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# The social dialogue as a source of EU legal acts – past performance and future perspectives.

Aukje A.H. van Hoek

## 1 Introduction

The social partners enjoy a special position in EU law. At the EU level, organizations of employers and workers are privileged stakeholders within the system of information and consultation regarding EU social policies. They may enter into negotiations, leading up to contractual relations, which may in turn be transformed into EU law by Council decision. At the national level, social partners may be responsible for implementation of EU law, but may also jointly or on their own accord be held accountable for violations of the Treaty provisions on non-discrimination and freedom of movement.

Both the TFEU provisions, the EC and the ECJ recognize the (de jure and/or de facto) regulatory function of the social partners, both at national and European level. Hence, it makes sense to study the role of the social partners as EU legal actors in the context of the current course / book. But studying the role of private actors as regulators poses a challenge, both with regard to the issue of definition (what exactly is meant by ‘private regulation’?) as to the question of legitimacy. On both topics the literature is immense and cannot even be summarized here. Hence the goals of this contribution can be no more than modest. What I aim to do, is first to provide an overview of the role of social partners in EU law. It will be concluded that EU law does recognize the regulatory role of the social partners, but provides neither a legal nor a fully developed conceptual framework (§ 2). The second point to be addressed concerns the output of the social dialogue at EU level (§ 3). Here the conclusion will be that the social partners fulfill a variety of functions, both as stakeholder and co-regulator. However, only a small percentage of the documents produced in the social dialogue have the status of collective agreement. It is the latter group which is most interesting from the point of view of regulation. Hence in the next sections, the route from agreement to binding decision is analyzed. How do the activities of the social partners interact with the EU legislative architecture (§ 4)? Can these acts be measured by the existing model(s) of good governance at EU level (§ 5 and 6).

The question is topical as there is currently a debate on the role of the Commission with regard to the procedure of Article 155 TFEU. This debate is triggered by the refusal of the Commission to put a collective agreement entered into by the social partners in the hairdressing sector before Council. The refusal was part of the Refit package in which the Commission announced its strategy to reduce red tape.<sup>1</sup> Hence, the result of negotiations between the social partners was tested against the current

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<sup>1</sup> European framework agreement of 26 April 2012 between Coiffure EU and UNI Europa Hair & Beauty on the protection of occupational health and safety in the hairdressing sector. See inter alia [http://corporateeurope.org/sites/default/files/attachments/red\\_tape\\_crusade.pdf](http://corporateeurope.org/sites/default/files/attachments/red_tape_crusade.pdf) and

policy agenda of the Commission. This contribution puts that decision in a wider perspective in order to assess its implications for the future (§ 7).

## 2 Social partners in EU law – not just any stakeholder

The history of association building and collective bargaining at EU level spans well over half a century by now.<sup>2</sup> A first recognition of the social partners as relevant actors at the European level is to be found in the now defunct Treaty on the European Coal and Steel Community of 1952, in which a Consultative Committee brought together representatives of employers', workers' and consumers' organizations. The 1958 Rome Treaties established an advisory Economic and Social Committee which also gathered representatives of various categories of economic and social activities. During the following years, several joint advisory committees were created by the European Commission to give advice on social and employment aspects in specific sectors.<sup>3</sup> These developments enabled the social partners to assume their role as privileged stakeholders in the consultation process.<sup>4</sup> The social partners are currently active in a myriad of consultation and decision making bodies at EU level, ranging from the Economic and Social Committee, the European Social Fund and the Standing Committee on Employment to the Management Board of the European Center for the Development of Vocational Training and the Expert Committee on Transnational Company Agreements.

An important starting point for the official recognition of collective bargaining at EU level is to be found in the Single European Act of 1986, followed by the Social Charter of 1989. These instruments conferred a duty on the Commission to promote social dialogue at EU level and specifically acknowledged that this dialogue may lead to 'relations based on agreement' c.q. 'contractual relations'. The text of the relevant provisions was prepared by the social partners themselves in what became known as the Val Duchesse dialogue: the cross-sectoral social dialogue which first took place at Val Duchesse in January 1985.<sup>5</sup> In 1991, the social partners reached an agreement on both consultation and collective bargaining which was introduced almost verbatim into EU law by the Treaty on European Union and can now be found (in a slightly altered format) in Article 154 and 155 TFEU.<sup>6</sup>

Article 154 (ex Article 138 TEC) obliges the European Commission to consult with management and labour both as to the general direction of any Union action in the social policy field and on the content of any proposal to be submitted. Hence, on any proposed EU action in this field, the social partners have

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[http://ec.europa.eu/unitedkingdom/press/press\\_releases/2014/pr1409\\_en.htm](http://ec.europa.eu/unitedkingdom/press/press_releases/2014/pr1409_en.htm). all websites were last visited on 4 March 2015.

<sup>2</sup> C. Barnard, *EU Employment Law* (2012), at 711; B. Bercusson, *European Labour Law* (2nd edition, 2009), at 126; T. Treu, 'European Collective Bargaining Levels', in P. Davies *et al.* (eds.), *European Community Labour Law: Principles and Perspectives, Liber amicorum Lord Wedderburn of Charlton* (1996) 169-187, at 171.

<sup>3</sup> Barnard, *supra* note 2, at 711. The structure of the sectoral social dialogue was revised in 1998. See Communication from the Commission of 20 May 1998 adapting and promoting the social dialogue at Community level, COM(98)322 final and Commission Decision 98/500 of 20 May 1998 on the establishment of Sectoral Dialogue Committees promoting the Dialogue between the social partners at European level, OJ 1998 L 225/27.

<sup>4</sup> Barnard, *supra* note 2, at 711.

<sup>5</sup> *Ibid.*, at 712.

<sup>6</sup> Bercusson, *supra* note 2, at 146 ff.

to be consulted a least twice.<sup>7</sup> On the occasion of this consultation, management and labour may inform the Commission that they prefer to enter into negotiations amongst themselves with the object to reach agreement on the issue put forward for regulation.<sup>8</sup> The period available for negotiations, which is set at nine months, may be extended by joint decision of the Commission and the organizations of management and labour concerned.

In Article 155 (ex Article 139 TEC) the TFEU confirms that the dialogue between management and labour may lead to contractual relations, including agreements. The provision further stipulates that 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. In the latter case, the European Parliament has no power of co-decision but is merely informed. Several European directives, with both cross-sectoral and sectoral coverage, are based on such EU collective agreements.<sup>9</sup>

The consultative and co-legislative role of the social partners under Article 154/155 takes place both at the cross-sectoral and the sectoral level. But management and labour also meet at the level of the company. The promotion of social dialogue within the company is part of the European Employment Strategy. The European involvement in this area is based on a theory of corporate governance in which collaboration and joint responsibility replaces a more hierarchical management style.<sup>10</sup> This led to the introduction of information and consultation rights at national level<sup>11</sup>, but also to the introduction of a special consultative body at the European level in transnational companies having subsidiaries in more than one Member State – the European Works Council.<sup>12</sup> The first European Works Council Directive

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<sup>7</sup> In addition, the social sector committees have a privileged position in the preparation of impact assessments as they are to be consulted whenever a proposal may impact significantly on social relations their sector. See European Commission, *Industrial relations report* (2012), at 205.

<sup>8</sup> Barnard, *supra* note 2, at 71 claims that the social partners may only intercept the process at the second stage of consultation. This position is based on the Communication from the Commission of 14 December 1993 concerning the application of the Agreement on social policy presented by the Commission to the Council and the European Parliament, COM(93)600 final, para. 29. For the opposite opinion, see Bercusson, *supra* note 2, at 149-50 and 534. In the material studied, the social partners did intervene at the stage of the second round of consultations.

<sup>9</sup> See below, sections 3 and 4.

<sup>10</sup> Barnard, *supra* note 2, at 658 and Proposal for a European Parliament and Council Directive of 2 July 2008 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast), COM(2008)419 final.

<sup>11</sup> See Council Directive 2001/23 of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ 2001 L 82/16 and Council Directive 98/59 of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, OJ 1998 L225/16.

<sup>12</sup> Directive of the European Parliament and of the Council 2009/38 of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast), OJ 2009 L 122/28. Article 2 lays the threshold for the requirement to establish a EWC at more than 1000 employees within the EU. The undertaking should have at least two establishments in different MS employing at least 150 people each. The signatures of at

was adopted in September 1994, the current directive dates from May 2009.<sup>13</sup> According to Simitis and A. Lyon-Caen ‘the guiding principle behind the European Works Council Directive of 22 September 1994 was to encourage the establishment of multinational companies operating across the Community as centres or sites of industrial relations.’<sup>14</sup> The establishment of a system of information and consultation at the European level has indeed contributed to the establishment of a company based structure for social dialogue which in turn increasingly leads to the conclusion of transnational agreements between management and labour. Though not regulated by EU law,<sup>15</sup> transnational company agreements have become a relevant factor in the governance of transnational companies in Europe and in particular in the management of change within such companies.<sup>16</sup>

In this context, in which the EU legal base for social dialogue is discussed, it’s interesting to note that the EWC Directive attributes a specific norm-setting role to management and labour. The establishment of a European Works Council, the composition thereof and its prerogatives are first and foremost subject to negotiations between management and labour. Only when no agreement can be reached between central management and the ‘special negotiation body’ consisting of workers’ representatives from the national subsidiaries, national law is called upon to regulate the composition and powers of the EWC, subject to a set of supplementary provisions in the EWC Directive itself.<sup>17</sup> Hence the substantive provisions in the EWC provide a background regulation which will only apply in absence of an agreement between management and labour. This system is akin to that of opening clauses in national labour law in which social partners are allowed to deviate from otherwise mandatory provisions by way of collective agreement.<sup>18</sup> Such opening clauses pose a strong incentive for collective negotiations as well as offering the possibility to reach solutions that are specifically adapted to the sector or company concerned. Several directives in the field of labour law allow the national social partners to deviate from

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least 100 employees from at least two different Member States are needed to request the creation of a EWC – Article 1(2) jo Article 5(1).

<sup>13</sup> Directive 2009/38 recast, *supra* note 12.

<sup>14</sup> S. Simitis and A. Lyon-Caen, ‘European Community Labour Law: a Critical Introduction to its History’, in P. Davies *et al.* (eds.), *supra* note 2, at 11.

<sup>15</sup> I. Schömann, ‘Transnational collective bargaining: in search of a legal framework’ in: I. Schömann et al., *Transnational collective bargaining at company level. A new component of European industrial relations?* (2012) 219-232, at 219-220; E. Pataut, ‘Collective agreements in Europe: European Social Dialogue and Contractual Autonomy’, “Collective Agreements in Europe: European Social Dialogue and Contractual Autonomy”, In : J. Basedow et al. (eds.), *Employee participation and collective bargaining in Europe and China*, Max Planck, Mohr Siebeck, 2015, forthcoming; O. Deinert claims that Article 155 TFEU gives binding effect to European collective agreements, but this is a minority opinion. See O. Deinert, *Internationales Arbeitsrecht* (2013), at 80-1 with references.

<sup>16</sup> See the Commission database on transnational company agreements:

<http://ec.europa.eu/social/main.jsp?catId=978> and I. Schömann, ‘Transnational company agreements: towards an internationalisation of industrial relations’ in: Schömann et al, *supra* note 15, 197-217, at 200.

<sup>17</sup> Directive 2009/38 recast, *supra* note 12, Article 7; Barnard, *supra* note 2, at 667; COM(98)322, *supra* note 2, at 21: Following the adoption of the 1994 Directive on the establishment of a European works council, the social partners in the companies concerned concluded more than 400 agreements before it came into force.

<sup>18</sup> For terminology see i.a. Barnard, *supra* note 2, at 714 and Bercusson, *supra* note 2, at 21-22; See S. Sciarra, ‘Collective Agreements in the Hierarchy of European Community Sources’, in P. Davies *et al.* (eds.), *supra* note 2, at 207 for the radically different character of the derogation clause in the EWC directive.

the rules given therein by way of collective agreement or even autonomously set standards.<sup>19</sup> The EWC Directive, however, seems to be the only European instrument given such far-reaching powers to the social partners at union level.<sup>20</sup>

The norm-setting capacity of social partners at the national level is also recognized in primary EU law and the case law of the ECJ. In the 1974 *Walrave v. Koch* judgment the ECJ considered that the ban on discrimination on grounds of nationality would have to apply to all types of regulation at the national level, both private and public, in order to be effective. Hence both the treaty provisions and Article 7(4) of Regulation 1612/68 were deemed to be applicable to collective labour agreements and other 'rules aimed at regulating in a collective manner gainful employment and the provision of services.'<sup>21</sup> This was sometimes referred to as the extended vertical effect of the Treaty provision, emphasizing the role of the social partners as quasi-legislators.<sup>22</sup> On the positive side, the regulatory function of collective agreements is recognized in art. 153(3) of the TFEU where it is stipulated that "A Member State may entrust management and labour, at their joint request, with the implementation of directives adopted pursuant to paragraph 2, or, where appropriate, with the implementation of a Council decision adopted in accordance with Article 155." Accordingly, directives and European level collective agreements transposed into EU law by a Council decision may be implemented by way of national collective agreements. Through this provision EU law recognizes the role of social partners as co-regulators (or even primary rule-makers in certain fields) at the national level. However, as is evident both from the provision of Article 153(3) itself and from the case law of the CJEU, such implementation is only sufficient when the national system of collective bargaining can ensure full and effective coverage of all workers concerned as well as individual remedies in case of breach.<sup>23</sup> In practice this is never the case. Implementation through collective bargaining is invariably accompanied by legislative or administrative measures.

This overview shows that EU law recognizes the regulatory function of social dialogue, both at EU and national levels. Article 143(3) articulates the role of the national social partners in the implementation of EU directives. However, in that case, the Member States retain final responsibility for full

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<sup>19</sup> Compare Bercusson, *supra* note 2, at 22; Barnard, *supra* note 2, at 65 and 714; Sciarra, *supra* note 18, at 206-7 with regard to working time.

<sup>20</sup> Sciarra, *supra* note 18, at 207; Barnard, *supra* note 2, at 668.

<sup>21</sup> Case 36/74, *Walrave and Koch v Association Union Cycliste Internationale and others*, [1974] ECR 1405, para 17. The ECJ later confirmed the horizontal effect of the relevant treaty provisions also with regard to individual employers – Case C-281/98, *Angonese*, [2000] ECR 4139. However, collective agreements and collective action may be considered particularly apt to influence the market freedoms. Compare Barnard, *supra* note 2 at 157; Sciarra, *supra* note 18, at 205-6.

<sup>22</sup> Barnard, *supra* note 2, at 157.

<sup>23</sup> The second full sentence of section 3 provides: "In this case, it [= the Member State] shall ensure that, no later than the date on which a directive or a decision must be transposed or implemented, management and labour have introduced the necessary measures by agreement, the Member State concerned being required to take any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that directive or that decision." Barnard, *supra* note 2, at 70-1; Bercusson, *supra* note 2, at 20 and 541; Sciarra, *supra* note 18, at 197. See also Case 143/83, *Commission of the European Communities v Kingdom of Denmark*, [1985] ECR 427 and Case 235/84, *Commission of the European Communities v Italian Republic*, [1986] ECR 2291; Case C-187/98, *Commission v Greece*, [1999] ECR 7713.

implementation. At the EU level, we find that collective agreements can supplement or replace EU legislation in specific instances. But the latter power is often mediated by way of Council Decision. It is this specific regulatory function which is discussed in more detail below.

### 3 Social dialogue in the EU – an output analysis

Barnard defines collective bargaining as “a process of interest accommodation which includes all sorts of bipartite and tripartite discussions relating to labour problems directly or indirectly affecting a group of workers.” In a more narrow sense the term refers to negotiations between trade union representatives / organizations of workers on one side and employers, whether organized or on an individual basis on the other, which may lead to the conclusion of agreements, which may or may not qualify as legally binding agreements.<sup>24</sup> These definitions already indicate that the outcome of social dialogue may take different shapes and may take on different degrees of legal relevance.

As discussed above, the social dialogue at EU level takes place at different levels of organization. In this it's no different from social dialogue at the national level. The EU Member States differ in the make-up of social dialogue in their country, but generally the dialogue may take place at a cross-sectoral level, encompassing all sectors of the economy, be confined to a specific sector or rather take place within a specific company or group of related companies. In addition, some MS have systems of negotiations both at the national or federal level and at a more local level. The latter distinction is irrelevant for present purposes, but the former is not.

The cross-sectoral and sectoral social dialogue at EU level is closely linked to policy making and regulation at EU level. The outcomes of these types of social dialogue share the characteristics of law in that they claim to be 'generally applicable': the norms contained in EU collective agreements at these levels contain general rules and principles which are meant to apply to an open group of norm addressees. This rule-making capacity is specifically recognized in Article 155 TFEU, which allows the social partners to put their agreement to the Commission for endorsement by Council decision. Only cross-sectoral and sectoral agreements qualify for this type of extension.<sup>25</sup> The scope of application of the norms thus extended is not restricted to cross-border situations, but rather is general in its application.<sup>26</sup> In contrast, the social dialogue within undertakings at the EU level specifically targets transnational undertakings and is closely linked to the activities of the European Works Councils. The agreements entered into, affect the workforce of a specific company or group of companies and do not purport to have a general effect within a sector of economy or on the EU labour market as such. Extension under Article 155 is not possible. Hence, the legal framework for either activity is different and their output is weighed differently.

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<sup>24</sup> Barnard, *supra* note 2, at 709. Compare Bercusson, *supra* note 2, at 127

<sup>25</sup> Treu, *supra* note 2, at 178-9.

<sup>26</sup> However, the social partners may limit the rules to cross-border situations, as they did in e.g. the Agreement of 27 July 2005 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.

The European Commission monitors the outcome of the social dialogue, both at the cross-sectoral and sectoral level and as regards the dialogue within transnational companies.<sup>27</sup> In both cases the output of the social dialogue is characterized by a wide variety in texts and by a degree of unclarity as to their legal status.<sup>28</sup> The texts at sectoral and cross-sectoral level can be subdivided into three different groups.<sup>29</sup> The first group consists of procedural texts relating to the EU social dialogue itself. These may be binding or non-binding in character, but a common characteristic is the reciprocal character and the inter se effect of the content thereof. A second group of texts consists of joint opinions and declarations aimed at EU institutions. These texts are part and parcel of the policy influencing role of the social partners as privileged stakeholders in the political debate. Given this role, their legal character is necessarily non-binding for the addressee. The third and most complex group targets the national level and aims to impact on the policy making and/or legal position of the stakeholders there – government, social partners and/or individual employers.<sup>30</sup> This latter group is the most interesting one for the present debate.

The European Commission, in its reports on social dialogue, subdivides this last group into three different subgroups, depending on their character and the follow-up measures they engender.<sup>31</sup> A first subgroup consists of tools and declarations aimed at the national level. Examples thereof are guides and handbooks explaining the meaning of certain texts, as well as websites and promotional activities meant to support the implementation or enforcement of certain rules or policies.<sup>32</sup> They do not require any particular follow up. The second subgroup consists of process-oriented texts, again aimed at the national level: frameworks of action, guidelines, codes of conduct and policy orientations. These non-binding instruments, which are similar to the soft law instruments of the European Commission itself (as part of the open method of coordination<sup>33</sup>) typically are monitored as to their effect in follow up reports. Lastly, the social partners may enter into agreements that contain rules to be applied to

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<sup>27</sup> The EC maintains a database on social dialogue text at sectoral and multisectoral level (<http://ec.europa.eu/social/main.jsp?catId=521&langId=en>) as well as a database on transnational company agreements (<http://ec.europa.eu/social/main.jsp?catId=978>).

<sup>28</sup> For transnational company agreements, see inter alia the Commission's database on Transnational company agreements <http://ec.europa.eu/social/main.jsp?catId=978> and their main page on TCAs: <http://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPageId=214>. See also Commission Staff Working Document, *Transnational company agreements: realising the potential of social dialogue*, SWD(2012)264 final. For present purposes the company agreements are less relevant and hence will not be further discussed here.

<sup>29</sup> Vademecum, *A Practical Guide for European Social Partner Organisations and their National Affiliates* (2014), available at <http://ec.europa.eu/social/main.jsp?catId=329&langId=en>.

<sup>30</sup> A special case is the Agreement of 19 April 2012 between UEFA, EPFL, ECA and FIFPro Division Europe regarding the minimum requirements for standard player contracts in the professional football sector in the EU and in the rest of the UEFA territory. This agreement is not targeting the national level, but rather aims to impact the policy of UEFA.

<sup>31</sup> See for example Communication from the Commission of 12 August 2004 – Partnership for Change in an enlarged Europe – Enhancing the contribution of European social dialogue, COM(2004)557 final, Annex 2.

<sup>32</sup> See for example the database on posting of workers set up by the social partners and sponsored by the EC <http://www.posting-workers.eu/> and the Agreement of 3 December 2009 between Eurociett and UNI Europa to set up a European Observatory on crossborder activities within the Temporary Agency Work sector (to be found in the EC database on social dialogue texts).

<sup>33</sup> Compare Simitis and Lyon-Caen, *supra* note 14, at 20 and COM(2004)557, *supra* note 31, at 9.

individual employment relations at the national level. In other words: they may enter into EU collective labour agreements. A collective agreement typically contains obligatory provisions dealing with the relationship between the signatory parties themselves and normative provisions aimed at regulating the individual employment relationships in the sector(s) covered by it. It's the latter aspect which turns collective agreements into a system of private regulation.<sup>34</sup> The follow-up on these kinds of instruments is typically the implementation report: where the rules contained therein effectively implemented at the national level?<sup>35</sup>

Hence the output of the social dialogue can be evaluated against different standards. Whose behavior does the instrument seek to affect? Is it inter se, aimed at the EU institutions or rather stakeholders and parties at the national level? The regulatory character of social dialogue is essentially aimed at the national level: it tries to impact on the individual employment relationships in the Member States. But even the instruments aimed at the national level may be quite diverse in character. A first distinction would be between tools and rules: Does the instrument provide tools for implementation and enforcement or does it contain the rules to be implemented or enforced?<sup>36</sup> Finally, even when the instruments contain rules or policy directions, the binding character thereof may differ widely: from merely expressing policy directions, through soft law to hard and fast rules. Only the latter ones represent collective agreements in the narrow meaning of that term.

Under Article 155 TFEU collective agreements may be implemented either according to the industrial relations traditions of the Member States or by binding Council decision. This puts collective agreements on the axis between upward and downward orientation: in order to impact on national employment relations, the social partners may directly involve the law-making architecture of the EU institutions. But also the opposite is true: the EU institutions may want to use the social partners as a means to further their policy goals. Collective bargaining at EU level can be used to bypass deadlocks in the legislative procedure.<sup>37</sup> A recent case in point was the attempt to revise the Working time directive by way of collective agreement after the ordinary legislative procedure failed to render a positive result.<sup>38</sup>

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<sup>34</sup> Treu, *supra* note 2, at 177-8.

<sup>35</sup> See for example European social partner, *Report on the implementation of the European autonomous framework agreement on work-related stress*, adopted at the social dialogue committee of 18 June 2008. Available at the Commission database on social dialogue.

<sup>36</sup> See for an example of the former: J. Pillinger, *The Toolkit Demographic change, age management and competencies in the gas sector in Europe* (2009); the Agreement between Eurociett and UNI Europa, *supra* note 32 (both to be found in the Commission database).

<sup>37</sup> See for a description of the historical development of the European social dialogue as a reaction to the UK deregulatory agenda from 1979 onwards: Bercusson *supra* note 2 at 126-8.

<sup>38</sup> See <http://ec.europa.eu/social/main.jsp?catId=706&langId=en&intPagId=205>. The legislative attempt was made in 2009: <http://www.europeansundayalliance.eu/site/law/article/68.html>. Negotiations between the social partners took place in 2012, but these likewise failed and were officially abandoned in 2013. <http://www.worker-participation.eu/EU-Social-Dialogue/Latest-developments/Failure-of-the-revision-of-the-working-time-Directive-negotiations>. In December 2014 a new round of consultations were opened: <http://www.age-platform.eu/latest-news-en-gb-6-1/2489-commissions-launches-consultation-on-the-working-time-directive> and <http://ec.europa.eu/social/main.jsp?catId=333&consultId=14&visib=0&furtherConsult=yes&langId=en>. For a similar strategy employed in the '80s, see Barnard, *supra* note 2, at 761.

The two implementation routes create yet another distinction within the group of collective agreements which corresponds to a division in the Commission data base on social dialogue texts. At this point in time<sup>39</sup>, the database contains twelve collective agreements which were nominated by the social partners for conversion into a Council decision.<sup>40</sup> Eight agreements are categorized by the Commission as ‘autonomous agreements’. In the context of the Commission database this term refers to the manner of implementation, rather than to the question whether negotiations were a response to a legislative initiative of the Commission or autonomous from the outset.<sup>41</sup> The framework agreement on telework, for example, is deemed to be an autonomous instrument, though the social partners themselves explicitly state that the initiative for the proposal did lie with the Commission.<sup>42</sup> Reversely the hairdressers’ agreement figures in the Council decision category although this agreement is autonomous in origin. However, it was put before the Commission in an attempt to make it binding by Council decision – a process which was halted by the Commission in the refit-project.

The EU database further distinguishes Codes of Conduct (10), frameworks of action (9); guidelines (35); declarations (110); joint opinions (450); policy orientations (18); procedural texts (47, consisting mainly of rules of procedure for the social dialogue itself plus 1 Memorandum of Understanding on the development and maintenance of an online risk assessment tool); ‘tools’ (84) and follow up reports (41). In 2010 the sectoral dialogue alone had produced more than 500 texts of varying legal status.<sup>43</sup> Only eleven of those are labelled as sectoral collective agreements.

It may be concluded from this overview that the strictly regulatory instruments in which social partners formulate rules that are meant to be binding at the national level, constitute a small minority within the multitude of outcomes of the social dialogue. This allows for a more detailed description of both the interaction between EU collective agreements and the legislative framework of the EU and the route these instruments have to follow in order to be implemented by way of Council Decision.

#### **4 Interaction between EU legislation and EU collective bargaining**

As was mentioned above, the Commission data base distinguishes between autonomous agreements and Council decision agreements. The distinction employed by the Commission is crucial in understanding the way the agreement is transposed into the national legal system (by law, government decree and/or national collective agreements). And, as we will see below, the distinction also predicates the European governance tests the agreement has to pass. However, on closer scrutiny, the interaction between the social dialogue and the EU legislative infrastructure is much more complex than that. To fully understand the role of social partners within the EU regulatory framework, it is necessary to take a closer look at those interactions.

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<sup>39</sup> The inventory is based on the content of the website in February 2015.

<sup>40</sup> Ten of those are currently implemented in the form of a directive, two are is pending.

<sup>41</sup> The origin of the agreement does impact the procedure for making it binding through Council decision: see below.

<sup>42</sup> Framework agreement of 16 July 2002 between ETUC, UNICE, UEAPME and CEEP on telework.

<sup>43</sup> [http://europa.eu/rapid/press-release MEMO-10-354\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-10-354_en.htm?locale=en).

An interesting subgroup within the group of Council decision agreements consists of the sectoral agreements on working time. The database on social dialogue contains four such agreements (out of a total of twenty collective agreements) all of which relate to working time in international transport. The original Working time directive of 1994 excluded the transport sector from its scope of application.<sup>44</sup> The 2000 revision of the directive did extend the scope to include in particular the office workers of transport companies, but only partially applied to mobile employees.<sup>45</sup> Moreover, the directive contained a provision which opened up the possibility to take special measures for specific sectors. This possibility was retained in the recast directive 2003/88. Article 14 thereof specifies that “This Directive shall not apply where other Community instruments contain more specific requirements relating to the organisation of working time for certain occupations or occupational activities.”

Before the 2000 extension took place the social partners in merchant shipping concluded an agreement on working time of seafarers, which was put into effect by means of a Council directive in 1999.<sup>46</sup> When the working time directive was extended to transport workers in 2000 (taking effect in 2003), merchant shipping was explicitly excluded from the scope of application of the directive. This exclusion is retained in the current Working time directive (recast) 2003/88.<sup>47</sup> In reaction to the 2000 extension, social partners in the different transport sectors started negotiations in order to reach specific agreements for their sector. Between 2000 and 2012 they concluded agreements for civil aviation (2000), interoperable cross-border services in the railway sector (2004) and inland waterways (2012) respectively.<sup>48</sup> All of these were implemented by way of EU directive<sup>49</sup> and rely on Article 14 WTD for their priority over the

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<sup>44</sup> Council Directive 93/104 of 23 November 1993 concerning certain aspects of the organization of working time, OJ 1993 L 307/18, Article 1(3). See also Barnard, *supra* note 2, at 535. Special rules for the transport sector already existed before the first working time directive was adopted. These measures were based on the transport title of the EC treaty. See e.g. Council Regulation 3820/85 of 20 December 1985 on the harmonization of certain social legislation relating to road transport, OJ 1985 L370/1.

<sup>45</sup> Directive 2000/34 of the European Parliament and of the Council of 22 June 2000 amending Council Directive 93/104/EC concerning certain aspects of the organisation of working time to cover sectors and activities excluded from that Directive, OJ 2000 L 185/41.

<sup>46</sup> Council Directive 1999/63 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 (FST), OJ 1999 L 167/33.

<sup>47</sup> See preamble paragraph (12) and Article 1.

<sup>48</sup> Implemented by Council Directive 2000/79 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), OJ 2000 L 302/57 and Council Directive 2005/47 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, OJ 2005 L 195/15.

<sup>49</sup> The Council formally accepted the European Agreement between the European Barge Union (EBU), the European Skippers Organisation (ESO) and the European Transport Workers' Federation (ETF) concerning certain aspects of the organisation of working time in inland waterway transport on December 19, 2014. See procedure file 2014/0212/NLE.

rules of the general directive. Transport by road likewise has a special regime, which is however contained in a directive adopted under the normal legislative procedure.<sup>50</sup>

The negotiations on the agreements for both seafarers and civil aviation were started after a second stage consultation by the European Commission.<sup>51</sup> At that stage of the legislative procedure the Commission has already decided it is necessary to take action at EU level. The agreement in the rail sector was not preceded by a two stage consultation, but nevertheless had the full support of the Commission. The agreement for inland waterways in contrast came into being on the initiative of the social partners themselves, hence independent of any prior analysis as to subsidiarity, proportionality and political priority.<sup>52</sup> In the case of transport by road the deviation from the general directive took the form of a 'normal' directive after the negotiations between the social partners had failed.<sup>53</sup> Accordingly, the sectoral social dialogue plays a crucial role in formulating special sectoral regimes. However, for the effectiveness of these special rules the social partners depend on the Commission and Council. The agreements themselves are not 'Community instruments' in the meaning of Article 14 WTD.<sup>54</sup> And, as will be discussed in more detail below, when the initiative of the agreement rests entirely with the social partners, the Commission may scrutinize the result more intensely for appropriateness.

There are two agreements which relate to occupational safety and health. This is again an area in which there is extensive pre-existing legislation at the EU level.<sup>55</sup> In this arena, the social partners in the health care sector adopted a Framework agreement on prevention from sharp injuries in the hospital and health care sector, which was converted into a Directive in 2010.<sup>56</sup> The agreement was a response to an initiative of the European Parliament, which adopted a resolution in 2006 calling upon the Commission to submit a proposal on this issue. The negotiations started in 2008, after extensive two stage consultations.<sup>57</sup> In contrast the hairdressers' agreement of 2012<sup>58</sup> was entered into at the initiative of

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<sup>50</sup> Directive 2002/15 of the European Parliament and of the Council of 11 March 2002 on the organisation of the working time of persons performing mobile road transport activities, OJ 2002, L 80/35.

<sup>51</sup> Council Directive 1999/63, *supra* note 46, preamble (5)-(7).

<sup>52</sup> Proposal for a Council Directive of 7 July 2014 implementing the European Agreement concluded by the European Barge Union (EBU), the European Skippers Organisation (ESO) and the European Transport Workers' Federation (ETF) concerning certain aspects of the organisation of working time in inland waterway transport, COM(2014)452 final, at 5.

<sup>53</sup> Directive 2002/15, *supra* note 50, preamble paragraph (3).

<sup>54</sup> See COM(2014)452, *supra* note 52, at 9, Sciarra, *supra* note 18, at 200-1 and W. Däubler, 'Instruments of EC Labour Law', in P. Davies *et al* (eds), *supra* note 2, 151-167, at 164-5. However, the UK house of Commons library Standard Note SN/BT/1377 seems to put directives and special agreements at a par with regard to Article 14 WTD.

<sup>55</sup> Notably Council Directive 89/391 of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ 1989 L 183/1 (European Framework Directive on Safety and Health at Work) and the directives that build upon this framework: see

<https://osha.europa.eu/en/legislation/directives/the-osh-framework-directive/the-osh-framework-directive-introduction> and K. Riesenhuber, *European Employment Law* (2012), at 365-369.

<sup>56</sup> Council Directive 2010/32 of 10 May 2010 implementing the Framework agreement on prevention from sharp injuries in the hospital and health care sector concluded by HOSPEEM and EPSU, OJ 2010 L134/66.

<sup>57</sup> [http://europa.eu/rapid/press-release\\_IP-10-243\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-10-243_en.htm?locale=en) and Proposal for a Council Directive of 26 October 2009 implementing the Framework Agreement on prevention from sharp injuries in the hospital and healthcare sector concluded by HOSPEEM and EPSU, COM(2009)577 final.

<sup>58</sup> Hairdressers Agreement, *supra* note 1.

the social partners themselves without support from the Commission. Hence there were no prior consultations within the EU legislative framework as to the necessity of EU action in the field and no impact assessment.

In the area of working time, collective agreements are used to develop specialized regimes within the context of a pre-existing European legislative framework. Also agreement in the area of occupational safety and health operate within such a pre-existing framework. However, in the case of the Working time directive the specialized regimes constitute a deviation from the rules of the directive, in order to take the special characteristics of the sector into account. The agreements on occupational safety and health do not detract from the obligations contained in the relevant framework directive. They rather add specific duties or provide for specific interpretations of and ways to implement certain already existing duties.<sup>59</sup>

A different role is fulfilled by the agreements in which special European diplomas and/or certificates are created. Such agreements exist(ed) in both the hairdressing sector and with regard to locomotive drivers in the railway sector. In these cases, the social partners developed a common licensing model in order to enhance free movement of persons and services. But that's about where the similarity between the two ends. The European agreement on the Implementation of the European Hairdressing Certificates 2009 is autonomous in both start and implementation and does in not in any way refer to or built upon a European legislative framework.<sup>60</sup> The negotiations on the CER-ETF Agreement on a European Locomotive Driver's License 2004<sup>61</sup> started at the initiative of the social partners, but the social partners had intended the agreement to be implemented by Council Decision.<sup>62</sup> Instead, the voluntary system was largely replaced by a directive,<sup>63</sup> which however did by and large follow the outline provided by the Agreement.<sup>64</sup> The Commission explains its choice of not simply submitting the Agreement under Article 155 TFEU (then Article 139 ECT) by the fact that, contrary to the agreements on working time which are fully covered by Article 153 TFEU, the question of licenses relates to safety and interoperability of the railway system. According to the Commission this calls for a clear EU legislative framework which should

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<sup>59</sup> Article 16 sub 3 Directive 89/391, *supra* note 55: The provisions of this Directive shall apply in full to all the areas covered by the individual Directives, without prejudice to more stringent and/ or specific provisions contained in these individual Directives.

<sup>60</sup> <http://ec.europa.eu/social/main.jsp?catId=521&langId=en&agreementId=5126>. The certificate does however fit into the system of Directive 2005/36 of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, OJ 2005 L 255/22, consolidated text Eurlex 2005L0036 — EN — 17.01.2014 — 010.003. This directive is not based on the social policy paragraph of the TFEU.

<sup>61</sup> <http://www.cer.be/publications/charters-and-agreements/5/> - Agreement of 27 January 2004 between the European Transport Workers' Federation (ETF) and the Community of European Railways (CER) on driving license.

<sup>62</sup> *Ibid.*: "The Agreement shall be implemented by the CER-affiliated companies pending a European Directive. For the part covering the scope of this Agreement, both parties want the Directive to be written on the basis of this Agreement."

<sup>63</sup> Directive 2007/59 of the European Parliament and of the Council of 23 October 2007 on the certification of train crews operating locomotives and trains on the railway system in the Community.

<sup>64</sup> The Commission proposal formulates the interaction between the directive and the agreement a bit differently and states that the Agreement was established in anticipation of the adoption of the directive. See Proposal for a Directive of the European Parliament and of the Council of 3 March 2004 on the certification of train crews operating locomotives and trains on the Community's rail network, COM(2004)142 final.

be fully coordinated with the other elements of the European legislative framework regarding interoperability and safety of railway networks. Hence the choice for a directive of the European Parliament and the Council, adopted under the normal legislative procedure and based on the competences related to transport policy.<sup>65</sup> After adoption thereof the social partners issued a statement on the interaction between the two instruments, both of which were deemed to apply, albeit on different grounds.<sup>66</sup>

Yet another role is performed by the agreements which implement ILO Conventions. The conventions of the International Labour Organisation are atypical in that they are concluded in a tripartite organisation, in which also management and labour are represented. The conventions thus adopted require the member states, within the limits of their jurisdiction, to ensure full implementation of the standards contained therein, through national laws or regulations, through applicable collective bargaining agreements or through other measures or in practice.<sup>67</sup> Hence, implementation by way of collective agreements is already part of the ILO framework.<sup>68</sup> In 2006 the General Conference of the ILO adopted the Maritime Labour Convention.<sup>69</sup> This highly complex Convention regulates a variety of issues relating to employment in merchant shipping, ranging from social security and repatriation rights to working time, on board recreational facilities and holiday allowances. The structure of the MLC is unique in its layered set-up of Articles, Regulations and Standards, which carry with them different obligations for the contracting states.<sup>70</sup> Due to its wide ranging subject matter, both the Member States and the EU are involved in its implementation.<sup>71</sup> Implementation through an EU collective agreement was seen as a way to smoothen the ratification process. The social partners reached such an agreement in 2008. Their agreement was converted into a directive in 2009 and entered into force simultaneously with the Maritime Labour Convention itself on 20 August 2013.<sup>72</sup> Both the agreement and the directive are limited in scope: they only implement the binding provisions of the Convention as it was not deemed possible to also include the non-binding standards in a directive.<sup>73</sup> Moreover, they only implement the

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<sup>65</sup> Article 71 ECT (= Article 91 TFEU). It is interesting to note that the purpose of both agreements and of the directive is also related to free movement. Compare the legal base for the directive on the recognition of professional qualifications. This was, however, not used as a separate argument by the Commission for not using the procedure of Article 155 TFEU. On the choice of legal basis for measures having social policy implications, see also Bercusson, *supra* note 2 at 145.

<sup>66</sup> <http://www.cer.be/publications/charters-and-agreements/5/> - Agreement on driving licenses, 1436 joint declaration.

<sup>67</sup> See e.g. Article IV (5) MLC.

<sup>68</sup> See ILO Convention C144 of 21 June 1976 concerning tripartite consultations to promote the implementation of international labour standards.

<sup>69</sup> <http://ilo.org/global/standards/maritime-labour-convention/text/lang--en/index.htm>.

<sup>70</sup> Memorie van Toelichting (explanatory note to the implementation of the MLC in the Netherlands) *Kamerstukken // 2010/2011 32 534 nr 3*, at 1.

<sup>71</sup> Hence, it's a mixed agreement.

<sup>72</sup> Council Directive 2009/13 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, OJ 2009 L 124/30, preamble (9) and Article 7.

<sup>73</sup> Memorie van Toelichting, *supra* note 70, at 2. The standards are not fully binding but do carry obligations as they operate on a 'comply or explain' basis.

provisions which deal with topics covered by Article 153 TFEU. Both the agreement and the directive contain amendments to the agreement (and ensuing directive) on working time of seafarers discussed above.

Work in fishing is excluded from the MLC. However, in 2007 a special Work in Fishing Convention was concluded in the context of the ILO. As (parts of) this convention fell within the exclusive competence of the EU<sup>74</sup>, the Council authorized the Member States to ratify the convention on behalf of the EU in 2010.<sup>75</sup> Based on the experience with the implementation of the MLC, the Commission invited the social partners to reach an agreement on the implementation of the ILO Convention in the EU Member States.<sup>76</sup> In May 2012 an agreement was signed in the presence of Commissioner Damanaki.<sup>77</sup> In the following year this text was revised to make it compatible with the *acquis communautaire* and the social dialogue provisions in the TFEU and to accommodate the expectations expressed by the Commission. The revised text was signed in May 2013. As of yet, the Commission has not forwarded a proposal implementing the agreement to Council.<sup>78</sup> On several occasions, the social partners expressed their concern at this delay.<sup>79</sup>

Lastly, most early collective agreements at EU level were cross-sectoral in character and were related to work-life balance and atypical employment. They related to parental leave (1995, recast 2009), part-time work (1996) and fixed-time work (1999). These agreements broke new ground in EU labour law. In the 1980s the Commission set out to regulate atypical employment – labour relationships which deviate from the standard model of employment which is based on a contract of indeterminate duration and involves integration of the worker in the work organization of the employer. Accordingly the Commission put forward proposals on part-time work, temporary agency work and fixed-term work. However, none of these proposals were adopted by Council, where at the time they still required unanimity.<sup>80</sup> After the adoption of the Social Protocol to the 1997 Maastricht Treaty, the topics were once more put on the agenda, this time as part of the (newly established) social dialogue. The social

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<sup>74</sup> Proposal for a Council Decision of 27 May 2008 authorising Member States to ratify, in the interests of the European Community, the Work in Fishing Convention, 2007, of the International Labour Organisation, COM(2008)320 final, at 3.

<sup>75</sup> Convention C188 of 14 June 2007 concerning work in the fishing sector. See inter alia Council Decision 2010/321 of 7 June 2010 authorising Member States to ratify, in the interests of the European Union, the Work in Fishing Convention, 2007, of the International Labour Organisation (Convention No 188), OJ 2010 L145/12 and COM(2008)320, *supra* note 74.

<sup>76</sup> Communication from the Commission of 10 October 2007 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Reassessing the regulatory social framework for more and better seafaring jobs in the EU (first phase consultation of the social partners at Community level provided for in Article 138(2) of the Treaty), COM(2007)591.

<sup>77</sup> [https://osha.europa.eu/en/legislation/guidelines/sector\\_specific/index\\_html/1/1/the-fishing-agreement-title-unknown](https://osha.europa.eu/en/legislation/guidelines/sector_specific/index_html/1/1/the-fishing-agreement-title-unknown).

<sup>78</sup> The Commission did announce a costs / benefit analysis to be performed: see below, footnote 136.

<sup>79</sup> See below, <http://www.etf-europe.org/FisheriesNews.cfm> and Statement of the EU social partners in Sea Fishing in support of the right that social partners' agreements are made legally binding, 14 February 2014, EP(14)12, <http://www.etf-europe.org/files/seealsodocs/42083/EP12%20SSDCF%20Statement%20in%20support%20of%20SPA%20hairdressi ng.pdf>.

<sup>80</sup> Riesenhuber, *supra* note 55, at 415 with references.

partners managed to reach agreement on part-time work and fixed-term work in 1996 and 1999. The negotiations on temporary agency work, however, failed in 2001.<sup>81</sup> In 2002 the Commission submitted a proposal which built upon the work done by the social partners. However, it took till 2008 for a Directive to be adopted – through the normal legislative procedure. The two collective agreements were transposed into a directive in 1997<sup>82</sup> and 1999.<sup>83</sup> Another form of atypical employment, to wit telework, was regulated in an autonomous agreement in 2012.<sup>84</sup>

The overview in § 3 shows the social partners at EU level to be active in a variety of ways. Collective bargaining as an instrument of regulation, however, is intimately linked to the regulatory framework of the EU. The possibility to have an agreement made binding through Council decision plays an important role in this interrelationship. When collective agreements are made binding by EU Directive, the rules contained therein have to be implemented in the Member States in a manner which ensures effective enforcement of the rights and obligations contained therein. This means inter alia that the implementation measures should guarantee full coverage of the targeted workforce, individual legal protection in case the directive contains individual rights and an enforcement mechanism which effectively deters breaches. These requirements make it de facto impossible to implement the EU collective agreements through national collective agreements only. EU horizontal subsidiarity could hence preempt national horizontal subsidiarity.<sup>85</sup>

When a collective agreement is not made binding, but relies on the autonomous implementation route, implementations studies show that the effect in the Member States is likely to be divergent.<sup>86</sup> For example the agreement on telework 2012 was implemented through a legislative procedure in Hungary, by way of collective agreement in Denmark whereas in the UK the agreement was not implemented in any binding way at all.<sup>87</sup> This lack of consistent implementation seems to rule out implementation of conventions through the autonomous route in case the EU itself is a signatory to the convention.<sup>88</sup>

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<sup>81</sup> *Ibid.* at 417.

<sup>82</sup> Council Directive 97/81 of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, OJ 1998 L 14/9.

<sup>83</sup> Council Directive 1999/70 of 28 June 1999 concerning the Framework Agreement on fixed-term work concluded by UNICE, CEEP and the ETUC, OJ 1999 L 175/43.

<sup>84</sup> Framework agreement on telework, *supra* note 42.

<sup>85</sup> A. Branch, 'The Evolution of the European Social Dialogue Towards Greater Autonomy: Challenges and Potential Benefits', *International Journal of Comparative Labour Law and Industrial Relations* 2005, 321-346, at 329.

<sup>86</sup> Treu, *supra* note 2, at 173. T. P. Larsen and S. K. Andersen, 'A New Mode of European Regulation? The Implementation of the Autonomous Framework Agreement on Telework in Five Countries', 13/2 *European Journal of Industrial Relations* (2007) 181-198. Branch, *supra* note 85, at 327-9. Bercusson, *supra* note 2, at 154-5.

<sup>87</sup> European Social Partners, *Report on the implementation Of The European Framework Agreement On Telework*, adopted by the social dialogue committee on 28 June 2006; Larsen and Andersen, *supra* note 86. See in general on the problem of implementing the soft law instruments of EU social dialogue: Léonard, 'European Sectoral Social Dialogue: An Analytical Framework', 14/4 *European Journal of Industrial Relations* (2008) at 408 and Branch, *supra* note 85, at 333.

<sup>88</sup> In its 2004 Communication on social dialogue the Commission stated its position on the choice between autonomous implementation and implementation by Council decision in the following manner: "While recognising the broad scope of the social partners' competences, in line with the previous concerns of the Commission, where fundamental rights or important political options are at stake, or in situations where the rules must be applied in a uniform fashion in all Member States and coverage must be complete, preference should be given to

However, also in the case of ILO Conventions in which the Member States ratify on behalf of the EU, implementation through the autonomous route at would create difficult problems of state liability in case the implementation is deemed to fall short of treaty obligations.

Where collective agreements amend a directive or deviate from one, the autonomous route might also be excluded. This seems to be the case with the sectoral working time agreements. The Working time directive does specifically allow for deviation by EU instrument, but this term refers to official instruments only, collective agreements not being considered as such.<sup>89</sup> Hence, the sectoral collective agreements can't become operational without the help of the EU institutions. Similarly, it doesn't seem possible to amend the Working time directive itself by autonomous agreement.<sup>90</sup> An even more complicated issue concerns the power of the social partners to amend or withdraw agreements once these are implemented by way of Council Directive. In the case of the revision of the parental leave directive, the update of the existing agreement turned directive took place in close cooperation between the social partners and the EU institutions.<sup>91</sup> However, there is no indication in the agreements and/or the directives to suggest that the directives lose their binding force when the social partners decide to terminate the underlying agreement. In this respect, the social partners seem to lose control of their agreement upon adoption thereof by Council.<sup>92</sup> This makes it all the more urgent to inquiry into the procedure that leads to the implementation of collective agreements by way of Council decision and the tests performed within that procedure.

## 5 Testing the outcome of social dialogue

Under Article 155 TFEU the signatory parties to an EU collective agreement may request the Commission to put their agreement before Council in order to make it binding in EU law. However, as soon as the signatory parties involve the EU regulatory framework, the EU institutions regain responsibility for the process and the provisions agreed upon are tested against that framework. The CFI decided as much in the UEAPME case. In this case, an organisation of employers made up of small and medium size enterprises objected to the conversion into a directive of the framework agreement on parental leave as

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implementation by Council decision. Autonomous agreements are also not appropriate for the revision of previously existing directives adopted by the Council and European Parliament through the normal legislative procedure.”: COM(2004)557 final, *supra* note 31, at 10. See for a critical assessment of this position: Bercusson, *supra* note 2, at 560.

<sup>89</sup> Däubler, *supra* note 54, at 164-5. Sciarra, *supra* note 18, at 200-1.

<sup>90</sup> It is interesting to note that the Commission did however call upon the social partners to start negotiations on the revision of the Working time directive after the legislative procedure failed to render a positive result: see Communication from the Commission of 21 December 2010 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Reviewing the Working Time Directive (Second-phase consultation of the social partners at European level under Article 154 TFEU,) COM(2010) 801 final, at 2 and 16.

<sup>91</sup> See Proposal for a Council Directive of 30 July 2009 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, COM(2009)410 final.

<sup>92</sup> See in contrast the mechanisms to make collective agreements generally binding in the Netherlands: the extension is limited in time and will in any case expire with the collective agreement. The extension can also be retracted on request of the social partners when they withdraw from or change their collective agreement: *Toetsingskader AVV*, Staatscourant 2013, nr 34009-n1, at 6.

they had not been admitted to the negotiation table. In its judgment the CFI decided that the social partners are free to choose not only whether to enter into negotiations, but also with whom. However, when they involve the EU legislative architecture, it is incumbent upon the Commission to check whether the agreement conforms to the requirements of EU law. As the procedure of Article 155 TFEU excludes any meaningful input from the European Parliament – which is only informed<sup>93</sup> – the principle of democracy on which the Union is founded requires that the participation of the people be otherwise assured, in this instance through a check of the representativeness of the signatory parties. Moreover, all EU action based on Article 153 TFEU should avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings. This requirement can also – if necessary – be checked by the courts.<sup>94</sup>

The UEAPME case is the only case to date in which the application of Article 155 TFEU is challenged. The lack of open conflict and the absence of case law also imply that it is still largely untested to what extent the EU framework applies unmodified to the outcome of the social dialogue. Recently a fierce debate has arisen as to the question whether the Commission actually enjoys discretion as to whether or not to put an agreement before Council.<sup>95</sup> The trigger for this debate is the position taken by the Commission on the European framework agreement on the prevention of health risks in the hairdressing sector (2010)<sup>96</sup> On the official website of the Commission, the agreement is hailed as ‘regulation by social partners for social partners’ and ‘tailor-made for small businesses’.<sup>97</sup> However, while the Commission’s services were assessing the framework agreement, opposition was voiced against the agreement by a number of Member States, led by the Netherlands and the UK.<sup>98</sup> These states officially asked the European Commission not to forward the framework agreement to the Council of Ministers for adoption as a legally binding decision. The same approach was pursued by Member States and parts of the Commission against two other sectoral social dialogue agreements concluded by ETF, one on working time in inland waterway transport and one on the implementation of the 2007 ILO “Work in Fishing Convention”. In the Refit communication of 6 June 2014 the Commission announced its decision not to present a proposal on the hairdressing agreement during its current mandate.<sup>99</sup> The 2015 Work

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<sup>93</sup> Article 155(2).

<sup>94</sup> Case T-135/96, *UEAPME v Council of the European Union*, [1998] ECR 2335, ECLI:EU:T:1998:128. See also WRITTEN QUESTION 3402/98 by Catherine Lalumiere to the Commission. Possibility for the European Union of Association for Craft and Small and Medium- Sized Enterprises (UEAPME) to participate in European consultations between management and labour as a full-fledged social partner OJ 1999 C 297/70.

<sup>95</sup> See Bercusson, *supra* note 2, at 152-3 with regard to the uncertain meaning of the Treaty provision and their historical development.

<sup>96</sup> [https://osha.europa.eu/en/legislation/guidelines/sector\\_specific/index\\_html/1/1/european-framework-agreement-on-the-protection-of-occupational-health-and-safety-in-the-hairdressing-sector](https://osha.europa.eu/en/legislation/guidelines/sector_specific/index_html/1/1/european-framework-agreement-on-the-protection-of-occupational-health-and-safety-in-the-hairdressing-sector).

<sup>97</sup> <http://ec.europa.eu/social/main.jsp?langId=en&catId=329&newsId=1286&furtherNews=yes>.

<sup>98</sup> See inter alia <https://www.cnvvakmensen.nl/caos/kappers/cao-kappers/nieuws/europese-commissie-gooit-veiligheid-kappers-te-grabbel> ; <http://www.fnmvooi.nl/persbericht-zppers-tot-stoppen-gedwongen/> ; [http://www.rethinkrefit.eu/docs/VAKBEWEGING-792\\_tcm22-304705.pdf](http://www.rethinkrefit.eu/docs/VAKBEWEGING-792_tcm22-304705.pdf).

<sup>99</sup> Communication from the Commission of 18 June 2014 to the European Parliament, the Council, the European economic and social committee and the Committee of the regions - Regulatory Fitness and Performance Programme (REFIT): State of Play and Outlook, COM(2014)368 final, at 4 footnote 8.

<http://www.uniglobalunion.org/news/eu-commission-says-no-social-partner-agreement-hairdressers>. For the term of appointment of the Commission, see [http://ec.europa.eu/about/index\\_en.htm](http://ec.europa.eu/about/index_en.htm).

Programme of the new Commission contains no further information on this issue. As mentioned above, despite earlier reluctance, the agreement on working time in inland waterway transport has by now been submitted to Council, which made it binding in December 2014. The agreement on the work in fishing convention is still pending.

Meanwhile the EU social partners consider the hairdressing agreement a test case for social dialogue and the EU's commitment towards social Europe.<sup>100</sup> On 14 February 2014, the Sectoral Social Dialogue Committee on Sea Fisheries (SSDC-SF) adopted a statement urging the Commission to respect the autonomy of the social partners and assist them, when so requested, in making social partners' agreements legally binding.<sup>101</sup> This statement was a response to the refusal of the Commission to submit the hairdressers' agreement to Council, but also reflects the concern of the social partners as regards the other agreements which were halted by the Commission during that period.<sup>102</sup>

The debate on the role of the Commission in the procedure of Article 155 TFEU has two distinct elements: a first one relates to the question which tests should be performed on the outcome of social dialogue before any agreement can be turned into EU law. This question immediately affects the autonomy of social dialogue versus the EU institutions. The second question addresses the role of the Commission in this: should the Commission be able to halt the progress by simply not submitting a proposal or is the test to be performed by Council or even exclusively in Court? I do not purport to formulate a definitive answer to the ongoing debate. However, I will try to give an overview of the checks which the Commission performs before putting a proposal before Council and how these operate in practice.

This analysis is complicated by the fact that the framework in which legislative proposals are tested has changed considerably over time. Only one collective agreement has been implemented by Council decision under full application of the Lisbon Treaty whereas two were adopted under a transitional regime.<sup>103</sup> Under the Lisbon Treaty, national parliaments are involved in the legislative procedure through the early warning mechanism. Through this mechanism the parliaments can perform a subsidiarity check on Commission proposals. The mechanism only applies to legislative procedures, excluding the input of national parliaments in other decision making and/or regulatory processes.<sup>104</sup> Interestingly enough, the adoption of a Council Directive under Article 155 is labeled as a 'non-legislative procedure' in the post-Lisbon system<sup>105</sup> though the outcome of the procedure is clearly legislative in character.<sup>106</sup> Hence, whereas under the procedure of Article 155 the influence of the European

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<sup>100</sup> See inter alia <http://www.uniglobalunion.org/news/barroso-must-stop-playing-workers-health-and-safety> and <http://mail.union-network.org/Apps/UNINews.nsf/vwLkpByld/24200665318E0E24C1257B7C00541F22>.

<sup>101</sup> Statement of the EU social partners in Sea Fishing, *supra* note 79.

<sup>102</sup> <http://www.etf-europe.org/FisheriesNews.cfm>.

<sup>103</sup> See Communication from the Commission of 2 December 2009 to the European Parliament and the Council – Consequences of the entry into force of the Treaty of Lisbon for ongoing interinstitutional decision-making procedures, COM(2009)655 final with annexes.

<sup>104</sup> C. Barnard and S. Peers (eds), *European Union Law* (2014), at 113.

<sup>105</sup> See COM(2014)452 final, *supra* note 52, procedure 2014/0212/NLE.

<sup>106</sup> Barnard and Peers, *supra* note 104, at 98. The extension of collective agreements in Germany, the Netherlands and Belgium likewise has this mixed character of an administrative procedure resulting in regulation with all the

Parliament is reduced to the possibility to give an opinion, the influence of national parliaments seems to be completely excluded.

The roles of Commission and Council are likewise limited as both feel bound by the contents of the agreement between the social partners. In several proposals for implementation the Commission has stressed that neither the Commission nor Council can amend the agreement in any way. Though this point is not unequivocally agreed upon in literature, it seems common ground between the institutions that the transposition of a collective agreement by Council Decision is basically a yes or no decision: the agreement is implemented as it stands or rejected.<sup>107</sup>

Impact assessments became standard procedure only in 2003. Though impact assessments are not required in the case of a request under Article 155 TFEU,<sup>108</sup> the model of testing applied in the assessments may influence the test performed by the Commission also in procedures not subject to assessment.<sup>109</sup> Likewise, the arguments used by the Commission are influenced by the protocols on subsidiarity and better regulation which were developed between the adoption of the first social partner agreement and the implementation of the most recent one.

With only a small sample, spread widely in time, it is not possible to draw too absolute a conclusion from the overview given below. Moreover, as I mentioned before, there is currently hardly any case law on the role of Commission and Council under Article 155 TFEU. Nevertheless, a description of the tests performed and the way they operate in practice may shed some light on the way the Commission perceives the relationship between the autonomy of the social partners and the responsibility of the EU institutions.

## 6 Representativeness, legality and appropriateness

In its Communication on adapting and promoting the social dialogue at Community level of 20 May 1998 the Commission formulated which tests it would perform before any legislative proposal implementing a collective agreement is presented to the Council. This formulation is repeated almost verbatim in each proposal of the Commission with regard to a specific agreement. Accordingly, the Commission will carry out an assessment “involving consideration of the representative status of the contracting parties, their mandate and the legality of each clause in the collective agreement in relation to Community law, and

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characteristics of (private law) legislation. See for example the Dutch *Toetsingskader AVV 2014*, Staatscourant 2013, nr 34009-n1, at 3 which contains the government’s position and policy on extension of collective agreements, M. Christiaanse, A. Joosten, ‘De andere Zalm-norm: loonpolitiek via de Wet AVV’, 9 *Nederlands Tijdschrift voor Sociaal Recht* (2004), 63 ff and Deinert, *supra* note 15, at 420-1.

<sup>107</sup> COM(93)600 final, *supra* note 8; Council legal service, Opinion of 31 March 1994, Council Doc 6116/94; COM(2014)452 final, *supra* note 52, at 4-5; Proposal for a Council Directive of 8 February 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 assigned to interoperable cross-border services, COM(2005)32 final, at 9 (paragraphs 45-48). See also Bercusson, *supra* note 2, at 158-60.

<sup>108</sup> See for example COM(2009)410, *supra* note 91, at paragraph 2.3 and COM(2009)577, *supra* note 57, at paragraph 2.3.

<sup>109</sup> For an overview of the tests performed, see European Commission, Impact Assessment Guidelines 15 January 2009, SEC(2009)92 [http://ec.europa.eu/smart-regulation/impact/commission\\_guidelines/docs/iag\\_2009\\_en.pdf](http://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/iag_2009_en.pdf).

the provisions regarding small and medium sized enterprises”.<sup>110</sup> But the test applied in practice also pertains to subsidiarity and proportionality. And the proposal is assessed in the light of the overall EU policy in the field. The latter three tests are taken together as a test for the ‘appropriateness’ of the proposed action.

### *Representativeness*

The proposals in which agreements are submitted to Council all contain a check on representativeness. The basic requirements which EU social partners must fulfill to be admitted to the social dialogue are that they are organised at European level while being made up of organisations which are themselves an integral and recognised part of the Member States’ social partner structures.<sup>111</sup> They should have the capacity to negotiate agreements and have the structures required to enable them to participate effectively in the framework of the EU social dialogue. The Commission delegates the basic representativeness test to Eurofound, a tripartite European Union Agency, which regularly publishes updates on the representative status of social partners.<sup>112</sup> When an agreement is entered into, the representativeness of the signatory parties is tested for the sector to which the agreement is meant to apply. In that sector they should be representative both as regards the number of employees and employers covered and as regards the number of Member States represented.<sup>113</sup> In this assessment also the presence or absence of other, non-included representatives of management and labour is weighed as a factor.

An illustrative example of how the test is performed in practice can be found in the proposal on the implementation of the agreement on working time in inland waterway transport. The Commission *inter alia* stated the following: “Given that the [... signatory parties AH] do not have affiliates in all EU Member States, to make the negotiation process transparent they sent a joint letter to the transport and labour ministries of all Member States in November 2009 informing them of the core content of their negotiations and asking them to forward the information to the relevant national social partner organisations. It appears there was no official response to this letter. The representativeness study carried out by Eurofound did not identify any other sectoral social partner organisation organised at European level. The Commission therefore concludes that the [... signatory parties] are the only EU-wide organisations representative of both sides of industry in IWT.” As the signatories to the Agreement have sufficient representative status with regard to IWT in general and to the workers and employers who may be covered by the Agreement’s provisions, and they have had a mandate from their national members to negotiate and conclude the Agreement, the requirements for transposition are met.<sup>114</sup> Earlier in the document the Commission had already assessed that “During negotiations on the

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<sup>110</sup> COM(98)322, *supra* note 2, at 19.

<sup>111</sup> COM(93)600 final, *supra* note 8 and COM(98)322 final, *supra* note 2. Riesenhuber, *supra* note 55, at 156.

<sup>112</sup> Eurofound was established by [Council Regulation \(EEC\) No. 1365/75](#). See <http://www.eurofound.europa.eu/observatories/european-observatory-of-working-life-eurwork/representativeness-studies>. COM(2004)557 final, *supra* note 31, at 9: ‘The Commission proposes that the representativeness studies should be carried out by the European Industrial Relations Observatory of the Dublin Foundation.’

<sup>113</sup> Riesenhuber, *supra* note 55, at 156.

<sup>114</sup> COM(2014)452, *supra* note 52, at 8.

Agreement, SME's were well represented by the ESO and their representatives were amongst the strongest supporters of the Agreement."<sup>115</sup>

The UEAPME case mentioned above related to the framework agreement on parental leave. This agreement was revised in 2009, this time with the participation of UEAPME. In the proposal regarding the revised framework agreement the Commission starts with the assessment that the 1995 Framework Agreement on parental leave was signed by the European cross-industry social partners ETUC, CEEP and UNICE (today called 'BUSINESSEUROPE'). At the time these organisations were deemed to meet the representativeness test. Studies commissioned by the Commission in 1999 and 2004 showed that their representativeness has not substantially changed and that their membership now includes the main cross-industry social partners in the new Member States.<sup>116</sup> According to the Commission, they are by far the most representative organisations of management and labour at EU level. All four organisations had a specific mandate from their national members for the negotiations on parental leave and concluded the Agreement on behalf of their members. All four approved the outcome of the negotiations in accordance with their internal decision-making procedures. The conditions of representativeness were therefore met.

#### *The legality test*

The representativeness test is procedural in character and is not related to the content of the agreement. The other tests performed by the Commission are. As far as these tests contain policy decisions and/or leave discretionary powers to the Commission, they may encroach upon the autonomy of the social partners to decide what and how to regulate within their own domain. Accordingly the less the test restricts itself to a pure legality check, the more likely it is to be contested whenever it leads to a refusal to implement. A. Lo Faro already remarked in 2000 "One cannot help wondering (even though the hypothesis seems somewhat remote) what the consequences would be, if quite apart from possibly deeming an agreement deeming to be contrary to Community law), the Commission gave a negative assessment of the substantive choices made by the social partners".<sup>117</sup> With the refusal of the Commission to submit the hairdressers' agreement to Council this hypothesis is now a reality. What then are the tests the Commission performs before proposing the implementation of an agreement?

Firstly, to be admissible for conversion under article 155 TFEU, the agreement must relate to matters open for regulation under Article 153 TFEU.<sup>118</sup> Additionally the Commission will check whether any of the provisions of the agreement violate pre-existing EU law. And lastly Article 153(4) stipulates that measures in this area of EU policy should have a minimum character: they 'shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaties'.<sup>119</sup> A standard assessment will check all three aspects as part of the 'condition of legality'. The

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<sup>115</sup> *Ibid.*, at 6.

<sup>116</sup> *Ibid.*, at 6.

<sup>117</sup> A. Lo Faro, *Regulating Social Europe* (2000), at 115.

<sup>118</sup> As collective agreements are implemented through directives, their scope is limited to the topics mentioned in Art. 153(1) under a-i. See e.g. Riesenhuber, *supra* note 55, at 158. Dissenting: Bercusson, *supra* note 2, at 156.

<sup>119</sup> Barnard, *supra* note 2, at 55.

instrument of choice for implementation of collective agreements is the Directive. Under Article 153(2)(b) directives in the field of social policy “shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.” In the UEAPME case the CFI implied that this requirement is not at the discretion of the social partners and/or the Commission but is open for scrutiny by the courts. The several proposals submitted by the Commission show that the Commission will take the requirement into consideration when assessing a specific agreement.

### *The appropriateness of legislative action at EU level*

It is widely accepted that neither the Commission nor Council can amend the provisions of the agreement as it is going through the transformation process of Article 155 TFEU. It is basically a yes or no decision for both institutions.<sup>120</sup> As discussed in the previous section, the Commission often cooperates at close quarters with the social partners in the wording of an agreement, especially when the negotiations start at the initiative of the Commission and depend on transformation into a directive for their effectiveness. The agreement on work in fishing offers a clear example of this close collaboration as the original agreement was amended to make it eligible for submission to Council. The close collaboration smoothens the way for implementation by Council decision as any problems regarding the contents of the agreement can be addressed beforehand. The situation is different when the social partners open negotiations at the own initiative.<sup>121</sup> In those cases the Commission might be faced with a *fait accompli* and any checks against the standards of better governance will have to be performed after the fact.

Moreover, when the social partners start their negotiations in the second stage of consultation, their negotiations take place within a predetermined EU policy. The decision to regulate has already been taken and a preliminary impact assessment has been performed. Under the current practice, a collective agreement is not subject to a separate impact assessment. This is true for both autonomous agreements and agreements resulting from prior consultation. However, if the agreement was the result of private initiative, rather than EU policy, an extensive scrutiny of the appropriateness of EU action is in fact performed. The Commission already announced as much in its 1998 Communication.<sup>122</sup> In the proposal

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<sup>120</sup> Barnard, *supra* note 2, at 76. This is not based on the text of the provision, but it is standard practice and reiterated in several documents. See inter alia Opinion of 31 March 1994, *supra* note 107 : while the EC and Council could introduce rules for implementation they cannot amend the essence of the agreement. For a different opinion see Riesenhuber, *supra* note 55, at 159: he states that the Commission is obliged to submit an agreement to Council without any amendments. However, in his opinion Council should be allowed to make changes and amendments as it would be inconsistent to hold it more strictly bound with regard to proposals of the social partners than with regard to autonomous proposals of the Commission (art. 193(1) TFEU). The Dutch government supports the reading of the Council legal service. See *Kamerstukken II 21 501-31 Nr. 361*: Letter of the Dutch Minister of Social Affairs.

<sup>121</sup> Barnard seems to suggest that negotiations under Article 153 always have to take place in reaction to a Commission consultation. This is not the leading opinion however (see e.g. Riesenhuber, *supra* note 55, at 158), and not supported by practice.

<sup>122</sup> “In addition, before proposing a decision implementing an agreement negotiated on a matter within the material scope of Article 2 ASP, but outside the formal consultation procedure, the Commission has the obligation to assess the appropriateness of Community action in that field.”

on the agreement concerning certain aspects of the organization of working time in inland waterway transport they made good on this 'promise': "As the European Agreement concerning certain aspects of the organisation of working time in IWT was concluded at the social partners' own initiative, the Commission needs to assess the appropriateness of EU action in the area [ ... ] Commission staff prepared an analytical document which accompanies this proposal in line with the guidelines on impact assessment. It provides a proportionate analysis which assesses the socio-economic impact of implementing the Agreement."<sup>123</sup> However, this analysis is not restricted to autonomous agreements.

In its proposals the Commission routinely checks for consistency with other policies and addresses the issues of subsidiarity and proportionality. The latter test is based on the fact that all EU legislative action is bound by the principles of subsidiarity and proportionality.<sup>124</sup> The principle of proportionality prescribes that 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'. The principle regulates the scope of EU action, once this can validly be taken. It also affects the choice of instruments by favouring those instruments which impact the least on the prerogatives of other relevant stakeholders. Hence, the choice between binding legislative measures and self-regulation is part of the proportionality analysis. This suggests that a preference for collective bargaining over top-down legislation also follows from the proportionality principle. However, in the labour law literature, the powers of the social partners vis-à-vis the legislature is traditionally coined in terms of subsidiarity.

The principle of subsidiarity impacts at an earlier stage of the regulatory process as it concerns the legitimacy of EU action as such. Its principle purpose is to delineate the respective powers of the Union and the Member States. In this context subsidiarity refers to vertical subsidiarity - the legislative assumption that the EU should act only and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States. In labour law, however, subsidiarity operates at the horizontal level. There, the term refers to a mechanism where legislative intervention is deemed subsidiary to regulation by the social partners themselves. EU law recognizes the role of social partners in Article 154, where the social partners are given the power to substitute proposed legislative action by collective negotiations. The impact assessment guidelines of 2009 recognize this aspect of subsidiarity by requiring the Commission to pay attention to the choice between self-regulation and EU action.<sup>125</sup> However, in contrast to the situation in some of the Member States, the social partners at EU level do not seem to have a reserved domain in which the legislator should not intervene.<sup>126</sup> EU collective agreements – linked as they are to the mechanism of Article 155 TFEU – largely cover the topics that are open for EU regulation and hence rarely pertain to those issues which are traditionally the prerogative of the social partners (such as pay and collective labour relations).<sup>127</sup> The interrelationship of collective agreements with the overall EU framework – as described in section 4 – further enhances the legislative

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<sup>123</sup> COM(2014)452, *supra* note 52, at 5.

<sup>124</sup> Article 5 TEU.

<sup>125</sup> SEC(2009)92, *supra* note 109.

<sup>126</sup> On the different models of labour law in the Member States, see for example Barnard, *supra* note 2 at 58 ff.

<sup>127</sup> Bercusson, *supra* note 2, at 156 ff argues that the social dialogue itself is not limited to the competence catalogue of Article 153 TFEU.

character of collective bargaining, which is sometimes referred to as ‘bargaining in the shadow of the law’.<sup>128</sup>

An analysis of the proposals submitted by the Commission demonstrates that the Commission does consider it to be her duty to assess whether the agreement meets the tests of subsidiarity and proportionality and overall appropriateness. The test performed has, however, developed over time.<sup>129</sup> In the proposals on the agreements on part-time work and fixed-term work specific assessment of the subsidiarity requirements is lacking, in line to the overall legislative framework of the time. The proposals contain a more general assessment of the agreements against the EU social policy. For example: the proposal on the implementation of the agreement on part-time work specifies that the agreement ‘contributes to implementing the conclusions of the Essen European Council’ after having already concluded that the negotiations took place after the second round of consultation by the Commission and fitted the priorities expressed in the Commission’s White Paper on the future of European Social Policy.<sup>130</sup> An almost identical assessment was made with regard to the proposal on fixed term work. In both cases, the negotiations between the social partners started after the legislative process failed.

In the case of the agreements on working time, the special regimes are based on Article 14 of the Working Time Directive. In its proposal on the special agreement in inland waterway transport of 2014 the Commission states with regard to subsidiarity that “Article 14 refers to ‘Community instruments’ as necessary to lay down such provisions. Therefore, the objective of the proposal can only be achieved at EU level.”<sup>131</sup> The need for a specific regime is substantiated with the transnational character of the sector involved and the need to establish minimum standards in order to avoid unfair competition.<sup>132</sup> The fact that the social partners deemed it necessary to reach a specific agreement is not mentioned as such. And as the agreement was entered into at the initiative of the social partners themselves, the Commission performed an impact assessment before putting the agreement before Council. The

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<sup>128</sup> Riesenhuber, *supra* note 55, at 157; Bercusson, *supra* note 2, at 147-8.

<sup>129</sup> See for the current framework: Report From The Commission, Annual Report On Subsidiarity And Proportionality 2013, COM(2014)506 final. The documents studied are COM(2014)452, *supra* note 52; COM(2009)577, *supra* note 57; COM(2009)410, *supra* note 91; Proposal for a Council Directive of 2 July 2008 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, COM(2008)422; COM(2005)32, *supra* note 107; Proposal for a Council Directive of 23 June 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) COM(2000)382; Proposal for a Council Directive of 28 April 1999 concerning the Framework Agreement on Fixed-term Work concluded by UNICE, CEEP and the ETUC, COM(1999)203; Communication from the Commission of 18 November 1998 to the Council, the European Parliament, the Economic and Social Committee and the Committee of Regions on the organisation of working time in the sectors and activities excluded from Directive 93/104/EC of 23 November 1993, COM(1998)662, PRT 98/0320; Proposal for a Council Directive of 23 July 1997 concerning the framework agreement on part-time work concluded by UNICE, CEEP and ETUC, COM(97)392.

<sup>130</sup> COM(97)392, *supra* note 129, at 6.

<sup>131</sup> COM(2014)452, *supra* note 52, at 9.

<sup>132</sup> SEC(2009)92, *supra* note 109.

proposals on the older working time agreements contain little information on this point. As regards the agreement in the railway sector the Commission merely states that has already given its support to the negotiations between the social partners in this field during the Transport Council's deliberations on the "second railways package" on 28 March 2003. Hence, the agreement fitted into the work plan of the Commission.<sup>133</sup>

A more straightforward reference to the autonomy of the social partners can be found in the proposal implementing the agreement on prevention from sharp injuries of 2009. In its assessment of the subsidiarity requirement the Commission largely defers to the social partners: "The fact that the substantive provisions of the Agreement incorporated in the proposal were drafted by the legitimate representatives of workers and employers acting at EU level (i.e. those most concerned by the various measures on the ground) is another guarantee of respect for the principle of subsidiarity."<sup>134</sup> However, as is evidenced by the word 'another', this argument is apparently not conclusive in and by itself. A similar reference to the social partners' assessment of the need for action is made in the proposal regarding the revision of the parental leave directive of the same year.<sup>135</sup> However, in that case the Commission also checks whether the agreement is overly prescriptive and detailed and starts with stating that goals of the agreement can only be attained at EU level. The arguments used here refer to the fact that the agreement is meant to update an existing Directive and aims to create a level playing field in a crucial aspect of reconciling work, private and family life. The proposal on the Maritime Labour Convention of 2008 again mentions the agreement between the social partners as (only) one of the arguments in assessing subsidiarity, together with arguments regarding the international character of the economic sector covered by the agreement and the need for minimum standards in order to avoid social dumping.

With regard to the most recent agreement in our sample, the work in fishing agreement of 2012, it is interesting to note that even though negotiations started at the invitation of the Commission and the Legal Services delivered a positive legal opinion as regards compliance with EU law, the Commission has announced it will perform a full costs/benefits analysis before submitting a proposal to Council. It did so in the progress report on occupational health report, first semester 2014.<sup>136</sup> In the same report the Commission announced that it had contracted an external study with regard to the hairdresser agreement of 2010, in order to better assess the added value of the agreement. Both collective agreements were meant to become operational in areas prioritized by the Commission in its Action plan for reducing administrative burdens of 2007.<sup>137</sup> Both were put on hold by the previous Commission pending further investigation and still await implementation.

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<sup>133</sup> COM(2005)32, *supra* note 107. The published proposals on the other agreements do not contain an explanatory memorandum.

<sup>134</sup> COM(2009)577, *supra* note 57, paragraph 3.3. at 10.

<sup>135</sup> COM(2009)410, *supra* note 91, 3.3 at 7-8.

<sup>136</sup> Found at <http://www.act.gov.pt/pt-PT/Itens/Noticias/Documents/Information%20from%20the%20Commission%20-%20Progress%20report%20on%20OSH%20activity%20-%20First%20semester%202014.pdf>.

<sup>137</sup> See Communication from the Commission of 24 January 2007 to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Action Programme for Reducing

Accordingly, one may conclude from the materials available that the Commission does check the agreements between the social partners against the requirements of appropriateness, subsidiarity and proportionality. The fact that the social partners agreed on the need for EU action is important but not in itself deemed to be conclusive. In recent cases, this scrutiny seems to have intensified. The Commission pays less deference to the social partners but will perform a cost/benefit analysis and some form of impact assessment in case these have not already been performed in the earlier stages of consultation. This strict scrutiny of the content of EU collective agreements is in line with a stricter assessment of all types of EU regulation and also fits the deregulatory agenda of the Commission, but seems to clash with the autonomy of the social partners at EU level.

## 7 Outlook

The social partners at EU level play an important role both as stakeholders and as co-regulators. The output analysis of the social dialogue shows that the strictly normative, regulatory instruments referred to as EU collective agreements are a small minority within the overall production of texts and instruments. Within the group of collective agreements, the agreements put before council for implementation by Council decision form an important sub-group. These latter instruments interact with the overall EU legislative framework in a variety of ways: they may implement international obligations taken on by the EU and/or the Member States, they may derogate from a general framework directive or specify the obligation contained in such. In those cases, the collective agreements need to be transposed into an EU instrument in order to be effective. This reliance on Article 155 TFEU is caused in part by the almost complete absence of genuine opening clauses at European level. For this reason the sectoral agreements on working time could not attain the required legal effect but for a Council decision transposing them into an EU instrument. But also in the areas where the existing EU legislative framework does not intervene with national implementation, the social partners may rely on the extension mechanism to ensure an even level of implementation. Research has shown that the autonomous implementation route to date has not resulted in full implementation in all Member States.

In the past the Commission has used the social dialogue to further EU social policy and circumvent political deadlocks in Council. In its policy documents of the time, social dialogue is described as an important element of EU governance. However, this happy cohabitation relied of converging interests between the social partners and the Commission. Currently, this convergence seems to have come to an end. In its REFIT communication the Commission stressed that the way in which the Commission prepares regulation has changed significantly over the last years. Reduction of the administrative burden imposed on businesses, and in particular small and medium sized enterprises, is one of the key policy objectives and a touchstone for any regulatory proposal. One of the areas which are prioritized for screening within the REFIT agenda is safety and health in the work place.<sup>138</sup> This domain also includes the regulation of working time. As the overview of EU collective agreements has shown, it is particularly

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Administrative Burdens in the European Union, COM(2007)23, in which both working environment/employment relations and fisheries are listed as priority areas.

<sup>138</sup> Communication from the Commission of 2 October 2013 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Regulatory Fitness and Performance (REFIT): Results and Next Steps, COM(2013)685 final at 2.

this domain which has been regulated by EU collective agreements. This explains the current clash between the Commission and social partners: their policies might well be at cross-purposes.

The discrepancy between the agenda of the social partners and the policy agenda of government is a phenomenon which is also known in those national systems in which collective agreements are extended by government decree. For example in the Netherlands a fierce debate took place in 2004 when the government's wage policy was not followed by the sectoral social partners in their negotiations. At the time the Minister threatened not to extend the agreements which were contrary to official policy – in this case by not respecting the wage ceiling proposed by the government and the tripartite.<sup>139</sup> The EU social dialogue has specific characteristics which make the problem even more poignant, though. Both the absence of direct norm setting competence of the social partners at EU level and the absence of effective autonomous implementation increase the pressure on the route of Article 155 TFEU. Meanwhile the Commission, when evaluating the agreement between the social partners, is caught between horizontal and vertical subsidiarity.

Subsidiarity in EU law is a judiciable principle which lies at the heart of EU competence. But it is also a highly politicized concept often leading to an overall assessment of 'appropriateness' of a specific action. Several authors have stressed that it is not up to the Commission to make a final judgment on this - the social partners should decide on the appropriateness of their action.<sup>140</sup> However, that conclusion does not sit well with the overall structure of EU competence. But even if we would acknowledge that a Council decision ex Article 155 TFEU is bound by the requirements of subsidiarity and proportionality as well as the requirement regarding SMEs, it is questionable whether the Commission should have a power of veto in this regard. We know from the UEAPME case that representative organisations may challenge a Council decision to make an agreement binding. However, there is no decision yet on the question whether these organisations may also challenge the decision by the Commission not to submit a proposal to the Council. And if so, whether the European courts would be willing to overrule the assessment of the Commission both as regards subsidiarity and as to the impact of the agreement on SMEs. This may be tested if and when the Commission actually does decide not to submit a proposal on the hairdressers' agreement. There are interesting times ahead.

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<sup>139</sup> Christiaanse and Joosten, *supra* note 106. A similar discussion took place in the '90s: G.Zalm, 'Betekenis en toekomst van de AVV', *ESB* (1992), 364 ff. F.Dorssemont, 'De binding van werkgevers aan collectieve arbeidsovereenkomsten – Enkele beschouwingen over juridische factoren die binding bevorderen of verzwakken', *Arbeidsrechtelijke Annotaties* 2014, (13) 2, at 37 states that in the relevant national laws the government does have discretionary power to extend or not to extend a collective agreement by special decree.

<sup>140</sup> B. Bercusson, *European Labour law* (1996), at 542-543; Riesenhuber, *supra* note 55, at 159; F. Dorssemont, 'Origin, Problems and Perspectives of the European Social Dialogue', in: M. De Vos, *A decade beyond Maastricht* (2003) at 27.