

## Chapter 14

### APPLICABILITY OF EUROPEAN COLLECTIVE AGREEMENTS

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#### 1. AN ACCELERATED *MIS EN SCÈNE*

As if trying to announce the 10th anniversary of the Community Charter of Fundamental Social Rights, in 1998 the first European collective agreement is signed (henceforth, ECA) on the sector level, on the working time of seafarers, between the European Community Shipowners' Association and the European Transport Workers' Federation<sup>1</sup>. Prior to it, several framework agreements on the highest level between European social partners had cleared the way for these sector agreements, several of which already exist<sup>2</sup>. In the space of a few short years, the European collective bargaining panorama has changed drastically, perhaps rendering obsolete the opinions voiced with caution for so long about the applicability of those instruments. Thus, a revision of the subject is necessary, though of course it cannot be the final one. Not only do an considerable number of European intersectoral and sectoral agreements currently exist, the Commission has just updated its list of representative organisations in the various industries<sup>3</sup>, and the European Trade Union Confederation (ETUC) seems to be comfortable with the new Helsinki statutes where it finds the basis needed for more standardised bargaining. The content of said collective agreements has also changed, as we will have the chance

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<sup>1</sup> Signed in Brussels on 30 September 1998.

<sup>2</sup> The most recent example — for the moment — is the European Agreement on Guidelines of Telework in Commerce, signed in Brussels on April 21, 2001 by EuroCommerce and Uni-Europa Commerce, whose dubious legal nature I will address further on.

<sup>3</sup> Paper by the Commission called *European Social Dialogue, a Force for Innovation and Change*, Brussels, 26 June 2002, COM (2002), 341 final, annex I.

to examine in the following pages. At the same time, the Commission is asking itself about the nature of the agreements that are inexorably appearing in multinational firms and European workers' delegations. In short, there is a new panorama, where employers have been quicker to organise than the trade unions<sup>4</sup> and there are as many as 27 sectoral dialogue committees, although bargaining itself is not without its difficulties<sup>5</sup>.

Before moving on to reflect on questions directly related to the applicability of ECAs, we must make, then, a brief digression to discuss the origins and distinguishing features this new phenomenon, which is reaching maturity right before our very eyes.

### 1.1. The origins of European collective bargaining

It has been repeated *ad nauseum* that collective bargaining emerged on the Community level with sector agreements on working hours in agriculture, reached by the European joint committee for that industry from 1968 onward<sup>6</sup>. This gave rise to a more general-

<sup>4</sup> In the previously cited Commission paper (Annex I), there are 38 European employers' industry organisations, versus 12 European trade union organisations, most of them not affiliated to the ETUC, as consulted in article 138 TEC.

<sup>5</sup> In 1995 the Commission consulted the European social partners about a regulation of burden of proof in cases of gender-based discrimination, and it obtained separate opinions, for which it pronounced Directive 97/80/EC, actually based on the Social Policy Agreement annex of the Maastricht Treaty. Bargaining on labour flexibility, initiated in 1995, achieved both framework agreements on part-time work in 1997 and fixed-term work in 1999, but those referring to part-time employment companies failed in May 2001 after a long time attempting to reach an agreement, and on other matters there have been more failures than successes, as can be seen in the Commission consultations of 1996 (prevention of sexual harassment of employees in the workplace), 1997 (information and consultation of workers), and 2000 (three reviews: protection of workers versus the insolvency of the employer, protection against asbestos, and safety and health in the workplace for self-employed workers), which received separate opinions and resulted in Directives in most cases. For information about the current situation of the consultation about the protection of personal details and social aspects of company restructuring, see the chapters on European collective subjects and social dialogue in this book.

<sup>6</sup> It is the second oldest joint sectoral committee (1963; European Commission Decision 74/422/ECC, reformed by Decision 87/445/EEC), only preceded by the coal and steel committee (1955). Currently made up of representatives from EFFAT (trade unions) and GEOPA-COPA (employers' organisations). It is one of the 27 advisory committees of sectoral and bipartite character that comprise the institutional participation in the EU, the first of which can be seen in RIBAS J. J.; JONCZY, M. J. and SÉCHÉ, J., *Derecho Social Europeo*, Madrid, 1980, pp. 196-7. The agreements were signed in 1968, 1972, 1978 and 1981. The 1968 agreement establishes the working hours of permanent workers in agriculture, and the 1972 agreement for zootechnics.

ised acceptance of the validity of such agreements, usually considered as mere recommendations aimed at the national social partners<sup>7</sup>. The object of these joint committees is to formulate the sector's economic or commercial policies for relations between Member States and up against non-Community countries, no matter how often they take stances having indirect relevance to employment relationships<sup>8</sup>. In effect, the European Agricultural Trade Union Federation itself admitted, referring to these agreements, that they were intended as «European recommendations» in the sense given to framework agreements, setting objectives for national collective bargaining<sup>9</sup>. But as Bercusson has pointed out, the absence of an effective European employers' organisation in that sector and a lack of interest in developing something beyond vague joint opinions kept impeding the European Community's efforts to develop social dialogue on the sector level<sup>10</sup>. In reality, as Rocella and Treu have accurately pointed out, they were «joint recommendations,» forms resembling the bona fide collective agreement, significantly developed in a sector where Community authority has invested conspicuous resources, following lines of common economic policy, although still very much tributaries of national interests<sup>11</sup>.

Also worthy of mention are the joint opinions signed between the main European confederations UNICE, CES and CEEP, baked by the European Commission in Val Duchesse. As a product of these tripartite meetings<sup>12</sup> during the summit, very interesting opinions were produced about questions ranging from employment (1986) and cross-industry advisory committees (1993) to occupational training (1995) without any intention of regulating working conditions in the sense that a collective agreement does<sup>13</sup>. As Lyon-Caen and Guarriello point out, the parties reach agreement not on a rule understood as binding,

<sup>7</sup> SCHNORR VON CAROLSFELD, "I contratti collettivi in un'Europa integrata", *RivItDirLav* I (1993), 333. They do not have regulatory effects, he argued, because they do not have an immediate bearing on employment relationships, since applying the contract to the parties as such, being third parties, cannot be derived from the agreement.

<sup>8</sup> ROCELLA, M. and TREU, T. *Diritto del Lavoro della Comunità Europea*, Padova, 1995, p. 371.

<sup>9</sup> BERCUSSON, B., *European Labour Law*, London, 1996, p. 83-4.

<sup>10</sup> BERCUSSON, *ibid.*, p. 84.

<sup>11</sup> *Diritto del Lavoro*, p. 372.

<sup>12</sup> Backed by the European Union (European Social Action Programme of 1984), which, however, does not take part in them, refers to that kind of virtual tripartism where one party — usually the government — commits and finances, but remains formally on the sidelines.

<sup>13</sup> The Reports from 1986 to 1995, in MTAS, *El Diálogo Social en la Unión Europea*, Madrid, 1997, pp. 49 *et seq.*

but on an opinion<sup>14</sup>. Tripartism takes on new functions with the bi-annual meetings between the European confederations and the troika starting in 1997 and the social summits of Stockholm, Laeken and Barcelona (2001 and 2001). However, it does not bring them closer, but perhaps even drives them further away from the missions of collective bargaining.

Neither agreements on working hours in agriculture nor the opinions on specific aspects from the Val Duchesse meetings can be considered as the origins of what we know as European collective agreements. The argument for this conclusion stems from the absence of a will to regulate working conditions in what their own authors regarded as recommendations or reports, not to say pure and simple *desiderata*. And such a will could not have existed since one of the signing parties, the employers, had no organisations with bargaining power, nor were they willing to authorise a the UNICE or the CEEP to sign collective agreements. Even in the 1995 Framework Agreement on parental leave, specific authorisation had to be given to each confederation belonging to the UNICE<sup>15</sup>, a mandate that the British employers' association CBI refused, without any consequence at the time beyond preventing its application in the UK. It was only in 1987 that the Single European Act, with its incorporation of article 118 B and its support via the Commission of European social dialogue and collective agreements on this level, did the necessary phases for the emergence of European collective agreements start to appear. This was followed by the Community Charter of Fundamental Social Rights, pushed along by a powerful personality, Commissioner V. Papandreou, article 14 of which clearly states that the right to bargain and sign collective agreements implies that "relations based on agreements may be established between the two sides of industry at European level if they consider it desirable," and that these agreements can cover employment and working conditions and the corresponding social benefits.

In this brief digression about the antecedents, I should mention, as a major milestone, the Social Policy Agreement (SPA) reached in 1992 as an annex to the *Maastricht Treaty*, where the 11 signing countries declare their desire to continue along the route plotted by the 1989 Social Charter. The SPA proposes a trilogy of European

<sup>14</sup> G. and A. LYON-CAEN, *Droit Social International et Européenne*, Paris, 1993, p. 333, and GUARRELLO, F., *Ordinamento comunitario e autonomia collettiva. Il dialogo sociale*, Milan, 1992, p. 375, cited by ROCELLA and TREU, *Diritto del lavoro*, p. 375.

<sup>15</sup> Agreement of 14 December 1995, based on the Social Policy Agreement, which initially excluded the United Kingdom and Northern Ireland.

collective agreements: those that *substitute* Community standards, those *reinforced* by Community standards, and those resulting from a *transposition* of Community standards<sup>16</sup>. Leaving out the latter type, for which the SPA confirms the possibility that national agreements may bring about the transposition of Community rules, a role questioned by the Court of Justice on several occasions<sup>17</sup>, the other two types are true novelties in European social law, with more than a few problems when it comes to their application which seem to be getting worked out with practice, as we will see over the course of this article. Here I will only say that, although they might look like a single type of agreement, inserted in the process of the elaboration of a Community standard that will later be promulgated anyway, but in connection with the agreement, what we are really witnessing are two independent types, initially linked to the point of giving the impression that they comprise a single body with two elements. I will go into more detail on this later.

With the SPA, we already have all the necessary ingredients for European collective agreements to be made. We will still see two failed attempts at collective regulation on the basis of its mechanisms, when the Commission consults the European social partners about their willingness to bargain an agreement about European works councils and about burden of proof in cases of gender discrimination, and receives a negative reply in both cases, giving rise to Council Directives 94/45/EC and 97/80/EC, respectively<sup>18</sup>.

The Amsterdam Treaty of October 1997 incorporates into ordinary law the typology of European collective agreements of the SPA (articles 137, 138 and 139 TEC), but it goes one step further: in the new article 136 TEC, express mention is made to the Community Charter of Fundamental Social Rights of 1989 and social dialogue becomes an objective of the Community and the Member States. The

<sup>16</sup> Cf. my article "La negociación colectiva europea," *RH II* (1993), 1249 *et seq.*

<sup>17</sup> For example, in the ECJ sentence of 30 January 1985, *Commission v. the Kingdom of Denmark C 148/83*, with respect to the transposition of Directive 75/117, about pay equity between men and women. Also, ECJ rulings of 8 June 1982, *Commission v. the Republic of Italy C 91/82*; 10 June 1986, *Commission v. the Republic of Italy C 235/84*; 21 October 1999, *Commission v. Grand-Duchy of Luxembourg*. Cf. on this issue, CASAS BAAMONDE, M. E., "Directivas comunitarias de origen convencional y ejecución convencional de las Directivas: el permiso parental," *Relaciones Laborales II* (1996), 85 *et seq.*

<sup>18</sup> More specifically, the statements of legal grounds for both indicate that "at the end of the second phase of the reviews, the social partners did not inform the Commission of their willingness to initiate the process that could lead to the signing of an agreement, as it is laid out in article 4 of the Agreement."

Nice Treaty of February 2001 does not introduce any significant novelties as far as European collective bargaining goes.

## 1.2. Distinguishing features

In my opinion, collective bargaining really takes off with two important Directives, the ones that emerged after, and based on, the SPA: the Directive on Working Time 93/104/EC, one of the few that managed to get passed in that period of renewed concern about social matters in the Community, and Directive 94/45/EC, on European works councils.

The former represents an important new twist in many ways: it meticulously and peremptorily regulates a number of questions about working time, which will earn the Council a lawsuit in the Court of Justice by a certain affected country<sup>19</sup>; it constantly remits to national or regional bargaining to determine certain aspects; also, it contains a mysterious article 14 that envisages the non-application of the Directive in the event that "other Community instruments" establish more specific regulations pertaining to particular professions or activities. Most likely, the individuals who drew up the Directive were not so clear, when they presented it, about which Community instruments it might be referring to. It is even feasible that they actually had other specific Directives in mind, of the type developed in 89/391 on matters relating to safety and health in the workplace. However, the Community strategy gave centre stage to collective bargaining for the regulation of working conditions, though we can't be sure if it was to scrupulously comply with the mandate of promoting social dialogue, to apply the principle of subsidiarity, or to back off on a particular subject — working conditions — about which it had always shown its mistrust. In my opinion, the Commission reacted to the new elements it did not have at its disposal before. Namely, the willingness to bargain that the employers' organisations had assumed since the SPA — the 11 signing countries free of the usual British ball and chain — showed them the Council's eagerness to pass Community laws that would have been unthinkable a short time earlier<sup>20</sup>.

<sup>19</sup> I am referring to the ECJ sentence of 12 November 1996, United Kingdom v. Council of the European Communities C84/94. The Directive about informing the worker 91/533, which precedes it, is also sufficiently specific, but the matter regulated does not allow it to be overly extensive.

<sup>20</sup> The most recent example is found with working hours for the highway transport sector: though industry federations in the area of aerial navigation and maritime transport had both reached agreements, the European highway transport

As for the latter, the European works councils started to persistently bargain all kinds of agreements about the progress of companies, theoretically aimed not so much at working conditions as at their *sustainability* in labour terms, real enterprise agreements whose characteristics deserve a specific chapter in this book. Here we will focus our attention on intersectoral (cross-industry) and sector agreements, which in a short time have made the following headway:

a) The first to appear, and the most abundant, are intersectoral ECAs of a framework variety, referring to a specific issue for all sectors and bargained by representatives from the European trade union confederations and employers' associations<sup>21</sup>. In turn, these can be subdivided according to their relationships with the Directives on the same subjects:

1. Framework ECAs with an accompanying Directive, which covers most of those mentioned<sup>22</sup>.

2. Framework ECAs without an accompanying Directive, a group only made up, so far, by only one on telework, the most recent.

b) A bit later on, and as the result of negotiations between European industry federations, emerge the first sectoral agreements, initially as an extension of the Directive on Working Time, which as we have already seen, which proclaimed themselves to have subsidiary application against more specific Community provisions<sup>23</sup>. It is not long, however, before an autonomous sector agreement appears, on telework in European commerce<sup>24</sup>. These agreements can also be

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representatives failed in their attempts: "despite intense negotiations between social partners, it has not been possible to reach an agreement with respect to mobile workers in the highway transport sector," was the wording of the statement of reasons of Directive 2002/15/EC of 11 March, which as a result of this was passed by the Parliament and the Council.

<sup>21</sup> Framework Agreement on Parental Permission, of 14 December 1995, signed by CES, UNICE and CEEP; Framework Agreement on Part-time Work of 6 June 1997, signed by CES, UNICE and CEEP; Framework Agreement on Fixed-term Work of 18 March 1999, signed by CES, UNICE and CEEP.

<sup>22</sup> See previous note. Directive 96/34/EC on parental leave; Directive 97/81/EC on part-time work; and Directive 99/70/EC on temporary work.

<sup>23</sup> Sectoral ECA on the working time of seafarers of 30 September 1998, signed by the organisations European Community Shipowners' Associations and the European Transport Workers' Federation (ETF); Sectoral ECA on working hours for flight personnel in civil aviation, of 22 March 2000, signed by the organisations Association of European Airlines (AEA), European Transport Workers' Federation (ETF), European Regions Airline Association (ERA), European Cockpit Association (ECA) and International Air Carrier Association (IACA).

<sup>24</sup> Of 26 April 2001, signed by Eurocommerce and UniEuropa Commerce, already cited.

broken down into two categories, just as we have done with the intersectoral agreements.

1. Sectoral ECAs accompanied by a Community standard, also the majority here, these being ECAs deriving from the Directive on Working Time which in turn provoke the promulgation of other specific Directives<sup>25</sup>.

2. Sectoral ECAs without an accompanying Community standard, for the time being only the one on telework in European commerce.

Needless to say, the biggest novelty in the recently described scenario is agreements that lack an accompanying Community standard, both in the category of framework agreements as well as in the sectoral agreement category.

Another noticeable trend in the group of European bargaining instruments and their "speculative" Community regulations — of these we should mention not only the accompanying ones, but also those passed after the failure of bargaining to reach an agreement — , I think it is important to point out the progressively detailed nature of their texts, as it can be seen by simply comparing the framework ECA on parental leave with Directive 2002/15/EC, which *punishes* the social partners of road transport for not having known, or wanted, to bring their negotiations to a successful conclusion.

## 2. THE MYSTERIES OF THE TREATY

### 2.1. How many types of collective European agreements?

Setting aside transposed national agreements, European to the extent to which they internalise a European-level rule, and whose consecration as valid instruments is found in article 137 TEC, there are still interpretative problems regarding what the Treaty was seeking in terms of purely European agreements. It has usually been admitted that articles 138 and 139 of the TEC allude to only one type of collective agreement, since the first remits to the second when the social partners decide to inform the Commission of their willingness to "initiate the process provided for in article 139". This phrase might

<sup>25</sup> Two to reinforce the ECA on the working time of seafarers: Directives 1999/63/EC and 1999/95/EC, due to the fact that the Agreement basically reproduces articles 1 to 12 of the OIT 180 agreement about seafarers, still not in force, and one for the ECA on working hours in civil aviation, Directive 2000/79/EC.

be interpreted to mean that it remits to the next article in its entirety, and consequently that it recognises a willingness to bargain an agreement, which would weaken the draft of the Community standard on the same matter, and the application of which could either be made via the social partners' own procedures or based on a Council decision adopted at the Commission's suggestion. There would be a continuum between these two articles, such that an agreement *substituting* a Community action would invariably be reinforced by another, giving the agreement a scope similar or identical to the thwarted Community standard. One gets the impression that the Treaty does not envisage that the signing parties to the agreement might fail to make a joint request for a reinforcing Community standard, since the offered alternative consists of applying the agreements through collective instruments. This is specified in Declaration 27, annex to the Treaty of Amsterdam, which indicates that the social partners' own procedures, alluded to in article 139, actually refer to collective bargaining subject to the regulations of each Member State, without each State being required to directly apply the agreements, enact their transposition rules, or even modify national legislation.

We could arrive at a somewhat more open interpretation, however, of the phrase "initiate the process provided for in article 139" if we consider that the remittance refers exclusively to the first section of this article, the part where it says that the dialogue between social partners may result in collective agreements. Thus, the second section would be "liberated" from it, in such a way that the application of the agreements concluded on the Community level could be done via internal collective bargaining or through the support of an EC decision. The tendential unity between the substituting agreements and the reinforced ones would thus be broken, and any other European collective agreement could be accompanied by an EC decision, not only the substituting agreements. The Commission's reiterated interest in publishing the lists of general and sector organisations that it considers to have representative authority will help facilitate the procedure of identifying which European agreements might seek to obtain the backing of Community law, which would not have much of a point if we knew in advance that only substituting agreements deserve this kind of support.

On the other hand, it is too easily understood that collective agreements can only substitute a Community standard. Article 138 fails to make such a clarification, as it always refers to "Community action," which could just as well mean a regulatory action as a merely administrative one.

The previously cited Declaration 27, in short, narrowly restricts the possibilities of European agreements, by specifying that they can only be applied via Community decision or internal collective bargaining. If article 139 says that the agreement can be applied through the social partners' own procedures, the Declaration at least seems to suggest that it is referring to internal agreements when it indicates that the direct State application of European agreements is not possible.

These and other shadowy parts of the TEC can and should be explained by the origins of its articles 138 and 139 and its Declaration 27. None of these saw the light in the Amsterdam Treaty of 1997. Rather, their origins can be traced to the Agreement on collective bargaining entered into on 31 October 1991 between CES, UNICE and CEEP<sup>26</sup>, which was later included in the Social Policy Agreement annex of the 1992 Maastricht Treaty as a binding standard for 11 EC countries, and after that to the foundational Treaty via the Treaty of Amsterdam. Declaration 27 originated with the incorporation of the terms agreed upon by the European social partners in 1991 into the 1992 Social Policy Act<sup>27</sup>. The limitations of the current TEC consist, therefore, in the failure to anticipate the new forms that European collective bargaining was going to take starting in the second half of the Nineties. The fact is, the TEC text derives from, I repeat, what was agreed by the social partners in 1991 when Commissioner Papandreou's regulatory thrust obliged the UNICE to accept, as a lesser evil, a bargained rule before an imposed rule<sup>28</sup>. Thus, in reality, the *intentio legis* of articles 138 and 139 is merely to prevent Community regulatory drafts initiated by the Commission from being brought to a good end by substituting them with agreements bargained by European social partners. This also explains the emphasis placed

<sup>26</sup> The European organisations CES, CEEP and UNICE had reached the agreement on collective bargaining and Community regulation in the ad hoc group promoted by the Commissioner V. Papandreou, and is contained in articles 3 and 4 of the Social Policy Agreement "in almost exact terms": MOLINA GARCÍA, M., *La negociación colectiva en Europa. Entre el acuerdo colectivo y la norma negociada*, Tirant, Valencia, 2002, p. 37. The SPA contains "the substantial parts of the previous Agreement of 31 October 1991, signed by CES, UNICE and CEEP", indicate COLINA, M.; RAMÍREZ, J. M. and SALA, T., *Derecho Social Comunitario*, Tirant, Valencia, 1995, p. 559. The text of the 1991 Agreement on proposals for drawing up articles 118, 118A and 118B, in MTAS, *El Diálogo Social en la Unión Europea*, cited, pp. 85 *et seq.*

<sup>27</sup> It was about, as you will recall, the Declaration of the 11 High Contracting Parties relating to section 2 of article 4 of the Social Policy Agreement, added by the Treaty on European Union, Maastricht, 7 February 1992.

<sup>28</sup> It was also a personal bet between two energetic personalities, Commissioner Papandreou and the Secretary General of the UNICE, Tadeua Tyskiewicz, which ended with the transaction referred to in this article.

by article 138 on the *stimulated* emergence of said agreements, as an upshot of a Commission communication announcing its intention to initiate proceedings for a Community action. And as the bargained substitution can result in a mere neutralisation of the planned measure, the panorama is completed with the "strong" possibility of an accompanying decision, perhaps to dispel the doubts of the ceding authority.

This is the rigid scenario that is seen in the early years, as each time the Commission announces a project for a Community standard a substituting agreement is reached, which only pretends to establish a few general rules; a framework agreement. This is overcome with sectoral agreements on working hours, which in turn substitute Directive 93/104, as I have already mentioned. However, it is a much more autonomous substitution, in the sense that they neither avoid its existence — they only weaken its application for certain sectors — nor do they crop up as part of the stimulating procedure of the SPA, but rather on the basis of the standard on health and safety. Later, we will see new scenarios with the non-stimulated framework agreements — or, if another name is preferred, independent or ordinary — such as the one on telework, which are not reinforced by Community standards either, and Community standards passed after the failure of bargaining between the social partners, such as 2002/15/EC. Of course, the scene gets cloudier with the signing of certain instruments that call themselves agreements, but which only propose mere recommendations to the Commission or the national bargainers.

Fortunately for us, articles 138 and 139, as well as Declaration 27, are drawn up leaving sufficient room to make up from the described overflowing. Now seems like a good moment to identify the loopholes in both articles before moving on to other questions:

a) Substituting agreements of article 139.1 TEC do not require the backing of a Community decision in the sense stipulated in article 139.2.

b) European agreements do not necessarily need to be of the substituting variety to obtain the backing of a Community decision of article 139.2 TEC, in their application to the Member States.

c) The application of European agreements can also occur through collective bargaining, according to the rules of each Member State. This does not necessarily require the intervention of national or internal agreements, as we will discuss later on.

d) Neither the articles nor the Declaration mention ordinary agreements; that is, those that arise as an autonomous manifestation

of the European collective partners, without no intention of substituting a Community rule or being accompanied by one.

## 2.2. Collective European pseudo-agreements

Within the so-called European social dialogue, we mustn't limit ourselves to regulatory agreements, aimed at regulating working conditions or employment relationships between collective parties. We must take into consideration that the variety of instruments is sometimes much more extensive, including non-statutory types that we should keep separate from the agreements analysed here<sup>29</sup>.

It could even be said that historically the non-legal instruments appear first, *stricto sensu* agreements being a quite recent offshoot, still in the minority. The number of joint options and recommendations signed by the European confederation and sector parties is very high<sup>30</sup>, and have not dropped of late, a moment in which they accompany binding agreements.

Unfortunately, while the instruments called joint options or recommendations clearly show their nature of mere proposals to the Commission, Member States or national bargainers, or simple expressions of opinion, the ones that call themselves agreements do not always reflect in their articles the nature they are supposed to have — and it doesn't matter at this point if it is a 'self-executing' or an indirectly binding agreement — . I am not talking about the typical distinction within a collective instrument between its obligational and regulatory parts, since in reality this distinction is always artificial, although the first is aimed at the signing parties themselves with its compulsory clauses and in the second at the affiliates with the regu-

<sup>29</sup> SCHNORR VON CAROLSFELD, G. warned about this in "I contratti collettivi in un'Europa integrata", *Rivista Italiana di Diritto del Lavoro* I (1993), 328, that the reference in 118 B TEC (introduced by the European Single Act of 1986) that European social partners could have contractual relationships contrasts with article 4.1 of the SPA of 1992, which speaks of "contractual relationships, including agreements", which leads us to the conclusion that the concept of agreement is higher than that of contractual relations, and that only the former can result in the "integrated procedure" contained in arts. 3 and 4. According to the same author, agreement relations have an inferior legal nature and shall remit to the establishment of presuppositions to organise future bargaining, as well incentives for the development of pre-bargaining.

<sup>30</sup> The joint opinions, recommendations and statements of Val Duchesse and their continuators are already numerous, and they are not far behind commerce and agriculture sector agreements, to cite a few examples. In the Web sites of these organisations, especially the trade unions, the texts of most of these can be seen.

latory clauses. Even in agreements where only commitments for the signing parties are considered, the document has legal force. Instead, I am referring to other documents called ECAs whose clauses are so gentle that they resemble, if they are not identical to, joint options<sup>31</sup>. These are the so-called "new generation" texts (letters, codes of conduct, agreements), which express commitments to be applied on the long term<sup>32</sup>. And if they lack formal imperativeness, what we might call material imperativeness is worthless, which gives the signing parties the capacity to impose their mandates about employment relationships, which is the second element to be taken into account.

I will mention three recent examples of the confusion produced by these ambiguous terms:

— The Agreement (sic) about fundamental rights and principles at work<sup>33</sup> repeatedly indicates in its text to be referring to a joint statement, which seems to be different from joint *opinions*, if only in a tiny variation in the name. However, article 1 clears up the fog by saying that the signing parties recommend their national organisation members to encourage companies and workers in European commerce to comply, whenever possible, with the fundamental rights set forth in the OIT Agreements, in particular the elimination of hard labour, the abolition of child labour, the elimination of discrimination and the rights to unionisation and collective bargaining<sup>34</sup>.

— The European agreement (sic) on guidelines for telework in commerce<sup>35</sup> offers a more complex content, as it contains useful delimitations for the regulatory mission — for example, telework has a definition that could come in handy when distinguishing between similar figures — , it shows the determined willingness of the signing parties to respect the principle of equality and proportionality between teleworkers and other comparable workers, and confirms the

<sup>31</sup> It is the content of the clauses, and not the formal or express attribution of binding effects which gives the ECA legal effects: "the question is whether it has compulsory effect, or if it serves to orient the legislator and the judge in acting on and interpreting the Directive.", as ARRIGO; G. indicates in "A propósito dell comparazione nel diritto comunitario del lavoro," *Il Diritto del lavoro* 1-2 (2002), p. 76.

<sup>32</sup> This is what the EC communication on *European social dialogue, a force for innovation and change*, ct., p. 18, calls them.

<sup>33</sup> *Agreement on Fundamental Rights and Principles at Work*, signed in Brussels on 6 August 1999 between EuroCommerce and Euro-FIET.

<sup>34</sup> It adds that the signing organisations will regularly debate about the application of the joint statement, and if necessary will make recommendations or carry out any pertinent actions (!).

<sup>35</sup> *European Agreement on Guidelines on Telework in Commerce*, signed in Brussels on 21 April 2001 by EuroCommerce and Uni-Europa Commerce.

teleworker's right to be informed of the basic terms of his or her contract. It also envisages the treatment of the workplace and teleworkers' right to communicate with their colleagues and participate in union acts and meetings, among other questions. Moreover, it contains a surprising article 5 that recommends national organisations, whether they decide to regulate telework separately or include it in existing agreements, to include the guidelines of the European agreement I am referring to. In addition, most of the labour rights are expressed with a "should be applied" or "should be assumed", which do not indicate they are compulsory. In my opinion, an Agreement like this would have to be classified as hybrid, part recommendation and part regulatory agreement, as it is not made sufficiently clear which parts are binding and which others are merely declarative.

— The recommendation framework agreement on the improvement of paid employment in agriculture of the Member States of the Union<sup>36</sup> contains numerous recommendations about working hours and other conditions for bargaining conducted on the national, regional or provincial level<sup>37</sup>. Its final declaration gives us an idea of its programmatic nature on the very long term: the signing of this Framework Recommendation Agreement by GEOPA/COPA and EFA/ETUC — it says — is the crucial first stage of the process of jointly improving the position of paid employees in agriculture. It represents an act of mutual trust by the signing parties and makes it much more probable that they will be able to successfully face the challenges they come up against on the eve of the third millennium.

Such ambiguities can be overcome, however, when the dubious collective instrument obtains the backing of a Community rule. The EC rule breathes life into what was born a weakling. In doing so it can say that some clauses are not sufficiently detailed, or that they have a provisional character, but we will always be talking about a "collective" rule. I will return to this question in a moment.

The question takes on a new complexion when the signing parties do not ask the Community authorities to enact a back-up Community standard, or when the Council decides by majority or unanimously to reject the request, which means that the Agreement will have the binding effect deserving of it alone. Not only the kind of applicabil-

<sup>36</sup> Brussels, June 24 1997, signed by GEOPA/COPA and EFA/ETUC.

<sup>37</sup> "The annual working time established by national, regional or provincial agreements shall not exceed 1,827 hours per year," it says, for instance. Beyond its orientative or programmatic literalness, the omission of other levels of bargaining, like local or enterprise, are surprising in the Recommendation Framework Agreement.

ity, but even the very nature of these autonomous or ordinary agreements is under debate.

In the lines that follow I will take a look, first of all, at the legal situation of collective agreements accompanied by an EC regulation and secondly, at the possibility and applicability of those that do not have this backing.

### 3. REINFORCED AGREEMENTS

#### 3.1. Do they always have to be stimulated by the Commission?

Article 138 TEC seems to suggest that always, in all cases, European collective agreements must originate as a response to a Community action initiative that the social partners decide to substitute, for whatever reason, with their own action. Thus, the Commission will consult with the social partners, and these will respond with an opinion or a recommendation in which they announce their willingness to initiate the process provided for in article 139. And this article states that the European social partners can reach agreements, and that the application of these can occur via procedures of their own or via a Council decision. Bearing in mind both articles, it seems that the panorama opens up on the way out, but not on the way in; in other words, there are two possibilities for applying the agreement, but they can only originate with a Commission initiative to which the social partners respond with their agreement. I have already mentioned that since its beginnings in the 1991 agreement, the intention of this procedure has been to substitute the planned Community standard through a collective regulation. Thus, it seems logical not only that the ECA emerges reactively, on the defence, but also that it is on the level of a Community rule owing to its compliance with the terms of article 139.

The meteoric evolution from that period until the present has surpassed the legislator's intention by far, giving a new dimension to the two TEC articles around which these ideas revolve. The interpretation of a standard cannot remain anchored in the historical moment when it came into being, but should be fuelled by the social reality of the moment when it is applied<sup>38</sup>. The two agreements on the working time of seafarers and civil aviation crews in the measure mentioned above have been spontaneous, not stimulated; and equally

<sup>38</sup> As the Spanish Civil Code states in article 3.1.



spontaneous has been the agreement on telework in commerce. The difference between the first two and the second lies in the fact that the former have obtained the backing of EC regulations, while the latter does not seem to have either requested or obtained it<sup>39</sup>. The trail has been blazed for the possibility of non-stimulated agreements, and it truly does seem logical in every way for the social parties, whether they be confederate or sectoral — although with even more reason, the latter — not to wait for the Commission to initiate preliminary steps if they deem it advisable to reach an agreement on some issue.

The interpretation of articles 138 and 139 TEC bring us to the same conclusion. If section 1 of article 138 orders the Commission to adopt all necessary provisions to facilitate dialogue between social partners, at the same time section 1 of the following article states that Community social dialogue can lead to agreements of this level. The spirit of this statement should not be interpreted as an imperative mandate to bargain, going against all the Community's philosophy of freedoms, but as the EC legislator's desire to see this practice flourish. Neither of the sections, as far as I understand them, envisages an incitement by the administration, although it comes from European levels; however, they do point out that the agreements are recognised even in the event that they are not guided by Community action. The fact that in another spot in article 138 a remittance is made to article 139, which I interpret as its section 1, does not necessarily imply that this section is, for that reason alone, confined to the opportunities offered by Commission initiatives, nor that all ECAs have to match the thirst for blocking incipient Community action. The invitation to bargain can in no way be understood as *sine qua non* legitimation, since this would mean a limit incompatible with the objective of social dialogue contained in article 136 TEC.

Thus, there is the possibility of non-stimulated ECAs; that is, agreements arising spontaneously from social dialogue, without any intervention whatsoever by the Commission. Both these as well as the stimulated agreements can obtain the backing of a Community regulation, as the contents of sections 1 and 2 of article 139 are independent, as we have seen. To clear up any possible doubts that this is so, we must only have a look at the back-up decisions, particularly the function they perform in the regulatory structure.

<sup>39</sup> However, the Framework Agreement on Telework of 16 July 2002 was motivated by a reaction to the second phase of consultations by the Commission on the modernisation and development of employment relationships, with a formal invitation to social parties to initiate bargaining on telework, accepted in a similarly formal manner by the parties on 20 September 2001.

### 3.2. The accompanying Community decision

If the concept of Community action is ambiguous, for whose substitution bargaining is sometimes initiated by the social partners, equally or more so is the concept of Community "decision" announced to accompany certain European agreements, when the Council agrees to this a qualified majority or unanimously, depending on the case<sup>40</sup>. The doctrinal possibilities that arise around the SPA range from those who thought that the "decision" referred to the usual kind of rule found in European social laws, the Directive, to those who thought that it should be interpreted in its technical sense, as a Council Decision, as well as others who defended a new, different meaning for the word<sup>41</sup>. The main problem stemmed from the fact that the Directives granted *erga omnes* applicability to European agreements that could inhibit bargaining in certain cases and for certain countries where the effects of bargaining activity had been traditionally restricted to affiliates of the signing parties. The Decision, on its part, had no such pretensions, and its statutory character directed at specific targets allowed its applicability to be adjusted to the desires of the social partners, without it being any different, on the other hand, from other cases in which a Decision reached millions of people in the EU. In practice, we see that the Decisions described in the TEC are published in the OJEC and many of them have a plural, although not general, target: for instance, those referring to matters such as tenders, official announcements, subsidies, etc., whose field of application at times affects many Europeans<sup>42</sup>: their defining identity resides — argues Boulouis — in the absence of general scope<sup>43</sup>.

<sup>40</sup> The Commission, in its *Communication about the application of protocol on social policy*, COM (93) 600 final, dated 14 December 1993, carefully avoids commenting on the nature of this measure, at the most calling it a "legislative instrument" (p. 16).

<sup>41</sup> See the different doctrinal stances in my article "Los euroacuerdos reforzados y la naturaleza de la decisión del Consejo," *REDT* 62 (1993), pp. 855 to 867, and in PÉREZ DE LOS COBOS ORIHUEL, F., *El derecho social comunitario en el tratado de la Unión Europea*, Civitas, Madrid, 1994, pp. 150 *et seq.*

<sup>42</sup> This is the case, among many others, of the Council Decision 93/465/EEC (OJEC of 30 August) about the system of placing and use of the term "EC", which has no express target in its articles, although its is directed at European "manufacturers" in its annex. The Council Decision of 24 June 1992 (OCEJ of 26 August), about the European Year of Older People, aimed at "public and private operators", although it doesn't show a precise target in its articles either. Or Council Decision 93/379/EEC (OJEC of 2 July) on a multi-annual support program for small and medium-sized undertakings (SMU), with a diverse range of measures, without stipulating a specific target, although in the Annex it can be deduced that it is all SMUs as a whole.

<sup>43</sup> BOULOUIS, *Droit institutionnel des communautés européennes*, Paris, 1991, p. 181. For more details on the type of Decision, please refer to my article "Los euroacuerdos reforzados y la naturaleza de la decisión del Consejo," cited above.

Since then, the Commission seems to have opted for symmetry in the type of accompanying regulation: if the ECA was substituting a Directive, it had to be another Directive that would reinforce it. Thus, the ECAs that have popped up in recent years as a reaction to the process for drawing-up Directives have been paired with Directives and only with Directives. This left the question of what would happen when the draft of the rule to be substituted was a Regulation or a Decision. Confirming the message of the facts, in 2002 the Commission seems to have adopted a broad position, imposing conditions on the responses to "the nature of the instrument used (Directive, Regulation or Decision)"<sup>44</sup>. Now then: is disparity between the substituted Community rule and the reinforced one possible if, for example, the first is a draft of a Directive and the other a Decision? The identities of the two are not distinguished in the articles of the TEC, and there are reasons to respond favourably to the use of a variety of instruments. This depends on the function that the reinforcement standard should carry out.

### 3.3. Function of the Community accompanying rule

There are at least three official European Commission texts from which we can glean what we might call a real interpretation of the legislator's intention regarding the objective of the reinforcing standards: the EC Communication of 1990, on the application of protocol on Social Policy<sup>45</sup>; that of 1998, about adapting and promoting of social dialogue on the Community level<sup>46</sup>, and that of 2002, about European social dialogue as a force for innovation and change<sup>47</sup>. Although they present differing opinions and state them *incidenter tantum*, for which reason they should only be regarded as a sporadic surfacing of thought, they *do* indicate the Commission's willingness to produce accompanying standards, ruling out any other possible directions. Of course, we are talking about official Commission announcements, so regardless of how they appear, they do have to be considered as firm and conclusive assertions.

The 1993 Communication insists that the Council's decision will be limited to making compulsory the provisions of the agreement

<sup>44</sup> Commission communication on *European Social Dialogue, a Force for Innovation and Change*, cited, p. 19, referring to the follow-up of the application of the Council decision.

<sup>45</sup> Communication of 14 December 1993, COM (93) final.

<sup>46</sup> Communication of 20 May 1998, COM (98) 322.

<sup>47</sup> Communication of 26 June 2002, COM (2002) 341 final.

reached by the social partners<sup>48</sup>. By the same token, the 1998 Communication says at one point in its text: "It must be stressed that the Commission does not present a legislative proposal to the Council *to make an agreement binding* if it thinks that the signing parties are not sufficiently representative in relation to the object of the agreement"<sup>49</sup>. On its part, the 2002 Communication analyses the application of an ECA by Council decision, stating the following: "In that case, which is a *procedure for extending* agreements negotiated and concluded by the social partners, the Council is required to take a decision on the social partners' text without changing the substance"<sup>50</sup>. Thus, the latter document seems to show that the Commission has changed the meaning given to the accompanying standards. If this judgment seems too harsh and we don't believe there has really been a change in stance, but rather a certain degree inconsistency or wavering with respect to their function, we would have to admit that the Commission has expressed at least two equally valid opinions on the matter. The reinforcing regulation may be geared towards a vertical consolidation of the ECA, in the sense of giving it binding force, or it may be aiming for a horizontal consolidation or *erga omnes* applicability of the agreement. The Commission does not seem to have made up its mind, however, in acknowledging its role of making the ECA a source of law, something which has been the subject of lively debate in scientific doctrine<sup>51</sup>. A role of source of (public) law that neither corresponds to it nor is it necessary for it to be able to regulate working conditions in European enterprises.

As I said earlier, the Treaty does not specify the function assigned to these accompanying regulations. Most likely, the Commission's wavering in stating its opinion on the matter is due to fact that both functions are perfectly valid and possible. I will explain myself in a few brief words.

<sup>48</sup> *Op. cit.*, p. 18.

<sup>49</sup> *Op. cit.*, p. 16.

<sup>50</sup> *Op. cit.*, p. 19.

<sup>51</sup> "Horizontal subsidiarity would turn the system of Community sources backwards, making the ECA the main source of social law, while heteronomous sources would serve to sanction, substitute and or/integrate the will of the parties," says GUARRIELLO, "Accordi di gruppo e struttura di rappresentanza europea", *Giornale de Diritto del Lavoro e di Relazioni Industriali* 53 (1992), pp. 58-59. For a look at the different stances, see my article "La negociación colectiva europea," *Relaciones Laborales II* (1993), 1260 *et seq.* For the Commission, on its part, "on the mid-term, the development of the European social dialogue raises the question of European collective agreements as sources of law. The discussions on the forthcoming reform of the Treaty should take this into consideration" (*Communication about European Social Dialogue, A Force for Innovation and Change*, cit., p. 19).

The accompanying regulation has a primary effect, which consists of granting binding force, not understood as regulatory conversion, as an ECA does not turn into a Directive just because the accompanying regulation remits to its text, but understood as an obligating force for the States, which are required to transpose the Agreement through internal regulations or national collective bargaining. This is how everyone has viewed it from the beginning, and the Commission has overseen the internalisation of the reinforced agreements almost as if they were Directives. This resulted in the initial weakness of the negotiations and the very content of the early ECAs, which were of the framework variety and rather ambiguous, leaving several options open to adapt to national peculiarities. As I see it, the binding force borrows from German law the immediate and unappealable effectiveness of collective agreements<sup>52</sup>. But this binding force cannot be the same for European ECAs, which in the early Nineties couldn't dream of having immediate, compulsory application throughout Europe: even though at that time, the biggest detractors of this kind of applicability would be left out, as the United Kingdom had not signed the SPA and did not join it until the Amsterdam Treaty of 1997<sup>53</sup>. Anyway, it was too early to assume that a framework agreement of these characteristics could be applied directly, and the Directive, with its own idiosyncrasies, could not give it this force either, although it could give it something very similar: the force of its internal application. An applicability that the ECA in itself does not have, being a private instrument, but which with the backing of the Community standard is tied to the national public powers. The final result is similar to binding effectiveness, as it obtains automatic, unappealable application for employment relationships, though not in a direct or self-executing way, but through the transposition standards and agreements.

The sectoral agreements that crop up in 1999, however, are no longer so weak or hazy, but very concrete, and the reinforcing norm is now seen as a carrier of a different validity: *erga omnes* applica-

tion, the obligation of Member States to guarantee the universal application — at least within the corresponding sector — of the European agreement clauses through the declaration of extension that the Community standard procures. However, the binding validity is threatened in part because of technical doubts raised by the application of national doctrine to an international instrument, and also because the European social partners slowly assert their power over the member organisations, as demonstrated in the Helsinki Conference of 1999, though with the disagreement of some national delegations. The explanation for general applicability can be found in Community law, essentially concerned with fair competition, under the parameters of which social dumping on these matters cannot be tolerated, and it seeks in the reinforcing regulation a means to impose a standard with the working conditions of the ECA.

In effect, granting general application to an ECA also implies an attempt to make it binding. I cannot imagine the extension of a collective instrument lacking in obligating power. Of course, we might envisage an ECA extended as a supplementary regulation, to be applied only when the national standards or agreements establish nothing to this respect, but so far agreements of this kind represent the minority, however important. What may indeed happen is, as it often occurs with the extension mechanism in the different national legal systems that have established this, the Community standard assumes that the collective instrument has in itself this obliging power, and adapts its intervention to this assumption. The European Commission can state in its Communication, therefore, that the reinforcing Directive serves to extend the application of an ECA to all workers and employers, even those not affiliated to the signing European organisations, an extension mechanism that respects the degree of binding force the instrument's authors intended it to have, as it is aware that all the elements necessary to deem that the social partners have enough power to impose application of ECAs themselves are already present.

Of course, the aforementioned raises two questions: one, whether the Commission really thinks as it says; and two, if the European social partners really have the power that it is assumed that they have. Save for an error or omission, I do not know of a Commission pronouncement where we can find traces of its thinking. It has heartily congratulated itself on the success of the implementation of new joint sectoral committees for social dialogue, and is striving to create bargaining forums on all levels, but it jealously guards its opinion on the legal and sociological power of the ECAs. On several occasions it has indicated the requirements that an ECA must meet to obtain the

<sup>52</sup> Immediate application (unmittelbare Geltung) means that the regulatory part of the agreements is applied to employment relationships without the need of their being included in individual employment contracts, *as if* they were objective rules, and unappealable application of said party (zwingende Geltung) means that it is applied in this way even when the individual parties express they are against it or have established different clauses, although in this case the more favourable clauses would take precedence (*in melius*). Cf. KEMPEN, O. E. and ZACHERT, U.; *Tarifvertragsgesetz*, Bund Verlag, Köln, 1997, pp. 595 *et seq.*, commenting on article 4.1 TVG.

<sup>53</sup> On the need for contractual incorporation of conditions regulated by agreement, in British law, cf. DEAKIN, S. and MORRIS, G., *Labour Law*, Butterworths, London, 1998, p. 258 *et seq.*

backing of a Community standard, but it has not provided any clues to help us answer the following questions:

- a) Sufficient representativity of the contracting parties.
- b) Legality of each clause in the agreement.
- c) Respect for provisions regarding small and medium-sized enterprises.
- d) Mandate of the signing parties to conclude the agreement<sup>54</sup>.

We find the clue of this confidence in bargaining power in another place, namely, from the social partners themselves. The social partners have learned to bargain at the cross-European level as a result of the first framework ECAs and the commitments assumed for the implementation of European works councils, from which 400 emerge as an immediate consequence of Directive 94/95/EC<sup>55</sup>. As a symptom of this confidence, there have already been agreements for which the Commission has not been asked to provide a reinforcing regulation. Without a doubt, this abstention might owe to the *erga omnes* applicability assigned to the mechanism, contrary and even strange to the normal situation of the various European countries; the declaration of extension is an unusual procedure where it exists<sup>56</sup>, and only in Spain do the most representative collective agreements have, *ab initio*, general applicability. But it is also clear that they would not reject it if they were incapable of having some kind of impact on their own. There is intense sectoral bargaining currently underway which has still not produced any clear results, national trade unions are putting aside their mutual distrust and are reaching joint bargaining agreements on a decentralised national level<sup>57</sup>, the attribution of European-level bargaining mandates has been regulated at least on the union side, etc.

This confirms, in my opinion, that for the first time ever we have European social partners with authority over their national organisations to socially impose the ECAs. The problem of whether they also have legal capacity to do so requires separate treatment, which we will see in the next section.

<sup>54</sup> The first three requirements, in the cited Communication of 2002 on social dialogue, p. 18. The fourth appears next to the previous ones in the Communication on application of protocol on social policy of 1993, p. 17, and on adapting and promoting of social dialogue of 1998, p. 16.

<sup>55</sup> "There is a social dialogue developing rapidly in multinational enterprises," it stated in its Communication of 20 May 1998, p. 16.

<sup>56</sup> France, Germany, Spain.

<sup>57</sup> The Doorn Agreements, of 5 November 1998, between German, Dutch and Luxembourg-based trade unions about the coordination of their bargaining policies, in particular, on attuning their wage policies, exemplify my point. Other examples are analysed in different chapters of this book.

First we will wrap up what we have already seen with five reflections:

— One, that the Council's decision can perform different functions in its accompaniment of an ECA: to require all Member States to impose its application, extend its applicability to all workers and employers, or both.

— Two, that article 139 TEC adopts the concepts "decision" in a generic manner, which can be interpreted as both a Directive as a Decision or even a Regulation.

— Three, that the type of Council decision to be chosen in each case does not depend on the type of Community action the ECA responds to — it might not even be a legislative initiative — but on the function assigned with respect to this.

— Four, that each function has a type of decision best suited to achieving the expected result: A Directive, if it aims to apply the ECA through the Member States and with general applicability; a Regulation, if it is seeking general applicability and is directed at European workers and employers; and a Decision if it is seeking direct application, but only to workers and employers affiliated to the signing organisations.

— Five, that the selection of one standard or another will also depend on the legal base or Community power of reference expressed in an article of the TEC that gives the upholds the granted support<sup>58</sup>.

## 4. ORDINARY AGREEMENTS

### 4.1. Phenomenology

The debate about the possibility of their existence, begun not so long ago<sup>59</sup>, is now resolved by the presence of many European col-

<sup>58</sup> "The application of the Agreement contributes to the realization of the objectives laid out in article 136 of the Treaty," states, for example, the preambles to Directives 1999/70/EC, referring to the framework agreement on fixed-term work and 1999/63/EC, regarding the sector Agreement on the working time of seafarers. "The application of the agreement contributes to the realization of the objectives envisaged in article 1 of the Social Policy Agreement," reads the preamble of Directive 97/81/EC, referring to the Agreement on part-time work, which also cites the principles of subsidiarity and proportionality of article 3B of the Treaty.

<sup>59</sup> For NAVARRO NIETO, F., "La negociación colectiva en el Derecho comunitario del trabajo," *REDT* 102 (2000), 387, the collective agreement that he calls *extra legem*, aside from being possible, does not have to be subjected to the Commission's initiative, given that it is not going to be incorporated into Community legislative

lective agreements, both on the intersectoral and sectoral level. Not only have they emerged spontaneously, without any prodding by the Community, but they have not solicited a Council decision for an accompanying regulation either, despite meeting the Commission's requirements to request it, which we have just mentioned.

As an initial observation with respect to ordinary ECAs, it might be mentioned that their requirements do not necessarily have to be the same as the reinforced ECA. For example, they do not have to see to the protection of small and medium-sized enterprises, nor do the signing parties have to be sufficiently representative, and the legality of their clauses does not have to meet the requirements of Community law. The reason stems from the fact that, although they are indeed European collective instruments, there is still no Community rule about them, so their initial legal identity is that of international contracts subject to national laws applicable at any given time. Save for standards on legal authority contained in European Regulation 44/2001 and the rules on conflict of the laws of the Rome Convention, an ECA signed in Brussels will be subject to Belgium law for certain matters and the national laws of the States where it will have effects for other ones. This is why article 139 expressly points out that when a Community Agreement is not applied based on a Council Decision, it will be done through the social partners' and the Member States' own procedures and practices.

Gorelli, Valverde and Gordillo boil down into four the main technical problems with European bargaining<sup>60</sup>: a) who can be a bargaining subject; b) what bargaining procedure is to be followed; c) what is the imperativeness of this type of agreement; and d) problems of articulation and complementarity between the European agreement and the national regulation.

#### 4.2. Binding force of ordinary European agreements, or common law agreements

The alternative to application via Council decision is application through the social partners' and Member States' own procedures and

procedure. For his part, CASAS BAAMONDE, M. E., "La negociación colectiva europea como institución democrática (y sobre la representatividad de los 'interlocutores sociales europeos')," *Relaciones Laborales II* (1998), pp. 78-9, makes a somewhat more restrictive interpretation of the issue based on the European Court of Justice ruling of 17 June 1998, UEAPME T-135/96.

<sup>60</sup> GÓMEZ GORDILLO, R.; GORELLI HERNÁNDEZ, J. and VALVERDE ASENSIO, A., *Marco laboral y relaciones colectivas en la Unión Europea, Informe al Consejo Económico y Social de Andalucía*, Seville, 2002, pp. 32-3.

practices, as we have seen that article 139 TEC states. The Declaration of the 11 High Contracting Parties of the SPA said in 1992 that this method would consist of developing the content of ECAs through collective bargaining, in accordance with the rules of each Member State, which did not mean that the States had to apply the ECAs directly, transpose them with internal legislation, or modify their own legislation to adapt to them. Developing an ECA through collective bargaining subject to national norms did not seem to have any other sense than to transpose it through national agreements:<sup>61</sup> at the time, there had been no experience with anything different, since the only solid knowledge that could come close was the application of Directives through national agreements, and on the European level there were only the ambiguous processes developed in the Social Dialogue Committee<sup>62</sup>. It was not until years later that the question was raised of whether sectoral ECAs were possible, or if they were restricted by the Social Policy Agreement, to which the Commission was forced to answer as late as 1998 that nothing in this Agreement prevented it, either as a supplement to interprofessional agreements or as independent agreement for the sector in question<sup>63</sup>. With such little bargaining experience, it is more than likely that both the partners as well as the Commission were thinking about general or framework agreements, as ambiguous as the Directives until then, only a bit more than joint statements and opinions made by the parties in the Val Duchesse dialogue and in sectoral committees. A basket with so few straws would be incapable of developing on its own without the support of a Directive, being the only possible alternative reinforcement to make the national agreements reach the employers and workers.

Under such restrictions, it is surprising that the Commission was open-minded enough to foresee the bargaining explosion that would come immediately after, and that was able to address it in a sustainable way. As early as 1993, its Communication on applying protocol to social policy<sup>64</sup> went further than a mere *coup de chapeau* to independent bargaining and provided the right setting to say that, if the social partners decide "to voluntarily apply" the ECA, "the terms of

<sup>61</sup> ARRIGO, G., *Il diritto del lavoro dell' Unione Europea*, vol. I, Giuffrè, Milan, 1998, p. 188.

<sup>62</sup> "The most active dialogue at cross-industry level has in recent years taken place within the Social Dialogue Committee where the three cross-industry organisations of general vocation, UNICE, CEEP and ETUC, conduct their autonomous dialogue," read the *Communication Adapting and Promoting the Social Dialogue at Community Level*, cited, p. 13.

<sup>63</sup> *Communication on Adapting and Promoting*, cited, p. 14.

<sup>64</sup> *Communication on Application of Protocol on Social Policy*, cited, p. 17.

said agreement will be binding for its members, and will affect them only, and only in accordance with their own practices and procedures in their respective Member States." The European Commission's manifesto could not be more clear or precise. Even the hasty limitation evident in the Declaration of the 11 Contractual Parties, of development through national agreements, is discreetly discarded in favour of a much broader expression, the voluntary application of ECAs, without specifying whether a second bargaining phase will be necessary on the national level or not. In the Declaration it is only emphatically stated that they will not have any sort of Community prerogative, such as, especially, *erga omnes* extension to all employers and workers in the Union. If in its diverse Communications on social dialogue, the Commission has established a series of requirements and effects, nothing said in them is applied to independent, free or ordinary ECA. The small legal scheme that has gradually developed along the lines of granting of general applicability is not enforceable for these, which are not going to receive such power, but rather the power that the legislation of each country gives them.

As far as being a common instrument, ordinary ECAs are held to the rules of International Private Law, with one characteristic: they are not any sort of civil contract, but collective contracts, and the initially applicable regulatory block would be the one dedicated to collective bargaining by each Member State. It is difficult for a commitment signed by trade union and employers' organisations on working conditions to be classified any other way in one of the Member States, although theoretically this could occur. Certain countries are very particular when it comes to classifying collective labour agreements, but even for these countries we might suggest a classification to this respect. Thus, Spain requires the intervening organisations to meet a number of conditions, a rather rigid bargaining procedure that involves communicating its start to the labour authorities and specifying its clauses in writing, depositing it in an *ad hoc* registry and publishing it in the official bulletin. However, such conditions are required for collective agreements with *erga omnes* applicability, very officialised since the time of the Franco dictatorship, but not for agreements of limited applicability, which are subject to the basic rules of the Spanish Civil Code. In this sense, practically in all the countries, recognition as an agreement has somewhat different requirements than the ones the EU uses to decide to issue a back-up regulation: the consent of the parties, the valid mandate of the represented parties, a legal regulation consistent with national regulations and perhaps a written form are demanded, and not whether it adapts to EU rules, respect for SMUs or the representative char-

acter of the parties<sup>65</sup>. Nor do the autonomous ECAs have to limit themselves to negotiable subjects indicated by the TEC in its article 137<sup>66</sup>, since the exclusion of issues like wages or unionisation is derived from Community directives and, where applicable, back-up decisions for the related ECAs<sup>67</sup>.

Consideration as collective instruments is accompanied, in many countries, by binding effects over individual employment contracts, in accordance with national law or case law. Throughout Europe the supercontractuality of collective bargaining is recognised with the exception of the United Kingdom.

### 4.3. The direct applicability of ECAs

Some of the ECAs currently in force have specifically indicated the transposition route for national agreements to be applied. As if they were collective directives, they appeal to a second phase of bargaining, this time in each country, to reach workers and employers<sup>68</sup>. I am not going to go into the problem of what happens

<sup>65</sup> The principles of freedom to bargain and mutual recognition, a determining factor in European collective bargaining, in the ruling UEAPME of the European Court of Justice, cited, substitute the recognition of the representativity made by the Commission with a view to the enactment of a reinforcing standard, but it raised other questions analysed by GORELLI HERNÁNDEZ, J., "El diálogo social en la Unión Europea: incidencia en el sistema de fuentes del Derecho," *Temas Laborales* 55 (2000), p. 64, and SANGUINETTI REYNAUD, W., "El papel de la autonomía colectiva en la construcción del espacio social europeo," *Carta Laboral* 35 (2000), p. 9.

<sup>66</sup> Its text has been modified by the Nice Treaty, article 2.9, but in substance it requires a majority to promulgate Directives relating to certain matters, and unanimity for others, also excluding the subjects of wages, unionisation, strike and lockout.

<sup>67</sup> Article 139 TEC remits to article 137 for types of Council approval for back-up decisions and has not been modified by the Nice Treaty to contain those produced in article 137, another example of the "internal analytical misalignment" denounced by DUEÑAS HERRERO, L., *Los interlocutores sociales europeos*, Tirant, Valencia, 2002, 147 *et seq.*

<sup>68</sup> The Framework Agreement on Telework, of 16 July 2002, indicates in its clause 12 that, in the context of article 139 TEC, it will be applied by members of UNICE-UEAPME, CEEP and CES (and its liaison committee EUROCADRES-CEC) "in accordance with the specific procedures and practices for employers and workers in the Member States." In the doctrine that we might call classical, there is no other way of giving the ECA binding applicability that does not involve the backing of a Directive: "Agreements do not have regulatory effectiveness in themselves, in the sense that they do not immediately have a bearing on employment relationships whose conditions they discipline...only as sources of compulsory bonds, to be made effective with consensual measures, so discipline of the agreed working conditions is made by way of the internal contractual right."

when the national instruments do not transpose the content of the ECA, although in my opinion it would be impertinent to think of direct application, of consistent interpretation (Marleasing doctrine) or state liability (Wagner Miret doctrine): as the Communication on Protocol for Social Policy indicates, the applicability of ECAs will result from their own practices and procedures.

But most express this in another way, and the strengthening of European collective bargaining allows us to venture the possibility of direct application, which does not need any intermediary mechanisms. What we might call style clauses in the ECA precisely allude not to application through national agreements, but through European agreements: this here Agreement — repeat the texts — does not limit the social partners' right to enter into agreements, on the appropriate level, even on the European level, that adapt or supplement their provisions so that they take into account the specific necessities of the affected social partners<sup>69</sup>

This has been the situation in Europe for 80 years now, in the first third of the 20<sup>th</sup> century, when collective bargaining is taking root everywhere as the ideal instrument for achieving social peace. A short time before the legislator of each country proclaimed binding application for employment contracts, doctrine had found the legal explanation of "unappealability" in Common Law, especially in Germany and Italy, and had ended up fiercely defending two types of explanation: either the signing parties represented the will of the workers and employers according to the conferred mandate (theory of the mandate), or they did so by virtue of their belonging to the signing association (theory of association), but of course they had to accept what was agreed in their name, if it was outside of the granted pow-

(SCHNORR VON CAROLSFELD, *op. cit.*, p. 330, interpreting article 4.2 SPA). "That is, in that case the Community collective agreement would continue to be a recommendational framework agreement, without any sort of legal effects, its application dependent on the inclusion of its content in the national collective bargaining of each Member State, in accordance with its respective regulatory legislations" (COLINA, M.; RAMÍREZ, J. M. and SALA, T., *Derecho Social Comunitario*, cited, p. 560. Under current law, says ZACHERT, U., "Europäische Tarifverträge — von korporatistischer zur autonomer Normsetzung?", in VV.AA., *Tarifaufonomie für ein neues Jahrhundert* (Festschrift Schaub), Beck'sche, Munich, 1998, p. 827, European agreements lack immediate applicability and require transposition via national organisations. For this eminent specialist, the mandate to bargain conferred by national organisations can harm — at least in Germany — the constitutional protection of collective autonomy.

<sup>69</sup> Framework ECA of 14 December 1995, on parental leave, clause 4; Framework ECA of 6 June 1997, on part-time work, clause 6; Framework ECA of 18 March 1999, on fixed-term work, clause 8.

ers<sup>70</sup>. The key concept in both positions was the representation conferred to bargain and acquire commitments in the name of, respectively, the workers and the employers.

Well then: the worker and the employer join an organisation, which directly signs an agreement or delegates another organisation to do so on a higher level. Those that sign a national agreement crown a line of representations that connects them to the bases. One step higher up, the European collective agreement connects its signing parties with the European bases through the chain of affiliations. Under these premises, is it totally necessary for a national federation affiliated to the signing organisation of the ECA to bargain a collective agreement to ratify its conformity with it? My answer is: not if the mandate conferred to the European organisation is clear.

When presented with a case soliciting compliance of an ECA, the local court will have to examine several aspects. Let us suppose the question is the application of clause 9 of the Framework agreement on Telework, which says that the employer will allow the teleworker to meet with his or her colleague on a regular basis and access company information<sup>71</sup>. As an international agreement subject to the Rome Convention of 19 June 1980<sup>72</sup>, on legislation applicable to contractual obligations, the judge will have to prove the validity of the contract according to the legislation chosen by the parties (if this choice has not been expressed, the country with which they have the closest ties) as well as the agreement's applicability to the alleged place and subjects, which involves a judgment of its validity as a collective instrument in their own country — especially, respect for rules of public order — when what has been signed binds the parties of the lawsuit<sup>73</sup>.

<sup>70</sup> I have developed this argument in greater detail in my article "¿Son 'meras recomendaciones' los acuerdos colectivos europeos?" in *Relaciones Laborales*, vol. I (1998), pp. 298-317.

<sup>71</sup> A future example: as clause 12 of the same Agreement indicates, "its application will be made in the three years following the signing of the agreement," that is, no later than 16 June 2005.

<sup>72</sup> The contractual capacity of signing associations is governed, in my opinion, by the Agreement on recognition of the legal status of foreign companies, associations and foundations, Hague Conference on International Private Law, 1 June 1956.

<sup>73</sup> Useful for this is CARRILLO DEL POZO, L. F., *Alegación y prueba del Derecho extranjero en el ámbito laboral y tutela judicial efectiva*, REDT 111 (2002), 451 *et seq.*; LUJÁN ALCARAZ, J., "La interpretación y aplicación del Derecho Comunitario por el juez español: la cuestión prejudicial en el orden social", *Aranzadi Social* 12 (1999), 9 *et seq.*; FERNÁNDEZ DOMÍNGUEZ, "Competencia judicial internacional y la Ley del contrato de trabajo en las relaciones internacionales", *Actualidad Laboral* III (1991), 533 *et seq.* On the subsidiary application of the *lex fori* for

It is pointless to say that the ECA only binds the affiliates<sup>74</sup>, that is, that it will be regarded as a collective agreement of limited applicability. In Spain the ECAs signed by CES and UNICE, organisations to which the most representative national head offices belong, would have general applicability if they did not lack other requirements, such as registration and publication in the official bulletin<sup>75</sup>, unless one of the following conditions had been met: either they were registered and published officially or at the request of a party<sup>76</sup>, or if the local judge put the ECA on the level of a national agreement, just as the European citizen is on the same level as the national citizen for labour issues.

The doctrine has raised another specific question in terms of the application of the ECAs, especially because they can serve to lower the levels reached by agreements in force<sup>77</sup>. For that reason, Zachert proposes a special formulation of the most favourable standard principle, by virtue of which the ECA could only establish minimum conditions<sup>78</sup> opposed to national agreements. As far as Spain goes, given that an ECA of direct application is normally going to be considered as an agreement with limited applicability, the principle of the most favourable standard acts against agreements of general applicability, so the one with the better level of conditions for workers would prevail.

lack of accreditation of the foreign law, SSTC 33/2002 of 11 February, and TS of 22 May 2001 (AR 6477).

<sup>74</sup> In countries like Spain, where there is no rule or common law doctrine on application when only one of the parties belongs to a signing organisation, the local court can do little except declare the ECA applicable, as neither by the conferred mandate nor by the representation held can it bind an employer or worker who has not shown his or her consent to it. Of course in Labour Law there are more measures of direct action to obtain application of the agreed terms.

<sup>75</sup> Similarly, PÉREZ DE LOS COBOS, *El Derecho Social Comunitario*, p. 148: the ECA is contractual in nature and is an extra-statutory agreement, but if at the European bargaining table the most representative Spanish organisations were represented and they had complied with the requirements laid out in articles 87 *et seq.* ET, the agreement would have *erga omnes* or statutory validity in Spain.

<sup>76</sup> Article 2.f of Royal Decree 1040/1981 of 22 May indicates as the object of registration in the agreement registry, "any other agreement, arbitration award or pact that has the legal effects of an agreement. Article 2.c also requires cross-industry agreements to be registered and on concrete matters of article 83 of the Workers' Statute, which refers to agreements drawn up by the most representative national or regional organisations, so that they can be considered as such to the ECAs, when said organisations are represented in them. The response would be different if article 83 strictly alluded to agreements signed on a national or regional level.

<sup>77</sup> This is the fear shown in Italy by ARRIGO, G., *A proposito della comparazione*, pp. 69 *et seq.*

<sup>78</sup> Europäische Tarifverträge, p. 827.

## 5. EUROPEAN ENTERPRISE AGREEMENTS

Without the stir produced by the intersectoral and sectoral ECA, the multinational enterprise agreements subject to the Directive 94-45-EC have flooded the European space in a short time, and will probably constitute in the near future the real channel through which continental industrial relations take shape. In principle referring to the creation of European works councils or alternative formulas, the matters assigned as the competencies of these committees is leading to important agreements with the management of multinational companies<sup>79</sup>. Their importance is proven by the swift appearance of ECJ doctrine in several rulings, of which we are interested in the one about Luxembourg: in the ECJ ruling of 21 October 1999, *Commission v. the Grand-Duchy of Luxembourg C-430/98*, the Member State defended itself of the accusation of not having duly transposed Directive 94/45/EC, saying that it had entrusted its application to collective bargaining and that most of the affected multinational firms had signed European works council agreements, except one or two of them, for which it had not deemed it necessary to enact a guaranteeing law. The ECJ found that precisely for this reason, the transposition of the Directive had not been totally safeguarded, and ruled against Luxembourg.

How these enterprise agreements fit in the context of European bargaining is one of the issues that remains to be settled. The Commission's Communications on social dialogue allude to intersectoral and sectoral agreements, but not to those of a lower level<sup>80</sup>.

The appropriate place to debate these problems is in the chapter of this book on enterprise bargaining, to which I refer.

<sup>79</sup> "Particularly with respect to mobility, pensions and equivalency of qualifications," says the Communication on European Social Dialogue of 26 June 2002, p. 11.

<sup>80</sup> It will have to be examined whether an agreement signed between social partners, representatives of certain occupational categories or sectors, is sufficient basis for the Commission to suspend its legislative action, says the Communication on Protocol for Social Policy of 14 December 1993, p. 15. However, PÉREZ DE LOS COBOS, *El Derecho Social Comunitario en el Tratado de la Unión Europea*, cited, pp. 157-8, considers that article 4 of the SPA (now article 139) is a precarious framework, but a framework after all, for regulating these European enterprise agreements.