **the lack of a legally binding and thus effective instrument** at their disposal in case they conclude a transnational "agreement";
- II. as far as EWC are concerned, **the lack of formal legitimacy to enter collective bargaining**, a lack which makes highly controversial:
 - a genuine counterpart role in respect to management;
 - the legal status of the agreements reached and their enforceability.

D. The presence of so many different actors taking the initiative to develop transnational negotiation, is likely to lead, as a direct consequence, to **unclear relationships among levels of decision making** and will open the way to easily predictable overlapping or even competition and conflicts: between the sectoral and the company level as far as transnational negotiation is concerned; between transnationally negotiated rules or principles and nationally defined ones, above all in case the former try to lower protection levels agreed within the latter.

E. Although existing **transnational tools** have proved to be reliable as policy instruments for Social Partners, it cannot be denied that they did not function in view of establishing a (legally) binding system of transnational regulation. Nevertheless, if, for the above mentioned reasons we are strongly convinced that the best solution in terms of effectiveness could be provided by a transnational legal intervention, we have not to forget that Member States have confirmed, approving art. 28 of the Nice Charter of Fundamental Rights, the recognition of the right to collective bargaining, specifying that it can be exerted at any appropriate level. Such non binding principle, given the legal nature of the Chapter approved as a solemn declaration, is nevertheless meaningful in inspiring the European Social Partners and in developing collective bargaining at transnational level. The development of an **optional legal framework** establishing a transnational collective bargaining system would represent a possible solution.

F. As we hope to have demonstrated in Part one of the report and as we have reaffirmed in this paragraph, *other options*, such as relying on self-regulation by Social Partners at any level will not be able to solve the problem of the direct binding effect of decision bilaterally agreed at transnational level, since they all need either EU institutions interventions or national bargaining transpositions. Both will alter the very meaning of "transnational" which, in our view, is strictly linked to *a regulatory power directly recognised to transnational agents*.

In such a perspective, the following proposal intends to enhance the already existing transnational experiences, offering them a transnational instrument to accede to binding collective agreements, different from and alternative to "Community level" social dialogue.

2. How could we have a legal framework on transnational collective bargaining?

A proposal to develop EU-TCB.

Our proposal for an optional legal framework on transnational collective bargaining is based on the creation of joint negotiating bodies within which transnational collective agreements can 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 the relevant sector. These managerial decisions should be submitted to a bilateral monitoring system at sectoral level and be recognized as legally binding in each EU Member State according to their law or practices.

In the following sections, we will give more details about the different elements of this proposal and the way it might be implemented.

2.1. EC Law Instrument.

In order to develop what we suggest to call a European Union Transnational Collective Bargaining (hereafter EU-TCB) system, we will refer to existing EC Law instruments. In view of respecting the subsidiarity principle (both in vertical and horizontal sense) we propose that the best instrument is a Council directive providing an optional framework of EU-TCB within which EU-Transnational Collective Agreements (hereafter EU-TCA) with legally binding effects can be concluded.

We also suggest that the Commission should establish an Advising Committee made up by national experts with the task to coordinate the ways of implementing the directive in the Member States.

This would guarantee a high level of homogeneity in the legal definitions adopted and in the means chosen for fulfilling the aims of the directive.

2.2. Legal Basis.

A possible only legal basis on which the directive could be grounded is represented by art. 94 TEC⁶⁶ We think that a directive offering an optional scheme for transnational collective bargaining could provide additional opportunities for bringing closer social standards and harmonising collective procedures. We must recall that in the past such a legal basis served the purpose to favour secondary legislation aimed at avoiding distortions in competition. Albeit in a very different economic context, we feel that harmonisation still is an objective to be pursued in taking measures which affect both the economic and the social sphere.

However, we highly recommend an extensive consultation of all European Social Partners in order to disseminate such a legislative initiative and clarify its purposes.

⁶⁶ According to art. 94 "The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market".

2.3. Contents of the EU-TCB Directive.

In order to make a EU-TCB system effective but also acceptable for Social Partners, the following points should be dealt with in the directive:

- (a) EU-TCB must be **complementary** to national collective bargaining systems. Such an additional level of bargaining should neither interfere with other existing national levels nor diminish the existing function of **transnational tools**.
- (b) Bargaining agents which can have access to and activate the optional framework must be clearly mentioned by the directive.

The overview of existing **transnational tools** (see above Part one) shows that they have been quite successfully developed at sectoral and at company level, although, in the latter case, above all within the CSR perspective (see above par. 2.2 Part one) (also in some restructuring cases like GM and Volkswagen). Even though we are well aware of the need to avoid the risk to confuse EU-TCB with workers' involvement in transnational companies, this cannot lead us to ignore the fact that *a kind of* transnational negotiation has been carried on also at that level by EWC even if usually assisted by Trade Unions. This is the reason why, in our view, on the one hand, EU-TCB has to be allowed to "spring" also from that level, but, on the other hand, it has to develop within a legal framework that clearly avoid confusion between workers' involvement and collective bargaining tools and aims.

For these reasons, in order to have access to and to activate the optional framework provided by the directive, an initiative can be taken:

(b1) jointly and voluntarily, by European Trade Union(s) and Employers' Organisation(s)⁶⁷ at Sectoral or Multi-sectoral Level;

(b2) jointly, by European Trade Unions and Employers' Organisations at Sectoral or Multi-sectoral Level on request of:

(b2.1) at least two National Trade Unions and Employers' Organisations at the same or comparable Sectoral Level, each of them belonging to a different Member State;

(b2.2) a EWC (or representative body in case of ES) and the management of the relevant Transnational Company or group to develop a bargaining process on subjects submitted to information and consultation;

(b2.3) a EWC asking for the insertion in the bargaining agenda of European Trade Unions and Employers' Organisations at Sectoral Level of subjects submitted to information and consultation.

(b3) unilaterally, by European Trade Unions at Sectoral or Multi-sectoral Level on request of:

⁶⁷ Submitted to a representativeness test according to 1998 Commission Decision and to *UEAPME* criteria quoted at fn. 10.

(b3.1) a EWC (or representative body in case of ES) jointly with the management of the relevant Transnational Company or group in order to develop a bargaining process on one or more of the subjects submitted to information and consultation;

- (b3.2) the management of the relevant Transnational Company or Group.
- (c) Definition of EU-TCB bodies.

The above mentioned variety of negotiating agents as well as the unclear relationships among levels of decision making shows the need for a precise definition of EU-TCB bargaining agents and procedures in order to avoid race to the bottom within the proposed system. In particular, recent developments in collective bargaining show that in several cases derogations *in peius* may occur at decentralised level of bargaining, thus creating a problem of enforceability of the agreements in question. National legal systems seem to favour ways of establishing the representativity of bargaining agents and to grant in various ways the *erga omnes* effect of the agreements in question.⁶⁸

At transnational level the risk of *in peius* agreements may rise from the fact that transnational companies might be attracted by the possibility to derogate from minimum standards fixed at Sectoral level by recurring to Company level transnational collective bargaining but also the possibility to lower social protection standards laid down at national level.

Since we are well aware of difficulties emerging in the relationship between bargaining levels, coordination should be encouraged, primarily to avoid *in nuce* competition among transnational collective agreements concluded by different agents in the same Sector, without precluding access to EU-TCB to transnational companies.

This means the recognition of a crucial role to be played by European Sectoral or Multisectoral Social Partners which will control "free rider" behaviours by transnational companies. This will exclude the need of an *ex post* regulation⁶⁹ of conflicts risen by the simultaneous presence of competing Sectoral and Company level transnational collective agreements, since, as we will clarify below, at least a sectoral organisation from employees' or employers' side will be always involved in the bargaining procedure.

Depending on which one of the above mentioned bargaining agents will access the system, the following steps shall be taken:

⁶⁸ See S. SCIARRA, *Re-assessing the centrality of a legal point of view*. General Report of "The Evolving Structure of Collective Bargaining in Europe (1990-2003)" Research Project Co-financed by the European Commission and the University of Florence (VS/2003/0219-S 12.359910). The Report draws on a comparative study of EU Members State and candidate countries.

⁶⁹ In our view *ex post* control on agreements which have been already signed will rise the problem of the capacity of the "controlling" agent to react by producing something more than a mere stigmatisation effect on the free rider agreement i.e. the modification or the withdrawal of its contents. This will be only possible when the controlling agent is provided by a hierarchical prevalence on the controlled agent which is very difficult to be affirmed in theory and even more to be guaranteed in practice in a collective bargaining system. Something different is supposed to happen within the framework of the "community level" social dialogue since in that case EU institutions are retaining the legal prerogative to exercise their "legislative" power according to art. 137 TCE.

(c1) in case of access under (b1) and (b2):

(c1.1) negotiation among European Sectoral or Multi-sectoral Trade Unions and Employers' Organisations which activated the optional framework for the constitution of a Joint Negotiating Body at Sectoral Level (JNB-SL) composed by the same European Sectoral or Multi-sectoral Trade Unions and Employers' Organisations;

(c1.2) conclusion, in writing, of a Basic EU-TCA establishing the JNB-SL and defining its functioning, at least, with reference to the decision making procedure;

(c2) in case of access under (b3):

(c2.1) negotiation among European Sectoral or Multi-sectoral Trade Unions and management of the relevant Transnational Company or group for the constitution of a Joint Negotiating Body at Company Level (JNB-CL) composed:

- in case of the access under (b3.1), by the same European Sectoral or Multisectoral Trade Unions, the management of the relevant Transnational Company or group and the EWC with mere consultative role;
- in case of access under (b3.2), by the same European Sectoral or Multisectoral Trade Unions and the management of the relevant Transnational Company or group;

(c2.2) conclusion, in writing, of a Basic EU-TCA establishing the JNB-CL and defining its functioning, at least, with reference to a decision making procedure.

As a result of such a procedure within JNB-SL EU-TCA at Sectoral or Cross-sectoral Level as well as within JNB-CL EU-TCA at Company Level may be concluded.

- (d) Definition of EU-TCA formal requirements.
 - (d1) All EU-TCA (Basic included) shall be in writing.

(d2) All concluded EU-TCA (Basic included) shall be accessible to the parties that can activate the optional framework. With this only purpose, all JNB have to transmit a copy of signed EU-TCA to the Commission which has to store it on a dedicated website.

(e) Definition of essential elements of the EU-TCB procedure.

Respectful of Social Partners' freedom, the directive, shall provide for the following basic elements:

(e1) In case of activation under (b2.2) and (b2.3):

- possible integration of employees' side delegation within the JNB-SL by the EWC (conditioned to Employees' representatives' within JNB-SL approval);

- possible integration of employers' side delegation within the JNB-SL by the Management of the relevant company (conditioned to Employers' representatives' within JNB-SL approval).

(e2) Transposition of the EU-TCA into as many managerial decision (binding according to the national laws or practices) as the companies of the sector adhering to Employers' Sectoral or Multi-sectoral Organisations represented within the JNB-SL or as the companies of the group represented within the JNB-L or as the companies of the group represented within the JNB-L or as the companies of the group represented within the JNB-SL or as the companies of the group repres

(e3) Provision of a bipartite compliance control system through monitoring according to (g).

(f) Provision of a voluntary and bipartite transnational collective⁷⁰ disputes resolution system on rights.⁷¹

In order to guarantee a uniform interpretation of the concluded EU-TCA SL or CL (disputes on rights), the directive shall lay down that the interpretation of the meaning of disputed EU-TCA clause(s), even on demand of only one party, will be provided by the JNB-SL or, the case being, by the JNB-CL.

(g) Provision of a bipartite compliance control system through monitoring. Minimum requirements concerning the establishment of a compliance control system have to be laid down by the directive,⁷² such as:

(g1) Monitoring by the JNB-SL or, the case being, by the JNB-CL of the effective transposition of EU-TCA into a managerial decision in each company falling within EU-TCA personal scope of application.

(g2) Monitoring by the JNB-SL or, the case being, by the JNB-CL of relevant management's compliance to the management decision implementing the EU-TCA.⁷³

⁷⁰ A decisive element for qualifying a collective dispute as transnational is represented by the involvement of transnational collective parties, being them European Sectoral Employees' or Employers' organisations or companies or National Employers' and Employees' organisations belonging to the former.

⁷¹ Disputes on rights refer the to meaning of an already existing rule setting (collective agreement clause, most of the times) and can be solved by the application of previously defined objective criteria laid down within the same rule setting. On the contrary, conflicts on interest are, explicitly or implicitly, aimed at modifying the existing rule setting or at creating a new one as a result of the same dispute resolution. For this reason many European Countries exclude conflicts on interest from matters that can be subjected to court decision.

⁷² In the view of the proposed legal framework, compliance control is neither aimed at solving questions related to the nature and to the effects of EU-TCA nor at guaranteeing the effective application of the contents provided by EU-TCA nor at defining any mandatory juridical remedy in relation to non application or misapplication of any clause. On the contrary, it is aimed at building up a monitoring control system concerning the way in which EU-TCA clauses are implemented by each managerial structure.

⁷³ Different types of decision may be envisaged as far as the activity of JNB is concerned: they can be, nevertheless, categorised as binding and not binding instruments. In any case and no matter which sort of acts can be adopted by the JNB, it would be useful and desirable that the same JNB develops codes of practices to which transnational companies can make reference in order to pursue a better implementation of EU-TCA clauses.

(h) Provision of an adequate enforcement procedure in case of non compliance.

Lastly, the Directive shall lay down that, in case of litigation, Member States have to provide for an adequate protection of individual and collective rights deriving from the same decision.⁷⁴

⁷⁴ The direct relevance of the managerial decision under the national law of the country where it has been adopted will allow, in our view, to avoid problems linked to the definition of the applicable law that are usually approached by International Private Law. Such a solution is even more needed taking into account that the desirable process of "communitarisation" of the Rome Convention has not, at the moment, came to an end. See on it Commission *Green Paper on the Conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation*, COM(2002) 654 final, 14.1.2003.

Annex 1 The SSD committees

Sectors	Employees' organisations	Employers' organisations	Date of creation	Number of documents issued since establishment
Agriculture	<u>EFFAT</u>	GEOPA/COPA	1999	29
Audiovisual	<u>EURO-MEI, FIA,</u> FIM, EFJ	UER/EBU, <u>FIAPF,</u> CEPI, AER, ACT	2004	0
Banking	UNI-Europa	<u>FBE; ESBG;</u> <u>GEBC</u>	1999	2
Chemical Industry	EMCEF	ECEG	2004	1
Civil aviation	<u>ETF; ECA</u>	<u>AEA; CANSO;</u> <u>ERA; ACI-</u> EUROPE; IACA	2000	18
Cleaning industry	UNI-Europa	<u>EFCI</u>	1999	9
Commerce	<u>UNI-Europa</u>	Eurocommerce	1999	14
Construction	EFBWW	<u>FIEC</u>	1999	3
Electricity	EPSU; EMCEF	Eurelectric	2000	4
Footwear	ETUF:TCL	<u>CEC</u>	1999	5
Furniture	EFBWW	<u>UEA</u>	2001	?
Horeca	<u>EFFAT</u>	Hotrec	1999	9
Inland waterways	<u>ETF</u>	UENF; OEB	1999	7
Insurance	UNI-Europa	<u>CEA; BIPAR;</u> ACME	1999	2
Live performance	EEA	Pearle	1999	?
Local and regional government	<u>EPSU</u>	CEMR	2003	0
Mines	EMCEF	APEP; <u>Euracoal;</u> Euromines; <u>IMA</u>	2002	8
Personal services	<u>UNI-Europa</u>	EU Coiffure	1999	1
Postal services	UNI-Europa	Posteurop	1999	17
Private security	UNI-Europa	CoESS	1999	3
Railways	ETF	CER; EIM	1999	20
Road transport	ETF	IRU	1999	5
Sea fishing	ETF	Europeche/Cogeca	1999	14
Sea transport	ETF	<u>ECSA</u>	1999	9
Shipbuilding	EMF	<u>CESA</u>	1999	?
Sugar	<u>EFFAT</u>	<u>CEFS</u>	1999	6
Tabacco	ECF-IUF	<u>GITES</u>	1997	1
Tanning and leather	ETUF:TCL	Cotance	2001	2
Telecommunications	UNI-Europa	<u>ETNO</u>	1999	32
Temporary work	<u>UNI-Europa</u>	<u>CIETT</u>	2000	2
Textile and clothing	ETUF:TCL	<u>Euratex</u>	1999	3
Woodworking	<u>EFBWW</u>	CEI-Bois	2000	3

Applications submitted					
Gas	EMCEF/EPSU	EUROGAS	-2005		
Steel	EMF	EUROFER	-2004		
Metal					

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