

## Chapter 3

# European framework agreements: 'nomina nuda tenemus' or what's in a name? Experiences of the European social dialogue

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### Introduction

The European Commission defines 'transnational company agreement' as 'an agreement comprising reciprocal commitments, the scope of which extends to the territory of several States and which has been concluded by one or more representatives of a company or a group of companies on the one hand, and one or more workers' organisations on the other hand, and which covers working and employment conditions and/or relations between employers and workers or their representatives' (European Commission 2008). A distinction is made between International Framework Agreements (IFA's) and European Framework Agreements (EFAs). With IFAs generally being considered as global instruments with the main purpose of ensuring compliance with international labour standards in all of the target company's locations, EFAs are generally limited in their geographical scope to European countries and cover a broader range of more concrete and focused topics and arrangements.<sup>1</sup> Although this seems a logical way of clarifying a relatively straightforward situation, it might still create confusion, in particular when juxtaposing this definition with less official yet regularly used terms found in documents on European industrial relations.

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1. A third group called 'mixed framework agreements' was recently introduced due to the overlapping scopes of the agreements. See Chapter 6.

For instance, according to the European Industrial Relations Dictionary, five types of European collective agreements exist:

1. Interconfederal/intersectoral agreements between ETUC, BUSINESS EUROPE, UEAPME and CEEP such as the framework agreements on parental leave (including its revision), part-time work and fixed-term work incorporated in directives, and the so-called autonomous agreements such as the ones on telework, stress at work, or harassment and violence;
2. multi-sector agreements negotiated and signed by the European social partners representing different sectors (e.g. the multi-sector Agreement on Workers' Health Protection through the Good Handling and Use of Crystalline Silica and Products Containing It);
3. European industry/sectoral agreements between social partners organised on an industry/sectoral basis at European level (e.g. agreements on working time arrangements reached in different sectors of the transport industry (air, sea, rail and road));
4. agreements with a multinational company having subsidiaries in more than one EU Member State (e.g. European Works Council agreements and framework agreements on labour policies, international labour standards and restructuring issues signed by European Works Councils and in certain cases also by European industry federations);
5. agreements covering regions extending to more than one Member State. These take the form of agreements between employers and inter-regional trade union councils in a number of cross-border areas.<sup>2</sup>

Transnational company agreements, whether in the form of international or European framework agreements, would thus tend to belong to the group of agreements mentioned under item 4 above. However, classifying them under the general heading of European 'collective agreements' does not coincide with the overall view of scholars who for

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2. [http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/european\\_collectiveagreements.htm](http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/european_collectiveagreements.htm)

several reasons agree that such agreements cannot be classed as ‘collective agreements’ (Sobczak 2007).<sup>3</sup>

However, when looking at the definition of the term ‘framework agreement’ in the same dictionary, we find the following: ‘a framework agreement is the term used to describe the successful outcome of the European social dialogue’ (be it interprofessional, sectoral or multi-sectoral) and whereby ‘the term “framework” is intended to highlight the particular nature of the agreement as providing an outline of general principles to be implemented in the Member States “either in accordance with the procedures and practices specific to management and labour and the Member States or at the joint request of the signatory parties, by a Council decision on a proposal from the Commission”’.<sup>4</sup>

So what’s in a name? In this chapter the focus lies on European framework agreements as negotiated and signed within the framework of European social dialogue (interprofessional and sectoral) as institutionalized in Articles 152-155 of the Treaty on the Functioning of the European Union (TFEU). Part One gives a brief overview of the history and (legal) framework of this dialogue. Part Two focuses on results achieved. Whereas in Chapter 1 reference is made to numerous scholars working on the question of these agreements<sup>5</sup>, Part Three of this chapter instead provides a concise overview of attempts by the European social partners in particular to clear the mist hanging over several aspects of these European framework agreements such as how they are nominated, how they are implemented, etc.

## 1. History and (legal) framework

Acting on an initiative of the then President of the Commission, Jacques Delors, the European social partners (at that time ETUC, UNICE (now BUSINESSEUROPE) and CEEP) started a social dialogue in 1985, presaging the development of a European contractual area and often

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3. See also Chapter 6.

4. <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/frameworkagreements.htm>

5. See also Chapter 1.

described as the Val Duchesse dialogue<sup>6</sup>. A major landmark for the success of this cross-industry social dialogue was their agreement of 31 October 1991 on the role of the social partners in developing the Community's social dimension (also known as the Agreement on Social Policy). This Agreement was almost literally taken over in the so-called 'Social Protocol' and annexed to the 1993 Maastricht Treaty, as well as being incorporated in the main body of the 1996 Amsterdam Treaty in the form of then Articles 137 and following.

Under Article 154 TFEU (ex-Article 138 TEC), the Commission has an obligation to consult the European social partners in two phases before adopting legislative proposals in social policy fields, in particular those listed under Article 137 TEC (now Article 153 TFEU). Following this consultation process, the European social partners can present an opinion or a recommendation to the Commission or inform the Commission of their intention to open negotiations on the subject covered by the consultation.

Article 155 TFEU (former Article 139 TEC) states that:

1. Should management and labour so desire, the dialogue between them at Union level may lead to contractual relations, including agreements.
2. Agreements concluded at Union level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 153, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission. The European Parliament shall be informed.

The Council shall act unanimously where the agreement in question contains one or more provisions relating to one of the areas for

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6. This because the inaugural meeting of this European social dialogue was held in 'Val Duchesse', a castle on the outskirts of Brussels. Interesting to note is that this start falls more or less together with the successful conclusion of first transnational company agreements at Thomson Grand Public (1985) and BSN-Danone (1986). See also Chapter 6.

which unanimity is required pursuant to Article 153(2).’ (underlining added by author)<sup>7</sup>

According to the European Commission, ‘since the Amsterdam Treaty, European social dialogue has had the capacity to be an autonomous source of European social policy legislation. European social partners may adopt agreements that can be implemented through a Council Directive, which makes them legally binding for all employers and workers in Europe once they are transposed into national legislation or collective agreements (“erga omnes” effect); they may also adopt autonomous agreements to be implemented through customary national procedures. In the latter case, the agreements are binding only for the signatories and their affiliates (“relative” effect)’ (European Commission 2010: 13).

These basic ‘rules of the game’, as contained in these few Treaty articles and Commission documents, have over the years been further enhanced and/or clarified – also in view of developments and lessons learnt over time in European social dialogue – by five Commission Communications and one Staff Working Document (respectively European Commission 1993, 1996, 1998, 2002, 2004 and 2010). Below, a brief summary is given of what these documents entailed, in particular in relation to the negotiation capacities of the European social partners and the agreements reached as a result of their dialogue.

### 1.1 European Commission (1993): Communication from the Commission on the application of the agreement on social policy

This first Communication of 1993 focused mainly on clarifying the conditions for implementing the Agreement/Protocol annexed to the

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7. According to its predecessor, Article 118(b) EEC Treaty (Single European Act of 1986), ‘the Commission shall endeavour to develop the dialogue between management and labour at European level, which could, if the two sides consider it desirable, lead to relations based on agreement’. In contrast to Article 155 TFEU there was no reference to ‘contractual relations’. Article 139 also remains silent as to what is required for an agreement to actually establish contractual relations in the sense of a binding commitment. Nevertheless and according to Schiek the then article 139(1) established a new type of contract, the ‘social partner agreement’ (Schiek 2005: 47).

Maastricht Treaty both in relation to the consultation of the European social partners and for the negotiation and implementation of these agreements (European Commission 1993).

The first pivotal issue to solve was the question of the representativeness of the organisations able to negotiate such European-wide agreements. To be eligible for consultation and to have the legitimacy to suspend the legislative process and opt for an agreement-based approach, the social partner 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 their effective participation in the consultation process.<sup>8</sup>

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**8.** Interestingly, in a joint opinion of 29 October 1993 on 'proposals by the social partners for implementation of the Agreement annexed to the protocol on social policy of the Treaty on European Union', ETUC, UNICE and CEEP put forward far more stringent criteria. For them the social partners had to meet all the following conditions:

- Be organised horizontally or sectorally at European level;
- Be composed of organisations which are themselves regarded at their respective national levels as representative of the interests they defend, particularly in the fields of social, employment and industrial relations policy;
- Be represented in all Member States of the European Community and, possibly, of the European Economic Area or have participated in the 'Val Duchesse' social dialogue;
- Be composed of organisations representing employers or workers, membership of which is voluntary at both national and European level;
- Be composed of members with the right to be involved, directly or through their members, in collective negotiations at their representative levels;
- Be instructed by their members to represent them in the framework of the Community social dialogue. (ETUC et.al. 1993)

In any case, the list of such representative organisations is reviewed regularly in the light of experience and of the results of an ongoing study on representativeness. To date, more than 80 European organisations representing employers or workers and acting on inter-professional and/or sectoral level have met these criteria. The list of organisations is available under: <http://ec.europa.eu/social/main.jsp?catId=522&langId=en>

Whereas the Commission did not want to take a restrictive view on the number of organisations involved in such consultation (although at the same time conscious of the practical problems posed by a multiplicity of potential actors), it was in any case more hesitant to nominate or clarify which were the organisations which could actually start negotiations. The Communication stated that ‘the social partners concerned will be those who agree to negotiate with each other. Such agreement is entirely in the hands of the different organisations.’ (European Commission 1993:20) The only proviso stated by the Commission was that the organisations signatory to an agreement should bear in mind the provisions of the 1991 Agreement regarding small and medium-sized undertakings (Article 2(2)). As for the coverage of EFTA countries (now EEA countries), it was stressed that ‘in practice, the social partners’ organizations normally cover the EFTA countries, so that they are de facto integrated at all stages of the consultation procedure, with negotiation being a matter for the social partners’. (European Commission 1993:21) Furthermore, the Communication only stipulated that ‘the question of whether an agreement between social partners representing certain occupational categories or sectors [to start negotiations] constitutes a sufficient basis for the Commission to suspend its legislative action will have to be examined on a case-by-case basis with a particular regard to the nature and scope of the proposal [for Community/ Union action and on which the organisations are consulted] and the potential impact of any agreement between the social partners concerned on the issues which the proposals seek to address’. (European Commission 1993:20) The latter condition would become particularly relevant for the admission of the UEAPME to the negotiation table later on. As for the content of the negotiations, the Commission stressed that the social partners concerned were in no way required to restrict themselves to the content of the proposal (European Commission 1993: 20).

The Communication also dealt extensively with the implementation of a concluded agreement via the two routes defined in what is now Article 155 TFEU. It stated that, in the case of the social partners opting to implement an agreement via this ‘voluntary route, the terms of this agreement will bind their members and will affect only them and only in accordance with the practices and procedures specific to them in

their respective Member States'.<sup>9</sup> The 11 High Contracting Parties furthermore declared that the 'first of the arrangements for application of the agreements between management and labour at Community level (...) will consist in developing, by collective bargaining according to the rules of each Member State, the content of the agreements, and that consequently this arrangement implies no obligation on the Member States to apply the agreements directly or to work out rules for their transposition, nor any obligation to amend national legislation in force to facilitate their implementation.' (European Commission 1993: 22)

In conclusion, the Commission already foresaw that 'the new situation created by the co-existence of two legal frameworks for action in the social field will be complex and difficult to manage. The new role for the social partners is an important step forward but will need time to grow and develop. (...) The important point at this early stage of implementing the new mechanism is to allow space for natural evolution. The creation of heavy structures is not likely to yield the best results at this early stage. The Commission feels that this Communication lays down the ground rules for the implementation of the new procedures so that business can be conducted efficiently and openly. (...)'. (European Commission 1993: 25) A conclusion all the more valid today.

## 1.2 European Commission (1996): Communication concerning the Development of the Social Dialogue at Community Level

In its 1996 Communication, the Commission provided an assessment of cross-industry and sectoral social dialogue, the efficiency and impact of its then existing structures and its development perspectives. With the then recent successful completion of negotiations on a European framework agreement on parental leave in mind, the Commission also looked at the first lessons to be learned for the negotiation of agreements under the Agreement on Social Policy (European Commission 1996).

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9. Underlining added as the term 'voluntary' has led to several problems necessitating a currently ongoing discussion on the nature and implementation of such agreements. See below.



Regarding the development prospects for such negotiations, alongside a possible review of procedures, the focus lay on the representativeness of the contracting parties. The Commission noted that the issue of participation in such negotiations 'has obviously proved to be sensitive and controversial' though it also continued to believe – as mentioned in the 1993 Communication – that 'only the social partners themselves can develop their own dialogue and negotiation structures and that it cannot impose participants on a freely undertaken negotiation.'<sup>10</sup> (European Commission 1996: 14) On the other hand, the Commission referred to its responsibility to assess the validity of an agreement in the light of its content, which required an assessment of whether those affected by the agreement had been represented. It considered that the question of the representativeness of the parties engaged in a negotiation had to be examined on a case-by-case basis, as the conditions would vary depending on the subject matter under negotiation. It had therefore to examine whether those involved in the negotiation had a genuine interest in the matter and could demonstrate significant representation in the domain concerned. The Commission wanted to encourage the European social partner organisations to co-operate more closely in finding a solution to this question, appealing to the social partners to be open and flexible on the issue in order to ensure appropriate participation in negotiations and inviting them to see 'what steps the social partners can take to reinforce the acceptability of a negotiated agreement to all interested parties, including social partner organisations who did not participate, the Council, the Commission and the European Parliament'. (European Commission 1996: 14).

It is interesting to note that, in the context of the theme of this publication on transnational collective bargaining and agreements, the Commission also stressed that 'while the principal levels of Community social dialogue are the interprofessional and sectoral dialogue, organised centrally, there is a growing need to assist the development of new levels of dialogue in the light of the challenges facing the EU. These include: – the social dialogue in the growing transnational industries.

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**10.** At that time the UEAPME indicated its intention to initiate proceedings before the European Court of Justice, criticising the fact that it was not party to the negotiations on parental leave and consequently questioning the validity of that first framework agreement and whether it was applicable to its members.

The European Works Council Directive has already played an important role in encouraging greater dialogue, but has demonstrated how national-based industrial relations systems are no longer sufficient; (...)’ (European Commission 1996: 16)

### 1.3 European Commission (1998): Communication on adapting and promoting the social dialogue at Community level

This Communication focused – alongside extending the remit of the social partners to new areas of work – on the need for adapting the consultation procedures both at cross-industry and sectoral level. It also contained the Commission Decision of 20 May 1998 on the establishment of Sectoral Dialogue Committees (ESSDC) as well as the draft Council Decision proposing amendments to the functioning and composition of the Standing Committee on Employment (European Commission 1998b). As for developments in the European sectoral dialogue, the main innovations were that a new framework for the establishment of sectoral social dialogue committees was provided whereby these committees were going to constitute the key forum for sectoral dialogue<sup>11</sup>, that these committees would also be consulted in a timely and substantial manner on sector-specific issues with important social implications and the fact that the development of negotiations at sectoral level was a key issue (European Commission 1998: 11 and 17). The Commission considered that the potential of the European sectoral social dialogue was not used to the full and hoped that the ESSDC’s would be conducive to entering into negotiations on voluntary agreements

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**11.** The Commission Decision of 20 May 1998 providing for this new framework refers in its considerations to the possibility provided by the Treaty for dialogue at European level which could lead if desirable to relations based on agreement (then Article 118b TEC) as well as point 12 of the Community Charter of the Fundamental Social Rights of Workers. It also established in its Article 1 the representation criteria allowing participation in an ESSDC, i.e. organisations (a) shall relate to specific sectors or categories and be organized at European level; (b) they shall consist of organizations which are themselves an integral and recognized part of Member States’ social partner structures and have the capacity to negotiate agreements, and which are representative of several Member States; and (c) they shall have adequate structures to ensure their effective participation in the work of the Committees.

promoting the key issues in the sectors.<sup>12</sup> (*Underlining added by the author*) Such negotiations would either complement cross-industry agreements or establish independent agreements limited to the sector concerned (ibid: 18).

The Commission also returned to the question of participation and representativeness in contractual relations at both cross-industry and sectoral level, reiterating that ‘the Commission cannot intervene in the negotiations. It is up to the social partners to decide who sits at any negotiating table and it is up to them to come to the necessary compromises. The respect of the right of any social partner to choose its negotiating counterpart is a key element of the autonomy of the social partners.’ (ibid: 15) At that time the UEAPME was still questioning the validity of both the parental leave agreement and the framework agreement on part-time work before the ECJ as it had not been party to the negotiations.<sup>13</sup>

As for the implementation of the concluded agreements, in particular when they were to be implemented by the social partners, the existence of good information and follow-up mechanisms was deemed crucial to their implementation effectiveness. The Commission expressed its readiness to support the social partners in developing such mechanisms.

In this Communication, the Commission also drew attention to the fast-developing social dialogue within multinational companies following the adoption of the EWC Directive and expressed its intention ‘to continue to support the development of links between the European and transnational levels so as to help the parties concerned to draw upon the best experiences and ideas.’ (ibid: 21)

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12. In that same section of the Communication reference is made to the EFA/ETUC-GEOPA/COPA Framework Agreement on the Improvement of Paid Employment in Agriculture in the Member States of the European Union of 24 July 1997 as ‘a good and recent example of what can be done when the most is made of that potential’ [of the sectoral dialogue].
  13. Cases T-135/96 and T-55/98. The Commission welcomed the positive example of the involvement of experts from EUROCOMMERCE, FENI, COPA and HOTREC in the negotiations on part-time work as an important step and encouraged the social partners to go further to make the agreements even more acceptable by ensuring optimum representation. (idem: 18).

#### 1.4 European Commission (2002): Communication on 'The European social dialogue, a force for innovation and change'

In this Communication, issued shortly after the successful completion of the negotiations on the first autonomous framework agreement on telework (ETUC *et al.* 2002a), the Commission, alongside promoting the key role of social dialogue and social partners in European governance, devoted a lot of attention to the particular problem of improving the implementation and monitoring of the results of European social dialogue. It also called on the European social partners to further develop their autonomous dialogue and to establish joint work programmes (European Commission 2002). In the context of EU enlargement, they were also advised to continue to improve their internal decision-making machinery, in particular for the purpose of establishing negotiating mandates and concluding agreements. It is recognized that only with sufficiently robust national structures will social partners from candidate countries be able to participate effectively in negotiations and other European social dialogue activities and also implement agreements at national level.

Given the increased use and adoption of so-called 'new generation' texts (like charters but also 'autonomous' agreements like the one on telework), the European social partners were firmly called upon to endeavour to clarify the terms used to describe their contributions and reserve the term 'agreement' for texts implemented in accordance with the procedures laid down in the former article 139(2) TEC (now article 155(2) TFEU). As for the implementation of such autonomous agreements, the Commission 'calls on the social partners to strengthen substantially the procedures for on-the-spot monitoring and to prepare regular reports on implementation of the agreements signed. These reports should outline progress on the content of the implementation of agreements and their coverage. Such structured reporting is particularly necessary where the agreement negotiated by the social partners follows Commission consultation under Article 138 of the Treaty [now article 154 TFEU]'. Further, the Communication states that 'looking ahead and in the medium term, the development of the European social dialogue raises the question of European collective agreements as sources of law. The discussions on the forthcoming reform of the Treaty should take this into consideration' (European Commission 2002: 18-19). It is stressed later on in the text – in connection with the status of

social dialogue in the candidate countries – that social dialogue is enshrined in the Treaty and forms an integral part of the ‘acquis communautaire’.

It was further stated that reinforcing European and transnational dialogue among firms was considered a fundamental challenge for Europe whereby the link between the company level and the more centralised levels of dialogue was seen as crucial.

### 1.5 European Commission (2004) Communication: Partnership for change in an enlarged Europe - Enhancing the contribution of European social dialogue

This was probably up till now the most crucial Commission Communication on European social dialogue instruments, their status, impact and implementation. Looking at ways of enhancing the role of European social dialogue as a form of better governance, the Commission expressed its concern that many texts contained imprecise and vague follow-up provisions, emphasising that the added value of a text depended not solely on whether it was binding, but on its effective follow-up at national level. It therefore proposed new terminology for the different texts which were classified in four broad categories:

- (1) **agreements** (whether or not implemented through European directives) which are binding and must be followed up and monitored, since they are based on Article 155 of the Lisbon Treaty;
- (2) **process-oriented texts** (frameworks of action, guidelines, codes of conduct, policy orientations), which, albeit not legally binding, must be followed up, and progress in implementing them regularly assessed;
- (3) **joint opinions and tools**, intended to influence European policies and to help share knowledge;

and finally

- (4) **procedural texts**, like rules of procedures for the ESSDCs but also encompassing for instance the social partners’ Agreement on Social Policy of 31 October 1991 (European Commission 2004: 15-19).

Although welcoming the increasing adoption of such new generation texts, the Commission encouraged the European social partners to make greater use of peer review techniques inspired by the open method of coordination for following-up these texts, for example by setting targets (quantitative, where feasible) or benchmarks, and regularly reporting on progress made towards achieving them.

As for autonomous agreements implemented in accordance with Article 139(2) TEC (now 155(2) TFEU), the Commission announced its intention to have its own monitoring process for such agreements. It also pointed out that, following the wording of Article 139(2) TEC; i.e. ‘Community level agreements shall be implemented’, there was an obligation to implement such agreements and for the signatory parties to exercise influence on their members in order to implement them (European Commission 2004: 16).

In an annex to this Communication, the Commission also proposed a checklist for drafting (new generation) social partner texts whereby it requests the social partners to provide, for each text, information on such aspects as: whom the texts are addressed to, the status and purpose of the text, the deadline by which the provisions should be implemented, how the text will be implemented at national level, etc. (European Commission 2004: 20).<sup>14</sup>

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**14.** The full set of proposed required information entails:

- Clearly indicate to whom they or the various provisions are addressed, e.g. the Commission, other European Union institutions, national public authorities, social partners;
- Indicate the status and purpose of the text clearly;
- Where applicable, indicate the deadline by which the provisions should be implemented;
- Indicate clearly how the text will be implemented and promoted at national level, including whether or not it should be implemented in a binding fashion in all cases;
- Indicate clearly through which structures the monitoring/reporting will be undertaken, and the purpose of the reports at different stages;
- Indicate when and/or at which intervals monitoring/reporting will take place;
- Specify the procedures to be followed for dispute settlement (e.g. disagreements over the interpretation of the meaning of the text);
- Be dated;
- Be signed;
- Agreements should include an annex listing the members of the signatory parties at whom the text is directed;
- Indicate which language(s) is/are the original.

The Commission basically considered there was a need for a framework to help improve the consistency of the social dialogue outcomes and to improve transparency, deeming this Communication to be a first step in that direction and expressing its intention to examine the possibility of drawing up a more extensive framework. However, the Commission readily stated that its preferred approach would be for the social partners to negotiate their own framework, calling on them to consider this possibility (European Commission 2004: 11).

Despite these clear and detailed follow-up provisions and given the fact that many of these new generation texts included the follow-up being ensured almost primarily by the social partners themselves, the Commission saw the need for an efficient and effective follow-up with greater interaction and even synergies between the different levels of industrial relations, from the European level, via national and sectoral levels, down to the company level. Regarding synergies between the European social dialogue and the company level, the Commission expressed its wish for the social partners to explore possible synergies between in particular sectoral social dialogue and European works councils, announcing a study on transnational collective bargaining and a consultation at a later stage of the social partners regarding the development of a Community framework for transnational collective bargaining (European Commission 2004: 11).

## 1.6 European Commission (2010): Staff Working Document on the functioning and potential of European sectoral social dialogue

Last but not least, the Commission Staff Working Document of 22 July 2010 generally takes stock of the functioning of the European sectoral social dialogue and identifies possible improvements with a view to extending the scope and quality of the consultation and negotiation processes. In doing so, the Commission noted that the sectoral social partners had not yet fully exploited the potential of sectoral social dialogue for negotiating agreements. This was seen as due to the fact that ‘major sectors where large transnational companies are prevalent (steel, telecommunications, chemical industry, civil aviation) tend to pay less attention to the European sectoral level because the social partners prefer to negotiate directly at company level, including also within European

Works Councils)'. The Commission therefore expressed its intention to continue providing technical and financial support to such negotiations in the context of sectoral social dialogue (European Commission 2010: 14).<sup>15</sup> As for the national-level implementation of autonomous agreements concluded at EU level, the Commission stated that European social partners needed to invest more in monitoring processes and to develop relevant indicators to improve implementation and evaluation of their agreed texts. Reference was made here to the implementation indicators set forth in the autonomous agreement on workers' health protection through the good handling and use of crystalline silica and products containing it (European Commission 2010: 17-18).<sup>16</sup>

## 2. Results achieved

Looking back on 20 years of European social dialogue at both cross-industry and sectoral level, the results achieved can be considered – at least from a quantitative point of view - as impressive, with more than 600 joint texts issued, ranging from framework agreements, joint work programmes, declarations, statements to such joint instruments as specific websites<sup>17</sup>. An overview of these joint texts can – alongside more general information on the European social dialogue - be found on a specific European Commission website including also a database where these joint texts can be consulted.<sup>18</sup>

Looking at signed European framework agreements, the cross-industry European social dialogue has up till now (September 2011) led to seven European framework agreements, three of which have been incorporated into a Directive:

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15. One example of technical assistance is the readiness of the Commission to provide legal assistance during negotiations where appropriate in particular because consistency with European law and quality in legal drafting are particularly important for instance for agreements to be implemented by means of European Directives.
  16. More information on this agreement is available on the dedicated website: [www.nepsi.eu](http://www.nepsi.eu)
  17. Reference is made here to the so-called 'Resource centres' operated by ETUC and the employer organisations where they – with a view to raising awareness on and disseminating the results of the European social dialogue – have posted an enormous amount of information accessible to the general public. See: <http://resourcecentre.etuc.org> or <http://www.erc-online.eu/Content/Default.asp>
  18. [http://ec.europa.eu/employment\\_social/social\\_dialogue/](http://ec.europa.eu/employment_social/social_dialogue/)



- the European Framework Agreement on parental leave concluded by UNICE, CEEP and ETUC on 14 December 1995 (transposed into Council Directive 96/34/EC of 3 June 1996); and of which a revised version was successfully negotiated and signed on 18 June 2009 by BUSINESSEUROPE, UEAPME, CEEP and ETUC (transposed into Council Directive 2010/18/EU of 8 March 2010)
- the European Framework Agreement on part-time work concluded by UNICE, CEEP and ETUC on 6 June 1997 (transposed into Council Directive 97/81/EC of 15 December 1997);
- the European Framework Agreement on fixed-term work concluded by ETUC, UNICE and CEEP on 18 March 1999 (transposed into Council Directive 1999/70/EC of 28 June 1999).

Four other European framework agreements emerging from this cross-industry social dialogue are so-called autonomous framework agreements, meaning that they have not been incorporated into a Directive, but are instead implemented via the second implementation route foreseen in Article 155 TFEU, i.e. ‘in accordance with the practices and procedures specific to management and labour and the Member States’. These are:

- the European Framework Agreement on telework concluded between ETUC, UNICE/UEAPME and CEEP on 16 July 2002;
- the European Framework Agreement on work-related stress concluded between ETUC, UNICE, UEAPME and CEEP on 8 October 2004;
- the European Framework Agreement on harassment and violence at work concluded by ETUC, Business Europe, UEAPME and CEEP on 26 April 2007;
- the European Framework Agreement on inclusive labour markets concluded by ETUC, Business Europe, UEAPME and CEEP on 25 March 2010.

Turning to European framework agreements emerging from the European sectoral social dialogue, the European Commission Staff Working Document of July 2010 taking stock of the main achievements of this form of social dialogue since 1998 refers to five agreements incorporated into a Directive and one so-called autonomous framework agreement (European Commission 2010; see table below). With regard to the latter, the autonomous agreement on workers’ health protection through the good handling and use of crystalline silica and products containing it, it is pointed out that this was the first European multi-sectoral agreement as well as the first time that the Official Journal published this type of Agreement<sup>19</sup>

Sectors	Agreements
Hospitals	COUNCIL DIRECTIVE 2010/32/EU of 10 May 2010 implementing the Framework Agreement on prevention from sharp injuries in the hospital and healthcare sector concluded by HOSPEEM and EPSU
Maritime	COUNCIL DIRECTIVE 2009/13/EC of 16 February 2009 implementing the Agreement concluded by the European Community Shipowners’ Associations (ECSA) and the European Transport Workers’ Federation (ETF) on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC
Transport	COUNCIL DIRECTIVE 1999/63/EC of 21 June 1999 concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Shipowners’ Association (ECSA) and the Federation of Transport Workers’ Unions in the European Union (FTS)
Railways	COUNCIL DIRECTIVE 2005/47/EC of 18 July 2005 on the Agreement between the Community of European Railways (CER) and the European Transport Workers’ Federation (ETF) on certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services in the railway sector
Civil aviation	COUNCIL DIRECTIVE 2000/79/EC of 27 November 2000 concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by the Association of European Airlines (AEA), the European Transport Workers’ Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA)
14 industrial sectors	Agreement on workers’ health protection through the good handling and use of crystalline silica and products containing it (signed on 25 April 2006)

(Source: European Commission 2010:11)

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19. OJ C 279 of 17 November 2006, p. 2

Surprisingly, this table does not mention the CER – ETF Agreement on some aspects of the organisation of working time in the rail transport sector of 30 September 1998 and which was implemented via Directive 2000/34/EC of 22 June 2000, even though it is listed when doing a search (using the search criteria ‘type: agreement council decision’) of the European Commission database on joint texts.

A similar discrepancy is found between the autonomous agreements listed in the 2010 Commission Staff Working Document and the results of a search on ‘type: autonomous agreements’ in that same database, with no reference made either to the Agreement on the European license for drivers carrying out a cross-border interoperability service between ETF and CER of 27 January 2004<sup>20</sup> or to the European agreement on the implementation of the European Hairdressing Certificates of 18 June 2009 between Coiffure EU and UNI-Europa Hair & Beauty.<sup>21</sup>

Neither of the two search results contains any reference to the Recommendation framework agreement on the improvement of paid employment in agriculture in the Member States of the European Union (24/07/1997), the European agreement on vocational training in agriculture (05/12/2002) and European agreement on the reduction of workers' exposure to the risk of work-related musculo-skeletal disorders in agriculture (21/11/2005), even though their titles include the term ‘agreement’

A new framework agreement - the European autonomous agreement on the Content of Initial Training for CIT Staff carrying out Professional Cross-Border Transportation of Euro Cash by Road between Euro-Area Member States - was concluded on 24 November 2010 in the private security sector between UNI-Europa and COESS. At the request of the signatory parties, the agreement was – at the time of writing - in process of being incorporated into a Council Directive.

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**20.** On 10 June 2009, the CER and ETF issued a Joint Declaration on their 2004 Agreement on a European Locomotive Driver's License to clarify the application of the Agreement.

**21.** A third source, the database containing all possible joint European social dialogue texts set up by the Observatoire Social Européen (OSE), comes up, when using ‘agreement article 139’ as a search argument, with the same hits as the ones in the European Commission database, thereby also classifying the joint declaration mentioned in footnote 19 as an agreement.

Last but not least, there is the autonomous European Framework Agreement on Competence Profiles for Process Operators and First Line Supervisors in the Chemical Industry concluded between ECEG and EMCEF on 15 April 2011.

Such search results, dependent on the sources used and documents consulted, confirm the need and concern of European social partners and the European Commission to clarify the understanding about and terminology used for the different instruments concluded in the context of their dialogue, in particular for framework agreements, as it often leads to problems and misunderstandings in the implementation of the texts.

### **3. Attempts by the European Commission, the European Parliament and social partners to clear the mist**

The existence of a (legal) framework for European social dialogue does not mean that all is rosy in the European social dialogue. This applies in particular to its outcomes, whether in the form of framework agreements or otherwise. As for transnational framework agreements, here as well there are still several problems and questions regarding the instruments used and their implementation. The sooner these are resolved or clarified the better it will be, as letting them persist will undoubtedly further negatively impact opinions on European social dialogue, its outcomes and the impact thereof.

Although doubts were already expressed a long time ago about the actual and probably patchy impact of the autonomous agreements<sup>22</sup>, it could be said that this probably triggered the shift towards greater autonomy and a more independent European social dialogue, resulting

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**22.** See Branch (2005) for a comprehensive overview and analysis of the challenges and benefits of the implementation of autonomous agreements at that time and including manifold reference to such earlier literature on the potential 'patchy' implementation. In the meantime, this 'rather patchy' is also confirmed by the different implementation reports worked out jointly by the European social partners, the European Commission, the ETUI and other bodies and which can be found at the ETUC Resource centre website: <http://resourcecentre.etuc.org>. See also in this regard for example Branch (2005), Clauwaert (2011), Prosser (2006) and (2007).

in a debate on the instruments of and a renewed framework for European social dialogue.

The period 2000-2002 seems crucial here, being characterised *inter alia* by:

- The launch of the Lisbon Strategy (2000), providing European social dialogue with greater recognition and giving it an important role in achieving its targets;
- The failure of the 2001 negotiations on a framework agreement on temporary agency work which was also foreseen as the final part of a triptych of agreements on atypical contracts following the successful negotiations on part-time and fixed-term work;
- The European social partners' joint Laeken Declaration of December 2001 in which they expressed their willingness to develop a work programme for a more autonomous social dialogue including the diversified use of practices and instruments but without really clarifying the possible status and (monitoring of the) implementation of these different texts; (ETUC *et al.* 2001)
- The Commission's 2001 establishment of the High-Level Group on Industrial Relations and Change which delivered its report in February 2002
- The successful conclusion of negotiations on the first 'voluntary' framework agreement on telework (July 2002) (ETUC *et al.* 2002a)
- The November 2002 adoption of the first joint European social partners' work programme for 2003-2005 (ETUC *et al.* 2002b), etc.

The Commission's call, in its above-mentioned 2002 Communication, for the European social partners to endeavour to clarify the terms used to describe their contributions and reserve the term 'agreement' for texts implemented in accordance with the procedures laid down in the former article 139(2) TEC (now article 155(2) TFEU) and to strengthen

substantially the procedures for on-the-spot monitoring and to prepare regular reports on implementation of the agreements signed, is to be seen in this context. Of similar weight is the already-mentioned statement, also found in the Communication, that: 'looking ahead and in the medium term, the development of the European social dialogue raises the question of European collective agreements as sources of law. The discussions on the forthcoming reform of the Treaty should take this into consideration' (European Commission 2002: 18-19).

A second milestone in this regard is in a certain way the year 2004. Two years had passed during which the signatory parties to the framework agreement on telework were engaged in its implementation. Several problems had arisen, centred around the term 'voluntary' agreement. This led the Commission, in its 2004 Communication 2004 and with the consent of the European social partners, to switch to the term 'autonomous' agreement. Later that year, in October, the European social partners concluded and signed their second autonomous agreement on work-related stress. The lessons learnt from the implementation of the telework agreement also – alongside the switch in terms – implicitly figured in the text of the agreement on stress, triggering ETUC to ask for and obtain more stringent provisions in the latter agreement on its monitoring and implementation.

### 3.1 The European social partners taking the lead themselves

All this led, again almost solely on the initiative of ETUC, to the inclusion of a new action in the second joint work programme of the European social partners for the period of 2006-2008 stating;

'8. based on the implementation of the telework and stress agreements and the frameworks of actions on the lifelong development of competences and qualifications and on gender equality, (European social partners will) further develop their common understanding of these instruments and how they can have a positive impact at the various levels of social dialogue.' (ETUC *et al.* 2006a)

Given the lessons learned, a reference to this was also incorporated in the conclusions of the final European social partners' joint implementation report on the telework agreement stating that 'The reporting exercise

shows the heterogeneity both in reporting and implementation. This is partly due to the fact that it is the first time that member organisations have had to do this. It is also partly due to the novelty of the issue itself and partly due to the diversity of industrial relations systems. However, some challenges had to be overcome, for example, the translation of the EU framework agreement or the development of a common understanding on the nature of the autonomous EU framework agreement. These elements will feed into the discussions European social partners will have, according to their work programme 2006-2008, in order to further develop their common understanding of these instruments and how they can have a positive impact at the various levels of social dialogue.’ (ETUC *et al.* 2006b: 29) In view of the preparation of this overall joint reflection, ETUC decided during the meeting of the ETUC Social Policy and Social Legislation Working Group of 17 January 2007 to set up a specific internal ad hoc working group on this matter. This group met on 3 and 25 April and on 4 October 2007. It is important to note that from the outset ETUC did not intend to limit this exercise to merely developing a ‘common understanding of the European social dialogue instruments’, but rather to engage in an overall reflection and discussion on all European social dialogue processes/ structures/ actors/tools, as it considered and still considers that the effectiveness and quality of the European social dialogue is not only dependent on its outcomes. The threefold objective was thus to: 1) better understand the different European social dialogue instruments, 2) improve the quality and impact of European social dialogue structures, procedures and instruments, and 3) enable further steps to be taken in the construction of a genuine European industrial relation system. As far as is known, no similar activities were taken and/or documented within the European employers’ organisations.

No concrete joint actions were undertaken during the course of that second work programme, leading to the third joint work programme for 2009-2010 in a sense reiterating ‘action point 8’ of the second work programme:

‘The European social partners will also further develop their common understanding of the various instruments resulting from their negotiations, determine their impact on the various levels of social dialogue, further co-ordinate the various levels of social dialogue and negotiations, including the development of better synergies between European;’ and will be ‘Monitoring, assessing and

evaluating the implementation of EU social dialogue framework agreements and frameworks of actions;(...)' (ETUC *et al.* 2009)

With a view to finally starting these joint talks in the course of the second half of 2011 but also in preparation of its 12<sup>th</sup> Statutory Congress held on 16-19 May 2011 in Athens, ETUC launched, with the financial support of the Commission, a project involving a) a report on the 'European Social Dialogue: State of Play and Prospects' written by the European Social Observatory (ETUC and OSE 2011); and b) a European Conference, held on 25-26 January 2011 in Brussels, to debate with affiliated organisations and representatives from the European employer organisations and European institutions the results of the report. The report's goal was twofold: firstly, to make a comprehensive qualitative and quantitative assessment of European social dialogue; and secondly, to try to identify the prospects for social dialogue on the basis of a questionnaire sent to all organisations affiliated to ETUC and interviews with union activists at national and European level. The report consisted of three parts: a first part focusing on data collection for the qualitative and quantitative assessment and also comprising a literature review; a second part focusing on the results of the survey conducted amongst the member organisations; and a third part attempting to draw conclusions and examine the potential prospects for European social dialogue with a particular emphasis on the political and economic context within which it takes place.

Regarding the assessment of the outcomes, the report revealed that the respondents had identified a real problem, not only with cross-industry social dialogue instruments – the effectiveness of which was in serious doubt – but also with the content of the adopted texts. The questionnaire revealed that over the past fifteen years, the content of the texts (from parental leave to inclusive markets) had been considered less and less reliable.<sup>23</sup> In addition to content issues, respondents had major concerns

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**23.** A striking feature of this evaluation of the contents of ESD joint documents by the respondents is that the three documents ranked highest correspond precisely – also in chronological terms – to the first three framework agreements signed by the European social partners and subsequently transposed into directives by the Council of the EU, namely the framework agreements on parental leave (1995), part-time working (1997) and temporary working (1999). They are followed by the autonomous agreements and the framework of actions, where once again the ranking corresponds almost exactly to the chronological order of adoption of the documents in question: Telework (2002),



about the implementation of joint texts, including ‘hard’ mutual commitments such as framework agreements and autonomous agreements (initially referred to as voluntary agreements), and ‘softer’ ones like recommendations and codes of conduct. Numerous issues were raised, including the reluctance of employers to cooperate nationally, the lack of interest shown by governments in social dialogue at national level, and insufficient knowledge (or no knowledge at all) of European texts on the part of grass-roots trade union organisations.

Despite the difficulties encountered and identified in the European social dialogue but also taking into account the larger context in which it takes place – the political environment (European Parliament, national governments), institutional activities (the role of the European Commission), the role and will of European social partners (both trade unions and employers), national social, economic and political stakeholders and the economic situation –, more than 95% of respondents agreed that improving European cross-industry social dialogue was a matter of priority. In this sense, they brought up the need for a clear framework for using social dialogue and its instruments. A framework directive was requested to clarify these procedures. When confronted with this call for a clear framework during the panel discussion at the European conference in early January 2011, the representatives of the European employer organisations did not basically object, with any divergence of views clearly lying in the overall content and form of such a framework.

In the context of the European Social Partners’ Integrated Programme 2009-2011, BUSINESSEUROPE, CEEP, UEAPME and ETUC jointly organised, with the financial support of the European Commission, a European conference on ‘European social dialogue: achievements and challenges ahead’, held in Budapest on 3-4 May 2011. Debates focused on the findings of a research project into the implementation and impact of European Social dialogue outcomes at national level, conducted by a team of experts between January and March 2011. The conference offered an important occasion for national social partners to discuss the

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Stress (2004), Equality (2005), Violence (2007), Inclusive Labour Markets (2010) and Skills (2002). (ETUC and ESO 2011: 73-75).

results and share their views on future challenges. The main challenges facing European social dialogue seem to be: 1) the question of its future role in European policy-making, with many delegates expressing their concern about the weakened influence of such social dialogue at EU level; 2) the need to maintain autonomy and work on autonomous agendas; and 3) the need to continue to support social dialogue structures throughout Europe and in particular in those countries where the role of social dialogue is still rather weak. Concrete suggestions on how to improve the European social dialogue emerged: 1) institutionalisation of social dialogue through a European-level ‘social dialogue directive’; 2) a clear need to improve social dialogue at national level; 3) to ensure more powerful instruments focusing more on concrete results and which are thus more binding and precise; and 4) a need to give greater visibility to the outcomes of European social dialogue. Related more to transnational collective bargaining, one quite important result of the survey reflecting the responses received from trade union organisations in particular on how to improve the performance of European social dialogue is linked to the relationship between cross-industry and sectoral social dialogue as well as other forms of transnational social dialogue, for instance in multinational companies.

Finally, reference is made to the ETUC Congress Resolution on ‘Mobilising for Social Europe: Strategy and Action Plan 2011-2014’ adopted at its 12<sup>th</sup> Statutory Congress in Athens on 16-19 May 2011. This sets priorities for ETUC, one of which is European social dialogue and its possible reform (ETUC 2011, see also in this regard Clauwaert 2011a).

In Chapter 10 ‘Mobilising for a social Europe for a genuine social dialogue at all levels’, ETUC notes the possibilities offered by and the developments and progress made in the European social dialogue. However, it also notes that cross-industry dialogue in particular has undoubtedly entered a new phase and is currently experiencing a very difficult period, with one of the reasons being that employers over the last ten years have gradually refused the idea of binding framework agreements. A further reason is that the Commission, obsessed in particular with its programme for ‘better regulation’ (now relabelled ‘smart’ regulation which frequently means ‘less regulation’), has provided ever less input for the social dialogue.

Furthermore, ETUC stresses that the general political context is not currently favourable to the development of European social legislation geared to progress or even, in some countries, to the development of national social dialogue at the cross-industry or the sectoral level, with this representing a major problem for the implementation of certain European commitments (in particular, autonomous agreements). Reference is also made to the results to the above-mentioned ETUC/ESO report, in which a majority of affiliates consider that the quality of the content of the texts adopted in the framework of the cross-industry social dialogue has diminished in terms of their legal and practical effectiveness. And a very broad majority considers that the implementation of these joint texts at national level is patchy and inadequate (this applies also to the agreements subject to Article 155§2 of the Lisbon Treaty). While dissatisfaction is deep, there is still a strong determination to improve the cross-industry social dialogue.

This is why ETUC must mobilise all its energy to relaunch the cross-industry social dialogue in the spirit of the Maastricht Social Agreement. This requires the building of a common trade union vision and strategy, the definition of clear goals and demands for the social dialogue, an ongoing effort to persuade and put pressure on employers, appeals to the European Commission to play its role in the social dialogue (in particular the cross-industry dialogue), a search for support from Euro-MPs and member states, etc. All of this is necessary in order to improve working conditions for all workers in Europe, in particular in the context of the current crisis. The main messages ETUC wants to put over in this regard are that:

- It is important to issue a firm reminder that the European social dialogue, both cross industry and sectoral, is a tool of solidarity whose primary function is to achieve genuine improvements in working conditions for all workers in Europe. Accordingly, the European social dialogue should complement, and be used to strengthen, existing mechanisms of collective bargaining and worker participation, at different levels, for the expression of worker interests and the improvement of working conditions, as well as improving the quality of employment. This process should take place, what is more, in a context of upward harmonisation and in accordance with the

letter and the spirit of the European Communities' founding Treaty.

- The Commission must be urged to adopt a more proactive approach to the cross-industry and sectoral social dialogue. Its task is to provide input in the form of proposals for the development of a set of social regulations in keeping with the economic integration of Europe.
- The European-level social partners should be consulted and allowed to play, if they so wish, their role of co-legislators, in relation to all matters of immediate or less direct relevance to workers, according to the spirit and the letter of the Treaty (Article 152 of the TFEU).

Basically it is seen as important to develop a genuine social dialogue at all levels (national, European, transnational companies, regional, world). A strengthening of worker rights of information, consultation and participation is key to the improvement of social dialogue at these levels. ETUC therefore gives the following commitments with regard to the reference period:

- ETUC is committed to ensuring that the European social dialogue will contribute to the upward harmonisation of social rights in a manner that will enable all workers in the EU to benefit from the same social rights. In European social dialogue negotiations, ETUC will pursue two priority goals, namely, improvement of the working conditions of all European workers and the fight against social dumping.
- This strengthening of the ambition of the content of the joint texts must be accompanied by a strengthening of the implementation and monitoring of the texts adopted in the framework of the European social dialogue by means of the creation of a permanent European secretariat of the social dialogue with its own budget and staff. Steps must be taken to ensure that these texts have a real impact on workers.

### 3.2 The least expected and unknown attempt by the 'outsider', the European Parliament

The European social partners and the European Commission are not the only ones who have tried to clarify certain aspects of this debate on the autonomous instruments in particular and a renewed framework for the European social dialogue in general. The European Parliament, which since the very beginning of the European social dialogue has played rather an 'outsider' role in this process, also once raised its voice, coming up with very concrete legislative proposals in particular on a renewed framework for such dialogue.

Only few of us will recall the debate in the European Parliament in the wake and aftermath of the revision of the Treaty 'at Amsterdam'. Although already envisaged in the revision of the Treaty 'at Maastricht', it was the Amsterdam Treaty that provided for a more comprehensive set of provisions on European social dialogue, using the provisions of the Social Protocol/Agreement annexed to the Maastricht Treaty (and as already mentioned itself stemming from a European social partners' agreement of late 1991) as a basis. The emergence of European social dialogue (at that time the parental leave and part-time agreements were in the course of being adopted) and its institutionalisation in the Social Protocol/Agreement annexed to the Maastricht Treaty had (again) raised questions of transnational trade union rights of participants in the social dialogue process and how these could be dealt with in the Treaty as such.

Against this background, the European Parliament commissioned an own-initiative research project on 'Trade union rights in the EU member states', conducted by the late Professor Brian Bercusson, the report of which was presented in January 1997 to the European Parliament Committee on Social Affairs and Employment together with a 'Draft report on trade union rights' by the rapporteur and Dutch MEP Ria Oomen-Ruyten. (European Parliament 1997). With the latter including a motion for a resolution on 'trade union rights in the Treaty concerning the European Union', this document was not to be regarded as 'just another EP report', but as a genuine, far-reaching and comprehensive proposal to the then Intergovernmental Conference preparing the text for the Treaty revision in view of regulating transnational

trade union rights in the body of the Treaty and thereby using the text of the Social Protocol/Agreement as a basis.

The main objective of the amendments/provisions proposed by the European Parliament was to regulate and establish the main triptych of trade union rights at European level, i.e. the rights of freedom of association, collective bargaining and collective action.

The provisions of the Social Protocol/Agreement were integrated into the Amsterdam Treaty in an amended way in the form of Articles 136-139 TEC (now Articles 151 and 153 - 155 TFEU)<sup>24</sup>. Unfortunately none of the EP's proposed amendments was actually accepted. If this had been the case, the following aspects being included:

- A reference to 'dialogue between management and labour at Member State and at transnational and/or Community levels' instead of just 'dialogue between management and labour' in Article 151 (1);
- The European Parliament recognized the competence of national-level social partners to implement Directives via collective agreements but also wondered what this would mean in relation to the effective implementation of European agreements not incorporated into Directives. Given the social dialogue and collective bargaining practices existing at the time throughout the EU, the European Parliament considered that many of them would have to make alterations to their regulatory frameworks. This incited the EP to call for an amendment to Article 155(2) to ensure the elaboration of 'national basic agreements' which would 'conform to the requirements of directives or framework agreements concluded at Community level';
- The deletion of Article 153 (5) relating to the exclusion of a European regulatory competence on pay, the right of association, the right to strike or the right to impose lock-outs;

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**24.** Article 152 TFEU, *inter alia* institutionalising the tripartite social summit, is a new article inserted in Lisbon and thus not figuring in the Amsterdam Treaty.

- Adding a paragraph to Article 154 (1) relating to the Commission’s two-phase consultation process: ‘[I]n particular, the Commission shall undertake consultations with a view to formulating a legal framework for the social dialogue at Community level’. The commentary to this amendment in the accompanying explanatory statement stated that this would have at least two effects: firstly it would oblige the Commission to exchange views with the European social partners on such a legal framework within a reasonable short space of time as the issue was now explicitly mentioned in the Treaty; and secondly, a basis was thereby created for a legal right to collective bargaining at European level;
- Amending Article 155(1) as follows ‘should management and labour so desire, the dialogue between them at Union level may lead to contractual relations, including agreements, in particular at inter-occupational and sectoral level.’
- Adding to Article 155 two new paragraphs on collective bargaining:
  - ‘To this end, management and labour at European level shall have the right to negotiate and conclude collective agreements. In particular, management and labour:
    - Must negotiate in a spirit of cooperation with a view to reaching an agreement;
    - Shall have the right to material support from the Community in proportion to the task of participation in the social dialogue
 The Commission shall take all measures appropriate to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers’ organisations and workers’ organisations at Community level with a view to this regulation of terms and conditions of employment by means of collective agreements.’

And

- ‘The Member States shall ensure that the first of the arrangements for applications of the agreements between management and labour at Community level will consist in developing the

content of the agreements by collective bargaining according to the rules of each Member State. In particular:

- Employers or employers' organisations, on the one hand, and workers' organisations, on the other, shall have the right to negotiate and conclude collective agreements in order to implement agreements concluded at Community level;
- Management and labour and the Member States shall take all appropriate measures to ensure that agreements concluded at Community level shall be implemented in accordance with the procedures and practices specific to management and labour and the Member States;
- Member States shall take all measures appropriate to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the articulation of national systems of collective agreements with agreements concluded at Community level;

The objective of the latter proposed amendment was to ensure that Member States made every effort to ensure that European agreements were indeed dealt with in national collective bargaining and that their implementation was ensured by national-level collective agreements.

- Finally adding two further provisions to Article 155: a) a right to resort to collective action in the event of conflicts of interest including the right to strike at national and transnational level, in particular for transfrontier workers; and b) the encouragement to establish and use, at the appropriate levels, conciliation, mediation and arbitration procedures to facilitate the settlement of transnational industrial disputes.

As already mentioned, none of these amendments was actually included in the texts of Articles 136-139 TEC integrated into the Amsterdam Treaty. The subsequent discussions on the proposals did however lead to a Resolution, albeit of a different nature and tenure. The Resolution on 'Transnational trade union rights in the European Union', finally adopted in July 1998, contained the following paragraphs of particular relevance to this book and chapter (i.e. European social dialogue, the



right to negotiations at European level and (the implementation) of European agreements):

- ‘G. whereas the right to negotiate at European level is already implicitly recognized in the EU Directive on the European Works Council and in the working time Directive;’
- ‘H. whereas the Treaty of Amsterdam establishes the possibilities of collective bargaining and negotiations at European level,’
- ‘2. Considers that ILO Conventions Nos 87 and 98, drawn up in the 1940’s, and the European Social Charter of the Council of Europe which established freedom of association and the right to collective bargaining at national level, must be applied at Community level and calls on the Commission to examine how this can be best achieved;’
- ‘6. Calls on management and labour either themselves or as part of the social dialogue to draw up proposals for negotiation rules and principles;’
- ‘7. Calls on the Commission to devote sufficient time, resources and staffing to the servicing of the social dialogue;’
- ‘8. Urges the Commission to act in its facilitating and mediating capacity and to have an investigation carried out into how management and labour can best establish contractual relations or agreements on the basis of Article 139 of the Treaty of Amsterdam;’
- ‘11. Considers that management and labour must enter into dialogue on the creation of appropriate instruments to avoid collective labour disputes,’
- ‘12. Considers it is essential that, in order to facilitate the resolution of transnational conflicts, efforts should be made for the establishment and implementation, at the appropriate levels, of conciliation, mediation and voluntary arbitration procedures;’<sup>25</sup>
- ‘14. Considers that the Council must use the options available under Article 138(1), (2) and (3) and Article 139(2) of the Treaty of Amsterdam to support the European social partners in the elaboration of a course of action for the conclusion of agreements;’ (European Parliament 1998b)

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**25.** See on this particular issue, Clauwaert (2011b).

In the explanatory notes of the draft version of this resolution of March 1998, as adopted by the EP Committee on Employment and Social Affairs, it was also mentioned that:

- ‘14. The right to collective bargaining and collective action must be seen as two sides of the same coin. In the case of collective bargaining, both parties must be willing to negotiate with a view to achieving a good result. Given the scope currently afforded by the Treaty, acknowledging this right at European level also implicitly says something about the national level. Not every agreement needs to be given generally valid effect through the legislative process. The European agreements may also be implemented in the form of agreements between management and labour at national level. They need to engage in bargaining to this end, so that the European agreements can be included in national collective labour agreements. That being so, management and labour must have the right to negotiate these matters at national level. Establishing a right at European level implicitly acknowledges the right at national level.
  
15. The right to collective action is a necessary corollary to the right of collective bargaining. Management and labour must be given the means of conducting collective bargaining. Here too, the right is granted at national level but not at European level. What is more, collective action is permissible in some European countries only in respect of national bargaining on working conditions. To prevent the trade union movement in particular from having to conduct European bargaining without any appropriate instruments, the right to collective action must be enshrined in the Treaty. This right extends to collective action in the case of:
  - bargaining at European level;
  - bargaining at national level in order to implement European agreements in the form of national agreements.’ (European Parliament 1998a: 9)

Although heavily contested by the European social partners at that time (including the trade union side), this proposal of the European Parliament was one of the most comprehensive and well-developed proposals for strengthening the (legal) framework of European social dialogue and its instruments. It would seem worthwhile to revisit it or at least use it as a basis for further work on the matter.

## 4. Conclusion

‘Nomina nuda tenemus’, the Latin phrase used in the title of the chapter, is part of the longer Latin sentence: ‘Stat rosa pristina nomine, **nomina nuda tenemus**’, which could be translated as: ‘And what is left of the rose is only its name...’.

With regard to European framework agreements, the subject of this chapter, and in particular in the context of ‘transnational collective bargaining and transnational company agreements’, names are certainly something we have, although they are used in a very confusing way. Even those concluding the agreements often do not know their exact meaning and implications.

This chapter has attempted to show that, compared to the transnational company agreements and despite the existence of a legal framework, not all is rosy with regard to European social dialogue in general and the framework agreements (and other outcomes) deriving from it. A lot of aspects (e.g. in relation to the effective implementation and enforcement of such agreements) remain in need of further clarification to give these outcomes (even) greater added value. This is all the more relevant due to the fact that, although the name of these instruments might sound empty or naked, their content is certainly not. Such agreements often contain genuine rights and obligations needing to be implemented and applied. Only then will they make an appreciable difference to the working conditions of the workers they apply to.

But the time seems ripe to review at least the specific framework of European social dialogue. Most of its strengths, weaknesses, opportunities and threats have been identified, analysed and documented, in particular by such directly involved stakeholders as the European social partners, the European Commission or European Parliament. In addition, the political will to engage in such discussions seems finally to exist. So why not take this opportunity to try and clarify certain aspects relating to transnational company agreements, building on the experience gathered up to now in both European social dialogue and transnational collective bargaining - many problems identified and challenges to be faced are the same or at least very similar.

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