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COLLECTIVE BARGAINING:  
A SINGLE EUROPEAN CONCEPT?

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Submitted in fulfilment of the requirement for the  
LL.M by research

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## Abstract

The European Union's establishment of the single market and the easing of boundaries have an effect on the economy but also on society, resulting in a Europe-wide movement of companies and employees. The employment relationship crosses boundaries, and parties have to face different systems of law. Considering that collective bargaining is one of the major tools of employment regulation, this research explores the functions and mechanisms of the bargaining process at a European level and in two Member States, France and the United Kingdom, chosen as examples because of the diversity in their legal traditions: France as a country of civil law, and the United Kingdom as a country of common law.

Prior studies have focused on outputs of the collective bargaining process rather than the process itself, and the possibility of convergence of national industrial systems in the context of European integration. To date, little comparative research has been conducted about the process of collective bargaining at the national level and its connection with European Union developments. By comparing two Member States with different legal conceptions and approaches, the flexibility of the collective bargaining process as a common concept can be seen. Comparisons can also be made between national collective bargaining and European social dialogue.

Therefore, this dissertation is motivated by two sets of research questions: (1) what was/is the influence of France and the UK on the European social dialogue construction? What in their politics decision had an impact, and what were the consequences? (2) Considering the actual framework about the process of collective bargaining, is there any phenomenon of convergence or divergence between the French and the British systems, and also with social dialogue? What are the consequences of similarities and differences on the employees' situation? To what extent is there a connection between the national and the European processes?

Three alternative hypotheses emerge: (1) the concept of collective bargaining is the same in the French, the British and the European systems. (2) This concept is common at the national level, but the European social dialogue differs from it. (3) The concept of collective bargaining is not applicable at the European stage, and the divergences between the French and the British systems prove that the realities of this concept are not the same. The goal of this study is to explore the collective bargaining process in these three systems to see their similarities and differences and what they can learn from each other to improve the concept of collective bargaining in the European Union.

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## Plagiarism Statement

This project was written by me and in my own words, except for quotations from published and unpublished sources which are clearly indicated and acknowledged as such. I am conscious that the incorporation of material from other works or a paraphrase of such material without acknowledgement will be treated as plagiarism, subject to the custom and usage of the subject, according to the University Regulations on Conduct of Examinations.

## List of abbreviations

- ACAS: Advisory, Conciliation and Arbitration Service
- ANI: Accord National Interprofessionnel (National Cross-Industry Agreement)
- Art: Article
- Cass.Soc.: Cassation Sociale (Social Chamber of Cassation Court)
- CJEU/ECJ: Court of Justice of European Union/European Court of Justice
- EA: Employment Act
- EC: European Community
- ECHR: European Convention of Human Rights
- ECtHR: European Court of Human Rights
- ESC: European Social Charter
- ETUC: European Trades Union Congress
- ETUI: European Trade Union Institute
- EU: European Union
- HSE: Health and Safety Executive
- ILO: International Labour Organization
- IRA: Industrial Relations Act
- SEA: Single European Act
- SP: Social Partners
- TFEU: Treaty on the Functioning of the European Union
- TU: Trade Union
- TUC: Trades Union Congress
- TULR(C)A: Trade Union and Labour Relations (Consolidation) Act
- UK: United Kingdom

# 1. GENERAL INTRODUCTION

## 1.1. Background and relevance of the study

What is now known as the European Union set out with an economic goal, the establishment of a common market<sup>1</sup>. The aim of this union was to constitute an economic space large enough to permit economies of scale for European companies to compete in the world market. The social aspect was considered as a natural consequence of the economic side, but was not seen as sufficiently important to be an independent subject by itself<sup>2</sup>. The turning point came in 1972 at the Paris Summit where it was officially declared that actions in the social arena were as important as the achievement of monetary and economic union. With the Val Duchesse Summit, the notion of social dialogue was introduced with the first official appearance of social partners on the European stage. Their role in European governance, through consultation, was institutionalised by the Maastricht Treaty in 1992. Thus, social dialogue had a function at the intersection between two levels. First, at the European stage, the EU was inspired by the national idea of social partners to develop the concept of a social Europe. Second, it also made use of the national systems of collective bargaining in order to implement EU law. Therefore this study has the purpose of exploring in detail the concept of collective bargaining in the French, the British and the EU contexts. The evidence of convergence and divergence between these systems will establish if the national realities behind the concept of the collective bargaining are the same. It will also show to what extent collective bargaining shares a common core with European social dialogue.

Debate on the possibility of an effective industrial relations regime at the EU level has persisted for a decade or more<sup>3</sup>. One way to regulate such relations is through European social dialogue. Much research on this topic focuses on the outputs of the process rather than the process itself<sup>4</sup>. Some scholars argue that more research is necessary on how social dialogue actually functions and what problems the actors have encountered<sup>5</sup>. At the same

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<sup>1</sup> HYMAN, Richard. The Europeanisation—or the erosion—of industrial relations? *Industrial Relations Journal*, 2001, vol. 32, no 4, p. 280-294 ; HEIDENREICH, Martin and BISCHOFF, Gabriele. The Open Method of Co-ordination: a way to the Europeanization of Social and Employment Policies? *JCMS: Journal of Common Market Studies*, 2008, vol. 46, no 3, p. 497-532.

<sup>2</sup> BERCUSSON, Brian. *European labour law*. Cambridge University Press, 2009. p.103

<sup>3</sup> HYMAN, Richard. *Supra. 1*

<sup>4</sup> KIRTON-DARLING, Judith and CLAUWAERT, Stefan. European social dialogue: an instrument in the Europeanisation of industrial relations. *Transfer: European Review of Labour and Research*, 2003, vol. 9, no 2, p. 250

<sup>5</sup> KIRTON-DARLING, Judith and CLAUWAERT, Stefan. *Ibid. 4*. p.250

time, the possibility of convergence of national industrial relations systems has been debated for more than 40 years, initially in the context of internationalisation, and in the last decade also in the context of European integration<sup>6</sup>. Whereas early writers typically saw convergence as inevitable, subsequently the dominant approach has been to stress the persistence of national variation, sometimes even increasing divergence.

Although this research has been developing, so far no comparative study has been conducted about the process of collective bargaining at the national level and its connection with European social dialogue. The idea of comparing Member States' legal systems to the European Union (EU) could be controversial to the extent that the EU is not a State. Some researchers argue that a non-state entity can have a legal system. This insight can be applied to the EU.<sup>7</sup> The nature of the EU, a Union of sovereign States, means that the domestic enforceability depends on national laws. Thus, it is necessary to examine what are the different applications of the European social dialogue in different Member States and the connections with the national process of collective bargaining. In addition, comparing two Member States in terms of their different legal conceptions and approaches would show the flexibility of the collective bargaining process as a common concept. Previous research has already compared the French and the United Kingdom (UK) system in the context of an international study. Some justify this choice because both of those systems had a strong influence over the world as former colonial powers, and recognised them as important systems in Europe.<sup>8</sup> Other studies focus more on one aspect of labour law and show that the same legal mechanism can be encountered in the two countries. In these cases it underlines that the subjects of the mechanism are not the same, and the legal manner in which they are proceed.<sup>9</sup> Those elements could be transposed to the collective bargaining issue. As it will be explained in this research, collective bargaining did not developed in the same way in the French, the British and the EU legal systems.<sup>10</sup> Contrary to the UK where collective bargaining is deregulated, in France the process of collective bargaining is at the intensively

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<sup>6</sup> VOS, Kees J. Europeanization and convergence in industrial relations. *European Journal of Industrial Relations*, 2006, vol. 12, no 3, p. 311.

<sup>7</sup> DICKSON, J. Towards a Theory of European Union Legal Systems?. *Philosophical Foundations of European Union Law*, 2012, p.30-31.

<sup>8</sup> KOOPMANS, T. The birth of European law at the crossroads of legal traditions. *The American Journal of Comparative Law*, 1991, p-493-507.

<sup>9</sup> BARRERE-MAURISSON, M-A, DAUNE-RICHARD A-M, and LETABLIER M-T. Le travail à temps partiel plus développé au Royaume-Uni qu'en France. *Economie et statistique* 220, no. 1, 1989, p-47-56.; MINE, M. Approche juridique de la discrimination raciale au travail: une comparaison France-Royaume-Uni. *Travail et emploi* 96, 1999.

<sup>10</sup> SLOMP, Hans. *Les relations professionnelles en Europe*. Editions de l'Atelier, 2000.; *See details 2.1*

subject to the law.<sup>11</sup> The impact on the employment relationship is not the same too; in France a collective agreement applies directly, when in the UK most of the time it needs to be integrated individually in the contract of employment.<sup>12</sup> Therefore, the contrast between those two systems deserves to be examined. In addition, this divergence of approach is reflected in the European Union development when it comes to the creation of the social dialogue.<sup>13</sup> Both countries wanted their vision to be applied at the EU level; the result is a social dialogue with similarities and divergence with both.

For these reasons, it is important to determine the different use of collective bargaining in the European and national French and British legal systems because it will give us an idea of its real efficiency regarding the employees' situation. In fact, this study will determine if the use of collective bargaining to implement European law is an appropriate solution if we want a homogeneous application of employment standards. At the same time, this study will underline the function and functioning of European social dialogue in order to see if the connection with a national level of collective bargaining is possible without breaking the initial dynamic.

## 1.2. Problem and Methodology

This analysis will raise two sets of research questions. (1) What was/is the influence of France and the UK on European social construction? Did political decisions have an impact, and what were the consequences? (2) Considering the actual framework of the process of collective bargaining, is there any evidence of convergence or divergence between the French and the British systems and European social dialogue? What are the consequences of such convergences on the employees' situation? To what extent is there a connection between the national and the European processes?

In order to answer these questions, it is necessary first to conduct descriptive research about these different legal systems. Then it will be possible to determine if some correlations or links can be established. Second, it will be interesting to explain the reasons for the existence of correlations or not. Both the descriptive and the explanatory approaches will revolve

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<sup>11</sup> See details 2.2

<sup>12</sup> See details 3.2.2.

<sup>13</sup> See details 2.1.3.

around three main variables that are the key characteristics of the collective bargaining process: the nature of the collective agreement, the functions of the social partners, and their relations with the executive. The executive could be the government or the European Council/Commission depending on the system examined.

The initial research hypothesis is that European social dialogue is a sort of collective bargaining at the European level. In fact, it is constituted of social partners who reach European framework agreements. One way to implement these in the national legal system is to use the national collective bargaining process. It means that there is a connection between the European and national social dialogues. Thus, there are two possibilities. Then, three alternative hypotheses emerge. The first one is that the concept of collective bargaining is similar in the French, the British and the European systems. Second, this concept is common at the national level, but the European social dialogue differs from it because of the complexity of the multicultural legal aspect of the EU. Third, the concept of collective bargaining is not applicable on the European stage, and the divergences between the French and the British systems prove that the realities of this concept are not the same.

The main materials used to examine those possibilities are both primary and secondary sources. Concerning the primary ones, at the European level they are mostly based on the treaties and especially on those of the European Union signed in 2007. In addition, the jurisprudence of the European Court of Justice (ECJ) is key to interpreting the terms of the treaties and how they should be applied in the national legal system. In the French system, the historical evolution of the concept of collective bargaining is based on several laws adopted by Parliament. However, all the legal principles outlined are in the French Labour Code that centralises the legislative rules in employment law. In addition, in order to have a full understanding of those laws, the jurisprudence of the Court de Cassation is essential. For the British system, the argumentation is based on status but the study of case law is just as important.

To perceive the full impacts and consequences of these sources, a study of the secondary sources is imperative. Therefore textbooks that explain the process of collective bargaining in French, British and European law are fundamental to understanding the essential ideas. However, in order to compare these systems, academic discussions and analysis in the legal literature are crucial.

Two methods are appropriate for analysing the relevant material and establishing a connection between the three legal systems: the comparative and the historical approach.

In the words of Professor Frankenberg, '*Comparative legal study is the logical reaction to global development and interdependence, to the transnational structure of law, or to the intensified economic, social relationships*'<sup>14</sup>. Therefore, this method of conducting research appears to be the most appropriate way to examine the transnational structure of collective bargaining in the European Union and the interdependence between the different levels of negotiation. In addition, the selection of France and the UK as examples for comparison is not a random one. In fact, these systems can be used to illustrate two of the main European 'parent legal families' constituting Western laws: countries belonging to the civil law tradition and countries belonging to the common law tradition<sup>15</sup>. Even if this classification is schematic it gives us an idea of the difference between those two countries in terms of cultural attitudes, which are profoundly important for the operation of the law within each<sup>16</sup>. A comparative in-depth study of the meaning of collective bargaining is important because legal concepts and structures rarely have exact equivalents in other legal systems<sup>17</sup>. As we will see, the context is also important, so that the history of a legal system and countries' politics are important aspects to consider.

The historical approach is particularly important at the beginning of the study for understanding the socio-legal context of the development of the collective bargaining process. In fact, legal history is important because of what we can learn about the nature of law itself by looking at the historical origins of legal rules and concepts and the processes by which they came to have the meaning and significance they do today<sup>18</sup>.

However, it is important to underline that the scope of this dissertation is limited. The main limitation is the fact that it is a purely legal approach to a phenomenon which is based on the intention of the parties. Therefore the real application to the employee situation will in practice be a case-by-case approach. All it is possible to do in this study is to examine the legal framework to see what is obligatory and the minimum standards applicable in all situations. In the case of empirical quantitative research it would have been possible to examine the data rather than the *pure* theoretical framework. Even if this study seems to be

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<sup>14</sup> FRANKENBERG, Gunter. Critical comparisons: Re-thinking comparative law. *Harv. Int'l. LJ*, 1985, vol. 26, p. 411.

<sup>15</sup> RAMBAUD, Thierry. *Introduction au droit comparé: les grandes traditions juridiques dans le monde*. Presses universitaires de France, 2014. p.43-52.

<sup>16</sup> HALLIDAY, Simon (ed.) *Law Basics. An Introduction to the Study of Law*. W. Green. 2012. p.74.

<sup>17</sup> HALLIDAY, Simon. *Ibid.* 16, p.73.

<sup>18</sup> HALLIDAY, Simon. *Ibid.* 16, p.63.

slightly disconnected, the purpose is to underline the functioning of the process of collective bargaining and the nature of the connections between the European Union and the French and UK legal systems in this context. It is the reason why the material used is limited to primary and secondary sources and involves no empirical results. Nonetheless, extension of this study to a PhD or publication would require further elements to support the different hypotheses and theoretical inputs.

### 1.3. Definition of key concepts

In order to understand the global field of this study, it is necessary to define the key concepts. The general context is the development of “social Europe”. It could be defined as the European experience of simultaneously promoting sustainable economic growth and social cohesion<sup>19</sup>. One way to promote social Europe is social dialogue, which could be defined as ‘*discussions, consultations, negotiations and joint actions involving organisations representing the two sides of industry (employers and workers)*’<sup>20</sup>. The negotiations between these two sides of industry, also called social partners, could be seen as one aspect of the collective bargaining process. It is acknowledged that social dialogue and collective bargaining are two different notions; however, for ease of reference, social dialogue is sometimes called “European collective bargaining” or “collective bargaining at the European level”.

According to International Labour Organization (ILO) standards, collective bargaining is defined as the ‘*machinery appropriate to negotiate, conclude, revise and renew collective agreements, or to be available to assist the parties in the negotiation, conclusion, revision and renewal of collective agreements*’<sup>21</sup>. Thus, the objective of this process is the conclusion of collective agreements which are:

*“all agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employer’s organisations, on the one hand, and one or more representative workers’*

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<sup>19</sup> JEPSEN, Maria and PASCUAL, Amparo Serrano. The European Social Model: an exercise in deconstruction. *Journal of European Social Policy*, 2005, vol. 15, no 3, p. 232

<sup>20</sup> <http://ec.europa.eu>

<sup>21</sup> GERNIGON, Bernard, ODERO, Alberto, and GUIDO, Horacio. *Collective bargaining: ILO standards and the principles of the supervisory bodies*. International Labour Office, 2000. p.9 ; ILO Recommendation n°91 pt 1(1).

*organisation, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them”<sup>22</sup>.*

In addition, at the national level collective bargaining regulates industrial relations. According to Hyman, industrial relations are a field of tension between the economic construction of the employment relationship and the broader social constraints imposed on its economic character, the latter primarily nation-specific<sup>23</sup>. Therefore, this study will examine how this tension between the economic and social aspects of industrial relations can be extended at the European level. Thus, the comparative study will be to examine the key characteristics of national collective bargaining and see how they are applicable and transposed in the social dialogue process.

#### 1.4. Summary and presentation of the study

The study will be divided into two parts. The first one will revolve around the main idea of the influence of the France and the UK on the construction of European social dialogue. The first chapter will adopt a historical comparison approach in order to understand how the national political choices of those two countries are reflected in the construction of European social dialogue to inspire the national collective bargaining process. Once the historical legal traditions of the three systems are explained, it will be possible to compare the aim of collective bargaining at the French, the British and the European level. Again, the idea is to determine if the national process impacts on the current framework of collective bargaining in terms of European governance.

The second part of the study will be centred on the main aspects of the collective bargaining process. The three topics chosen are: the collective agreement, the social partners and the enforcement of collective bargaining. Here, the aim is to determine in the day-to-day application of collective bargaining as a process the nature of the resemblances and divergences between the European, the French and the British approach. In other words, it will be examines if the main aspect of the collective bargaining process means the same thing in the three legal systems.

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<sup>22</sup> ILO Recommendation n°91 pt 2(1).

<sup>23</sup> HYMAN, Richard, *Supra. I.*

In the end the objective is to determine if the actual functioning of collective bargaining on the French, the British and the European level is sufficiently developed to adopt and implement the concept required for a homogeneous and efficient social Europe. 2.The national reflection of the British and the French systems on the construction of the European social dialogue process

## 2.1.The national influence on the historical development of the concept of European social dialogue from a socio-legal perspective

In both national systems considered the phenomenon of collective bargaining was initially a practical one<sup>24</sup>; the workers came together in order to counterbalance managerial power. It was not a political choice, unlike the European system. In France as in the UK, politics had to deal with this new form of industrial regulation. However, the position chosen was completely different; in France collective bargaining was slowly integrated into national governance, whereas in the UK the government guaranteed minimum official intervention by means of *collective laissez-faire*. This difference in conception was not a problem as long as the systems were not connected. However, with the creation of the European Community in 1957, a common denominator in the economic area was agreed. Then the EU changed direction and started to integrate a social dimension in its governance. Both France and the UK had an influence on the construction of social dialogue; the question is what their reactions were, why they reacted like that and what the consequences were for collective bargaining in this process.

Therefore, the two first sections of this chapter will revolve around the key analysis of the historical evolution of the concept of collective bargaining, and the politics adopted to treat this new phenomenon in France and the UK. This examination will underline the motivation of the different governments to develop or not, and to integrate or not, the collective bargaining process into their national governance. This will help to explain what they were willing to discuss on the European stage and make it easier to understand the tension and conflict of interest between the Member States at the moment when it had to be decided whether to develop a European social dialogue or not.

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<sup>24</sup> ETIENNOT Agnès and ETIENNOT Pascale, *Droit du Travail*. Ellipses, 2015. p.683.

## 2.1.1. Collective bargaining in the French system: from tolerated phenomenon to valued mechanism in a century

### 2.1.1.1. The twentieth century: setting up a collective employment relationship

#### 2.1.1.1.1. Recognition and construction of legal framework

The nature of the collective agreement has always been complex. It has been defined as a “*legal monster with a body like a contract and the soul of law*”.<sup>25</sup> Therefore, the first stage of regulation was focused on the recognition of this new phenomenon to provide an appropriate legal framework.

The law of 19 March 1919 was the first set of rules applicable to this new kind of contract; individual in its elaboration and collective in its application. The collective agreement was a contract of private law, so it was applicable only to Trade Union (TU) members. It was easy to avoid its effect on the contract of employment simply by quitting the union. Despite the possible lack of effectiveness in application of collective agreement, this law was important because it gave to this new phenomenon a legal definition.

The collective agreement got a new dimension in 1936 when it was seen as a way to resolve industrial disputes. The government intervened for the first time in the collective agreement field; it introduced a new sort of agreement with the law of 24 June 1936<sup>26</sup>. Hence, the government could extend the collective agreement to all workers in a sector of activity if the agreement complied with legal content and form requirements. Only representative TUs were able to sign this kind of agreement<sup>27</sup>. In this context the nature of the collective agreement started to be altered by government action. It became a private contract with a public purpose. The equilibrium in the relationship between the social partners and the government was tense during the adoption of the law on 11 February 1950. This law was a clear stand by employers and trade unions against State interventionism. This opposition underlined the contradiction

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<sup>25</sup> CARNELUTTI Francesco : “*Monstre juridique, au corps de contrat et à l’âme de loi*”.

<sup>26</sup> LE CROM, Jean-Pierre. *Deux siècles de droit du travail: l’histoire par les lois*. Editions de l’Atelier, 1998. p.129.

<sup>27</sup> MORIN, Marie-Laure. Principe majoritaire et négociation collective, un regard de droit comparé. *Droit social*, 2000, no. 12, p. 1080.

which is typical of the French system<sup>28</sup>. On the one hand, social partners affirmed their autonomy and independence, rejecting any kind of State intervention. They also requested the State authority to value collective agreements and to rule their disputes. On the other hand, the State recognised the freedom of negotiation, but did not want to limit its possibilities of intervention. This law combined both; there was no need for ministerial approval to apply collective agreements, but the Labour Minister kept the initiative of the extension process. Additionally, the legislator recognised the *erga omnes* effect of all collective agreements<sup>29</sup>.

#### **2.1.1.1.2. Encouragement and development**

The law of 13 July 1970 had two important consequences for collective bargaining. The first point concerned trade unions. They had a monopoly in terms of negotiating and signing collective agreements. The purpose of the agreement did not matter anymore<sup>30</sup>. Probably because of the *erga omnes* effect of collective agreements there was a need to confirm the idea of representativeness by exclusivity. Limiting the faculty to bargain to representative trade unions was a first guarantee that the interest of most employees would be defended. Contrary to the present situation, to be applicable an agreement had to be negotiated and signed by all the trade unions<sup>31</sup>. Second, this law provided the recognition of a right to bargain for employees. This right was not only the exercise of a conventional freedom that the State must permit individuals to exercise; it became an employee's enforceable right. Consequently the exercise of this right had to be organised<sup>32</sup>.

Subsequently the three Auroux laws<sup>33</sup> considerably modified the situation of collective labour organisation in France. These laws confirmed that TUs had exclusive bargaining competence with the irrefutable presumption of representativeness for five national trade unions<sup>34</sup>. It meant that these TUs were automatically able to negotiate without the need to prove their representativeness.

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<sup>28</sup> LE CROM, Jean-Pierre. *Ibid* 26, p.181.

<sup>29</sup> RODIÈRE, Pierre. La loi du 4 mai 2004 sur le dialogue social : une réforme en devenir. *Semaine social Lamy*, 2004, no.1183 Supplément.

<sup>30</sup> LE CROM, Jean-Pierre. *Supra* 26, p.129.

<sup>31</sup> CE, 23 July 1943, *Gaz Pal.*, 1943, II, 149 ; CE, 4 March 1960, conclusions NICOLAY, *Droit social*, 1060, p.349

<sup>32</sup> LE CROM, Jean-Pierre. *Supra* 26, p.190.

<sup>33</sup> See general CAIRE, Guy. Les lois Auroux. *Relations industrielles/Industrial Relations*, 1984, p. 235-258.

<sup>34</sup> DUPAYS, Alain, PHERIVONG Catherine, Caractéristiques historiques et actuelles de la négociation collective, *Les Cahiers du DRH*, 2000, supp no22 « Négociation collective : les règles du jeu », p.6

The notion of representativeness was important because this law introduced the possibility that a collective agreement could be less favourable than the law<sup>35</sup>. There was a change of conception of the collective agreement; it was not only an improvement of working conditions. The representativeness issue acquired an important dimension, and became the centre of legal modification at the beginning of the twenty-first century.

#### 2.1.1.2. The twenty-first century: the shift from collective employment to social democracy

##### 2.1.1.2.1. Democracy through legitimacy of collective agreement

The shift from collective employment to social democracy started on 16 July 2001 with the “*Position commune*” whereby trade unions wanted to give a new impulse to collective bargaining. The legislator transposed most of the social partners’ recommendations into the law of 31 January 2007<sup>36</sup>.

Before 2007, it was possible for the government to ask the social partners’ opinion before beginning any reform of labour law. Furthermore, the government was free to transpose a common position or an inter-professional agreement into a law if it wanted to. The 31 January 2007 law introduced a new article, L-1, into the French Labour Code. It provided that every law draft concerning labour law had to be discussed first by the social partners at the inter-professional level<sup>37</sup>. The government must wait for their feedback before adopting a new law. Then, if the social partners reached an agreement or adopted a common position, the government had to respect it. It was only if no agreement was reached that the government regained the initiative regarding the law’s content.

This idea was first introduced in the 2001 common position<sup>38</sup> and was largely inspired by the European process of social dialogue<sup>39</sup>. In fact, at the European level social partners are consulted before each intervention in labour law. The mechanism is exactly the same and

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<sup>35</sup> DUPAYS, Alain and PHERIVONG, Catherine, *Ibid.* 34. p.2.

<sup>36</sup> N°2007-130.

<sup>37</sup> BARTHÉLÉMY, Jacques, and MORAND, Michel. Place de la négociation collective dans l’élaboration du droit du travail. *Les Cahiers du DRH*, 2010, no163, p.30.

<sup>38</sup> In France a « common position » is the name given to a official communication from the national social partners.

<sup>39</sup> Approfondissement de la négociation collective Position commune des partenaires sociaux. *Liaisons Sociales Quotidien* 2001, no174 – Cahier joint au n°13453.

allows the government to focus its intervention on the best the needs of professionals. By making social partners actors in law-making, and by giving inter-sectoral agreements the status of a pre-law draft, this law gave more legitimacy to collective agreements. Furthermore, representative trade unions became actors in the legislative process; they were on the border of political democracy. This shift made them and their work more legitimate and proved that their actions were justified. Because of their new function, the next and final step in collective bargaining's evolution was the modification of social partners' representative rules.

#### **2.1.1.2.1. Democracy through representativeness**

Although there had been some doubts about its foundation, the situation concerning the representativeness of trade unions had not changed since the Second World War. The government decided to change the situation in 2008 and, in accordance with article L-1, asked for social partners' opinion. The common position of 9 April 2008 suggested important modifications that were integrated in the law of 20 August 2008<sup>40</sup>.

The 2008 law changed the criteria for representativeness. The most important point is that this law cancelled the irrebuttable presumption of representativeness. To be representative, trade unions had to prove that they met legal requirements.<sup>41</sup> These requirements included: the influence of the TU that is characterised by the activity and experience, and the audience. The law stipulated that all these conditions were cumulative. The thresholds are different at the company<sup>42</sup>, sectoral<sup>43</sup> and inter-professional level<sup>44</sup>. These dispositions gave a new dynamic to TU life. In fact, because their representativeness was not guaranteed anymore, they had to “fight” for it. Finally, the trade unions' representativeness was in line with political legitimacy. This new requirement of representativeness was necessary and important as regards the functions of collective agreements in the French system and these are examined in the next chapter.

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<sup>40</sup> n°2008-789.

<sup>41</sup> L.2121-1 of French Labour Code.

<sup>42</sup> L.2122-1 of French Labour Code.

<sup>43</sup> L.2122-5 of French Labour Code.

<sup>44</sup> L.2122-9 of French Labour Code.

### 2.1.1.3. Connections and Comparisons

Finally, the French legislator succeeded in giving a stable legal base to a phenomenon inherently unstable because of its confrontational nature. In one century a practice born outside the law grew up and became a keystone of the legal labour framework. The government intervened in several areas of collective bargaining. First came the legal recognition of the phenomenon as a new private way to regulate industrial relations. Then, the public authorities used collective agreements by extending them to whole sectors. Afterwards, the government introduced collective agreements as a preliminary stage in the making of employment law. The relationship between the government and social partners moved from the simple recognition of the latter's existence to its recognition as real actors at the national level. These historical modifications had an effect on the nature of the collective agreement and also on the function of social partners.

In fact, collective agreements developed a double legal nature over time. When it regulates only a specific situation, the collective agreement belongs normally to the contract area. It is a private contract that is applicable to the involved parties, and is enforceable under common contract law. However, when the collective agreement is in connection with a public activity, it becomes a hybrid. The collective agreement has a private origin but will also find an application in the context of public action. The TUs have the same dual function. In the beginning they were recognised as possible contractual partners. That was an important step in allowing them to reach an agreement. Then, their functions were developed and they gained power not only in the workplace, but also in the area of public policy. Therefore, they had to be qualified as representative in order to assume these responsibilities. The proof of their representativeness moved from an arbitrary system to a democratic one.

## 2.1.2. The strong political influence of the British government and its consequences for collective bargaining at domestic and European level

### 2.1.2.1. Modest beginnings of collective bargaining in the statutory world

Although there had been previous government interventions in industrial relations and collective bargaining through statutes, the period which marked the most significant turning point was in 1968; it was the first attempt to change the system of industrial relations from what had developed in practice with the *collective laissez-faire*. Whereas originally the social partners largely shaped collective bargaining, in this period there were attempts to shape it by means of law and politics.

The Donovan Report was published in 1968 and can be considered as a milestone in the history of industrial relations in the UK<sup>45</sup>. The main suggestion was to find a balance between framing industrial relations with statutes and developing the voluntarist tradition of collective bargaining<sup>46</sup>. In order to restore peace and efficiency to industrial relations, it was suggested that collective bargaining should be legally framed and centralised at company level. The interesting thing about this report is the fact that it was the first to introduce government action into industrial relations.

However, the recommendation of the Report never came to fruition. The Conservative government tried to repeal collective laissez-faire through the IRA 1971, and to put the law at the centre stage of collective bargaining<sup>47</sup>. The reform was about the presumption that written collective agreements created legal relations unless there was an express clause to the contrary. The consequence of government intervention was important in terms of the value of the collective agreement, generally giving it a legal binding value. However, these new procedures failed to be applied for various reasons. One of them was the fact that the Act's encouragement of legally enforceable collective agreements was ineffectual because the optional clause on legally binding agreements was a universal feature<sup>48</sup>. This experience showed that social partners were strongly opposed to the idea of legally binding collective agreements. This had important consequences for the value of agreements and also on enforcement.

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<sup>45</sup> BROWN, Richard K. From Donovan to where? Interpretations of industrial relations in Britain since 1968. *British Journal of Sociology*, 1978, p. 439.

<sup>46</sup> DEAKIN, Simon F. and MORRIS, Gillian S. *Labour law*. Hart, 2012. p.29.

<sup>47</sup> LEWIS, Roy. The historical development of labour law. *British Journal of Industrial Relations*, 1976, vol. 14, no 1, p.12

<sup>48</sup> LEWIS, Roy. *Ibid.* 47. p.13.

The IRA 1971 was a failure, and was immediately repealed by the Labour Party after its election in 1974. In addition, the EA 1975 was adopted; for the first time the Labour Party decided, like its predecessor, to legislate in the field of industrial relations. This Act introduced a compulsory recognition procedure for trade unions that wanted to bargain<sup>49</sup>. This statutory recognition was the first illustration of the representativeness issue in the British system and the need to prove the representativeness of the TUs to force employers to bargain.

In addition, the close connection between the Labour Party and the TUs helped to develop collective bargaining. By 1975 the TUC was acknowledged to have a significant role in shaping government policy. The consequence of the TUC's position was the acceptance of the role of collective bargaining as a mechanism for job regulation<sup>50</sup>. In this respect, the central union was an important tool in government. The 1970s was the period when the trade unions and collective bargaining were most recognised and developed<sup>51</sup>.

#### 2.1.2.2. Thatcher's break on social ground at national and European level

With Margaret Thatcher as Prime Minister, the relationship between the government and TUs changed radically. Thatcher believed that “*trade unions should be subject to special restrictions because of the damage they do to free markets*”<sup>52</sup>. One of the main aims of her philosophy was to weaken the trade unions and their influence on industrial relations. First of all, her government dismantled the tripartite structures that had given unions access to the corridor of power in previous Labour governments<sup>53</sup>. It excluded social partners from the informal consultation process while they were the main subjects of reforms. Second, it increased individual liberties and rights<sup>54</sup>. These measures developed and emphasised individual aspects of contracts of employment and also contracts with the TUs, thus weakening collective bargaining.

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<sup>49</sup> TOWNSHEND-SMITH, Richard. Trade union recognition legislation—Britain and America compared. *Legal Studies*, 1981, vol. 1, no 2, p. 196.

<sup>50</sup> TOWNSHEND-SMITH, Richard. *Ibid.* 49, p.198.

<sup>51</sup> KOUKIADAKI, Aristeia and DIDRY, Claude. Droit et conflits du travail dans l'Angleterre du New Labour. 2012. p.13 Some 55% of workers were members of a TU in 1979.

<sup>52</sup> FUDGE, Judy. Trade unions, democracy and power. *International Journal of Law in Context*, 2011, vol. 7, no 01, p. 97.

<sup>53</sup> EVANS, Steve, EWING, Keith, and NOLAN, Peter. Industrial relations and the British economy in the 1990s: Mrs Thatcher's legacy. *Journal of Management Studies*, 1992, vol. 29, no 5, p. 579.

<sup>54</sup> A person's right to sue a TU for membership of the union has been unreasonably refused or s/he has been unreasonably expelled from the union (EA 1980 s.4(4)); the right not to be unjustifiably disciplined by the TU (EA 1988 s.3(1)) implying the right not to support or support any strike or industrial action (EA 1988 s.3(3)(a)).

One legal example of her politics is the adoption of the Employment Act 1980. The Act repealed the procedure of statutory recognition<sup>55</sup>. The government deprived TUs of their bargaining right; they could not oblige an employer to bargain, and even if they managed to do so there was no way to enforce it. In fact, the “natural” way of enforcement via industrial action was strongly restricted as well<sup>56</sup>. Note that at the same time in France the Auroux laws gave more rights to TUs, underlining the different approach adopted by each country.

Thatcher’s politics had influence not only inside the UK but also at the European level. In social matters, Thatcher’s politics were in complete contrast to European practice<sup>57</sup>. The 1980s and 1990s were synonymous with deregulation and deconstruction of industrial relations in Britain, but the opposite held at the European level with the construction and promotion of social dialogue. The political lines were particularly divergent relating to collective bargaining and TU functions. At the European level they were recognised as part of European governance<sup>58</sup>; what was emerging was an example of the tripartite situation that Thatcher wanted to avoid<sup>59</sup>. At the European level collective bargaining could be a precursor to law or used to implement it; Thatcher’s government did its best to exclude collective bargaining from the legislative process, as illustrated by several British vetoes when it came to the adoption of a new social direction for the EU<sup>60</sup>. It has been argued that this opposition was a factor in the development of social dialogue.

### 2.1.2.3. Tentative reconstruction of industrial relationships

Thatcher’s actions meant the union movement declined substantially<sup>61</sup>. In 1997 when the Labour Party was elected, TUs wished to repeal all of Thatcher’s legislation. and desired mandatory recognition to reverse the balance of power in their favour. However, the government was in a strong economic situation and did not need TU support<sup>62</sup>. Additionally,

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<sup>56</sup> Trade Union Act 1984 Part II. *See details* FREDMAN, Sandra. The new rights : Labour Law and ideology in the Thatcher years. *Oxford Journal of Legal Studies*, 1992. p.27-28.

<sup>57</sup> EVANS Steve, EWING Keith and NOLAN Peter. *Supra* 46, p.585

<sup>58</sup> STREECK, Wolfgang. European Social Policy after Maastricht: The 'Social Dialogue' and 'Subsidiarity'. *Economic and Industrial Democracy*, 1994, vol. 15, no 2, p. 152

<sup>59</sup> EVANS, Steve, EWING, Keith, and NOLAN, Peter. *Supra* 46. p. 579.

<sup>60</sup> TOWERS, Brian. Two speeds ahead: social Europe and the UK after Maastricht. *Industrial Relations Journal*, 1992, vol. 23, no 2, p. 86.

<sup>61</sup> DAVIES, Paul L. and FREEDLAND, Mark. *Towards a flexible labour market: labour legislation and regulation since the 1990s*. Oxford University Press, 2007. p.6 ; KOUKIADAKI, Aristeia and DIDRY, Claude. *Ibid.* 7 ; 30% of workers were members of a TU.

<sup>62</sup> DAVIES, Paul L. and FREEDLAND, Mark. *Ibid.* 61, p.107.

the government was conscious that making important reforms and giving power to TUs could put them in difficulty<sup>63</sup>.

The government's approach changed the relationship between the State and the TU. The idea was to stay as neutral as possible, in order to respect citizens' capacity for autonomous choice<sup>64</sup>. The consequence was non-intervention by the State in industrial relations. Therefore the government re-introduced with the Employment Act 1999 a minimum procedure for trade union recognition.

This procedure was slightly different from the one introduced in 1971. The scope of the recognition was limited. The procedure was more complex than before. Contrary to previous legislation, the purpose of this Act was not to encourage the spread of collective bargaining<sup>65</sup>. This legislation could be seen as a return to the voluntarism tradition. As Duke said:

*“The 1999 recognition procedure is at variance with this because it is designed to promote voluntary agreements as a good in itself, and not to secure improved terms and conditions of employment for the relevant workers”*<sup>66</sup>.

Finally, after several attempts at collective bargaining in the 1970s and 1980s, the 1990s saw a return to neutrality. Nevertheless, because of EU influence, which opened up the possibility to transpose a European directive through national collective bargaining, the UK had to guarantee minimum standards regarding collective bargaining.

The election of New Labour in 1997 was also a turning point for the UK's international position. After years of opposition to the European Union, the United Kingdom finally signed the Social Chapter of the Maastricht Treaty, including the Charter of Fundamental Social Rights in 1989. Signature of the treaty, however, was more a declaration of intention rather than an announcement of deep legislative change. The EA 1999 was not against collective bargaining and it supported the right to bargain, but there is a gap between respecting a right and promoting it. In this context the position of Britain did not change<sup>67</sup>. However, from a

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<sup>63</sup> DAVIES, Paul L. and FREEDLAND, Mark. *Ibid.* 61, p.109.

<sup>64</sup> FUDGE, Judy. *Supra.* 52, p.98.

<sup>65</sup> DUKES, Ruth. The Statutory Recognition Procedure 1999: No bias in favour of recognition? *Industrial Law Journal*, 2008, vol. 37, no 3, p. 236.

<sup>66</sup> DUKES, Ruth. *Ibid.* 65, p. 236-267

<sup>67</sup> Despite the fact that the procedure of recognition was found to contravene ILO Convention 98 in five respects there is no

political perspective the United Kingdom was recognised and integrated as an actor in the social policy of the European Union.

#### 2.1.2.4. Connections and comparisons

To summarise, government behaviour in respect of collective bargaining can be seen as fluctuating over time. The relationship with TUs changed considerably from one government to another; they were politically integrated with the Labour Party, then rejected by the Conservative Party, and finally “ignored” by New Labour. These variations in government attitudes had consequences not only for the nature of collective agreements but also for the rights and functions of TUs.

The main characteristic of the traditional British system was voluntarism. Therefore, the rights of the TUs - in matters of collective bargaining- were focused on statutory recognition. It is argued that this procedure was sometimes used as an indirect way to promote collective bargaining<sup>68</sup>, or just to guarantee the access to the right to bargain, depending on the government and the complexity of the procedure. At the same time, the nature of collective bargaining stayed in the hands of the social partners, and the various interventions of the government had little effect.

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reform planned (CEACR: Individual Observation concerning Right to Organise and Collective Bargaining Convention, 1949 (No. 98) UK, 2007, available <http://www.ilo.org/ilolex/english/iloquery.htm> as of June 2008.)

<sup>68</sup> With the encouragement of voluntary agreement on recognition; see DUKE, Ruth. *Supra.* 65.

### 2.1.3. The dual development of collective bargaining throughout the social construction of the European Union

#### 2.1.3.1. The slow emergence of a social dimension at the European Union stage

Initially, the European Community was founded on two treaties: the Treaty of Paris in 1951 and the Treaty of Rome in 1957. Although both were focused on economic issues, they also covered working conditions. The Treaty of Paris was slightly more ambitious concerning the social arena, but the general approach stayed the same<sup>69</sup>. Employment policy was not seen as a way to improve or stabilise employment in the European zone; it was intended to help workers adapt to economic change.

The position started to change with the Paris Summit in 1972 when Heads of State and Prime Ministers declared<sup>70</sup>: “*They attach as much importance to vigorous action in the social field as to the achievement of the monetary and economic union*”<sup>71</sup>. Shortly after, the first concrete step came with the Social Action Programme of 1974, following the enlargement of the EU to include the UK. The main idea of this Programme was to adopt rules at European level and apply them in the same way in all Member States: top-down standardisation. However, in the 1980s subsequent attempts to develop a more active social policy were halted by the election of Margaret Thatcher in the UK<sup>72</sup>. The reason was the UK government's determination to veto anything which undermined its deregulation of the labour movement<sup>73</sup>.

The development of social dialogue at European level was essentially owed to the French Commission's President: Jacques Delors<sup>74</sup>. He was President of the Commission from 1985 to 1995. Jacques Delors was a French socialist. The 1980s had been a period of socialist government in France, where laws in favour of collective bargaining had been adopted<sup>75</sup>. His dynamic was to give voice to social partners in the social field. At European level, the illustration of this idea was the Val Duchesse Summit in 1985. It was the starting point of a

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<sup>69</sup> BERCUSSION, Brian. *Supra.* 2. p.103.

<sup>70</sup> BLANPAIN, Roger. *European labour law*. Kluwer Law International, 2008. p.207.

<sup>71</sup> VAN PRAAG, Philippe. Trends and Achievements in the Field of Social Policy in the European Communities, *Bulletin*, 1973, vol. 1. p.150.

<sup>72</sup> BERCUSSION, Brian. *Supra.* 2, p.102.

<sup>73</sup> WICKHAM, James. The end of the European social model: before it began? 2002. p.12

<sup>74</sup> DIDRY, Claude and MIAS, Arnaud. *Le moment Delors: les syndicats au coeur de l'Europe sociale*. Peter Lang, 2005.

<sup>75</sup> See details in 2.1.1. p.16

social dialogue by European social partners<sup>76</sup>. Even if the period after Val Duchesse did not produce collective agreements, meetings between trade unions' and employers' European representatives were important and formed the basis for future European agreements.

This informal step was completed by a more formal one a year later with the Single European Act 1987. This Act institutionally recognised social dialogue with the introduction of a new article, 118B. Thus some subjects fell under the qualified majority<sup>77</sup>; however, provisions relating to the rights and interest of employed people stayed in the unanimity vote area and so under UK veto. Social dialogue paved the way for European social construction.

### 2.1.3.2. Institutional recognition of social dialogue in European governance with the Maastricht Treaty

In 1988 during a speech to the British TUC, Jacques Delors emphasised the difference of France's approach from that of the UK by contrasting the European social model with the existing *laissez-faire* in Britain<sup>78</sup>. This opposition was fully illustrated by the Social Chapter of the Maastricht Treaty.

The Maastricht Treaty was a massive turning point in European construction in all areas: economic, financial and social. In terms of the last, there were three main changes. The first one was that implementation of common labour law through collective bargaining within Member States was explicitly recognised. The European Union Court of Justice had already recognised this implementation option. As BERCUSSON noted<sup>79</sup>, the court underlined that there must be adequate coverage by the agreements, and that the substantive content of the agreements must coincide with directives' requirements<sup>80</sup>. The different value given to collective agreements in France and the UK could change the effectiveness of EU law implementation.

Second, the role of social partners and the status of their agreements were formally recognised. They had the right to be consulted, and any agreements they reached could

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<sup>76</sup> LYON-CAEN, Antoine and SCIBERRAS, Jean-Christophe. *Pratiques et perspectives de la négociation collective européenne. Travail et Emploi*, 1989, vol. 42, p. 23.

<sup>77</sup> Art. 118A SEA 1986.

<sup>78</sup> WICKHAM, James. *Supra*. 73. p.12

<sup>79</sup> BERCUSSON, Brian. Maastricht: a fundamental change in European labour law. *Industrial Relations Journal*, 1992, vol. 23, no 3, p. 181.

<sup>80</sup> *Commission v. Denmark*, Case 143/83 (1985) 427.

become directives under certain conditions<sup>81</sup>. The process of consultation was an important step in the development of social Europe and the integration of social partners into European governance. It is interesting to note how this process came strongly to influence the French system<sup>82</sup>. At the same time, choosing to integrate TUs into European governance was in direct opposition to the British dynamic of excluding them from the political stage<sup>83</sup>.

To conclude, the Maastricht Treaty was considered as an important step in European social construction thanks to the content of its social provisions. However, it also marked the start of a two-track Europe with the non-adherence of the UK to these provisions

### 2.1.3.3. European social ambitions in perspective

The end of the 1990s was a premise to an attempt at further social involvement with the draft of the European Union's Constitution, and the writing of the European Charter of Fundamental Rights. However, these proposed advancements were linked with political integration issues, and faced opposition from France and the United Kingdom<sup>84</sup>. This resulted in reconsideration of European ambitions as a whole with the Lisbon Treaty in 2007.

The Treaty of Lisbon set out new social objectives for the EU. The main idea was the integration of horizontal social clauses to ensure the coherence of the EU's actions. The consequence was that the social dimension had to be taken into account in all actions of the European Union<sup>85</sup>.

One modification introduced by the treaty was the extension of qualified majority to the subject of social policy. Although it was a further step in social action, there was nothing new about collective bargaining. The extension concerned only matters involving social benefits for migrant workers and their families. However, it is important to remember that since Amsterdam (1997) and Nice (2000), it had been decided that the European Council should act by unanimity<sup>86</sup> for matters relating to collective representation and defence of workers'

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<sup>81</sup> See details of this procedure 2.2.3.

<sup>82</sup> See details 2.1.1.

<sup>83</sup> See details 2.1.2.

<sup>84</sup> France was opposed to the European Constitution and the UK to the legal effect of the Charter.

<sup>85</sup> SCHÖMANN, Isabella. The Lisbon Treaty: a more social Europe at last. *ETUI Policy Brief-European Social Policy*, 2010, vol. 1, no 6. p.3

<sup>86</sup> Art.153 & 294 TFEU.

and employers' interests. In addition the EU had no competence in matters of the right of association and the right to strike<sup>87</sup>.

Collective bargaining is explicitly linked to neither collective representation nor the right of association. Some authors considered that the right to collective bargaining is a right related to freedom of association<sup>88</sup>. The consequence is the exclusion of collective bargaining from the remit of the EU. However, it is argued that collective bargaining could also be defined by its function: collective defence of workers' and employers' interests. The consequence would be the incorporation of collective bargaining into the competence of the Commission. It would be a massive change which could give a straight tool in the convergence of the way of bargaining into Member States. Hence, if we can insure that collective bargaining is almost the same everywhere, it would secure the effectiveness of implementation of European law when collective bargaining is chosen. Finally, it could be argued that changing the approach to collective bargaining would legitimate the action and bring more coherence to European social action.

#### 2.1.3.4. Connections and comparisons

From this broad vision of the social construction of the European Union in respect of collective bargaining, two observations can be made. First, the EU and in particular social Europe, was born out of the opposition between Member States who wanted to create a social union and those which wanted to stay in a purely economic one. This opposition is illustrated by the approach of France and the UK. Both of them tried to reflect their national approach at European level; France with the promotion of collective bargaining and its integration into European social governance, and the UK with the exclusion of social partners from this governance. The result was the construction of a non-binding framework, and the use of social dialogue as a soft way to intervene in the social area with the help of social partners. The second observation concerns the two faces of collective bargaining at the European level; it is a tool in social action, but also the subject of a fundamental right recognised in treaties. They are linked because the value of the right to bargain collectively influences the value of the collective agreement in Member States and therefore the value of the act which implements European law.

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<sup>87</sup> Art. 153(5) TFEU.

<sup>88</sup> BARNARD, Catherine. *EU employment law*. Oxford University Press. 2012. p.699

#### 2.1.4. CONCLUSION

This historical approach to the political and legal choices of the French, the British and the European systems in respect of collective bargaining shows one important thing; the development of the European social dialogue was a way to take into consideration the wish of certain States – like France – to give a social direction to the EU, but also the wish of the UK to have only an economic union.

In France, the collective bargaining process slowly moved from practical process to a institutionalised one. The different stages were first the recognition of the social partners as private actors with the capacity to conclude collective contract, and then their recognition as privileged interlocutors in the social field. The collective bargaining process had the function of regulating the particular circumstances of the workplace, but also the more general conditions at the national level. The government fully integrated its social partners into social governance. At the same time, the collective agreement qualified as a collective contract, which could have a private and/or a public application and purpose. There is a close link between the collective bargaining process and the legal framework. In British history the situation is completely different. The collective bargaining process was born out of the law and stayed a practical process. The social partners did not trust the judiciary or the law<sup>89</sup>. Therefore, there was a reluctance to frame the collective bargaining process in law. This position was justified by the wish to guarantee the autonomy of collective bargaining. In addition, governments accepted for a long time the idea of minimum intervention in industrial relations through the concept of *a* collective laissez-faire. Links with the government were unofficial and existed only with the Labour Party. Therefore, the fact that the country was led for years by the Conservative Party, and especially Margaret Thatcher, was damaging for its social partners. Beyond the simple disconnection between the politicians' and social partners' action, the consequence was a weakening of the TU. These contrary movements of French integration and British disintegration of the collective bargaining process led to a new turn in the European construction.

In order to accommodate the wishes of both France and the UK, and so to respect EU competence without weakening the economic framework, it was decided to develop a social Europe through social dialogue. The main idea was to allow the States who wanted to go

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<sup>89</sup> DAVIES, Anne CL. *Employment law*. Pearson, 2015. p.45.

further with European integration to do it without constraining others to do the same. At the same time, the ones who wanted be part of it should have their national traditions respected. A space for dialogue was opened to allow discussion about social matters at the European stage between social partners. Nonetheless, the European Union decided to take a step further with the Maastricht Treaty where the integration of the social partners into the Social governance was fully recognised. There was a similarity with the French system whereby the social partners were recognised not only as private negotiators but also as advisers of the executive. In the end, the development of the current framework for social dialogue reflected the choice of the soft way in order to respect the institutional limitations and national legal traditions.

## 2.2. The national influence on the creation of a conceptual framework for the European collective bargaining process from a legal perspective

Initially, in France as in the UK, collective bargaining was associated with the idea of confrontation and social conquest<sup>90</sup>. Over time, collective bargaining became a tool to adapt industrial relations to economic needs<sup>91</sup>. As demonstrated previously the integration of this tool into national governance was different in the French and the British systems. Thus this chapter focuses on the determination of the functions of the collective bargaining process depending on the degree of integration in national governance. It is hypothesised that the level of autonomy of the social partners is in correlation with the functions of the social partners, the relations with the government and the value of the collective agreement. This comparative study between the French and the British functions of collective bargaining reveals that the same process does not have the same legal reality. With the legal difference in mind we can then examine the function of social dialogue.

In fact, contrary to the Member States' confrontational conceptions, at the European level collective bargaining is considered as a key tool for the modernisation and further development of the social area<sup>92</sup>. The creation of social dialogue at the European level was a deliberate choice of the Delors Commission<sup>93</sup>. From the beginning it was agreed that social partners' actions would have a close relation with the wishes of the Commission. Thus, the place and the functions agreed by the Member States and European social partners were central to the discussion. In addition, the fact that the European Union was composed of sovereign Member States limited the possible functions of social dialogue. Therefore, the concept of subsidiarity with the Member States has to be studied to understand what it is possible to expect at the European level.

In other words, this chapter explores the French, the British and the European functions of collective bargaining to see if there is any connection between them. The functions mainly depend on the relations with the Executive – i.e. national governments or Commission – and the degree of autonomy of the social partners in the execution of the collective bargaining process.

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<sup>90</sup> DUPAYS Alain, and PHERIVONG Catherine. *Supra* 34

<sup>91</sup> ETIENNOT Agnès, and ETIENNOT Pascale. *Supra* 24. p.687.

<sup>92</sup> BARNARD, Catherine. The social partners and the governance agenda. *European Law Journal*, 2002, vol. 8, no 1, p. 85.

<sup>93</sup> STREECK, Wolfgang. *Supra* 58. p. 152.

## 2.2.1. The different functions of collective bargaining in the French system: legal application, derogation or inspiration

### 2.2.1.1. Improvement of the law: the social function of collective bargaining

The primary function of collective bargaining is a social one, i.e. the protection of employees<sup>94</sup>. In accordance with this idea, the collective agreement can contain dispositions more favourable to employees than the legislative ones<sup>95</sup>. The only limitation is the respect of public order<sup>96</sup>. This notion is used in French private law to limit contractual freedom<sup>97</sup>. In the employment law context there is a special notion of public order. This concept is relative in the sense that the reference point is the law, and the law can change. Consequently, in order to guarantee the effectiveness of employees' social protection, the law is considered as a minimum standard and it is not possible to go below this. However, it is perfectly possible to bargain for terms which are more favourable for the employee than the law. Therefore, the social public order is also called the *principe de faveur*. This principle is recognised as a fundamental one in French employment law by all the high jurisdictions<sup>98</sup>. However, it is not a constitutional principle so it is not applicable to the legislator<sup>99</sup>. Therefore, social public order is not an absolute and there are two exceptions: absolute public order, and derogatory public order.

Absolute public order is applicable to all kinds of contract, not only in employment law. This public order is a set of dispositions that it is impossible to change, even in a more favourable way. It is the unshakeable stand of employment law<sup>100</sup>. The second exception is exclusive to the employment field. Derogatory public order was introduced in 1982<sup>101</sup>. It permits collective bargaining to derogate from the legal standards in a less favourable way. Because of the negative impact on employees' situations, the conditions for concluding a derogatory agreement are limited and strictly framed by the law<sup>102</sup>. In this situation the legal standards are subsidiary and apply only when there is no collective agreement. This idea is illustrated by the rules concerning overtime pay. The minimum legal requirement is an

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<sup>94</sup> ETIENNOT Agnès, ETIENNOT Pascale, *Supra.* 24, p.688.

<sup>95</sup> Art L.2251-1 French Labour Code.

<sup>96</sup> ETIENNOT Agnès, and ETIENNOT Pascale, *Supra.* 24, p.56-58.

<sup>97</sup> PINSON Arie, and SOUKPRASEUTH Delphine, Retour sur l'ordre public en droit du travail et son application par la Cour de cassation. Bull. d'Inf., de communication de la Cour de cassation avril 2011.

<sup>98</sup> Conseil Constitutionnel, 25 Juillet 1989 n°89-257 ; Cass.soc., 29 Janvier 2014 n°13-40.067 ; Conseil d'État, 21 Juillet 2001 n°22.0067.

<sup>99</sup> Cass.soc., 29 Janvier 2014 n°13.40.067.

<sup>100</sup> See more details in BARTHELEMY, Jacques, Ordre public et droit du travail. *Les cahiers du DRH*, 2011. N°172, p.41-49 ; ETIENNOT Agnès, and ETIENNOT Pascale, *Supra.* 24, p.57-58.

<sup>101</sup> Ordonnance n°82-41 16 Janvier 1982.

<sup>102</sup> n° 2004-391, 4 May 2004.

increase of 25% of the normal wage, but it is possible for a collective agreement to set a different percentage (could be less than 10%). It is important to note that there are still “fundamental minima” (e.g. 10%) that collective agreements have to respect in order to protect the employee.

#### 2.2.1.2. Downstream of the law; the complementary function of collective bargaining

With the derogatory agreement, collective bargaining becomes a way to regulate the collective employment relationship<sup>103</sup>. This workplace regulation through the collective agreement has to apply in accordance with the legislative regulations. Therefore, the strict separation between the application of the law and the collective bargaining is over. Nowadays, there is a broad range of situations where the functions of law and collective bargaining are laid out more subtly.

There are two possibilities. First, the law sets out clear and precise requirements but it requires collective bargaining to implement them<sup>104</sup>. Second, the law sets out a broad general framework and it is left to collective bargaining to agree the precise detail and how it will be applied<sup>105</sup>. A similarity with the function of collective bargaining at the European level is evident. In fact, when the European Parliament and the Council adopt a European directive they set a target and goal, and then the application is the responsibility of the Member States. The choice of implementation is left to them. As we will see<sup>106</sup>, one of the options to implement it is through collective agreements. Therefore, both in the French and in the European systems the collective agreement is a way to realise a principle settled in theory. It implies the recognition of the importance of the social partners. In this situation they have a complementary role to ensure appropriate application of the law or directives. This configuration does not exist in the British system because of the importance of the voluntarism tradition, but also because the government does not integrate – at least officially – the social partners as part of its governance.

#### 2.2.1.3. Upstream of the law: collective bargaining as an inspiration

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<sup>103</sup> FAVENNEC, Françoise. Pour une nouvelle articulation accord collectif/contrat de travail. *Semaine sociale Lamy*, 2015. Sup n°1667, p.13.

<sup>104</sup> Art. L.3122-33 French Labour Code

<sup>105</sup> Art. L.2281-5 French Labour Code

<sup>106</sup> See details 2.2.3 and 3.2.2.

The French system goes even further in the integration of social partners in its governance through the Accord National Interprofessionnel<sup>107</sup> (ANI). This kind of agreement is not a novelty in French law; the first one was in 1947. An ANI is important in the construction and improvement of the employment situation in France because it applies to a whole sector of activity in the same way across the country. Therefore it is an effective method of harmonisation. It is interesting to note that this kind of agreement is encouraged and developed in France, whereas the contrary applies in the British system because of the strong decline of national bargaining<sup>108</sup>. This difference could be seen as the result of the historical political divergence in the two countries seen in the previous chapter.

In France, the turning point was the law of 31 January 2007<sup>109</sup>. Prior to this law, national cross-industry bargaining was optional. The important improvement of the 2007 law is the codification of article L-1 of the Labour Code. According to this article, every time there is a proposed legislation in the employment area, the national social partners must be consulted. It does not mean there has to be a conclusion of an ANI; the only “obligation” is to open a bargain space. Sometimes, at the end of the process, there is no ANI but a recommendation for the legislator.

Nonetheless, the legislator has to find a balance between taking into consideration what is said in an ANI and translating it almost word for word<sup>110</sup>. In fact, the nature of a national collective agreement is not the same as that of the law. The collective agreement is an illustration of private interest by virtue of its contractual nature. The law is a unilateral act adopted in the general interest. This should not be overlooked when the legislator uses an ANI as inspiration for the law; the ANI does not answer the same need and does not have the same purpose as the law. In this context there is a similarity with the European system. As seen previously the French law of 2007 was inspired by the Maastricht Treaty, so it is logical to find the same process of consultation in the law-making process of these two systems. As we will see<sup>111</sup>, the European Union also consults its social partners when a modification of the employment context is planned. However, there is also a difference: in France the conclusion of an ANI leads automatically to a law, but at the European level once the framework agreement is concluded it is possible to let it in the hands of the social partners. There is no obligation to turn it into a directive. In my view it marks the difference between

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<sup>107</sup> National cross-industry agreement or national multi-employer agreement

<sup>108</sup> KATZ, Harry C. The decentralization of collective bargaining: a literature review and comparative analysis. *Industrial & Labor Relations Review*, 1993, vol. 47, no 1, p.10

<sup>109</sup> n° 2007-130

<sup>110</sup> BARTHELEMY Jacques, and MORAND Michel. *Supra*. 37. p.29-39.

<sup>111</sup> See details 2.2.3. and 3.2.2.

the “consensus” agreements that it is not good to generalise in a law and the “pre-law” agreements that it is possible to modify in a law. Finally, it could be seen as the same distinction as that between the purely contractual collective agreement and those that the Labour Minister extended in the French system in 1936.

#### 2.2.1.4. Connections and comparisons

To summarise, the three main functions of collective bargaining in the French system are: the improvement of the law, the application of the law and the inspiration of the law. Depending on the situation, the social partners’ autonomy changes. When it comes to the improvement of the law, the social partners are completely free to bargain for what they want subject only to the limitation of public order. Then, when they are co-actors in the law-making process, their autonomy decreases a little; the government chooses the topic on which they must bargain, but their approach of the subject is free. Finally, when they are agents of the legislator by applying the law at company level their autonomy decreases again; their action margin is limited and they have to achieve fixed goals.

## 2.2.2. Subtle balance between freedom of parties and minimum standards: the British system

### 2.2.2.1. Collective laissez-faire: a foundation for bargaining autonomy

In the UK, it appears clear that the collective relationship has developed independently of the employment law framework. The autonomy of the parties is illustrated through the process of recognition. It could be defined as a situation wherein employers undertake to negotiate with TUs on collective bargaining issues<sup>112</sup>. The recognition to bargain is limited in the content, but also in the time; you can bargain only once on a limited scope. However, thanks to contractual freedom, it is possible to organise the process of bargaining through an agreement.

Recognition is subjective, depending on the relationship between trade unions and employer. This situation is totally different from the French one where the recognition of trade unions is objective, subject to the representativeness of the TU in the company. In France employers do not have a choice of social partners; they have to bargain with the trade unions who are the most representative. The law sets conditions as to representativeness and the subject on which they have to bargain.

The right to bargain collectively is a fundamental employment right<sup>113</sup> and the voluntary system has limitations<sup>114</sup>. For these reasons the State had to intervene to protect and guarantee this right through statutory recognition. The issue is to determine how the British system managed to make the right to bargain enforceable while respecting the freedom of the relevant parties. In recent decades, collective bargaining has emerged in the UK as an important human right at work<sup>115</sup>. The responsibility for protecting human rights must remain with states<sup>116</sup>. However, the meaning of the term and the behaviour called for by governments and employers in order to respect the right are open to different interpretations<sup>117</sup>. This is the reason why how they choose to enforce this right may differ.

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<sup>112</sup> TULR(C)A 1992 s.180(3)

<sup>113</sup> 1998 ILO Declaration on Fundamental Principles and Rights at Work s.2(a) ; See ADAMS, Roy J. Collective Bargaining as a Minimum Employment Standard. *The Economic and Labour Relations Review*, 2011, vol. 22, no 2, p. 153-164; WHEELER, Hoyt N. Viewpoint: Collective bargaining is a fundamental human right. *Industrial Relations: A Journal of Economy and Society*, 2000, vol. 39, no 3, p. 535-539.

<sup>114</sup> PETRASEK, David. Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies. *International Council on Human Rights*. [www. http://www. ichrp. org/ac/excerpts/30. pdf](http://www.ichrp.org/ac/excerpts/30.pdf), 2002.

<sup>115</sup> ADAMS, Roy J. *Ibid.* 113. p. 153

<sup>116</sup> PETRASEK David, *Ibid.* 114.

<sup>117</sup> ADAMS, Roy J. *Ibid.* 113. p.154

In fact, when we compare the French and the British systems, it seems that the general exception in the British system is the general rule in the French one; an obligation to bargain on a certain subject when the trade unions prove its representativeness in the workplace<sup>118</sup>. These terms are fundamental because they guarantee to workers their rights to bargain if the employer refuses to recognise them voluntarily.

The ability to bargain is essential because it introduces a kind of democracy into the enterprise<sup>119</sup>. Without democracy, there may be a paternalistic benevolence that implies no equality of bargaining power. It is the reason why a balance has to be found between voluntary and statutory recognition.

The British system tries to find a theoretical harmony between the two, even if the practice shows its limitations.

#### 2.2.2.2. Multiple functions of the collective agreement to support collective bargaining's autonomy

As underlined by Hepple, one of the distinctive characteristics of British labour law is that the parties themselves have wide scope for creating norms, which in practice govern the working relationship<sup>120</sup>. In fact, following the distinction made by Kahn-Freund<sup>121</sup> and later by Honeyball, the collective agreement has a double function: the regulation of the mechanism of the collective bargaining, with procedure agreements, and regulation of work conditions with substantive agreements<sup>122</sup>.

As noted previously, the development of the importance of collective bargaining was owed to a minimum legal intervention. The main principle was freedom; there was no legal requirement that collective agreements should cover any specific matters, include any specific terms or any particular form<sup>123</sup>, or be of any minimum or maximum duration<sup>124</sup>. Because of the lack of legislation in this area, the responsibility for setting this kind of rule fell to the social partners, if they wanted it. Regulation of the relationship between the social partners is possible through a procedural agreement.

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<sup>118</sup> TULR(C)A 1992 Sch A1, Part 1; *see details 3.1.1.2.*

<sup>119</sup> ADAMS, Roy J. *Supra.* 113, p.155

<sup>120</sup> HEPPLER, Bob Alexander and FREDMAN, Sandra. *Labour law and industrial relations in Great Britain.* Kluwer Law Intl, 1986. p.67

<sup>121</sup> KAHN-FREUND, Otto. Collective agreements under war legislation. *The Modern Law Review*, 1943, vol. 6, no 3, p. 115

<sup>122</sup> HONEYBALL, Simon and BOWERS, John. *Labour Law.* 2006. p.364

<sup>123</sup> *Burke v Royal Liverpool University Hospital NHS Trust* (1997) ICR 730

<sup>124</sup> DEAKIN Simon and MORRIS Gillian S. *Supra.* 46, p.69

The content of these agreements answered to the voluntary principle and there was no legal obligation. Thus collective self-regulation<sup>125</sup> could establish mechanisms for the negotiation of employment standards, procedures for varying the standards, and methods for resolving disputes. An agreement arguably specifies its duration, and even the condition for the next negotiations. If procedural agreements were used more often, they might introduce a sort of stability into the bargaining process. Perhaps it should be the subject of a legal intervention, while at the same time respecting the idea of flexibility of collective bargaining. Even if social partners started planning the “future of their bargaining relationship”, they would keep their freedom and the British system would remain far from the statutory French system where the entire second book of the Labour Code is dedicated to the bargaining framework.

The second function of the collective agreement is the traditional one, common to every system: the normative function. The collective agreement regulates the terms of individual contracts of employment. These “substantive” terms<sup>126</sup> may cover pay scales, working hours, holidays, shift work and overtime, and many other areas. It should be underlined that subjects covered by the agreement are again a matter for social partners. The only exception is the case of statutory recognition where subjects of bargaining are imposed<sup>127</sup>, although the union and the employer are free to add other subjects. These additional topics are not regulated by statute<sup>128</sup>.

The common point of the voluntary and statutory normative agreement is that all terms bargained can be integrated in the contract of employment. As we will see in the second part of this dissertation, the collective agreement by itself does not automatically have a legal value. The judicial enforceability of the agreement depends on the social partners’ intention. Therefore, when a collective agreement does not have a legal value, the only way to make it judicially enforceable is by incorporation into the employment contract.

### 2.2.2.3. Connections and comparisons

The concept of collective laissez-faire leads to a high degree of autonomy for the social partners in the British system. Depending on the correlation between the social partners’ level of autonomy and the functions of the collective agreement described

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<sup>125</sup> COLLINS, Hugh, EWING, Keith, and MCCOLGAN, Aileen. *Labour law*. Cambridge University Press, 2005. p.13

<sup>126</sup> DEAKIN Simon and MORRIS Gillian S. *Supra*. 46, p.69

<sup>127</sup> TULR(C) Act 1992, Sch A1 Part I s 3(3)

<sup>128</sup> HONEYBALL Simon and BOWERS John. *Honeyball & Bowers’ Textbook on Labour Law*. Oxford University Press. 2006. p.369

previously<sup>129</sup>, it can be argued that the British function of the collective agreement is a pure improvement of the law in respect of public order. However, we can see that the autonomy of the social partners goes beyond that, and it would even be possible to introduce the idea of their independence. In fact, in France the social partners improve the law through the collective agreement. It means there is always a legal base, and they do not have a creative function. Nonetheless it is what happens in the UK. Because of the minimum legal recognition of collective bargaining – and so its actors – the government lets *its* place of framing the collective bargaining to the social partners.

To some extent, there is a similarity with the European Union system. In fact, social dialogue was created in parallel with the legislative process to compensate for its institutional limitations<sup>130</sup>; the British social partners compensate for the minimum legal intervention by acting themselves. The interesting thing is that those two phenomena have the same cause: the refusal of the British government to intervene legally in the social area or social dialogue at either the national or European level. The British social partner is a sort of workplace legislator acting independently of the legal system. The French social partner has the same qualification when the collective agreement is qualified of ‘the law of the workplace’. The main difference, however, is that in France they are fully integrated in the legal sphere. This difference justifies the difference of effectiveness of the collective agreement in these two systems, which we will study later<sup>131</sup>. In the next section we study the position at the European Union level, and see if it is possible to achieve a blend between the French and the British conceptions.

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<sup>129</sup> See 2.2.1.4

<sup>130</sup> See 2.1.3.

<sup>131</sup> See 3.3

## 2.2.3. European social dialogue: between theory and reality

### 2.2.3.1. Collective bargaining: overcoming obstacles to integration

The tension between the economic dimension and the social dimension of the European Union is not something new. According to Fredman, the European Union's genesis as a free trade zone has always threatened to privilege economic freedoms over social rights<sup>132</sup>. Nonetheless, social rights could be seen as a "productive factor", an essential contribution to the economy, while economic policy should promote social objectives.

On the one hand, the European Union recognises the fundamental nature of the right to collective bargaining<sup>133</sup>. In the Treaty of the Functioning of the European Union (TFEU), the EU not only promotes this right but references other international treaties defending the same idea<sup>134</sup>. Furthermore, at the European Union level the Charter of the Fundamental Rights of the European Union<sup>135</sup> underlines the importance of the right to negotiate and conclude collective agreements at national and community level. In the light of these considerations, it seems to be clear that the right to collective bargaining is a fundamental social right.

However, on the other hand, in the view of the European Union this right is considered to be subordinate to the economic consideration. The Union promotes social dialogue by taking account of the need to maintain the competitiveness of the Union's economy<sup>136</sup>, and without prejudice to other provisions of the treaties<sup>137</sup>. In other words, the development of social dialogue and collective bargaining happens in an economic context which incorporates the social area. Thus, the social field of competence of the European Union is limited to an exhaustive list of subjects<sup>138</sup> covering both individual and collective aspects of the employment relationship. In addition to the limited substance of action, the process is also strongly framed; consultation of social partners<sup>139</sup>.

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<sup>132</sup> FREDMAN, Sandra. Transformation or dilution: fundamental rights in the EU social space. *European Law Journal*, 2006, vol. 12, no 1, p. 41

<sup>133</sup> Article 151 TFEU

<sup>134</sup> Art 6 of European Social Charter 1961, and article 12 of the Community Social Charter of Fundamental Rights 1989

<sup>135</sup> Art 28 *Ibid.* 133

<sup>136</sup> Art 151 TFEU

<sup>137</sup> Art 156 TFEU

<sup>138</sup> Art 153(1) TFEU

<sup>139</sup> Art 154 TFEU

The second important restriction of the social partners' autonomy at the European level is the nature of the European Union. As Streeck reminds us, the European Union is a community of sovereign nation-states<sup>140</sup>. He also underlines the fact that the source of the Member States' legitimacy is the fact that they are responsible for social policies at the national level. Therefore, they are unlikely to cede control over these to supranational agencies like the Commission or the European Parliament<sup>141</sup>. At the same time, the Maastricht Treaty institutionalises the principle of subsidiarity<sup>142</sup>. According to this principle,

*'in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States (...) but can rather (...) be better achieved at Union level'*.

Because most of the social policy topics do not fall within the exclusive competence of the EU, they are subject to the subsidiarity principle. However, as we saw in the previous chapter, Maastricht also institutionalised a role for social partners at the European level through the consultation process. The procedure is that of "bargaining in the shadow of the law"<sup>143</sup>. Both Bercusson and Barnard are of the opinion that this process raises important issues of subsidiarity<sup>144</sup>.

### 2.2.3.2. Social partners as a compass in the European Union's social governance

Considering the limitation of scope and action of the European Union in the social area, a key issue is to determine how it is possible for the Commission and social partners to have an effective impact on European employment law.

Most importantly, article 154 of TFEU provides that the Commission shall consult management and labour on the possible direction of Union action. In the case where action is advisable, social partners must be consulted on the content of the planned proposal. At this

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<sup>140</sup> STREEK Wolfgang. European Social Policy after Maastricht : The 'Social Dialogue' and 'Subsidiarity'. *Economic and Industrial Democracy*. 1994, vol.15, no2, p. 156.

<sup>141</sup> PELKMANS, Jacques. The institutional economics of European integration. *Integration through law—Europe and the American federal experience*, 1985, vol. 1.

<sup>142</sup> Art 5 TEU.

<sup>143</sup> BERCUSSON, Brian. *Supra*. 79. p. 188.

<sup>144</sup> See BERCUSSON Brian *Supra*. 79 ; and BARNARD Catherine. The social partners and the governance agenda. *European Law Journal*, 2002, vol.8, no 1, p.80-101

point a choice is given to the social partners; they put forward to the Commission an opinion or a recommendation, or they inform the Commission of their wish to initiate a process of autonomous negotiation. This theoretical framework illustrates the tripartite process chosen by the European Union in the social area. It is important to observe that in the tripartite relationship, the social partners are required to contribute to a policy defined by European institutions<sup>145</sup>.

As observed previously, the opportunity to negotiate is open to social partners<sup>146</sup>. If they agree to start bargaining, there are two possibilities. The first one is the failure of the negotiation, or failure to meet the Community's objectives, in which case it is possible to put forward a proposal for a legislative act. In such cases, and if an agreement is concluded, it would be possible to implement it under the social partners' and Member States' own procedures and practices. However, it is also possible for the Commission to exercise its right of initiative and write a proposal for a legislative act on its own. The second hypothesis is if social partners reach an agreement. The agreement could remain in the hands of the social partners or the Commission could ask to submit the agreement for implementation by Council decision<sup>147</sup>. The role of the Commission is important because it assesses the representativeness of the contracting parties, their mandate, and the legality of each clause of the collective agreement in respect of Community law. If the Commission does not adopt the proposal, the agreement goes back to the social partners. If there is a Commission proposal, the Council discusses it. If it rejects the proposal, the responsibility for the agreement's implementation is exclusively that of the social partners. However, the Council may decide to "extend" the agreement and to transpose it into a Directive, a Regulation or a Decision.

#### 2.2.3.4. Connections and comparisons

It is interesting to see some similarities and differences between the European and the French system, considering they have each inspired the other. On the one hand, in both, the social partners are integrated into governance as co-authors in the legislative process. In addition, the "executive" (Commission for the EU, and the government in France) has the power to extend the application of agreement reached by the social partners. On the other

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<sup>145</sup> MOREAU, Marie-Ange (ed.). *Before and After the Economic Crisis: What Implications for the 'European Social Model'?*. Edward Elgar, 2011.p.273

<sup>146</sup> Articles 154 & 155 TFEU

<sup>147</sup> Art 153(3) TFEU

hand, there is an important difference between the two processes. In the French system, the government consults the social partners who bargain an agreement. To turn this agreement into a law, it has to be approved by the Parliament. There is a connection between social democracy, with representative trade unions and employers' unions, and political democracy, with a Parliament directly elected by the people. This is not the case at the European level. First, the European social partners are not always the more representative<sup>148</sup>; theirs is an indirect legitimacy. Second, and more importantly, the European Parliament is not involved in social dialogue. It is a problem because, as Barnard noted, democratic legitimacy derives from the European Parliament's participation. Therefore, this lack of connection and the indirect legitimacy of the social partners lead to what she called a *democratic deficit*<sup>149</sup>. The problem is, if the action is not recognised as legitimate and democratic, it will not be applied correctly either by the Member States in the implementation of Directives or by national social partners in the implementation of the European agreement. To conclude, "*social dialogue can only ever supplement but not supplant representative democracy*", or at least not in these conditions<sup>150</sup>.

In addition, the limited competence of the European Union in social policy has an important impact on the function and also the organisation of collective bargaining; the integration of the social partners in public European action is partial. First, there is the background where the social dialogue takes place that is limited by the economic and national considerations. Then, the action of the Commission is subordinated to the subsidiarity principle. Therefore, when the Commission consults the social partners, their degree of autonomy is very low and their action strictly framed. In addition, there is the problem of legitimacy of the collective route to legislate due to the absence of connection with the European Parliament. Even if then intention is good, the conditions for a good execution may be limited. Therefore, there is still the possibility for the European Social partners to go outside the institutionalised process and bargain themselves; it would be a European collective *laissez-faire*. It appears that the real function of collective bargaining at European level is limited.

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<sup>148</sup> See details 3.1.1

<sup>149</sup> BARNARD Catherine, *Supra*. 144. p.82

<sup>150</sup> BARNARD Catherine, *Supra*. 144. p.101

#### 2.2.4. CONCLUSION

This comparative study of the French and the British systems highlights different functions of the collective bargaining process and various degrees of autonomy. At the two extremes are the French and the British systems and both are reflected to some extent at the European level. At one end there is the French fully integrated function of collective bargaining as a process to inspire law-making with a low degree of autonomy; at the other the British autonomy function is disconnected from the law-making procedure. Those two dual functions exist as well at the European level, divided between tripartite and binary relations.

In the French system there are basically three functions of the collective bargaining process. The first one is when it improves the legal standard; the social partners are autonomous in the terms bargained. The social partners have no contact with the government and the collective agreement is a collective contract of private law. Second, the collective bargaining process can be directly connected with the law where it has the aim of applying it. The law defines the theoretical principles and the collective agreement adapts them to the practical needs of the workplace. In this configuration, law frames the autonomy of the social partners. There is an indirect link with the government that unites the social partners in ensuring the effectiveness of the law. The collective agreement is still a private contract but with a legal motivation. Third, the collective bargaining process is a way for the government to consult the social partners. The autonomy of the social partners is relatively low – because it is subject to political directions. Thus, the collective agreement will be a private contract with a potential public application.

In the British system only the first hypothesis is possible. In fact, the configuration where there is a link with the law or the government is not applicable because of the principle of collective laissez-faire and also the importance accorded to the autonomy of the social partners. Hence, the collective bargaining process does not only have the function of regulating industrial relations, which is common in French law. It also has to regulate the process of collective bargaining itself. In this configuration there is a complete disconnection with the government, and the contact with the law is reduced to the strict minimum. The degree of autonomy of the social partners could not be higher. The collective agreement becomes the law of industrial relations.

Once again, this gap between the national functions of the bargaining process could explain why expectations of collective bargaining or social dialogue at the European Union are not the same. The voluntary approach is present at the EU level when it comes to the bipartite work between the social partners. They have freedom of action but the consequence is a disconnection with the Commission's action; thus there is a lack of institutional support for implementation in the Member States. In other words, the social partners are exclusively responsible for implementing their agreements into national legal systems. This situation is similar to the British one. On the other hand, in the configuration of tripartite consultation there are direct exchanges between the social partners and the European public authorities. As in the French system, the subject of negotiation is subordinated to political decisions. However, the counterpart of this limited autonomy is the support of the institutions for the implementation and the application of the collective agreement in the Member States. Nonetheless, this support will be limited considering the fact that the European intervention has to respect the economic freedoms and also the institutional limitation, in particular the subsidiarity principle.

At this point, it could be concluded that neither the French nor the British systems have had an individual impact on European social dialogue. Even if there are some similarities between the European system and the French and the British ones, there is not a wish to transpose either one of these systems to the European stage. Their real influence is a collective one in the sense that their deep divergence has made the European situation what it is. If it had been a common influence, the social dialogue could have been legally binding and so in line with the French vision, or voluntary as in the British one. It is argued that the fact that the French and the British conceptions are opposed has contributed to soft binary functions at the European level.

### **3. Functioning of the collective bargaining process: the different realities in the French, British and European systems**

#### **3.1. Selection of the collective bargaining actors: convergence or divergence?**

This chapter focuses on the definition of the collective bargaining actors, or the social partners, and on some of their characteristics – i.e. legitimacy, representativeness and legal persona – in the three systems. It will be argued that the requirements for qualification as social partners are not the same in the three legal systems and they depend on the function of the collective bargaining process. Although there are obvious differences, there may also be similarities, and this chapter will explore the possibility of common points and connections.

This study will explore the process for statutory qualification as an official TU in the French, the British and the European legal systems. Then the correlation between the qualification and the access of the collective bargaining process is examined in detail. The concept of representativeness is particularly important because its necessity varies between the systems and depends on the functions of collective bargaining<sup>151</sup>. A close connection could be established between the representativeness and the notion of legitimacy of the social partners. The legitimacy of their action could be more or less recognised and valorised by giving them freedoms and rights; the scope and the existence of a legal persona seems necessary to apply those rights and conduct their bargaining action. Once again, it is relevant to examine the meaning and the scope of the concept of social partners' legal persona in the three systems. Indeed, this element has an influence on the value of the collective agreements, but also on the possible ways to enforce it<sup>152</sup>.

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<sup>151</sup> I.e. the need for representativeness is less important when the agreement applies only to the TU members, and is more important when this kind of agreement has an *erga omnes* effect. See details 2.1.1.

<sup>152</sup> See details 3.2.2. and 3.3

### 3.1.1. Legitimacy through the qualification and the representativeness of actors in the collective bargaining process

#### 3.1.1.1. Assumed/borrowed legitimacy - *European case study*

There is no statutory definition of the aim or qualification of European TUs in European treaties. In fact, the provisions related to social partners do not give information or set legal requirements about actors themselves. In the common meaning, the founding principle of trade unionism resides in the existence of objective interests shared by members of the workforce<sup>153</sup>. This definition is apt because representativeness is the criterion used by the European Commission to identify the social partners who must be consulted in the context of social dialogue<sup>154</sup>. To be considered as representative organisations, they should conform to three requirements<sup>155</sup>: be cross-industry or relate to specific sectors or categories and be organised at European level; consist of organisations which are themselves an integral and recognised part of Member State social partner structures, have the capacity to negotiate agreements and be representative of all Member States, as far as possible; have adequate structures to ensure their effective participation in the consultation process.

There is one interesting element in the second condition to be recognised as social partners: *the need to be an integral and recognised part of Member State social partner structures and with the capacity to negotiate agreement*. It emphasises that the qualification of European social partners is a direct link with the official recognition and affiliation of Member States' trade unions. The difference between the Member States could be the reason why there is no strict definition of what should be the aim of a trade union at the European level: to respect the conception and the socio-legal tradition of Member States. There is still the idea of an indirect definition through domestic law conceptions.

It might be argued that collective bargaining by the social partners constitutes a form of representative democracy<sup>156</sup>. Therefore, the actors have to be representative to be part of it. The conditions for proving representativeness and to qualify as an official European TU are

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<sup>153</sup> DUFOUR, Christian and HEGE, Adelheid. The legitimacy of collective actors and trade union renewal. *Transfer: European Review of Labour and Research*, 2010, vol. 16, no 3, p. 357

<sup>154</sup> Communication concerning the application of the agreement on social policy presented by the Commission to the Council and the European Parliament. COM (93) 600 final, 14 December 1993

<sup>155</sup> Art. 7 of the Communication concerning the application of the agreement on social policy presented by the Commission to the Council and the European Parliament. COM (93) 600 final, 14 December 1993.

<sup>156</sup> ACKERS, Peter. Collective bargaining as industrial democracy : Hugh Cleeg and the political foundations of British industrial relations pluralism. *British Journal of Industrial Relations*, 2007, vol.45, no 1, p.82.

the same. However, in the context of collective bargaining, the representativeness of the signatory parties does not have to be absolute. In fact, as the European Court underlined in the UEAPME case<sup>157</sup>, to be legally able to sign a agreement, the signatory has to show sufficient collective representativeness. First, the notion of “sufficient” means that representativeness itself is not enough. Second, the Court emphasises the word “collective”. Thus, despite the fact that taken individually one social partner could not justify it, a number of partners could sign the agreement as cumulatively they are sufficiently representative.

Once again, the representativeness of the social partners depends on the national systems; the EU sets up neutral principles and relies on the Member States to determine the “factual” criteria of selection. Thus it is necessary to compare the French and British systems on similar issues.

### 3.1.1.2. Factual limited legitimacy - *British case study*

A trade union is defined<sup>158</sup> by statute as:

*“an organisation (whether temporary or permanent) which consists wholly or mainly of workers of one or more descriptions and whose principal purposes include the regulation of relations between workers of that description or those descriptions and employers or employers’ associations”.*

The *regulation of relations* links directly the purpose of the trade unions to the mechanisms of collective bargaining. It means that the TU has to be committed to the workplace and not only to political activities, which may influence industrial relations<sup>159</sup>. What is expected is a direct implication for workers’ interest, and so a real representation during negotiations. Furthermore, its principal function of regulation of industrial relations does not need to prove its effectiveness or its frequency of intervention<sup>160</sup>.

Second, fitting the legal definition is enough for a trade union to legally exist; there is no requirement to be registered<sup>161</sup> – contrary to the French system. However, in practice this registration is indispensable considering its connection with the certificate of

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<sup>157</sup> Case T-135/96

<sup>158</sup> TULR(C)A 1992, Part I Chapter I S1(a)

<sup>159</sup> DEAKIN, Simon F. and MORRIS, Gillian S. *Labour law*. Hart, 2012. p.798

<sup>160</sup> *BAALPE v. NUT* [1986] IRLR 497

<sup>161</sup> PITT, Gwyneth. *Employment Law*. Thomson, sweet & maxwell, 2007. p.321

independence<sup>162</sup>. To be able to bargain with an employer, there is a legal requirement to be independent<sup>163</sup>. Indirectly, list registration is required to be able to bargain<sup>164</sup>. To conclude, the main characteristics to be able to bargain are to be an independent organisation of workers with the aim of regulating industrial relations<sup>165</sup>.

As regards representativeness, in the UK the collective bargaining process is based on the voluntary tradition. Thus, there is no need to prove representativeness when there is no employer opposition.<sup>166</sup> However, when the employer refuses to bargain, the union has to prove its legitimacy to be able to enforce its rights. This is illustrated by the statutory recognition process<sup>167</sup>. There are similarities with the French system about the use of TU members' headcount criteria, and the fact that the right to bargain is subordinate to the ballot box<sup>168</sup>.

### 3.1.1.3. Automatic and structured legitimacy– *French case study*

The aim of trade unions is clearly set out in the French Labour Code which provides that they have the principal function of defending the rights and the interests, moral and material, individual and collective, covered by their statutes<sup>169</sup>. In addition, the function must relate to the defence of workers' interests, and not political ones<sup>170</sup>. There are five conditions for being a representative trade union<sup>171</sup>; three of them are used to recognise the status of TUs, and in consequence the application of TU rights. These three conditions are: (1) respect of republican values, (2) independence, and (3) seniority of two years in the professional sector and geographical zone of the bargain level.

There is a similarity with the British system about the independence criteria. The reason is that independence is one of the fundamental elements of syndicalist freedom<sup>172</sup> at international level. The interesting thing is that proof of independence is not required for

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<sup>162</sup> TULR(C)A 1992, s5

<sup>163</sup> DEAKIN, Simon F., *Supra.* 46. p.801

<sup>164</sup> DAVIES, Anne CL. *Supra.* 89. p.396

<sup>165</sup> BAKER, Aaron and SMITH, Ian. *Smith and Wood's Employment Law.* Oxford University Press, 2013. p.566

<sup>166</sup> BAKER, Aaron and SMITH, Ian. *Ibid* 165. p. 558

<sup>167</sup> TULR (C)A 1992 Sch A1

<sup>168</sup> TULR(C)A 1992 Sch A1 para 29

<sup>169</sup> Art L.2131-2 of French Labour Code

<sup>170</sup> Cour Cass., ch. mixte 10 avril 1998, n°97-17.870

<sup>171</sup> Art L.2121-1 of French Labour Code

<sup>172</sup> ILO Convention n°87

legal qualification as a trade union in the United Kingdom, but it is in France. However, it is required by both systems to be able to bargain.

Second, the representativeness is proved by a TU headcount and electoral results<sup>173</sup>. It is a way to ensure the effective presence and action of TUs at the appropriate bargaining level<sup>174</sup>. It also has to be adequate to assume that TUs represent real workers' interest<sup>175</sup>. The real singularity is the fact that representativeness is also based on the professional/workplace election result. In addition, as in the EU system, being representative does not mean being able to reach an agreement alone. The signatory parties have to show sufficient collective representativeness through the application of the *principe majoritaire*<sup>176</sup>.

To conclude, the proof of representativeness is automatic and happens in a “neutral” (non-confrontational) context. The consequence is that this system limits the number of potential social actors and focuses only on the main ones.

#### 3.1.1.4. Connections and comparisons

The soft aspect of social dialogue illustrates neutrality at the EU level. The qualification to be social partners depends on the national process, and the criteria set by the various governments. At the same time, being representative does not imply automatic access to collective bargaining. In fact, the appropriate interlocutors will be chosen from the panel of representative organisations depending on the factual situation: what the bargain is about. This selection is made in accordance with the national rules, even for a subject discussed at the European stage.

The traditional divergence between France and the UK rises to the surface one more time. Thank to international standards, independence is required in both systems. However, the need for representativeness does not appear at the same time. In France, there is an idea of collective and automatic need for representativeness that justifies access to the bargaining process for four years. In the UK, it is a factual and individual representativeness. In France TUs are representative compared with each other; in the UK they are representative of a situation. One option does not appear better than another, because they have to be considered

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<sup>173</sup> Art L.2121-1 French Labour Code

<sup>174</sup> See ETIENNOT Agnès, and ETIENNOT Pascale. *Supra*. 24. p.691-692

<sup>175</sup> Cass.soc., 3rd December 2002, n°01-60.729

<sup>176</sup> Art L.2232-12 French Labour Code. ETIENNOT Agnès, and ETIENNOT Pascale. *Supra* 24. p.695

as a whole; however, it would seem reasonable to organise European elections so as to choose social partners outside the national context, to have a European system and not a European façade. In fact, at the moment the European rules to be only a façade considering that the ‘effective’ rules to choose the European social partners are in practice the national ones.

### 3.1.2. The recognition of the legal persona of social actors as an indicator of their place in the bargaining process

#### 3.1.2.1. Indirect legal persona – *European Union case study*

The previous section has highlighted the extent to which the EU relies on national legal systems in order to identify relevant social partners. Now, turning to the question of legal persona and capacity, a similar study will be made.

On its website, the ETUC – which is the main European trade union – indicates that: “*The ETUC is a de facto association*”<sup>177</sup>. Considering the ETUC is based in Brussels, the legal system applicable is the Belgium one. In this system a de facto association does not have a legal persona itself; it means the association does not have legal rights or duties<sup>178</sup>. Nevertheless members of the association have one; it is members who are responsible for the association’s actions. This responsibility can be individual or collective, depending on the circumstances. If the responsibility is collective, members are not severally responsible; they are equally individually responsible<sup>179</sup>. The main point of a de facto association is the mandate and the possibility to make the members collectively liable.

If these principles are transposed to the context of European social partners, it means that they do not have a direct legal persona; they use the legal personas of their members to legitimate their actions when they defend the interests of their workers. Furthermore, previously<sup>180</sup> it was explained that one condition imposed on European social partners is that they should: “*Consist of organisations, which are themselves an integral and recognised part of Member State social partner structures and with the capacity to negotiate agreements, and which are representative of all Member States, as far as possible*”. Consequently, even if the association does not have the legal capacity to conclude a contract or agreement – and so to conduct collective bargaining – it is not a problem at European level because its members can. In other words, when European social partners bargain and sign an agreement they engage the responsibility of their members. They are allowed to do that with the general mandate that members give to them when they join the association.

However, there is another question: determining who legally signs collective agreement at European level, and the value of the agreement. One hypothesis is that the

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<sup>177</sup> <https://www.etuc.org/what-legal-status-etuc>

<sup>178</sup> [http://www.belgium.be/fr/economie/entreprise/creation/types\\_de\\_societe/associations/](http://www.belgium.be/fr/economie/entreprise/creation/types_de_societe/associations/)

<sup>179</sup> <http://www.fef.be/wp-content/uploads/2010/06/assoc-ou-asbl.pdf>

<sup>180</sup> See 3.1.1.

signature of an association could be “replaced” by the individual signatures of each member. So when the ETUC signs a European framework agreement, it is equivalent to each national trade union signing the agreement. They let the European trade union engage their own responsibility.

The previous idea of the “neutral” legal value<sup>181</sup> of the European framework agreement developed in the thesis fits perfectly; the legal value of the agreement will depend on each legal system that members belong to. The European agreement has a plurality of legal values: one for each nationality represented by its members. The “applicable” legal value of the agreement will be materialised once the agreement is transposed – through a Directive or social dialogue in Member States. Therefore, the study of the national legal persona is the key to a full picture of the legal capacity of the social partners beyond the EU stage.

### 3.1.2.2. Direct legal persona of trade unions in Member States –*French and British case study*

Both in the French and in the British system trade unions have a kind of legal persona that legally justifies, frames and protects their actions. Initially both systems base the legal status of trade unions on the association’s legal status. However, considering the special aim of trade unions, its legal framework had to be modified to enlarge its rights.

In the British system the legal nature of trade unions is based on an association of individuals bound together by a contract of membership that regulates the relationship between their members<sup>182</sup>. In addition, TULR(C)A 1992 provides terms that take into consideration the specificity of trade unions by recognising their “quasi-corporate status”<sup>183</sup>. Trade unions have a hybrid legal status; they are not a body corporate but some of their legal capacities are related to this legal form. In fact, trade unions are *capable of making contracts*<sup>184</sup>. In the context of the collective bargaining process it is probably one of the most important legal capacities considering the fact that the collective agreement is a kind of contract. This disposition recognises trade unions as legal parties at contract, and gives them the opportunity to conclude legally binding acts.

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<sup>181</sup> See details 3.2.2.

<sup>182</sup> DEAKIN, Simon. *Supra.* 46, p. 806

<sup>183</sup> COLLINS, Hugh, EWING, Keith, and MCCOLGAN, Aileen. *Supra* 125. p.495

<sup>184</sup> TULR(C)A 1992, s.10 (1) (a)

Second, trade unions are *capable of suing or being sued in their own name, whether in proceedings relating to property or founded on contract or tort or any other cause of action*<sup>185</sup>. The fact that they are capable of suing is important in the conclusion of the collective agreement, but also guarantees the enforcement of the collective agreement if parties decide to make it legally binding. The fact that they are capable of being sued is primarily important in terms of industrial action. It recognises the opportunity for trade unions to go in front of the court in their own name, without involving their individual members. Additionally, the ability to act in the name of the collective body shows the imbalance of power in favour of workers. Even if it rarely happens, it means that if parties want the agreement to be legally binding they can achieve this.

In the French system, there is a similarity with associations because both trade unions and associations are private organisations created by individuals<sup>186</sup>. Even if trade unions can be understood as associations with a professional aim, they do not have the same legal basis. The legal framework of associations is based on the law of 1901, whereas the legal framework of trade unions is based on the French Labour Code. In fact, the question of the legal persona for trade unions was resolved a long time ago in the French system. The Waldeck-Rousseau law<sup>187</sup> in 1884 provided the legal persona for trade unions under the concept of *personnalité civique*. This disposition was extended to collectives of trade unions in 1920<sup>188</sup>. Nowadays, the legal status and terms relating to the legal persona of trade unions are set out in the French Labour Code in article L.2131-2 ff. The French Labour Code provides that trade unions have the exclusive capacity to negotiate collective bargaining<sup>189</sup>. They also have the capacity to sue in front of all jurisdictions in order to defend the interest of workers they represent<sup>190</sup>. In addition, their civil persona means that their actions – including the conclusion of contracts – produce legal effects.

The difference from the legal status of associations is important because associations cannot sue; they have a limited legal capacity and they do not have the authority to represent workers. As in the British system, the modifications to associations' legal status were a necessity to insure the effectiveness of trade union action. In both systems the legal persona

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<sup>185</sup> TULR (C)A 1992, s.10 (1) (b)

<sup>186</sup> DUPEYROUX, Jean-Jacques. *Le régime juridique des organisations professionnelles dans les pays membres de la CEE. Service de publication des communautés européennes*, 1966, p.307-314

<sup>187</sup> Law of 21 March 1884 relating to the creation of professional trade unions

<sup>188</sup> Loi du 12 mars 1920 Sur L'extension De La Capacité Civile Des Syndicats Professionnels

<sup>189</sup> Art. L 2132-2 of French Labour Code

<sup>190</sup> Art. L 2132-3 of French Labour Code

of trade unions is focused on the ability to conclude collective agreements, and be able to defend their members' interest before the court. However, the acquisition of this legal persona is subordinate to the appropriate formal registration.

### 3.1.2.3. Connections and comparisons

The idea of a European façade is still applicable as regards the legal persona of social partners. In fact, even if there is one signature for a European TU, it has no “reality”; the European TU does not have the capacity to sign a contract. Behind this lies the responsibility of the members: national trade unions. Therefore, the European social partners do not have a legal persona but they do have a mandate to act in the name of their members, an indirect legal persona, if you like. Their rights and duties are limited by the mandate and the rights and duties of the members.

There is a similarity between Member States' legal persona in the sense that the accent is put on the ability to defend the workers' interest through collective bargaining. The scope of action allowed by the legal persona is a tool necessary to accomplish the TU functions. To complete the picture of the collective bargaining process it will be interesting to see the consequence on social partners' capacity to sue in the context of a collective agreement application.

### 3.1.3. CONCLUSION

The common point of the TUs in the three systems is the fact that they represent the objective interests shared by their members. The fact that they represent this interest is the main characteristic that qualifies them to bargain. However, the qualification of a TU and access to the collective bargaining process are two different things. On the one hand, qualification is connected with the definition of the TU, the aim of their existence. The official qualification is the recognition of their purpose and gives them some legal rights and duties. On the other hand, access to collective bargaining could be subject to more or fewer requirements depending on the legal system. One possible requirement is proof of representativeness.

In the British system qualification as a TU is enough for access to the collective bargaining process but proof of representativeness guarantees the enforcement of the right to bargain collectively. Thus, as soon as the TU is independent and recognised, it has access to the process of collective bargaining, and can bargain even if it is not representative. It is an illustration of the contractual freedom which allows the social partners to bargain with whomever they want. In the French system the proof of representativeness is an absolute necessity for access to the process of collective bargaining, in addition to legal qualification. It is possible to be an official TU without having the access, and it is not possible to bargain if the TU is not representative. Finally, at the European level representativeness is a criterion for recognition as a social partner and being able to be part of the social dialogue.

The need for representativeness is not the same in the three systems. In the British system the proof of representativeness is a guarantee of the right to bargain collectively. When the bargaining happens in the context of voluntary recognition it can be seen as the freedom to bargain collectively. In France, the legitimacy of the social partners is inspired by political legitimacy; the collective bargaining is seen as social democracy. Therefore the representativeness of the social partners is an indispensable and automatic requirement to be part of the Collective Bargaining process. In the European system, the function of social dialogue is to coordinate the social actions of the national TUs at the European stage. Therefore, there is no European TU autonomous legal entity; the European social partners have a mandate to represent the interest of their members. However, to be sure they represent the main interest of workers across Europe the members themselves must be representative at

the national level. However, there is no common European requirement to prove this; the rules of proof are based on the national ones. The problem is that, depending on the nationality of the TU, the same TU could be considered as representative or not. Even if there is one common requirement to be a social partner, the reality and the selection behind are not the same in the Member States. Finally, the European requirements are a façade based on the national legal systems.

This idea is perfectly illustrated by the legal persona of the social partners in the three different systems. In fact, at the European level the social partners do not have their own legal persona. Their capacity to sign an agreement is based on their mandate, and their action in general is limited by this mandate. Finally, the real legal personas at the European stage are the ones at the national ones. In that context, some similarities can be seen between the French and the British legal personas. In both systems, they are legally able to defend the workers' interest through the collective bargaining process. This legal persona allows them to enforce their right to the collective bargaining process by suing the employer who does not respect it, for example. But it also gives them the possibility to reach legally binding agreements. However, to enforce the collective agreements this legal persona is more or less useful depending on the legal systems, on the national traditions. Having the same legal rights does not imply that they are applied in the same way.

### 3.2. The collective agreement structure: an illustration of diverse legal traditions

In the previous part of this thesis, the difference between the organisation and function of the collective bargaining process at the European and the national levels was emphasised. One illustration of those divergences is the difference in the selection process and qualification of the social partners. Thus, a second issue is to examine the link between the function of collective bargaining and the collective agreement. This chapter focuses on two aspects related to the collective agreement: (1) the content of the collective agreement, (2) the value of the collective agreement. It will determine if the social partners bargain about the same subjects or not and the legal/statutory value of the collective agreement in the French, the British and the European systems.

The study of the content of the collective agreement focuses only on mandatory bargaining in the French, the British and the European systems and does not cover voluntary bargaining. The main idea is to compare the subjects that have to be bargained, and not those that can be bargained; it is the distinction between the right/duty to bargain certain themes and the right/freedom to bargain others. The outcome of this comparative study supports the idea of a close link between the autonomy of the social partners and the process of mandatory bargaining. The degree of autonomy of the social partners is also connected to the value of the collective agreement. The value of the collective agreement in the French, the British and the European systems illustrates the function of collective bargaining. In addition, the exploration of the value of the collective agreement is one explanation of the different ways to enforce the agreement.

### 3.2.1. The organisation of collective bargaining: an illustration of divergent functions

#### 3.2.1.1. The duty to bargain – *European case study*

As seen previously<sup>191</sup>, collective bargaining is well integrated in European governance. The consequence is that mandatory bargaining in the EU system is owed to political opportunity. The TFEU<sup>192</sup> stipulates that *before submitting proposals in the social policy field, the Commission shall consult* European social partners. The fact that the Commission has the task of promoting social policy is clearly set out in the treaty<sup>193</sup>; however, there is no rule about when to do it. The initiative rests with the Commission<sup>194</sup>, depending on the work programme. It implies that social partners have to be consulted when the Commission decides; it could be seen as a legal requirement to bargain for social partners. The Commission can initiate proposals in the social policy field only for topics covered by Article 153 of TFEU. There are 11 topics defined in broad terms so they can be split into subsidiary topics. It means that mandatory bargaining applicable to social partners will be related only to these subjects. If the social partners want to negotiate about another subject, they are free to do so in the context of their autonomous and voluntary framework agreements<sup>195</sup>.

Concerning the “productivity” of mandatory bargaining at the EU level, a guide published by the European Commission<sup>196</sup> explains that directives owed to this process have resulted in four cross-industry agreements. These agreements have resulted in changes to legislation in many Member States, and given millions of workers new rights, resulting in improved employment conditions for part-time and fixed-term workers, and working parents. In addition, five sectoral agreements<sup>197</sup> have been adopted and implemented by Council

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<sup>191</sup> See details 2.2.3.

<sup>192</sup> Article 154(2) TFEU

<sup>193</sup> From Article 151 to Article 161 of TFEU

<sup>194</sup> FALKNER, Gerda. The Council or the social partners? EC social policy between diplomacy and collective bargaining. *Journal of European Public Policy*, 2000, vol. 7, no 5, p. 706.

<sup>195</sup> « In the EU context, the term ‘voluntary agreement’ usually refers to an agreement which is not the result of a political decision-making process exclusively within the framework of the official EU institutions » (<http://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/voluntary-agreements>)

<sup>196</sup> European Commission. Social Dialogue. *Social Europe guide*, January 2012 vol.2.

<sup>197</sup> Framework agreement on prevention from sharp injuries in the hospital and healthcare sector (2010); Framework agreement on the Maritime Labour Convention (2006); Framework agreement on certain aspects of the working conditions of mobile workers engaged interoperable cross-border services in the railway sector (2005); Framework agreement on the

Directive following Commission consultations. As with the cross-industry agreements implemented through directives, these sectoral agreements have brought practical and legally binding improvements in employment and working conditions for workers across the EU. There has been a total of nine acts in 20 years, excluding agreements concluded autonomously by social partners<sup>198</sup>. To conclude, the situation of EU mandatory collective bargaining could be described as random. There is no cycle of bargaining and the social partners cannot force the start of negotiation. It is all in the hands of the Commission, who decide when and what to bargain.

### 3.2.1.2. Automatic mandatory bargaining on autopilot – *French case study*

Compulsory bargaining is one of the key characteristics of the French system; as noted previously<sup>199</sup>, of the three systems, the French is the only one which provides a legal obligation to bargain in an annual or triennial cycle. Therefore this system will be taken as an example to explain compulsory bargaining on a regular basis.

The bargaining obligation means that the employer has to convene representative trade unions, to make proposals concerning the subject, and to hear counter-proposals in order to reach an agreement<sup>200</sup>. All subjects of mandatory bargaining are set in the Labour Code: annual negotiations from articles L.2242-5 to L.2242-14, triennial negotiations from articles L.2242-15 to L.2242-23.

These articles cover different themes; from remuneration to work time regulation, to senior employability, the law requires trade unions to review periodically almost every aspect of the employee situation<sup>201</sup>. There are more than 20 themes to bargain for every year or every three years. Soon employers and trade unions will be in a constant bargaining process<sup>202</sup>. For these reasons, the recent law of the 17 august 2015<sup>203</sup> had the aim of reforming social dialogue and collective bargaining. The themes of bargaining do not

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Organisation of Working Time of Mobile Workers in Civil Aviation (2000); Framework agreement on the organisation of working time of seafarers (1999)

<sup>198</sup> I.e. Framework agreement on inclusive labour markets (2010), Framework agreement on competence profiles in the chemicals industry (2011)

<sup>199</sup> See details 2.2.1.

<sup>200</sup> ABOUT, Carole. Quelles sont les négociations collectives obligatoires et leur périodicité? *Les Cahiers Lamy du CE*, MAI 2014, n°137. p.25-29

<sup>201</sup> DUPAYS, Alain. Négociation obligatoires d'entreprise en tableau. *Les Cahiers du DRH*, Mars 2011, n°174. p. 8-10

<sup>202</sup> DUPAYS, Alain. *Ibid.* 201.

<sup>203</sup> LOI n° 2015-994 of 17 august 2015 related to social dialogue and employment.

disappear<sup>204</sup> but they are grouped into three mandatory areas<sup>205</sup>: annual negotiation on remuneration, work-time and sharing added value; annual negotiation on quality of life at work; and triennial negotiation on job management and professional pathway. At the same time, the law gives the opportunity to social partners to change the period of the bargaining cycle<sup>206</sup>. By majority agreement, at company level, they could extend the valid agreement periods from one to three years and from three to five years, respectively.

We can see that social partners do not have any leeway concerning the process of bargaining. The legislator decides everything: the time, the level, the subjects and the actors. It is done once, and then social partners “follow legal instructions”. It might be argued that it is like an autopilot system where the main direction and the destination are programmed; passengers can sometimes modify some details but not the essential instructions. The organisation of collective bargaining is beyond the will of the social partners. This situation is completely different from the British system where, as in the European one, there is mandatory bargaining on an irregular basis; it means there is a need for someone to start/initiate the process.

### 3.2.1.3. The right to mandatory bargaining – *British case study*

Contrary to the French system, compulsory bargaining is only one possibility in the British system; the process starts when certain conditions are met. As in the French system, the legislator sets some criteria about what and when it is possible to modify the employee situation through collective bargaining. However, one of the important differences from the French system is the context of compulsory bargaining. Whereas in France it is a neutral and automatic situation, in the UK when it comes to mandatory bargaining there is a conflict situation<sup>207</sup>; it is the option chosen when the employer refuses to bargain voluntarily. It is an enforced measure. The Employment Act 1999 provides for statutory recognition and sets out the framework for compulsory bargaining. As seen in the first part of this study, collective bargaining in the UK is led by the voluntarism tradition; the statutory provisions exist only as

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<sup>204</sup> Projet de loi sur le dialogue social (2). *Liaisons Sociales Quotidien*. Juin 2015, n°16843

<sup>205</sup> Art.19. of the Law n°2015-994

<sup>206</sup> Art.19. of the Law n°2015-994

<sup>207</sup> BAKER, Aaron and SMITH, Ian. *Supra*.165. p.628

a protection of the right to bargain. Compulsory bargaining is seen as the last resort<sup>208</sup>. This difference in context could explain the difference in the application of the bargaining process.

First, because of its extraordinary nature, compulsory bargaining should be applied only when it is necessary. There is such a need when the voluntary system does not work anymore, when the employer is not willing to bargain. The consequence is that the initiative to start the mechanism of compulsory bargaining devolves on trade unions. In fact, the trade union has to submit an application to the CAC to prove the support of the majority of workers it wants to cover<sup>209</sup>. It is only under this condition that it will be possible to force the employer to bargain. Second, because of the “last chance” to bargain, the scope of the negotiation subjects is limited. Voluntary collective bargaining is defined as negotiations connected with a long list of items<sup>210</sup>. When bargaining is the result of statutory recognition the range of matters on which the employer will have to negotiate is more limited: that is, pay, hours and holidays, unless parties agree to extend the scope of negotiation<sup>211</sup>.

The organisation of mandatory bargaining in the UK is an illustration of the right of negotiation for trade unions; the initiative at least is in the social partners’ hands. This mechanism stays faithful to the tradition of the UK, which favours purely voluntary collective bargaining. The situation is different, even if it is on a non-regular basis, from the European Union system where the initiative is the responsibility of politicians.

#### 3.2.1.4. Connections and comparisons

First, it can be seen that there is a connection between the functions of collective bargaining, the place of the social partners and mandatory bargaining. At the EU level, collective bargaining is well integrated in the governance of the EU, and it was a creation of the Commission. Therefore, the action of the social partners at EU level is strongly related to the Commission’s action plan. However, the demonstration goes further and shows that the initiative of the collective bargaining belongs only to the Commission; the social partners only “answer” to their institutional duty. It is the opposite in the UK where the initiative is in

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<sup>208</sup> SMITH, Ian, WOOD, John Crossley & BAKER, Aaron. *Ibid.* 165

<sup>209</sup> TULR(C) Act 1992, s 296(1)

<sup>210</sup> PITT, Gwyneth. *Supra* 161. p.137

<sup>211</sup> TULR(C) Act 1992, Sch A1 Part I s 3(3)

the hands of the social partners only. This approach is perfectly in line with the British tradition and the fact that the government does not have any official legal interaction with the social partners. In France, the government intervenes only when the social partners are consulted. In the case of regular bargaining, the legislator intervenes to establish the principle and leaves the automatic application to the social partners.

Second, at the EU level mandatory consultation depends only on the Commission's intention. There is no cyclical/recurring consultation that could inspire the Member States. For example, if every five years the Commission plans to bargain a second time on a topic, it would be possible to organise mandatory consultation of the national social partners about how the first bargain was applied, take it into consideration and open a new space for dialogue at the European level. It does not mean that a new agreement must be concluded, but it allows the social partners to have second thoughts and to amend the agreement if necessary. This hypothesis would permit a follow-up of the subjects already discussed and take into consideration the economic and social modifications.

### 3.2.2. The value of the collective agreement: between legal autonomy and subordination

#### 3.2.2.1. Collective agreement autonomy guaranteed by legislation - *French case study*

As seen previously, in France the collective agreement has a legal value<sup>212</sup>. This value is connected with the contractual nature of the agreement. There are two important things about it. First, the collective agreement is a collective contract<sup>213</sup>. Consequently, because of the representativeness of the signatory parties, the agreement is applicable to persons other than them. It is the idea of the *erga omnes* concept. Second, it is a *contrat ouvert*, meaning that other organisations than the signatory parties could join the collective agreement after its ratification<sup>214</sup>. This possibility is called *l'adhésion*<sup>215</sup>, and is an exception in French contractual law. However, this concept is in line with the function of the collective agreement in France: it is applicable to most employees.

Thus, contrary to the European and British systems, the collective agreement is applicable in itself independently of the employment contract. Therefore, the legislator had to regulate the co-existence of those two contracts of employment<sup>216</sup>: the individual and the collective. The collective agreement has three effects on the contract of employment: the immediate, the imperative and the automatic effect<sup>217</sup>. The immediate effect means that once the collective agreement is applicable in a company, it is also applicable for the on-going contract and any future ones<sup>218</sup>. The imperative effect means that the collective agreement applies as a law would do. Therefore, employees cannot renounce the rights contained in the agreement<sup>219</sup>. However, the imperative effect has to be applied in harmony with the *principe de faveur*. Third, the automatic effect means that the terms of the employment contract contrary to the collective agreement are suspended for the application time of the agreement.

To conclude, the previous statement shows that the value of the collective agreement in the French system is not a natural one, especially considering the position of the jurisprudence

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<sup>212</sup> See details 2.2.1.

<sup>213</sup> ETIENNOT Agnès, and ETIENNOT Pascale, *Supra.* 24. .p.683

<sup>214</sup> Art L.2261-3 of the French Labour Code

<sup>215</sup> See *L'adhésion à une convention collective existante. Lamy Social 2015.* Partie 1, Titre 1, Division 1, Chapitre 2, Section 2, Sous section 1, point 46

<sup>216</sup> COUTURIER Gérard. L'ambivalence des rapports entre contrat de travail et convention collective. *Semaine Social Lamy*, 2012 n° 1534. p.7-9

<sup>217</sup> FAVENNEC Françoise. *Supra.* 103. p.12-17

<sup>218</sup> Art L 2254-1 French Labour Code

<sup>219</sup> Cass.soc., 30 Mai 2000, n°98-40.085

needed to protect the intangibility of the employment contract<sup>220</sup>. It is a political choice to give priority to the collective agreement over the employment contract<sup>221</sup> in order to be in line with the regulatory functions of the collective agreement. This concept is completely opposite to the British one, and so is the effect on the employee situation.

### 3.2.2.2. The incorporation of collective agreements into contracts of employment - *British case study*

The collective agreement in the British system is not presumed to be legally binding<sup>222</sup>. In fact, under English common law what matters is the intention of parties to the contract to be legally bound<sup>223</sup>. In addition, as Davies observed, “*collective agreements are not, themselves, contracts and are not drafted as such*”<sup>224</sup>. At the same time, she also recognised that there is generally a clear intention on the part of the signatory parties that employees should benefit from the collective terms agreed<sup>225</sup>. Therefore, in the British system the legal value of the collective agreement will depend on the terms incorporated in the contract of employment. The contract of employment can be seen as a “bridging” act for applying the collective agreement.

The first way to do it is through the process of express incorporation. While there is no obligation to provide employees with a written contract, there is a statutory obligation to provide a written statement of the main contractual terms<sup>226</sup>. This written statement should stipulate whether there are any collective agreements that are directly applicable to the terms and conditions of employment. This is applicable whether or not the collective bargaining agreement is legally enforceable.<sup>227</sup> To be considered as incorporated it needs a clear reference, either in the contract of employment or in the collective agreement, that specific collectively bargained terms should form part of an individual’s terms and conditions of employment.

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<sup>220</sup> Cass.soc., 28 Septembre 2010, n°08-43.161

<sup>221</sup> Even if there are some exceptions

<sup>222</sup> TULR(C)A, s 179(1)

<sup>223</sup> FIFOOT, L. and CHESHIRE, D. Law of contract. 1975.

<sup>224</sup> DAVIES, Anne CL. *Supra.* 89. p.146

<sup>225</sup> DAVIES, Anne CL. *Supra.* 89. p.144

<sup>226</sup> Employment Rights Act 1996, s(1)

<sup>227</sup> PHILLIPS, Annelise Tracy, ROME, Paula, PLAYER, Thomas, *et al. Reviewing and Changing Contracts of Employment: A Specially Commissioned Report.* Thorogood, 2003.

The absence of an express reference is not an automatic obstacle to the incorporation of collectively bargained terms; implied incorporation is also possible. It is possible when there is clear custom and practice that terms of collective agreements are incorporated into individual contracts<sup>228</sup>. Implied incorporation is also possible if the union has authority to bind the employees to the terms of the framework agreement and the union's word that a majority of the employees are in favour is accepted<sup>229</sup>. However, this configuration is harder to prove and requires the demonstration of other criteria such as the legitimacy of TUs.

### 3.2.2.3. The incorporation of collective agreements through private or public action – *European Union case study*

In the context of social dialogue it is possible, according to article 155(1), to conclude agreement. In the opinion of Niforou, despite the qualification of “soft law”, these agreements are important in influencing Member States at different levels<sup>230</sup>. In fact, using autonomous agreements at international level could be seen as a good balance between market integration and legal diversity<sup>231</sup>. There are two methods of implementation; transposition into a Council Directive creating legal obligations for Member States, or implementation in accordance with the procedures and practices specific to management and labour and the Member States<sup>232</sup>. According to Deinhert, the latter could be seen as advantageous because it respects the differences between national institutions<sup>233</sup>, even if, it could be argued, it sometimes leads to a gap of effectiveness between Member States.

For example, on 8 October 2004, European social partners adopted an autonomous framework agreement about work-related stress<sup>234</sup>. This agreement was implemented in a soft way. While both France and the UK are considered as having successfully implemented the agreement, they did so in different ways and therefore the consequences for employees are different.

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<sup>228</sup> *Henry v. London General Transport Services Ltd*, [2001] IRLR 132

<sup>229</sup> *Henry and Others v. London General Transport Services Limited*, [2002] IRLR 472

<sup>230</sup> NIFOROU, Christina. *The role of trade unions in the implementation of autonomous framework agreements*. Warwick papers in industrial relations, 2008. p.29-30

<sup>231</sup> COLLINS, Hugh. The freedom to circulate documents: regulating contracts in Europe. *European Law Journal*, 2004, vol. 10, no 6, p. 798-802.

<sup>232</sup> Art. 155(2) TFEU

<sup>233</sup> DEINHERT, Olaf. Self-executing collective agreements in EC Law. in Marc de Vos (eds) *A Decade Beyond Maastricht: The European Social Dialogue Revisited*. 2004, Kluwer Law International, p.33- 51.

<sup>234</sup> Framework agreement on work-related stress (2004)

In France, the autonomous agreement was transposed with an ANI<sup>235,236</sup>. This agreement is legally binding on those who sign it. This ANI was extended by a ministerial order<sup>237</sup>. The initial autonomous agreement, seen as soft law, became an agreement with an extended legally binding effect. Thanks to the French government and social partners action, it is possible to say that the European agreement effectively protects employees.

In the UK the choice of transposition was very different. The autonomous framework was implemented by soft law through the publication of guides. These codes of practice were published by the HSE and ACAS, and the content of the autonomous framework was transposed through guidance but not legal principles. The aim was to heighten awareness of stress and of the need to fight against it. The scope of the implementation was national, but there was no creation of legal obligations for employers and no effective protection for employees.

In conclusion, it might be argued that the value of the initial, non-legally binding autonomous framework agreements is “neutral”: the final value of the agreement depends on the value of the transitory act. Member States can choose to implement it through a legally binding act or not.

#### 3.2.2.4. Connections and comparisons

Considering the fact that social dialogue at the EU level was created to respect the tradition among the Member States, the collective agreement does not have a legally binding effect. The “final” value will be the one that the Member States decide to give it and will be the same than a similar collective agreement in the national system. Therefore, it is not possible to say that the EU system influences the value of the collective agreement in France and the UK. However, it is possible to see similarities between the EU and the UK systems. In fact, in both the collective agreement is not a contract itself and needs a “bridging” act to be applicable to individuals. This situation is questionable because the application of what is bargained is not in the hands of the signatory. At the EU level the application will depend on the Member State’s tradition, and in the British system the incorporation into the contract of

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<sup>235</sup> Accord National Interprofessionnel sur le Stress au Travail, 2 Juillet 2008

<sup>236</sup> LEROUGE Loïc. Le Stress au travail, objet d’un ANI. *Semaine sociale Lamy*, n°1365. p.2-3

<sup>237</sup> Arrêté du 23 avril 2009 portant extension d’un accord national interprofessionnel sur le stress au travail. NOR: MTST0909479A

employment places the collective terms into an individual context. In both situations there is a risk that the effective application will not be in line with the intention of the signatory; the aim of collective bargaining will be lost. On the other hand, in the French system the application of the intention of the social partners is statutory and directly linked with its contractual nature. However, this contractual qualification raises problems of application because of coexistence with the individual contract of employment. The regulatory function of the collective agreement has priority over the contract of employment. This situation is the result of a political decision to encourage officially collective bargaining, something that is not possible in the British conception. Because of this deep conceptual difference the EU has no choice but to stay neutral.

### 3.2.3. CONCLUSION

Despite the first impression of deep differences between the three systems, some similarities are found in the British and the European systems; both systems contrast with the French organisation.

In fact, the British and the European systems establish their collective bargaining process on a non-regular time base. To start with, someone has to activate the bargaining process and solicit the social partners. The selection of the person who initiates is in line with the aim of the collective bargaining. At the EU level, social dialogue was created as a tool for the Commission to avoid political obstacles and institutional limitations. Therefore, it is the Commission who decides when to start the negotiations of social dialogue between the social partners. The choice of the time and the subject of bargaining depend on the European politics applicable at a certain time. Therefore, neither the subject nor the time basis of social dialogue is decided in advance. However, when social dialogue happens outside the institutional framework – the bipartite relation – it is the social partners themselves who decide. According to this voluntaristic approach, common to the British one, the social partners decide if they want to negotiate or not and, if they do, the topic on which they are willing to negotiate. Nonetheless, in the UK system, in order to secure the right to bargain collectively, it is possible to constrain the employer to negotiate on certain subjects. The moment of the negotiation is not based on a regular timing; the TUs decide when they want to bargain. If the representativeness of the TUs is established, the employer has to bargain on certain legally defined topics.

On this last point, there is a similarity with the French system as well. In France the collective agreement has functions to regulate industrial relations and at the same time to apply the law. The law provides general principles for the organisation of the collective bargaining process, but also about the content of the negotiations that are often linked with a law. Therefore, the collective bargaining is based on a regular timing, but also on obligatory topics. The second main difference from the previous systems is that, because it is done on a regular basis, there is no need for anyone to initiate the bargaining process; it is almost automatic. In practice, the employer has a legal duty to start negotiations every year or three years. If the employer fails in that duty, the TU can enforce the law and ask for the negotiation to start. Even if the social partners initiate the collective bargaining it is because of a legal obligation.

The similarities between the British and the European systems are not limited to these points. They are similar to some extent concerning the value of the collective agreement. Once again, they differ from the French system. In both the British and the European systems, to be applicable to the employee the collective agreement needs a “bridging act”. At the European stage, the European framework agreement does not have a proper legal value. The legal value of the content will depend on the process chosen to implement it in the Member States. First, even if the framework agreement becomes a European directive, this act has to be implemented in the national legal system to be applicable. Only in rare circumstances does the Directive have a direct effect on the employee situation. Second, the European framework agreement could be implemented through national collective bargaining or in accordance with national traditions. The value of the European framework agreement will depend on the value given to a collective agreement in the national legal system. As demonstrated before<sup>238</sup>, this value differs considerably from one system to another. In fact, in the British system – most of the time – the collective agreement is not legally binding. To be applicable to the employee situation, the provisions of the collective agreement have to be incorporated in the contract of employment. The British agreement needs this private contract to have a legal value, unlike the French system. In France the collective agreement is applicable by itself and has its own legal value. It is directly applicable to the employee and does not need to be transposed or incorporated in another act. Those structural differences in the value of the collective agreement influence how this agreement is enforced.

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<sup>238</sup> See details 3.2.2.

### 3.3. Enforcement of collective bargaining: divergent ways

In the previous chapter, the difference between the legal personas of social partners at the European and the national levels was emphasised. A link between the legal persona and the value of the collective agreement was also established. Thus, the final issue is to consider how this value is reflected in the practical application of the collective agreement. How is the collective agreement guaranteed through different methods of enforcement?

This chapter focuses on examination of methods of enforcement in the French, the British and the European systems. A distinction can be made between the “theoretical way” of enforcement through the judicial process and the “practical way” with the study of the strike process. In fact, industrial action has long been regarded as an essential part of the collective bargaining process<sup>239</sup>. The criterion of distinction is if the process of enforcement takes place in a judicial or a workplace context. There is a close link between the enforcement options possible and the value of the legal agreement, and so with the legal persona of the social partners. Considering that those variables change from one system to another, the procedure in front of the courts or tribunals will not be the same and will not apply in the same way. At the same time, the difference in structure between the national and the European stages outlines the difficulties of a direct application of the collective agreement or a strike framework at a supra-national level. The comparative study of the French and the British systems shows that the lack of harmonisation in ways of enforcement leads to huge divergences which are damaging for employees.

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<sup>239</sup> DAVIES, Anne CL. *Supra.89*. p.456

### 3.3.1. The theoretical way of enforcement: judicial action to defend the application of collective bargaining

#### 3.3.1.1. Indirect protection of the collective agreement– *European case study*

As seen previously, a European collective agreement can be implemented into national legal systems either through national social dialogue or within a Directive. The first hypothesis falls into national domestic law and will be covered in the following paragraphs. It is interesting to study the enforcement and the application of a European collective agreement through the implementation of a Directive.

We need to determine if the Directives that transpose a European collective agreement can have a direct effect on national legal systems, and what would be the consequence for the employees. The ECJ underlines in *Van Gend en Loos*<sup>240</sup> that, in order to have direct effect, a provision must contain ‘*a clear and unconditional prohibition which is not a positive but a negative obligation; the obligation is unconditional; and does not require MS legislative intervention*’. Considering that those Directives relate to collective bargaining, and so result from compromise, it seems unlikely that the provisions would fall within this description. It would have been possible to confer to individuals’ rights enforceable by them in the courts of a Member State only if the provision imposed a precise obligation that left Member States no discretionary power in relation to its implementation<sup>241</sup>. The provisions of a collective agreement are rarely unconditional or sufficiently precise, and Member States have discretionary power about its implementation<sup>242</sup>; if not, it would be contrary to the spirit of social dialogue. Even if it is the case, there is a second limitation; the scope of direct effect of a Directive is limited by the fact that under Art 288 TFEU it is only binding upon those to whom it is addressed, i.e. Member States. This is a paradox considering that the initial recipients of the framework agreement are supposed to be the employers and employees. Thus, many scholars think Directives should simply be given vertical and horizontal direct effects so that they can be invoked against private companies<sup>243</sup>. Solanke holds that the prohibition of a horizontal direct effect on an economy dominated by private relationships prevents the majority of workers from benefiting from rights in EU Directives. This is particularly true when the Directive is inspired by European collective agreements reached by

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<sup>240</sup> C-26/62

<sup>241</sup> SOLANKE Iyiola, *EU Law*. Pearson, 2015. p.208

<sup>242</sup> *Becker* C 8/81

<sup>243</sup> SOLANKE, Iyiola. *Ibid.* 241. p.212

private actors with the intention that they should apply to private employment relationships.

To counterbalance this situation, the ECJ has identified a way to manage the boundaries of the Directive direct effect. One of them is indirect effect; it refers to the requirement that national courts interpret and apply national law in conformity with EU law<sup>244</sup>. It could be seen as an indirect way to enforce the terms and conditions of the EU collective agreements at the national level. But once again it underlines the fact that it is not possible as a private party to enforce directly the provisions of a collective agreement at the EU level in the context of an employment relationship; the enforcement is a national matter. Therefore, it is important to see how it is possible to enforce collective agreements before judicial courts and tribunals in France and in the UK.

### 3.3.1.2. Trade unions as judicial actors committed to the protection of the collective agreement – *French case study*

In the French system, trade unions can defend, in their own name, collective agreements in judicial processes. This possibility is a particularity of the French system, and is framed in the Labour Code in articles L.2262-9 et seq. If a collective agreement is not correctly applied to a member, the trade union would be able to engage in litigation without the need for a mandate from the member. The only obligation is to inform the member of the procedure and, if s/he does not oppose it, the trade union can sue the employer for non-application. It is important to underline the fact that the TU is acting in its own name and does not need the legal responsibility of the members, who are supposed to be protected from the employer.

At the same time, when an employee individually engages in litigation in order to enforce the rights s/he gets from a collective agreement, the trade union which signed the agreement can intervene in the action<sup>245</sup>. This intervention is the enforcement of a trade union's right by itself<sup>246</sup>; it is a judicial action independent of the employee's action. It means that if the employee abandons her/his claim, the judge still has to rule on the trade union's claim.

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<sup>244</sup> NOLLKAEMPER, Andre and BETLEM, Gerrit. Giving effect to public international law and European Community law before domestic courts: a comparative analysis of the practice of consistent interpretation. *European Journal of International Law*, 2003, vol. 14, p. 572.

<sup>245</sup> Art L2262-10 of French Labour Code

<sup>246</sup> Cass.soc., 25 août 1961, *Bull.*, 894

There is also a possibility for individuals to enforce their collective rights before the courts and tribunals; in all national legal systems employees are able to engage in litigation against their employer when s/he does not respect their employment contract or labour law<sup>247</sup>. Once again the specificity of the French system rests on the fact that the TU has a right to represent and/or to assist the employee during the trial<sup>248</sup>. It is important to note that only legal representatives of the trade union can do this, not regular members. Additionally, the trade union that represents the employee has to have a mandate from the employee; the action of the trade union is subordinate to the action of the individual<sup>249</sup>. The enforcement of the individual contract of employment is an indirect way to enforce the collective agreement. When an employee defends her/his rights, s/he defends the application of the terms of the collective agreement incorporated into the contract of employment at the same time.

To conclude, the judicial defence of the collective agreement is wide open in the French legal system. The defence of the collective bargaining could be the defence of the act by itself or when it is integrated through the contract of employment: both the trade union itself or individuals are able to do it. The responsibility for defending the collective agreement by judicial means is both individual and collective.

### 3.3.1.3. TU exclusion and individual responsibility – *British case study*

The situation is completely different in the British system where collective actors are largely left out of the judicial system. This is possibly explained by the fact that, in English employment law, there is a traditional suspicion of the courts<sup>250</sup>. The reasons for this mistrust are based not only on worry about the courts' attitude toward employees and TU, but also worry about the inappropriate application of doctrines from other areas of law in the employment setting. The trade union only has the possibility to stand in court when the consultation rights of a union's representatives are at stake<sup>251</sup>. There is, most of the time, no judicial way for trade unions to protect a collective agreement through a judicial process; the only situation where it is possible is when the social partners decide to make the collective

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<sup>247</sup> Art L1411-3 French Labour Code

<sup>248</sup> Art R1453-2 French Labour Code

<sup>249</sup> Art L2132-3 French Labour Code

<sup>250</sup> DAVIES, Anne CL. *Supra.* 89. p.45

<sup>251</sup> MALMBERG, Jonas. Effective enforcement of EC labour law: A comparative Analysis of Community Law Requirements. *European journal of industrial relations*, 2004, vol. 10, no 2, p. 226.

agreement legally binding. In this case, it is the common law and the breach of contract rules that are applicable<sup>252</sup>. There is no specific collective process similar to the French one. The responsibility to defend the collective agreement through the judicial process is rarely open to trade unions and belongs essentially to individuals.

Most of the time, collective agreements have to be integrated into the contract of employment to be legally binding<sup>253</sup>. Thus, disputes related indirectly to the application of the agreement are heard before the common law courts<sup>254</sup>. Non-application of the collective agreement would be considered as a breach of the contract of employment.

Consequently, the only way to defend the collective agreement judicially is when it has a contractual legal value. Whether it is a direct defence by the trade unions, or an indirect defence by the employee through the contract of employment, the legal base is the same: breach of contract before common law courts. It means that there are no specific rules to protect the collective agreement. Perhaps there is scope for viewing the contract of employment in a special context but this is relatively undeveloped<sup>255</sup>. In *Autoclenz*<sup>256</sup> the Supreme Court held that tribunals and courts should look for the “true agreement” between the parties because of the inequality of bargaining power between employers and workers. Maybe this approach could apply when the collective agreement is legally binding; thus it would not be treated as a traditional contract but its special context could be taken into consideration.

#### 3.3.1.4. Connections and comparisons

At the EU level, regardless of method – social dialogue or Directive – the final application and therefore enforcement of what is agreed will be a national matter. There is no way for an individual to enforce the terms of a European collective agreement against a private person directly in front of the ECJ. The only possibility is to sue the Member State because it fails to transpose correctly the Directive in the national legal system. That, however, puts the conflict outside the pure employment relationship. As regards the national legal systems, the French and the British systems are very different in terms of the actors who are able to defend agreements judicially. In France the TU can defend in court the content of

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<sup>252</sup> DEAKIN, Simon F. and MORRIS, Gillian S. *Supra.* 46. p.75

<sup>253</sup> DAVIES, Anne CL. *Supra.*89. p.144

<sup>254</sup> DAVIES, Anne CL. *Supra.*89. p.43

<sup>255</sup> DAVIES, Anne CL. *Supra.*89. p.46

<sup>256</sup> *Autoclenz Ltd v. Belcher* {2011} UKSC 41, {2011} ICR 1157

the collective agreement, both in an individual or collective context. This is contrary to the UK, where it is strictly separated; either the TU defends the collective agreement as a collective contract or the employee defends it individually through incorporation in the individual employment contract, At any time it is possible for the TU to support judicially the action of individuals. Considering that a collective agreement is rarely legally binding in the British system, it is usually left to the single employee to face the employer. This situation is contrary to the first aim of the collective organisation. Therefore the collective has to find another way to enforce the collective agreement: the strike.

### 3.3.2. The practical way of enforcement: the strike

#### 3.3.2.1. The positive right to strike protected in the French system

In France, the right to strike is a constitutional freedom<sup>257</sup>. However, although it has been a constitutional right since 1946, the jurisprudence still considers from a civil point of view whether the striking employee is in breach of contract. In this context, there is a similarity with the British system. The difference is that the French legislator has adopted two laws that improve the strike framework. In 1950<sup>258</sup>, the legislator introduced a new principle: when an employee joins a strike her/his contract is suspended and not broken. Then, in 1985<sup>259</sup> there was a huge improvement in the protection related to the right to strike; it is legally prohibited to discriminate against an employee based on the lawful use of the right to strike.

Therefore, there is in France a positive framework to protect the right to strike. However, to be able to benefit from those provisions the industrial action has to fall within the jurisprudential definition of the strike. A strike is lawful if it constitutes: “The collective and consulted cessation of work (1), in order to support professional claims (2) known by the employer (3)<sup>260</sup>”. Concerning the collective and consulted cessation of work, contrary to the British system it is not necessary to prove a majority to organise a strike in the private sector<sup>261</sup>. In addition, prior consultation does not mean a notice period<sup>262</sup>. The strike can be spontaneous but it has to express the intention of all striking employees to stop work to support common claims<sup>263</sup>. Additionally, the claims have to have a professional nature<sup>264</sup> related to individual or collective rights.

From an international perspective, even if the European Committee of Social Rights considers that the French system complies with Article 6(4) of the European Social Charter, it has pointed out two main infringements to the right to strike as defined by the ESC<sup>265</sup>. The important point is that, according to French law, only the most representative trade unions in

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<sup>257</sup> Preamble French Constitution of 27 October 1946, Art. 7

<sup>258</sup> Art.4 of the Law of 11 February 1950 n°50-205

<sup>259</sup> Law of 25 July 1985 n°85-772 ; Art. L.1132-2 French Labour Code

<sup>260</sup> Cass.soc. 4 Nov 1992, Bull. Civ. V n°529 ; RJS 12/92 n°1407

<sup>261</sup> Cass.soc. 3 Oct 1963-10-03

<sup>262</sup> In the private sector only; in the public sector, the strike could be conducted only by a representative trade union and after a period of notice.

<sup>263</sup> ETIENNOT Agnès, and ETIENNOT Pascale. *Supra.24.* p.744

<sup>264</sup> Cass.soc. 17 Dec 1996, n°95-41.858

<sup>265</sup> European Committee of Social Rights, Conclusions XV-1 (2000), France. Recalled on the same points in its Conclusion of 2014

the public sector are entitled to call a strike. Consequently this right is only available to the most representative unions at the relevant level, depriving other groups and individuals of the right to pursue their claims through strike action. However, this is limited to the public sector and justified by the idea that strike has to be better framed than in the private sector, because the public sector provides service of general interest.

### 3.3.2.2. The negative right to strike tolerated in the British system

In the British system, the right to strike is not protected as a fundamental right but simply regulated by statute and common law<sup>266</sup>. The rules framing strikes are set out in Part V of the TULR(C)A 1992<sup>267</sup>. Additionally, with the Human Rights Act 1998 the ECHR is integrated into British domestic law. This act is important because it introduces the ECHR in the UK legal system. Technically, the UK has to be in line with the ECtHR position about the right to strike and collective bargaining. However, with regard to the judge's position in the Metrobus and NURMT cases some authors question whether the right to strike is anything more than a slogan<sup>268</sup>. Others go further and suggest that there is no right to strike in the UK<sup>269</sup>. In fact, the right to strike is protected through immunity; it is a negative right, rather than a positive one as in the French system. In the UK, the government finds a way to tolerate the exercise of the right to strike rather than promote it. Even if this system is in line with the ECJ, it does not comply with the ECtHR and international standards. In fact, on 16 December 2010 the European Committee of Social Rights reported that the UK was in breach of the ECHR on 10 points out of 13 examined<sup>270</sup>. The breach covered the right to bargain collectively and the right to strike. The last point concerns the fact that the employee is not effectively protected and is in breach of the employment contract. Indeed, in the British system a long-term work stoppage is a *repudiatory* breach of contract<sup>271</sup>, which has significant consequences in terms of dismissal. In order to protect the right to strike, the obligation of the Employment Tribunal to hear an unfair dismissal claim is removed if the employee is participating in a strike<sup>272</sup>.

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<sup>266</sup> STEWART, Arabella and BELL, Mark.. The right to strike: a comparative perspective. *The Institute of Employment Rights*, 2009.p.97

<sup>267</sup> s 226 A, s 231 A, s 234 A, s 238 A(1)

<sup>268</sup> DUKES, Ruth. The Right to Strike Under UK Law: Something More Than a Slogan? NURMT v. SERCO, ASLEF v. London & Birmingham Railway Ltd. *Industrial Law Journal*, 2011, vol. 40, no 3, p. 302-311. ; DUKES, Ruth. The Right to Strike Under UK Law: Not Much More than a Slogan? Metrobus v. Unite The Union [2009] EWCA Civ 829. *Industrial Law Journal*, 2010, vol.39. p.1-10

<sup>269</sup> EWING, Keith in LA MACCHIA, Carmen and SOLARI, Fabrizio. The Right to Strike in the EU. 2011. p.232

<sup>270</sup> European Committee of Social Rights, Conclusions XIX-3 (2010) (United Kingdom)

<sup>271</sup> *Simmons v. Hoover* {1997} QB 284, 299

<sup>272</sup> TURL(C)A, s.238(2)

However, the duration of this protection is only 12 weeks<sup>273</sup>. Therefore, although there is a protection period it is a limited one and it simply delays the employer's dismissal of the striking employee. According to international standards, these provisions are an obstacle to the effectiveness of the right to strike<sup>274</sup>, and so indirectly to the enforcement of collective bargaining.

### 3.3.2.3. The international right to strike outside the competence of the EU

Paradoxically, in Community law, even if the right to strike is clearly recognised as a fundamental social right, this subject is expressly outside the competence of the EU.<sup>275</sup> In fact, the right to strike has been recognised since 1989 in the Social Charter of the European Community.<sup>276</sup> This was embodied in 2000 with the Charter of Fundamental Rights of the EU<sup>277</sup>. In both cases, the right to strike is named but indirectly recognised through the right of collective bargaining. The right to strike as a collective action is identified as the corollary of collective bargaining through case law.<sup>278</sup> It is also mentioned that this right applies “*in accordance with Community law and national laws and practices*”. It means that the EU institutions recognise it but cannot regulate it at EU level. The responsibility falls primarily on the MS to frame it. Consequently, the ECJ has never had jurisdiction to enforce the right to strike in a Member State. However, the ECJ found an indirect way to intervene on this issue through a “back door”<sup>279</sup> in the famous Viking<sup>280</sup> and Laval<sup>281</sup> cases.

Through case law, the ECJ's indirect approach contrasts the right to strike to the freedom of establishment and the freedom to provide service, which are undoubtedly in the competence scope of the EU. The ECJ recognised the *fundamental right to strike* as a principle of Community law. However, this recognition is limited, and some scholars underline that the

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<sup>273</sup> TURL(C)A, s.238A(3)

<sup>274</sup> Committee on Freedom of Association, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th edn 2006), Chap 10, {661}

<sup>275</sup> TURL(C)A, s.238A(3)

<sup>276</sup> Article 13 « *The right to resort to collective action in the event of a conflict of interests shall include the right to strike, subject to the obligations arising under national regulations and collective agreements.*»

<sup>277</sup> Article 28, « *Workers and employers, or their respective organisations, have, in accordance with community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.* ».

<sup>278</sup> BARNARD, Catherine. *Supra* 81. p. 717

<sup>279</sup> NOVITZ, Tonia. *International and European protection of the right to strike : a comparative study of standards set by the International Labour Organization, the Council of Europe and the European Union*. Courier Corporation, 2003. p.258

<sup>280</sup> *The Rosella or International Transport Workers Federation v. Viking Line ABP* [2008] IRLR 143. Case C-438/05

<sup>281</sup> *Laval Un Partneri Ltd v. Svenska Byggnadsarbetareförbundet* [2008] IRLR 160. Case C-341/05

position of the court could have a negative impact on rights to take industrial action.<sup>282</sup> The right to strike is subordinate to economic freedom. In fact, given these ECJ decisions, the exercise of the fundamental right to collective action must meet the justification test of the economic freedoms of establishment and providing services.

The consequence for the lack of a “European right to strike” is that the European social partners do not have it; they only have it indirectly through their national members. It means that if the European social partners want to call for a European strike it cannot be legally framed at the EU level and will only depend on the coordination of national calls. It also underlines that the European social partners cannot use the right to strike in cases of conflicts to defend their interests, including the ones bargained in framework agreements. Considering the development above about the neutral value of the framework agreements at the EU level and the impossibility of enforcement beyond the EU courts, it can be concluded that the social partners cannot enforce their collective agreements at the EU stage. The only way possible to enforce this is after the agreements’ implementation in the Member States, and so in accordance with domestic laws. This makes European agreements contingent on national implementation. Therefore the lack of a European right to strike strongly limits the impact of the European collective bargaining process.

#### 3.3.2.4. Connections and comparisons

At the EU level, the enforcement of the right to strike and so the protection of the collective agreement will be a national matter. It is a similarity with the judicial action explained previously. Even if the right to strike is internationally recognized and expressly mentioned in EU fundamental charters it remains dependent on national application. It could be different if the EU had competence in the matter of the right to strike but, according to the recent failure of the Draft Monti II regulation, it probably will not happen<sup>283</sup>. As regards the national legal systems, the French and the British systems are once again very different in terms of legal protection, and their general approach to the right to strike. In France, it is a constitutional freedom, a positive right and the law protects its enforcement through the special status given to workers who strike. This is contrary to the UK, where it is a negative

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<sup>282</sup> STEWART, Arabella and BELL, Mark. *Supra 266*; EWING, K.D. The draft Monti II regulation: An inadequate response to Viking and Laval Institute of Employment Rights Briefing, 2012.

<sup>283</sup> See details EWING, K.D. The Draft Monti II regulation: An inadequate response to Viking and Laval. Institute of Employment Rights Briefing, 2012; BRUNN, Niklas and BÜCKER, Andreas. Critical assessment of the proposed Monti II regulation – more courage and strength needed to remedy social imbalances. *ETUI Policy Brief*, 2012, no 4. p.1

right, tolerated by the law, and the workers are fully responsible if they decide to strike. Once again the worker has to take the risks for their job in case he/she decides to be part of a strike. Having his/her job threatened could be seen as an obstacle to the effective exercise of the right to strike. On this point, the European Committee of Social Rights argues that the UK is breaching the ECHR. The French system is also recognized as not being in conformity with the ECHR, but on different points. Assuming that the EU will not accede to the ECHR in the immediate future,<sup>284</sup> the ECHR and ECtHR case law as a way to have a common EU ground to enforce the right to strike is closed; the right to strike and so the enforcement of collective agreements remain fully the responsibility of the Member States.

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<sup>284</sup> ECKES, Christina. EU Accession to the ECHR : Between Autonomy and Adaptation. *The Modern Law Review*, 2013, vol.76, no 2, p.266

### 3.3.3. CONCLUSION

Either before the courts or during the strike, enforcement of the collective agreement is different in the French, the British and the European systems. The study of the enforcement of the collective agreement at the European level underlines the limits of European social dialogue and the reasons why it cannot be considered as a European collective bargaining process. First, from a judicial point of view it is impossible to enforce the European framework agreement directly because of the need for a bridging act. Enforcement will depend either on the legal system where the European framework agreement is implemented or the common principle of Directive enforcement will be applied. In both situations, the terms of the agreement will not directly benefit the employees, and they cannot enforce them before the ECJ. At the same time the TU cannot judicially intervene to enforce the European framework because the agreement does not have a legal value by itself. The alternative would be the organisation of a European strike to force employers to apply the agreement. The strike, however, is outside the scope of European Union competence and so there is no common principle to regulate it and it too depends on the national systems. Even if there were a possibility of organising a strike movement with a European impact, it would be a European coordination of national strike movements rather than a European strike at the national level. Therefore, it might be concluded that all aspects of the enforcement of collective agreements depend ultimately on the national legal systems.

Comparison of the national methods of enforcement illustrates further the divergent consequences explained previously. From a judicial perspective there is an important difference between the French and the British systems regarding those who are able to enforce the collective agreement. In France, because the collective agreement itself has a legal value, it is possible for the TU – party to the contract – to ask for the enforcement of its provisions in front of a court or tribunal. In addition, because the collective agreement applies to the contract of employment, the TUs have the possibility to defend the individual interests of the employee derived from the collective agreement advantages. The TU can itself defend the content of the collective agreement in both an individual and a collective context. In addition, the employee is still free to ask for the proper application of the collective agreement to her/his individual employment situation in front of the employment tribunal.

The situation is different in the UK where traditionally TUs do not trust judges and do not want to give them the power to interpret or enforce the collective agreement. Therefore, judicially the only way to enforce the provisions of the collective agreement is through the contract of employment. This means an individual method of enforcement within the individual responsibility of the employee. Workers decide to organise collectively and to bargain collectively in order to counterbalance the power of the employer; but where is the effective counterbalance if the employee is left alone to apply the bargaining in front of a tribunal?

Hence, the only way for the British TUs to enforce a collective agreement is by direct pressure on the workplace by means of a strike. The problem is that once again it is the individual employee who carries the risk. In the UK system the right to strike is a negative one tolerated through the use of immunities. However, these immunities are limited in time. In addition, if an employee decides to join a strike her/his personal employment contract is broken. Therefore, even if a strike is legal – a very complex issue to determine<sup>285</sup> – the employee has little protection at the end of the immunity period. The situation is completely different in France where the right to strike is positively defended in the preamble of the Constitution. In addition, when an employee joins a strike her/his contract is suspended and restarts as soon as the strike is over. Thus there is no risk to the continuity of the employee's job; s/he is free to exercise the right to strike to defend collective claims without being under threat from the employer. It is important to note that there is a legal prohibition to justify a dismissal on the fact that an employee joined a strike movement. The lack of European standardisation of the right to strike causes a divergence between the legal systems; in two European Member States in the same situation – i.e. a legal strike – one employee could lose her/his job and the other one not. The consequence is far-reaching and changes the global approach of the ways to enforce the collective agreement.

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<sup>285</sup> Part V of the TULR(C)A 1992

## 4. GENERAL CONCLUSION

The goal of this study was to explore the collective bargaining process in the French, the British and the European systems in order to determine if it is a shared common concept. This aim was pursued by detailed examination of the similarities and differences in collective bargaining in those systems with a view to establishing connections between them or explaining the lack of connections.

The main conclusion is that because of the Member States' influence – especially the British one – the European influence on the process of collective bargaining is a soft one. There is a disconnection between the European and the national level. Thus, the main consequence is maintenance of a deep division between the practical applications of the collective agreement provision for French and British employees. In other words, the collective bargaining process is not a concept shared in the French, the British and the European systems.

To come to this conclusion it was necessary to examine in detail the historical construction of the European social dialogue, and more specifically the political influence of the French and the British systems. The comparative study of those two systems has shown that their conceptions of the function of collective bargaining are not the same. In the French system, the collective bargaining process is completely integrated by the government and even used to have a complementary application of the law. In the British system, the collective bargaining process is not integrated and is completely disconnected from the law; it could even be said that it challenges the law. Hence, this difference of approach explains the choice at the European level to qualify the social dialogue as a soft way of regulation. The idea was to respect the national traditions, and therefore offer the opportunity to join without obligation. The result is the integration of collective bargaining into European social governance, albeit with limited effect.

The second part of the study was dedicated to examining the collective bargaining process in the French, the British and the European systems. Different aspects were approached: the social partners, the negotiation and the enforcement of the collective agreement. The same question was asked: is there any common standard in the three systems? The answer was no. The reason was always almost based on the same schema: there are some global principles at the European stage that coordinate the national traditions but do not change them. As a reminder, the aim of social dialogue is to implement European standards in respect of the

national traditions, and so their divergence of approach. European social partners do not have a legal persona; they have a mandate to represent the national social partners on the European stage. The dynamic is bottom-up, not top-down. It would have been different if the European social partners were independent legally and had national nodes in the Member States. In that case, the dynamic centre of decision would have been the European stage and not the national one.

The same can be said about collective agreement. What is concluded at the European level is not independently enforceable and has to be implemented into a national act that is subject to national rules. Consequently, an act commonly negotiated at the European stage has a different reality at the national level; in France the collective agreement is independently applicable, but in the UK the collective agreement has to be incorporated into the contract of employment. In other words, a European collective dynamic could have a collective or an individual application depending on where it is implemented. Similarly, there are no general standards about the protection and the enforcement of the collective agreement at the European level. Both from a judicial and an industrial action perspective, the rules applicable are the national ones and there is a gap between the French and the British systems. In the French system the TUs could defend the collective and individual interest derived from the collective agreement before the courts and tribunals. At the same time, the right to strike is actively protected by the preamble of the French Constitution. However, in the British system it is the individual who has to defend the collective agreement both in front of the courts and tribunals and also during the strike with the system of immunity. Even if the content of the European agreement enjoyed the same wording in the two systems, the practical application to the employees' situation would not be the same. In the French system the employees are protected by the collective, whereas in Britain the employees have to face their employers individually to apply collective provisions.

Therefore, apart from demonstrating that there is no common concept of the process of collective bargaining in the French and the British systems, this study also highlights that a lack of standardisation leads to important gaps in the application of collective agreements and the protection of employees' bargaining rights. Thus, there are two possibilities for further research: first of all, identifying an effective system at the European level to reduce the gap between the French and the British law. At the moment, the coordination of the European system does not seem to be strong enough to ensure a homogeneous application of the employment standards in Europe. In fact, if the status quo remains, even if some principles

are adopted at the EU stage and then implemented in the national systems, the reality applicable to the employee will not be the same. The treatment of employees by the same European authority will not be equal. This study underlines why there is such a difference and the effect of the divergence at the European Union scale, both at the national and international level. Therefore we have to think about a way to change that.

The second way to develop this research would be to complete it with empirical research. As underlined in the Introduction, this study is based only on a theoretical framework. Therefore, it would be interesting to examine in practice the organisation of European collective bargaining, and see if the difference between the French and the UK system is real and, if so, to what extent.

Finally, this research confirms the studies of Bieling and Schulten, who argue that European social dialogue does not represent an emerging European collective system but might be better characterised as a new form of “symbolic Euro-Corporatism”<sup>286</sup>. It can even be argued that the aim of European social dialogue is to develop a social Europe by coordinating national collective action. It is harmonisation from below and not from the top. Second, this study develops the idea expressed by Kirton-Darling and Clauwaert about the need to have a closer look at the process of collective bargaining to determine the obstacles that social partners have to face<sup>287</sup>. The main problem, the source of all this divergence, is arguably the limited competence of the European Union in the social area and the fact that social dialogue is not legally binding. Therefore, the title of the dissertation could be modified as: “Collective bargaining process: a single European wording with a divergence of realities”.

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<sup>286</sup> BIELING, Hans-Jürgen and SCHULTEN, Thorsten. Competitive Restructuring and Industrial Relations within the European Union: Corporatist Involvement and Beyond?, 2001, *WSI Discussion Paper No. 99*, Düsseldorf, November.

<sup>287</sup> KIRTON-DARLING, Judith and CLAUWAERT, Stefan. *Supra.4.* p. 247-264.

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