Final report

EUROACTA

European Action on Transnational Company Agreements: a stepping stone towards a real internationalisation of industrial relations?

with financial support from the European Union

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Country	**Partners**
Italy	IRES CGIL Associazione "Bruno Trentin" IRES Emila Romagna University of Cassino
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1. Introduzione

Questo rapporto è il risultato finale del progetto *"EUROACTA – Un'azione europea in materia di accordi aziendali transnazionali"*, il cui obiettivo era di monitorare e approfondire la diffusione, le procedure e gli aspetti legali relativi alle esperienze realizzate con gli accordi aziendali transnazionali (d'ora in poi l'acronimo inglese *TCAs*).

Realizzata grazie al sostegno dell'UE (DG Occupazione e Affari Sociali)[1], la ricerca è stato promossa e coordinata dall'*Istituto di Ricerche Economiche e Sociali* (IRES) nazionale italiano, in partneriato con alcuni sindacati, istituti di ricerca sindacale e dipartimenti universitari di sette stati membri dell'UE: Italia, Francia, Spagna, Germania, Polonia, Bulgaria e Svezia. Si è trattato della *CGIL*, dell'*Associazione "Bruno Trentin", dell'IRES Emilia Romagna* e dell'*Università di Cassino* per l'Italia, di *ASTREES* e dell'*IRES* per la Francia, della *Fundacion 1 ° de Mayo* (CC.OO) per la Spagna, di *Solidarnosc* per la Polonia, dell'*ISTUR-CITUB* per la Bulgaria, dell'*Università di Amburgo* per la Germania. La CES e il sindacato dei colletti bianchi svedese *TCO* hanno offerto il loro sostegno esterno. Grazie a questa ampia ed influente rete di organizzazioni, è stato possibile acquisire degli esperti[2] che sono anche gli autori di alcuni tra i più noti studi sull'argomento[3].

Il tema centrale della nostra ricerca ha riguardato il tipo di regolazione che meglio si presterebbe a raggiungere lo scopo di conferire ai TCA una dose adeguata di certezza giuridica. Inoltre, volevamo verificare la reale efficacia delle soluzioni adottate finora su base negoziale, e migliorare il livello di coordinamento tra gli attori coinvolti nella contrattazione collettiva sia a livello internazionale che nazionale e aziendale. Sulle esperienze concrete di TCA sono stati condotti due ricerche empiriche, presso la Volkswagen (settore auto) e l'ArcelorMittal (siderurgia), per esaminare l'impatto di questo tipo di accordi nei paesi del partenariato dove queste due importanti multinazionali hanno stabilimenti e marchi affiliati.

Lo scopo del progetto era anche quello di promuovere e di migliorare la conoscenza di questa tematica tra i partner sociali europei. Con due workshop internazionali, a Parigi e a Danzica, e una conferenza conclusiva a Roma, siamo riusciti a portare avanti uno scambio di vedute e di esperienze tra esperti e attori negoziali dei diversi paesi partner. Questi tre eventi hanno complessivamente richiamato più di cento partecipanti. Abbiamo in questo modo mescolato e discusso di temi teorici e di esperienze concrete relativamente ai TCA, con testimonianze dirette, come nel caso della ArcelorMittal, Areva, Axa, GDF Suez, Schneider, Electrolux, Ford, GM Europe, Volkswagen.

Questo rapporto conclusivo è la sintesi di tutte le suddette attività e dei contributi realizzati dai ricercatori e pubblicati per esteso in una versione in inglese. Esso attesta, nei vari paragrafi

[1] Linea di budget VP/2011/001; Rif. Accordo VS/2011/0154.

[2] Studiosi come Edoardo Ales, Udo Rehfeldt, Volker Telljohann, Reingard Zimmer – fra gli altri – sono stati coinvolti direttamente nella partnership del progetto, laddove altri noti esperti di questi temi, come André Sobzack, Isabela da Costa, Claude Emmanuel Triomphe, Jakub Stelina, Tiziano Treu, Silvana Sciarra, Anna Alaimo, Mimmo Carrieri, Ricardo Rodriguez, Francesco Gariblado e altri ancora – fra i rappresentanti delle parti sociali e in special modo dei sindacati, fra cui Fausto Durante, del Segretariato Europa della CGIL, e Luca Visentini, della Segreteria della CES – per avere attivamente contribuito alla riuscita dei nostri incontri.

[3] I. da Costa and U. Rehfeldt, *Transnational Restructuring Agreements: General Overview and Specific Evidence from the European Automobile Sector,* in Papadakis (ed.), 2011, cit.; V. Telljohann, I da Costa., T. Müller, U. Rehfeldt, R. Zimmer, *European and International Framework Agreements. Practical Experiences and Strategic Approaches*, Eurofound, Dublin, 2009; E. Ales, S Engblom., S. Sciarra, Valdes Del-Re, *Transnational collective bargaining: past, present and future*, European Commission, 2006.

che lo compongono, lo sforzo teorico e la ricerca sul campo che abbiamo proficuamente condiviso nel corso delle varie fasi di questa comune elaborazione.

2. Il processo di Europeizzazione delle relazioni industriali: il ruolo dei TCA

E' ormai un dato appurato come la globalizzazione dei mercati abbia progressivamente stimolato l'avvento di una dimensione transnazionale nelle relazioni industriali[4]. Per internazionalizzazione (o europeizzazione) delle relazioni industriali si intende quell'insieme di assetti e procedure di governance sovranazionale, il cui sviluppo ha finora assunto la forma dell'informazione, consultazione e partecipazione nelle imprese di dimensione europea, coi CAE e con la Società europea; un certo grado di influenza sulle politiche internazionali ed europee in tema di lavoro e diritti sindacali; la negoziazione di accordi sovranazionali di settore e/o di gruppo[5]. Questi ultimi, come vedremo, costituiscono uno degli sviluppi più interessanti e promettenti.

Questo processo è il risultato di un complesso sistema di fattori. Uno riguarda certamente le sfide che da un trentennio ormai la globalizzazione neoliberista pone al movimento sindacale in termini di salvaguardia dei diritti e delle tutele acquisite nel secondo dopoguerra e nella fase matura del compromesso fordista-keynesiano. Diversamente di quanto a volte si è soliti ritenere, questo modello di globalizzazione, lontano dall'aver avuto uno sviluppo "naturale" o "spontaneo", è stato promosso e controllato da alcuni attori nazionali e internazionali[6]. In particolar modo, le grandi multinazionali hanno svolto un ruolo cruciale, adottando strategie di ristrutturazione che si dispiegano lungo una catena del valore sempre più frammentata e organizzata al di là delle frontiere (outsourcing, subappalto e delocalizzazioni), e assumendo la finanziarizzazione (e i suoi corollari, ad esempio la massimizzazione del valore delle azioni) come la logica principale intorno alla quale ripensare i suoi modelli organizzativi[7].

Il volume degli investimenti diretti stranieri e le strategie di *offshoring*, creano un divario di governance e sovranità tra l'economia e la politica, laddove le delocalizzazioni determinano un serio e comprovato rischio di dumping sociale[8]. Gli ancora forti differenziali retributivi e delle norme a tutela del lavoro, all'interno dell'UE a 27, costituiscono una tentazione troppo forte per aziende interessate a diminuire i costi della produzione, ricercando per questa via una soluzione alle sfide competititive che con sempre maggiore forza giungono dalle economie emergenti. Al contempo non va trascurata la necessità delle imprese di qualificare oggi i loro brand anche in termini reputazionali, e in quanto facenti parte di una politica di responsabilità sociale.

In un tale scenario, si comprende come il perseguimento di accordi collettivi sovrazionali costituisca per i lavoratori e il sindacato una prospettiva strategica ineludibile. Il consolidamento dell'integrazione economica e monetaria ha spinto i sindacati a promuovere una crescente armonizzazione delle condizioni sociali e di lavoro all'interno dell'area economica europea. Un'importante tappa è stata conseguita nel 1999, al Congresso di Helsinki, quando la Confederazione europea dei sindacati (CES) adottò una risoluzione volta a promuovere la creazione di un sistema autenticamente europeo di contrattazione collettiva e

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[4] R. Hoffman, *Proactive Eurpeanisation of industrial relations and trade unions*, in W. Kowalsky e P. Scherrer, (Eds.) *Trade unions for a change of course in Europe*, ETUI, Bruxelles, 2011; S. Sciarra, *Transnational and European Ways Forward for Collective Bargaining,* WP C.S.D.L.E. "D'Antona", n. 73/2009.

[5] V. Glassner and P. Pochet, *Why trade unions seek to coordinate wages and collective bargaining in the Eurozone: past developments and futures prospects*, Working Paper, ETUI, 3/2011, pp. 9-13.

[6] D. Harvey, *A brief history of neoliberalism*, Oxford University Press, 2005.

[7] Keune, M. and V. Schmidt, *Global capital strategies and trade union responses: towards transnational collective bargaining?*, in "International journal of labour research", Vol. 1, Issue 2, 2009; W. Rhode,.*Global production chains, relocation and financialization: the changed context of trade union distribution policy*, in "International journal of labour research", Vol. 1, Issue 2, 2009.

[8] A. Perulli, *Globalizzazione e dumping sociale,* "Lavoro e diritto", n. 1/2011.

relazioni industriali[9]. Si è infatti capito quanto necessario sia divenuto stabilire delle forme di interazione organizzate a livello collettivo e su un piano sopranazionale, rispetto al quale i TCA possono favorire un coordinamento dal basso delle politiche negoziali e una più efficace azione di contrasto a quelle forme deteriori di dumping sociale che, praticate su scala globale, non risparmiano la dimensione europea. Essi possono costituire un modello per tentare di colmare parzialmente il vuoto di governance tra l'aspetto sempre più globale delle strategie di impresa e la natura sostanzialmente territorializzata degli attori dei sindacati e dei lavoratori.

Intorno ai TCA si è progressivamente raccolto un forte interesse teorico, e non soltanto sindacale. Per studiosi ed esperti di relazioni industriali[10] saremmo in presenza di una nuova "prassi sociale"[11], di nuove "sedi di contrattazione"[12], qualitativamente significative[13]; di una "nuova stella" nella galassia delle fonti collettive[14], una delle "nuove idee strategiche per uscire dalla crisi dei diritti e del lavoro dei sindacati transnazionali"[15].

3. Profili tipologici e aspetti definitori

I TCA sono un fenomeno eminentemente seppur non esclusivamente europeo, che si è evoluto dalle relazioni industriali europee, grazie in particolare all'intraprendenza di alcuni comitati aziendali europei (CAE) e delle federazioni europee di settore, in grado di strappare ad alcuni grandi gruppi multinazionali intese finalizzate a stabilire alcuni standard comuni di trattamento per tutti i dipendenti.

Nel mappare preliminarmente questi accordi[16], notiamo come il primo di essi risalga al 1988 e abbia come protagonistil gruppo Danone. Oggi, secondo l'ultimo aggiornamento disponibile, se ne contano 224 per un totale di 144 aziende. Di queste 86 sono europee, con in testa la Francia (55), seguita dalla Germania (23), dagli USA (18), e più ditero Svezia (13), Belgio (13), Italia (8)[17]. Essi coinvolgono pressoché tutti i settori, anche se compaiono più frequentemente in quello metalmeccanico (specie nel comparto auto), chimico-energetico e nei servizi finanziari. Si ritiene – e questo è un dato che va sottolineato – che non meno di 10 milioni di lavoratori siano oggi coperti da un accordo di questo tipo.

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[9] CES, *Towards a European System of Industrial Relations*, Statutory Congress of Helsinki, 29/6-2/7 1999.

[10] Revue de l'IRES, numéro spécial, *La participation des salariés au niveau européen : comités d'entreprise européens, société européenne, syndicats européens,* n° 71/2012; K. Papadakis. (ed.), *Shaping Global Industrial Relations: The Impact of International Framework Agreements,* ILO/Palgrave Macmillan, 2011; van Hoek e A. Hendrickx, *International private law aspects and dispute settlement related to accordi aziendali transnazionali,* European Commission, Bruxelles, 2010; V. Telljohann, I. da Costa, T. Müller, U. Rehfeldt, R. Zimmer, *European and international framework agreements: new tools of transnational agreements and industrial relations*, *Transfer* 15 (3-4), 2009; I. Schomann, A. Sobzack E. Voss, P. Wilke, *International framework agreements: new paths to workers' participation in multinational governance?* "Transfer", n. 14/2008; K. Papadakis (eds.), *Cross-Border Social Dialogue and Agreements: an Emerging Global Industrial Relations Framework?,* International Institute for Labour Studies/ILO, Geneve, 2008.

[11] I. Schomann, A. Sobzack, E. Voss, and P. Wilke, *International framework agreements: new paths to workers' participation in multinational governance?* "Transfer", 14 (1), 2008.

[12] A. Lo Faro, *Bargaining in the shadow of "Optional Frameworks? The rising of transnational collective agreements and EU law*, "EJIR", 2011.

[13] V. Telljohann, I.da Costa, T. Müller, U. Rehfeldt., R. Zimmer, *European and International Framework Agreements. Practical Experiences and Strategic Approaches*, Luxembourg, Ufficio per le pubblicazioni ufficiali delle Comunità Europee.

[14] S. Sciarra, *Uno sguardo oltre la Fiat. Aspetti nazionali e transnazionali nella contrattazione collettiva oltre la crisi*, "Riv. Ital. Dir. Lav.", III, 2011

[15] S. Sciarra, *Collective Exit Strategy: New Ideas in Transnational Labour Law*, WP Jean Monnet n. 4/2010

[16] A. Sobzack, Dati presentati al workshop EUROATCA di Paris, 15 dicembre 2011; European Commission, *Database on accordi aziendali transnazionali*, April 2012. *http://ec.europe.eu/social/main.jsp?catId=978&langId=en*

[17] Eni, Enel, Marazzi, Impregilo, Italcementi, Merloni, Generali, Unicredit.

Ciò che è emerso dalla nostra ricerca ha confermato un quadro di testi molto diversificato. I testi tendono a riflettere i modelli e le prassi del paese in cui ha sede il l'impresa controllante (c.d. *"home country effect"*). Un dato peraltro già noto da vari studi condotti in materia di CAE. Non meno importanti, specie a livello di implementazione degli accordi, è la forza sindacale in termini di memrship, nonché lo stile manageriale e le pressi negoziali vigenti. La fiducia reciproca tra management del gruppo e rappresentanti dei lavoratori è certamente un fattore importante.

Il termine "accordo" (*agreement*) – ad essere rigorosi – compare espressamente sono in un numero limitato di testi, laddove nella maggior parte si è preferito adottare formulazioni tecnicamente meno stringenti, quali *dichiarazione congiunta, punti di vista comuni, posizione comune*. Il trait d'union risiede in definitiva nella loro natura bilaterale e nel fatto che queste intese siano scaturite da un processo negoziale, diversamente che nel caso di adozione unilaterale di codici di condotta e altre forme di responsabilità sociale dell'impresa[18]. In un certo senso, essi possono essere considerati un'alternativa a quell'approccio.

Sotto il profilo terminologico, gli tali accordi possono essere definiti *transnazionali* se vengono stipulati tra i rappresentanti dei lavoratori e le aziende transnazionali. I TCA sono detti *Europei* (*European Framework Agreements* – EFA) quando sono firmati dai sindacati europei; sono detti *Internazionali* (*International Framework Agreements* – IFA), se a firmare sono le federazioni mondiali dei sindacati (*Global Union Federations* – GUF). La maggior parte degli accordi sono stati siglati esclusivamente dai CAE, una ventina solo dalle Federazioni sindacali europee (*European Industry Federations* – EIF). Le aziende sono solitamente rappresentate dalla direzione generale dell'impresa controllante.

Per poter definire la dimensione transnazionale è necessario chiarire come essa si differenzi – per contrasto o per caratteristiche proprie – dalla dimensione *nazionale*, da quella *sovranazionale* e da quella *internazionale* della contrattazione collettiva (Ales).

a) la dimensione *nazionale,* che a volte è istituzionalizzata e che prevede un intervento pubblico di estensione dell'efficacia, va intesa come quella che si instarua tra le parti sociali all'interno dei confini di un determinato stato, e le cui regole siano almeno potenzialmente applicabili ai lavoratori e ai datori di lavoro di quel paese;

b) la dimensione *sovranazionale* europea va invece intesa come quella creata dalle parti sociali nell'ambito del dialogo sociale comunitario, con lo scopo di modificare i sistemi giuridici su un piano intersettoriale o settoriale, inclusa l'azione di lobbying sulle istituzioni dell'UE;

c) la dimensione *internazionale* – sviluppata nel contesto dell'Organizzazione Internazionale del Lavoro (OIL) per mezzo delle sue Convenzioni e Raccomandazioni – presenta un forte grado di istituzionalizzazione ed è essenzialmente tripartita;

d) la dimensione propriamente *transnazionale*, infine, va intesa come quella creata dai rappresentanti dei lavoratori e delle imprese (o da una singola impresa) quando essi concordano una serie di regole applicabili oltre il contesto nazionale. Un aspetto che la distingue rispetto alla dimensione nazionale, senza che tuttavia arrivi a configurarsi una dimensione propriamente sovranazionale o internazionale, alla stregua di quanto indicato prima.

Il contenuto di questi testi copre una vasta gamma di materie: il rispetto dei diritti fondamentali e delle norme ILO sul decent work (diritto antidiscriminatorio, diritto di associazione e negoziazione, divieto di lavoro minorile o forzato), ristrutturazioni e anticipazione dei cambiamenti, misure di accompagnamento (training, outplacement, mobilità intraziendale transnazionale), politiche delle risorse umane, salute e sicurezza, dialogo sociale e diritti sindacali, subappalto, partecipazione finanziaria. Confrontando i TCA esistenti è

[18] Eurofound, *Multinational companies and collective bargaining*, Dublin, 2009

emerso come il contenuto di quelli europei (EFA) sia più diversificato e sostanziale di quelli internazionali (IFA). Nei primi il tema principale è stato quello delle ristrutturazione e del dialogo sociale. Il richiamo ai diritti sociali fondamentali, che svolge un ruolo minore negli EFA, è invece prepondernate negli IFA.

I TCA possono essere distinti e classificati tra "procedurali" e "sostanziali"[19]. Nel primo caso, che è ancora il più ricorrente, essi evocano principi generali, laddove nel secondo caso stabiliscono regole e clausole più circostanziate e impegnative riguardo alla gestione di casi specifici di ristrutturazione. Accordi di questo tipo, definiti "di seconda generazione", sono stati definiti *transnational restructuring agreements*. Il settore automobilistico è quello che finora più si orientato in questo senso, ad esempio nel caso di crisi come quelle che in questi anni hanno riguardato DeimlerChrysler, Renault, PSG, Ford Europe, GM Europe, Volswagen. Si noti, da un punto di vista italiano, come nessun accordo di questo tipo sia stato sottoscritto alla Fiat, dove pure ce ne sarebbe stato bisogno.

L'impressione è che numero sempre maggiore di accordi non si limiti più a enunciati di principio (pure importanti) o a questioni relativamente minori, ma include aree più canoniche della contrattazione collettiva. Gli accordi di ristrutturazione contengono in certi casi clausole per ripartire in modo più equlibrato i sacrifici fra i vari stabilimenti di produzione. Sono testi, per così dire, di "seconda generazione", nei quali la componente "sostanziale" tende ad espandersi, anche se i numeri complessivi restano estremamente limitati. La recente *Carta dei rapporti di lavoro* della Volkswagen è uno degli esempi più significativi di questa tendenza, con il suo modello che arriva ad includere, su certi temi, forme "alla tedesca" di co-determinazione. Noi abbiamo approfondito questi aspetti in una delle nostre due ricerche sul campo, concentrandoci sull'impatto di un modello innovativo creato intorno alle caratteristiche di un sistema nazionale specifico – in questo caso quello tedesco – in un paese come l'Italia (dove VW controlla Lamborghini e Ducati) sostanzialmente privo di una tradizione di questo tipo. Da questo punto di vista l'accordo globale siglato in VW rivela come possa esserci un'alternativa all'approccio, frontale e controverso, della Fiat alla ristrutturazione e alle relazioni industriali. Un approccio globale per dimensione e ispirato al dialogo e al rispetto – se non anche a una espasione – dei diritti nella sostanza.

Anche altri TCA – ad esempio quello GDF, AXA, Areva e ArcelorMittal, (quest'ultimo è stata oggetto anch'esso di una specifica ricerca nell'ambito del nostro progetto) – confermano che esiste la possibilità di raggiungere un accordo in cui la gestione di una ristrutturazione anche profonda può avvenire nella prospettiva di un cambiamento tendenzialmente anticipato e consensuale. Dunque testi che rivelano quanto meno un certo grado di buona volontà nel tentare di cercare soluzioni relativamente meno unilaterali di quanto non accada in molto altri casi.

Ciò nondimeno, occorre rilevare come l'attuale crisi abbia assunto proporzioni tali da logorare quello sforzo condiviso che pure aveva inzialmente ispirato la stipula di molto di questi accordi. Il caso dell'ArcelorMittal (AM), il precipitare della sua crisi e le pesantissime ripercussioni che ciò sta già sortendo negli stabilimenti francesi, spagnoli o italiani, sembrebbe dimostrare come accordi di questo tipo siano più adatti all'adozione di formulazioni relativamente meno vincolanti in fasi meno turbolenti di quelle che invece stanno investendo un'ampia parte del sistema produttivo europeo. La crisi di questi ultimi anni sta mettendo duramente alla prova lo sforzo compiute con queste intese. Il settore dell'elettrodomestico bianco, particolarmente colpito, non è stato in grado di conseguire alcun accordo. In casi come quello di Electrolux e Siemens ciò è anche dipeso dalla riluttanza di alcuni sindacati nazionali a gestire a livello sovranazionale crisi che si riteneva di potere fronteggiare meglio a livello nazionale. Un colosso dell'acciaio come ArcelorMittal, con tagli

[19] I. da Costa and U. Rehfeldt, *Transnational Restructuring Agreements,* in K. Papadakis. (ed.), *op. cit.*.

e chiusure di stabilimenti storici – come quello di AM in Lorena – sembrerebbe dimostrare come questi accordi stentino quando la crisi assume contorni particolarmente turbolenti.

Tutto ciò ripropone drammaticamente sia il problema dell'efficacia e della reale effettività di accordi scarsamente muniti di dispositivi legali sanzionatori, sia quello di una solidarietà e di un cordinamento sindacale internazionale, in presenza di scenari in cui al divide et impera datoriale corrisponde – di fatto se non espressamente – il tristemente noto *mors tua vita mea*. La competizione tra i vari siti di produzione di uno stesso gruppo sembra essere piuttosto marcata, a volte anche all'interno di uno stesso Stato. Fattori di questi tipo, ancora una volta, possono fatalmente ostacolare la creazione di un solido ed efficace sistema sovranazionale di relazioni industriali.

4. Attori e processi negoziali

Una questione di primaria importanza riguarda la legittimazione degli agenti negoziali: dunque gli attori abilitati (chi negozia), la forma (come si negozia), l'implementazione e il seguito degli accordi a livello nazionale aziendale. Il rischio da più parti rilevato è che nulla garantisca un procedimento adeguatamente democratico, dal momento che esso risulta da nient'altro che da una sommatoria di interessi nazionali/locali, privi di qualunque genuina capacità di rappresentare interessi a livello più latamente europeo. In mancanza di un chiaro quadro di responsabilità in capo alle parti, ciò che accade è che i TCA sono siglati da vari attori, vale a dire i CAE, le federazioni europee di categoria, quelli mondiali, in alcuni casi dai sindacai nazionali o dai comitati d'azienda nazionali.

In alcuni casi, la contrattazione transnazionale è stata condotta da comitati costituita ad hoc, appositamente. Questi comitati sono normalmente guidati da un attore sindacale dominante, che corrisponde solitamente col sindacato dell'impresa-madre. In altri casi, le trattative sono state portate avanti da comitati *ad hoc* (una serie di sindacati nazionali scelti, o vari tipi di rappresentanti dei lavoratori). Generalmente questa soluzione viene portata avanti da un attore dominante quali il sindacato (o i sindacati) dell'azienda madre, o in qualche caso persino dall'azienda stessa. Questa soluzione non garantisce un risultato adeguato, non favorendo la necessaria mediazione europea fra tutti gli interessi in gioco. I sindacati mondiali (GUF) lamentano – lo abbiamo ascolta a Roma in occasione della conferenza finale del progetto – il ruolo troppo spesso marginale e "all'ultimo momento" che in tali procedimenti giocano queste organizzazioni, a fronte di una dialettica che riflette un sostanziale primato eurocentrico da parte dei maggiori soggetti negoziali.

Ciò che dovrebbe essere evitato è un approccio negoziale troppo calato dall'alto, suscettibile di provocare un senso di una ingerenza indebita, se non anche di una una minaccia, fra quanti a livello nazionale e locale si sforzano di intepretare correttamente il loro quotidiano ruolo di rappresentanti e negoziatori. Un tale obiettivo, abbiamo convenuto, deve essere conseguito col più largo coinvolgimento negoziale possibile, inclusivo di tutti gli attori rappresentativi coinvolti, sin dalle fasi di avvio del confronto e attraverso un mandato chiaro sia alla negoziazione che alla chiusura dell'accordo.

Rispetto a questa valutazione, uno degli snodi più critici inerisce al ruolo specifico dei CAE che, come è noto, non dispongono di un potere formale a negoziare e concludere accordi collettivi. Né la Direttiva di refusione 2009/38/EC né le leggi nazionali di trasposizione contengono una base normativa che autorizzi i CAE a concludere TCA. Nulla tuttavia impedisce che ciò avvenga se, ovviamente, l'azienda accetta. Oggi grazie alla nuova direttiva CAE, potrebbe apririsi qualche nuovo spiraglio per svolgere funzioni anche diverse (*beyond the legal minima*) da quelle solo informative/consultive. Molti CAE, del resto, hanno una struttura sindacale adeguata; sono già in grado di assolvere a tutti i requisiti propri di un vero organismo negoziale. E' dunque non è un caso che essi abbiano finora rivestito un ruolo essenziale nell'avviare e portare a compimento questo genere di accordi. Ed è probabile che

continuino in questo senso anche in futuro. Di certo i CAE hanno svolto e svolgono ancora un ruolo decisivo nel facilitare la circolazione e la socializzazione sindacale transnazionale, indispensabile per la creazione dal basso di un modello autenticamente europeo di relazioni industriali. Oggi vi siano all'incirca 15.000 delegati CAE[20], in grado potenzialmente di costituire – anche grazie al coordinamento delle federazioni europee di categoria (di cui per inciso ricordiamo il forte concentramento conseguito tramite fusioni) – la spina dorsale di un modello che non si limiti alla sola informazione e consultazione, ma che evolva – come è opportuno che sia – verso una vera e propria contrattazione collettiva di livello aziendale e sovranazionale.

Il limite di questi organismi in rapporto ai TCA risiede nel fatto che non tutti i CAE presentano una composizione interna adeguata, essendovi molti casi in cui la rappresentanza non solo non sindacale ma persino sospetta di ingerenze datoriali, specie in alcune realtà dell'Europa centro-orientale. Da quei una certa riluttanza dei sindacati europei a lasciare mano totalmente libera ai CAE, rivendicando piuttosto un ruolo primario di coordinamento e gestione negoziale. Le federazioni europee di categoria e la CES hanno già sviluppato un orientamento interno per questo tipo di trattative, al fine di conseguire una maggiore e migliore espansione dei TCA[21].

5. La natura giuridica dei TCA e il diritto dell'UE

Queste considerazioni ci portano al cuore della questione, che riguarda la natura giuridica di questi accordi. Tutte le ricerche condotte, inclusa la nostra, dimostrano quanto questo problema sia arduo da essere trattato e risolto.

Iniziamo col dire che i TCA non godono di una base giuridica espressamente intitolata né nel diritto sociale europeo, né – a maggior ragione – in quello internazionale. Essi rappresentano dunque una tipologia di accordi integralmente fondati sull'autonomia collettiva, priva di un chiaro e definito fondamento giuridico. Normalmente questi accordi godono di una forza propria che nasce dal fatto che le parti firmatarie si obbligano vicendevolmente a rispettare gli impegni presi. Ciò non arriva mai a configurare un vero e proprio obbligo giuridico di trasposizione, da parte del management locale, dell'accordo stipulato a livello di casa-madre. Da qui si diramano solitamente direttive affinchè ciò avvenga, esercitando un vincolo di influenza che – si badi – vale anche a livello sindacale, fra i diversi livelli in cui si articola e auspicabilmente coordinata l'attività negoziale. Essi sono, con una brutta traduzione dall'inglese, *auto-avviati* ed *auto-attuati*. La loro attuazione può eventualmente rilevare secondo i principi generali, complessi e spesso poco noti, del diritto privato internazionale[22], tenuto anche conto del fatto che l'art. 4 della Convenzione ILO no. 98 identifica quello alla contrattazione collettiva come un diritto fondamenale.

Per divenire efficaci i TCA richiedono un passaggio ulteriore a livello nazionale. Detta altrimenti: l'accordo si firma a livello sovranazionale ma poi la sua trasposizione avviene tramite una sua rinegoziazione a livello nazionale, o anche sito per sito. Oltretutto, la natura a volte generica del loro contenuto può anche rendere difficile agli attori nazionali, e ai sindacati in particolare, rivendicare e trasporre gli impegni adottati in modo esatto. Tutto ciò ha come conseguenza un sistema eterogeneo e incerto, che tradisce lo spirito di questo

[20] R. Jagoddzinski, *EWC after 15 years – success or failure?* "Transfer", 17 (2), 2011; J. Waddington, *EWC: the challenge for labour*, Industrial relations journal, vol. 42, Issue 6, 2011

[21] FEM, Procedure for Negotiations at Multinational Company Level; Luxembourg, 13-14 Giugno 2006; Statement on a UNI-Europa Finance Strategy on Transnational Collective Bargaining, UNI-Europa Finance Conference Vienna, 7 Novembre 2008; Procedure for Negotiations at Multinational Company Level Adopted at the EPSU Executive Committee, 9-10 Novembre 2009, Brussels

[22] van Hoek and A. Hendrickx, *op. cit:* S. Scarponi, *Gli accordi transnazionali a livello di impresa: uno strumento per contrastare il social dumping?,* "Lavoro e Diritto", 1/2011

modello. A causa delle differenze tra i sistemi giuridici nazionali è del tutto possibile che l'implementazione di questi accordi differisca a secondo del contesto che lo recepisce. Ma a questo punto la sostanziale nazionalizzazione degli effetti finisce con l'inficiare la natura propriamente transnazionale di questi accordi. Il punto più problematico è che gli accordi collettivi non hanno lo stesso valore giuridico in tutti gli stati membri. La contrattazione collettiva non ha efficacia vincolante in tutti i paesi. Nel Regno unito, notoriamente, essi sono considerati comunemente considerati alla stregua di "gentlemen's agreements", salvo diversa disposizione. In alcuni casi, l'effetto vincolante viene prodotto solo incorporando il contenuto dell'accordo di contrattazione collettiva al contratto di lavoro individuale. C'è poi il caso di quegli stati membri che non hanno un solo tipo di accordo aziendale. Questi essi possono essere distinti tra accordi collettivi autonomi o esecutivi di accordi di livello superiore, possono essere negoziati dai sindacati o dai consigli dei lavoratori, come nel caso dei sistemi a due livelli tedeschi ed austriaci[23].

A dispetto di tutto ciò, possiamo anche adire che la mancanza di uno statuto giuridico determinato non è stato di ostacolo allo sviluppo e alla diffusione dei TCA. Nel contesto europeo, il ruolo e le funzioni che il diritto dell'UE riconosce all'autonomia collettiva e alle parti sociali sono ampie e molto significative[24]. Ciò qualifica *modello sociale europeo*, alla stregua dei diritti di informazione, consultazione e partecipazione, del dialogo sociale, dei comitati aziendali europei[25].

Pur in assenza di disposizioni specifiche, il diritto europeo non nega ma anzi offre numerosi spunti affinchè i TCA trovino un sufficiente grado di legittimazione giuridica. L'art. 6 della Carta Sociale Europea del 1961 e l' art. 11 Carta dei Diritti Fondamentali del 1989 includono il diritto dei sindacati di negoziare collettivamente. L'art. 28 della Carta dei Diritti Fondamentali afferma "il diritto di negoziare e di concludere accordi collettivi su livelli appropriati". Il vecchio art. 139 del Trattato (ora 155 TFEU) prevede la possibilità che il dialogo sociale europeo possa sfociare in accordi volontari o *autonomi*, - sia tra industrie che tra settori – nei quali l'implementazione è lasciata alle "procedure e alle prassi specifiche delle parti sociali e degli Stati Membri". Anche la Corte Europea dei Diritti Umani ha avallato questo orientamento, da ultimo nel caso Demir & Baykara[26].

I TCA appartengono proprio alla categoria degli accordi autonomi, ne sono per così dire una sottospecie, in alternativa alla normativa tripartita di ispirazione neo-corporativa, grazie alla quale il dialogo sociale europeo ha prodotto finora alcuni dei suoi risultati più significativi. Un modello che conosce una fase di stallo, attestato dal notevole calo dei risultati conseguiti negli ultimi anni in termini di nuove direttive sociali, a differenza degli accordi volontari tra partner sociali, che invece sono cresciuti sensibilmente.

I TCA europei (EFA) interagiscono su scala multilivello con gli altri ambiti in cui prende corpo il dialogo sociale e la contrattazione collettiva. Alcuni di essi traggono ispirazione dagli accordi interprofessionali o di dialogo sociale settoriale della UE. Altri invece rappresentano un'estensione transnazionale di accordi nazionali.

La Commissione, dal canto suo, da anni sta puntando sugli EFA[27], raccomandandone una espansione e un consolidamento già nell'Agenda Sociale Europea 2005-2010. La Direzione Generale occupazione e gli affari sociali costituì, nel 2008, un gruppo di esperti sul tema, con l'obiettivo di monitorarne gli sviluppi e scambiarsi informazioni su come sostenere il

[23] See R. Rodríguez et alii, *op. cit.*.
[24] B. Caruso e A. Alaimo, *Il contratto collettivo nell'ordinamento dell'UE,* WP "CSDLE", n. 87/2011
[25] *Revue de l'IRES, numéro spécial, La participation des salariés au niveau européen: comités d'entreprise européens, société européenne, syndicats européens,* n° 71/2012.
[26] ECHR, 12.11.2008 (no. 34503/97), 2009.
[27] (COM(2005), 33 Final. Commission staff working document SWD(2012)264 - *Transnational company agreements: realising the potential of social dialogue;* Brussels, 10.9.2012. Various reports and studies are available in http://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPageId=214

processo che era in corso. Nel 2011 il lavoro degli esperti è proseguito, elaborando infine una proposta, consegnata alla Commissione, che a sua volta ha assunto i TCA "come coerenti coi principi e gli obiettivi su cui si fonda la Strategia UE 2020 e l'agenda di flessicurezza"[28]. La Commissione ritiene che "in quanto caratteristica emergente del dialogo sociale europeo, i TCA meritano di essere promossi secondo la competenza conferitagli dal Trattato (art. 152 and 153) e dalla Carta dei Diritti (art. 28)".

6. Il problema dell' efficacia giuridica dei TCA

Per i lavoratori e i loro sindacati il problema dell'efficacia delle norme – come sempre – resta quello decisivo[29]. Una questione particolarmente complessa sotto il profilo tecnico-giuridico. Nell'ambito di EUROATCA abbiamo discusso approfonditamente gli aspetti più problematici riguardanti la situazione attuale, e cioè la mancanza di regole formali, giuridiche, per i TCA. Tale carenza, ci siamo chiesti, costituisce un incentivo alla contrattazione o un ostacolo alla sua efficacia? L'astensionismo normativo e il volontarismo sono sufficienti o è necessaria una base giuridica a livello di diritto dell'UE? Esistono delle alternative all'intervento normativo del legislatore europeo? E come possiamo salvaguardare l'autonomia delle parti sociali? Le procedure di monitoraggio e di follow-up sono sufficienti a garantire efficacia ed esecutività? In definitiva, come possiamo passare dalla sperimentalizzazione a uno sviluppo stabile?

La visione che è prevalsa all'interno del Gruppo di EUROACTA è che nessun sistema di relazioni industriali può resistere troppo a lungo se i suoi esiti non sono garantiti da un grado accettabile di certezza giuridica.

In dottrina vi è chi ritiene che l'UE non abbia l'autorità di stabilire una base giuridica per i TCA. Si fa notare come in base in base all'art. 5.2 TEU e art. 7 TFEU l'UE può agire solamente nell'ambito del quadro stabilito dai trattati. Orbene, nell'area di competenza condivisa, entro cui rientra la politica sociale e la coesione economica (art. 4.2 TFEU), l'Unione può prendere delle iniziative per assicurare il cooridnamento fra le politiche degli stati membri (Art. 5.3 TFEU), nonché integrare le loro attività secondo l'art. 153.1 TFEU. Questa autorizzazione non sussiste rispetto ai salari, al diritto di associazione, al diritto di sciopero e di serrata (art. 153.5 TFEU), laddove invece si può applicare alla rappresentanza e alla difesa collettiva degli interessi dei datori di lavoro e degli impiegati, inclusa la codeterminazione.

L'idea di una base giuridica opzionale per le trattative aziendali transnazionali comparve per la prima volta nell'Agenda Sociale nell'anno 2005. All'epoca, la proposta della Commissione fu di adoperarsi per creare una cornice normativa *opzionale* per i TCA, che però raccolse una reazione negativa delle associazioni datoriali. Ciò spinse la Commissione a rimandare qualsiasi ulteriore iniziativa e a costituire un gruppo di esperti ad hoc, designati dai sindacati, dalle associazioni imprenditoriali, dai governi e da altre istituzioni internazionali. Il gruppo aveva il compito di monitorare gli sviluppi e scambiarsi pareri su come sostenere il processo in corso. Il Gruppo ha concluso il proprio lavoro nell'ottobre del 2011[30]. La relazione finale mette in luce tutti gli aspetti più controversi e solleva delle opzioni di linea politica che le parti sociali sono libere di accettare, di rifiutare o di approfondire ulteriormente. Essa mette in luce quattro ambiti in cui le parti sociali possono trovare un terreno di convergenza, e cioè: 1) riconoscere il ruolo dei TCA e contribuire al loro sviluppo; 2) sostenere gli attori dei TCA, chiarendo quello che è il loro ruolo; 3) promuovere la trasparenza dei TCA; 4) Migliorarne l'implementazione e i collegamenti con gli altri livelli del dialogo sociale.

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[28] Communication COM(2012) 173. Draft elements for Commission's conclusions Expert Group, *Transnational company Agreements* - 31.1.2012.
[29] Idem
[30] Expert Group, *Accordi aziendali transnazionali. Draft elements for conclusions of DG Employment,* Working Document, 5 October 2011.

Alcuni studi[31] hanno elaborato alcune possibili opzioni per una nuova base giuridica dei TCA, vale a dire:

1) Recepimento tramite nuovi accordi conclusi a livello nazionale. Una possibilità è che i TCA conclusi a livello europeo producano gli stessi effetti giuridici attraverso la tecnica dell'adesione. Le parti nazionali/aziendali devono cioè fare un accordo specifico a livello nazionale di recepimento del TCA, che pure non è stato negoziato e firmato da loro. Ciò avvrebbe sulla del vincola associativo che lega fra loro organizzazioni di diverso livello (federazioni sindacali europee e nazionali di settore), e in base alla teoria del mandato. Questa soluzione avrebbe il pregio di tenere nel dovuto conto le differenze reali fra i vari sistemi di relazioni industriali. E ciò la rende per certi versi più praticabile. Tuttavia essa si attesterebbe sull'attuale status quo, coi problemi di effettività che sappiamo. Se, ad esempio, gli attori nazionali non dovessero essere favorevoli ai contenuti del TCA, potrebbero boicottarne l'implementazione a livello nazionale. E dunque non avremmo fatto veri passi avanti rispetto all'attuale situazione.

2) L'effetto giuridico varia a seconda della volontà delle parti. Un'altra possibilità è che gli effetti giuridici dei TCA varino a seconda della volontà espressa dalle parti. Una Direttiva europea predeterminerebbe qui solo una base giuridica minima e su aspetti eminentemente procedurali. Gli effetti giuridici, la portata e altro ancora sarebbe rimesso alle rispettive normative nazionali di recepimento. Il vantaggio di una tale soluzione sarebbe quello di garantire una maggiore flessibilità delle parti nell'accordo collettivo. Tuttavia, questa soluzione non risolve l'attuale problema dell'incertezza giuridica.

3) Standardizzare tutti gli effetti giuridici in tutti gli Stati Membri. La scelta di più ambiziosa è quella di dotarsi di una base normativa europea, ad esempio un Regolamento, che consenta effetti giuridici uniformi in tutti gli stati membri. Questa soluzione sarebbe senza dubbio la più efficace nel garantire ai EFA un impatto sostanziale nei vari stati membri. Si tratta ovviamente di una sfida particolarmente impegnativa, viste le grandi differenze che permangono fra i vari sistemi nazionali di relazioni industriali.

Tra gli esperti di EUROACTA è condivisa l'idea che l'attuale volontarismo, cruciale nel preparare il terreno per relazioni industriali internazionali, non basta ad incoraggiare un'ampia diffusione di questi accordi e ad assicurare che, una volta firmati, ci sia un'adeguata, effettiva ed uniforme transnazionalità dell'implementazione a livello locale. Già il Rapporto per la Commissione, curato da Edoardo Ales[32], si era espresso a favore di un approccio sì flessibile, ma sulla base di un intervento normativo che fornisca una base giuridica più solida a questi accordi. Lo scopo dovrebbe essere quello di passare da testi di tipo dichiarativo a testi in grado di avere un effetto veramente vincolante. Dunque una qualche forma di normativa quadro, a livello europeo, sarebbe a questo punto opportuna, secondo la prospettiva della "legislazione ausiliaria"[33] nella quale possa prender corpo una "contrattazione all'ombra del diritto"[34], per usare formulazioni della scuola anglosassone delle relazioni industriali.

Una cornice normativa minima e duttile, da perseguire attraverso uno degli strumenti normativi tipici del diritto europeo – Regolamento (per Ales), Direttiva (per Zimmer) – lasciando alle parti la facoltà di specificare l'aspetto vincolante, o non vincolante, degli impegni che si intendono assumere. Più sono chiari gli impegni, e più la loro esecutività è

[31] R. Rodríguez et alii, *Study on the characteristics and legal effects of agreements between companies and workers' representatives,* 2012.

[32] E. Ales et alii, *Transnational collective bargaining: past, present and future,* Final Report, European Commission, 2006; E. Ales, *La contrattazione collettiva transnazionale: tra passato, presente e futuro*, in "DLRI", n. 3/2007.

[33] S. Sciarra, *Collective Exit Strategy, op. cit.*

[34] B. Bercusson, *Maastricht: a fundamental change in European Labour law*, "Industrial Relations Journal", 23/1992; A. Lo Faro, *La contrattazione collettiva transnazionale: prove di ripresa del dialogo sociale in Europa?,* in "DLRI", n. 3/2007.

forte. Si potrebbe pensare a dispositivi self-executive, secondo un modello già utilizzato per la Direttiva "silicone" del 2006[35], o anche prevedere clausola riguardante la scelta della legge/giurisdizione. Inoltre, le nuove soluzioni dovrebbero tener conto dei conflitti gestionali e della risoluzione dei conflitti.

In mancanza di una sezione del lavoro della Corte di Giustizia Europea che possa essere chiamata a giudicare l'applicazione di un EFA, una soluzione potrebbe essere quella di creare un organismo di conciliazione/arbitrato a livello europeo e a composizione tripartita (Zimmer). Una nuova istituzione che potrebbe essere accessibile su base volontaria, e le cui decisioni non impedirebbero alle parti coinvolte di rivolgersi eventualmente a un tribunale. Ciò consentirebbe inoltre di elaborare una sorta di giurisprudenza transnazionale (anche di natura privata), che possa aiutare questo tipo di prassi ad essere meglio compresa nei suoi aspetti giuridici, e anche valutata su criteri di giustizia ed equità rispetto all'interesse europeo degli attori coinvolti.

6. La soluzione opzionale

Creare una base giuridica comune, ce ne rendiamo perfettamente conto, rappresenta oggi una sfida quasi impossibile. L'ambizione di realizzare un qualche tipo di interventismo giuridico si scontra tuttavia con una serie di ostacoli. Le associazioni imprenditoriali, innanzitutto, che ad ogni livello hanno dichiarato la loro contrarietà a qualsiasi soluzione che vada oltre l'integrale volontarismo di oggi[36]. Ciò di per sé, per com'è consegnato il processo deliberativo europeo, potrebbe bastare a compromettere ogni ulteriore sviluppo normativo di questa esperienza. Al contempo va anche notata la forte resistenza posta da alcuni sindacati nazionali, i quali percepiscono gli accordi di questo tipo come una interferenza, a volte anche regressiva, se paragonata agli standard e alle procedure locali. I sindacati scandinavi non nascondono la loro riluttanza ad adottare un tale approccio, anche rispetto ad altri aspetti riguardanti lo slittamento della sovranità sulla contrattazione collettiva, su un piano sopranazionale. In alcuni casi queste diverse valutazioni fra sindacati, prima ancora che fra le parti sociali, hanno avuto un impatto piuttosto grave[37], come nel caso del piano di ristrutturazione dell'Electrolux, coi sindacati svedesi contrari a un accordo europeo di gruppo, o anche come nel caso della Siemens, dove la posizione dei sindacati tedeschi, parzialmente diversa nella forma, è stata dello stesso tipo nella sostenza.

In considerazione di questi ostacoli, ragioni di realismo dovrebbero spingere a ricercare, nell'attuale pratica delle contrattazioni collettive transanzioanle, il modo migliore trovare soluzioni migliori, adottando regole negoziali di condotta uniformi, in modo da poter definire almeno da parte dei sindacati, linee guida comuni e condivise per firmare accordi che non siano troppo diversi gli uni dagli altri.

La Commissione ritene che l'adozione di una serie di regole opzionali sia la linea politica più duttile e praticabile. Il movimento sindacale europeo, da parte sua, sta tentando di identificare meglio il fenomeno, per giungere a una posizione comune su come dovrebbero essere utilizzate le trattative transnazionali. Il comitato esecutivo della CES si era già interessato al problema degli accordi transnazionali nel 2006[38]. Nel giugno 2012 è stata adottata una nuova risoluzione dal Comitato Esecutivo che mira a realizzare una "serie

[35] B. Caruso e A. Alaimo, *Il contratto collettivo nell'ordinamento dell'UE,* WP "CSDLE", n. 87/2011

[36] R. Janssen, *Transnational employer strategies and collective bargaining: the case of Europe*, "International Journal of Labour Research", Vol. 1, 2009.

[37] V. Telljohann, *Processi di delocalizzazione nel settore europeo degli elettrodomestici e forme di regolazione sociale*, in "Sociologia del lavoro", n. 123/2011

[38] Il gruppo di esperti della CES ha espresso alcune raccomandoazioni, fra le quali: a) riconoscere innanzitutto l'importanza dei TCA e contribuire al loro sviluppo; b) sostenere gli attori e chiarire il loro ruolo; c) promuovere la trasparenza; d) creare un collegamento migliore con gli altri livelli del dialogo sociale; e) trovare forme di risoluzione interna delle controversie e di gestione dei conflitti.

facoltativa di disposizioni". Essa si basa innanzitutto sulla capacità autonoma dei sindacati di "incoraggiare uno sviluppo effettivo della contrattazione collettiva transnazionale". La raccomandazione è ancora una volta quella di prendere delle precauzioni. Si considerano infatti alcuni elementi che potrebbero meglio qualificare la forza degli EFA sia in termini di efficacia che di validità giuridica. Dunque:

- Dichiarare quali clausole stabiliscono degli obblighi reciproci (parte obbligatoria) e quali clausole hanno invece effetto sugli impiegati (parte normativa).
- Ambo le parti firmatarie devono palesare il loro mandato così da dimostrare di essere autorizzati ad agire per conto delle parti firmatarie e garantire la legittimità delle trattative.
- Riconoscimento del ruolo dei CAE nell'avviare le trattative transnazionali.
- Ruolo centrale delle federazioni europee di categoria, che assumono il ruolo di guida e che alla fine firmano gli accordi.
- I sindacati nazionali devono partecipare alle trattative. Il principio dev'essere la ricerca del massimo consenso possibile.
- Le parti devono dichiarare le loro intenzioni per quanto riguarda gli effetti giuridici che vogliono ottenere firmando un EFA. Gli impegni di carattere più urgente devono essere identificabili ed esposti in modo chiaro.
- Inserimento di una clausola di "non regresso" per evitare conflitti fra EFA e negoziatori nazionali.
- Prevedere istanze e procedure per la gestione di eventuali conflitti interpretativi e gestionali.

In tutti i casi, sarebbe molto utile promuovere le pratiche migliori – e la loro divulgazione – quelle che osservano determinati principi, determinati standard e linee guida.

L'obiettivo della CES è che le organizzazioni affiliate richiedano un forte aumento della cooperazione e della coordinazione delle trattative con le multinazionali. Si tratta di un obiettivo che pur essendo stato perseguito dai tempi del Congresso di Helsinki, sembra non aver ancora prodotto dei risultati adeguati rispetto alle sfide che si hanno davanti[39].

7. Tra la soft law e hard law. I TCA come "governance sperimentale".

Sul piano della teoria giuridica, i TCA rappresentano in modo emblematico il processo di de-positivizzazione che attualmente concerne l'evoluzione del diritto globale. Questi testi rappresentano un tipico caso di diritto a "bassa definizione", diverso da quello ad "alta definizione" del diritto civile moderno[40]. Un diritto dislocato, periferico, che si esprime attraverso una varietà di fonti e di procedure, in cui gli attori privati contribuiscono a forme di governance che differiscono dal tipico atteggiamento del diritto normativo, che definisce chiaramente precetti di tipo sostanziale.

E' stato obiettato che la soft law può equivalere a "nessun diritto", al massimo a un "diritto incerto", a metà tra il diritto e il non diritto, in grado di conseguire "connessioni lasche"[41], spesso più simboliche che altro. Oppure, più insidiosamente, un diritto asimmetrico: soft con gli obblighi datoriali verso i lavoratori, hard se si tratta di imporre loro sacrifici.

A ciò si aggiunga un'altra considerazione. Il processo deliberativo sul piano europeo è diventato talmente lungo, vasto e complesso – anche più che tra le istituzioni, tra le parti sociali e perfino all'interne delle stesse, come si è potuto osservare direttamente nell'ambito della CES – da richiedere una catena di mediazione tale per cui qualsiasi volontà di voler

[39] P. Scherrer, *Unions still a long way from a truly European position*, in W. Kowalsky and P. Scherrer, *Trade unions for a change of course in Europe*, ETUI, Bruxelles, 2011
[40] M. R. Ferrarese, *Prima lezione di diritto globale*, Laterza, 2011
[41] B. Cattero, *Tra diritto e identità. La partecipazione dei lavoratori nel modello europeo*, in "Lavoro e partecipazione - Sociologia del lavoro", n. 123/2011

aumentare e consolidare i diritti dei lavoratori e gli standard di protezione è destinata ad essere sistematicamente frustrata dal veto di qualche struttura o istituzione.

Il rischio è dunque che la soft law, pur essendo probabilmente la second best solution divenga di fatto l'ultima *ideologia sindacale,* nel senso dato a questa nozione dallo storico del diritto italiano Giovanni Tarello o, nella peggiore delle ipotesi, una *ideologia* tout court. Ovvero, la dissimulazione di una sostanziale e drammatica impotenza a poter fare di più e di meglio.

8. I TCA e il loro impatto sulle relazioni industriali

Appare chiaro che i TCA, col sostegno degli EIF, forniscono ai rappresentanti sindacali di tutta Europa assetti e mezzi per condividere obiettivi e prospettive comuni. I TCA sono delle misure che mirano a sviluppare un dialogo sociale permanente come pre-condizione della gestione manageriale in previsione di un cambiamento. Generalmente parlando, queste previsioni dimostrano una volontà comune di voler concretamente organizzare in modo efficace il dialogo sociale in una azienda transnazionale, andando oltre a ciò che le normative europee e nazionali hanno già progettato. L'impegno è sempre mirato ad assicurare un dialogo sociale efficace e meglio strutturato, ad es. un dialogo sociale che contribuisca realmente alla performance economica e sociale del gruppo su vari livelli. Tuttavia, prendendo in esame alcune delle interviste che sono state realizzate, va notato come sia a livello europeo, col dialogo sociale europeo, che a livello nazionale, contrattazione collettiva e strumenti partecipativi siano lontani dall'essere centrati su temi strategici e di lungo termine. Del resto, management e sindacati non hanno quasi mai una diagnosi condivisa del quadro economico del loro settore e della loro azienda, come si potuto constatare nel caso di studio dell'ArcelorMittal.

La diffusione dei TCA comporta vaste implicazioni per l'insieme delle relazioni industriali. La portata, l'ambito del loro negoziato e della loro validità è essenzialmente duplice: quella di ordine transnazionale, in cui il gruppo opera, e quella che coinvolge ogni sede individuale, dove l'azienda è concretamente localizzata. Pertanto, essi rappresentano un archetipo di diritto "glocalizzato"[42] e multi-livello. Da questo punto di vista il centro di gravità dell'interlocuzione collettiva si polarizza agli estremi: a) *verso l'alto*, sul piano dell'impresa multinazionale, dove essa ha la sua sede principale, e b) *verso il basso*, sul piano subnazionale dell'aziendalizzazione. Per il cosiddetto modello "continentale" delle relazioni industriali – con le sue varianti nordiche e mediterranee – il rischio è si bypassi il tradizionale primato del più comune medium nazionale: il contrattazione collettivo nazionale di settore. Ciò potrebbe comportare la diffusione di un corporativismo di stampo aziendalista, più tipico del modello anglosassone e dei nuovi Stati Membri, in cui finirebbe con l'enfatizzarsi la competizione sul piano dei diritti e delle tutele, tra imprese dello stesso settore, dello stesso paese e dello stesso territorio. Per questo, clausole di non regressione andrebbero assolutamente incluse in tutti i testi dei TCA.

L'azione dei sindacati a livello sovranazionale è destinato a diventere sempre più centrale. E' dunque indispensabile migliorare tutti, e in special modo i sindacati, la conoscenza dei diversi sistemi nazionali di relazioni industriali. Occorre andare oltre ciò che Ulrich Beck chiama "nazionalismo metodologico". Lo studio delle relazioni industriali ha la comparazione internazionale nel suo DNA. Da sempre, ad esempio ci si interroga sul primato delle tendenze alla *divergenza* o piuttosto verso la *convergenza* fra i sistemi nazionali. Analisi ormai classiche, da Otto Kahn-Freund a Giovanni Tarello a Lord Wedderburn, hanno chiarito come il valore della comparazione negli studi giuridici e delle relazioni industriali risieda nella correlazione che instaurano tra l'analisi descrittiva dei vari sistemi nazionali e il profilo

[42] R. Robertson, *Globalizzazione. Toria sociale e cultura globale*, Asterios, 1999

normativo (e politico) che essi pssono assumere grazie alla loro trasferibilità (*legal transplant*) da un paese a un altro. Tuttavia, un approccio del genere richiede molto più equilibrio. Esso è infatti particolarmente soggetto al rischio di essere strumentalizzato, pretendendo di conferire una legittimazione sovranazionale a riforme nazionali che hanno un preciso obiettivo politico. Basti pensare al *Fiscal compact* e al *transplant* normativo a senso unico che viene fatto in nome del metodo aperto di coordinamento. Si mutua o invoca l'esempio straniero che deroga o restringe i diritti, tralasciando deliberatamente (e sintomaticamente) di recepirne i tratti eventualmente pro-labour.

Oggi l'impressione è che, nonostante le persistenti differenze tra i modelli istituzionali formali e le basi normative nazionali, enfatizzate negli studi di economia politica comparativa (la nota teoria delle "varietà di capitalismo"[43]), prevalgano sempre più tendenze convergenti[44], e verso politiche che nella sostanza sono di chiara impronta neo-liberista[45]. Lo scenario è del resto globale e in larga misura comune, caratterizzato dalle sfide che pone la competizione sfrenata, il post-fordismo e la finanziarizzazione dell'economia, e ora la crisi più grave dal dopoguerra a oggi. Un combinato disposto che a tutte le latitudini solleva delle serie difficoltà nel movimento sindacale, come sintomaticamente attestano il generale declino della membership, della copertura della contrattazione collettiva e del conflitto industriale.

Il problema principale dei TCA, come abbiamo avuto modo di dire, sta nella loro complessa implementazione e nella loro efficacia, specialmente in tempi di crisi, e in particolare laddove i sindacati sono piuttosto deboli, come nei nuovi stati membri ma non solo, dove i manager locali spesso si rifiutano di implementare i TCA. Dunque, in aggiunta ai problemi di incertezza giuridica che abbiamo tentato di riassumere, va anche preso in considerazione il serio indebolimento del potere dei sindacati in molto stati membri. La contrattazione collettiva e sempre più concessiva, decentralizzata e individualizzata, mentre in molti paesi vediamo una sensibile diminuzione del tasso di sindacalizzazione e di copertura di contrattazione[46]. Sarà in particolare decisivo capire in che modo si evolveranno le relazioni industriali nei nuovi stati membri, realtà verso le quali vi è stata in questa anni una forte tendenza alla delocalizzazione produttiva da parte di imprese con origini e insediamento storico nei pasi sindacalmente e normativamente più forti.

Quindi, parlare di contrattazione collettiva transnazionale è giusto e necessario, ma solo se si comprendono pienamente tutti i processi che attualmente minacciano in una qualche misura, e in diversi paesi, la contrattazione collettiva settoriale e multi-imprenditoriale.

Last but not least. Questi accordi, lo abbiamo detto, ammontano a 225 e coinvolgono 150 aziende. Sappiamo che il numero di CAE finora istituiti è di circa 1000, laddove – stando ai requisiti fissati della Direttiva 45/94 – dovrebbero essere non meno di 2400. Su scala globale dati UNCTAD ci dicono che nel mondo operano circa 65.000 multinazionali[47]. Pertanto, a livello quantitativo, dobbiamo concludere che i TCA hanno avuto finora un impatto davvero molto limitato. La crisi di questi ultimi anni sta inoltre mettendo duramente alla prova lo sforzo meritorio compiuto con queste intese. Il settore dell'elettrodomestico bianco, particolarmente colpito, non è stato in grado di conseguire alcun accordo, laddove la crisi di un colosso dell'acciaio come ArcelorMittal, con tagli e chiusure di stabilimenti anche storici,

[43] P.A. Hall e D. Soskice (a cura di), *Varieties of Capitalism*, Oxford University, 2001.
[44] H.C. Katz e O Derbishire, *Converging Divergences*, Crnel Univ. Press, 2002
[45] L. Baccaro e C. Howell, *Il cambiamento delle relazioni industriali nel capitalismo avanzato: una traiettoria comune*, in "QRS", n. 1/2012.
[46] L. Baccaro and C. Howell, *A common Neoliberal Trajectory. The transformation of industrial relations in advanced capitalism,* in "Politics & Society", 2011.
[47] M. Fichter, M. Helfen, K. Schiederig, *Si può organizzare la solidarietà internazionale a livello aziendale? La prospettiva degli International Framework Agreements* (Ifa), in "Lavoro e partecipazione - Sociologia del lavoro", n. 123/2011

sembrerebbe dimostrare come questi accordi stentino quando la crisi assume contorni particolarmente turbolenti.

Al contempo però, dobbiamo anche essere consapevoli del fatto che alla luce degli attuali rapporti di potere globale, sempre più sbilanciati a svantaggio dei lavoratori e dei loro sindacati, può apparire persino miracoloso che si stia continuando a firmare accordi di questo tipo. E soprattutto, che alla ricerca di una negoziazione sovranazionale, quanto meno per i sindacati, non c'è alternativa.

Introduction

Transnational company agreements: a stepping stone towards a real internationalization of industrial relations?

Salvo Leonardi*

1. Introduction

This study is the final outcome of the "EUROACTA" project, a *European Action on Transnational Company Agreements*. The objective was to monitor and deepen diffusion, practices and legal aspects related to the transnational company agreements (TCAs) experiences. With the financial support from the EU[48], the action was promoted and coordianted by the Italian national *Istituto di Ricerche Economiche e Sociali* (IRES), in partnership with trade union confederations, trade union related insitutes and Universities of seven Members States: Italy, France, Spain, Germany, Sweden, Poland and Bulgaria[49].

Thanks to this broad and influential network of organizations, it was possible to engage directly and indirectly a group of experts[50], some of which are already authors of some of the most known and appreciated studies conducted on our subject[51].

The core issue of our collective research has concerned the kind of regulation which could better fit to cope with the aim of giving the TCAs an opportune dose of legal certainty. Furthermore, we wanted to verify the actual effectiveness of the adopted solutions and to deepen the degree of coordination among collective bargaining actors at all different levels. Two case studies were conducted on the TCAs at Volkswagen and ArcelorMittal,

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[48] Ref. Agreement VS/2011/0154.

[49] They were: the *CGIL*, the *Associazione "Bruno Trentin",* the *IRES Emilia Romagna* and the *University of Cassino* for Italy; the *ASTREES* and *IRES* for France; the *Fundacion 1 ° de Mayo* for Spain; *Solidarnosc* for Poland; the *ISTUR-CITUB* for Bulgaria; the *University of Hamburg* for Germany. The *ETUC* and the Swedish white collars union confederation *TCO* gave their formally external but precious support, taking part in all the scheduled activities.

[50] Scholars such as Edoardo Ales, Udo Rehfeldt, Volker Telljohann, Reingard Zimmer – among the others – were directly involved into our project partnership, whereas André Sobzack, Isabela da Costa, Claude Emmanuel Triomphe, Marco Cilento, Jakub Stelina, Barbara Surdykowska, Tiziano Treu, Silvana Sciarra, Anna Alaimo, Mimmo Carrieri, Walter Cerfeda, Ricardo Rodriguez and still others – among experts, social partners and practitioners – were speakers and actively participants at our workshops and final conference.

[51] I. da Costa and U. Rehfeldt, *Transnational Restructuring Agreements: General Overview and Specific Evidence from the European Automobile Sector,* in K. Papadakis. (ed.), *Shaping global industrial relations. The impact of international Framework agreements,* Palgrave Macmillan/ILO, 2011; V. Telljohann, I. da Costa., T. Müller, U. Rehfeldt, R. Zimmer, *European and International Framework Agreements. Practical Experiences and Strategic Approaches*, Eurofound, Dublin, 2009; R. Zimmer, *Soziale Mindeststandards und ihre Durchsetzungsmechanismen. Sicherung internationaler Mindeststandards durch Verhaltenskodizes?* 2008; E. Ales, S Engblom., S. Sciarra, Valdes Del-Re, *Transnational collective bargaining: past, present and future*, European Commission, 2006.

investigating their impact on the countries of the partnership were these two important MNCs have plants and affiliated brands.

The aim was also to promote and improve the knwoledge of these experiences among the Eurpean social partners. In two international workshops, in Paris and in Gdansk, and one final conference in Rome, allowed us to carry out an exchange of viewpoints and practice among experts and social partners from the different partner countries. More than one hundred participants took part in these three events. During these events we mixed and discussed either the theoretical issues and the description of several concrete experiences of TCAs, as in the cases of ArcelorMittal, Areva, Axa, GDF Suez, Schneider, Electrolux, Ford, GM Europe, Volkswagen.

This report is the result of all these activities. The different chapters show of the theoretical effort and empirical research we all have fruitifully shared during the different phases of our common elaboration.

This executive summary, edited by the co-ordiantor of the project, sums up the contributions of this partnership of experts, that provided the different chapters refer in depth viewpoints in the previous chapters.

2. The process of Europeanisation of industrial relations: the role of the TCAs

The transnational company agreements are quite unanimously considered today as one of the most interesting and promising part of that process which goes under the name of internationalization (or Europeanization) of the industrial relations[52]. With this concept, developed in the last chapter of this report, we usually refer to all those mechanisms of governance and those procedures at the supranational level that today tend to unfold in various fields and levels: multi-sectoral, sectoral, companies. They aim to achieve three major goals: negotiation of collective agreements; workers' information, consultation and participation; influencing pro-labour public policies[53].

TCAs are, in a nutshell, collective agreements concluded with transnational companies, where the scope includes several countries. In literature[54] they have been considered as

[52] J. Addison and C. Schnabel (eds), *International Handbook of Trade Unions*, Cheltenham 2003; R. Hoffman, *Proactive Eurpeanisation of industrial relations and trade unions*, in W. Kowalsky and P. Scherrer, (Eds.) *Trade unions for a change of course in Europe*, ETUI, Bruxelles, 2011; S. Sciarra, *Transnational and European Ways Forward for Collective Bargaining,* WP C.S.D.L.E. "Massimo D'Antona", n. 73/2009; B. Mahnkopf and E. Altvater, *Trasmission belts of transnational competition? Trade Unions and collective bargaining in the context of European integration*, in "Europena Journal of Industrial Relations", n. 1/1995.

[53] Revue de l'IRES, numéro spécial, *La participation des salariés au niveau européen: comités d'entreprise européens, société européenne, syndicats européens*, n° 71/2012; V. Glassner and P. Pochet, Why trade unions seek to coordinate wages and collective bargaining in the Eurozone: past developments and futures prospects, Working Paper, ETUI, 3/2011.

[54] K. Papadakis (Eds), *Shaping global industrial relations. The impact of international Framework agreements,* Palgrave Macmillan/ILO, 2011; A. Lo Faro, *Bargaining in the Shadow of "Optional Frameworks"? The Rising of Transnational Collective Agreements and EU Law*, "EJIR", 2011; S. Scarponi e S. Nadalet, *Gli accordi transnazionali sulle ristrutturazioni di impresa,* "Lavoro e Diritto", 2010; Eurofound, Multinational companies and collective bargaining, Dublin, 2009; van Hoek and A. Hendrickx, *International private law aspects and dispute settlement related to transnational company agreements,* Study financed by the European Commission (VC/2009/0157): J. Gennard, *Development of transnational collective bargaining in Europe*, in "Employee Relations" n. 31 (4), 2009; European Commission, *The Role of Transnational Company Agreements in the Context of Increasing International Integration,* Commission Staff Working Document, Bruxelles; V. Telljohann, I. da Costa , T. Müller, U. Rehfeldt, R. Zimmer, *European and international framework agreements: new tools of transnational agreements and industrial relations*, in "Transfer", n. 15 (3-4), 2009; I. Schomann, A. Sobzack, E. Voss, P. Wilke, *International framework agreements: new paths to workers' participation in multinational governance?* in "Transfer", n. 14 (1), 2008; K. Papadakis (eds.), *Cross-Border Social Dialogue and Agreements: an Emerging Global Industrial Relations Framework?,* in International Institute for Labour Studies/ILO, Geneve, 2008; T. Müller, H-W. Platzer, S. Rüb, *International Framework Agreements.*

"qualitatively new tools"[55], a new "social practice"[56], new "bargaining fora"[57], a "new star" appeared in the galaxy of collective sources[58], able to create new and unusual holes in supranational negotiations. It would be one of the "new ideas for an exit strategy to the crisis of transnational trade union rights and labor"[59]. They can in fact represent one way to bridge that gap of the previously mentioned governance between the increasingly global character of capital strategies, and substantially territorialized nature of the unions and workers.

The European Social Agenda 2005-2010 recommended to enhance and widespread more and better TCAs[60]. In order to better understand and know this new trend of international industrial relations, DG Employment and Social Affairs, established a thematic group of experts whose mission was to monitor developments and exchange information on how to support the process under way, and inviting the social partners, governmental experts and experts of other institutions to take part[61]. In 2008, the Commission published a Staff Working Document on 'The role of transnational company agreements in the context of increasing international integration'[62]. In its Communication COM(2012) 173 'Towards a job-rich recovery', announced that the Commission will '*develop further action to disseminate good practice and promote debate*". Transnational company agreements are considered by the Commission as "one of the tools available to cope, at the level of companies, with social and economic effects of restructuring in a socially responsible way. (..). "Transnational company agreements require policy attention at European level. They play a positive role in identifying and implementing agreed solutions at company level to the challenges posed by a constantly changing business environment, in particular in the context of corporate restructuring". The Commission considers these agreements "as coherent with the principles and objectives underpinning the EU 2020 Strategy and flexicurity agenda" and "as an emerging feature of EU social dialogue, TCAs deserve to be promoted in line with the competence given by the Treaty (artt. 152 and 153)[63].

This growing interest in TCAs can be explained by their rapid and widespread expansion of this phenomenon, co-related to the occurrence of a series of political and economic conditions labelled as "globalisation". The driving and more important force is the emergence and the intensification of a new type of internationalization of economic activities on a global scale. This process has been characterized by the new financial markets, a sharp increase in foreign direct investment and the growing importance of multinational companies[64]. They have

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Opportunities and Limitations of a New Tool of Global Trade Union Policy, Briefing Papers, n. 8, Friedrich-Ebert-Stiftung, 2008; Eurofound, *Codes of conduct and international framework agreements: new forms of governance at company level,* Dublin, 2008; J. Arrowsmith and P. Marginson, *The European Cross-border Dimension to Collective Bargaining in Multinational Companies*, in "European Journal of Industrial Relations", No. 3, (vol. 12) 2006.

[55] V. Telljohann, I. da Costa, T. Müller, U. Rehfeldt., R. Zimmer, *op. cit.*.

[56] I. Schomann, A. Sobzack, E. Voss, and P. Wilke, *International framework agreements: new paths to workers' participation in multinational governance?,* in "Transfer", 14 (1), 2008.

[57] A. Lo Faro, *Bargaining in the shadow of "Optional Frameworks? The rising of transnational collective agreements and EU law*, "EJIR", 2011.

[58] S. Sciarra, *Uno sguardo oltre la Fiat. Aspetti nazionali e transnazionali nella contrattazione collettiva oltre la crisi*, "Riv. Ital. Dir. Lav.", III, 2011

[59] S. Sciarra, *Collective Exit Strategy: New Ideas in Transnational Labour Law*, in G. Davidov and B. Langille (Ed.), *The Idea of Labour Law*, OUP, 2011.

[60] (COM(2005), 33 Final. Commission staff working document SWD(2012)264 - *Transnational company agreements: realising the potential of social dialogue;* Brussels, 10.9.2012. Various reports and studies are available in http://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPageId=214

[61] This group was composed by some peak-level European trade unionists, with experiences at National and European level. ETUC and some of its national affiliated were directly engaged as full or deputy members.

[62] SEC(2008) 2155 of 2.7.2008.

[63] Draft elements for Commission's conclusions Expert Group, *Transnational company Agreements* - 31.1.2012.

[64] P. Hirst and G. Thompson, *Globalisation in question,* Polity, Cambridge, 1996;

become an increasingly decisive factor of business activities and at the same time, the epicenter regarding the new labour relations. Off shoring strategies, provoke a governance gap between global economy and sovereignty, whereas delocalization determine the risk of a social dumping[65]. With the internationalization and the progress made by ICTs, capital markets and companies determine an unprecedented gap between places and processes, between space of policy and space of economics. The "space of flows" replaces the one of the places[66]. The de-concentration and de-massification of the work produced by the change in the socio-technical organizational paradigm (the so-called *post-fordism*), determine a process of de-territorialisation of the company and the production cycle that breaks every anchor the physical boundaries of the territory, city or national both. "Made in the world" seems to be the only correct expression to describe today the source of most of the products on the market. Globalization makes economies increasingly interdependent through a centrifugal socio-economic process, the engine of which is represented by individual economic actors: the multinational corporations (MNCs).

For the most optimistic, growth and the global spread of MNCs tend to produce beneficial effects on the economy of the host country either through the direct transfer of knowledge and superior techniques, or through emulation, which allows for the acceleration of deployment better than human resource policies from one country to another[67]. For the more critical, economic operators are more and more free from any territorial restrictions, and are now able to minimize the costs of production, taking advantage of the comparatively different tax and legal conditions which are more favorable. Luciano Gallino speaks of "irresponsible enterprise"[68], describing it as one that is beyond the basic requirements of the law, and does not not have to answer to any public or private authority nor to public opinion about the consequences of the economic, social and environmental impacts of its activities. Not a new phenomenon, and yet, in the transition to the managerial capitalism the company is driven exclusively to the realization of the interests of shareholders, at expense of the stakeholders. Interest (and the destiny) of workers, local communities and suppliers vanishes from the concerns and efforts of management decision-making, losing their connotation of dependent variables of entrepreneurial action.

In such a scenario, TCAs open up new and interesting perspectives. There is in fact a need to govern the globalisation[69], establishing – among others – forms of collectively organized interaction at the supranational level and TCAs can prevent social dumping and wage competition and to achieve a progressive approximation of working conditions within the same company. They usually result from a number of factors, such as the need for firms to qualify their brand in terms of reputation, as part of a of social responsibility policy[70]. Or even from the pressures exerted by national and international unions to handle complex

[65] A. Perulli, *Globalizzazione e dumping sociale,* "Lavoro e Diritto", n. 1/2011.
[66] M. Castells, The *Information Age*: *Economy, Society and Culture*, Vol. III. Cambridge, Blackwell, 1998; J. Ruggie, *Territoriality and beyond*, in "International Organizations", n. 41/1993; D. Harvey, *Spaces of Global Capitalism. Toward a Theory of Uneven Geographical Development*, Verso, London. 2006.
[67] B. Kogut and N. Rogovsky, *Multinational corporations and high performances systems*, Paper prepared for the Roundtable Conference on "International Evidence: worker-management institutions and economic performances", Washington D.C., 14-15/3/1994.
[68] L. Gallino, *L'impresa irresponsabile*, Einaudi, 2009.
[69] D. Held, *Global Convenant. The social democratic alternative to the Whasinghton Consensus*, Polity Press, Cambridge, 2004.
[70] A. Lo Faro, *Bargaining in the Shadow of "Optional Frameworks"? The Rising of Transnational Collective Agreements and EU Law*, "EJIR", 2011.

restructurings[71], avoiding competition between national systems based on regulatory law shopping and social dumping.

3. Working definition of the transnational dimension of labour relations.

What has emerged from our research confirms a diversified panorama of TCA texts and experiences. What they seem to share is to be "agreements comprising reciprocal commitments the scope of which extends to the territory of several States and which has been concluded by one or more representatives of a company or group of companies on the one hand, and one or more workers' organisations on the other hand"[72]. They cover working and employment conditions and/or relations between employers and workers and/or their representatives. What matters, anyway, is to underline the bilateral nature and negotiation of these texts, which differ significantly in such respect from codes of conduct and the other unilateral forms through which the company decides to assume the concept of social responsibility[73]. In a certain sense, they can be considered as alternative to that model and approach.

Chapter one (Ales and Verrecchia) provides an articulated definition and typology of the existing texts, calling them for what they "have not" ("definition by way of subtraction"). In this perspective, the attention is placed on profiles and their respective lexical meanings, so the notion of "transnationality" may be otherwise changed to "national", "supranational" or "international" (or more depending on the case of agreements "prompted", "spunn-off", "modelled" or "spontaneous"). By transnational dimension – Ales states – "we mean that one created by workers and employers (representatives) who agree on (or unilaterally define accepted) rules that go beyond the National dimension (differentiation in positive), without belonging either to the Supranational or to the International dimension (differentiation in negative)".

A further distinction could also be drawn between the *multinational* or rather transnational feature of a company operating on a global scale. In the former case a multinational company, with a specific national identity and properties, establishes "clones" of the parent company in different countries. Transnational corporations, often also owned by MNCs, establish instead the various steps of an integrated production chain (suppliers, subcontracting)[74] in different countries. This has important consequences with regard to the identification of a unitary legal notion of undertaking (or group of undertakings), whose configuration increasingly global and complex often makes it difficult to establish precise responsabilities in the field of industrial relations and labor relations. From this point of view, as we've learned from the now wide experience of the EWCs, the exact definition of the scope of a company or a group of undertakings with an international dimension becomes a crucial precondition for any negotiation of TCAs and for their implementation at the level of individual production plants.

As we can seen in chapter four and nine, TCAs are said *Europeans* (European Framework Agreements – EFAs) when the agreements are signed by European organizations, *International* (International Framework Agreements – IFAs), those signed by international trade unions. Companies are normally represented by their management or executive committees of their group. The co-signatory parties, on the union's side, are mainly the EWCs only (51), or with the European industry federations – EIFs (23) and / or global union

[71] M. Keune and V. Schmidt, *Global capital strategies and trade union responses: towards transnational collective bargaining?*; W. Rhode,.*Global production chains, relocation and financialization: the changed context of trade union distribution policy*, both in "International journal of labour research", Vol. 1, 2009.
[72] Definition of the European Commission Staff Working Document on *The role of transnational company agreements in the context of increasing international integration*, SEC(2008)2155, 2.7.2008.
[73] Eurofound, *Codes of conduct and international framework agreements, op. cit.;* 2008;
[74] See G. Ingham, *Capitalism*, Polity Press Cambridge, 2008

federations (GUFs), national organizations or employee company representative (17), with problems sometimes of legitimacy and connection.

Mapping these texts, as we did in the Paris' workshop with the aid of André Sobzack[75], we find out that the first one is dating back to 1988 and concerned Danone. By early 2012, 224 such agreements were known in 144 companies (86 European), employing over 10 million people. Most of these companies are French (55), followed by the Germans (23), Northern American (18), Swedish (13), Belgique (13) and Italians (12)[76]. All sectors are involved even if they appear more frequently in the metal, food and finance sectors. Chapter nine returns on these data. It is esteemed that not less than 10 million employees are covered by an agreement of this type.

The texts, as we have noted, tend to reflect the models and practices of the countries where the parent group has its headquarter (the so-called "home country effect"). The same key word "agreement" is not uncontroversial, since it expressly occurs only in a certain number of texts, whereas in many others prevail expressions like *joint declarations, common viewpoints, joint positions* and so on. Factors such as the different degrees of institutionalization of industrial relations, the collective bargaining systems, levels and procedures of extension, the nature and prerogatives of the workers/unions representatives at the workplace level, the rate of unionization, the styles and practices of industrial relations at the central level and patterns of trade union group, are of great importance[77]. Mutual trust between group management and employee representatives is an essential driver force for the negotiation and conclusion of TCAs. In addition, the cohesion between unions from different countries is clearly at stake when considering TCA negotiations.

The contents of these texts usually cover a larger number of subjects[78], like restructurings and the anticipation of change in order to avoid compulsory redundancies, the fundamental rights and the ILO core labour standard (anti-discrimination rights, freedom of associations, sustainability policies, equal opportunities, child labour, forced labour), accompanying measures (training, outplacement, transnational inter-firm mobility), human resource policies, health and safety, trade union rights and social dialogue, employee financial participation.

In their contribution (chapter four), Isabela da Costa and Udo Rehfeldt suggest to distinguish and classify the agreements between "procedural" and "substantive" agreements[79]. In the first case, by far the most common, TCAs set general principles for potential future restructuring, whereas in the second case they set substantive rules for management of specific restructuring cases trough concrete and binding clauses. They call them *transnational restructuring agreements* (TRAs). The automotive sector (DeimlerChrysler, Renault, PSG, Ford Europe, General Motors Europe, Volkswagen), is probably the one which has more addressed in this direction. From a comparative study of the existing TCAs emerges that the EFAs content are more diverse and substantial than IFAs, the main themes being restructuring, social dialogue and health and safety. Fundamental social rights play only a

[75] A. Sobczak, figures presented at the EUROATCA workshop in Paris, December 2011; C. Weltz, *A qualitative analysis of International Framework Agreements: implementation and impact,* in K. Papadakis (Eds.), 2010; European Commission, *Database on transnational company agreements*, April 2012. *http://ec.europe.eu/social/main.jsp?catId=978&langId=en*

[76] Commission Staff Working Document, *Transnational company agreements: realising the potential of social dialogue***;** SWD(2012) 264 final, Brussels, 10.9.2012

[77] M. Fichter, M. Helfen, K. Schiederig, *Si può organizzare la solidarietà internazionale a livello aziendale? La prospettiva degli International Framework Agreements* (Ifa), in "Lavoro e partecipazione. Sociologia del lavoro", n. 123/2011

[78] C. Weltz, *op. cit.* 2011

[79] I. da Costa and U. Rehfeldt, *Transnational Restructuring Agreements: General Overview and Specific Evidence from the European Automobile Sector*, in K. Papadakis. (ed.), *Shaping Global Industrial Relations: The Impact of International Framework Agreements* .Geneva: International Labour Office/Palgrave Macmillan.

minor role in EFAs whereas they are predominant in IFAs. Similarly to IFAs, some EFAs are mere declarations of common understanding, whereas others are quite detailed and codify concrete measures of implementation.

According to Rehfledt and da Costa the "substantive" component tends to spread more and more, even if their number is limited. The recent *Charter on Labour Relations* at Volkswagen, is probably one of the best examples of this new generation of texts, with its Bill of Rights, including co-determination on a wide range of issues. Volker Telljohann, in chapter five, deepens these aspects in one of our two case studies, noting that the impact of an innovative model designed around the characteristics of a specific national system – in this case, the German co-determination – in a country like Italy (the group's sites Lamborghini, Ducati), offer an alternative to the controversial Fiat approach to restructuring and industrial relations.

TCAs like those signed at the GDF, AXA, Areva (discussed in the Paris' workshop) and at ArcelorMittal, the latter being a specific case study within our project in the Teissier's chapter, also attest to the possibility of reaching agreements in which the management of extensive restructuring can take place with a logic of anticipation of change. But they also reveal the fact that the current crisis, as emerged from our fieldwork, is putting a strain on the consensual foundations which had inspired the genetic phase of agreements like these. From this point of view, it will be important to see and monitor also in the future, whether TCAs are fit only when there's "good wheather", or if they can positively contribute to a better restructuring management in a logic of anticipation and proactive social dialogue.

4. Actors and procedures: the role of the EWCs and the EIFs

A very important issue concerns the legitimacy of the negotiating agents: the actors legitimated (who negotiate?), the form (how negotiate?), the implementation and follow-up at the national level. The risk could be that nothing guarantees a proper democratic process, as it remains a sum of national interests deprived of any genuine capacity of pan-European representation of interests. In several cases, transnational collective bargaining has been conducted by *ad hoc* trade union committees (a selection of national trade unions). This solution is normally led by a dominant actor such as the trade union(s) of the parent company or (worse) by the company itself. Global unions, as we have been said at the EUROATCA final conference[80], play too often a marginal role during the negotiation process, too much dominated – according to this point of view – by a "Eurocentric" attitude. What should be avoided is a mere top-down approach, which would risk to be perceived from social partners as an interference or a threat to the national or local level where the decisions concretely take place. Such an aim, for the EUROATCA Group of experts is crucial to involve all the negotiating actors, included the European industry federations (EIFs) and national organisations, already at early stage, through a clear given mandate, either in the negotiation or in the conclusions

One of the most critical juncture concerns the role of EWCs, which are not formally hold a negotiating mandate, but which undoubtedly played a major role in signing many agreements that we know[81]. In the absence of a clear picture of responsibilities of the parties, what now occurs is that the TCAs are signed by different actors (EIFs, EWCs, trade unions of the countries involved.

The EWCs, participatory rights and now the TCA are essential tools to facilitate the socialization between union officials and delegates from across Europe (and in view of the

[80] Carla Coletti, for years staff member of the International Metal Federation in Geneve.
[81] On this issue, the presentation of Marina Monaco (ETUC) at the EUROACTA workshop in Gdansk

world)[82]. It has been estimated that today there are something like 15.000 EWCs, which can certainly represent – if better activated – the backboon of the new transnational industrial relations. As Marco Cilento underlines in his contribution to our research, EWCs have shown some activism in negotiating with Multinational companies. On the other hand, it could be said that because of the flexibility of the EWC Directive, EWCs have different structures and therefore may acquire different functions.

Some EWCs have a full-bodied trade union structure and therefore EWCs may sometime fulfill all criteria pertaining to a collective bargaining body. It is not less true that EWCs only eventually fulfils such criteria and experience shows that good trade unions practices are not frequent, not structured enough and can easily fade away. In chapter one Ales and Verrecchia emphasize as after the recasting Directive 2009/38/CE, there is potential change in the vision of the EWC where it attempts to reconcile EWC needs and European trade unions prerogatives. If in the directive of 1994, the EWC was seen as a representative body of workers with no connection to the union, that presents itself as a "non union channel" of representation of workers in a hypothetical dual channel, in the Directive of 2009, the vision of the EWC changes. The 2009 recasting directive has expanded the prerogatives of these structures, but not as far as to encompass the power to negotiate. Neither the new directive nor national implementation acts contain a basis for authorization for EWCs to conclude TCAs. Although nothing prevents this from occurring, if the company accepts it. In Cilento's words: "EWCs have legitimately concluded EFAs in the past years and they will likely do in the future. However, if the aim is to frame transnational negotiations with multinational companies in predefined procedures (or even within an optional set of rules) the current experience demonstrates that EWCs can hardly be a reliable trade union structure for collective bargaining at cross-border level" (see chapter nine).

For the EFA, the ETUC indicates the European industry federations as the primary actor with respect to EWC and national unions which must have an essentially complementary function. We can conclude that, even if having legitimately concluded EFA in the past years, EWCs are an inadequate trade union tool on which a reliable structure for collective bargaining at cross-border level may be founded. The most convincing option experienced in the last decade refers to procedures and rules established by EIFs that make EIFs leading actors for negotiating and signing agreements in MNCs with a cross-border scope[83].

TCAs are not disconnected from other levels of social dialogue (see Alaimo in her chapter). Actually some EFAs take inspiration from EU inter-professional or social dialogue sectoral agreements. Others provide a cross-border extension to national agreement. On the way around it is assumable that a consolidate experience of negotiations at the transnational level in a given sector can deliver its positive effects on the social dialogue in that sector.

The objective of ETUC is to emphatically request the affiliated organizations to increase the cooperation and coordination of negotiations in multinational companies. Work made by EIFs could be spread further and implemented, as well as the procedures. The role of trade unions in signing transnational agreements should be strengthened, whereas the scope of such agreements should be extended at the core part of the work conditions. The presence of a multitude of actors must be rationalized, while the EIFs should be the leading actors and the only entitled to sign EFAs. Transparency is very important and it should probably resides within procedures and mechanisms established by EIFs. If the mandate is clear and easily traceable, the entire process will result more transparent and accountable.

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[82] R. Jagodzinski, *EWC after 15 years – success or failure?* "Transfer", 17 (2), 2011; J. Waddington, EWC: the challenge for labour, Industrial relations journal, vol. 42, Issue 6, 2011

[83] T. Muller, H.W. Platzer and S. Rub, *Transnational company policy and contribution of collective bargaining – new challanges and roles for European industry federations*, in „Transfer", n. 4/2010

5. Legal frame for transnational collective agreements in Europe

These considerations lead us to the heart of the problem**,** which concerns the legal nature of these agreements and their effectiveness**.** In fact these texts have not a specific legal framework neither in the EU law nor, *a fortiori*, in the international law. In the absence of specific international norms, TCAs see basically applied the highly complex and quite uncertain principles of international private law[84]. In chapter two, Reingard Zimmer reminds us of some of its common and basic principles: *lex posterior, lex specialis*, the most favourable principle, possibility of deviation from higher regulation only if allowed at that level.

Such a lack has not been an obstacle up to now to the growing development of TCAs and also in the international legislation it is possible to find out norms and rights which legitimatatize their existence. At a global level, for instance, the ILO Conventions 89 and 98 provide a potential legal basis to these agreements, particularly if their scope extends outside the EU, where they obtain a stronger recognition and legitimazation in the *acquis communitaire*. Here infact the role and functions that the EU Law recognizes to the social dialogue and industrial relations, including collective bargaining, are quite large and significant (see Anna Alaimo in chapter three)[85]. They are a pillar of the European social model at all the levels: European and National, bipartite e tripartite, at multi-secotrial, sectoral and workplace level. The old art. 139 of the Treaty (now 155 TFEU) provides for European social dialogue can evolve into volunteer or *autonomous* agreements – either cross-industry or sectoral – in which the implementation is left to "procedures and practices specific to management and labour and the Member States". The art. 28 of Carther of Fundamental Rights, now part of the TFEU establishs "the right to negotiate and conclude collective agreements at the appropriate levels". Furthermore, it's well-known the importance of information, consultation and participation workers' rights, also at transnational level, including the possibility to establish EWCs[86].

In such a legal and political scenario, the European Framework Agreements (EFAs) represent today an emerging but integral and consequent part of the European approach to the industrial relations. In more technical terms, they can be considered as a sub-specie of the autonomous volunteer agreements under the EU law, in an alternative to the tripartite regulations of neo-corporatist inspiration, with which the European social dialogue has so far produced some of its well-known and significant results. A pattern which – according to some commentators – is passing through a stalemate phase, as attested by the considerable drop in concrete outcomes in recent years, unlike the volunteer agreements between social partner at EU level[87]. They are non-statutory agreements, being self-initiated and self-implemented. With no obligation to transpose it into binding decisions for local management, there's usually a mere obligation of influence for the parent undertaking to the related local reprentatives[88].

The major problem of volunteer and non-binding agreements concerns their (homogeneous) implementation/transposition in all the different company /workplaces, dislocated in different countries. The frame set by TCAs have in fact to be implemented at a National level, so that their provisions can become binding everywhere the parent company has the legal control of

[84] van Hoek and A. Hendrickx, *International private law aspects and dispute settlement related to transnational company agreements*, Study undertaken on behalf of the European Commission (VC/2009/0157):
[85] B. Caruso e A. Alaimo, *Il contratto collettivo nell'ordinamento dell'UE,* WP "CSDLE", n. 87/2011.
[86] N. Kluge, *Employee participation and trade union in europe – quo vadis?*, in W. Kowalsky and P. Scherrer (ed.), "Trade unions for a change of course in Europe. The end of a cosy relationship", ETUI, Bruxelles, 2011.
[87] B. Caruso and A. Alaimo, *op. cit.*; A. Lo Faro, *op. cit.*
[88] S. Scarponi, *Gli accordi transnazionali a livello di impresa: uno strumento per contrastare il social dumping?,* "Lavoro e Diritto", 1/2011

its affiliated plants. The subscribed agreements should have their own inherent strength based on the capacity of the signatory parties to influence their local controlled and/or affiliated terminals with the engagements they have taken. The signatory parent company, in particular, should be responsible for a respectful adoption of the TCAs by the local managements. The clearer the engagements are, the strongest is their enforceability. But this is not always the case, arising the problem of the TCAs effectiveness. In the lack defined norms ruling a) the legal status of these texts and b) the hierarchical coordination among the different negotiating actors, the most common result is that they have to be re-negotiated by the local actors (work councils, unions and management), no matter if they result formally linked to the peak level signatory parties, as in the case of unions who adhere to the ETUC/EIFs. In the system of legal sources, a European collective agreement should assume a legally superior place to the national levels but this is not always the case since local managers and/or the workers' representative and unions can refuse to implement measures which consider worsening their prerogatives and standards. Then contents and real effects of a TCA risk to vary according to the will of the new local signatory parties. The remarkable differences among European collective bargaining systems (binding or non-binding effects, extension of the effects, workers representation, etc.) imply that the transposition of these agreements at national/local level may differ significantly from one context to another. Furthermore, the often generic nature of the TCAs contents can make it difficult for national actors, and unions in particular, to claim and transpose the exact commitments adopted. All this inevitably leads to relatively inhomogeneous results, uncertain if not random, and the nationalization of the effects on the other, which can affect the actual transnational nature of these agreements. TCAs cease to be "transnational" and, at best, become common company collective agreements, although influenced by transnational agreements.

On the other hand, also companies and local managements have the need to reduce as much as possible and minimize uncertainty. Without a sufficiently defined framework the risk, even for the companies, not only for the workers, would be to add to the factors of economic uncertainty, including those of legal uncertainty[89].

6. The "effectiveness question" and ways out to cope with it

It's now clear that the cross-border effectiveness of these agreements is the core of all the TCAs problems and is basically due to the current situation concerning the lack of formal and legal rules for TCAs. Up to now the effectiveness question "remains substantially unsolved" [90]. It refers to a series of questions which concern the TCAs implementation and follow-up at the national level, the problem of hierarchy between the different levels of existing of collective bargaining, the legitimation of the transnational collective bargaining actors, the procedures in case of refusal of the implementation of the agreements.

As we can read in the very recent Commission Staff working Document "Legal risks attach to the conclusion of transnational company agreements, particularly for company management. The parties face difficulties in controlling the legal effects of transnational

[89] F. Galgano, *La globalizzazione nelle specchio del diritto*, Il Mulino, 2005; p. 124. On the employers' approch to TCAs, Businesseurope, *Key issues for management to consider with regard to Transnational Company Agreements (TCAs). Lessons learned from a series of workshops with and for management representatives*. www.businesseurope.eu/content/default.asp?PageID=609..

[90] As Lo Faro put it: "The *effectiveness* question still with reference to other forms of European social dialogue: i.e. *autonomous* agreements - either cross industry or sectoral - whose implementation is left to the 'procedures and practices specific to management and labour and the Member States'; and *transnational* company agreements, whose legal status is undoubtedly the more uncertain and problematical"; A. Lo Faro, *Bargaining in the Shadow of "Optional Frameworks"? The Rising of Transnational Collective Agreements and EU Law*, "EJIR", 2011

company agreements as their intentions and the actual legal effects produced can diverge considerably"[91].

As group of experts we've discussed in depth these very problematic questions on which we all agree cannot be eluded. Is abstentionism and voluntarism sufficient or is a EU legal framework necessary? Is it an incentive to bargain or an obstacle to its effectiveness? Are there alternatives to it? How can we safeguard social partners autonomy? Are the monitoring and follow-up procedures enough to guarantee effectiveness and enforcability? How can we shift from experimentation to stable development?

The common view, within our group of experts, is that every system of industrial relations can hold up too long, if its outcomes are not secured by an acceptable degree of legal certainty and justiciability. The current entirely volunteer instrumentation, while crucial in preparing the ground for truly international industrial relations, is not sufficient either a) in encouraging a wide diffusion of these agreements and b) in ensuring them, once signed, a proper effectiveness and uniform transnationality at the local level of implementation.

Already the Ales report[92], and more recently the expert group of the European Commission document[93], have promoted a flexible approach, calling for some kind of "soft" regulatory intervention that gives a framework of stronger value to these texts.

The parties should explicitly specify a reference to the binding, or non-binding, character of the commitments that have been undertaken[94]. Non-regression clause should be included into all the texts[95]. New solutions should concern conflict management and dispute solutions. All the texts should set internal procedures for verification of any discrepancies, through forms of arbitration and conciliation that any agreement should contain. As well as, for instance, self-implementing and self-executing provisions, as in the model of the silicon Directive of 2006[96]. The aim should be to create rules from practice, along with the elaboration of a sort of supranational jurisprudence, even of private nature. The best solution might be to elaborate a sort of cross-border jurisprudence (even of private nature) that can help such practices to be better interpreted in their legal aspects, and judged on the basis of justice and equity of the European interest of the concerned sectors (see chapter two). Finally, it would be very useful to promote best practices – and their dissemination - which observe certain principles, standards and guidelines.

The aim should be to move from often declaratory texts, to texts which can produce really binding effects. Among our legal experts prevail an address intended to promote a solution focused on "hard" tools, with Ales most favorable to the Regulation, and Zimmer and others to the Directive. Such a solution, as Zimmer underlines, "would predetermine only a legal framework with procedural rules, which would have to be inserted into the national law. Legal effect, scope etc. would depend on the respective national regulations[97]. The advantage of such a solution would be the great flexibility of the parties of the collective agreement. In

[91] SWD(2012) 264 final, *Transnational company agreements: realising the potential of social dialogue*, Brussel, 10/9/2012.
[92] Ales E, Engblom S., Sciarra S., Valdes Del-Re (2006), *Transnational collective bargaining: past, present and future,* Final Report, European Commission.
[93] Expert Group, *Transnational Company Agreements. Draft elements for conclusions of DG Employment,* Working Document, 5 October 2011.
[94] In this sense also Hendricks et alii Report, *op. cit.*
[95] The ETUC Seville Congress of 2007 approved this hierarchical sequence, stressing the value of "non-regression clause", whereby the contents of the agreement can not be *in pejus* than existing in the agreements made at the national level.
[96] B. Caruso e A. Alaimo, *Il contratto collettivo nell'ordinamento dell'UE,* WP "CSDLE", n. 87/2011
[97] See also Rodríguez et. al., *Study on the characteristics and legal effects of agreements between companies and workers' representatives.* Report for the European Commission, 2012; p. 13 f.

this way we would achieve what Brain Bercusson called "bargaining in the shadow of law"[98], not too differently from what Silvana Sciarra hopes when she speaks of "auxiliary legislation"[99].

The creation of a legal framework for TCAs in the 27 Member States is a highly "difficoult task", as Zimmer says in her chapter, due to the different industrial relations and legal traditions. We are aware that the ambition of a legal framework is an highly complex objective, which must deal with a series of obstacles. The employers' associations, first of all, are famously opposed to any solution which could go beyond the total voluntarism of today[100]. At the same time, however, we must also take note about some strong resistance from some national trade unions, that perceive agreements like these as a sort of interference, and in some cases regressive, if compared to the local standards and procedure. The Scandinavian unions make no secret of their reluctance in this respect, as for other aspects concerning a shift of collective bargaining sovreignity to supranational level. In some concrete cases, referred during our workshops, these different strategic options among unions have appeared in a quite dramatic and explicit manner, as in the case of the Electrolux global restructuring plan[101], but also in a more indirect (and maybe hypocritical) way, even where the union was officially much more pro-European, as in the case of Siemens.

In consideration of such a lack of common will to move from voluntarism to interventionism the (second) best as a policy option should be to work for a flexible and optional frame of rules, as suggest by the European Commission epxerts. Also the ETUC seem now oriented in this direction. In June 2012, a Position paper was adopted by its Executive Committee, aiming to an "optional frame of rules" for "more and better" TCAs[102]. Reasons of realism should therefore prompt a search, in the current practice of collective bargaining, for the main track to beat, adopting codes of conduct for negotiations, in order to define at least on the union side, common and shared guidelines for the signing of agreements like these.

Abandoning the objective of an "hard law" intervention at EU level can be considered a symptomatic sign of the times, where the soft law of Open Method of Coordination (OMC) and volunteer agreements are by far preferred to the most conventional tools of the European method. The deliberative process at European level has become so long and complex – even before between institutions, between the social partners and even within each of them, as we observed directly within the ETUC – to require a chain of mediation in which every ambition to increase and consolidate the labour rights and protection standards is destined to get systematically frustrated. We are coping with a process of de-positivization or de-juridification which now increasingly concern the evolution of the global law, TCAs are an

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[98] B. Bercusson, *Maastricht: a fundamental change in European Labour law*, "Industrial Relations Journal", 23 (3), 1992

[99] S. Sciarra, *Collective Exit Strategy, op. cit.*

[100] Businesseurope*, Key issues for management to consider with regard to Transnational Company Agreements (TCAs). Lessons learned from a series of workshops with and for management representatives*. www.businesseurope.eu/content/default.asp?PageID=609; R. Janssen, *Transnational employer strategies and collective bargaining: the case of Europe*, "International Journal of Labour Research", Vol. 1, Issue 2, 2009;

[101] V. Telljohann, *Processi di delocalizzazione nel settore europeo degli elettrodomestici e forme di regolazione sociale*, in "Lavoro e partecipazione - Sociologia del lavoro", n. 123/2011

[102] According to the ETUC guidelines TCAs have to be based on the autonomous trade union ability "to encourage an effective development of cross-border collective bargaining". The recommendation is to take always some precautions, as the following four: a) force the binding effects of the agreements to respect the internal rules adopted by the European industry federations (EIFs); b) refer to the representativeness criteria of European trade union organizations similar to those which apply for the European social dialogue committees; c) provide a list of required elements to be considered when negotiating European framework agreements; d) establish a voluntary agreements European conciliation body for a transitional period of 5 years to help solve extra-judicial disputes and gain experience with the good functioning of the optional legal framework for EFA.

emblematic case of transnational law that Maria Rosaria Ferrarese defines at "low definition", so as to distinguish it from the law at "high definition" to the juridical tradition of modern civil law[103]. Rules set in this way seem to have essentially procedural characters. They produce a "dislocated", peripheral[104] law, which is expressed through a variety of sources and procedures, in which private actors contribute to forms of governance which differ from the typical attitude of a normative law, which clearly defines precepts of a substantial type.

Soft law equals "no law", said someone. Or at best a "tentative law", a sort of "experimentalist governance", halfway between law and no law. Failed attempts to harmonize upward, which risks to be a one way soft law (soft with business duties and workers rights, and vice versa, hard with the workers sacrifices and business interests), and can achieve "loose connections"[105], often more symbolic and rhetorical than anything else. The very "hard" policies such as those configured in the *Euro Plus Pact*, now *Fiscal Compact,* dramatically reveals the weakness of most of the "soft" labour law instruments.

The risk is that the soft law, although for someone a second best strategy, if adopted as a pillar of the social policies of tomorrow, becomes the last *union ideology* in the sense of the Italian historian of law Giovanni Tarello, at best, an ideology tout court at worst. That is, the concealment of a substantial and dramatic impotence to do more and better.

7. TCAs and their impact on the industrial relations

Today an overall evaluation of the TCAs cannot elude, also in a quantitative perspective, to reflect about their representative value in relation to the esteemated number of worldwide multinational companies. The agreements – as we said – are currently 224, concerning 144 MNCs. We know that the number of already established EWCs is about 1000 (2011), whereas according the Directive's requisites – as we know – it should not be less than 2400. If we enlarge the view to the world-wide level – many TCA have in fact such a scope – the UNCTAD figures tell us there are around 65,000 multinational companies all around the world[106]. So, from this point of view, we have to conclude that TCAs have produced just a very limited impact so far. Nevertheless, we are also aware that in current global power relations, more and more unbalanced between labour and management, it can seem almost miraculous that so relatively few agreements have been signed. They certainly testify for a social dynamism, particularly valuable is compared with slowness or absence of the policy at many levels.

For the already established ones, the major problem of the TCAs – as we have already said – concerns their concrete implementation and effectiveness, especially as emerges in chapters seven and eight, where unions are quite weak and local managers often refuse to appropriately implement the TCAs (like Poland or Bulgaria). Furthermore, in times of crisis and restructuring like these companies can be tempted to elude or avoid the subscribed engagements, while the social climate at the workplace level worsen in view of job cuts and frozen wages. As emerges from the ArcelorMittal case study: "This is sometimes due to the fact that the management and unions have no shared diagnosis of the economic sustainability of their sector in their own country and across Europe" (see chapter six).

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[103] M. R. Ferrarese, *Prima lezione di diritto globale*, Laterza, 2011; Y. Dezalay, *I mercanti del diritto: le multinazionali del diritto e la ristrutturazione dell'ordine giuridico internazionale*, Giuffré, 1997.

[104] G. Teubner, *Societal Costitutionalism. Alternative in State-Central Constitutional Theory*, in C. Jorges et al. *Transnational Government and Costitutionalism*, Hart Publishing, 2004.

[105] B. Cattero, *Tra diritto e identità. La partecipazione dei lavoratori nel modello europeo*, in "Lavoro e partecipazione - Sociologia del lavoro", n. 123/2011

[106] M. Fichter, M. Helfen, K. Schiederig, *Si può organizzare la solidarietà internazionale a livello aziendale? La prospettiva degli International Framework Agreements* (Ifa), in "Lavoro e partecipazione - Sociologia del lavoro", n. 123/2011

TCAs have an extensive implication on industrial relations. The scope of validity are basically two: the global one, in which the group operates, and each individual site where it is concretely located. Therefore, they represent an archetype model of multi-level "glocalized" law, to quote Robertson[107]. The center of gravity of collective bargaining shifts – somehow "escapes" (it is centrifugal) – *upward*, at the international corporation level, and *downward*, at individual firm level. For the so called "continental" model of industrial relations – with its Nordic and also Mediterranean sub-species – the challenge is that they both risk to bypass the traditional primacy of the most typical national medium: the multi-employer collective bargaining level. This could lead to a "business corporatism" – more typical of the Anglo-Saxon model and the new Member States – which reduces rather than enlargeing the space of solidarity, emphasizing the competition, in terms of employees' rights, between brands and firms also in the same sector, in the same country, in the same territory.

In the current and future scenarios of the globalization, the supranational trade union action has become increasingly central. A stronger cooperation and coordination of bargaining in transnational companies – as a tool of cross-fertilization – is commonly considered necessary and urgent. This aim requires improving in a comparative perspective the knowledge of different national systems of industrial relations; to break with what Ulrich Beck calls the "methodological nationalism". The study of industrial relations has the international comparison in its DNA. Knowledge and comparison of national systems becomes an essential element for the formation and the uniform application of a supra-national law and its proper application within individual domestic laws. This occurs in a process of circulation and mutual conditioning[108]. As underlined by Lord Wedderburn, comparative studies have become a indsipensable base for achieving a reasonable harmonization between the various standards[109]. They are a necessary condition for effective Europeanization. Always, for example, there are questions on the primacy of the trends to divergence or convergence. In spite of the persistent differences between formal institutional models and national regulatory frameworks, particularly emphasized in studies of comparative political economy (the known theory of "varieties of capitalism"[110]), common trends are found almost everywhere to a convergence[111] of neo-liberal policies[112]. The scenario is, in fact, global and largely common, characterized by the challenges posed by unbridled competition, post-Fordism, financialization of the economy, the most serious crisis of the last decades. A conjunction that at all latitudes raises serious difficulties in the labor movement, as symptomatically attest to the general decline of the members, of the collective bargaining coverage, of industrial conflict. Collective bargaining is more and more concessive, decentralized and individualized, whereas in many countries the rate of unionization and bargaining coverage is seriously declining[113]. So, talk of transnational company bargaining is just and necessary, but only if we fully understand all the processes that now threaten to some extent in more countries sectoral and multi-employer collective bargaining. Asymmetries of power between labor and capital have taken very worrying and unprecedented proprtions over the past decades. The threat to relocate their production represents a powerful tool in the hands of companies, so to influence

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[107] R. Robertson, *Globalization: Social Theory and Global Culture*, 1992.
[108] B. Caruso e M. Militello, *L'Europa sociale: il contributo del metodo comparativo*, WP – CSDLE "Massimo D'Antona", n. 94/2012.
[109] Lord Wedderburn, *Comparazione e armonizzazione nel diritto del lavoro*, in "Giornale di Diritto del Lavoro e delle Relazioni Industriali", 1991.
[110] P.A. Hall e D. Soskice (a cura di), *Varieties of Capitalism*, Oxford University, 2001.
[111] H.C. Katz e O Derbishire, *Converging Divergences*, Crnel Univ. Press, 2002
[112] L. Baccaro e C. Howell, *op. cit.*.
[113] J. Kelly and K. Hamann, *The puzzle of trade union strength in Western Europe since 1980,* in "The Indian Journal of Industrial Relations, n. 4/2010; L. Baccaro and C. Howell, *A common neoliberal trajectory: the transformation of industrial relations in advanced capitalism*, in "Politics & Society, 2011.

the negotiation process with the trade unions of their own country and leaving them little alternative but to accept a significant deterioration of the overall conditions of work. This results in a substantial attrition in the long run of the relationship of trust between the unions and their social base, and more and more disillusioned about the effectiveness of their function.

Transnational and global phenomena - such as those related to the restructuring plans of a multinational company, with their strong social impacts in the various countries where that company is present - cannot be properly faced with the sole instruments of national law and practices of each individual country. From this point of view, it seems clear to us that the TCAs provide areas and means for union representatives across Europe, under the umbrella and with the support from the EIFs, to share common perspectives and objectives. The TCAs are really innovative measures aiming to develop a permanent social dialogue as a pre-condition for the anticipatory management of change. Generally speaking, these provisions show a common will to efficiently and concretely organize social dialogue in a transnational company, by going beyond what European and national regulations already plan. Focus is put on ways to ensure an efficient and better structured social dialogue, ie. a social dialogue that really contributes to the economic and social performance of the group at different levels.

The industrial relations systems in the new Member States is going to play a more and more important role, as discussed in chapters seven and eight. As we can read in the contribution of Adamczyk and Surdykowska: "The basic question is whether there exists a possibility for using the trend observed for the last 20 years to negotiate TCAs in multinationals for strengthening industrial relations in the new member states". Answering this question – they carry on – "depends on establishing the significance of the TCAs for trade unions, especially in their European variation called the European framework agreements (EFAs), which are much more concrete in terms of its content. Therefore, it is important to know whether a real political will exists on the European trade unions' side to support the EFAs (including the legal framework developed for their adoption and implementation), and whether EFA's provisions may become so much more concrete to influence labour conditions to bigger extent. In this context a more general question appears about the relation between adopting EFA and the dynamics of the European Social Model, considering the on-going spontaneous decentralising of collective bargaining in the old EU member states".

Affiliated trade unions from Eastern Europe in particular ask for improved cooperation/coordination of the negotiations in transnational companies. This goal, although pursued since the Helsinki Congress, it does not seem to have yet produced results that have adapted to the challenges[114].

All this should be part of the European trade union policy, oriented towards greater coordination of collective bargaining strategies. The ETUC has drafted a new resolution on coordination and guidelines for collective bargaining, addressed to all member organizations[115].

The crisis and the new instruments of European governance pose an unprecedented challenge to the European social model and its traditional order in the field of industrial relations. A change in level must that the union has to decline for a new strategic perspective. With the European law, if it formally permits, otherwise with the autonomous social practice,

[114] P. Scherrer, *Unions still a long way from a truly European position*, in W. Kowalsky and P. Scherrer, *Trade unions for a change of course in Europe*, ETUI, Bruxelles, 2011

[115] In such perspective see the EMF – Internal EMF Procedure for Negotiations at Multinational Company Level; Luxembourg, 13-14 June 2006; the Statement on a UNI-Europa Finance Strategy on Transnational Collective Bargaining, Adopted by the UNI-Europa Finance Conference Vienna/Austria, 7 November 2008; the Procedure for Negotiations at Multinational Company Level Adopted at the EPSU Executive Committee, 9-10 November 2009, Brussels

even without such a formal support. What finally these agreements, in spite of the gaps described, to some extent show possible.

Chapter 1

Transnational: the emerging multifaced dimension of industrial relations

Edoardo Ales e Giorgio Verrecchia[*]

1. Working definition of the transnational dimension of labour relations.

It is universally accepted that the globalisation of markets has stimulated the growth of a transnational dimension in industrial relations. To date, however, studies have concentrated either on specific legal aspects or empirical features of this phenomenon. The aim of this article is to underline the emerging multifaced dimension of industrial relation.

To such end, it appears appropriate to start with a definition obtained by way of "positive" and "negative" deduction from those dimensions classically indicated when referring to the regulative function of industrial relations, namely, the national, the supranational and the international dimensions. In order to be able to define the transnational dimension, it will therefore be necessary to provide (streamlined) definitions of the others.

a) The national dimension of collective relations (which is sometimes institutionalised and tripartite) is to be understood as the one created (often within an existing legal framework/against the backdrop of legal regulation) by social partners operating at any and every level, whose rules (whether unilateral or negotiated) are (at least potentially) applicable to workers and employers who are based or operate within the borders of a sovereign State.

b) The supranational (and institutionalised) dimension of collective relations is to be understood as the one created by European social partners in the context of Community social dialogue, with the aim of altering national labour law systems at an inter-sectoral or sectoral level, including through the lobbying of European Union institutions.[116]

c) The international dimension of collective relations (institutionalised and tripartite *par excellence*) is to be understood as the one that has developed in the context of the International Labour Organization (ILO) and is formalised by way of Declarations, Conventions and Recommendations.

d) The transnational dimension of collective relations is consequently to be understood as that multinational one created by workers' and enterprises' representatives (or by an individual enterprise) when they agree (or accept) rules that are applicable beyond the national context (a "positive" point of differentiation from the national dimension), without belonging to the supranational or international dimension by virtue of such fact (a "negative" point of differentiation from the supranational or international dimension).

2. Typologies of Transnational Company Agreements

Although the transnational dimension's definition has been formulated by way of deduction/differentiation, empirical enquiry shows that its forms enjoy only partial autonomy

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[116] If one agrees with the view that those results of (intersectoral) European social dialogue that are transposed into "Council Decisions" pursuant to articles 154 and 155(2) TFEU are to be considered instrumental to European Union law-making, one has to conclude that they belong to the supranational dimension of Industrial Relations and do not fall within the definition of trans-national just proposed. See the Agreement on Workers' Health Protection through the Good Handling and Use of Crystalline Silica and Products Containing it (2006/C 279/02), for a situation presenting highly anomalous features.

from the supranational and international systems of industrial relations and their legal systems of reference (i.e. those of the European Union and ILO, respectively).

It is precisely an empirical enquiry that allows the transnational dimension's different forms to be classified into types, according to the manner in which they interact with the legal systems underlying the supranational and international dimensions of industrial relations.

Four types of transnational emerge from the analysis: a "prompted" transnational; a "spin-off" transnational; a "modelled" transnational and a "spontaneous" transnational.

2.1 "Prompted" Transnational

Various forms of interaction between European social partners and EU law, Institutions or policies (in a broad sense) can be traced back to what we may define a "prompted" transnational.

Such is the case with:

a) the *European Autonomous Framework Agreements* (or *Action Plans)* signed between 2002 and 2010;
b) the results of sectoral European social dialogue, if they are not implemented by a Council Decision; and
c) the agreements establishing the European Works Councils (EWC), the *Societas Europaea* Works Councils (SEWC) and the *Societas Cooperativa Europaea* Works Councils (SCEWC).

a) As far as the first category is concerned, if, on the one hand, the *European Autonomous Framework Agreements* are concluded autonomously, they are, on the other, more often than not "prompted" by EU institutions or inspired by EU policies.

This is what occurred in relation to three out of the four Agreements that have been signed to date i.e. those concerning Telework (2002), Work-related Stress (2004) and Inclusive Labour Markets (2010). Such Agreements were prompted by:

- an invitation from the European Council and the European Commission to open negotiations on flexible working arrangements, including telework;

the need for specific joint action on work-related stress in anticipation of a Commission consultation; and

- the European Social Dialogue Work Programmes for 2006-2008 and 2009-2010, in which the European social partners reiterate their support for the Lisbon Strategy, the harmonisation of their action with the Growth and Jobs Strategy and, last but not least, the implementation of the common principles of contractual Flexicurity in inclusive labour markets[117].

The very Framework Agreement on Harassment and Violence at Work (2007), which does not refer to the EU's institutions or policies, has itself been complemented by the *Multi-sectoral Guidelines to tackle third-party violence and harassment related to work,* agreed by the social partners in September 2010 under the aegis of the European Commission.

Analogous conclusions may be drawn in relation to the European social partners' *Framework of Actions on Lifelong Development of Competencies and Qualifications* (2002) and *Framework of Actions on Gender Equality* (2005). Respectively regarding the themes of continuing professional training and gender equality, both these "general action" programmes are directed at contributing to the implementation of the Lisbon Strategy. As a consequence, the transnational documents that execute them (such as, in the case of the former, the joint declaration on the subject of *Lifelong Development of Competencies and Qualifications* issued in 2002 by the European social partners in the banking sector, for example) may be included within the category of "prompted" transnational.

[117] See, also, the Commission's commitment contained in COM(2010) 758, p. 17.

Thus, not by chance, the Lisbon Treaty (2007) adds article 152 to the TFEU, which states, *"The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy."*

b) If they are not implemented by a "Council Decision", the fruits of European sectoral social dialogue (ESSD) also fit within the perspective of a "prompted" transnational, whatever their legal status and purpose may be. Indeed, as is well known, since 1998 the European Commission has been encouraging ESSD through the vehicle of the Sectoral Social Dialogue Committees. In this committee context, sectoral European social partners negotiate in the shadow of the supranational.

c) Last, but certainly not least, a fundamental example of "prompted" transnational may be found in the agreements establishing the European Works Councils (EWC), the *Societas Europaea* Works Councils (SEWC) and the *Societas Cooperativa Europaea* Works Councils (SCEWC), activated as they are by Council Directives 94/45/EC (as amended by Directive 2009/38), 2001/86/EC and 2003/72/EC, respectively. Moving beyond an "optimistic" or "pessimistic" evaluation of their potential for building a European identity, here it will be sufficient to note how, at a structural level, the EWC, SEWC ad SCEWC are transnational institutions *par excellence,* since they have been set up as (Community-scale) multinational Groups or Companies and their constituents come from at least two Member States.

2.2 "Spin-off" Transnational

In the light of what has been said about the agreements establishing the European Works Councils belonging to the category of "prompted" transnational, the *European* or *International Framework Agreements* signed by the EWCs with multinational Groups or companies may be considered an example of transnational that is a "spin-off" from European Union law. Indeed, these agreements go beyond the EWCs' scope of action (which, in theory, is limited to information and consultation) since they effectuate the transnational regulation of important, delicate issues. Thus the fact that the EWCs operate as transnational institutions apparently outside their own fields of competence, and irrespective of the external support of the international, European or national trades unions, may be considered the principle feature of "spin-off" transnational. For this reason, such Councils cannot be regarded a mere extension of national industrial relations. Indeed, according to the various ways in which the directive on EWCs is transposed (it, in its turn, having been influenced by the different industrial relations traditions in every Member State), the Councils' constituents can be elected after inclusion on trade-union lists or appointed by trade-union organisations but they can also be elected directly by workers and thus outside every form of trade-union context. It therefore follows that parties who are not necessarily unionised not only negotiate but also do so in relation to matters that, in certain Member States, fall within the exclusive competence of the trade-union organizations. Conversely, the trade-union components of EWCs are called to tackle subjects that, in some Member States, are the exclusive competence of the Works Councils.

One or two of the many possible examples may help us to understand the diversified scope of action that can be attributed to the "spin-off" type of transnational and the role that it consequently plays in the transnational (and national) dimension of industrial relations at present.

Two agreements were signed at *General Electric Plastic Europe B.V.* (G.E.P.E.), in 2002 and 2004. These concerned the use of electronic communication systems and pre-employment

screening (the so-called "background control"), respectively. Both themes are complex and extremely delicate and are often strictly regulated by national provisions. Indeed, both agreements contain a "fair safeguard" clause which, presuming that the agreements are "to be used for all European sites of the company", provides that "all local legislation will be taken into account. In case any part of [the] agreement is in conflict with any applicable local and/or European legislation, the latter prevails.". Furthermore, the text regarding the pre-employment screening provides, "[i]n order to comply with local law, country guidelines have been put together . In case some activities are prohibited by local law this is marked by an asterisk*". Analogously, as far as the use of electronic communications systems is concerned, "[v]iolation of any of the foregoing rules or guidelines may result in disciplinary action up to and including discharge".

That "spin-off" transnational documents touch upon complex and delicate themes is confirmed by the European Agreement on Data Protection drawn up by the PORR Gruppe AG (Austria) in 2003. The agreement governs the collection, evaluation and transmission of employees' recorded data within the company or to the authorities (in the widest sense of the term) " *under strict observance of both national and international law*".

The GEPE and PORR agreements equally show how the EWCs are assuming the same role within the multinational groups originating in those Member States where the co-determination model predominates that the Works Councils enjoy at a national level.

The same conclusion may be drawn in relation to a mixed (Anglo-German) model of industrial relations after reading the Agreement governing the *Ford Visteon* separation (*Agreement governing the separation of the Ford Visteon organisation*). Signed at *Ford of Europe* in 2000, this governed (or should have governed) the transfer both of the Visteon activities owned by *Ford of Europe* and of the employees actually employed at that moment to a separate, newly founded legal entity (a Newco).

The *Charter of Principles of Social Management* adopted by the *Dexia Group* (Belgium/France) in 2002 constitutes a further example of a "spin-off" transnational agreement that was soft in its instrumentation but decidedly hard in its contents. Under the form of a unilateral commitment of the Group's that was shared with the EWC, the Charter governs social dialogue, employment (skills, professional and language training, information about the group's activities and an enhancement of promotion opportunities) and mobility within the Group.

2.3 "Modelled" Transnational

Over the last decade, a growing number of multinational groups and companies have begun to adopt transnational "texts". Modelled either directly or indirectly on international rules, these texts have been partly negotiated with (various types of) workers' representatives and partly developed unilaterally by individual enterprises before being shared with the workers' representatives. Moving beyond the question as to whether such transnational "texts" should be viewed as having the self-promotional function of creating a socially responsible company image, they do currently constitute an important expression of the transnational dimension of industrial relations from a structural point of view.

As far as their inspirational model is concerned, reference must be made to four fundamental principles and their correlated rights at work as specified in the ILO Declaration of 1998: "[…] namely: (a) freedom of association and the effective recognition of the right to collective bargaining [C87 Freedom of Association and Protection of the Right to Organise Convention, 1948; C98 Right to Organise and Collective Bargaining Convention, 1949], (b) the elimination of all forms of forced or compulsory labour [C29 Forced Labour Convention, 1930; C105 Abolition of Forced Labour Convention, 1957], (c) the effective abolition of child labour, [C138 the Minimum Age Convention, 1973; C182 Worst Forms of Child

Labour Convention, 1999] and (d) the elimination of discrimination in respect of occupation and employment [C100 Equal Remuneration Convention, 1951; C111 Discrimination (Employment and Occupation) Convention, 1958; and C135 Workers' Representatives Convention, 1971]".

However, other ILO rules had already inspired the European social partners in 1997 when, in a European sectoral social dialogue context, they drew up the *Code of Conduct on Fundamental Labour Rights at Work* for companies operating in the textiles and clothing sector.

The four *fundamental principles and (correlated) rights at work* were then inserted (as Principles 3, 4, 5 and 6) into the United Nations' *Global Compact* of 2000, in the context of their human rights strategy (see, also, "the human right to form trade unions", as subsequently provided for by the principles of social responsibility that DaimlerChrysler adopted in 2002).

In the meantime, the abovementioned principles had been specified and enriched by the OECD's *Guidelines for Multinational Companies* in 2000 (which were then explicitly cited by the EADS NV *International Framework Agreement* in 2005 and the G4S *Global Agreement on Ethical Employment Partnership* in 2008). According to these guidelines, multinationals must, *inter alia*, implement a system involving workers' representatives that is similar to the one provided for by EU law; i.e. they must, "observe standards of employment and industrial relations not less favourable than those observed by comparable employers in the host country; take adequate steps to guarantee occupational health and safety in their operations; employ, to the greatest extent practicable, local personnel and provide training with a view to improving skill levels, in co-operation with employee representatives and, where appropriate, the relevant governmental authorities; not threaten to transfer the whole or part of an operating unit from the country concerned nor to transfer employees from the enterprise to other of its component entities in different countries, in order to unfairly influence negotiations or to hinder exercise of the right to organise".

References to ILO documents have multiplied in the transnational texts agreed since 2000: they include, *inter alia*, the themes of a minimum wage, working time, health and safety, the prevention of HIV/AIDS, qualification and training and employment protection.

The reference to international standards is a common feature of the "modelled" type of transnational, not only when it constitutes the fruits of effective bargaining between parties (see, for example, the *Global Agreement* reached by AngloGold Ashanti Ltd in 2009, the *International Framework Agreement* drawn up by EADS NV in 2005 and PSA Peugeot Citroën's *Worldwide Framework Agreement* dating to 2010) but also when it takes the form of a text that has been formulated unilaterally by a Group and then subsequently shared with the workers' representatives (e.g. Volkswagen's *Declaration on Social Rights and Industrial Relationships* dating to 2002, DaimlerChrysler's *Social Responsibility Principles,* dating to 2002, and Rheinmetall's *Social Responsibility Guidelines,* dating to 2003).

If, from the workers' point of view, the "modelled" type of transnational results in a great variety of negotiating agents/signatory parties (acting individually or in combination), from the employers', the effect is the opposite: employers' organizations are hardly ever involved in the negotiations (for an example that goes against the trend, see the *Memorandum of Understanding on Temporary Agency Work* drawn up between the International Confederation of Private Employment Agencies (CIETT) and UNI in 2008, implementing Convention 181 on Private Employment Agencies and Recommendation no. 188 of 1997).

In such a perspective, the "modelled" type of transnational may be understood as a sort of multi-faceted "sub-dimension" of the already variegated transnational dimension of industrial relations and one that is found essentially at a group or company level. Such "sub-dimension" may, in turn, be understood:

1. on the one hand, as "global", when workers' interests are represented: a) by international trade unions, as in the case of AngloGold Ashanti Ltd., in 2009, for example b) jointly, by international trade unions and (Group) Global Works Councils (e.g. Volkswagen in 2002) (c) by enlarged Works Councils, acting jointly with International/European trade unions (e.g. DaimlerChrysler, 2002; Rheinmetall, 2003; and EADS NV, 2005) or (d) by EWCs acting alone (Ford of Europe, 2003; UniCredit Group, 2008 and 2009);
2. on the other, as "glocal", when the same interests are represented jointly by International/European and national trade unions (e.g. Danske Bank, 2008; AKER Asa, 2008; ENI, 2002; Gaz de France, 2008; Grupo Portugal Telecom-Brazil, 2004; and PSA Peugeot Citroën, 2010) or by international and national trade unions and enlarged EWCs (e.g. Renault, 2004).

That the "modelled" type of transnational is playing an increasingly important part within the transnational dimension is confirmed by the fact that the sectoral international trade unions have adopted "Model international framework agreements" that systemize and complete the references to the international rules referred to above (see, for example, the *Model Framework Agreement* realised by *Building and Wood Workers International* (BWI), which contains rules on workers' welfare, social security protection and regular employment relations, and the *Model International Framework Agreement* realised by the *International Metalworkers Federation* (IMF) containing rules on decent working conditions).

In such a perspective, one may wonder whether the multinationals' adoption of transnational "texts" that have been "modelled" on international standards may constitute an effective complement to (or, possibly, vehicle for applying) such rules in those national systems that have not ratified or fail to respect ILO Conventions.

2.4 "Spontaneous" Transnational

Only rarely does the transnational dimension prove to be "spontaneous" i.e. neither "prompted", nor a "spin-off", nor "modelled". From a quantitative point of view, therefore, expressions of the "spontaneous" type of transnational currently seem to belong to a wholly residual category. Such a statement is confirmed by the empirical analyses, since these highlight the paucity of "spontaneous transnational texts" agreed between sectoral international or European trade unions and multinational companies. Conversely, from a qualitative point of view, the fact that many crucial aspects of employment relations have been exhaustively regulated by "spontaneous" forms of transnational must be emphasised.

The potential of this type is clearly illustrated by various examples of transnational agreements dealing with such crucial themes as equal opportunities, the anticipation of change, restructuring and the recognition of trade unions for negotiating purposes.

The AREVA/EMF *Group Agreement on Equal Opportunities,* dated 2006, and the Total/EMCEF, FECCIA and FECER *European Agreement on Equal Opportunities at Group Level* (2005) were both signed in a French multinational context. Echoing the European social partners' *Framework of Actions on Gender Equality* (2005), they provide detailed guidelines aimed at offering female and disabled workers a path towards equal opportunities in relation to engagement, career development, mobility, reconciliation of work and family life, remuneration and professional training. The EWC are recognised as having played a crucial part in ensuring the agreements' application.

The Schneider Electric/EMF *European Agreement on Anticipation of Change,* dating to 2007, and the Arcelor/Mittal *European Framework Agreement on Anticipating and Managing Change*, dating to 2009, were both signed by EMF, a pioneer in transnational collective bargaining. Both agreements are geared to: safeguarding and developing the competitiveness of the companies concerned and guaranteeing the sustainable development of their production

in Europe; preserving and developing the employability of their employees in Europe, and developing workers' professional and other skills in such a way as to enable them to adapt to the new economic and strategic challenges. In the case of *Schneider Electric*, the EWC is considered the privileged forum for anticipating change.

Last, but certainly not least, comes the NAG/UNI, FSU Australia, Amicus and FINSEC *Global Agreement on the NAG and Global Unions Engagement Strategy,* dating to 2006. This provides that, "the trade unions are key stakeholders in the company" and that "the role of the union representatives will be encouraged, valued and supported as a key component of the engagement strategy". However, it also provides that "the Unions and the *National Australia Group* will respect an individual's right to choice and all employees will be treated with fairness and respect", thereby excluding union-shop practices.

2.5 Unilateral "Spontaneous" Transnational

a) Adopting a broader perspective, it could be argued that the "spontaneous" category of transnational is not limited solely to those transnational texts that are chiefly, if not exclusively, signed at a company level. In truth, the coordinated bargaining strategies of the European unions at a sectoral level may be understood as signs of a unilateral form of "spontaneous" transnational, irrespective of their effectiveness. So, too, may the Common Demands (formulated by the EMF in 2004 and 2009, in relation to "The Individual right to training" and "For more secure employment and against precarious work", respectively), and the ETUC's campaigns for the European Charter of Fundamental Rights and the Convention on the Future of Europe.

b) Considering the position of employers in the same perspective, it is appropriate to focus on "the micro-level problem of how, concretely, the multinationals act as agents of change by introducing innovations into their subsidiaries and thence into the host business system". The answer is that "the globalisation dynamic is *intrinsically* played out through the medium of interacting, internally heterogeneous, nationally rooted multinational companies, seeking to draw their international competitive advantages from the distinctive and variegated institutional configurations, including the system of employment relations in which they are embedded" (Ferner and Quintanilla, 2002, p. 249). Consequently, the unilateral transfer of multinationals' employment practices (through the exportation or abandoning of the "country of origin model") may be seen as a further example of a unilateral form of "spontaneous" transnational.

3. Actors

The "trust" of social parties in the European collective bargaining, as already outlined by Academy, is evident, even if with shifting results. In fact, experiential observation shows that social parties choose to shift some bargaining activities at European level, rather than leave them at national level, within a voluntary and independent bargaining process. Given that these are the kind of TCA that can be stipulated, it is possible both to identify which are the signing parties, and to define their role and influence in the transnational bargaining.

The EUROACTA study has clearly showed that the European trade unions are definitely the more appropriate bodies to manage the complex phenomena linked to the transnational collective bargaining. In fact, European trade unions grant a global vision of single member national realities, thanks to their composition. As an example, art. 1 of ETUC Chart includes national trade union organizations and federations as full members.

Several are the agreements signed by the European trade unions and some examples have been already given. From a juridical point of view, then, there are no doubts that European trade unions play a relevant role in the transnational bargaining process.

Next to the European trade unions, we find the National trade unions, who play a specific role, even if at a local level, in the implementation of the principles stated by the transnational contract or agreement.

At such a regard, there is a growing role of "representatives of competent recognised Community-level trade union organisations…", as mentioned by directive 2009/38/CE[118]. The just mentioned directive, in fact, does not specify if the trade union organization who takes part to the EWC agreement has European or National level. Its character of "Community-level recognition" gives the idea of an expertise that can belong to both trade union territorial levels. As a matter of fact, we can also include the national trade union in the case of "recognized Community-level trade union", if nothing else for its affiliation to the European trade unions[119].

On the other hand, its leading part in the EWC it is less obvious. As everybody knows, in fact, many reservations have been expressed by both trade unions and employers about the role of EWC in the bargaining process. At a certain point EWC started to bargain[120] and signed agreements with different denominations and uncertain juridical nature.

The now described phenomenon has a greater relevance for the tackled subjects (mainly reorganizations), than for the number of signed agreements. The Community lawmaker had to take into consideration this use and proposed a distribution model of the above mentioned different actors' competences in the same directive 2009/38/CE, in the attempt to conciliate EWC needs and European trade unions prerogatives. Art. 12 of the Directive provides, in fact, that "Information and consultation of the European Works Council shall be linked to those of the national employee representation bodies, with due regard to the competences and areas of action of each and to the principles set out in Article 1(3)". Linking procedures between the information and consultation of the EWC and National employee representation bodies are established by the agreement referred to in Art. 6. That agreement does not affect the provisions of national law and/or practice on the information and consultation of employees. Where no such arrangements have been defined by agreement, the Member States shall ensure that information and consultation processes are conducted in the EWC as well as in the national employee representation bodies when decisions are likely to lead to substantial changes in work organisation or contractual relations".

This is therefore likely to lead to a potential change in the vision of the EWC in the UE legislation. If, in fact, in the directive of 1994, the EWC was seen as a representative body of workers with no connection to the union, thus presenting itself as a "non union channel" of representation of workers in a hypothetical dual channel, in the Directive of 2009, the vision of the EWC changes, since the European union is fully involved in the creation of the EWC itself.

The European Trade Unions, in fact, fully negotiates the establishment of the EWC, which then loses its above described character of "non union channel". This allows the EWC to have a role in transnational bargaining. As known, the EWC participates in any negotiation of the transnational collective agreement as the only legally codified body representing the workers at European level. The EWC can also provide known experience and information to the bargaining process as it has the right to receive information and to participate in the consultation. In fact, the EWC is born with the specific aim to receive information and to

[118] Recently implemented in Italy with Legislative Decree n. 113 of 22 June 2012, published in Official Bullet on 27 July 2012.

[119] On representativeness of the actors see B. Caruso and A. Alaimo, *Il contratto collettivo nell'ordinamento dell'Unione europea*,WP C.S.D.L.E. "Massimo D'Antona" .INT – 87/2011, p. 27.

[120] See B. Caruso and A. Alaimo, *op. cit.;* p. 64; S. Scarponi, *Gli accordi-quadro internazionali ed europei stipulati con le imprese transnazionali: quale efficacia?*, in *Nuovi assetti delle fonti del diritto del lavoro* publishing, http://caspur-ciberpublishing.it

carry out the consultation and its negotiating powers have been developed in practice but not recognized by law.

European and international framework agreements signed by European work councils and multinational companies or groups, therefore fall into the category of "spun-off" transnational agreements, as described in previous sections. These agreements exceed the function of employees' information and consultation assigned to the EWC, providing a transnational regulation of complex and sensitive issues, even if in a "soft" way[121].

In other words, the EWC can not negotiate on their own but can do it together with trade unions at transnational and National level. Its participation is nevertheless necessary in order to ensure the principle of subsidiarity and proximity to employees, being the EWC a (theoretically) direct expression of workers.

Same considerations can be done from employers' standpoint, where you can appreciate the presence of both single employers and employers' associations at European and national level.

It is obvious that the kind of company concerned in a transnational negotiation is a multinational firm with a Community dimension, using a definition dear to the Community legislature. The sites of transnational bargaining therefore identify with the undertakings to which Directive 94/45/EC on European Works refers but the effects may go even further in order to include other experiences like those of the International Framework Agreements[122].

As it is known, the doctrine has frequently addressed the issue of coordination of actors at EU level by proposing the creation of social dialogue sector committees[123] forums, as mentioned by the Commission Decision 98/500, integrated by some members of work councils of that same sector.

4. The implementation of TCA.

As known, academia argues that the scope of the TCA may extend beyond the company and its subsidiaries, involving other companies belonging to the same group, and the "chain" of suppliers and subcontractors. According to this approach, therefore, the transnational corporation would be responsible for checking the functioning of the whole production chain, no matter where branches and group's plants are located[124].

Parties can therefore provide for the applicability of the TCA in the agreement itself, extending it to group companies or industries, in addition to the signatory companies and branches. In this regard, the parties undertake to implement the agreement, the violation of which, as known, allows the other party to civil action for the protection of its rights.

However, if the parties do not envisage the extension of the scope of the agreement beyond the signatories, this rises the question of determining the procedures for the implementation of these agreements in order to ensure the effectiveness of TCA in the wider scope possible.

From this point of view, a relevant role is accorded to the social partners themselves, which may contractually implement the transnational agreements even if they were not involved in their conclusion and signing. The consensus of the individual employer is therefore crucial. If he, in fact, implements the transnational agreement, the provisions herein shall apply to all concerned employees.

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[121] In this perspective, see the Agreement governing the separation of the Ford Visteon organisation subscribed in Ford of Europe nel 2000, who has disciplined the transfer in different juridical entities (Newco) of the activities of Visteon (property of Ford of Europe) and of the employees at this moment employed.

[122] A. Lo Faro, *La contrattazione collettiva transnazionale: prove di ripresa del dialogo sociale in europa*, in "DLRI", n. 3/2007; p. 554.

[123] G. Arrigo, in G. Verrecchia (ed.), *European Work Council and Sectoral Social Dialogue: going along together to overcome the crisis*, Roma, 2011 p. 11 and ff..

[124] S. Scarponi, *Gli accordi-quadro internazionali ed europei stipulati con le imprese transnazionali: quale efficacia?*, cit., p. 3.

The perspective therefore moves from the transnational level to the more restricted local one, thus revealing the propensity of transnational agreements to their implementation also at local level.

The scenario could then be a random, fragmented implementation of transnational agreements, which would be left to the voluntarism of the social partners.

The possible modalities of transnational agreements' implementation may fall within those above shortly described: one is that the commitment to implementation is assumed by the signatories in the Agreement itself, through the specific indication of the subjects to which the agreement applies; one is left to the will of the (non signatories) parties, in case the agreement does not provide the detailed specification of the scope. This mode also applies in cases where the agreement, designed for a specific market sector, may be extended to employees of any other sector due to its provisions (i.e. equality promotion and prohibition of discrimination).

There is no doubt that the general implementation of transnational agreements would translate into a guarantee for the concerned workers. The transnational texts, in fact, are able to establish a sort of unitary jurisdiction, although multifaceted. For this purpose, the proposal could be that a Community law provided the obligation to implement the transnational agreements at all levels where they can fully express their effects[125]. This could be achieved through a general regulation providing for this obligation for all parties concerned. Another possibility may be a periodically enacted provision, which identifies single binding transnational agreements. It is, however, only a proposal, since the doctrinal debate on the point has not yet led to the adoption of any solution. Indeed, the solution may also be found in the collective bargaining system and in the distribution of skills depending on the levels concerned.

5. The question of the effectiveness of TCA.

First of all, we should draw a distinction between internal (mandatory) effectiveness of the agreements among the stipulating parties and its external (erga omnes) binding effectiveness.

There is then the typical problem rised by the multi-dimension order to which this provision belongs, that is whether the effectiveness of the agreements affects the supranational level, as an autonomous level, or the national level, to which all legislative acts of European law come to enforce.

As known, the group of academics constituted by the European Commission in 2008 proposed the instrument of the directive and the national collective agreement to solve the question of the effectiveness of TCA[126].

It is also possible that the implementation measures of TCA occurs through the employer. The above mentioned Report also says that it is possible that the employer of the industry or of the group to which the agreement relates shall carry out the transposition of the TCA. The incorporation of TCA in a decision of the employer ensures its effectiveness, thus overcoming every interpretation problem.

Part of the doctrine argues that the rule on the application methods of the agreements refers to the second area of effective legal enforcement, that is the national one[127]. Indeed, the effectiveness of agreements depends on the binding nature attributed to them by the parties. This can be measured by the distribution of the effects of the TCA over time.

As stated above, the formula used to guarantee the effectiveness seems to be that the undertaking by the holding company that enters into the agreement concerns the entire group. The commitment is made by using large formulas or by listing explicitly the firms belonging

[125] This solution would grant the first one of the crucial point underlined by S. Leonardi in the introduction of this volume.
[126] See the Report.
[127] See B. Caruso – A. Alaimo.

to the group[128]. While the second approach simplifies the task of identifying the involved parties, the first expression leaves more margins of opting out of the agreement. In fact, if it overcomes the legal obstacles in relation to the subsidiaries by the group or corporate ownership, from a social point of view does not accurately reflect the concentration of economic power. In fact, there could be problems of effectiveness of the TCA in other satellite companies that do not belong to the group.

The question of the effectiveness of the provisions contained in agreements rises when the TCA does not provide the subjects to which it should be applied. The problem is to ensure the effectiveness of the TCA for workers who can potentially benefit from their contents, in the absence of an instrument which ensures their effectiveness.

Furthermore, assuming that the agreement recognizes rights to workers, there is the problem of the feasibility of a judicial procedure to enforce the rights therein contained.

With regard to the Italian situation, we underline the value of the Legislative Decree n. 113 of 2012 on the implementation of Directive 2009/38/EC. The decree implements the recommendations of the Directive on the coordination of national representation of workers and EWC. From coordination could derive different arrangements of implementation of the TCA. At present, it is too early to test the hypothesis just mentioned given the recent transposition of the Directive.

[128] A. Lo Faro, *La contrattazione collettiva transnazionale: prove di ripresa del dialogo sociale in europa*, cit., p. 554.

Chapter 2

Establish a legal frame for transnational collective agreements in Europe: a difficult task

***Reingard Zimmer*[129]**

1. Introduction

Collective bargaining and collective bargaining law have always been responsibility of nation states, owing to the fact that there are tremendous differences in the systems of industrial relations. An explicit legal framework to conclude transnational collective agreements (TCAs) exists neither on a global level, nor in the European Union. In fact, legislative acts of the EU are explicitly blocked by art. 153.5 TFEU for pay, the right of association, the right to strike and to impose lock outs.

As known, the internationalization does not stop at national borders, important management decisions have long not been made in the country effected, but in the corporate headquarter which might be located on another continent[130]. Thereupon. first agreements between global unions and transnational enterprises/groups have already been concluded in the early 1990's, in the meantime there are numerous agreements with global scope. TCAs consistently are concluded on enterprise or group level[131], whereas at national level in many countries (regional) sectorial collective agreements are prevalent. Also in the European Union, in addition to the constituent agreements of European works councils (EWC) and agreements concluded under the social dialogue[132], both provided in the laws of the EU, Europe-wide agreements on enterprise level have been concluded without the existence of an explicit legal frame. Just recently the cases Viking[133] and Laval[134] clarified,[135] that also in national law on collective bargaining transnational questions are more and more important. Furthermore, a social Europe implies the transnational cooperation of trade unions. Trade unions started with the coordination of wages policy in some border regions years ago,[136] whereupon there are strong limits, taking into consideration the extreme differences in wages in the EU.

The European Commission takes quite some time considering to create a legal frame for optional transnational collective agreements on enterprise level in Europe and appointed 2011 (a new) group of experts, who elaborated a concrete proposal[137]. This contribution gives a

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[130] See already Fröbel, Heinrichs, Kreye, *Die neue internationale Arbeitsteilung*, 1979

[131] In the following the terminology "enterprise" is used, even if the scope of a number of TCAs covers the whole group.

[132] These agreements have a clearly defined legal basis and therefore are not part of this work.

[133] European Court of Justice of 11 December 2007 (C-438/05, Viking), ECR I-10779-10840.

[134] European Court of Justice of 18 December 2007 (C-341/05, Laval), ECR I-11767-118904.

[135] Concerning the two decisions see: Zimmer, *Labour Market Politics through Jurisprudence. The influence of the judgements of the European Court of Justice (Viking, Laval, Rüffert, Luxembourg) on labour market policies*, in GPS 1/2011, p. 211 ff.

[136] Schroeder and Weinert, in Schroeder and Weßels (ed.), *Die Gewerkschaften in Politik und Gesellschaft*, p. 565 ff.

[137] Rodriguez er al., *Study on the characteristics and legal effects of agreements between companies and workers' representatives.* Report for the European Commission, 2012. The research group constists of: Ricardo

description of the appearance of transnational collective agreements on enterprise level and explains perspectives of a legal frame in the EU, partly relying upon the report of the expert group, in which the author participated.

2. TCAs in Europe: definition and appearance

Collective agreements can be characterized as transnational if they are concluded between workers` representatives and transnational companies and the scope includes several countries. The European Commission has recorded 215 of such agreements in its database[138]. This includes not only agreements of which the scope is limited to Europe, but also agreements with a global or at least a scope beyond Europe. Some of these texts are collective agreements in the form of contractual arrangements, others rather have the character of joint statements or declarations.

The agreements were either concluded between European or global union federations, coalitions of national trade union at industry level or EWC and representatives of transnational companies. In most cases, the agreements are signed not only by the responsible European Union Federation, but also by the national trade union of the country in which the company operates, often likewise by the EWC.[139] European workers councils are often involved in the initiation and in the procedure of negotiation, even if they finally do not sign the agreement, as shown by various studies.[140] Waddington indicated already 2006, that about a quarter of EWC surveyed in his study, had concluded transnational agreements.[141]

TCAs are a European phenomenon that evolved from the European industrial relations, even if in the meantime there are several agreements with companies headquartered outside of Europe.[142]

European collective agreements cover a wide range of topics. A research from 2008 for the European Foundation identified restructuring as the by far most common theme for european TCAs. Other topics include social dialogue, occupational health and safety, HRM and social management, data protection, social standards, financial participation, business relation with sub-contractors, equal opportunities, training and CSR[143].

A large part of the agreements thus does not move into the "soft issues", but includes areas of classical collective bargaining law, as restructuring agreements usually contain determined provisions to decrease the compensation or on how many staff will be reduced in each production site.

In some cases, for example at Opel (General Motors Europe), the strategy of “sharing the pain” was developed by the EWC (in cooperation with the European Metal Workers Federation, EMF), whereby cuts will be distributed equally to all countries.

3. Legal frame for transnational collective agreements in Europe

Although now many TCAs on company level have been concluded, neither at global level, nor in the European Union an explicit legal framework exists. Whereas the right to collective

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Rodríguez (coordinator), Kerstin Ahlberg, Tomas Davulis, Lionel Fulton, Tamás Gyulavári, Patrick Humblet, Teun Jaspers, Jose María Miranda, Franz Marhold, Fernando Valdés and Reingard Zimmer.

[138] The list of the Commission can be found under: http://ec.europa.eu/social/main.jsp?catId=978&langId=en (from July 2011, download 20.04.12).

[139] Some European trade union federations (like the European Metalworkers Federation) have the policy, that european agreements are exclusively signed by them.

[140] Rüb, Platzer, Müller, *Transnationale Unternehmensvereinbarungen*, p. 19; Mählmeyer, *Vom Informations- und Konsultationsgremium zum Verhandlungspartner*, 2011, esp. p. 111.

[141] Waddington, *Was leisten Europäische Betriebsräte?*, in WSI-Mitteilungen 10/2006, p. 560 (565).

[142] Telljohann, da Costa, Müller, Rehfeld, Zimmer, *European and international framework agreements: Practical experiences and strategic approaches*, 2009, p. 22.

[143] Idem; p. 28.

bargaining is guaranteed not only in Art. 28 European Charter of Fundamental Rights, but in all international conventions[144]. The current agreements therefore move in a legal grey area, legal quality and legal effects are highly controversial[145].

3.1. Current agreements

Only few transnational or European collective agreements on company level contain provisions for the dispute, there are hardly no clauses to choice of law or dispute settlement mechanisms. Some texts are rather a common declaration while others have contractual value and partially normalize even subjective rights. This can be either rights of a party, for example the right of the workers` side on an annual global meeting of which the employer has to bear the costs, or if further participation rights are normalized, on top of the legally guaranteed rights. Access rights of the respective trade union fall into this category as well.

However, there are also agreements in which individual rights of third parties were normalized, for example in the form of a right of employees to participate in smoking cessation courses[146] or if the coverage of costs for the employer-initiated training is promised[147]. So far no claims on titles from TCAs have been filed in Court.

3.2. Establishment of a legal frame by the European Union

For some time the European Commission has considered to establish a legal framework for Europe-wide transnational collective agreements. In 2006 a first group of experts under the direction of Eduardo Ales (Ales-group) was already charged for a report on a possible legal frame and various questions were considered in further research projects. After the results of the research were discussed extensively in subsequent years with the social partners,[148] the European Commission appointed another group of experts coordinated by Ricardo Rodriguez (in which the author participated) in 2011. This group elaborated concrete proposals for a legal framework.[149]

It certainly highly depends on the reaction of the social partners, whether the Commission will really act. Trade unions initially were rather reluctant to the idea of a legal frame for transnational collective agreements on company level. Though gradually tentative approval was becoming apparent,[150] ETUC published in June a statement on European company framework agreements, in which they speak out for more time since a legal framework for TCAs is being created by the Commission. ETUC rather wants "to frame transnational

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[144] Art. 4, ILO Convetion 98; Art. 6 ESC as well as Art. 11 Abs. 1 ECHR, which also includes the right to collective bargaining (since the decision of the European Court of HR on "Demir & Baykara" from 12.11.08, Nr. 34503/97, AuR 2009, 269 ff.).

[145] See Zimmer, *Soziale Mindeststandards und ihre Durchsetzungsmechanismen*, p. 267; Sobczak, *Legal dimensions of international framework agreements in the field of corporate social responsibility,* p. 115; Thüsing, *International Framework Agreements: Rechtliche Grenzen und praktischer Nutzen*, RdA 2010, p. 78, each with further references.

[146] Like this agreed in the global framework agreement on fundamental labour rights in the Danske Bank Group of 9.9.2008 between Danske Bank and the global union federation UNI, trade unions from Ireland (IBOA), Norway (Finansforbundet), Sweden (Finansförbundet), Finland (SUORA) and Denmark (DFL a. Finansforbundet).

[147] So agreed in the IFA between GeoPost and UNI-Europe plus severale national trade unions from 9.5.2005.

[148] See the material on the website of the European Commission, online: http://ec.europa.eu/social/main.jsp?catId= 707&langId=en&intPageId=214 (02.05.12).

[149] R. Rodríguez et. al, *Study on the characteristics and legal effects of agreements between companies and workers' representatives.* Report for the European Commission, 2012.

[150] See Cilento in the current study and the ETUC protocol of the 6th meeting of the expert group 11.10.2011, Brüssel online: http://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPageId=214; as well as Schömann, ETUI Project on Transnational Collective Bargaining, 2010.

negotiations within a single trade union strategy" which has to be further elaborated.[151] At any case, the mandate for negotiating and signing collective agreements must be "the sole responsibility of the European trade union federation".[152] Anyway, so far non of the European Union Federations at branch level has a statutory mandate of its member organizations to conclude European collective agreements (appropriate authorizations cannot be found in any statute). In any case BusinessEurope has militated decidedly against a legal framework for transnational collective agreements from the start.[153]

4. Legislative competence of the European Union

According to the principle of conferral of powers (Art. 5.2 TEU, Art. 7 TFEU) the EU can only act within the frame assigned by the treaties. In the area of shared competence in the field of internal market, social policy and economic cohesion (Art. 4.2 TFEU) the Union may take initiatives to ensure coordination of social policies of the member states (Art. 5.3 TFEU) and supplement their activities according to Art. 153.1 TFEU. This authorization also applies to the representation and collective defense of the interests of employers and employees including codetermination, whereupon according to the block of Art. 153.5 TFEU the EU has no legislative competence for pay, the right of association, the right to strike and to impose lock outs.

It is therefore moot, whether the European Union in general has the authority to establish a legal framework for TCAs at European level.[154]

Some of the European-wide collective agreements contain questions of wages and therefore touch a topic from the field blocked by Art. 153.5 TFEU, e.g. the agreements on restructuring or financial participation. It is questionable however, whether Art. 153.5 TFEU would really be touched, if the EU created a legal frame for agreements of the social partners which does not influence the different systems – it is *the social partners themselves* who would conclude autonomous and voluntary agreements. A legal frame which does not violate the different systems of collective bargaining and which does not contain provisions on wages itself, should not be blocked by Art. 153.5 TFEU.

The first research group from 2008 used Art. 94 EG (now Art. 115 TFEU) as a basis for authorization.[155] This norm enables with unanimous decision to adopt "directives for the approximation of such laws, regulations or administrative provisions of the Member States as *directly affect* the establishment or functioning of the internal market". Europe-wide collective agreements certainly effect economic affairs in the EU, therefore it seems not unreasonable to rely on this norm. Though it is doubtful, whether the criterion of immediacy ("directly affect") can be affirmed, especially because the provision was originally created to prevent distortions of competition. Beyond that, it is questionable, whether a general basis of authorization can be used for areas of the more specific Art. 153.1 TFEU.[156]

Therefore legislative acts of the EU should rather be based on a different basis for authorization. As such the provision on social dialogue in Art. 155.2 (1rst alt.) TFEU in conjunction with the new Art. 152 TFEU, supported by Art 28 EU charter. Art. 152 TFEU,

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[151] ETUC, *More and Better European Company Framework Agreements: Enhancing Trade Unions in Transnational Negotiations with Transnational Companies* (Discussion Note), p. 4 ff.
[152] ETUC, l.c, p. 8.
[153] See statement of Hornung-Drauss (BusinessEurope) to the current study in the protocol of the 6th meeting of the expert group 11.10.2011 in Brüssel (p. 7).
[154] Critical Weiss, *Transnationale Kollektivvertragsstrukturen in der EG. Informalität oder Verrechtlichung*, FS Birk, 2008, p. 957 ff.
[155] E. Ales, S Engblom., S. Sciarra, Valdes Del-Re, *Transnational collective bargaining: past, present and future*, European Commission, 2006 (Ales Report); p. 36.
[156] Schiek, *Transnational Collective Labour Agreements in Europe and at European Level – Further Readings of Article 139 EC,* S. 83 (93).

introduced by the treaty of Lisbon, can be considered for it codifies the obligation of the EU to acknowledge the role of the social partners and their autonomy at all levels, whereupon the difference of the national systems has to be respected.[157] The wording however, gives no assistance in interpreting how far the competence of the social partners can be defined. Taking into consideration that in several member states agreements between management and labour are rather considered as autonomous affairs, then as preparation of legislation (especially in the Scandinavian countries), one could presume that the social partners cannot only propose legislation communally but can also conclude agreements which they implement autonomously.[158] The authorization to create a legal frame for transnational collective agreements in the EU might not be derived from Art. 152 TFEU solely.[159] As Art. 152 TFEU refers to the social dialogue of Art. 154, 155 TFEU, it has to be interpreted in conjunction with these norms.[160] And the wording of Art. 155 TFEU, which provides for the right of the social partners (SP) to conclude a SP-agreement (and ask the Commission to make it binding), supports the assumption that also agreements which are implemented autonomously are permissible. The norm illustrates that the EU generally allows the SP to conclude agreements. The perception of *agreement* in Art. 155.1 TFEU is also wide enough to generally include European collective agreements.[161]

However, whether traditional collective agreements (CAs) can be based on Article 155 TFEU is disputed. According to one view, these CAs are not comprised, since Article 155.2 TFEU requires that the agreements are implemented either by acts of the EU or by acts of the member states.[162] Sectoral agreements indeed point stronger towards the direction of genuine European collective agreements as they do not replace European legislation. The argument of the opposing position nevertheless has to be agreed with, that the limitations set forth in Art. 153.5 TFEU are not applied to the agreements implemented "in accordance with the procedures and practices specific to management and labour and the Member States" of Art. 155.2 1rst Alt. TFEU, which indicates the possibility to conclude classical collective agreements.[163]

This interpretation is supported by constitutional aspects, as Art. 28 EU charter provides "the right to negotiate and conclude collective agreements at the appropriate levels" without limiting these rights to the national level.

Furthermore, since the Treaty of Lisbon the EU has the same legal value as the Treaties (Art. 6.1 TEU). Also Art. 4 ILO convention 98 as well as Art. 6 ESC (European Social Charter) and Art. 11 CFREU (Charter of Fundamental Rights) comprise the right of trade unions to bargain collectively, whereupon the latter contains the right of collective bargaining merely since the decision of the ECHR on Demir & Baykara.[164]

Summing up, it can be asserted that a legislative initiative of the EU to create a legal frame for European collective agreements therefore would be admissible, provided that the directive would respect the different systems of industrial relations and legal traditions.

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[157] See Streinz (Eichenhofer), Art. 152 AEUV, paragr. 5.
[158] Schiek, *Economic and Social Integration in Europe*, 2012, p. 109.
[159] Some academics also characterize the norm as merely programmatic, see: Callies and Ruffert, *EUV/AEUV-Kommentar* (Krebber), Art. 152, paragr. 1. Yet, such a characterization is relatavised when the same author expresses, the norm would demonstrate a corporatism which could not be endorsed („Ausdruck eines nicht zu billigenden Korporatismus", ibid. paragr. 4.
[160] Callies and Ruffert (Krebber), Art. 152 AEUV, paragr. 3; Streinz (Eichenhofer), Art. 155 AEUV, paragr. 1.
[161] Idem, Art. 155 AEUV, paragr. 3; Birk, EuZW 1997, 453 (454).
[162] Streinz (Eichenhofer), Art. 155 AEUV, paragr. 2. Similar Weiss, l.c, p. 964.
[163] Schiek, *Transnational Collective Labour Agreements in Europe and at European Level – Further readings of Article 139 EC*, p. 83 (95).
164 ECHR, 12.11.2008 (no. 34503/97), AuR 2009, p. 269 ff.

5. Problems in establishing a legal framework

Due to the different composition of industrial relations in the 27 EU member states, transnational collective bargaining can only work complementary to collective bargaining in each of the member states. In particular, transnational CB may not interfere in the different systems.[165] To create a legal framework under this premise is a great challenge. The most problematic point is that collective agreements do not have the same legal value in all member states. CB agreements do not have normative value in all countries, which means that they are valid directly and imperatively for employees. In some cases, the binding legal effect is produced by incorporating the content of the CB agreement in the individual work contract, in Great Britain they solely are considered as „gentlemen's agreements".

Moreover, some member states do have more than one type of company agreement.[166] On company level one can distinguish between necessary and enforceable collective agreements, voluntary or co-determined works agreements, partially co-determined and voluntary ones, negotiated by trade unions or workers councils, as it is the case in the two-tier german and austrian system.[167]

The list of relevant differences in the industrial relations system could be continued.

6. Options for a legislative framework for transnational collective agreements on company level in Europe

Other studies[168] elaborated three options for the TCAs legal framework which – we guess – sum up in an exaustive ways the terms of the dilema:

1rst option: uniform legal effect in all member states

The most far-reaching option would certainly be, if the European legal frame gave uniform legal effect to European collective agreements throughout the member states. This possibility would most effectively guarantee a consistent impact of transnational collective company agreements (TCAs) in the different member states. Where upon the disadvantage of this solution is evident, given the large differences of the different systems in Europe. In some countries collective agreements with different legal effect would exist, depending on the concluded level: European agreements without normative value and "normal" collective agreements (with normative value). This would be a strong intervention into the structure of the collective bargaining systems by the European legal requirements.[169] This alternative would therefore rather not be considered, especially when taking into account the block of Art. 153.5 TFEU.

2nd option: the legal effect varies according to the will of the parties

Another possibility is that the legal effect of TCAs varies according to the will of the parties. The European Directive would predetermine only a legal framework with procedural rules, which would have to be inserted into the national law. Legal effect, scope etc. would depend on the respective national regulations[170]. The advantage of such a solution would be the great flexibility of the parties of the collective agreement.

Therein lies on the other side the disadvantage, such flexible solutions run the risk of legal uncertainty. Moreover the possibility to formulate flexible to such an extent scope, legal

[165] So already the Ales Report, p. 33.
[166] This is the case in Austria, Belgium, Denmark, Estonia, Finland, France, Germany, Greece, Lithuania, Luxemburg, Poland, Portugal, Romania and Spain.
[167] R. Rodríguez et al., *op. cit.*; p. 3.
[168] Idem
[169] Idem, p. 11 f.
[170] Idem, p. 13 f.

effect and content of European collective agreements, could put pressure on existing collective agreements of the respective systems. In addition, it is to question whether such a flexibility of European collective agreements is really necessary. Ultimately the parties voluntarily decide to conclude the collective agreement, the door is left open to choose a different form of action, e.g. the form of a joint statement, if they want to avoid certain legal effect.

3rd option: the same legal effect as company agreements concluded at national level
A third possibility is that TCAs concluded at European level automatically do have the same legal effects in member states as company agreements concluded at national level. European collective agreements would consequently differ from internal (national) collective agreements only by negotiators and content. The legal technique which comes into question is partly described as „adhesion", which means that the parties finally have to implement an agreement at national level, which they did not negotiate and sign themselves. It therefore would be necessary, that member organizations mandate the European trade union federations at branch level to negotiate on behalf of them.

This solution would take into consideration and respect the differences in the industrial relations and legal systems of the member states, which seems to be preferable. Though disadvantages might result concerning enforceability, if for example national actors are not in favour of the content of a European collective agreement and therefore boycott the implementation at national level.[171]

1. Conclusion

The creation of a legal framework for transnational collective agreements (at company level) in the 27 member states is a highly complex task, due to the different industrial relations and legal traditions. It will certainly take some time until the European Commission will act, not just because the social partners currently vote against legally binding solutions for European collective agreements. On the other hand, more and more companies conclude transnational agreements on various topics with European industry trade unions or with workplace actors like EWC. The evolving practice therefore creates accomplished facts while jurisprudence is following rather slowly. Not only the internationalization of economy, but also the European single market yet require urgent activities of the parties to collective agreements across national borders. For trade union this means nothing less than to reflect on the historical roots and to give greater priority to European or international solidarity.

[171] Idem; p. 14

Chapter 3

Transnational Company Agreements and Sectoral Social Dialogue: parallel lines, no convergence?

Anna Alaimo[*]

1. Premise

The theme of transnational collective negotiation forms a crossroads with studies and reflections on a wider scale, those of internationalization (and Europeanisation) of industrial relations[172]; a field in which a variety of collective actors, transnational collective interests, scope and topics of negotiation (different from those typical of national collective agreements) interact. Like other developments, even transnational collective negotiation produces changes affecting labour law, generating new ideas in this matter which rotate around an open process of transnational juridification[173]. It has been said that in this context new patterns of labour law in times of economic crisis are also created [174].

The study of transnational collective negotiation must, in any case, be measured against the complexities and the multifaceted character of European social dialogue; therefore it seems opportune to define *nomina* and general categories, in order to clarify the rapport between the macro-category of European social dialogue and that of transnational collective negotiation[175].

In giving a brief summary of this taxonomy of social dialogue, the European legal and industrial relations system will be taken as point of reference.

In fact there can be two types of transnational collective negotiation - sectoral or company level [176] - and *Transnational Framework Agreements* (*TFAs*) negotiated at company level (*Transnational Company Agreements: TCAs*) can be *European Framework Agreements* (*EFAs*) *or International Framework Agreements* (*IFAs*). Companies or groups which make up this arena of negotiation can, as a matter of fact, have different structures, given that the sites of the individual company or the companies which form the group can be deployed either solely within the EU or both in the EU and in non EU countries.

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[172] I. daCosta, V. Pulignano, U. Rehfeldt, V. Telljohann, *Transnational negotiations and the Europeanization of industrial relations: Potential and obstacles*, *EJIR*, June 2012, vol. 18 (3), p.123; P. Beneyto., F. Rocha, *Trade unions and Europeanisation of the industrial relations: challenges and perspectives*, in this volume; S. Leonardi S., *Executive summary. Transnational company agreements: a stepping stone towards a real internationalization of industrial relations?,* in this volume; V. Telljohann, I. da Costa I., T. Müller, U. Rehfeldt, R. Zimmer, *European and International framework agreements: new tools of transnational industrial relations*, *Tranfer*, 2009, vol. 15 (3-4), p. 505; P. Marginson, *The transnational dimension to collective bargaining in a European context*, Paper to an ETUI/GURN/ILO Workshop on Collective Bargaining in Global Context, Brussels, 2008.

[173] S. Sciarra, *Collective Exit Strategies: New Ideas in Transnational Labour Law*, Jean Monnet Working Paper 04/10.

[174] S. Sciarra, *Patterns of European labour law in the crisis*, Sociedad Internacional de Derecho del Trabajo y de la Seguridad Social, Sociedad Internacional de Derecho del Trabajo y de la Seguridad Social - Sevilla, Espana, pp. 1-10, 21-23 september 2011.

[175] See B. Caruso B., A. Alaimo, *Il contratto collettivo nell'ordinamento dell'UE,* WP "CSDLE", n. 87/2011.

[176] E. Ales, *La contrattazione collettiva transnazionale tra passato, presente e futuro*, *GDLRI*, 2007, p. 541; E. Léonard, A. Sobczak, *Accords transnationaux d'entreprise et dialogue social sectoriel européen: quelles interactions? Travail et Emploi*, *Janvier-mars* 2010, p. 43; E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining: Past, Present and Future, Final Report*. Brussels: European Commission, DG Employment, Social Affairs and Equal Opportunities, 2006.

The first part of this article will aim to clarify the categories of general reference, aiming to reduce the different notions of European social dialogue (§ 2). Then, there will be some data relevant to the two forms of transnational negotiation (sectoral or company level), analysing their similarities and differences and providing some points for reflection on their reciprocal interaction (§ 3).

Finally I will examine the issue of potential legal intervention by the EU on transnational collective negotiation – and therefore of a possible "legal framework" and the possible alternative regulatory solutions on the matter whether they be proposed or potential – *hard, semi-hard and soft solutions* (§§ 4-5).

2. Transnational collective negotiation and European social dialogue.

Let us begin with the general categories. The area of transnational collective negotiation pertains to social dialogue.In particular, both forms of transnational negotiation (sectoral or company level) are, almost always, a form of *spontaneous* and *autonomous* bipartite social dialogue.As was clarified elsewhere [177], the institutions of the Union (the Commission and/or the Council) can "participate" in various ways in the European social dialogue or vice-versa the dialogue can take place *spontaneously* and/or produce texts which are implemented *via the autonomous route* [178].

"Participated" dialogue is ascribable to precise norms of primary EU law: articles 152, § 2, 154 and 155 of the Treaty on the Functioning of the European Union (TFEU).

The participation of the European institutions in the dialogue can consist of a *direct* presence during the negotiations: if we think of tripartite social dialogue, for example, which, thanks to the Treaty of Lisbon, has a seat in the Tripartite Social Summit for Growth and Employment (art. 152, § 2, TFEU).

However, it can also take place with indirect participation: in those cases dialogue remains bilateral but is led by initial consultation by the Commission and leads to agreements implemented by Council decision (i.e., in practice, directive).

This is the case of typical or institutional European collective bargaining [179], bound to the so called "integrated procedure" which is regulated by articles 154 and 155, § 2, TFEU [180], from which, and to use Stijn Smismans terminology "*statutory agreements*" derive. These are different and in contrast with "*non-statutory agreements*" [181].

Spontaneous dialogue instead, is spontaneously undertaken by the parties; this takes place totally independently of the initial institutional input (consultation by the Commission in particular) although that does not exclude the possibility of concluding some true and proper agreements implemented by Council directives further down the line.

Finally, *autonomous* dialogue is when the social partners autonomously implement the texts that result from that dialogue themselves, irrespective of the decision by the Council (see

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[177] B. Caruso, A. Alaimo, *Il contratto collettivo nell'ordinamento dell'UE*, cit.

[178] See B. Keller, *Social Dialogue – The Specific Case of the European Union*, *IJCLLIR*, vol. 24 (2), 2008, p. 201.

[179] According to the classification of E. Ales, G. Verrecchia, *Transnational: the emerging multifaced dimension of industrial relations*, in this volume, this type of negotiation refers to the «supranational and (institutionalised) dimension of collective relations».

[180] See C. Welz, *The European Social Dialogue under Articles* 138 *and* 139 *of the EC Treaty: Actors, Processes, Outcomes.* Alphen aan den Rijn: Kluwer, 2008, pp. 288 ss.

[181] S. Smismans, *The European Social Dialogue in the Shadow of Hierarchy*, *Jour. Publ. Pol.*, 2008, 28 (1), pp. 162-163. Using the acronyms, the A. represent the statutory agreements in COCOCAs (*Commission-initiated and Council-implemented Collective Agreements*) and SICOCAs (*Self-Initiated but Council Implemented Collective Agreements*) and the *non-statutory* in COSICAs (*Commission initiated but Self-Implemented Collective Agreements*) and SISICAs (*Self-Initiated and Self Implemented Collective Agreements*).

Art. 155, § 2, TFEU). The agreements which derive from it are self- implemented by the social parties "in accordance with the procedures and practices specific to management and labour and the Member States". The paradigm of autonomy can be considered inherent therefore to when the texts are implemented rather than to when the negotiations begin.

Outside of the "integrated procedure" which leads to the "typical" or institutionalized European collective agreement, and therefore in the context of the so-called spontaneous/autonomous social dialogue, there are numerous other combinations.

The social parties can abandon the merely reactive approach of the Commission in favour of a more pro-active approach [182]. Dialogue can therefore be *voluntarily* undertaken by the parties leading to agreements which are then implemented through the Council's decision (Self-initiated but Council implemented Collective Agreements: SICOCAs).

Alternatively, dialogue can be inspired by consultations by the Commission and lead to agreements which, vice-versa, are then self-implemented (Commission initiated but Self-Implemented Collective Agreements: COSICAs) [183]. This is the case of some important, and well known, cross-industry autonomous agreements signed since 2002 on a variety of topics: agreement on telework (2002); agreement on work-related stress (2004); agreement on harassment and violence at work (2007); agreement on inclusive labour markets (2010). As a matter of fact, in all these cases the negotiations took place as a result of the Commission's input and the dialogue is «guided *and* autonomous» [184].

Transnational negotiation, either corporate level or sectoral level almost always brings together the two characteristics of voluntariness and autonomy. The great majority of negotiations opened at the sectoral and corporate level, are as a matter of fact, spontaneously undertaken by the parties and the adopted texts are autonomously implemented by social partners in accordance with mechanisms and procedures which will be examined further on (§ 3).

Only in rare cases, in fact, are the outcomes of the sectoral social dialogue implemented by Council directive [185], therefore the experience of "*statutory agreements*" in the sectoral context has been very limited overall.

On the contrary, the spontaneous start of negotiations, the informality of the texts and the autonomous implementation are certainly typical characteristics of TCAs. Transnational company negotiation is therefore the most typical example of voluntary and autonomous dialogue.

3. Differences, similarities and interaction between transnational sectoral negotiations and transnational company negotiations

[182] M. Peruzzi, *L'autonomia nel dialogo sociale europeo*, Il Mulino, 2011, p. 211.
[183] S. Smismans, *The European Social Dialogue in the Shadow of Hierarchy*, cit.
[184] S. Clauwert, *2011: 20 years of European interprofessional social dialogue: achievements and prospects*, *Tranfer*, 2011, vol. 17 (2), p. 174.
[185] Compare the sectoral agreements: on working time of seafarers (implemented with Directive 1999/63/EC); on the Organisation of Working Time of Mobile Workers in Civil Aviation (implemented with Directive 2000/79/EC); on certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services in the railway sector (implemented with Directive 2005/47/EC); on the Maritime Labour Convention, 2006 (implemented with Directive 2009/13/EC); on prevention from sharps injuries in the hospital and healthcare sector concluded by HOSPEEM and EPSU (implemented with Directive 2010/32/EU): see *Commission Staff Working Document on the functioning and potential of European sectoral social dialogue*, SEC (2010) 964 final, Brussels, 22.7.2010 (Table 3).

Let us come to the comparison between the two types of transnational collective negotiation (company and sectoral level).

The first two differences concerns the scope of the transnational texts and the negotiating agents.

As we have seen the texts which come out of transnational company negotiations can have a European or "ultra-European" scope, it is therefore clear that TCAs can have a "worldwide or European reach", through the use of *IFAs* or *EFAs*.

Sectoral Social Dialogue (SSD) instead produces texts whose scope is limited to the EU, since it is tied to the activities of the Sectoral Social Dialogue Committees (SSD Committees), constituted and defined by the 1998 Commission decision [186]; these Committees represent the institutional "arena" of this specific form of transnational negotiation[187].

Whilst for SSD there is a 1998 Commission decision, which is *soft law* and which concern the negotiating agents, transnational collective negotiation at company level takes place without the benefit of European institution rules. It is therefore, characterised by a greater "legal-institutional" weakness compared to sectoral negotiations which avail themselves of a more institutionalised context.

In practice, the principle actors in transnational negotiations in Community-scale undertakings and Community-scale groups of undertakings (companies and groups who are the objectives of the Directives 94/45/EC and 2009/38/EC) are the European Works Council (EWCs). Up to today, the EWCs have been the sole signatories of the majority of EFAs (77% of the cases). Far more inferior, as a matter of fact, is the percentage of EFAs which have "a joint signature" and that is also signed by European or International workers' organisations (23%).

In July 2008 the Commission published two documents regarding *TCAs*, *a Mapping of transnational texts negotiated at corporate level* [188] and a *Staff Working Document on "The role of transnational company agreements in the context of increasing international integration"* [189]. The Commission's services had recorded 147 transnational texts classifying them into three categories: *European* (76) *Global* (59); *Mixed* (12) [190]. From the first it emerges that the EWCs have signed 71 out of a total 88 recorded European and mixed texts.

The reason that the EWCs sign the majority of these texts is certainly tied to the fact that these bodies hold rights of information and consultation on "transnational issues". As a matter of fact it is well known that the new Directive 09/38/EC has conferred explicit transnational competence on the EWCs (art. 1, § 3 Dir. 09/38/EC). Although such competence is legally

[186] Commission Decision of 20 May 1998, 98/500/EC.

[187] As can be read in the *Commission Staff Working Document on the functioning and potential of European sectoral social dialogue* (SEC(2010) 964 final), «these committees are an arena for trust-building, information sharing, discussion, consultation, *negotiation* and joint actions».

[188] *Mapping of transnational texts negotiated at corporate level*, EMPL F2 EP/bp 2008 (D) 14511 of 2nd July 2008.

[189] SEC (2008) 2155 of 2nd July 2008, *Commission Staff Working Document The Role of Transnational Company Agreements in the Context of Increasing International Integration*.

[190] 76 texts are limited in scope or focus on the European area; they are called "European"; 59 texts are focused on aspect for fundamental rights primarily outside Europe; they are called "global"; 12 texts are of global scope but also address specific European issues and/or very strongly involve the European Works Council; they are called "mixed". See also É. Bèthoux, *Transnational Agreements and Texts negotiated or Adopted at Company Level: European Developments and Perspectives. The case of agreements and texts on anticipating and managing change*, European Commission – DG Employment, Social Affairs and Equal Opportunities Invitation to tender N°. VT/2008/022, 2008, p. 11.

given only as regards rights of information and consultation, EWCs have ended up transferring that competence to the negotiating table [191].

Another difference is of a typically empirical kind and keeps to the preferences expressed by the negotiating agents (union federations, companies, EWCs) with regards to one or other form of negotiation: whilst employers and their federations favour corporate level negotiation, workers' federations give preference to the sectoral level, believing it to be, overall, more controllable and manageable.

What comes out of research by the ILO *International Training Centre* [192], is that the companies who negotiate TCAs often take on a "proactive" approach, part of a strategy of anticipation or management of risk. In other case the approach is "reactive", that is triggered by an immediate specific situation or circumstance (e.g. a strike in a far-away location, or restructuring)[193]. In the majority of cases the negotiation of TCAs is however, tied to a long term industrial relations corporate strategy, to a true "company industrial relations architecture" [194]. Companies are interested in signing these texts and as the unilateral codes of conduct from which they derive [195], they are used to create "consensus" and to demonstrate sensitivity towards social issues to the outside world.

For the European trade-unions on the other hand, the negotiation of TCAs often represents a problem, principally in Community-scale undertaking and Community-scale groups of undertakings in which the actual negotiation is prevalently "captured" by the EWCs. Trade-unions find themselves faced with the challenge of governing this competition, or at least, of building more intensive cooperation with them [196].

The fact that there is already a long standing experience of transnational negotiations in numerous companies, means that the European trade-unions find themselves faced with yet another challenge: to use the effective expression of Clauwaert and Shömann in a recent study on the social European dialogue and TCAs [197], they face governing a "patchwork of individual cases" .

Some European trade union federations have already tried to provide solutions to these challenges providing internal mandating procedures to negotiate and sign TCAs. These "autonomous" rules regard mainly negotiating agents and procedures.

The European Metalworkers' Federation (EMF) gives a telling example of such initiatives. In 2006 the EMF was as a matter of fact the first European federation to adopt an internal

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[191] A. Alaimo, *Il coinvolgimento dei lavoratori nell'impresa: informazione, consultazione e partecipazione*, *Trattato di Diritto privato dell'Unione Europe* (diretto da Ajani, Benacchio), vol. V, *Il lavoro subordinato,* Sciarra, Caruso (ed.), Giappichelli, 2009, pp. 663-669. Also A. Alaimo, *The New Directive on European Works Councils: Innovations and Omissions*, *Int. Journ. Comp. Lab. Law Ind. Rel*., 2010, vol. 26, p. 217.

[192] In the field of research, carried out with the support of BUSINNESSEUROPE, 5 daily workshops were held during 2010; the research resulted in the conclusive Report: International Training Centre, *Key issues for management to consider with regard to Transnational Company Agreements (TCAs). Lessons learned from a series of workshops with and for management representatives*, December 2010.

[193] International Training Centre, *Key issues for management to consider with regard to Transnational Company Agreements (TCAs)*, cit., p.9.

[194] *Ibidem*.

[195] I. Schömann, A. Sobczak, E. Voss, P. Wilke, *Codes of conduct and international framework agreements: New forms of governance at company level*, European Foundation for the Improvement of Living and Working Conditions, 2008; S.Sciarra, *Transnational and European Ways Forward for Collective Bargaining*, WP C.S.D.L.E. "Massimo D'Antona". *INT* – 73/2009.

[196] Not by chance the topic of the relationship between EWCs and European union federations has been emphasised by the ETUC in the consultation phase regarding the revision of Directive: 94/45/EC; the confederation hoped for a greater collaboration between unions and EWCs and better coordination of their activities (compare *ETUC strategy in view of the revision of the European Works Councils Directive*, viewable on: http://www.etuc.org.)

[197] S. Clauwaert, I. Shömann, *European social dialogue and Transnational Framework Agreements as a response to the crisis?*, *ETUI Policy Brief – European Social Policy*, 4/2011.

document for *Procedure for negotiations at multinational company level* [198]. An attempt was made this way, mainly to try and resolve the problem of the legitimacy and capacity in negotiating and to give the EWCs an ancillary role compared to that of the federation.

Other European federations have subsequently adopted similar documents (EMCEF, EPSU, FSE-THC, UNI-finance, UNI-graphical): in 2008 it was, for example, the turn of the *UNI-Europa Finance*[199] and in 2009 the turn of the *European Public Service Unions*[200].

The same has been done with some group agreements, which have created a framework of procedural rules on transnational negotiations. An interesting case and a fairly well-known one is that of the *European Aeronautic Defence and Space Company N.V.* (EADS) Group[201]. In 2010 an *Agreement relating to procedure for labour negotiations at European level* was signed, by the delegations of the national trade union federations (French, German, English and Spanish), which regulated the future negotiations within the Group and its divisions.

Even in this case, the agreement tackled and resolved the crucial issue of the identification of actors who have legitimacy in negotiation; it provided the constitution of a "*European Negotiating Group"* in which representatives of national unions, representatives of the European Metalworkers' Federation and only two Chairpersons of the EWC of EADS participate.

But let's return to the comparison between the two forms of transnational negotiations.

We have seen that visible differences exist with regards to the scope of the negotiated texts, the negotiating agents and - on the empirical plain – the different inclinations of companies and trade unions towards one or other form of negotiation. There are, nonetheless, some significant common traits in the two types.

They regard, in particular:

(a) the outcomes of the negotiations;

(b) the follow-up procedures;

(c) the topics of the negotiations.

(a) There is a classification by type for the outcomes of the SSD negotiations, by now well known and proposed in the Communication from the Commission "*Partnership for change in an enlarged Europe - Enhancing the contribution of European Social Dialogue*" August 2004 [202]. This classification was re-proposed by the successive *Commission's Staff Working Document on the functioning and potential of European sectoral social dialogue* of 2010.[203] The Commission suggested a typology to classify the outcomes of the SSD.

On the basis of such a classification, the outcomes of SSD can belong to one of the three following categories: 1. *agreements,* implemented by Council directive or by social partners; 2. *process-oriented texts* (*frameworks of action, guidelines, codes of conduct, policy orientations*), which, albeit not legally binding, must be followed up, and progress in implementing them must be regularly assessed; 3. *joint opinions and tools*, intended to influence European policies and to help share knowledge.

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[198] *Internal EMF Procedure for negotiations at multinational company level*, Luxembourg, 13-14 June 2006.

[199] *Statement on a UNI-Europa Finance Strategy on Transnational Collective Bargaining* Adopted by the UNI-Europa Finance Conference, Vienna/Austria, 7 November 2008.

[200] *Procedure for Negotiations at Multinational Company Level* Adopted at the EPSU Executive Committee, 9-10 November 2009, Brussels.

[201] See D. Comandè, *L'integrazione europea via contrattazione transnazionale: quo vadis?*, *RIDL*, 2012, III.

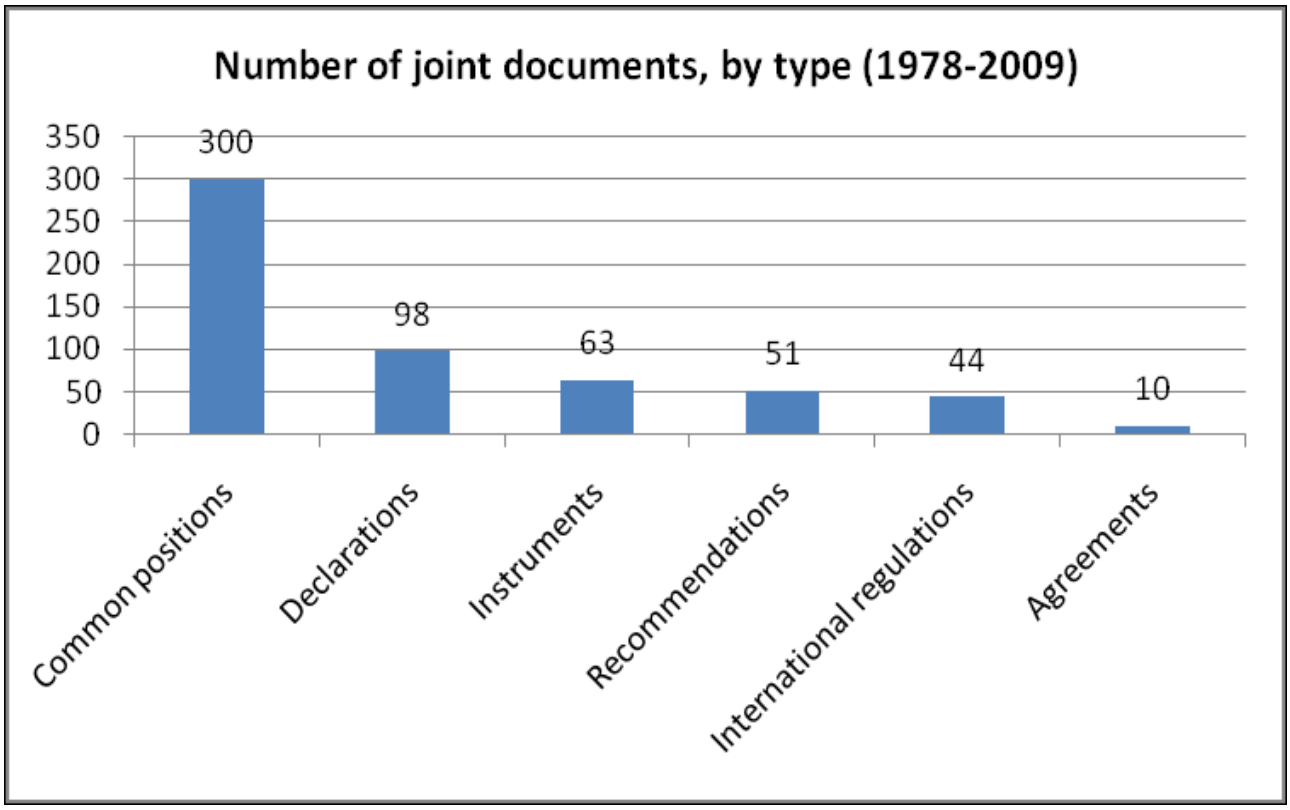
[202] COM (2004) 557 final, Brussels, 12.8.2004.

[203] SEC (2010) 964 final, Brussels, 22.7.2010. See also P. Pochet (with the contribution of A. Peeters), E. Léonard, E. Perin, *Dynamics of European sectoral social dialogue*, European Foundation for the Improvement of Living and Working Conditions, Dublin, 2009. The same classification can also be found in B. Bechter, B. Brandl, G. Meardi, *From national to sectoral industrial relations: Developments in sectoral industrial relations in the EU*, European Foundation for the Improvement of Living and Working Conditions, Dublin, 2011, p. 6.

In other research the terminology used is slightly different but the substance remains unchanged. For example in the ETUC-ESO report of 2011[204] the categories *agreements*, *international regulations*, *recommendations*, *instruments*, *declarations*, *common positions* are distinguished [205].

In any case, the most significant fact is represented by the scarce number of agreements and therefore the major critical element of the SSD regards the lack of legally binding outcomes [206].

As can be seen from the following table [207], the agreements are in reality less than 10 out of more than 550 texts.



Through similar analysis we come to similar conclusions regarding TCAs

In the research by the ILO *International Training Centre*, we read for example, that in the vast majority of cases, TCAs are not real and proper agreements, nor are they considered such by companies, who, in the main, consider them mere declarations of intent, not recognising their nature as legally binding outcomes.

[204] ETUC-ESO, *European Social Dialogue: State of Play and Prospects* (Coordinator: C. Degryse), January 2011.

[205] The Report by E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining*, cit., distinguishes: *agreements*, *recommendations*, *codes of conduct* (*charters*), *common positions*, *opinions*, *declarations*, *guidelines*.

[206] B. Keller, S. Weber, *Sectoral social dialogue at EU level: Problems and prospects of implementation*, *EJIR*, 2011, p. 227.

[207] Source: ETUC-European Social Observatory, *Final report - European Social Dialogue: State of Play and Prospects*, January 2011.

(b) Even the monitoring and follow-up procedures regarding the national implementation of texts are similar in the two fields (sectoral and corporate). Such procedures often imitate those of autonomous inter-professional agreements (in particular on telework, work-related stress, harassment and violence at work). These almost always provide the stipulation of a three year term for implementing the agreement, the involvement of the Social Dialogue Committee in the process of follow-up, the drafting of periodical national evaluation reports by the national social parties and of a final evaluation on behalf of the Commission [208]

Pochet, Léonard and Perin [209] proposed an interesting classification of the follow-up procedures regarding the outcomes of the SSC, outlining six types of follow-up procedures: 1. *written survey among members*; 2. *annual or periodic reports*; 3. *plenary meetings* (much more informal approach); 4. *presentation of good practices*; 5. *conferences and websites*; 6. *new texts and initiatives*.

Some solutions, for example the drafting of annual reports or periodicals, are built on models and systems of implementation of cross-industry autonomous agreements.

Even TCAs provide for procedures for monitoring and follow-up which all-in-all are similar: annual review or meeting on the implementation of the text and/or setting-up of a monitoring committee [210]. In the case of the EFAs such committees, often involve CAE and European or international federations, if these also have signed the text.

The similarities of follow-up mechanisms, which concern the various contexts of autonomous social dialogue (cross-industry, sectoral, company level), lead us to think that the overall qualitative shift in the nature of the social dialogue towards greater autonomy has induced the social parties to face the question of the implementation and impact of texts. By experimenting similar mechanisms, on a variety of levels the solutions which were thought out for one level (especially cross-industry) are then "naturally dragged" over to another (the sectoral and company level).

(c) The analysis of texts produced by the SSD and by transnational company negotiations demonstrates, finally, that a partial commonness exists in the topics of the two forms of negotiations; an area of common topics on which the SSD and the transnational company negotiations end up overlapping on. Notwithstanding that the spectrum of the topics dealt with in the context of the SSD is to a general degree, wider than that of the TCAs.

The latter do not have the traditional regulatory contents of collective agreements at national level (which mainly concern, salaries and other working conditions) and with regards EFAs, they focus mainly on the topics indicated in the following table [211].

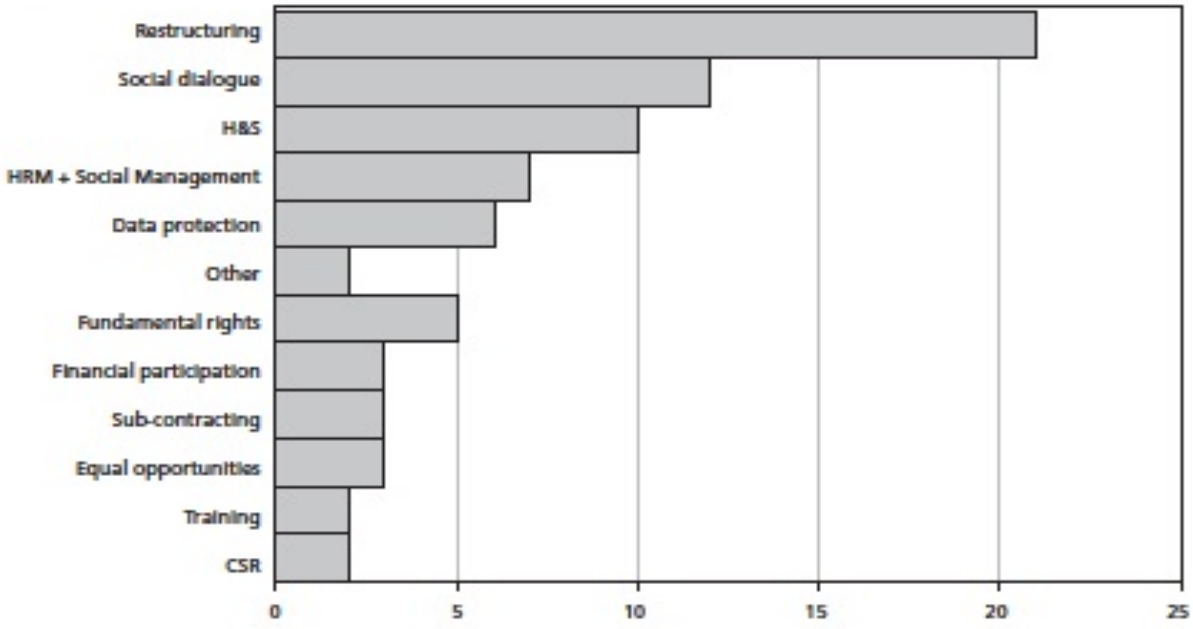
[208] B. Caruso B., A. Alaimo, *Il contratto collettivo nell'ordinamento dell'UE*, cit.; T. Prosser, *The implementation of the Telework and Work-related Stress Agreements: European social dialogue trough "soft law"?*, *EJIR*, 2011, vol. 17 (3), p. 245.

[209] P. Pochet (with the contribution of A. Peeters), E. Léonard, E. Perin, *Dynamics of European sectoral social dialogue*, cit., pp. 56-58.

[210] International Training Centre, *Key issues for management to consider with regard to Transnational Company Agreements (TCAs)*, cit., p. 21.

[211] Source: V. Telljohann, I. da Costa, T. Müller, U. Rehfeldt, *European and International Framework Agreements: Practical Experiences and Strategic Approaches*, European Foundation for the Improvement of Living and Working Conditions, 2009, p. 29.

Figure 4 Content of EFAs



Restructuring is the topic most often included in European TCAs, so much so that Isabela da Costa and Udo Rehfeldt identified a specific category of TCAs – that of *Transnational Restructuring Agreements* (*TRAs*) – dividing them into two types: "procedural" and "substantive" [212].

Differently to TCAs, the texts negotiated in the context of SSD cover a wider range of topics [213].

Since 2008, a topic which has been widely tackled by SSD Committees has been, for example, that of the economic and financial crisis; 14 joint declarations were adopted in 9 SSD committee meetings on this matter [214].

Amongst the topics dealt with by the SSD however, those typical to transnational corporate negotiations also feature: training, health and safety, socially responsible restructuring; Corporate Social Responsibility (CSR).

An area of common topics therefore exists.

To summarise the analytical comparison which has been carried out so far, we can say, therefore, that there are visible differences between the two forms of transnational negotiations, but also converging points. These, as we have seen, keep to the topics which are the object of negotiation (see point c), but above all, to the type of the texts (see point a), the monitoring and follow-up procedures (see point b) and prevalently depend on the matrix that is "voluntariness" and "autonomy" which unites transnational negotiations, both on a sectoral and company level.

The question which, at this point, we must pose, is the following: does organised integration of some type exist between the levels? For example a hierarchical organisation which in some way recalls the internal one of many national collective bargaining systems

[212] I. da Costa, U. Rehfeldt, *Transnational Company Agreements on restructuring at EU level,* in this volume.
[213] P. Pochet, A. Dufresne, C. Degryse, D. Jadot, *European sectoral social dialogue 1997-2004*, European Trade Union Institute for Research, Education and Health and Safety (ETUI-REHS) Observatoire social européen (OSE), Brussels 2006.
[214] *Industrial Relations in Europe 2010*, Publications Office of the European Union, Luxembourg , 2011, pp. 174-178.

(sectoral level, corporate level)? Or does competition exist between the sectoral and the company level, which produces overall disarticulation?

It is probable that the answer to the question veers towards a disarticulated and competitive situation rather than to an organised integration between the two levels.

If we consider the area of common topics we can agree with Léonard and Sobczak [215] and confirm that the interaction between the two forms of transnational negotiations happens, as Hancké suggests [216], in a "convergence of topics without coordination".

The lack of coordination is evident if we consider the effects that could arise from different texts stipulated at different levels and the consequent risk of "decline" and therefore of worsening agreements signed by companies. Companies may be attracted by the opportunity to waive the minimum standards fixed at sectoral level (but also national level) through transnational negotiations at corporate level and eventually proceed with the consensus of EWCs[217]. So much so that in order to avoid such risks the EMF's document for *Procedure for negotiations at multinational company level* recommends that company agreements at a European level provide a "non regression clause".

If we then consider the analogies of the outcomes of the negotiations, we can talk of "analogous but uncoordinated outcomes": on neither level of transnational negotiations do we reach legally binding outcomes.

What is missing in effect is dialectics between the two levels of transnational negotiations. This gap poses the problem of finding the best set of instruments for bringing together that which currently is a juxtaposition of distinct and separate contractual levels, into an organised system of co-ordinated actions [218].

4. A *"legal framework"* for transnational negotiation? Research, proposals and positions of the parties.

So we reach the most widely debated issue: that of an eventual supranational legal framework on transnational collective negotiation.

The following issues which are all connected are just as complex: (a) the relationship between transnational negotiation and systems of national collective bargaining; (b) enforceability of the texts produced by transnational negotiation and their legal effects, in particular their effects on individual contracts of employment; (c) limited to TCAs, the homogenous implementation in all the different companies/workplaces which may be located in different countries.

All these problems lead us back to most relevant legal junction of autonomous social dialogue, in its various facets (and therefore not only transnational collective negotiation), since they enfold crucial questions regarding relationships between national and European collective bargaining systems.

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[215] E. Léonard E., A. Sobczak, *Accords transnationaux d'entreprise et dialogue social sectoriel européen: quelles interactions?*, cit., p. 50.

[216] B. Hancké, *The political economy of wage-setting in Eurozone*, in Pochet P. (ed.), *Wage policy in 98/500/EC of 20 May 1998 on the Establishment of the Eurozone,* Brussels, Peter Lang, p. 131.

[217] E. Ales *La contrattazione collettiva transnazionale*, cit., p. 549.

[218] The same Communication from the Commission *Partnership for change in an enlarged Europe -Enhancing the contribution of European social dialogue* (COM 2004 557 final) recommend establishing «synergies between the European social dialogue and the company level» (point 3.2.3.). See also the Expert Group Report, *Transnational Company Agreements. Draft elements for conclusions of DG Employment, Social Affairs and Inclusion.* Revised Working document, 31 January 2012, p. 17, where it is written that «the interaction between the different levels of social dialogue could be subject to further work of the European Commission together with social partners».

The Commission itself is more sceptical about the consequences of autonomous implementation of the outcomes of autonomous social dialogue: «autonomous agreements are very well adapted to regulate and improve certain aspects of working conditions, but they cannot guarantee uniform outcomes, binding status and full coverage in all countries» [219].

The problems appear even greater if the contents of the negotiated texts are such that they affect individual rights and positions: to ensure effects on individual contracts of employment, the TCAs and the transnational tools at sectoral level must be implemented at the national level. In particular, the TCAs will have to be ratified by national social partners and implemented in conformity with national standards.

However as has been noted «the full effectiveness of transnational agreements is therefore attained by denying the very transnational nature of the agreement in question: 'only TFAs co-signed by national trade unions or replicated by a series of identical national agreements can have a legally binding effect'. This is far from satisfactory, and one must agree with those who have noticed that such situations 'alter the very meaning of "transnational" which, in our view, is strictly linked to a regulatory power directly recognized to transnational agents'» [220].

Since the middle of the last century the European Commission has promoted studies and research on transnational collective negotiation, so as to analyse the spontaneous development and to study proposals for a European regulation on the matter.

The proposal was included in the Commission Social Agenda 2005, in order to organize and structure the European social dialogue at all levels.

The same European trade-union federations were initially favourable to a legal framework, on the contrary to the traditional union attitudes which defend autonomy and resist heteronymous interventions; this is in contrast to employers, who instead have always preferred not to "have their hands tied".

It is likely that the trade unions see a solution in the legal framework for resolving, above all, the problem of legitimising their negotiating power in transnational companies, in which, as we have seen, the risk of marginalising trade unions is high, due to the importance of the CAE.

The first research, commissioned by the Commission to a group of academics coordinated by Edoardo Ales, resulted in the already well-known *Report* on *Transnational Collective Bargaining* 2006 [221]. The *Report* , which is divided in two parts, contained a recognised study into the two forms of transnational negotiations and a regulative *semi- hard* proposal. Although a directive was being discussed, and therefore a hard-law, the idea was for an "*auxiliary directive*", which was limited to providing an optional legal framework on transnational collective negotiation. If the legal framework had been respected it would have allowed agreements with legally binding effects.

Of a completely different nature and generally *harder,* is the solution provided by a later study promoted by the Commission, whose final report was written by the Dutch Van Hoek & Hendrickx, published in 2009[222].

Assuming that TCAs are "private law instruments", the report analyses the characteristics of the obligations assumed by the parties to a TCA from the private international law

[219] EC (2009) *industrial Relations in 2008.* Brussels: Office for Official Publications of the European Communities.

[220] A. Lo Faro, *Bargaining in the shadow of 'optional frameworks'? The rise of transnational collective agreements and EU law*, *EJIR*, 2012, who first cites Telljohann, I. daCosta I., T. Müller, U. Rehfeldt, R. Zimmer, *European and International framework agreements* , cit., and then E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining*, cit.

[221] E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational Collective Bargaining*, cit.

[222] A.van Hoek, F.Hendrickx, *International private law aspects and dispute settlement related to transnational company agreements*, October 2009.

perspective. Coherently, the report provides solutions based on the Rome I Regulations – Reg. (EC) No 593/2008 on the law applicable to contractual obligations - and Brussels I Regulation - Reg. (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

The main conclusions made are the following:

a) the parties to a TCA can designate the law to be applied to their agreement themselves. In fact, Art. 3 of Rome I Regulation (Freedom of Choice) established that the contract is governed by the law chosen by the parties.

b) The EU legislator may consider supplementing the rules of Article 4 Rome I (which with reference to a series of specific cases, establishes which law should be applicable in absence of a choice made by the parties) with a special sub-rule on TCAs. This sub-rule could establish the presumption that a TCA is governed by the law of the place of establishment of central management of the leading company.

c) On the question of dispute resolution systems of *Alternative Dispute Resolution Mechanisms* (*ADR*) could be applied, which could be included in TCAs by the parties.

EU legal regulation is proposed even in this case, yet the proposal is for a *hard law*, for the type of source on which we should intervene (a Regulation), moreover, which is characterised more by private and contractual law rather than a trade union law perspective.

4. From a "legal framework" to a "soft support" of the actors in transnational collective negotiation. A halfway point between abstentionism and interventionism

Eight years have passed since the first report on transnational collective negotiation and three since the Dutch report of 2009.

In the meantime, a continuous and continual development of voluntary and autonomous dialogue has been seen at all levels (cross-industry, sectoral, at company level). The prospective which has been opened up by the social parties during the Social Summit at *Laeken* at the start of the last decade [223] has, as a matter of fact set off a trend which has continued to the present day.

As we had read in the Communication from the Commission of August 2004, «in recent years there has been a qualitative shift in the nature of the social dialogue towards greater autonomy. This is reflected by the increasing adoption by the social partners of 'new generation' texts, in which they undertake certain commitments or make recommendations to their national members, and seek to actively follow-up the text at the national level». We can say that there has been an about turn since 2004.

The lack of a European legal framework over the years and, in the same way, the growing autonomy of the different forms of social dialogue and deregulation which has progressively marked the evolution of the two forms of transnational negotiation cannot not pose further questions. First of all: can we continue to think of a supranational legal framework, albeit in the form of "transnational auxiliary legislation?" [224] Or is it possible to maintain a system of abstentionism and voluntarism to safeguard social partners' autonomy, introducing maybe corrective measures?

I believe that in order to answer these questions we cannot disregard the active role that the Commission has consciously taken on in the "support" of voluntary and autonomous dialogue at all levels, including sectoral and company level.

Such a role, moreover, is also supported by the Treaties: art. 156 TFEU provides that in order to achieve the social objectives identified by art. 151 (promotion of employment,

[223] ETUC, UNICE, CEEP, *Joint contribution by the social partners to the Laeken European Council*, 7 December 2001.

[224] S. Sciarra, *Transnational and European Ways Forward for Collective Bargaining* WP C.S.D.L.E. "Massimo D'Antona" .*INT* – 73/2009

improved living and working conditions, so as to make their harmonisation possible while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion), "the Commission shall *encourage* cooperation between the Member States and *facilitate* the coordination of their action in all social policy fields under this Chapter», in particular in a series of issues (employment, labour law and working conditions, basic and advanced vocational training, social security, prevention of occupational accidents and diseases, occupational hygiene, the right of association and collective bargaining between employers and workers) amongst which « *the right of association and collective bargaining between employers and workers*» falls.

It is likely that for the Commission, having taken the route of "support" rather than that of a legal framework , represents, at least in this phase, a point of no return, a genuine shift towards a new form of governance, a symptomatic sign of the times, where *soft law* and autonomous agreements are by far preferred to the most conventional tools of the European method[225].

Whilst sharing the idea of possible regulatory participation of an "auxiliary" kind, in the belief that a directive would be ideal in providing a better framework and greater security on the legitimation of negotiations, on procedural rules, on the mechanisms for implementing the texts, we can't but underline that the scenario seems somewhat mutated, and therefore, so the choice of solutions must keep in mind the changes and must be in context.

Wanting to provide a perspective of short and medium term work, in this article, one might put forward an intervention on behalf of the Commission regarding transnational company negotiation based on the adoption of a "*soft law"* . Along the lines of the 1998 Commission decision on SSD Committees, it could be responsible for the selection of the participants and the criteria for assessment of the representativeness of the actors who will be involved in TCAs. In this way, the crucial question of the legitimacy to negotiate such agreements would be faced and, at an institutional level, resolved, coherently with previous interventions by the Commission which have concerned, albeit in other contexts, the subject of the negotiations. If we think, for example, of the indications given by the Commission since 1993, on the criteria for representativeness of the social partners who could be admitted to the "integrated procedure" ex articles 155, § 2, TFUE[226], and the same 1998 Commission decision on the SSD Committees.

Instead, the rules regarding the negotiating procedure and the mechanisms for implementing the texts could remain solely a trade union prerogative.

The solutions could be similar to that contained, for example in the *EFM Procedure Document* (point 6) in which it is foreseen that «all trade unions involved shall agree to implement the signed agreement. The agreement shall be implemented in accordance with the national practices of the countries involved. Implementation must respect the legal framework and the collective agreement system of these countries».

Even on the employer's side the problem of enforceability of TCAs could be managed through voluntary arrangements involving relationships between the central management of the group and the national subsidiaries, such as those already used in some recent agreements (for example: EDF Group Agreement on Corporate Social Responsibility, 2009)[227].

Even with regards to the monitoring and follow-up procedures, we could, however, suggest "soft support" of the Commission who along the lines of assistance and institutional support

[225] S. Leonardi, *Executive summary. Transnational company agreements*, cit.
[226] Such criteria, as indicated in the Commission's *Communication concerning the application of the Agreement on Social Policy* (COM 1993 600 final), are taken up by the *Communication from Commission adapting and promoting social dialogue at Community level* (COM, 1998, 322 final) on the issue.
[227] See A. Lo Faro, *Bargaining in the shadow of 'optional frameworks'?*, cit.

already experimented with the implementation of "autonomous inter-professional agreements" (including translation, awareness-raising, reporting and moral persuasion)[228], could intervene with a series of analogous institutional support activities: The *evaluation* of the texts and the *monitoring* of their implementation, as well as their *publication*[229].

Maybe reasoning on solutions based on models of "soft" regulation can be a more compatible choice for now, be it with the attitude of the Commission and with the developments in an autonomous sense of social dialogue at all levels.

Solutions of this kind seem to point to a far more easily trodden path compared to that of hard solutions (which would still be the solution of a directive). This route is certainly steeper, but should lead to the formation of clearer and more defined co-ordination between the two levels of transnational collective negotiation and ensure greater certainty and effectiveness of TCAs.

[228] B. Keller, S. Weber, *Sectoral social dialogue at EU level: Problems and prospects of implementation*, cit., p. 236; B. Caruso B., A. Alaimo, *Il contratto collettivo nell'ordinamento dell'UE*, cit.

[229] As is probably known, a database of TCAs already exists. See European Commission, *Database on transnational company agreements*, April 2012. *http://ec.europe.eu/social/main.jsp?catId=978&langId=en.*

Chapter 4

Transnational Company Agreements on restructuring at EU level

Isabel da Costa[*] and Udo Rehfeldt[**]

1. Introduction: General features of transnational company agreements

The first attempts at international union coordination with the intention to ultimately reach transnational collective bargaining (TCB) started in the 1960s, when the international trade secretariats (ITSs) of the metalworking, chemical and food sectors, which were particularly affected by the process of internationalization, encouraged the creation of "world councils" within the multinational or transnational companies (TNCs) (Gallin 2008; da Costa and Rehfeldt 2008). By the 1990s, this strategy had evolved into the signing of international framework agreements (IFAs) by the global union federations (GUFs) – the new appellation of the ITSs since 2002. Before 2001 these transnational agreements were uncommon as less than 10 IFAs existed, but in the following decade their number rapidly increased. In our latest research (see Box 1) we have identified 115 IFAs signed by GUFs by the end of 2011 (da Costa and Rehfeldt 2012). Some of them are co-signed by world works councils, European works councils (EWCs), and/or national unions. Even though the scope of application of these agreements is global, about 90 per cent of all IFAs have been negotiated and signed with TNCs having headquarters in continental Europe. EWCs often play a role before or after the signing of these TCAs, in coordination with the GUFs. The main topic of IFAs is core labour standards (CLS), particularly those included in the 1998 Declaration on Fundamental Principles and Rights at Work of the International Labour Organization (ILO).

Transnational company agreements (TCAs) with a scope of application limited to Europe emerged and developed at the same time as the global agreements. [230] In our collective study for Eurofound (Telljohann et al., 2009, see Box 1), we called them -- for lack of a better term and by analogy to IFAs -- "European Framework Agreements" (EFAs), a terminology now commonly used. The content of EFAs is more diverse and substantial than that of IFAs, the main theme is restructuring, followed by social dialogue and health and safety. Fundamental social rights play only a minor role in EFAs whereas they are predominant in IFAs. Similar to IFAs, some EFAs are mere declarations of common understanding, whereas others, particularly those on restructuring, can be quite detailed and codify concrete measures of implementation. EFAs are negotiated and signed by TNCs and a variety of different actors: EWCs; European trade union federations (ETUFs); national trade unions; and/or specially designed negotiation bodies. Overall, EWCs have been the driver on the employee side as they have signed or co-signed the majority of EFAs (over two thirds, including alone in over half the agreements), Since the adoption of the European directive of 1994, EWCs have been established in most EU-wide large companies. In a small but increasing number of cases these new bodies of worker representation for information and consultation purposes thus have, in coordination with union organizations, started to play a more significant role. The recent tendency, however, is for EFAs to be signed by the ETUFs alone (da Costa and Rehfeldt

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[230] TCAs with a regional scope in other geographical and economic areas have also recently started to emerge, but their number is still small and we will not treat them here.

2012). This development reflects an evolution of the strategy of ETUFs and the European Trade Union Confederation (ETUC). Most ETUFs have adopted since 2006 internal mandating procedures to negotiate and sign TCAs. Unionized EWC members are nevertheless often included in these procedures and EWCs are also often involved in the monitoring and follow-up procedures of implementation of the TCAs.

The evolution towards the negotiation and signature of TCAs is an autonomous initiative of the social partners. The adoption of an "optional framework" applying to TCAs has been in discussion since 2005 at the EU level but so far has not resulted in any agreement leading to a future Directive (see the other chapters in this report). The TNCs have thus played an important role in the development of TCAs. Different factors account for their increased interest as regards TCB. In some cases, the personality of the managers and the culture of the firm has been a determining factor; in others, the debate about codes of conduct and a concern about public opinion have led to changes in strategy. Moreover, some firms have developed a preference for the management of human resources at European level, in particular for certain issues such as transnational restructuring (see, for example, Daugareilh 2005; Moreau 2006; Schömann et al. 2008; Papadakis 2008; Béthoux 2008a; Telljohann et. al. 2009; da Costa and Rehfeldt 2012). Thus for various reasons, the management of certain TNCs, mainly European ones, has been interested in TCAs as voluntary and autonomous forms of social dialogue, and has often taken the initiative to negotiate such agreements.

We will here concentrate on the TCAs that include clauses dealing with restructuring at the transnational level, updating in this contribution part of the research we have conducted for ILO in 2010-2011 (see da Costa and Rehfeldt 2011). We will first present transnational restructuring agreements (TRAs), which we divide into procedural and substantive agreements. We will then analyse these two types of TRAs with a focus on the most important cases of substantive TRAs.

Box 1: Three studies on transnational collective bargaining

This contribution is based on and has benefited from three previous sets of research. We conducted the first set from 2004 to 2006 with a focus on transnational collective bargaining in the automotive sector for the Commissariat Général du Plan, a French institution for economic analysis and social partner consultation, created in 1946 and transformed in 2006 into the Centre d'analyse stratégique (da Costa and Rehfeldt 2007, 2009, 2010).

From 2007 to 2008 we participated in a second study which analysed all existing international framework agreements (IFAs) and a few selected European framework agreements (EFAs) for the European Foundation for the Improvement of Living and Working Conditions - Eurofound (Telljohann et al 2009).

Since 2009 we have been concentrating on transnational restructuring agreements and in 2010 we started developing the issue for the Industrial and Employment Relations Department of the International Labour Office (cf. da Costa and Rehfeldt 2011).

Altogether for the three sets of research we have conducted over 100 interviews with representatives of the following: all the Global and European Trade Union Federations, the European Trade Union Confederation, the International Trade Union Confederation, BusinessEurope, the International Organization of Employers, as well as EWC members and representatives of the unions and the management of several European companies. For the present research we have updated our data (see Tables 1 and 2) and the case studies presented in the contribution.

2. European TCAs on restructuring

Restructuring is the topic most often included in European TCAs. We here consider restructuring in a larger sense, including « anticipation of change », i.e. including preventive measures to try to avoid compulsory redundancies and/or site closures as well as accompanying measures in case of job reductions (training, outplacement assistance, intra-firm mobility). We have not here adopted a specific definition of "restructuring" (see Eurofound dictionary or EU site "Anticipedia") but chose to take into account the intention of the signing parties.

Nearly half of the 110 European TCAs signed until the end of 2011 include clauses mentioning restructuring (da Costa and Rehfeldt 2012). For the purpose of this contribution, we have identified 45 TCAs we have considered as transnational restructuring agreements (TRAs). This is a minimal number, since there is no legal obligation to report TCAs to any EU institution, and our interviews indicate that the real number is likely to be much higher. We have excluded from our list the TCAs for which we could not clearly identify the signatory parties, as well as signed minutes of EWC meetings. This was not always an obvious task because the frontier between consultation and negotiation, i.e. the difference between the outcome of a EWC consultation process and a formal agreement signed by an EWC, is sometimes difficult to establish.

The preamble to the 1994 EWC Directive sets a clear connection between transnational restructuring and EWCs, and requires companies to inform and consult representatives of the employees affected by their decisions. Despite the intended connection, the small number of actual cases for which EWCs have really been consulted about transnational restructuring projects is striking. According to a survey conducted by Jeremy Waddington in 2005 with union representatives in EWCs (Waddington, 2007), only 13 per cent of the respondents consider that the EWC was informed and consulted in a timely manner about a restructuring decision, even though 80 per cent of respondents experienced transnational restructuring in the five years preceding the survey. A recent comparative project, "Anticipating for an Innovative Management of Restructuring in Europe" (AgirE), also concludes that EWCs play only a marginal role in restructuring situations (Moreau and Paris, 2009). This general context should be kept in mind for the assessment of the TCAs on restructuring presented here. They are few but very significant.

We have divided TRAs into two types: "procedural" and "substantive". In our terms, procedural TRAs set the rules and principles for future restructuring; substantive TRAs address specific cases of announced restructuring through concrete and binding clauses (da Costa and Rehfeldt 2011). Procedural TRAs in Europe are more numerous than substantive ones, respectively 27 and 18 (see tables 1 and 2), and most of them are agreements on "anticipation of change".[231] A few IFAs also refer to restructuring, but not as the main topic, and we have excluded these TCAs from our analysis here.[232]

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[231] A few studies before ours have analysed and provided inventories of transnational agreements on restructuring, particularly those of Carley and Hall (2006) for Eurofound and Schmitt (2008) and Béthoux (2008b) for the European Commission. The classifications in these studies are slightly different. We aggregated the data to make them compatible with our own categories and updated them until the end of 2011, first through our research and, since its availability in 2011, with the help of the TCA database of the European Commission (http://ec.europa.eu/social/main.jsp?catId=978&langId=en). For a more detailed methodological explanation see da Costa and Rehfeldt 2012.

[232] The main topic of IFAs is fundamental labour rights. The GUFs have progressively adopted model TCAs and conditioned their signature to explicit reference to the core labour standards included in the ILO Declaration on Fundamental Principles and Rights at Work of 1998. Recently the GUFs have also negotiated and signed IFAs of a different type with some TNCs, all of which had already signed an IFA on fundamental rights. The most important IFA of this new type is the Volkswagen "Charter on Labour Relations" signed in 2009 by the company, the IMF, the Volkswagen EWC, and the Volkswagen world works council (WWC). This charter sets out participation rights of employee representative bodies in the different Volkswagen sites (see the contribution of Telljohann to this report). The Charter distinguishes between three types of participation rights: right to

3. Procedural Transnational Restructuring Agreements

Procedural TRAs just as substantive ones treat alternative ways to try to avoid compulsory redundancies in case of restructuring. Unlike substantive TRAs, however, the procedural ones do not give concrete guarantees for the preservation of employment and against plant closures. Most procedural TRAs generally set procedures of information and implication of worker representatives at the European and local levels, and propose measures such as training, outplacement assistance or intra-firm mobility, in order to anticipate or to accompany future restructuring processes.

The majority of procedural TRAs (17 out of 27, see Table 1) are signed or co-signed by EWCs, 12 are signed by EWCs alone. Over half (14) are signed or co-signed by European trade union organisations, 8 are signed by ETUFs alone. All the 8 TRAs signed by ETUFs alone are agreements with French TNCs – or, in the case of ArcelorMittal, with a TNC of French origin. This is linked to specificities of the French industrial relations system and the coordination strategies from local to European level of the French social partners, which we have analysed elsewhere (da Costa and Rehfeldt 2012).

The 2009 TCA with ArcelorMittal is an interesting example of an agreement on "anticipation of change" which combines measures to avoid employment problems and measures to develop alternatives to redundancies in the event of a job reduction plan (see the contribution of Teissier). An important part of the agreement is the commitment that the blast furnaces which had been "temporarily" closed will reopen if the demand for steel products improves. This part is akin to a substantive agreement, although it does not give specific guarantees for individual jobs. For lack of space we will not further analyse procedural TRAs (see da Costa and Rehfeldt 2011) and will concentrate here on the substantive ones.

4. Substantive Transnational Restructuring Agreements

Substantive TRAs address specific cases of announced transnational restructuring with a significant impact on employment. They include concrete and binding clauses and are the most meaningful TRAs for employees, since these agreements have a direct impact on employment levels. Beyond principles or procedures to be followed in the event of future restructuring and procedural rules concerning the information and consultation of the representatives of the employees and the monitoring of the agreement, substantive TRAs include rules about issues such as job security, work organization or the choice of products and production sites. These TRAs contain specific collective and individual guarantees and are designed to mitigate the effects of announced and ongoing restructuring plans. They generally provide:

- guarantees against plant closures and for employment protection;
- guarantees for the employees transferred within or outside the TNC, including similar employment conditions and rights (wages, seniority, pensions, etc.);
- measures to avoid forced redundancies (early retirement, voluntary severance, etc.).

Among the 18 substantive TRAs we have identified, 16 were signed by only three companies in the automotive industry – two European subsidiaries of US companies (Ford and GM) and a company that was German–US at the time (DaimlerChrysler). All these agreements were signed by EWCs. Some of the GM and DaimlerChrysler agreements were co-signed by the European Metalworkers' Federation (EMF). The substantive TRAs in the automobile sector represent a threefold evolution: of the strategy of some companies initially opposed to the

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information, consultation, and finally co-determination. As far as restructuring is concerned, however, the Charter grants only information and consultation rights.

EWC Directive and negotiating now with the European representatives of workers, including ETUFs, of the EWCs from information and consultation to negotiation of TCAs; and of union strategies of coordination from national to European level, with a new role for the ETUFs. We will now analyse the TCAs negotiated with Ford and GM, which we consider as the most meaningful TRAs.

5. Ford Europe

Ford's EWC was the first EWC to sign an agreement in the auto industry at EU level. The Ford-Visteon agreement, signed in January 2000 on the occasion of the Visteon spin-off aimed at protecting the ex-Ford workers transferred to the new company. This was negotiated by the United Auto Workers (UAW) in the US and then by the EWC for Europe. All the ex-Ford workers who were transferred to Visteon during the spin-off were to benefit in their new work contracts from the same employment conditions as before, including the following: seniority and pension rights; a lifetime guarantee at Visteon that their wages, benefits and other conditions would be equivalent to those of Ford's workers in their countries; before final separation, ability to ask to return to Ford ("flow-back"), according to job availability and a series of other criteria applicable during a maximum of five years. The agreement also contained commercial and subcontracting clauses between Ford and Visteon, so that the latter could ensure these employment terms for the workers covered during the following two product cycles. The problems that occurred during the first years of the implementation of the Visteon agreement were partially solved by the negotiation of an appendix signed by both the Ford and Visteon EWCs.

The Visteon agreement was the first to deal in a specific way with a particular case of restructuring and to lay down constraining and detailed rules to be applied at local level concerning both employment and production. Both the EWC and the unions considered the agreement as successful because, despite employment reductions, there were no plant closures among the sites transferred to Visteon until 2006. The experience was judged in a positive way also by management and paved the way for the signing of other TCAs in 2000, 2004, and 2006 along the lines of the Visteon agreement. A Memorandum of Understanding signed in 2000 and the revision of the EWC internal rules in 2002 clarified the conditions of bargaining at European and national levels. All these agreements were signed without industrial conflict.[233] The Ford EWC functions on the basis of an internal mandate, and the agreements were not formally negotiated in cooperation with the EMF. The external trade union organizations intervened only as national experts (from Germany and the United Kingdom). The German expert is also the coordinator between the EMF and the EWC.

6. General Motors Europe

In the GM plants in Europe restructuring and reorganizations had been negotiated for years at local level with plants being pitted against each other. Progressively, GM Europe's EWC adopted a European-wide strategy of transnational solidarity (Herber and Schäfer-Klug, 2002;

[233] The recent automobile crisis, however, raised questions about the follow-up of the Visteon agreement in a critical situation of major restructuring. After Visteon filed for bankruptcy and was put under administration in the United Kingdom, all three British Visteon (UK) facilities were closed in 2009. With no advance notice, the 610 workers, including about 510 ex-Ford employees, were told that they were made redundant and had to leave the premises. No guarantees were given as to redundancy pay (only the statutory minimum was offered) or pension rights. As a reaction, workers occupied the plants. Finally a settlement was reached with Ford and Visteon in May 2009. It included notice pay, a lump sum, and full Ford redundancy entitlements. Additionally, the ex-Ford employees also received a pay increase which was previously awarded to Ford workers but had not yet been implemented at Visteon. The legally complex pension issue, however, remains unresolved at the time of writing.

Kotthoff, 2006) based on three principles: no plant closures, no forced redundancies, and systematic search for negotiated and socially responsible alternatives.

The first European agreement between the GM EWC and the management of GM Europe was signed in May 2000. It protected GM employees transferred to joint ventures of GM and Fiat in the event of the GM–Fiat alliance failing (which actually happened in 2005). The subsequent agreements signed at GM Europe in 2001, 2001, 2004, 2008, 2009 and 2010 are the most significant TCAs on restructuring, since they theoretically protected all the company employees in Europe (da Costa and Rehfeldt 2007, 2009 and 2010). They were the result of a coordinated strategy involving the EWC representatives and the trade unions concerned at different levels as well as the EMF. This strategy of transnational solidarity has included both European-wide mobilization and transnational negotiation. Several times, and particularly in 2001, 2004 and 2006, up to 50,000 GM workers throughout the sites in Europe took part in common strikes or "action days" against plant closures, putting pressure during the negotiations with GM Europe. In 2004, the EMF established a European trade union coordination group that comprised members of the EMF secretariat, representatives of the national unions involved, as well as members of the GM EWC. This constituted an important experience for the EMF future strategy on socially responsible restructuring and the establishment of its transnational negotiation procedures or principles.

When five European GM plants were put into competition for a new Astra/Zafira model, the employee representatives from those plants signed a "solidarity pledge" and agreed on EU level negotiations in order to avoid plant closures and obtain a fair distribution of car volumes. GM Europe finally accepted to sign another TRA in April 2008 which excluded forced redundancies and guaranteed production in four plants: Ellesmere Port (United Kingdom), Bochum (Germany), Trollhättan (Sweden) and Gliwice (Poland) for the life cycle of the new model. The plant in Antwerp (Belgium), which had not been chosen for the new Astra, was to be safeguarded by the production of a small sports utility vehicle.

After the car sales crisis in the autumn 2008, and the crisis of the GM mother company in the United States, the EWC chairman and the CEO of GM Europe tried to work out a plan to make the European operations independent from GM headquarters and avoid plant closures and forced redundancies. But in November 2009 GM, now owned by the US Department of the Treasury, announced it would not sell its European subsidiary Opel/Vauxhall, as GM Europe was called after the separation of Saab. In January 2010, the management of Opel/Vauxhall presented a new restructuring plan including 8,300 job cuts in Europe and the closing of the Antwerp plant (2,600 workers) — the production of the vehicle promised by the 2008 TRA, had been shifted to Daewoo, the subsidiary company of GM in South Korea. In April 2010, the Belgian trade unions and the local management of Opel Antwerp agreed on a social plan, based on anticipated retirements and premiums for voluntary departures. As a tripartite restructuring group set up by the Flemish Government could not find new investors acceptable by GM management the Antwerp plant was shut down.

In May 2010, the Opel management and the EWC chairman finalized yet another TRA which was ratified by the EWC, the union representatives, and the EMF. This agreement confirmed the 8,300 job reductions in Europe but excluded collective redundancies until 2014 in exchange for wage reductions. It was transposed by local agreements.

Given the continuous economic difficulties of Opel/Vauxhall it became increasingly difficult for the Opel/Vauxhall EWC to maintain its European solidarity strategy. In 2012 GM management elaborated another restructuring programme including the transfer of the new Astra model to the Ellesmere Port plant and the closure of the Bochum plant after the end of the Zafira model in 2015. Again, the unions reacted with a solidarity approach, asking for negotiations at the European level, but this time they succeeded only in implementing this approach at the national level. In June 2012, the German IG Metall union and the German

Opel works council signed a framework agreement to secure employment in the four German Opel plants until 2016 in exchange of a further wage freeze, but the Opel management maintains its intention to close down the Bochum plant after that date.

Despite this evolution, the TRAs signed with GM Europe remain an outstanding example of transnational solidarity pushing for socially responsible restructuring. The EWC with the unions involved as well as the EMF have managed to preserve international solidarity through very difficult times during which the possibilities of seeing national strategies emerge were manifold, notably given the involvement of the respective governments not particularly prone to financing jobs outside their borders.

The lack of a European legal framework for bargaining at company level has been a problem in particular when GM management decided to close down Azambuja in 2006 and Antwerp in 2010, despite contrary commitments in the TCAs it had signed. In the Antwerp case, the employee representatives have appealed to the Belgian courts for breach of contract, but this had no effect on the plant closure Unless the courts otherwise decide, TRAs are at present not considered as legally binding contracts, and there are no sanctions for disregarding them other than those which the unions can bring about through collective action – and this is a difficult venture in some countries as the right to strike at European level is either non-existent or very restricted (e.g. Bercusson, 2008).

7. The other substantive Transnational Restructuring Agreements

Compared to the TCAs on restructuring signed at Ford and GM, those signed by at Daimler are more modest. But so was the internationalisation of the company, since before the split of the DaimlerChrysler group only 6 per cent of Daimler employees in Europe worked outside Germany, and the representatives of the non-German subsidiaries of the DaimlerChrysler EWC were mainly representatives of the sales organisations. In 2006, after the announcement of a job reduction which particularly affected white-collar workers, the EWC signed a TRA on the "adjustment of employment levels" which aimed at preventing dismissals in Europe and seeking socially acceptable measures for reducing employment. In 2007 another TRA was signed on the adaptation of the sales organization in Europe after the separation of Daimler and Chrysler. About 400 employees were transferred to other companies of the group, avoiding non-voluntary transfers. The employees concerned received a welcome bonus of the same type as the one previously negotiated at the local German level. These two TRAs were co-signed by the German trade union coordinator of the Daimler EWC on behalf of the EMF.

The Danone 2001 agreement dealt with the workers affected by the restructuring and plant closure of the biscuits branch of the group. It provided specific guarantees for the workers transferred to other sites inside and outside the group, including the preservation of the conditions of employment and remuneration. Danone promised to compensate any loss of income during a transitional period. If new skills were required for the new jobs, Danone financed the necessary training; if workers were to lose their new job, they would receive preferential treatment from Danone's placement services. In 2007, Danone decided to sell its biscuits branch to Kraft, a US company. The latter agreed not to make any redundancies until 2010.

The 2009 TRA signed by the EMF with Alstom and Schneider Electric guarantees employment and remuneration in the former Areva Transport and distribution (T&D) divisions bought by Schneider Electric and Alstom. All European T&D employees at the date of acquisition were guaranteed equivalent positions in the same geographical and professional employment area, including equivalent remuneration and seniority. The two companies confirmed that they excluded plant closures and collective dismissals in Europe for a period of three years. In addition, the two last commitments apply also to all the employees within

the newly created divisions in both companies, and not only to the employees transferred from Areva. The negotiation process of this TRA differs from the previous ones as it was led by the EMF, although the negotiations team comprised the three EWC secretaries of Areva, Alstom and Schneider Electric. In application of its new internal rules (EMF 2006), the EMF was formally mandated by all the affiliated unions in the three companies to lead the negotiations. The draft agreement was adopted by the unions involved following the same internal EMF procedure, and the deputy EMF secretary signed the TCA alone. For the management of Alstom and Schneider Electric, this procedure had the advantage of avoiding time consuming separate negotiations with all the national union and/or works council representatives involved, and in particular with the five unions of the home country, which can often have conflicting positions on restructuring issues.

8. Conclusion: towards closer coordination between EWCs and unions

The TCAs on restructuring analyzed here required a delegation of the capacity to negotiate from the national to the European level and at least three types of coordination: between the national level and the European level, between the EWC and national trade unions, between the EWC and one or several European trade union federations.

This coordination has evolved over time. Most of EWCs having signed TCAs were heavily unionized and had a long experience with many meetings, including those of the select committees. Personal contacts and trust relations were progressively built, facilitating the emergence of solidarity and strategic bargaining at European level all the more so that most often the EWC members involved in negotiating TRAs are also union members of national unions affiliated to the same ETUF. Furthermore, there has been a growing involvement of the ETUFs in the EWCs since the creation of networks of EWC coordinators and exchanges of experiences and internal debates to elaborate strategies for TCB. Union involvement is strong in TNCs such as Ford, GM, Daimler, and most of the French TNCs, in which the ETUFs are now recognized as partners for European-level negotiations and particularly as signatory parties of EU level TCAs.

The EMF has played a leading role in this evolution of trade union involvement at the European level. The GM 2004 TRA inspired a document adopted by the EMF in June 2005 on socially responsible restructuring (EMF 2005) implemented through an early warning system resting on the EMF coordinators in the EWCs, according to which, in the event of a transnational restructuring project, the EMF coordinator, together with the EMF secretariat, are to set up a European trade union coordination group consisting of EWC representatives and one trade union officer for each national union involved. This group will eventually negotiate a TCA, prior to any national level negotiations. In 2006, the EMF further elaborated internal rules concerning mandates for the negotiation and adoption of TCAs at transnational EU level (EMF 2006). The EMF experience in turn has inspired other EIFs.

Some of the factors accounting for the signature of substantive TRAs are sector specific. Nearly all the substantive TRAs were signed in the automobile sector. The automobile sector is a trade union stronghold. Trade union presence is strong both in the sector and in the companies analysed. The existing mechanisms of employee representation can thus be used by the trade unions at national and European level to coordinate and/or implement their strategies. The EWCs in the auto sector are almost exclusively made up of trade union members. This has facilitated the emergence of strategies perceived as legitimate and coordinated by an ETUF and the EWCs at the transnational level.

The substantive TRAs analysed here are however a minority as they have been signed with few TNCs for the moment. Other automobile TCNs with equally strong union presence have not negotiated TCAs on restructuring (Fetzer, 2008). We consider however that, while a strong union presence might not be a sufficient condition for TRAs to emerge, it is certainly a

necessary one. Without it, the legitimacy of strategic collective action at European level and European solidarity during transnational restructuring would be difficult to achieve. In other cases, a variety of interests, difficult to combine, is generally more likely to lead to the negotiation of national level agreements (or to no agreement at all) rather than to international solidarity. The global economic and financial crisis has even increased protectionist tendencies that facilitate the development of whipsaw competition techniques across plants and countries.

Obviously, national preferences are always present in most TNCs. They are sometimes brought about by the trade unions from the home country of the TNC, but sometimes also by the foreign subsidiaries, because of the perceived possibility of national industrial relations arrangements that might seem to be able to provide more favourable results than what would be available through a TCA. Furthermore, national union actors often view transnational ones with scepticism and can be reluctant to delegate power to negotiate at EU level. Last but not least, ETUFs often lack the needed resources to take on their increased role in TCB. Nonetheless, transnational collective actions and negotiations have emerged at the European level and, in the absence of a legal framework for EU level company negotiations, their procedures are being elaborated by the ETUFs, their national members, and the EWCs based on their experiences and strategies. As this is still an on-going process, we will outline, as a conclusion to our contribution, that, based on our research, it seems important and necessary to develop forms of coordination that enable all the parties involved to reach the best solution appropriate to their case, for the moment in a pragmatic way, but one consistent with the democratic principles that should always be at the core of Social Europe and which should include a voice for all levels and actors if they are to be perceived as legitimate, particularly in cases of transnational restructuring which exacerbate tensions. In times of crisis, if the high road of European solidarity cannot be taken through coordination involving all parties concerned, then the low road of inner competition is almost a certainty for employee representatives in transnational enterprises.

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Table 1: Procedural European Transnational Restructuring Agreements

Company	***Home country (headquarter)***	***Sector***	***Main theme***	***Signing parties Employee side***	***Year***
ABB	Switzerland	Metal industry	Restructuring, anticipation of change	EWC	2009
Air France / KLM	France	Transport	Anticipation of change: airport agencies	EWC	2010
Alstom	France	Metal industry	Restructuring, anticipation of change	EMF	2011
ArcelorMittal	Luxemburg	Metal industry	Restructuring, anticipation of change	EMF	2009
Axa a)	France	Finance	Restructuring (annex to renewed EWC agreement)	UNI, French unions, EWC	2005
Axa b)	France	Finance	Restructuring (annex to revised EWC agreement)	UNI, French unions	2009
Axa c)	France	Finance	Restructuring principles, anticipation of change	UNI Europa, French unions	2011
BP Europe	Germany	Chemicals	Restructuring: business service centre	EWC	2008
DBApparel	Sweden	Clothing	Anticipation of change	ETUF-ICL, EWC	2010
Deutsche Bank	Germany	Banking	Restructuring	EWC	2004
Dexia a)	Belgium	Finance	Social dialogue, restructuring	EWC	2002
Dexia b)	Belgium	Finance	Restructuring: outsourcing	EWC	2007
Diageo	United Kingdom	Food	Restructuring	EWC	2002
EADS	France/Germany (Netherlands)	Metal Industry	Restructuring	EWC	2006
Econocom	Belgium	Services	Restructuring	National unions, EWC	2009
GDF Suez	France	Utilities	Anticipation of change, skill management	EPSU, EMCEF, nat. unions	2010
PSA Peugeot Citroën	France	Metal industry	Social dialogue, anticipation of change, Europeanization of joint strategic committee	National unions	2008
RWE	Germany	Energy	Restructuring	EWC	2010
RWE Energy	Germany	Energy	Restructuring	EWC	2007
Schneider Electric	France	Metal Industry	Restructuring, anticipation of change	EMF	2007
Solvay	Belgium	Chemicals	Restructuring: joint ventures	EWC	2003
Suez a)	France	Utilities	Anticipation of change, skill management	ETUC, CEC, French unions, EWC	2007
Suez b)	France	Utilities	Restructuring, anticipation of change	ETUC, CEC, French unions, EWC	2008
Thales	France	Metal industry	Anticipation of change: Professional development	EMF	2009
Total a)	France	Chemicals	Social dialogue, restructuring	EMCEF, FECCIA-CEC, FECER-CEC,	2004
Total b)	France	Chemicals	Restructuring: Promotion of SMEs	EMCEF, FECCIA-CEC, FECER-CEC,	2007
Unilever	UK	Food	Restructuring	EWC	2001
Source: da Costa and Rehfeldt 2012					

Table 2: Substantive European Transnational Restructuring Agreements

Company	*Home country*	*Sector*	*Main theme*	*Signatories*	*Year*
Alstom / Schneider Electric	France / France	Metal industry	Restructuring: ex-Areva subsidiaries	EMF	2010
DaimlerChrysler a)	Germany	Metal Industry	Restructuring	EMF, EWC	2006
DaimlerChrysler b)	Germany	Metal Industry	Restructuring: Sales organization	EMF, EWC	2007
Danone	France	Food	Restructuring	EWC	2001
Ford Europe a)	USA (Germany)	Metal Industry	Restructuring: Outsourcing Visteon	EWC	2000
Ford Europe b)	USA (Germany)	Metal Industry	Restructuring: joint-venture GFT	EWC	2000
Ford Europe c)	USA (Germany)	Metal Industry	Restructuring: Outsourcing Visteon 2	EWC	2003
Ford Europe d)	USA (Germany)	Metal Industry	Restructuring: joint-venture IOS	EWC	2004
Ford Europe e)	USA (Germany)	Metal Industry	Restructuring : Engineering	EWC	2006
GM Europe a)	USA (Switzerland)	Metal Industry	Restructuring: Joint-ventures GM/Fiat	EMF, EWC,	2000
GM Europe b)	USA (Switzerland)	Metal Industry	Restructuring: Luton	EMF, EWC	2001
GM Europe c)	USA (Switzerland)	Metal Industry	Restructuring: Olympia plan	EMF, EWC	2001
GM Europe d)	USA (Switzerland)	Metal Industry	Restructuring	EMF, EWC	2004
GM Europe e)	USA (Switzerland)	Metal Industry	Restructuring: Astra (Delta)	EMF, EWC	2008
GM Europe f)	USA (Switzerland)	Metal Industry	Restructuring: Outsourcing	EMF, EWC	2008
GM Europe g)	USA (Switzerland)	Metal industry	Restructuring: Reduction of working time	EMF, EWC	2009
GM Europe h) (Opel/Vauxhall)	USA (Germany)	Metal industry	Restructuring: Antwerp	EMF, EWC	2010
GM Europe i) (Opel/Vauxhall)	USA (Germany)	Metal industry	Restructuring	EMF, EWC	2010
Source: da Costa and Rehfeldt 2012					

Chapter 5

The implementation of the Global Labour Relations Charter at Volkswagen

Volker Telljohann[*]

1. Introduction

The increasing globalization of economy is, among other things, characterized by mergers, acquisitions and joint ventures. Against the background of processes of internationalization trade unions have to face their own limited capacity to act, which is largely circumscribed by national boundaries. In the light of the limited capacity for legal regulation at transnational level, the best option available to create a social framework consists in pushing for more self-regulation through the conclusion of Transnational Company Agreements (TCAs) which may be signed at European as well as at global level. As a consequence, in recent years TCAs have seen a growing diffusion. The fact that by early 2012 224 TCAs had been signed in 144 companies (European Commission 2012) shows that TCAs have succeeded in becoming a new tool of industrial relations at transnational level. As at the same time the contents of TCAs are becoming more substantial the question of the enforceability at national level becomes more urgent. So far, TCAs are characterized by an uncertain legal status. Therefore, the question is how it is possible to ensure their effective implementation throughout the company's subsidiaries.

In order to better understand the real impact of TCAs on national industrial relations it is necessary to investigate whether TCAs have been implemented at national level and, if yes, in which way the implementation took place. In this contribution we will analyze the implantation of the Global Labour Charter which was signed in 2009 at the Volkswagen Group. The case study suggests, that what matters is the active involvement of the various actors at the different levels. On the one hand, the signatories to the agreement play of course an important role, but, on the other hand, the effective implementation of the agreement also requires the commitment of the local management and employee representatives. This article draws on interviews with managers and worker representatives directly involved in the implementation of the transnational company agreement at Volkswagen[234].

2. Profile of the Volkswagen Group

The Volkswagen Group, based in Wolfsburg (Germany), is one of the world's leading automobile manufacturers and the largest car producer in Europe. In 2011 the Group increased the number of vehicles delivered to customers to 8.265 million (2010: 7.203 million), which equates to 12.3 percent of the global passenger car market. In Western Europe more than one fifth of all new cars (23.0 percent) were manufactured by the Volkswagen Group. The Group's sales revenue totalled €159 billion in 2011 (2010: €126.9 billion). Profit after tax in the fiscal year 2011 totalled €15.8 billion (2010: €7.2 billion). The Volkswagen Group owns twelve brands from seven European countries: Volkswagen, Audi, SEAT, Škoda, Bentley, Bugatti, Lamborghini, Volkswagen Commercial Vehicles, Scania, MAN, Porsche and Ducati. Each brand has its own distinctive character and operates autonomously in the marketplace.

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In 18 European countries and eight countries in the Americas, Asia and Africa, the Volkswagen Group operates 96 production facilities. Around the world more than 500,000 employees produce approximately 34,500 vehicles per working day, provide vehicle-related services or work in other business areas. The Volkswagen Group's sales operations cover 153 countries.

The distribution of voting rights in 2011 was as follows: Porsche Automobil Holding SE, Stuttgart, held 50.73 percent of the voting rights. The second-largest shareholder was the State of Lower Saxony, which held 20.0 percent of the voting rights. Qatar Holding LLC was the third-largest shareholder, with 17.0 percent; Porsche GmbH, Salzburg, held a 2.37 percent share of the voting rights. The remaining 9.9 percent of the 295,089,817 ordinary shares were attributable to other shareholders.

Thanks to the Group's competitiveness and innovative strength, the number of jobs showed a marked rise of 103,000 in 2011. This was due not only to the acquisition of MAN and Porsche-Holding Salzburg, but also to organic growth: the Volkswagen Group created 28,000 jobs worldwide, including 11,000 in Germany alone.

3. Respect of labour standards at transnational level

According to the group sustainability and responsibility are the basic principles underlying Volkswagen's corporate activities. At Volkswagen corporate social responsibility (CSR) is considered a contribution to sustainable development. In the view of Volkswagen the Group pursues ecological, economic and social goals which are thus an integral part of efforts to contribute to a sustainable development.

Sustainability is considered the foundation of corporate policy at Volkswagen. This means that sustainability is integrated along the entire value chain of the Company. With regard to the social dimension sustainability consists in the attempt to reconcile job security with economic efficiency.

In the past the Volkswagen Group has taken various steps in the exercise of global and local responsibility. In 2010 a Code of Conduct has been introduced that guarantees the respect of international conventions, laws, and internal rules. The Group's values which include closeness to the customer, superior performance, value creation, renewability, respect, responsibility, and sustainability are considered the basis for Group-wide collaboration and have been incorporated into the Code of Conduct. That means that Volkswagen respects internationally recognized human rights and supports the observance of these rights. Furthermore, it is the declared objective of the Group to act in accordance with the applicable requirements of the International Labour Organization. This implies that Volkswagen recognizes the basic right of all employees to establish trade unions and labour representations and that the Group rejects child labour as well as forced or compulsory labour.

The Group also declares that it heeds the minimum age requirements for employment in accordance with governmental obligations. In order to favour the application of these norms Volkswagen tries to raise awareness among its employees through preventive measures and their integration in the existing management system. To this end Volkswagen has created a compliance network throughout the Group which brings together the expertise of compliance officers in the brands and companies and of various Group bodies.

4. Social Sustainability and Transnational Company Agreements

The Group's orientation in the field of social sustainability has also entailed a number of transnational company agreements. In 2002 the *Declaration on Social Rights and Industrial Relations at Volkswagen (Social Charter)* was signed by management, the Group's Global Works Council and the International Metalworkers' Federation. The Declaration refers to the Conventions of the International Labour Organisation. The frame of reference for this

agreement are all countries and regions represented in the Volkswagen Group Global Works Council. The fundamental social rights and principles described in this declaration are meant to represent the basis of Volkswagen Corporate Policy. On May 11, 2012 a revised version of the *Social Charter* was signed. In the new version also the Group's business partners are invited to take into consideration the *Declaration on Social Rights and Industrial Relations.* In 2004 an agreement on *Occupational Safety Policy* was signed. In 2005 a *Declaration of intent regarding the cooperative information exchange with workers' representatives at VW China* followed.

In 2006 an agreement was signed on the *Requirements for sustainable development with regard to relationships with business partners.* In this case the frame of reference is represented by all tier 1 suppliers of the Volkswagen Group. This agreement includes that suppliers have to ensure that their own sub-suppliers can guarantee suitable measures for company and product-related environmental protection and for social standards. The content of these supplier requirements for sustainable development is based on the Group's internal guidelines, the environmental policy, the resulting environmental objectives and environmental specifications, the occupational safety policy as well as the declaration on social rights and industrial relations. At the same time, it is oriented to external international standards which the Group has accepted as a multinational company.

In 2009 the Global Labour Charter that is aimed at improving labour relations and that has to be applied at all locations belonging to the Volkswagen Group

Finally, another transnational company agreement is going to be signed on the issue of temporary agency work at the Volkswagen Group.

It is important to note that in general all negotiations take place at global level. As a consequence, the agreements are signed by the International Metalworkers' Federation. On the side of the employee representative bodies agreements are signed by the European Group Works Council as well as by the Global Works Council.

By mid 2012, the process of negotiations at transnational level that started in 2002 has produced five transnational texts and agreements and further agreements will be signed in future. Thus, it can be concluded that transnational negotiations have become a consolidated activity at the Volkswagen Group. It has also to be underlined that the contents of the agreements have become more and more specific over the last ten years. Starting with a declaration on fundamental social rights the following agreements treated more specific issues such as health and safety, relationships with business partners and participation. The social regulation of temporary agency work represents another specific topic which will be dealt with in the forthcoming transnational agreement. Dealing with more specific issues was so far considered a characteristic of European Framework Agreements (Telljohann et al. 2009) but in the case of Volkswagen it also characterizes the negotiation processes at global level.

5. The contents of the Global Labour Relations Charter at Volkswagen

An important cornerstone of social sustainability is represented by the Global Labour Charter, that was signed on October 29, 2009 at the Volkswagen Group. In the agreement far-reaching participation rights for employee representatives are laid down. The Charter sets out a framework of participation rights of employee representative bodies at all individual facilities of the entire Group. The agreement, concluded between employee representative bodies at European and global level, the Group Board of Management and the International Metalworkers' Federation, was signed at the meeting of the Global Group Works Council. The meeting was attended by employee representatives from the Group's more than 60 locations in 15 countries, the Volkswagen Group Board of Management and the international human resources managers of the Group. The Charter is to improve world-wide labour

relations standards at all locations. In the view of the Group it is considered an expression of the special culture of co-determination at Volkswagen.

With regard to the concept of participation rights a distinction is made between three stages: the right to receive information, consultation rights and co-determination. These terms are defined as follows:

"The right to *information* means that on-site employee representatives must be given comprehensive information in due time in order to have opportunity to assimilate the facts of a given circumstance and form an opinion. 'In due time' means that information concerning measures must be provided at the time of commencement of any planning process. "Comprehensive" means that all relevant aspects and data must be relayed in comprehensible form. Information must previously have been provided before any measure can be implemented.

The right to *consultation* refers to the necessity for active dialogue between on-site employee representatives and management. The aim of consultation is to give employee representatives opportunity for initiative or protest concerning a given issue or circumstance and, where necessary, for discussion about how to prevent detrimental effects. Consultation must have transpired before any measure can be implemented.

The right to *co-determination* means the right of on-site employee representative to consent, control and initiative in connection with any shared active decision-making or responsibility. Prior consent must be solicited before any measure can be implemented" (Volkswagen 2009).

In order to guarantee effective participation processes the company has to provide regular and early information to employee representatives concerning the economic situation, strategy planning, product events, medium-term allocation scheduling, products and investments.

The agreement also provides for annual location symposia at which management and employee representatives are to discuss the development of the location within the relevant planning period and especially employment prospects.

The Global Labour Charter sets out the participation rights of employee representative bodies in the following areas:

- human resources and social matters,
- work organization,
- remuneration systems,
- information and communication,
- initial and advanced training,
- occupational health and safety,
- controlling,
- social and ecological sustainability.

It has to be stressed that in the first six areas the Charter provides with regard to specific topics also for co-determination rights. Only in the seventh and eighth area participation is limited to consultation rights.

In order to guarantee competence-based participation processes the Charter also includes the right for works councils to consult external experts .

In addition, the Charter also grants to employee representative bodies the right to hold workforce meetings up to four times per year. At least at one of these meetings, management is to inform the workforce on the economic situation, the development of the location and developments in the area of human resources and social matters.

All the costs related to the implementation and application of the Charter have to be borne by the respective company. This also includes the assumption of costs for material and financial outfitting of the works council and the assumption of costs for training measures and external consultation services for the works council.

6. The underlying philosophy of the Global Labour Charter

Although there is no intention to export the German model of co-determination there seems to be an intention to disseminate at least its spirit. The Charter provides a binding framework within which to further develop existing labour relations in a spirit of co-operative conflict management. In the spirit of the Charter co-operation is based on the logic that employee and management representatives commit to accepting shared responsibility, on the one hand, and to exercising trust-based participation, on the other hand.

In this view the legitimate interests of both sides are recognized and taken into account in the establishment of viable forms of cooperation. This approach also implies that the parties involved have to take a constructive approach to pursuing economic success, on the one hand, and employment security and the welfare of the workforce, on the other hand. In this context the Charter emphasizes the role of a policy of social consensus and the need to resolve problems through negotiation processes.

The charter is based on the shared conviction that the future development should be characterized by a responsible business approach based on broad participation. This approach also calls for a high level of competence and a keen sense of responsibility on the part of both employer and employee representatives. As a consequence, skills development becomes also central to the further development of employee participation at locations outside Germany**.**

7. The Implementation of the Global Labour Charter

At the Group's locations, the Charter will be implemented on the basis of specific agreements reached between the managements and employee representatives of the plants concerned. In this context it is important to underline that the parties concerned recognize country-specific trade-union traditions within the Volkswagen Group. That means that there is no intention to just export the German model of co-determination.

The procedure for negotiating such an agreement includes four key steps:

In a first step employee representatives and management at the respective site have to formulate an assessment of the current situation of co-operation including the existing rights and obligations of both sides. On the basis of the assessment company-level employee representatives then have to select the participation rights they wish to include in negotiations for the *site-specific participation agreement*.

In a following step the detailed content of regulation will be agreed by the parties involved. The *site-specific participation agreement* should contain a time and content schedule for the different phases of implementation. The schedule should contain the date of implementation of the cited participation rights and the necessary conditions for implementation. According to the Charter the schedule should also specify the on-site work and coordination structures necessary to enable the participation rights to be exercised.

In order to enable the participation rights to be exercised, employee representatives are expected to take part in regular training measures. The parties concerned have to agree specific training measures for employee representatives in order to acquire the required skills. The training measures have to be either provided or funded by the company.

The workforce at the respective site have to be informed about the content of the Charter and the content of the locally agreed participation contract. The works council has also the possibility to conduct information briefings for the workforce together with management.

In order to monitor the implementation process it is envisaged to set up a control group comprising the president and secretary-general of the Volkswagen European Group Works Council and the Volkswagen Group Global Works Council as well as the labour director and the head of Group HR International. The main task of the control group consists in maintaining a system of regular progress reports on the sites and companies. Furthermore, the control group supports the implementation process through the organization of training

measures and the installation of an electronic platform onto which the agreements and regulations laid down for each site should be posted.

8. Experiences of Implementation

In 2010, several locations began to flesh out the Charter with declarations of intent and outline implementation arrangements agreed between management and employee representatives. In these cases the local collective bargaining partners agreed on a phased implementation of these outlines, guaranteeing in this way that the rights to participation set out in the Charter can be put into action.

In particular, Volkswagen Slovakia, Volkswagen Auto Europa and Volkswagen Motor Polska, Volkswagen Group Italy, Lamborghini as well as Volkswagen Spain started to implement the Global Labour Charter. As a result, in May 2012, at a joint meeting in Wolfsburg, the Volkswagen European Group Works Council and European HR managers from the Volkswagen Group gave a positive assessment of progress in implementing the Global Labour Charter.

Spain

At the Volkswagen Navarra plant a shift in industrial relations has taken place in the recent past. The signing of the agreement for the period 2007-2009 represented the start of a change towards more cooperative industrial relations based on concertation and joint responsibility of the parties, aimed at improving the competitiveness of the factory, the quality of production, job security and labor rights of their workers**.**

The following agreement, signed on October 25, 2010 and valid till the end of 2012, represented the consolidation of the industrial relations of cooperation, including major commitments on investment, employment, early retirement, training and benefits. According to the discussion between management and trade union representatives the agreement for the next three-years-period will be aimed at securing employment, improving productivity and contributing to the *Volkswagen Group Strategy 2018.*

In this perspective, business and unions agree on the need to maintain and improve the industrial relations system built in recent years, both through institutionalized local collective bargaining, as through cross-cutting thematic agreements and through the harmonization of rights and labour involvement within the Volkswagen Group.

On this last point, the 16th Additional Provision of the agreement signed in 2010 establishes the commitment to adapt to the *Global Labour Charter.* Union members interviewed in the course of this study believe that this *Charter*, which defines and regulates the rights and procedures for information, consultation and co-determination, represents the general framework for the group companies, based on already established standards in their German companies, although its level of development and implementation is still uneven in terms of both union representation systems and the national legislation of those more than 20 countries around the world with Volkswagen factories.

However, the adoption of the Charter is considered very positive as it contributes to the modernization of industrial relations and trade union dialogue in the various countries. The Charter is seen as an attempt to move towards harmonization of working conditions and its more relevant indicators (skills, rights and employment benefits, etc.), except wages, as a correlate to the process of homogenization of production and work organization developed by the Group, even including strategies of internal competition between factories operating at times as a mechanism of local pressure to achieve its overall objectives.

In the Spanish case, the *site-specific participation agreement* referred to in Article 6 of the Charter had not been formalized by mid 2012, but the spirit consisting in the *culture of participation and performance* and many of the objectives including labor rights, education,

health and safety, social and ecological sustainability, etc. have been developed steadily in recent years and characterize the current model of industrial relations at Volkswagen Navarra, at least with regard to the development of information and consultation rights, whereas the development of co-determination rights shows to be more difficult and less generalized. In fact, the agreement signed in 2010 includes among its commitments a significant part of the topics listed in the Charter.

So far, the evaluation of the major trade unions (CC.OO. and UGT) is generally positive. However, the implementation of the Charter will be dealt with more in detail in the context of the negotiations of the next three-years-agreement.

Poland

Volkswagen was one of the first companies to actively integrate its Eastern European plants into its European Works Council. The Group is quite active in Eastern Europe in Poland, Slovakia, Hungary and the Czech Republic. In Poland Volkswagen has production sites at Polkowice and Poznan.

According to the Polish interviewees implementation of the Charter at Volkswagen Polkowice has, so far, shown to be a difficult and demanding process. In Poland the implementation of the Global Labour Charter entailed, in fact, a profound cultural change as in there was no tradition of employee participation and, thus, management was not used to involve employee representatives in decision-making processes.

From November 2009 to May 2010 internal discussions among the employee representatives at company level took place. The implementation of the Charter was also discussed at meetings of the working group on international solidarity coordinated by IG Metall Wolfsburg. In this group the Charter was analyzed in depth and a discussion on opportunities and threats regarding the implementation of the Charter took place in which representatives from Volkswagen Wolfsburg, Polkowice, Poznań, the Slovakian site and Skoda Mlada Boleslav participated. The result of the meetings consisted in an assessment of the actual level of employee involvement. At the same time the Polish delegates received tangible support from the World Works Council in form of organizing seminars.

In May 2010, probably due to the pressure from the World Works Council, employee representatives and management started the process of analysis of the current state of employee involvement in order to determine the conditions for developing information, consultation and co-determination rights. As a result, in May 2010 the company-level actors signed a letter of intent on the implementation of the Charter at Volkswagen Polkowice.

With regard to the attitude of the management Polish employee representatives see a growing understanding and support in the process of implementation of the Charter. According to the employee representatives this positive development is the effect of having succeeded in building reciprocal trust.

An example of how the culture of cooperative action at Volkswagen is implemented internationally is the “Employee-Friendly Employer” award given to Volkswagen Poznan in October 2011. This national award was presented by the President of Poland and accepted jointly by representatives of the Board of Management in Poznan and the local trade union, Solidarnosc.

All in all, it seems that the implementation of the Charter entailed increasing participation of employee representatives, on the one hand, and growing responsibilities, on the other hand. As this stronger involvement of employee representatives requires more skills and knowledge management agrees on training measures for employee representatives. Due to the stronger involvement and the development of reciprocal trust employee representatives consider the Charter an important added value for both, labour relations at the level of the site and the company’s productivity.

Italy

In Italy the process of implementation regarded in a first phase the car producer Lamborghini in Bologna and the sales organisation. That meant that metalworking trade union organisations as well as trade unions for commerce were involved in the implementation of the Charter. The process started with an in-depth analysis of the Charter. On the employee side company-level structures of interest representation as well as external trade union organisations were involved in this process of analysis. Coming from a more conflictual tradition of industrial relations an initial concern regarded the commitment to accept shared responsibility.

However, at the end of the process of analysis and internal discussion trade unions and employee representatives decided to sign a first agreement with management on the intention to implement the Global Labour Charter. In the agreement that was signed at Lamborghini on February 2, 2011, it was agreed to introduce a new model of industrial relations based on the principles laid down in the Charter. At the same time it was underlined that the new industrial relations would have to be compatible with the national collective agreement applied at Lamborghini and that collective bargaining represents the main device in company-level industrial relations. That means that in the agreement of February 2011 explicitly recognizes the country-specific trade union traditions.

After the signing of the agreement it was agreed to organise training measures for all employee representatives of the Volkswagen Group in Italy. During the training measures that took place at the beginning of 2011 German representatives of the Group's World Works Council explained in detail the contents and the spirit of the Global Labour Charter.

In the case of Lamborghini it was decided to include an extension of participation rights in the company-level collective agreement for the period 2012-2014. In a first step trade unions and employee representatives discussed which participation rights should be asked for in the process of collective bargaining. It was decided extend participation rights in the fields of

- work organization and working methods,
- job classification and training,
- ergonomics and health and safety and
- result-related bonuses.

In these cases so-called bilateral technical commissions were introduced. There is a clear division of labour between the commissions and the company-level structures of interest representation. The results and proposals of the bilateral commissions represent the basis for negotiation processes between management and the company-level structures of interest representation. It has also to be noted that the members of the commission have a right to training and external experts. The costs for the training measures and the external experts have to borne by the company. At Lamborghini the agreement was signed in June 2012. With regard to the sales organisations the company-level collective agreement for the period 2011-2013 contributed to implement the Global Labour Charter and to extend the participation rights.

In the view of the interviewees the Global Labour Charter contributed to strengthening the position of employee representatives at local level. In this context it was stressed that the strengthening of their position can also be explained with the important support they received from the German employee representatives.

In both cases it has become clear that when it comes to an increasing involvement in company-level change processes there is a growing need for capacities to learn and to develop transversal competences such as critical thinking, problem-solving, creativity, teamwork, intercultural and communication skills as well as innovation skills. However, the extension of

participation rights requires not only higher skills levels, but also a new, trust-based relationship between all the company-level actors.

9. The role of competencies for effective participation

The Volkswagen case seems to confirm that today European competitiveness depends on a highly qualified labour force and innovative forms of employee participation. Research reports published, for example, by the European Foundation for the Improvement of Living and Working Conditions (2009) stress the fact that in future production will require increasing skills and a continuous updating on the part of employees. In fact, a highly qualified workforce is of the utmost importance for successful change processes. Recognising the strategic importance of workers' skills thus implies, among other things, the need for investment in the labour force throughout working life and the involvement of employees and their representatives in managing changes. Employees have, therefore, to be involved at company level through advanced forms of participation. These aspects also characterise a strategy based on the quality of work.

The links between participation, quality of work, productivity and competitiveness are also emphasised by the European Economic and Social Committee (EESC) (2011). Unlike the European Commission (EC) the EESC focuses on the role of workplace innovation for the improvement of productivity and the quality of work. Work processes, work organization, working methods and tools, the physical working environment, professional skills, working practices, and the active involvement of employees and their representatives are the areas for future improvement. Although the concept of the *innovative workplace* is not mentioned in the Commission document, the EESC considers it at the heart of the Europe 2020 strategy, as it is one of the key prerequisites for its success. Therefore, the EESC recommends that the *innovative workplace* concept should be incorporated into the Europe 2020 strategy. In this context the Volkswagen case and the implementation of the Global Labour Charter can become an important point of reference for the dissemination of the *innovative workplace* concept.

10. Conclusions

After the signing of the Global Labour Charter several agreements at the level of brands, companies or production sites were signed in order to implement the Global Labour Charter at decentralized level. In general, these agreements that have been concluded at the Group's international sites, have contributed to develop and extend co-determination rights and practice at the level of local sites.

All analyzed cases have confirmed that since there is currently no legal framework for transnational collective bargaining only TCAs co-signed by national trade unions or replicated by a series of identical national agreements can have a legally binding affect (Ales et al. 2006, Telljohann *et al.* 2009).

The agreements provide for a phased introduction or extension of participation rights; at the same time they are aimed at guaranteeing the balance between rights and responsibilities. In all the analyzed cases the agreements have contributed to a shift to more cooperative industrial relations.

Since 2010, the implementation of the Charter entailed, in fact, in several cases an enhancement of the plant-level co-determination rights, including first-ever general Company meetings and symposia being held in several locations outside Germany. In some cases, the work of local employee representatives is now being coordinated or developed within special committees, ensuring that the participation rights set out in the Charter are made more effective.

The analyzed cases have shown that the Charter has the potential to improve labour relations standards at all locations. The fact that employers and employee representatives are negotiating on the future of labour relations in these economically troubled times demonstrates the importance attached to these issues by both sides. The Charter can be considered an expression of the special culture of co-determination at Volkswagen, a co-determination culture that according to the actors has contributed to the success of the Volkswagen group.

Although the Global Labour Charter is characterized by a strong imprinting of the German co-determination model there has been in no case an export of the German model. In all analyzed cases the processes of implementation were characterized by the respect of national industrial relations.

The cases of implementation of the Charter at local level have also shown the importance of strength of the works council at headquarters sustaining workers' representatives outside Germany. Furthermore, also the training measures confirmed to be an important tool of support in the process of implementation of the Charter.

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Chapter 6

ArcelorMittal: dealing with restructuring through a transnational company agreement?

Christophe Teissier*

Introduction

Generally speaking, one may notice a significant number of European Framework agreements dealing with restructuring issues, with variations considering the specific topics (anticipation of changes, outsourcing, training issues, etc.) addressed or tools set up by EFAs[235].

In the context of the global economic crisis, more than ever, restructuring is a major issue for industrial relations. The choice of ArcelorMittal (AM) case was justified by the fact that very few European Framework agreements were concluded in the first phase of the global crisis. In the literature about European social dialogue, the ArcelorMittal – EMF agreement is thus considered as a best practice in times of crisis.

The general idea is first to present the cross-border agreement (as well as its process of negotiation) and then to search for the concrete impacts of the latter at national level, two years and a half after its conclusion.

The first part of the case is based on a previous EUROFOUND research run by ASTREES in 2010[236]. It aims at presenting the background of the agreement, the negotiation process and the agreement as such. The second part of the case deals with the concrete implementation of the agreement at national level in France, Italy, Poland and Spain. It results from a limited number of interviews carried out in the first quarter of 2012 by some of the partners in the EUROACTA project.[237]. Results presented are limited and should be considered with caution. Due to the timetable of the EUROACTA project and to the very difficult period (in economic and social terms) ArcelorMittal group is currently going through, it proved to be very uneasy to get interviews with social partners in ArcelorMittal. We especially did not manage to get interviews with representatives from AM management at national level, which is a major limitation. Further research would therefore be necessary to better assess the concrete outputs of the Framework agreement.

1. The European framework agreement: negotiation and contents

1.1. Background elements

1.1.1. Economic context at the times of the negotiation

ArcelorMittal is the world's largest steel producer. ArcelorMittal operates in 60 countries in the world. Europe used to represent almost half of the revenues of the group but the part of

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[235] Isabela Da Costa and Udo Rehfeldt provided a very significant analysis of this phenomenon to be found in this study.

[236] C.E. Triomphe, R. Guyet, D. Tarren (coord.), *Social dialogue in times of global economic crisis*, EUROFOUND, 2011

[237] List of people interviewed (February and March 2012) France: Jacques Laplanche, secretary of the ARCELORMITTAL EWC (CGT), interview carried out on 27th February 2012; Philippe Verbeke, coordinateur national ARCELORMITTAL (CGT), interview carried out on 26th March 2012. Italy: Vittorio Bardi, national official of Fiom-Cgil (in charge of the steel sector), interview carried out on 7th March 2012; Claudio Valacchi, shop steward in ARCELORMITTAL Piombino, interview carried out on 7th March 2012. Poland: M. Wladyslaw Kielian, Chairman of Solidarnosc ArcelorMittal Poland, March 2012.

Europe was dramatically reduced between 2008 and 2009, which questions the sustainability of the steel production in Europe. The situation of the steel market played a role in the negotiation of the European Framework Agreement. Steel market has become global and is strongly influenced by the global economic context, such as the evolution of the exchanges rates between Euros and Dollars which places the European steel market in a difficult competitive situation. The competition is strong between countries and continents, even among the different plants in the group. The evolution of the Brazilian steel market seems to be one of the biggest threats over the European production. In 2009, this situation led the management and the employees' representatives to think about a solution to maintain European competitiveness in this tough market.

The European steel market was particularly hit by the drop in demand and in a way the crisis constitutes a revealing factor of the structural difficulties of the steel market in Europe. As early as November 2008, cost savings measures were introduced across the entire group to address the consequences of the crisis. The measures consisted in launching a Voluntary Leave Programme and in temporarily closing 15 out of the 25 blast furnaces in Europe to reduce the production, thus leading workers to fear job losses. As a result, at this time, workers exerted pressure on the company management to find solutions to maintain jobs and purchasing power. This led to protests and strikes. The moral or philosophical orientations of the Group CEO probably also played a role in the solution finding process. Indeed, as Indian, his management is influenced by community based logics with more collective decision making process and a strong importance of the group and therefore the necessity to "save" the community[238]. As a result, in 2009, the group top management declared in the press that the blast furnaces were only temporarily mothballed and that the reopening will take place as soon as the economy recovers. Forced dismissals were not planned.

Following this declaration it was clear that something had to be done to meet the expectations of the workers in the face of the crisis. It was therefore urgent to find short term solutions.

1.1.2. Approaches of social dialogue within the group

The agreement signed between ArcelorMittal (AM) and the European Metalworkers Federation (EMF) in November 2009 is embedded in a particular social dialogue framework. Indeed, the structural background of social dialogue at ArcelorMittal represents an important element to understand the permanent process of social dialogue that has been created in the group for several years and that was reinforced by the transnational agreement concluded in 2009.

The structural background of social dialogue at ArcelorMittal thus plays an important role in the elaboration of the 2009 agreement. Before 2007 and the merger between ARCELOR and MITTAL STEEL, genuine social dialogue was already a reality, at least in some extent, within ARCELOR. For instance, the ARCELOR EWC agreement concluded in 2002 could be considered as an advanced one comparing to the legal requirements of EU and national laws in force at this time. In addition, as soon as 2004, ARCELOR group launched an ambitious and very demanding occupational health and safety policy at European level, in close collaboration with the EWC. Since the merger occurred, ARCELORMITTAL has been trying to pursue the same orientations by promoting development of social dialogue as a way to increase the group competitiveness. The AM European Works Council has been created in 2007 and includes different working groups, each of them dedicated to specific issues, such as training, employment and restructuring, communication. Generally speaking, there has been and there still is a declared willingness among the managers and employees' representatives to stimulate a continuous social dialogue. Best example of this state of mind lies in the global

[238] N. Prime, *Culture et mondialisation : la diversité* , in « L'Expansion Management Review », n. 102, September 2001, pp. 52-66

framework agreement on occupational health and safety concluded in 2007 between ARCELORMITTAL, the FIOM and the EMF. One striking aspect of this agreement is that it plans the setting up of social dialogue bodies dedicated to health and safety in all companies of the group worldwide, which is crucial in some countries where social dialogue structures are not well developed.

Coming back to the influence of national models of industrial relations, it is probably significant to notice that the ArcelorMittal group is the heir to the former French steel industry group named USINOR. The latter was established in 1948 and then merged in 2002 with the Spanish Aceralia and the Luxembourgian Arbed to form the new Arcelor Group. Arcelor Mittal results from the merger in 2006 of Arcelor and Mittal. Even if the parent company of the group is today located in Luxembourg, this long history probably explains the strong influence of the French model of industrial relations on ArcelorMittal. France is to be seen as a country where employee representation at company level is based on a dual channel. Briefly speaking, as a matter of principle, elected workers representatives exist alongside some union representatives directly appointed by the representative unions in the company. Depending on the size of the company, elected employee representatives may be shop stewards and/or members of the works council. Elected representatives are only entitled to information and consultation rights on company's decisions. Only union representatives are, when they exist, entitled to conclude collective agreements with the employer. This dual channel of representation is similar to the one established in ARCELORMITTAL at European level through both the EFA (see below) and the European Works Council (EWC) put in place in 2007. In the view of the group management, the EWC is only a body in charge of being informed and consulted on the group transnational decisions. Unions are seen as the only partner able to negotiate collective agreements. This explains why the EMF was considered as the legitimate actor to negotiate the EFA with the management and also why, as a result of the EFA, the EWC now works alongside the European Social Dialogue Group, a joint body putting together union representatives and the management (see below).

1.2. The negotiation process

The agreement is the result of a negotiation between the EMF and ArcelorMittal top management at EU level. Before the economic crisis began to affect the ARCELORMITTAL group, the EMF and ARCELORMITTAL management had already exchanged on the opportunity to conclude a transnational company agreement on anticipation of change, and, more precisely, on human resources planning. However, when the crisis occurred in 2008, it seemed impossible, especially to the EMF, not to address management of ongoing changes and restructuring processes in the group through a possible transnational agreement. For this reason, the EMF prepared a document, named common platform of demands, to be used as a basis for negotiation with the group management. This common platform was adopted by national unions affiliated to the EMF and represented in the group in December 2008. From this moment, EMF thus got a mandate to negotiate with AM management on behalf of its affiliates. This common platform included precise requests related to the management of the crisis effects: no compulsory dismissals, no permanent plants closures. In February 2009, the EMF informed the management that the negotiation to be carried out should be based on this platform considering short term measures to cope with the crisis.

The negotiation then lasted three months. Timing was short due to the urgent situation created by the economic crisis. For this reason, it was also decided that negotiation would be carried out by a small group. The negotiation group put together three representatives of ARCELORMITTAL management (Willie Smith, group vice-president in charge of industrial relations, Hugues Fauville, responsible for employee relationships in Europe and Jean-Yves Tollet, head of international coordination for labour law) and three representatives appointed

by the EMF, including the EMF deputy general secretary and the EMF coordinator within ARCELORMITTAL European Works Council The EWC as such was not represented in negotiations as this body is not considered as a negotiating one by both the EMF and the management. Four meetings of negotiators were held. In between these meetings, the EMF organized coordination meetings with national unions represented in the group to discuss the results of the negotiation at different steps: it enabled to include everybody in the process, and at the same time, to be quicker on the side of the negotiation. At the end of June 2009, negotiators agreed on a common text. They then followed up procedures and consultation with local HR (on the management side) and with the national unions (on EMF side) before signing the agreement. The latter was finally signed on 2nd November 2009.

The EMF considers that the negotiation process as such is a success: the federation managed to carry out a negotiation in a short time while fully complying with its internal procedures (association of affiliated unions in the course of negotiations). This analysis is confirmed by some unions responsibles at national level: for instance in Italy, the national officer of FIOM CGIL in charge of the steel sector stated*: "The discussion on a possible agreement for the anticipation of change in ArcelorMittal was opened and carried on within the EMF at the beginning of the first wave of the crisis, in late 2008. We in fact considered necessary to manage the restructuring, trying to safeguard the employment and workers' incomes, with adapting the skills and professionalism to the output stage of the crisis. Furthermore, it was considered possible to reach a cross-border agreement, in some ways innovative, even wake of the previous comprehensive framework agreement on health and safety the year before, which had showed to us some willingness of the management – at least formally – to the social dialogue and to come to an agreements with us the European unions"*. And he added: *"Although the reality of AM in Italy relatively small and aimed only at the processing plant, with no primary production, the Italian unions have always been involved in the initiative's overall EMF"*.

However, it's significant to notice that some French union federations refused to approve the agreement, fearing that new social dialogue tools planned in the agreement (see below) may threat legal prerogatives of the European Works Council and overlap the latter rights to information and consultation on transnational strategic issues. Also in Poland, some difficulties affecting the negotiation process were raised by the chairman of Solidarnosc ArcelorMittal Poland. According to him, during the negotiation, all proposals were sent through the trade unions' channel - ie. the branch organization, the Metalworkers' Secretariat of the Solidarnosc affiliated to the EMF. The main difficulty was the necessity of quick and proper mutual translation of changing records. At the end, Polish unions think they were put a little bit in a forced situation: either the version accepted by the employer would be adopted or there would be no such agreement at all.

Finally, it proved to be possible to reach an agreement between unions and the management because both parties found an interest in designing common responses to the crisis and ways to better anticipate future economic changes. Globally speaking, both parties agreed on the fact that group economic performance and social dialogue may not be disconnected. Both sides recognised the ineluctable feature of restructuring and the need to anticipate it in the context of a very competitive market. Moreover, they shared a common interest in formulating long term solutions to maintain jobs and competitiveness in Europe. This shared interest explains that parties managed to overcome the main difficulty they faced.

1.3. The Contents of the Agreement

The scope of the agreement is larger than the one of the European Works Council. The agreement applies to all workers employed in ARCELORMITTAL group companies in 34 European countries whereas the EWC "only" covers directly 9 countries. It especially means

that workers in countries which are not members of the European Union are covered by the agreement: Turkey, Serbia, Bosnia, Macedonia, etc.

The agreement signed on 2nd November 2009 is an open –ended one. It cannot replace any national and local legislation and/or national, regional or company level agreements if these are more favourable for the workers. The agreement is thus a framework one. It lays down minimum principles to which all companies included in its scope should refer to, to anticipate and manage change in a socially responsible way. It does not prevent the group companies from further developing these minimum principles at local level or from continuing to do so where they already exist. The agreement plans some specific conciliation procedures in case of disputes resulting from the interpretation or implementation of the agreement.

The agreement includes three different chapters and is a mix of short time measures to manage the current effects of the crisis and long term measures to better anticipate future changes.

The first chapter has been agreed on in reaction to the crisis. Therefore, it plans group's commitments to mitigate the effects of the crisis. Three different types of commitments are planned. First, ARCELORMITTAL commits itself to reopen plants whose activities were temporarily suspended because of the drop in steel demand worldwide. Second, ARCELORMITTAL commits itself to avoid compulsory dismissals, ie. to use all possible means to maintain the workforce by using all possible alternative solutions, such as short – term working, and by providing training opportunities in periods of economic cutbacks. Dismissals may only be envisaged if all possible alternatives have been explored. In this case, AM commits itself to search for negotiated solutions with unions with a view to create long term solutions for the employment basins affected. At last, AM commits to search for negotiated solutions with unions at national/local level to maintain purchasing power of the workforce, especially by limiting the loss of salary in case of short-term working. This last measure is only temporary. It was valid for one year after signing the agreement but may be extended by mutual agreement between the parties.

Chapter two of the Agreement is related to the anticipation of change. It plans framework provisions to promote forward-looking management of jobs and skills within the group by stating some general principles and guidelines related to:

- information on the group strategy and forecasts on main areas of the group orientation and developments;
- development of workforce skills, whatever the professional categories, especially through vocational training. General aim here is to improve workers' employability. The agreement plans some guidelines on training policy within the group focused on different key principles, especially : promotion of internal mobility through individual professional development interviews; individual right to training; certification of work-derived experience, development of annual collective training plans at local level in cooperation with unions. These guidelines are to be developed and made concrete through a dedicated negotiation which was to be held before the end of 2010. This additional negotiation was to result in an annex to the 2009 agreement. Main idea here is to complement existing training policies within the group by promoting the latter and by creating additional tools, such as training passports, and/or addressing specific issues such as knowledge transfer.

The third chapter of the Agreement is related to the development of social dialogue at different levels to better anticipate and manage change. Provisions here are related to two complementary aspects:

- *Development and strengthening of social dialogue at national level*: the agreement plans minimum standards to be implemented in all countries covered without prejudice to existing national legislations. Generally speaking, social dialogue processes, involving

both management and **representative** trade unions through different bodies and channels (works councils, unions delegates, etc.) should exist in all countries (including non EU member states) at all relevant levels. Social dialogue is also to be implemented at national level (**and not only at plant level**) when it is not already the case (especially in some of the countries covered, such as Poland, Romania or Czech Republic). Moreover, the agreement plans that **national follow up committees** are to be set up at national level. These committees are responsible for monitoring the implementation of the agreement in each country but are also a tool to better frame social dialogue at national level. In some countries, such as Spain, they are a way to set up permanent structures for social dialogue between unions and management at national level when such permanent structures do not exist. National follow up committees are composed in equal number of management representatives lead by the country Human Resources coordinator and of employee representatives (one representative by national trade union represented in ARCELORMITTAL group). Concrete implementation of these national follow up committees is to be discussed at national level, allowing for an adaptation of each national committee to the national context.

- *Strengthening strategic social dialogue at European level*: the agreement aims to ensure an "active" and "permanent" dialogue on the group strategy at European level. To meet this objective, it redesigns and empowers **a** Social Dialogue Group alongside the European Works Council. A Social Dialogue Group at European level has been existing in ARCELOR MITTAL since 2002, but it has never really worked. Objective of the Agreement in this respect is thus to promote a new social dialogue tool at European level, in addition to the EWC, to implement a strategic dialogue on anticipation of changes. It is thus to address long term issues related to competitiveness and sustainability of the group in Europe on the basis of several and various indicators (types of investments, analysis of so called critical competences, employment evolutions, need for training, information on sub-contractors). It is also to act as a social and industrial observatory and to explore the viability of all ARCELORMITTAL sites. At last, it is responsible for the follow up of the agreement at European level. It is thus to receive reports from national follow up committees and to facilitate settlement of possible difficulties arising at national level. The Social Dialogue group is to meet every quarter. It is composed of 12 representatives of the trade unions (the 3 members of the negotiating team on behalf of the EMF + 9 representatives of national unions –ie. one representative for each of the main European countries the group is located in) and 12 representatives of the management (including negotiating team on behalf of ARCELORMITTAL and other representatives, such as the ones from the different business lines *("segments"*) of the group).

  From both the EMF and ARCELORMITTAL point of view, the Social Dialogue group is to complement the European Works Council activities and not to replace the latter. Idea is to benefit from a light structure to allow for an in depth dialogue on strategic issues between management and unions, something the legal/formal prerogatives of the EWC (information and consultation on strategic decisions) would not necessarily allow for. However, for both management and the EMF, social dialogue group is not a negotiating body.

Generally speaking, beyond the provisions of the agreement as such, it's worth noticing two major aspects which have to be considered before analysing the implementation of the agreement:

- First, the agreement is clearly a trade off between a better internal and external flexibility for the group and a better employment security for the workers (through job security in the short

term and better employability in the medium /long-term). As such, it may appear to be a concrete illustration of what flexicurity concept may mean in global companies

- Second, from our view, the agreement is really innovative considering measures aiming to develop a permanent social dialogue as a pre-condition for the anticipatory management of change (chapter 3 of the Agreement). Generally speaking, these measures show a common will to efficiently and concretely organize social dialogue in a transnational company, by going beyond what European and national regulations already plan. Focus is put on ways to ensure an efficient and better structured social dialogue, ie. a social dialogue that really contributes to the economic and social performance of the group at different levels. At European level, joint position of the signatories of the agreement is that in depth exchanges and dialogue about strategic and long term issues for the group may not really occur in the framework of the European Works Council. More specifically, there would be a need for permanent exchanges, especially in a context of economic recession, between unions and management, and this need could not really be addressed through the institutional framework regulating the EWC (information and consultation procedures on daily business / ordinary EWC meetings, etc..). The agreement therefore intends to organize a complementarity between the social dialogue group at European level (focused on discussions on strategic and long term issues) and the EWC. Idea is that the two bodies may feed each other in order to get a more efficient social dialogue and not that the social dialogue group replaces the EWC. In that extent, the agreement set up a kind of dual channel of workers' representation at European level, through unions on one hand (thanks to the Social dialogue group) and through workers' representatives on the other hand (thanks to the EWC). System is thus similar to what we may find in some national systems of industrial relations, such as the French or the Belgian one.

2. Implementation and follow up

2.1. The context: some persistent economic difficulties and a conflicting situation within the group

It seems clear that major changes affecting the implementation of the agreement occurred from 2011. From the point of view of several employee representatives from different countries, it can be said that the agreement, albeit with some difficulty in some countries, worked efficiently at least for the first phase of the crisis. Real problems everywhere began in 2011, when the expected economic recovery didn't occur.

Facing a persistent drop in steel demand at global level, the group announced an additional costs saving plan up to 1 billion euros on 23rd September 2011. Objectives of these measures are to ensure the competitiveness of the group by optimizing its "*actifs*" and reducing its costs. As a result, AM followed on a severe strategy of restructuring plans, downsizing, jobs cut, plant closures and mothballing of production in several countries : closure of the hot area of Liege in Belgium in 2011; closure of the AM site in Madrid in 2012 ; mothballing of several blast furnaces and other production tools across Europe (France, Czech Republic, Poland, Luxembourg).

All in all, the employment effects of this strategy are visible in the table below:

Evolution of the staff of ArcelorMittal in the countries represented in the European Works Council (December 2008-December 2011)

COUNTRY	2008	2011	% Evolution 08-11
Belgium	13.128	10.589	-19,3
Czech Republic	10.830	8.864	-18,1

Germany	9.954	9.298	-6,6
Spain	12.634	10.944	-13,4
France	23.678	20.259	-14,4
Italy	1.626	1.376	-15,4
Luxembourg	6.793	5.570	-18,0
Poland	23.710	17.135	-27,7
Romania	18.230	11.360	-37,7
TOTAL	120.583	95.395	-20,9

Source.- SYNDEX, March 2012

One may provide further illustrations of the impacts of the group strategy at national level.

In France, as a result of the group global policy, the strategy seems to maximize some production units, the more performing ones in Dunkerque and Fos sur Mer, and to mothball activities of other units to take into account the drop in steel demand. The main consequence of this strategy has been the mothballing of two blast furnaces in Florange (Lorraine region) since July (halt of the 1st blast furnace) and October 2011 (halt of the 2nd blast furnace) for an open ended period.

In Italy, within the Arcelor Mittal Group, ArcelorMittal Piombino S.p.A. has its mission to serve the Italian and part of the Mediterranean market, especially for coated product areas: construction, household appliance, industry in general, cars. The Group employs in Italy 1.388 people (Dec. 2011); they were 1.650 in 2007. The manufacturing plants are located in Piombino, Avellino, Canossa, while and services and administration offices are in Milan and Udine. According to the unions interviewed, ArcelorMittal is now asking Piombino to do more in order to reduce labor costs through a better "rationalization" of the production cycle, savings and eventually even staff reduction. In April 2011, the company had not still officially quantified the surpluses, although they were roughly esteemed in some sixty people. Mobility procedures and pre-retirement, ruled by the Italian legislation, have been encouraged, but their possible use expired on February 2011. Now the workers remaining in the plant of Piombino are relatively too young to be eligible in future for a further use of incentivized retirement, even because new rules, fixed by Italian law in December 2011, have remarkably delayed the age to get a pension.

This difficult situation raises a very conflicting situation at both national and European level.

In France, the decisions previously mentioned have provoked a very conflicting situation. French Unions, and especially those represented in Florange, fearing some definite closure of the site, have been developing many protest actions since 2011. For the time being, no reopening of the blast furnaces has been decided and the new French President met the unions on 4th May 2012 to discuss about the situation and possible solutions.

In Italy, in summer 2011, the local metal workers unions' secretaries met the political forces in order to explain the delicate and difficult situation at Piombino. They said: *"We are very concerned about the future of the plant of Piombino. That's why we wanted to put this situation in the center. We guess that it is necessary to protect the steel industry in Italy as a whole"*. According to the : "*The steel plant of Piombino is a national issue. We know that there are difficulties; just look at AM, which has just closed another blast furnace in Europe! Every State that still maintain and industrial apparatus cannot give up the steel industry. And also an industrial system like such as the Italian, needs still to bet on the steel industry. Giving up the steel industry* – Landini adds – *would imply to buy products from others and, therefore, depend on other countries"*. There are currently statements and rumors by the company, but the union intends to play in advance. *"We're against any reduction of the workforce"*, says Gabrielli (Gen. Secr. Fiom for the area of Piombino). *"Once a negotiation should start, we first want to know what the objectives and perspectives are*".

At European level, a critical assessment of the implementation of the agreement led to the call, by the European Metalworkers Federation, to a day of protest in all group companies (December 7, 2011), against the policy of *'stop and go'* (temporary closure of factories, dismissal) and relocation, aimed at keeping prices and profits at the expense of productive capacity, employment and skills of workers, while requiring the group direction to comply with the agreements and to negotiate a new strategic plan (addressing investment issues, R & D, employment, training, etc.).

In addition, at sectoral level, the EMF steel committee adopted the Piombino Declaration on 8th November 2011. The EMF Committee strongly supported the ongoing actions against the AM Group after the announcement of closure of several European plants. In that Declaration[239], the EMF demanded a global European industrial strategy for the steel industry, supporting the single EU Member States through the sectoral allocation of the European structural funds so:

- to sustain investment in new technologies and processes in upgrading installations and plants to contribute to a resources and energy efficient European economy based on high-quality jobs in the same time improving health and safety in the workplaces, maintaining employment and rejecting precarious jobs;
- to safeguard the European production from unfair competition improving social and environmental constraints and the quality standards of steel products utilised in the EU;
- to save secure and good jobs in the European steel industry.

2.2. The implementation of the agreement provisions

In this context, it appears to be difficult to really assess the implementation of the agreement as such. We may however highlight some information collected at national level, in France, Italy, Spain and Poland

2.2.1. Substantive issues

As detailed previously, The EFA is a mix between measures aiming at safeguarding employment in the group in a context of economic crisis and measures aiming at better anticipating changes, including the improvement of workers' employability. In October 2010[240], following observations about the implementation of the agreement could be made:

As for measures included in chapter 1 of the agreement, one could notice positive effects. As for the maintain of the group production capacities in Europe, the reopening of temporary closed blast furnaces had been done. As for the maintain of workers' purchasing power , the group implemented some flexitime arrangements, such as short time working or temporary layoffs, in cooperation with unions and national governments and in accordance with local regulations in the different countries. For instance in Romania, legal rules related to temporary layoffs were amended, and some collective agreements, concluded at company level, allowed for maintaining decent salaries during economically difficult times. As for provisions related to dismissals, ARCELOR MITTAL implemented a worldwide voluntary redundancies scheme from the end of 2008. This scheme was designed at global level and the European Works Council was informed and consulted about it at European level. It was then concretely implemented at local level. As a result, many layoffs which occurred in Europe were not compulsory ones. The group seemed to prioritise voluntary redundancies. Therefore, globally speaking, in October 2010, the group seemed to have complied with its short-term commitments. However, it proved to be difficult to assess the direct impact of the 2009

[239] See http://www.emf-fem.org/Industrial-Sectors/Steel/EMF-Steel-Committee-adopt-Piombino-Declaration

[240] See the EUROFOUND research previously mentioned

agreement, as some of the measures implemented were already taken before the agreement was signed.

As for measures included in the chapter two of the agreement, work was in progress. Pursuant to the agreement provisions, the Social dialogue group had begun to work on training issues in cooperation with the European Works Council. A meeting held in July 2010 allowed for discussing common principles and guidelines, related to training policies in Europe. During this meeting, a working group set up within the European Works Council and dedicated to "training issues" had the opportunity to present provisional conclusions of its works to members of the Social Dialogue Group. At that time, ARCELORMITTAL management was working on proposals of guidelines about training with a view to complement existing training policies in force in the group in Europe.

Almost two years later, it's possible to complement a bit some aspects of this first assessment on the basis of few interviews made in 2012 with various union representatives in France, Italy, Poland and Spain (see the list in annex)

In France, as for the first type of measures, unions representatives interviewed presented a negative overview of the current situation. They distinguished two periods in the implementation of the EFA. They first consider that the group more or less complied with the commitments included in the EFA until approximately mid 2011: it was especially the case regarding measures aiming at maintaining the workforce since some short time working, as planned in French law, has been widely used with the financial support of public authorities. ArcelorMittal especially used a specific form of short time working, named APLD[241], allowing for long periods of short time work, partly subsidized by the State and the Unemployment insurance system. These measures have been allowing maintaining jobs and employees purchasing power. In addition, the EWC secretary interviewed noticed that during this period, the group implemented a fair burden sharing of the economic difficulties between the different units in Europe. However, the latest economic developments, from mid 2011, having led to the mothballing of the blast furnaces in Florange, explain that unions' representatives today fear that these units never reopen. In that extent, the safeguarding of employment as well as tools and plants as planned in the European agreement would be threatened. In the meanwhile, on the contrary, the group management in France has always been stating that the production sites affected would not be closed down and that the group would invest in the maintenance of the furnaces as well as in the search for financing of innovative industrial alternatives, especially through a new industrial project named ULCOS (Ultra-Low Co2 Steelmaking).

As for the second type of measures, according to the people interviewed, the group does not comply with both the spirit and terms of the agreement regarding major issues relating to anticipation of changes. In short, the voluntary dismissals plan implemented in France in 2009[242] and especially targeting the older workers resulted in a loss of technical experience within the group and nothing would have really been done to address this issue. On the contrary, the group policy would rather be to hire temporary workers to face possible increases in steel demand if needed, up to a percentage of 25% of the workforce! In terms of vocational training, the interviewees criticized the group policy: the collective agreement planning forward looking employment and skills concluded at group level in France on 15th

[241] French acronym for "Activité Partielle de Longue Durée"
[242] This plan aimed to suppress 1400 jobs

december 2007[243] would not be really implemented in practice. At last, none of the people interviewed was aware of further developments of the chapter 2. of the agreement [244].

In Poland, it was said that the agreement's provision planning that the employment will be tried to keep at the same level is constantly contravened by local managements. Unions permanently have to remind employer about the carrying out retraining and shifting workers to other jobs within the company as a main option *vis-à-vis* the workforce reduction.

The situation may appear to be more positive in Italy and Spain.

In Spain, in June 2009, processing of temporal regulation procedure employment was agreed, which set a number of measures (temporary stop of production, ensuring 90% of gross wages of the employees affected and 100% of their pay and vacation bonus) designed to adjust production to fluctuations in demand, ensuring the maintenance of employment and wages of workers, and a commitment to reopen the factories affected when confirming the recovery of the economical cycle.

This model of adaptation, which corresponds to the philosophy of the Transnational Agreement, has been renewed every six months since then, and has been promptly applied in the factories agreed in each phase, while the rest were operating normally.

The most important case in this process of negotiated management of the crisis has been that of the Madrid factory of Villaverde (390 employees), dedicated to the production of long steel products (beams, sections, rails), whose demand had experienced a sharp drop as a result of the crisis in construction and public works, so it was first managed the reduction of their production and finally the temporary closure, agreed with union representatives and based on an important series of measures to provide guarantees to workers.

On March 14, 2012, Villaverde workers, gathered in assembly, approved overwhelmingly (91.5%) the agreement negotiated by the unions that set security for early retirement of a portion of the staff and for transfer of the rest to other factories in the group (Guipúzcoa and Zaragoza), with the maintenance of wages, seniority and an aid of 25,000 €, with a commitment to their return to Madrid factory at the time of its reopening.

All in all, in the case of the factory in Villaverde, measures generically designed in Chapter 1 of the EFA are applied (temporary closure, job retention and wages), while through a framework negotiated by unions and business to the *ArcelorMittal-Spain* group, management measures and anticipation of change laid down in Chapter 2 of the EFA are established, such as negotiated internal flexibility (article 5 of the FA), functional mobility (art. 14), education (arts. 18 and 23), etc., and all based on social dialogue developed through both formal institutions and processes and the ongoing industrial action (Chapter 3 TA).

In Italy, according to the national officer of FIOM CGIL in charge of the Steel Industry, "*The employment levels – until now - have been largely preserved. At least the open-ended kind, albeit in some cases some of the fixed-term and temporary workers have also been stabilized. But in parallel some senior workers used the opportunity they were offered to resign, thanks to an incentive plan called the Voluntary Separation. Experiences of training and re-training of workers have been initiated, at least in some plants. There have been measures aimed at supporting the implementation of the agreement, as to transform the periods of low productive requirements in working hours to shift in vocational training and re-skilling towards the job polyvalence".*

2.2.2. Social dialogue issues

[243] And thus providing a basis for a group HR policy aiming to anticipate changes through training actions and tools for career developments….

[244] Let's remind that the agreement plans that its chapter 2. "will be further developed and made more concrete before the end of 2010"

As previously mentioned, the development of a strategic social dialogue focused on long term issues and aiming at ensuring the future of the European steel industry, at both European and national level, was one of the major objective of the EFA.

In this respect, in October 2010, following observations about the implementation of the agreement could be made. One noticed that new social dialogue structures planned by the agreement had begun to work. The European Social dialogue group already met three times and the third meeting was dedicated to training issues. In addition, according to the EWC secretary, the existence of the social dialogue group had not resulted in less strategic information provided to the EWC by ARCELORMITTAL management in the framework of the information and consultation process. This was pursuant to the framework agreement provisions.

As for the national follow up committees, it was decided to test the measure in the nine main countries in Europe (which are also the countries directly represented through the EWC). ARCELORMITTAL MANAGEMENT monitored the setting up and activities of the national committees through specific reporting tools. At this time, follow up committees had been put in place in 8 countries. Only in Belgium, some difficulties had arisen especially due to difficulties for Belgian trade unions to agree on representatives to be appointed in the national committee. In other countries, one noticed a wide diversity in terms of composition and activities of the national committees, in line with the spirit and provisions of the framework agreement. In Spain, a local agreement about the setting up of the national committee had been concluded very soon (November 2009). This agreement planned that the Spanish committee includes 6 representatives of ARCELORMITTAL Management in Spain and 6 representatives of trade unions organisations affiliated to the EMF (CCOO, UGT, USO and ELA). The Committee was to meet twice a year. In the CZECH Republic, the national committee decided to devote part of its activities to topics which are not explicitly covered by the framework agreement but which are relevant when thinking about future prospects of the steel industry in Europe (in this case, the evolution of regulations on environmental issues).

Moreover, it was pretty clear, that national committee should allow for better social dialogue at national level in the group, especially in countries where no permanent structures for social dialogue at national level exist (Spain but also some countries from Eastern Europe).In that extent, a long term impact of the agreement that could be expected, lied in an improvement of social dialogue at national level in all countries in Europe, making easier to anticipate and manage restructuring processes at this level.

Almost two years later, once again, it's possible to complement a bit some aspects of this first assessment on the basis of few interviews made in 2012 with various union representatives in France, Italy, Poland and Spain

Interviews carried out in France provide some insights to better assess whether the promotion of a strategic and genuine social dialogue is a reality at both European and national level.

At European level, the European social dialogue group was launched at the beginning of 2010. It meets every quarter as it is planned in the EFA. It is indeed composed of 12 employee representatives, including the EMF representatives, and 12 management representatives including corporate HR representatives as well as business units managers. Each national employee representative is responsible for disseminating at national level the information regarding the European social dialogue group meetings. In France, the CGT represents all the French unions in this committee, following an agreement of the different unions represented in the group. To the CGT representative (M. Verbeke) view, the European Social Dialogue group should aim, accordingly to the EFA provisions to get information about the group strategy on the medium term as well as indicators enabling to concretely monitor the implementation of the agreement provisions. However, it seems that, in practice,

employee representatives face real difficulties to get the strategic information requested: for instance, the employee representatives are not necessarily informed of major restructuring operations, such as the mothballing of blast furnaces. To M. Verbeke, the social dialogue is not sincere: the group management would only try to justify costs saving measures and to get the support of employee representatives on the latter with no real discussions about their relevance. In addition, some indicators related to crucial HR issues would not be provided by the management, regarding for instance the number of retirements or of training actions implemented.

For these reasons, all in all, the dialogue does not seem to really exist whereas it initially was a major objective of the agreement

*At national level, n*o specific agreement was negotiated in France to implement the EFA as it was not considered to be necessary. There is no national follow up committee as such, ie. a new body established following the conclusion of the EFA. However, the national follow up is organized through meetings between the national HR coordinator and the different national union representatives within the group. There are four national union representatives within the group in France (named RSN), each of them representing a union considered to be representative within the group. Unions represented are the following : CGT ; CFDT ; FO and CFTC. During the meetings, up to now, the national HR coordinator has been accompanied by a technical adviser. According to M. Verbeke, the start of the follow up process was difficult. The unions had to convince the management at national level that specific quarterly meetings were necessary. It seems that it was due to the fact that the management primarily considered that specific meetings were not necessary, considering that regular meetings already existed. As a result, the meetings have been put in place very recently and the process is not well established yet. Up to now, the meetings enabled the unions representatives to get regular information about the economic and social situation of the group in France. This aspect is significant because there is no other area where this kind of global information can be provided to employee representatives, especially considering that there is no longer a group works council in France. However, we could not find any element demonstrating the specific added value of such national follow up. According to M. Verbeke, there's still a risk that this process stays a formal one. In addition, regarding the management delegation in this follow up process, it is not seen as a representative one as the different business units are not represented as such.

In other countries, national follow up committees also exist but *it's not clear whether they are really a place for a pro active social dialogue at national level*. In Italy, for the implantation of the EFA at the national and plant level, the responsible is a bilateral committee between the two parties, where the workers are represented either by the company work council (RSU) and National sectoral federations for metal workers. Accordingly, the signatories parties laid down the composition of this committee, respecting criteria proportionality the social side and equal in both business and union representatives. This audit committee is to meet in ordinary character for 1/2 times a year, and character of extraordinary need expressed by either party.

In Poland, the follow up is taken in charge by a team consisting of 5 unions representatives and 5 representatives of the employer. This committee meets at least once per quarter, after the meetings of the European social dialogue group, and even more if there is a need for it. No additional information could be collected in Spain regarding this issue.

Beyond the follow up committees as such, one may notice other issues related to social dialogue, especially regarding the *articulation between actors at different levels.*

The implementation of the agreement did not lead to specific negotiations at national level but in Italy. In this country, a national agreement of implementation was signed on October 12, 2010. The company and the national unions have in this way intended to complete the

formalities required at the national level by the framework agreement signed by the EMF in November 2009. In France, Spain and Poland, it was considered that a specific negotiation at national level was not necessary, probably because the European Agreement is a framework one which is to lay down minimum principles and not to replace any existing national legislation or company level agreements. In this respect, at least for substantive matters, the concrete implementation of the agreement depends on national negotiations or regulations. Such examples of articulations between the EFA and some national provisions are provided in section 2.2.1.

One question here is to identify a possible positive effect of the EFA on company collective bargaining at national level, for instance by promoting the negotiation of innovative agreements. It seems that in France, Poland and Italy the agreement did not produce such an impact. The implementation of the agreement, when it exists, is generally based on existing provisions (from law and /or collective agreements in force): provisions about short time working or procedures of voluntary dismissals are good examples of this. Only in **Spain**, a direct impact of the EFA on collective bargaining at company level seemed to occur (*see the developments included in section 2.2.1.*)

At last, it is not clear at all whether the concrete coordination between the different actors and levels of social dialogue is effective. If the social dialogue system established by the EFA is to work pursuant to its general objectives, coordination should indeed be ensured at different levels, especially between the European and national follow up committees and the local structures for employee representation (local unions representatives and/or works councils or elected delegates). Few information were collected in this respect. I**n France**, after each meeting, the French representative in the European Social Dialogue Group prepares a report he then disseminates to national union representatives. However up to now, he has never received any feedback or questions from his colleagues!!! Generally speaking, regarding the links between the French national follow up structure and the employees, there seems to be a gap between the union representatives and the employees. Considering the management side, such a gap also seems to exist between the management at national level and the local managers. Of course, this situation does not facilitate a concrete implementation of the agreement!

3. General assessment

Considering the interviews made, the general assessment of the agreement may vary from one country to another.

In Poland, since the provisions of Polish labour law are considered as being adapted to the standards of the EU legal framework, the union responsible interviewed does not see that this agreement brings an added value to the regulations already in force.

In Italy, the cross-border agreement – if compared to the Italian labour standards – *"doesn't represent in itself a particular added value"*, but – as one of the unionist interviewed stated: "*It's useful anyhow, because it design a path on which the parties can share a method of work"*. Talking about constrains and opportunities of the agreement at company level the same representative said: *"Its scope is very broad: European but also global. Therefore I presume that its value, its concrete impact, can be quite various from country to country. Probably in countries like Romania, Poland, Czech Republic the situation of the industrial relations is not like here in Italy. And so the agreement can represent a major step forward than here in Italy, where we traditionally have a more structured system of representation, collective bargaining and social protections"*.

In Spain, the feeling is much more positive: the relationship between the three levels of bargaining (European, national and local) is assessed as generally positive, generating transfer and complementary processes which help to offset at local level the existing inefficiencies at global level, while the objectives set in this area operate as guidelines and general reference. The EFA is positively valued by both parties, even with its limitations and shortcomings, as an instrument of crisis management and anticipation to change.

On the contrary, **in France**, the usefulness of the EFA was put into question by the union representatives we met. Both representatives interviewed underlined their support to the general objectives of the agreement. They especially highlighted that the agreement may help to foster social dialogue at national level in eastern European countries where it is sometimes weak. They also insisted on the fact that the agreement is based on valuable objectives regarding the future of steel industry in Europe, such as the sustainability of European production sites, the skills development of workers or the development of research and development. In this respect, the main added value of the agreement, underlined by our interviewees, is that it provides areas and means for union representatives across Europe, under the umbrella and with the support from the EMF, to share common perspectives and objectives, all of them being related to the ways to ensure the future of the steel industry in Europe. However, some significant shortcomings in the implementation of the agreement lead them to minimize the outputs of the EFA. According to unions representatives interviewed, the group global economic strategy (optimization of actifs, reduction of costs, investment in other highly profitable sectors of activity, especially mining, outside the European Union), especially from mid 2011, contradicts the spirit and terms of the agreement regarding the safeguard of employment and jobs and raise serious doubts about the sustainability of the steel industry in Europe. In their view, the closure or the mothballing of several production units across Europe confirms this analysis. In that extent, measures taken by the group to maintain jobs, especially through short-time working schemes are positive but not sustainable. In this respect, it's worth highlighting that, in France, the EFA has apparently not resulted in a concrete and effective anticipation of changes, through the strong development of training actions or knowledge transfer initiatives.

These doubts affecting, at least in some countries, the possible added value of the agreement explain that the opportunity to terminate the agreement was discussed between unions at European level after the European day of protest held on 7th December 2011. For the time being, the choice has been made to maintain the agreement while reiterating demands for compliance. However, this debate within the trade union movement unveiled both the nationalist dynamics *("the closure of A can benefit to B"*) and the different union cultures, which, even allowing to match in the critics, remarkably hinder the establishment of common alternatives.

4. Conclusions and perspectives

Two issues for the future of the EFA are worth highlighting:

I) The European solidarity between employee representatives: as already mentioned, it seems clear that the EFA provides areas and means for union representatives across Europe, under the umbrella and with the support from the EMF, to share common perspectives and objectives, all of them being related to the ways to ensure the future of the steel industry in Europe. However, in line with the above-mentioned debates about a possible termination of the agreement, it seems that the coordination between unions across Europe may be seriously threatened by jobs cuts mainly implemented and managed at national level especially through voluntary dismissals plans. Even if it was impossible in the framework of this study to get precise information about it, the internal competition between the group production sites is strong, even within a single state like France. Such elements can really hinder union cohesion

across Europe. They make it difficult to build up a European cohesion between workers which is probably a pre condition to promote the future of the steel industry as a whole in the European Union.

II) The need for a strategic social dialogue at both European and national levels: as already mentioned, from our view, the EFA is really innovative considering measures aiming to develop a permanent social dialogue as a pre-condition for the anticipatory management of change. Generally speaking, these provisions show a common will to efficiently and concretely organize social dialogue in a transnational company, by going beyond what European and national regulations already plan. Focus is put on ways to ensure an efficient and better structured social dialogue, ie. a social dialogue that really contributes to the economic and social performance of the group at different levels. However, considering some of the interviews carried out[245], we have to notice that both at European level, through the European Social Dialogue Group, and at national level, social dialogue concretely implemented is far from being focused on strategic and long term issues for the group. Listening to some interviewees, one may even consider that there's no genuine social dialogue, something which is confirmed by the official positions recently adopted by the EMF[246]. This is probably due to the fact that the management and unions have no shared diagnosis about the economic sustainability of the steel industry in France and Europe (see above). With regard to this, it appears to be difficult to assess positively the impact of the EFA and major questions related to the future of the agreement seem to be on the agenda.

[245] even if additional information in this respect would be highly necessary
[246] For instance, see http://www.emf-fem.org/Press/Press-releases/ArcelorMittal-workers-on-the-move-throughout-Europe-on-7-December-2011

Chapter 7

The importance of TCAs from the perspective of industrial relations in the new Member States: the case of Poland

Slawomir Adamczyk[*] and Barbara Surdykowska[**]

1. Introduction

The enlargement of the European Union eastwards was a symbolic end of the post-war division of Europe. That division was political, but its effects for diversification of industrial relations were exceptionally drastic. Democratic states of Western Europe implemented the European Social Model, according to which the dialogue between the capital and the labour was an indispensable part of economic development. In countries of Central and Eastern Europe, institutionalisation of labour relations that had been initiated after the 1st World War[247] was replaced in mid-1940s by an authoritarian system, where capital and labour were managed solely by the state. After the democratic breakthrough of 1989, it became necessary to build the legal framework of industrial relations from scratch in this region. However, it was not considered a priority by the governing elites. As a result, the adopted legal solutions were not systemic, but were an effect of two processes: ad-hoc reaction to trade unions' pressure from the sectors being under painful restructuring and the need to formally cope with the EU social dialogue standards.

Countries that joined the EU between 2004-2007 were characterised not only by visibly lower economic standing, but also by labour relations structure in disorder. This caused well-founded concerns that undermining social dialogue as a basic pillar of the European Social Model could be a possible result of this EU enlargement[248].

The arrival of multinational corporations (MNCs) bringing their own policies and human resources management practices to the process of rapid privatisation of post-communist economies was another element characteristic for the CEE states. And since the native industrial relations' systems were weak, the MNCs' role became much broader than in the old EU member states. But it didn't mean that this influence was of positive nature. MNCs mainly made it a principle not to engage in bilateral social dialogue on higher levels, which additionally deepened the fragmentation of collective bargaining.

The basic question is whether there exists a possibility for using the trend observed for the last 20 years to negotiate transnational company agreements (TCAs) in multinationals for strengthening industrial relations in the new member states. Answer to this question depends on establishing the significance of the TCAs for trade unions, especially in their European variation called the European framework agreements (EFAs), which are much more concrete in terms of its content. Therefore, it is important to know whether a real political will exists on the European trade unions' side to support the EFAs (including the legal framework

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[247] For example in 1921 in Czechoslovakia bill was passed on worker's councils, and in 1937 Poland passed a bill on collective agreements.

[248] D. Vaughan-Whitehead, *EU Enlargement versus Social Europe? Uncertain Future of European Social Model,* Cheltenham 2003, p. 265.

developed for their adoption and implementation), and whether EFA's provisions may become concrete enough to influence labour conditions to bigger extent. In this context a more general question appears about the relation between adopting EFA and the dynamics of the European Social Model, considering the on-going spontaneous decentralising of collective bargaining in the old EU member states.
The following text is based on experience gained by authors while promoting the instruments of autonomous dialogue in Poland and advising Polish trade unionists participating in European Works Councils.

2. The characteristics of industrial relations in the new member states

The systemic transformation of the post-communist states of the CEE took place in very unfavourable economic conditions. For instance, in 1990 Poland was in hyper-inflation, GDP dropped by more than 10% and real wages by 25%. As rapid actions in monetary and economic policies were needed at the beginning of the transformation, social issues were put aside, also in the area of legal and institutional foundations of industrial relations.

The attitude of ruling political elites was to wait for weakening of influence of sectoral groups of interest, as they might have interfered with necessary structural reforms[249]. This way, restructuring of the economy was started without any social assistance and co-operation between government and trade unions. As one could expect the things reached dead end. Rapid increase of unemployment and chaotic privatisation caused waves of strikes and industrial actions in mid-1990s, what finally forced the creation of institutional backbone for modern type of social dialogue. However despite the fact that legal conditions for autonomous (bilateral) social dialogue were ensured, on the national and branch levels mainly tripartite relations were developed, which was justified by the need for reconstructing the economy and was aimed at increasing the status of social partners.

As a result a system of advanced decentralisation or even fragmentation of collective bargaining was created, with a strong role of the state on the national level and under-developed autonomous dialogue (especially on the branch level). This model is very common in post-communist states. It is sometimes emphasised that in the CEE countries an 'illusory corporatism' was created in order to have the trade unions accept being marginalised and to soothe (to mask) the implementation of neoliberal policies[250]. In such a model the tripartite councils for social and economic affairs established in most of these countries are commonly only façade bodies not serving any real negotiations[251].

In Poland, as in the majority of the new member states, the main problem is the atrophy of bilateral sectoral negotiations in the private sector, which had already been noticed in the pre-accession period[252]. As foreign capital investment in Poland increased, the situation worsened. For instance, in the steel industry, traditionally highly unionised, the role of social dialogue between the trade unions and sectoral employers' was supposed to be the basis for socially acceptable employment restructuring during 1990'-s. When the majority of Polish companies were taken over by multinational corporations, sectoral social dialogue practically ceased to exist and multi-enterprise collective agreement was terminated by the employers' organisation dominated by a single company: ArcelorMittal.

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[249] J. Gardawski, *Na dwudziestolecie dialogu społecznego w Polsce*, in J. Stelina (ed.), *Zbiorowe prawo pracy w XXI w.* (*The 20th anniversary of social dialogue in Poland (in:). Collective Labour Law in 21st Century*), Gdansk 2010; p. 44.
[250] D. Ost, *Illusory Corporatism in Eastern Europe: Neoliberal Tripartism and Postcommunist Class Identities*, 'Politics & Society', 2000, vol. 28 (4), pp. 503-530.
[251] D. Ost, *'Illusory corporatism'. Ten Years Later,* 'Warsaw Forum of Economic Sociology', 2011, vol. 2(1), pp. 19-50.
[252] Y. Gellab, D. Vaughan-Whitehead, (eds), *Sectoral Social Dialogue in Future EU Member States: The Weakest Link,* Budapest 2003.

Another example is the automotive industry, controlled by MNCs from the very beginning of transformation, where no bargaining had been initiated on sectoral collective agreement despite trade unions' efforts and the existence of an employers' organisation. It was probably due to the reason that multinationals wanted to remove any obstacles for their mutual competition (including possible sectoral co-ordination of trade unions' demands).
This trend is visible in almost all new member states. Sectoral collective bargaining, if any, is limited to a few sectors with dominating ownership of the state[253].

3. Social dialogue in MNCs

Top-down controlled privatisation of state-owned enterprises was one of the key features of the social-economic transformation in the post-communist states. The scale and rate was unprecedented. In Poland, in 1989 some 9% of the active workforce was employed in the private sector (except for agriculture), while in 1990 it was 47% and in 2001 over 75%. In 1990 the private sector's share in the GDP was 30%, and in 2001 - 75%.

As privatisation started, foreign capital began to flow in very dynamically. In 1990, cumulated FDI in Poland was 109 million USD[254]. In 2000 it was 34 billion USD, and in 2008 almost 183 billion USD. This means that the value of accumulated foreign investment increased almost 2,000 times over the last two decades. Between 1995-2008, the annual average value of FDI constituted 3.7% of the GDP. Presently, companies with foreign capital share generate over 60% of Polish export, and in some sectors, like white goods or automotive industry that volume exceeds 90%[255]. Almost 24% of jobs in Polish economy are found in companies with foreign capital. According to the findings of European comparison study covering five the most internationalized sectors, wages in Polish MNC subsidiaries are on the average 25% higher than in domestic companies – the difference may vary depending on the sector but is noticeable[256].

The quality of industrial relations in Polish subsidiaries of the MNCs cannot be evaluated unequivocally. The historic context of specific investments is an important factor in this respect. At the beginning of the privatisation process entire existing state-owned companies were taken over and social dialogue with trade unions in those companies was at least formally maintained. The trade union's position depended largely on their ability to adapt to the new situation. Quite quickly it turned out that local managers have little influence on strategic decisions made by multinational corporations about their Polish subsidiaries. But soon trade unions had to face new challenge. Increasing greenfield foreign investments required them to actively organise members in new sites. And in many cases it wasn't fairy-tale story. Although freedom of association is legally protected in Poland possibility of real trade unions' presence depended mainly on the corporate culture of the foreign investor in question.

As experience of the authors shows, multinational corporations originating from Europe were more eager to take up dialogue with newly created trade union organisations even if they had previously tried to prevent their development. In several cases of multinationals from outside Europe the unions needed to demonstrate their strength by various industrial actions before they received a mandate for legitimate dialogue.

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[253] European Commission, *European Industrial Relations 2010*, Luxembourg 2011.
[254] UNCTAD, *World Investments Report* 2010.
[255] J. Witkowska, *Rola kapitału zagranicznego w kreowaniu przewag konkurencyjnych polskiej gospodarki* (*The role of foreign capital in creating competitive advantage of Polish economy*), at: http://www.mrr.gov.pl/rozwoj_regionalny/Polityka_rozwoju/SRK/Ekspertyzy_aktualizacja_SRK__1010/Documents/ekspertyza_Janina_Witkowska_08122010.pdf.
[256] M. van Klaeveren, K. Tijdens, *Multinationals versus domestic firms: wages, working hours and industrial relations,* Amsterdam 2011.

This is an appropriate moment to mention European works councils (EWC) as an important instrument for strengthening trade unions position against local management. The lack of sectoral dialogue and fragmentation of collective bargaining cause that institution of EWC is very often considered by trade unions from CEE countries as a tool for establishing European model of industrial relations especially in reference to dismantling double West – East social standards existing in many multinationals[257].

Therefore Polish trade unions (mainly NSZZ "Solidarnosc") have tried to integrate their representatives into existing EWCs from the very start of application of the EU Directive 94/45/EC although it was not a legal obligation before 1 May 2004. As early as in mid-1990s the first representatives of Polish employees were included in the existing EWCs (e.g. such companies as Thomson, Benckiser, ABB) and the process continued until the formal accession of Poland to the EU. This process has accelerated after 1 May 2004, but also other phenomenon is worth to mention. In multinational companies that conducted business mainly in the new member states and from EU enlargement were covered by the 94/45/EC Directive, fresh initiatives for negotiating the EWC agreements began and very often trade unions from CEE countries played the leading role. For instance, in a global brewing company SABMiller, the initiative of an EWC came from the unions from CEE countries. This is also the case of American-rooted company International Paper where the EWC has been established as a result of strong pressure from Polish trade unions. Interestingly, authors have noticed some examples that initiatives deriving from CEE countries to create new EWCs in companies of European origin were not supported by the unions from the 'old' EU countries, especially from the home countries of specific corporations. Presently, Polish representatives participate in some 200 EWCs.

Generally, participation in the EWC is evaluated positively by trade unions' leaders. Thus, Poland had incorporated the culture of social dialogue based on respect for the other party and strive for a win-win situation. In the industrial sectors, the EWC's are perceived as an important tool for strengthening the potential of trade unions against local managements and for cross-border co-operation. However, it is a common opinion of Polish trade unions that EWC potential could be used for facilitating the transnational dimension of industrial relations going beyond the information and consultation tasks.

4. The use of TCAs

The practice of active participation of Polish trade unions in negotiations of the TCAs is quite new. A few cases have been identified so far in the automotive sector (Volkswagen, GM), in the steel sector (ArcelorMittal), wood processing (Pfleiderer), food (Danone, Kraft Foods) and public services (GdF Suez, EdF, Veolia). The evaluation of participation is anecdotally positive, yet the general opinion, with a few exceptions (Volkswagen case), is that the agreements have little influence on local labour conditions. This is confirmed by the results of broader research according to which TCAs have some potential to influence fundamental rights but no influence on work conditions have been noted[258]. Managers in MNCs also confirm such opinions stating that there is no significant correlation between the TCA, economic results and effectiveness of a company[259].

[257] J. Tholen, *Labour Relations in Central Europe: The Impact of Multinationals'* ,Aldershot 2007, p. 71.
[258] K. Papadakis*, Introduction and Overview*,(in K. Papadakis (ed.), *Shaping Global Industrial Relations*, Palgrave 2011, p. 12.
[259] Ibidem, p. 4.

Various articles clearly emphasize that the most disappointing issue is the implementation and monitoring of EFAs[260]. It seems that implementation of these agreements on company level in new member states definitely needs more in-depth research.

The structural weakness of labour relations' systems in the CEE states begs a question on the future role of TCAs. Is it going to be just a ornament supplementing national/local negotiation level with reference to the ILO standards? Is it going to be only a way of emergency reaction to the effects of trans-border restructuring in more developed EFA cases?

Verbal opinions of trade unions' leaders regarding the TCA/EFA collected by authors seem to show that Polish trade unions are more ambitious than their counterparts in western Europe – they refer to negotiating specific issues on transnational level which are considered core trade unions' business and this way to make TCA/EFA a European instrument for real collective bargaining in order to bring together the standards of employment in corporations' subsidiaries in old and new member states. The shortages of negotiations at national level are noticeable. An opinion of a trade union representative from MNC with relatively high quality of social dialogue may be quoted here: 'it's hard to negotiate increase of wages on the local level when all the decisions are made in Paris'. Several problems occur at this point.

Firstly, *the quality of the TCAs and their vague legal status.* The trends in TCAs development up till now do not suggest any evolution towards more concrete instruments which trade unions may use accordingly to the 3-stage Levinson rule proposed 40 years ago, meaning joint international negotiations according to demands put forward at the national level[261]. The so-called substantive agreements (see chapter four) are a minority among the TCAs and refer mainly to specific cases of trans-border restructuring, which are always traumatic for the workforce. No cyclical negotiations on specific issues of labour conditions have been noted so far. Paradoxically, the EWC is an additional obstacle in this respect. Admittedly, establishment of that legally guaranteed institution of social dialogue was a catalyst for international negotiations in multinationals[262], but it has also made EWCs aspire to conduct such bargaining and presently they *de facto* dominate as a signing party to the EFAs[263]. Since trade unions always reject conducting any negotiations by non-trade union bodies, the TCAs have no chance to evolve into classic collective agreements until their legal status and negotiations principles are defined on the EU level. This, in turn, is virtually impossible to achieve due to hard resistance of the European employers and the absence of any drive from the European Commission, which basically limits the possibility of an institutional support for any initiatives within the framework of the European social dialogue[264].

The second problem is of internal nature of trade unions, and it is *their deep uncertainty as to what they would like to achieve thanks to the Europeanisation of the labour relations.* For quite a long time a trend has been observed in the labour relations systems of the old EU member states, which is a transfer from sectoral bargaining to bargaining with only one employer, especially in the sectors being under strong external competitive pressure[265]. This creates a downward spiral of consecutive concession cycles aiming to stimulate wage

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[260] I. Schömann, *The Impact of Transnational Company agreements on Social Dialogue and Industrial Relations*, in K. Papadakis (ed.), *Shaping Global Industrial Relations. The Impact of International Framework Agreements*, Palgrave 2011, p. 35.

[261] C. Levinson, *International Trade Unionism*, London 1972.

[262] V. Telljohan, I. da Costa, T. Muller at al., *European and International Framework Agreements: Practical experience and strategic approaches,* Luxembourg 2009, p. 17.

[263] Ibidem, p. 27.

[264] W. Eichhorst, M. J. Kendzia, B. Vandeweghe, *Cross-border collective bargaining and transnational social dialogue,* Brussels 2011.

[265] P. Marginson, K. Sisson, *Multinational Companies and the future of collective bargaining: A review of the research issues,* 'European Journal of Industrial Relations', 1996, no 2, pp. 173-179.

dumping[266]. It has been called expressively a *rat race to the bottom.*[267] This mechanism may be especially dangerous in case of MNCs.

The research on trade union co-operation in automotive industry showed that trade unions from old and new member states are able to oppose jointly the "beauty contests" announced by the management in order to increase internal competition among subsidiaries. But this appears only after all other national instruments are depleted and on condition that trade unions perceive a benefit in such trans-border co-operation[268]. Using the 'share the pain' principle is considered a last resort mechanism. And this refers to the sector which is very advanced in terms of European co-ordination of collective bargaining. This distrust and only trace elements of real (not only verbal) transnational solidarity of employees practically reduces any chance for qualitative Europeanisation of collective bargaining in the MNCs. Obviously, diversification of methods of trade unions reflecting various national traditions and cultures of industrial relations[269] and different legal and institutional national frameworks for national collective bargaining[270] are yet another impediment to effective transnational co-operation. However, authors are of the opinion that it is just a marginal element.

One cannot forget that there is common opinion that Europeanisation of industrial relations is quite undeveloped. Although national trade unions put more pressure on transnational dimention of their actions, it is still insufficient[271]. It can be clearly seen in the lack of an overall vision of *'European solidaristic wage policy'* that could be used as a counterpoint to the neoliberal concept of salaries subordinated solely to market competitiveness[272]. Lessons learned from the work of ETUC Coordination Collective Bargaining Committee show that building of such comprehensive wage strategy is difficult not only due to underdeveloped structure of industrial relations in the new member states. The proliferation of the *beggar-thy-neighbour* policy amongst trade unions from EU 15 constitutes also real threat as typified by the concessional bargaining phenomenon. Under the circumstances it seems that possibility of 'real' cross-border negotiations within multinational companies is still the thing of the future.

5. Summing up

Currently there are substantial obstacles stopping the TCAs from playing a major role in shaping labour conditions in the new member states. However, such a possibility should not be left undiscussed. On the contrary, in the latest Resolution on the priorities of collective bargaining co-ordination, the ETUC for the first time so clearly points to the expectations of CEE trade unions to strengthen the co-ordination of collective bargaining in MNCs in order to achieve progress in approximation of working conditions in various European subsidiaries of the same multinational[273]. As was said previously, this may be the only chance to strengthen the negotiation position of trade unions in countries like Poland, where the odds in favour of

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[266] R. Erne, *European Unions. Labour Quest for a Transnational Democracy,* Ithaca and London 2008.
[267] D. Sadowski, O. Ludevig, F. Turk, *Europeanization of collective bargaining*, in: J. Addison, C. Schnabel (eds), *International Handbook of Trade Unions*, Cheltenham 2003, pp. 461-501.
[268] M. Bernaciak, *Labour Cooperation or Labour Dispute in the Enlarged EU. Trade union response to the raise of the automotive industry in Central – Eastern Europe*, Brussels 200.
[269] C. Crouch, *Industrial Relations and European State Traditions*, Oxford 1993; R. Hyman, *Understanding European Trade Unionism: Between Market, Class and Society*. London 2001.
[270] F. Traxler, *European trade union policy and collective bargaining – mechanisms and levels of labour market regulation in comparison*, 'Transfer', 1996, no 2, pp. 287-297.
[271] Ex. P. Scherrer, *Unions still a long way from truly European position*, p. 30 and R. Hoffmann, Proactive Europeanisation of industrial relations and trade unions!, p. 60 (in:) W. Kowalsky, P. Scherrer (eds), *Trade unions for change of course in Europe. The end of cosy relationship,* Brussels 2012.
[272] T. Schulten, *Foundations and perspectives of trade union policy, (in:) E. Heim at al. (eds), Macroeconomic policy coordination in Europe and the role of the trade unions*, Brussels 2005, pp. 263-292.
[273] ETUC, Resolution on 6-7 March 2012: '*Collective bargaining: The ETUC priorities and working program'*, at: http://www.etuc.org/a/9872.

development of collective bargaining on the sectoral level in branches dominated by multinationals are close to none.

European TCAs should gradually and orderly transform themselves into instruments supporting concrete negotiation goals of trade unions in the areas that are their core business (thus returning to the Levinson rule). This way, it will be possible to influence the development of industrial relations in the new member states in a way which does not pose any threat to the foundations of the European Social Model. On the other hand trade unions in the old member states will be able to prepare for using this mechanism if their national sectoral bargaining patterns weaken in the future what in the light of current trends poses a real threat.

Chapter 8

Transnational tools and social dialogue in enlarged Europe: the case of Bulgaria

Plamenka Markova and Ekaterina Ribarova[274]

1. Introduction

Collective labour law has a short history in Bulgaria and is developing mainly under the impetus of the EU integration instruments. Nevertheless it is still far away from recognizing the rapid changes imposed by new developments when dealing with transnational private and voluntary sources and persists in neglecting them in academic publications. The emergence of new types of rules, emanating from both international (including European) and private law makers, cannot be explained by traditional theory that is largely based on the national States' monopoly in lawmaking and that implies a hierarchy of sources. As this theory has lost much of its explanatory power, we need a new one.

Before the accession period the social partners and academicians were familiarized with the the OECD Guidelines for Multinational Enterprises (MNEs) and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. These instruments belong to a generation different than the current wave of corporate social responsibility (CSR) initiatives.While non-binding they constitute an expression of the expectations of the international community with regard to the behaviour of multinationals, rather than a voluntary assumption of responsibilities by those enterprises themselves. The Social Justice Declaration adopted by the International Labour Conference in 2008 calls for the development of partnerships with multinational enterprises and trade unions operating at the global sectoral level.

Other instruments that became known in the early years of the transition after 1989 were the codes of conduct adopted by international organizations and large multunational companies[275] as leading sources to enforce fundamental rights, hence recognizing the counterparty's significant role, despite the fact that their unilateral adoption did not imply negotiations, nor the signature of agreements. The Codes of conduct have been identified as part of a '*soft'* approach to labour rights, mainly because they are not, in a strict sense, legally binding. They provide a flexible way for governance of transnational companies, often accompanied with the adoption of good practices, dealing with CSR.

In Bulgaria, the UN Global Compact (GC) was officially launched in 2003. Nowadays, the UN GC brings together more than 140 members in a semiformal local network. Since Bulgaria joined the EU, companies have shown much greater interest in CSR. Because of the enacted Currency board (since 1997) and a negotiated pace of reforms in different spheres of the economy, Bulgaria developed more special relations with the World bank, which makes the CSR meaning, defined by this institution, of second greatest importance to the entities,

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[275] It is important to emphasize distinction between *corporate codes of conduct* and *codes of conduct for multinational corporations*. Corporate codes of conduct are individual company policy statements that define a company's own ethical standards, while codes of conduct for multinationals are externally generated and to some degree imposed on multinationals.

operating in the country. In view of the current crisis, companies, NGOs and the Bulgarian government are continuing their efforts to develop and encourage corporate social responsibility, for example through the national strategy for CSR (2009–2013).
In 2007 a Code for Good Corporate Governance was passed by a group of business representatives, the Commission for Financial Supervision, the Bulgarian Stock Exchange and some other independent experts and academics. In 2009 the Bulgarian Stock Exchange decided that the companies, registered in the high segments ranges (they are about 40 companies) should compulsory accept the Code for Good Corporate Governance and the others, registered at the stock exchange also could accept the code, but for them this requirement is not compulsory.

2. The European Social Dialogue and the Bulgarian participation

Many of the affiliated member federations/unions to CITUB and CL Podkrepa are actively involved in the European social dialogue and the rest give as a reason for their nonparticipation the lack of financial resources and capacity with regard to the foreign language proficiency. Most of the employers' organizations also take part in European and international structures without being directly involved in the European social dialogue.

Despite this, the leaderships of both confederations consider the access structures to the European social dialogue insufficient and think that this activity should be improved. This concerns mainly the subsidiaries of the Community scale enterprises with regard to the participation in the preparation of agreements negotiated by the European Industry Federations and the respective companies, in the preparation and updating of the Codes of conduct, the participation in the information and consultation structures at company level and in the work of the EWCs.

In recent years several sectoral social dialogue committees have promoted good CSR practices and established guidelines.[276] The EC facilitates such initiatives and recognises that CSR contributes to and supplements social dialogue. Innovative and effective CSR policies have also been developed through transnational company agreements (TCAs) concluded between enterprises and European or global workers' organisations.[277] A wide range of sector specific documents have been signed at the European level defining the commitments to corporate social responsibility of social partners which should also bind Bulgarian employers and trade unions (in hoteliering and restaurateuring, in the sector of electricity production, sugar production).
However, the issue of representation of trade unions and employer organisations at both national and European level remains unregulated. In these sectors the nationally represented Bulgarian employer structures are not involved in the European social dialogue and are not bound by those agreements. The same situation exists in the leather industry where in 2008 the social partners at the European level have adopted standards for reporting social and environmental practices in the sector.

According to the Bulgarian CSR Strategy, adopted in 2008 the main obstacle to CSR is the lack of uniform, national or sectoral policies or strategies for CSR.

So far in Bulgaria there is no sectoral social dialogue on the problems of CSR (the only exception being the Branch Council for Social Partnership in the brewing industry). The main reason for this is still a lack of understanding of employers that their main partner in the implementation and reporting of socially responsible practices (not just stakeholders) could be the TUs, not only at the level of the enterprise but also at the regional and sectoral levels. According to TU leaders and key members of the Confederation of Independent Trade

[276] European Commission, *Industrial relations in Europe 2010*, Brussel, 2011
[277] *The role of transnational company agreements in the context of increasing international integration,* COM(2008) 419 final

Unions in Bulgaria (CITUB) and the territorial divisions of Confederation of Labour (CL) "Podkrepa" in no enterprise the representatives of the workers and trade unions have participated in the development of business strategies or in the reporting of CSR activities. [278] Moreover, TU structures are not well aware of the nature and importance of CSR, they have not developed their views concerning their own role in implementing the policies of socially responsible business behaviour. Social dialogue at the sectoral level can be an effective means of promoting CSR initiatives and can play a constructive role in exchanging best practices in this area. The social partners could discuss and develop sectoral policies on CSR as well as industry-specific indicators by which to report progress. A number of MNEs having offices in Bulgaria - ABB, Enel, Coca Coal Hellenic, Danone, HP, Nestle, Solvay, TITAN, etc. are corporate members of "Enterprise 2020". They have adopted the objectives of the initiative and therefore will make progress reports in the specified areas.
In all these MNEs divisions in Bulgaria there are structures of CITUB and CL "Podkrepa" and employers are members of the national representative bodies. At enterprise level the problems of CSR should be subject to social dialogue at the sectoral level and special attention should be paid to the divisions of the MNC involved in the network "Enterprise 2020.

3. Social audits

Over the last decades, auditing and certification systems for labour standards have developed alongside existing national inspection programmes for various reasons.[279].

The Economic and Social Council of Bulgaria has conducted an analysis on the topic of *"Social Audit - Experience and Prospects for Development"* in 2010 and among its recommendations strongly come up the request for The Action Plan on the National Strategy for CSR 2011 and 2012 to stipulate and provide with resources the responsibilities and commitments of the social partners and the state in the promotion and dissemination of knowledge on CSR and the development of social dialogue on issues concerning CSR and social auditing.[280]

Bulgaria has been included in an international study carried out by the ILO in 2005 together with Romania and Turkey.[281] For each country 400 companies in the field of textile, footwear, wood processing, leather and other industries were chosen. This study also shows that it is performed predominantly by foreign social auditors and almost entirely in the supply chain.
Codes of conduct for MNEs are clearly distinguished from framework agreements, which are concluded between trade union organizations and individual companies regarding the companies' international activities. First, there are written understandings between MNEs and international TU organizations, *which may cover any subject*. Examples of such framework agreements include those establishing information and consultation arrangements, as mandated by the European Works Council Directive. Second, there are framework agreements between TUs and companies concerning *the labour practices of the company*, or of its suppliers and subcontractors in other countries. Such provisions may also be included in collective agreements that are recognized under national law. Recent research shows that these practices have been progressively turned into proper negotiations, leading to the

[278] Economic and Social Council of Bulgaria, *Social Audit - Experience and Prospects for Development",* 2010
[279] Among others: pressure by activist and consumers demanding so called 'fair trade' products made under the right conditions; Weakness in existing governmental inspection systems ensuring adequate conditions for workers; Reduction of brand liability, as part of corporate risk management strategies; Demand by supplier factories wishing to gain a competitive advantage over their peers.
[280] Available at: www.esc.bg/
[281] See van der Vegt, S. B. A., *Social Auditing in Bulgaria, Romania and Turkey; Results from survey and case study research,* Ankara, Turkey. International Labour Office, 2005; ISBN 92-2-117574-X (web pdf)

signature of International Framework Agreements (IFA)[282] or European framework agreements (EFAs).

Clearly, IFAs and EFAs are closer to traditional approaches to industrial relations, collective bargaining and dispute prevention than the CSR initiatives. They promote interaction across national borders in a way which has been seen by some as a first step towards the globalization of industrial relations. The mere existence of an IFA does not necessarily imply its uncontested recognition and application in countries where value chains are located, irrespective of the origin of the MNE. As voluntary self-regulatory instruments, IFAs cannot replace national legislation or managerial cultures, yet they are dependent on domestic law for any legal effect.

As pointed out in some publications instead of becoming an alternative, or even a way to escape labour law and collective bargaining, CSR and corporate codes of conduct should supplement legal and voluntary sources and be better equipped in providing effective monitoring, seeking, when necessary, institutional support.[283]

4. MNEs in Bulgaria and the impact on industrial relations

The Institute for Social and Trade Union Research ISTUR/CITUB has conducted three surveys on MNEs and their impact on industrial relations in Bulgaria: in 1998, 2004 and in 2008 while highlighting good practices.[284] In the last survey the scope has been expanded to more divisions. In their prevailing part (14 out of 22), these MNEs fall among the 100 biggest foreign investors in the country. The examined MNEs come from Germany, Belgium, Austria, Luxembourg, Sweden, Italy, France, the Netherlands, the Czech Republic, Denmark, Greece, Iceland, Turkey, Switzerland and the USA.Within the analyzed 5-year period of the third survey(2004-2008) foreign direct investments (FDI) have reached record levels. Their total amount constitutes some 75% of the cumulative amount since 1992 until to date. Investment expenditure had been a major contributor to growth in the boom.

However both private consumption and investment expenditure declined rapidly in 2009 and 2010. In Bulgaria a significant proportion of these capital inflows were invested in the non-traded goods sector of the economy. This helped create boom conditions in the construction, real estate and financial services sectors but only about 20 % of the FDI stock was directed to the manufacturing sector. The analysis of the results shows a contradictory picture: while highlighting examples of good practice, the research finds that the management of some of the subsidiaries is trying to marginalise trade unions and belittle the role of social dialogue.

The CSR forms part of the MNE strategies in Bulgaria. New practices of human resources management have been introduced and some programmes of personnel training and development have been elabourated. Modernization of labour organization has proved to be a priority in the activity of MNE management. To a certain extent, the development of industrial relations in the examined MNEs is contradictory. The surveys show that industrial relations and social dialogue are better developed in enterprises, which have been privatized

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[282] European Foundation for the Improvement of Living and Working Conditions, *Codes of conduct and international framework agreements: New forms of governance at company level*, Luxembourg, OOPEC 2008; K. Papadakis (ed.), *Cross-border social dialogue and agreements: an emerging global industrial relations framework,* ILO-IILS, Geneva 2008, and in particular the chapter by A. Sobczak, *Legal dimensions of international framework agreements in the field of corporate social responsibility*, 115 ff. Voluntary transnational texts are developing on a de facto basis, proving once more the autonomy of collective bargaining.

[283] S. Sciarra, *Transnational and European Ways Forward for Collective Bargaining,* WP C.S.D.L.E. "Massimo D'Antona"; n. 73/2009; p. 10

[284] N. Daskalova, E. Ribarova, L. Tomev, T. Mihailova and others, *Multinational companies-2008. European dimensions of the industrial relations*. ISTUR with the CITUB, Fridich Ebert Foundation. 2009 (in Bulgarian)

by foreign investors, due to the already existing traditions in such enterprises, than in those, which have been established by means of new investments and to many of which *trade unions have no access*.

The examined enterprises have shown *high trade union density* – 61, 8 % at an average rate of about 18% for the country. Trade union space is divided primarily between CITUB and CL Podkrepa, however two divisions of MNE have organizations of smaller trade unions. In about 80 % of the examined enterprises interrelations between social partners are based on cooperation, partnership and on mutual respect and trust. In more than the half of analyzed enterprises (13), industrial relations have been institutionalized by establishing bodies of social partnership. No violations of trade union rights have been reported in approximately 60 % of the analyzed enterprises. Legislation has been observed by employers and no manifestations of anti trade union conduct have been registered.

Collective agreements have been signed in 95% of the MNEs affiliates, involved in the survey. As a rule, the reached labour and social arrangements are better than the statutory and the agreed arrangements in the industry/branch collective agreements. Negotiations are characterized by cooperation and willingness to make compromises. Along with this, however, industrial relations and social dialogue in some divisions of MNEs have been found disturbed and not sufficiently effective. Only about 1/3 of the examined enterprises have elected representatives of the workers and the employees to provide them with information and advice, pursuant to art. 7a of the Labour Code.

There are no headquarters of MNEs in Bulgaria(or not headquarters of big MNC-s)[285] – only subsidiaries falling under the conditions of the Directive for the establishment of EWCs. In 30 subsidiaries of MNC Bulgarian representatives have been elected in the EWCs.

The sectors with EWCs are: light industry, textile and clothing; financial mediation; metallurgy, metal processing and machine building, including production of machines, electric appliances and electronics; food industry, chemical industry; production of construction materials; trade; energy (electricity production and supply).

The coordination of the functions between the national and multinational representatives is still weak, because in some cases there are elected EWC representatives but there is no representation in the MNEs subsidiary.

The expectations now, with Bulgaria being a full right EU member and in spite of the crisis, are that better possibilities will be created for utilizing the practice of European social dialogue, for enhancement of the possibilities for providing workers with information and consultation rights, and for efficient participation of the representatives of the Bulgarian divisions of MNEs in the European Works Councils.

Some authors have argued that "in light of the novelties brought about by the revised Directive, it is possible to argue that EWCs are legitimate collective actors in both promoting transnational agreements and even in signing them. They are linked to different representation bodies at other levels; they can be the voice of the employees 'as a whole' within the boundaries of the transnational companies; they are promoters of new solidarities derived by transnational collective interests. There is now, more clearly than in the past, a solid ground to build up a transnational legitimacy test at a purely voluntary level. Detailed solutions are in the hands of the social partners"[286] .

6. Some issue of the implementation of the TCAs in Bulgaria

[285] At the moment of finishing of the paper an information of the first registered European cooperative society in Bulgaria was obtained

[286] S. Sciarra, *op. cit.;* p. 14

At present transnational company agreements have not been subject of publications and surveys in Bulgaria. The reasons are to be found in the specific economic development of the country, the types of MNEs present and the readiness of the social partners to use private transnational sources.

In Bulgaria there are subsidiaries of many companies from several sectors, having TCA-s, code of conduct, signed by the employers and trade unions, joint declarations, social charters, accepted by trade unions and employers and others. Among them could be mentioned SKF, Scheider Electric , Tyssen Krup, ABB (metal industries, electrical and electronical industries); Solvey, Lukoil (chemistry), Italcementy (cement production), IKEA(wood and furniture), Coca Cola HBK, Kraft Foods International, Danone (food and drink industry), ENEL (electricity production), OTE(telecommunications) H& M, Metro, Carrefour (commerce), Accor (tourism-hotels), UniCredit Group (banking), Generali and Allianz (insurance).

In regard to the scope of the documents, they concern also Bulgaria, but there are various kind of agreements, declarations, principles, codes and many others. In some cases (declarations, codes, charters) the content could be broad or more narrow, but the provisions are rather equivalent to recommendations, or at best cases – as basic principles of the company conduct, then some kind of obligations of the governing bodies or of the employers in the local subsidiaries. In cases where agreements are signed they are usually related only to some particular issues, like qualification and work-force development, equal opportunities, social consequences of the restructuring, there are not broad agreements , looking like usual collective agreements at the national sectoral or company levels.

All of the documents have been signed by the governing bodies of the companies(or in some cases also by HRM directors), on the one side, and by the European or Global federations, or both of them (Scheider Electric, Coca Cola, Carrfour, IKEA, Lukoil, Danone, SKF, Adecco, Manpower), by the European/Global trade union federation together with local trade unions (OTE) , by the EWC –s/SE-s Works Councils or .and Global WC(UniCredit Group, Allianz, Solvey, ABB, Generali); by the EWC-s and trade unions-European and local federations(ENEL, Kraft Foods International), by the EWC-s and Group works councils (ThyssenKrupp), on the other side. There are also some documents (principles, charters and s.o., implemented by the decisions of the governing bodies of the MNC-s only.

The Bulgarian subsidiaries, covered by such documents (agreements and others) could be divided in several groups. In the first there are subsidiaries, where also good industrial relations systems exist and trade unions could observe the implementation of the agreements also. In such companies the industrial relations concern more broad issues, then the transnational agreements or other documents (they usually are implemented) and also various kind of mechanisms of partnership are used (collective bargaining, information and consultations, co-partnership in the implementation of some programs and projects and others). In some cases the local trade union representatives, or/and the EWC members participated in the preparation of the trans-national company agreements or other documents. The same is related to the Bulgarian subsidiaries of SKF, Solvey, Kraft Foods International, Danone, UniCredit Group, the subcontractors of IKEA and some others. In all of these companies also Bulgaria representatives of the EWC-s are elected.

The second group involves companies with rather week unions, where the industrial relations are not promoted. Trade unions exist legally, but they don't have enough practical rights and functions, including monitoring of the implementation of agreements and other documents. The TCA or other documents probably are implemented, but trade unions don't have enough power to monitor the process. Trade unions are either excluded or symbolic represented in the process of election and action of the EWC-s. The same are the cases of Coca Cola HBK and Metro.

The third group involves subsidiaries where trade unions do not exist and not any kind of industrial relations are promoted. Although in some of them officially also EWC-representatives are elected, it is not clear how this happened, and whether or not such representatives were nominated directly by the management?It could not investigate at all whether the agreements, charters and other documents are implemented. This concerns, for example the subsidiaries of Schneider, OTE, Allianz, Generali.

Special case is Lukoil-Bulgaria, where trade unions do exist and also the industrial relations officially were promoted. However, the most promoted trade union is the union, which is practically found by the initiative of the management and forced to join the international company trade union of the Lukoil, which happened before the signature of the agreement. Other trade unions, although they exist in the company are only symbolic and the management rather prefer to communicate mainly with the company union. Practically the interest of the workers could be better protected if they decide to join the so-called company trade union, which is not corresponding with the support of the trade union rights, mentioned in the agreement. As such union is very close to the management, and the others are rather discriminated, it could not be investigate whether or not the trans-national company agreement is implemented or not

In conclusion, the implementation of the trans-national company agreements is already not new for Bulgaria, however, it still is not among the priorities of the trade unions, which concerns also the information and consultation process (including the EWC-s).Also the employers do not pay much attention on the such issue. The better integration of the Bulgarian economy in the single European market could bring the challenge of the TCA-s to a better place among the trade union/ and employers' policies.

Chapter 9

Development of transnational negotiations with multinational companies in a trade union perspective

Marco Cilento*

1. Definition and classification of TCAs

All new phenomenon come along with a new terminology to describe them. This has been the case for cross-border collective agreements in multinational companies. Today, these kinds of agreements are called Transnational Company Agreements (TCAs).

'Transnational' stays for agreements applicable to the operations of the same group in more than one country. That terminology is meant to include both International and European (regional) agreements. The use of the term *transnational* does not fully reflect the different characteristics that a TCA may have. Analysing current texts the author has detected at least three different manners for an agreements to be 'cross-border':

a) *Transnational agreements*: agreements extending their effects in different countries because of the endorsement of transnational actors (EWCs, ETUF, ad hoc trade union committees, etc.)
b) *Multinational agreements*: agreements whose cross-border effects rely on a cascade of national agreements. It envisages a sort of ratification of a TCA at national/company level.
c) *Ultranational agreements*: agreements installed in one national legal system and deploying their effects in other countries.

As well explained by academics, each solution has vices and virtues[287].

'Company' means that we are referring to company-based agreements, excluding other levels of collective bargaining or social dialogue structures from the family. But the assumption that a Transnational Company Agreement refers to *a single* company is also misleading. In reality, all TCAs cover multinational agglomerates which are composed by several legal entitiestied by corporate relationship. Compared with other forms of cross-border negotiations with multinational companies, TCAs are not supported by a proper legislation which defines a group of companies as a single legal entity (as it happens, for instance, in negotiations to establish EWCs, or to implement employees' involvement procedures in SE Companies). Per consequence, in legal terms, TCAs may function as multiemployer agreements even if the concerned companies all belong to a single group of companies. But almost all TCAs are negotiated and signed by the parent company only.

'Agreements' means that TCAs may have binding effects but such effects stem from rules that are different from collective agreements or collective conventions as regulated by national legislations. It is assumed that such agreements do not deal with traditional topics covered by collective agreement as salaries, working time, etc. even if this latter assumption appears obsolete in the light of the most recent experiences.

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[287] International private law aspects of dispute settlement related to transnational company agreements, see A. van Hoek and F. Hendrickx (Eds.), *International private law aspects and dispute settlement related to transnational company agreements,* Study commissioned by the European Commission (VC/2009/0157).

In general, TCAs is an agreement entailing reciprocal commitments the scope of which extends to the territory of several States and which has been concluded by one or more representatives of a company or group of companies on the one hand, and one or more workers' organisations on the other hand, and which covers working and employment conditions and/or relations between employers and workers or their representatives[288].
TCAs can be grouped in three categories:
- *International Framework Agreements (IFAs)*. IFAs can be so defined because of the scope (they cover worldwide operations of a MNC) or because of the signatory parties (e.g. GUFs). They first appeared in the Eighties (e.g. Danone) and the great majority of them deals with the enforcement of fundamental rights (e.g. ILO conventions) or CSR policies.
- *European Framework Agreements (EFAs)*. EFAs are so classified because of their geographical scope limited to European Countries. They are signed by EWCs, EIFs, Ad hoc TU delegations or other actors. Topics can be more substantial in terms of impact on working conditions (e.g. EFA can deal with Restructuring, Human resources, Financial Participation, Health and Safety, CSR. Etc.).
- *Mixed-scope framework agreements*. Recently a new group has been introduced because of the ambiguity of the scope of the agreements. Some TCA may have a mixed geographical scope in which European-wide agreements may be partially applicable to the worldwide operations of a transnational company.

2. Some data

The database on TCA of the European Commission records 215 joint texts co-signed by multinational companies and employees' representatives289. 109 of them have a global scope, 83 have a Europe-wide scope and about ten have a mixed geographical scope.

Largest number of International Framework Agreements wants to engage companies to the respect of ILO Standards and respect of trade union rights. EFA cover a larger number of subject like restructurings and anticipation of change (31), HR policies (7), Health and Safety (6), Trade union rights and social dialogue (5), other topics are sustainability policies, employee financial participation, equal opportunities, etc.

The headquarters of companies that have signed TCAs are in France (55), Germany (23), USA (18) and far behind Sweden (13), Belgium (13), Italy (12). All sectors are concerned even if metal, food and finance sectors appear more frequently. If we limit the scope of investigation to EFA, the metal sector remains dominant (16), followed by Energy and Water Supply (12) Chemical (9), Building and Wood work (7), Finance (7).

It has been estimated that more than 10 million workers worldwide and 6.5 in Europe are covered by a TCA.

Practices in the way cross-border negotiations are triggered and managed are quite diversified. A large number of EFA have been signed by EWCs (51), national unions or employee company representatives (17) and European Federations (23). Sometimes they have negotiated alone, in other cases in cooperation among them but with different structures and procedures.

3. The legal debate in the Group of experts

[288] This definition appeared for the first time in 2008 within the Commission Staff Working Document on *The role of transnational company agreements in the context of increasing international integration,* (SEC(2008)2155 of 2 July 2008.
[289] The final number also depends on what criteria are used to include a joint text within the family of TCA. For the time being, the European Commission's goal is to increase awareness of the phenomenon and therefore it makes very extensive use of the definition of TCA.

The idea of an optional legal framework for transnational company negotiations appeared for the first time in the Social Agenda in year 2005 (COM(2005) 33 final).

At that time, the European Commission proposal for an optional framework for company-based cross-border negotiations registered a backlash from social partners[290]. It pushed the Commission to delay any further initiative and establish a Group of experts on Transnational Company Agreements composed by experts appointed by trade unions, employer associations, governments and other international institutions. The group had the task to monitor developments and exchange information on how to support the process under way.

The Group of experts has concluded its works in October 2011. The Final report has the merit to speak out all the most controversial aspects and submits to a larger public some policy options that social partners are free to accept, reject or investigate further. Draft elements for conclusions have been advanced by DG Employment, Social Affairs and Inclusion.

It points out four key areas of work in which the social partners can find opportunities and policy options:

1. Recognizing the role of transnational company agreements and contributing to their development
2. Supporting the actors in transnational company agreements and clarifying their role
3. Promoting transparency in transnational company agreements
4. Enhancing the implementation of transnational company agreements and the links with other levels of social dialogue

But the pathway for a mutual engagement of social partners remains narrow. In drafting the final report of the work performed by the Group of experts, social partners have not refrained from remarking their diversified positions. Trade unions have shown a more constructive approach. The trade union delegation has demanded that the following points could be taken into consideration as they emerged during the work of the Expert Group:

- The 'mandate' formation on the employer side is no less problematic than on the employee side
- Role of EWCs is emphasized too much and does not reflect the most recent trends according to which ETUFs have become key actors in all stages of negotiation and management of TCAs.
- Notification of new negotiations to a single recipient at European level can become a major source monitoring cross-border negotiations and for learning from current practices.
- Possible interferences with other levels of collective bargaining must be further analysed, even envisaging a presence of non-regression clauses in transnational agreements.

As a proof of the diversified opinion on the role that TCAs could play in future evolutions of social dialogue in Europe, there is the position undertaken by Businesseurope.

The association representing private employers at European level dedicated a specific project[291] on transnational negotiations with multinational companies. The European employers recognise some advantages in concluding TCAs. Positive aspects are mostly found in gains in term of reputation and improvement of social relations with their staff. More pragmatically, employers see advantages in having a TCA as it facilitates access to public procurement and improves attractiveness on financial markets.

But the convenience to engage in a TCA should be evaluated case by case. In its report, Businesseurope alerts their members of the risks behind. In their opinion, a TCA implies additional commitments with no evidence of any concrete return. On the contrary,

[290] This idea was inspired by the Ales Report.

[291] In December 2010 Businesseurope published *Key issues for management to consider with regard to Transnational Company Agreements (TCAs). Lessons learned from a series of workshops with and for management representatives*. It was the final publication of a European Project "Building the capacity of actors represented at company level to engage in and implement transnational company agreements (TCAs)." www.businesseurope.eu/content/default.asp?PageID=609

multinational companies may have enough resources to achieve the same objectives alone (e.g. harmonise industrial relations and HR policies throughout the group). In terms of industrial relations, Businesseurope declares a preference for local-based solutions while TCAs imply a centralisation of industrial relations. Moreover, TCAs could increase risks of conflicts with employee representatives or to expand TU demands.

It is not surprising that the European employers invite the European Commission to refrain from promoting TCAs. Employers' arguments against a direct engagement of the European institutions in promoting TCAs are based on the assumption that a very small minority of companies have been engaged in TCAs. They consider the European level not pertinent and the promotion of good practices discriminates against companies not wishing to engage in TCAs.

4. The role of EWCs and ETUFs

Despite such diversified opinions, TCAs have gained ground in the trade union agenda, especially in a European dimension.

In recent years, agreements with a European scope of application (EFA) have rapidly increased in number. Their contents are more and more concrete and touch core working conditions (restructurings, career development, financial participation, etc.). Therefore, "enforceability" is now a key issue.

The debate around cross-border negotiations has been extremely intense. It is widely held opinion that negotiations with MNCs have been driven by the absence of rules. Autonomy and flexibility work as an incentive in an early stage. However, as time passes, the absence of general rules (heteronomy) becomes an obstacle to an effective implementation of agreements.

Despite the fact that the ETUC resolution in 2006 warned that cross-border negotiations should be firmly kept into trade union hands, practices have been quite varied. In a future perspective, the presence of a multitude of actors should be rationalised. ETUFs seem to be the better placed to bargaining and sign European Company Agreements. Some solid argumentations could be found to support this political assumption.

EWCs have shown some activism in negotiating with Multinational companies. It has to be said, that because of the flexibility of the EWC Directive, EWCs have different structures and therefore may accomplish to different functions. It is a truth that some EWCs have a full-bodied trade union structure and therefore EWCs may sometime fulfill all criteria pertaining to a collective bargaining body. On the other hand, it is not less true that EWCs only *eventually* fulfils such criteria and experience shows that good trade union practices are not frequent, not enough structured and likely to fade away.

We can conclude that EWCs have legitimately concluded EFAs in the past years and they will likely do in the future. However, if the aim is to frame transnational negotiations with multinational companies in predefined procedures (or even within an optional set of rules) the current experience demonstrates that EWCs can hardly be a reliable trade union structure to accomplish for collective bargaining purposes.

In some other cases, negotiations have been conducted by *ad hoc* committees (a selection of national trade unions or diversified forms of employee representatives). This solution is normally led by a dominant actor as the trade union(s) of the parent company or by the company itself. This solution does not either guarantee a proper democratic result as it remains a sum of national interests deprived of any genuine capacity of pan-European representation of interests.

The convincing option experienced in the last decade refers to procedures and rules established by ETUFs that make ETUFs legitimate leading actors for negotiating and signing agreements with a cross-border scope.

Many ETUFs have already developed their internal rules for transnational negotiations with TNCs in order to establish their legitimacy as the negotiating and signatory party from the workers' side.

According to the IndustriAll procedures[292], the European federation must be informed of the opportunity for triggering a transnational negotiation in a transnational company. The initiative mostly comes from an EWC but it may also come either from a national union or the works council of the company concerned or by the European Federation itself. However as an evidence of the relevance of the EWC in creating an enabling environment for transnational negotiations, it should be remarked that current EFAs have been negotiated in companies in which an EWC exists. According to IndstriAll policy, EWCs should be involved from the beginning in order to take advantage of their privileged position in the company.

If negotiations take place, the IndustryAll takes the lead. A delegation of the Euroepan federation will be set up and will include a representative from most countries (major players) in which the agreement is supposed to take effect. The IndustriAll delegation will be composed of national trade union officials and unionised members of the EWC, duly mandated by their national organisations. The IndustryAll Secretary will act as the leader of the delegation and will be the spokesperson. If an agreement is reached, it will be signed by the IndustriAll.

The IndustriAll procedure is designed to make the EFA as binding as possible. The procedure is designed to give voice to both the national organisations and the EWCs concerned but also to prevent small minority groups from definitely vetoing the eventual start-up of European negotiations/agreements. Thus, that countries representing less than 5% of the workforce cannot veto the decision to start negotiations. The outcomes of the negotiation are endorsed in each country with a qualified two-third majority according to national practices and rules.

Agreements signed by the IndustriAll according to its procedures derive their validity from its constitution. The IndustriAll does not recognise as equally valid agreements signed outside these procedures.

EFFAT has established its own procedures even if its political agenda does not prioritise the establishment of EFA in transnational companies. According to the EFFAT procedures, the EWC or the national unions must immediately inform the European Federation of the opportunity of negotiating an EFA. In this case, EFFAT receives its mandate from the Executive Committee and a trade union delegation will be set up under the EFFAT leadership. EFFAT's executive committee has to be kept informed about the ongoing negotiations and their outcomes. The agreement has to be approved by national unions and the organisations involved in the executive committee according to the 2/3-majority rule.

According to EPSU rules, when a company indicates its intention to start negotiations, or the EWC or the trade unions involved in the company express such a wish, then EPSU procedure should be respected.

The decision to trigger negotiations will be taken in a meeting with the national unions and the EWC. A decision will be taken according to the rule of 2/3-majority in each country. EPSU asks its national organisations to disclose the procedure through which they have voted or decided. However, countries representing less than 5% of the workforce cannot veto the decision to start negotiations.

Mandates can be discussed case by case but, as general rule, a mandate should be unanimously endorsed. If not, the 2/3-majority rule and the 5% threshold will apply. The mandate will specify the scope of negotiations, the composition of the delegation and a non-regression clause.

The EPSU delegation will be made up of a negotiating/monitoring group and a negotiating team. The latter is tasked with achieving an agreement with the company's management. The

[292] Please note that similar procedures had been adopted by EMF, EMCEF and TLC-ETUF. The recentely established Federation IndustriAll will continue to use the procedure as hereby illustrated.

team can be led either by an EPSU Secretariat representative or by a national trade union official. The negotiating team may engage EWC representatives.

The text is submitted to the negotiating/monitoring group. Once approved by the negotiating/monitoring group, the agreement needs to be adopted at national level according to the 2/3-majority rule. Should the agreement be rejected in a given country, none of the unions of that country should sign the agreement.

The agreement will be signed formally by the General Secretary or Vice-General Secretary (or other person duly mandated by them). It will include all the organisations concerned. The latter will have the task (commitment) of implementing the agreement in their own countries according to their own practices and traditions.

The UNI-Graphical has also decided on a mandate and negotiation procedure identical to the one in force at the IndustriAll Federation.

We can detect recurrent elements in ETUF procedures:

- Recognition of the EWC role in creating an enabling environment for transnational negotiations. Trade union members of EWCs can be part of the European delegation which negotiates an EFA, as part of the Trade Union mandated negotiators.
- European Federations must be informed on the possibility of starting a negotiation for an EFA. European federations take a leading role and sign agreements.
- National unions must be part of the negotiations but they have to mediate their specific national interests within the procedures adopted at European level.
- The search for consensus is the leading principle. In order to introduce democratic elements into a situation of divergent interests the 2/3-majority rule applies within each country. Blocking minorities are subject to the threshold of 5% of the workforce.
- Procedures and mandate formation will make the agreements legally stronger and ensure their enforceability at national level.
- Information on the ongoing negotiations and their results are normally communicated to the executive committee of the ETUFs and other coordination bodies. Communication at national level and implementation into national level of collective agreements falls under the competence of the national organisations.

5. An optional legal framework and legal strength of TCAs.

An optional frame of rules for transnational negotiations is an opportunity to consolidate the strategies implemented by the European trade union federations. It also implies that while clarifying the legal nature and binding effects of agreements with a transnational scope, its scope would be limited to EFA only.

It is early to imagine what shape an optional frame of rules could take. However, at least from a trade union point of view, it is possible to figure out properties that an optional legal framework for transnational negotiations will likely have:

- It has to submit the binding effects of the agreements to the respect of the internal rules adopted by ETUFs.
- It has to refer to the representativeness criteria of European trade union organisations similar to those, which apply for the European social dialogue committees.
- It must provide a list of required elements to be considered when negotiating EFA, including a non-regression clause
- It may establish a voluntary European conciliation body for a transitional period of 5 years to help solve extra-judicial disputes and gain experience with the good functioning of the optional legal framework for EFA.

The last point concerning possible conflicts arousing from the implementation of transnational agreements is of overwhelming importance. As general rule, collective agreements derive their inherent strength from the capacity of a signatory parties to force each

other to stick with the engagements they have undertaken. The clearest the engagements are, the stronger the enforceability of the agreement is.

Some other elements may better qualify the inherent strength of an EFA in terms of enforceability and legal validity:

- All agreements must be duly signed. Date and venue of the signature clearly stated. The expiring date of the agreements must be displayed as well.
- Both signatory parties (employees and employer representatives) must disclose their mandate in order to prove capacities of signatory parties and legitimacy of the negotiations.
- Parties must state their intentions especially concerning the legal effects they want to obtain signing an EFA. Engagements that are supposed to be compelling must be identifiable and clearly explained.
- A "non regression" clause must be always considered in order to prevent conflicts between national/local collective agreements and EFA. Parties should also consider potential conflicts with legislation or collective agreements in countries in which the EFA is supposed to be enforced.
- Objectives and beneficiaries of the agreement must be clearly stated. In particular parties should declare what clauses are aiming at setting mutual obligations (obligatory part) and what clauses are supposed to produce effects on employees (normative part).
- Enforcement procedures must be detailed. In particular, parties should state under which conditions an EFA will produce its legal effects (also considering a further implementation through national agreements) and what procedures oversee to its correct implementation.
- Procedures to manage eventual conflicts should also be considered.

However, if signatory parties are the best placed actors to enforce the agreements and autonomously solve eventual disputes, in future it cannot be excluded that third parties (judicial or non judicial instances) may be called upon to solve conflicts.

But the legal nature of EFAs is still a controversial issue. A study made for the Group of experts "International private law aspects and dispute settlement related to transnational company agreements" shows how difficult is to utter a final word on cross-border legal implications of EFA. It shows that the application of international private law to cross-border negotiations does not offer final answers on how national courts would treat EFAs. Moreover, especially from a trade union point of view, the application of international law and European law to EFA may have undesired effects in terms of ownership of the agreement, validity of the mandate chain, divergences in rulings on the same dispute by different national Courts, etc.

A European mediation/conciliation body could prevent from going before national courts for each minor infringement. It can encourage partners to engage in new and more advanced agreements as well.

Few words can be finally spent on two further aspects concerning transnational negotiations with multinational companies: transparency and relations with other levels of social dialogue.

External observers underscore the fact that EFA are concluded in "dark rooms", alleging a lack of involvement of the beneficiaries; second, they denounce the poor quality of the texts, in particular in the "old generation" agreements.

It may happen that employees and subsidiaries falling under the scope of a transnational company agreement are not properly informed about its existence or have not access to its contents. However, transparency still resides within procedures and mechanisms established by the signatory parties, on both trade union and employer sides. If the mandate is clear and easily traceable, the entire process will result more transparent and accountable. ETUFs have progressed faster than employer in equipping themselves with procedures and rules for transnational negotiations.

Cross-border negotiations with multinational companies are still at an experimental stage. Partners are free to decide what has to be negotiated, the geographical and material scope of

negotiations, instruments to manage and solve conflicts. In fact there is no prioritization or coordination from European trade unions concerning subjects and/or objectives to be pursued through transnational negotiations with multinational companies.

It does not mean that EFA are completely disconnected from other levels of social dialogue. It is worthy to underscore that some EFAs have taken inspiration from EU Interprofessional or Sector Framework Agreements or driven by the desire to provide a cross-border extension to national agreements. On the other hand it is assumable that a consolidate experience of negotiations at group level in a given sector can deliver its positive effects on the sector social dialogue in that sector.

By the way, a transnational agreement may interfere with collective agreements signed and applicable to local operations of the company concerned. There is a wide consensus on the fact that collective agreements regulated by national legislations (according to national practices) remain the predominant instrument to regulate working conditions. A non-regression clause should always be included in order to avoid that a transnational agreement could (be supposed to) overrule or be in conflict with agreements signed in the framework of national legislations. It would definitively improve the legitimacy of negotiations and will enhance the binding strength of a transnational agreement.

Chapter 10

Trade Unions and Europeanisation of Industrial Relations: Challenges and Perspectives

Fernando Rocha [*] ***and Pere J. Beneyto*** [*]

1. Introduction

The great current crisis which affects Europe and some Member State in particular has so far had a huge impact on the economic activity of the developed nations. Its effects on labour markets −particularly in terms of job destruction and increase of the unemployment rates− have caused a significant deterioration of living and working conditions for broad segments of the population. The result has been the emergence of an alarming social scenario, further worsened by the negative trend of various international economic indicators registered in the last quarter of 2011. As a consequence, many of the OECD member countries have experienced what is generally known as a "double-dip recession," i.e. a second dip in economic activity following the first recession which officially ended in mid-2010[293].

It should be noted that, far from being accidental, this further deterioration of the economic situation is largely the result of a new direction in the political decisions adopted by the most advanced countries. The first two years of the crisis were characterised by a coordination effort among the G20 countries aimed to actively boost recovery, as well as to implement the reforms needed to strengthen regulation of the financial system and increase the credit flow to productive companies. However, these aims seem to have been abandoned in 2010, with the exception of the United States, in favour of other priorities such as the recapitalisation of credit institutions or austerity and budget adjustment policies, effectively preventing reform of the banking practices at the root of the crisis and relinquishing a vision on how the real economy could be brought back into recovery.

In the context of the European Union, and beyond the points already mentioned, the EU Institutions and the Governments of the Member States generally agree that improving competitiveness should be another key objective of the economic policy for the next few years. The European Commission has issued several legislative proposals in recent years, including the so-called "Six-Pack" on economic governance and the Euro Plus Pact adopted by the European Council in March 2011[294].

The contents of these initiatives have proven to be controversial among the European social partners. The employers' organizations −represented by *BusinessEurope*− openly defend the proposals presented by the EU Institutions regarding European economic governance. More specifically, they articulate the need to advance structural reforms having a bearing on such

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[293] International Labour Office: *Global Employment Trends 2012. Preventing a deeper job crisis,* ILO, Geneva, 2012.

[294] See contribution of Salvo Leonardi in this report.

aspects as public deficit reduction and labour market flexibility (including collective bargaining)[295].

On the other hand, the European Trade Union Confederation (ETUC) has expressed its strong opposition to these initiatives for a variety of reasons, of which two are particularly worth noting[296]. Firstly, the ETUC denounces that this political process aims to consolidate a "European competitiveness law" focused on pushing down wages under the pretext of "saving the euro." Secondly, trade unions are openly against the new economic governance −and the "European semester" in particular− being used as an instrument to restrict wage bargaining. To this effect they reject all kinds of interference from the political powers −at both European and national level− and defend the principle of autonomy of collective bargaining for the social partners (which constitutes a cornerstone of the European social model).

In relation with the latter point, the ETUC has also expressed its concern that the revision of several EU Directives could put at risk the workers' participation rights in companies[297]. There are further worries about some particularly controversial rulings by the Court of Justice of the European Union −Viking, Laval and Rüffert cases− that mean that the balance between the business and social dimensions of the European integration project has been broken in favour of the former, which could open the way for social dumping in Europe[298].

The combination of all these factors is having a negative impact on trade union attitudes, traditionally in favour −albeit in different degrees− of the European integration project. Some voices have even pointed out that "*trade unions are increasingly turning their backs on Europe, primarily because Europe has turned its back to them*"[299]. The result is a certain increase in "euroscepticism" among the trade unions, particularly in those countries −like the Scandinavian nations− where opposition to the process of European construction has been traditionally higher.

This is the context of the present debate on the Europeanisation of industrial relations. It is by no means a new debate among European trade unions, though −as already mentioned− it has gained a new momentum within discussions on the various initiatives launched at the European level to tackle the crisis.

Our text aims to contribute some critical reflections on this debate. To this end, we shall make first a general assessment of the process of Europeanisation of industrial relations to highlight its strengths and weaknesses. The final part discusses the different options proposed by the trade unions to bring about a "change of course" in the European integration project, with the defence of the social model −including crucially the dynamics of industrial relations− as one of the strategic targets of such change.

Ultimately, we propose the idea that *the social response to the neoliberal drift of the European project is not "renationalisation" −which would inevitably lead to a downward spiral undermining the workers' rights and working conditions− but reinforcing trade union cooperation and industrial relations at transnational level*.

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[295] De Buck, Ph. (2011): "Where is Europe Heading?", *European Business Outlook* (15/9/2011), BussinessEurope.

[296] European Trade Union Confederation (ETUC): *Collective bargaining: The ETUC priorities and working program (Resolution)* (6-7/3/2012); *ETUC Declaration on the "Treaty on stability, coordination and governance in the economic and monetary union"* (25/1/2012); *ETUC Resolution on European Economic Governance* (11/3/2011); *ETUC Resolution on Economic and Social Governance* (13-14/10/2010). All resolutions are available for consultation at www.etuc.org.

[297] *ETUC Resolution on workers participation at risk: towards better employee involvement* (7-8/12/2011).

[298] Janssen, R.: "Transnational employer strategies and collective bargaining: the case of Europe", *International journal of labour research*, Vol. 1, Issue 2 (2009), pp. 131-148.

[299] Kowalsky, W.: "Unions for a change of course in Europe. Unions and Europe - an imminent parting of the ways?", in Kowalsky, W. and Scherrer, P. (Eds): *Trade Unions for a change of course in Europe. The end of a cosy relationship*, European Trade Union Institute, Brussels, 2011, p. 86.

2. The process of Europeanisation of industrial relations: a general assessment

The concept of Europeanisation of industrial relations refers to the identification of different governance mechanisms and procedures of supranational nature whose development at different levels −from cross-sectoral to company level− aims to three major goals: negotiation of agreements; information and consultation; and influencing public policies[300].

This process is the result of different causes, but generally there are two main types of factors. The first of them relates to the challenges faced by the trade unions as a result of the wide adoption of the neoliberal globalisation model in recent decades, which has had a great impact on employment, working conditions and industrial relations.

It should be noted that this globalisation model, far from being a "natural" or "spontaneous" development, has been promoted and controlled by certain national and international actors[301]. In particular, large multinational corporations have played a crucial role with a double dimension: (a) adopting strategies of productive restructuring such as outsourcing, offshoring and parallel production, focused on a value chain that is becoming increasingly fragmented and organized across borders; and (b) imposing financialisation as the main logic behind business administration policies[302].

On the other hand, it has been noted that the consolidation of economic and monetary integration has led trade unions to promote an upward harmonisation in working and social conditions in the integrated economic area. An important milestone was reached in 1999 in Helsinki, when the ETUC adopted a resolution to actively promote the creation of a European system of industrial relations[303].

There have also been several institutional initiatives supporting the supranational nature of workers' participation rights. This subject was already addressed in the EU legislation in the 1970s, but it was in the mid-1990s when both the legal corpus and the political instruments were substantially improved[304].

Academic literature does not offer a unanimous interpretation of the development and outcomes of this process, while European trade unions hold differing views on the subject. However, the various opinions can be initially classified in two groups[305].

The "optimistic" view considers that support for the supranational dimension of workers' participation rights represents a substantial advance, since it lays the foundation for a genuine multilevel system of industrial relations at the European level. Supporters of this opinion point out that "*though the results so far are still modest and developments in this sphere are very gradual, Europeanisation nonetheless represents a central opportunity for furthering trade union interests in the future*[306]".

The "pessimistic" view, on the other hand, considers that "soft" legislation and procedural flexibility in the area of industrial relations are damaging for the consolidation of Social

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[300] Glassner, V. and Pochet, P.: *Why trade unions seek to coordinate wages and collective bargaining in the Eurozone: past developments and futures prospects*, Working Paper 2011.03, European Trade Union Institute, Brussels, 2011, pp. 9-13.

[301] Harvey, D.: *A brief history of neoliberalism*, Oxford University Press, New York, 2005.

[302] Keune, M. and Schmidt, V.: "Global capital strategies and trade union responses: towards transnational collective bargaining?", *International journal of labour research*, Vol. 1, Issue 2 (2009), pp. 9-26; Rhode, W.: "Global production chains, relocation and financialization: the changed context of trade union distribution policy", *International journal of labour research*, Vol. 1, Issue 2 (2009), pp. 99-112.

[303] ETUC: *Towards a European System of Industrial Relations* (Statutory Congress of Helsinki, 29/6-2/7 1999).

[304] Detailed information on different supranational instruments available for workers' participation in the EU is available for consultation at http://www.worker-participation.eu.

[305] Müller, T. and O'Kelly, K.P.: "Editorial", *Transfer*, 17(2), May 2011, pp. 135-136.

[306] Hoffman, R.: "Proactive Europeanisation of industrial relations and trade unions", in Kowalsky, W. and Scherrer, P. (Eds): *Trade Unions for a change of course in Europe. The end of a cosy relationship*, European Trade Union Institute, Brussels, 2011, p. 60.

Europe. According to this opinion, this approach not only does not reduce the asymmetry in power between capital and work; it also contributes to erode national systems for workers' participation in countries with higher standards and does not help to improve conditions in countries with lower standards.

The process of Europeanisation of industrial relations integrates several aspects whose in-depth analysis would by far exceed the scope of this text. However, the results obtained by different studies allow for a summary description of the main challenges and prospects faced by trade unions in this context.

2.1 Cross-border coordination of national collective bargaining.

The first aspect refers to the *cross-border coordination of national collective bargaining* and has been pursued only from the trade union side. It originated in the 1970s and gained new momentum from the mid-1990s, mainly because of the trade unions' wariness that the increase of competitiveness in the wake of economic and market integration of the European Union would cause a downward spiral undermining wages and working standards.

Several studies allow to identify some strengths and weaknesses of this process[307]. Firstly, it should be noted that cross-border coordination has yielded positive results, including annual limitation of working hours, inclusion of certain issues like professional development in the agenda of national collective bargaining, and exchange of information and confidence structures among actors from countries with very different systems of collective bargaining.

On the other hand, it is also possible to identify some barriers and challenges of both structural and contextual nature. The most serious structural problem for trade union cooperation and decision making is the increasing relevance of company-level negotiations, which undermines a cross-border approach to collective bargaining. The reduction in union membership, the weakness of higher-level organizations and the low activity of labour markets are other factors contributing to erode the trade unions' bargaining power. Likewise, differences in systems, practices and outcomes of collective bargaining and in the scope, level and extension of collective agreements, as well as the lack of synchronicity of negotiation rounds in the Member States, are other barriers against cross-border coordination of collective bargaining policies.

Finally, another crucial factor is associated with the impact of EU initiatives aimed to enhance European economic governance, which −as previously mentioned− undermine the social partners' autonomy and increase the pressure for wage reductions and decentralisation of collective bargaining.

2.2 European social dialogue

Another all-important aspect of the process is related to the development of the European social dialogue on its different levels (cross-sectoral, sectoral and company). The evolution of the *European interprofessional social dialogue* during the last 20 years shows unquestionably good results, as reflected in different agreements: (a) three framework agreements incorporated into EU Directives on parental leave (1996, revised in 2010), part-time work (1997) and fixed-term work (1999); (b) four autonomous agreements on telework (2002), stress at work (2002), harassment and violence at the workplace (2007) and inclusive labour markets (2010); (c) two frameworks of action on lifelong development of competencies and qualifications (2002) and gender equality (2005); and (d) four joint work programmes

[307] Glasnner and Pochet: op.cit.; Glassner, V.: "Transnational collective bargaining coordination at the European sector level: the outlines and limits of a "European" system", *International journal of labour research*, Vol. 1, Issue 2 (2009), pp. 113-130; Marginson, P.: "The transnational dimension to collective bargaining in a European context", *International journal of labour research*, Vol. 1, Issue 2, 2009, pp. 61-74; and Hoffman: op.cit., pp. 66-70.

established by the European social partners (2003-2005, 2006-2008, 2009-2011 and 2012-2014)[308].

However, a more qualitative assessment paints a more guarded picture, mainly because of the uneven development and impact of these agreements in the EU Member States[309]. In this regard, initiatives in this area are faced by various challenges connected with such aspects as the involvement of the different actors, the development of agreement negotiation and implementation processes, and the adoption of legal mechanisms for the enforceability and application of such agreements.

The *European sectoral social dialogue* is a process initiated in the 1950s, although it gained new momentum in 1998 with the decision of the European Commission to establish Social Dialogue Committees promoting the dialogue between the social partners at European level[310]. As of 2010 there were 40 European Committees in different sectors, covering some 145 million workers and more than 6 million companies[311].

The analysis of this process highlights its valuable contribution to the development and consolidation of the European social model[312]. This is reflected in more than 500 texts agreed by the social partners, including agreements, recommendations, declarations, joint opinions, tools and procedural rules. Among them, six agreements were later implemented through EU Directives[313] and four autonomous agreements will be developed through standard national procedures[314].

In more qualitative terms, the sectoral social dialogue covers a wide variety of contents in such areas as: economic and sectoral policies, including matters like anticipation of change and restructuring; lifelong learning and competencies; employment and working conditions; occupational health and safety; working time; equal opportunity, diversity management and non-discrimination; and corporate social responsibility. It should also be noted that 14 joint declarations were signed in 2008-2011 to address the impact of the present crisis on the diverse productive sectors, as well as to identify potential measures to mitigate its most negative effects on employment and economic activity[315].

In summary, the development of the European sectoral social dialogue represents an obvious advance that so far has yielded very positive results. However, the consolidation of this process faces some challenges regarding coordination among European Federations of

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[308] The texts of these agreements are available for consultation at http://www.worker-participation.eu.

[309] Clauwert, S.: "2011: 20 years of European interprofessional social dialogue: achievements and prospects", *Transfer*, 17(2), 2011, pp. 169-179.

[310] *Commission Decision of 20 May 1998 on the establishment of Sectoral Dialogue Committees promoting the Dialogue between the social partners at European level* (Official Journal of the European Communities, 12/8/98).

[311] European Commission (EC): *European Sectoral Social Dialogue Recent developments. 2010 edition*, Publications Office of the European Union, Luxembourg, 2010, p. 7.

[312] EC: *Commission Staff Working Document on the functioning and potential of European sectoral social dialogue*, SEC (2010) 964 Final, Brussels; Degryse, C. and Pochet, P.: "Has European sectoral social dialogue improved since the establishment of SSDCs in 1998?", *Transfer*, 17 (2), 2011, p. 145-158; Léonard, E., Perin, E. and Pochet, P.: "The European sectoral social dialogue: questions of representation and membership", *Industrial relations journal*, Vol. 42, Issue 3, 2011, pp. 254-272; Pochet, P., Peeters, A., Léonard, E. and Perin, E.: *Dynamics of the European sectoral social dialogue*, Office for Publications of the European Communities, European Foundation for the Improvement of Living and Working Conditions, Dublin, 2009; Weber, S.: "Sectoral social dialogue at EU level", *Transfer*, 16 (4), 2010, pp. 489-507.

[313] For railways (1998 and 2004), maritime transport (1998 and 2008), civil aviation (2000) and hospitals (2009). The texts of these agreements are available for consultation at http://www.worker-participation.eu.

[314] For railways (2004 and 2009), personal services (2009) and cross-sectoral (2006). The texts of these agreements are available for consultation at http://www.worker-participation.eu.

[315] Clauwaert, S. and Schömann, I.: "European social dialogue and transnational framework agreements as a response to the crisis?", *ETUI Policy Brief, European Social Policy*, Issue 4/2011, pp. 2-4.

social partners and their national affiliates in areas such as[316]: representation problems of very different trade unions and employers' organizations in 27 countries; reluctance to grant a mandate for the purpose of acting at European level; difficulties of national organizations to participate in European Sectoral Committees; and coordination problems within the organization when involvement of national affiliates is required to implement a joint text.

2.3 European Works Councils (EWCs)

Since their formal establishment through the EU Directive 94/45 of 1994, European Works Councils (EWCs) have been a key instrument for the development of the *European social dialogue at company level*[317]. The main effect of this Directive has been a sustained −albeit moderate− annual growth of this supranational body of workers' representation. As of the first quarter of 2012, 1,218 EWCs had been created of which 1,001 −79%− remained active[318]. This is certainly a significant number, but still insufficient given the number of companies covered by the Directive where no EWC has so far been created.

This situation has been denounced by the different national trade unions, which have identified several barriers related to factors such as[319]: (a) access to company information and lack of visibility into the structure of companies, their operations and the workforce distribution among the affiliated societies; (b) limited resources available to national trade unions and European federations responsible for EWC coordination; (c) companies' reluctance to take on the costs required to create and manage these bodies; and (d) the greater difficulty of EWC establishment in smaller multinational companies.

Given the extreme variety of situations, reaching a single qualitative assessment on the functioning of EWCs is not an easy task. However, several empirical studies have highlighted the positive impact of EWCs on both the workers' interests and the companies' efficiency and competitiveness. They have a key role to play when it comes to leading the social dialogue and forging a company-wide common identity[320].

This assessment should in no way ignore the existence of several critical elements for the performing of EWCs and in particular the failure of many companies to fulfil their obligations on information and consultation, especially during restructuring processes. Other problems relate to the absence of any precise role for trade union involvement, the allocation of resources and other aspects not covered −or not sufficiently covered− by Directive 94/45[321].

This led the European Trade Union Confederation to demand a revised Directive once the original terms had been met. Strong opposition by the Confederation of Employers'

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[316] Perin, E. and Léonard, E. "European sectoral social dialogue and national social partners", *Transfer*, 17 (2), 2011, pp. 159-168.

[317] *Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees* (Official Journal of the European Communities, 30/9/1994).

[318] European Works Councils Database, ETUI (April 4, 2012).

[319] Jagodzinski, R.: "EWCs after 15 years –success of failure?", *Transfer,* 17 (2), 2011, pp. 205-208.

[320] Among the many references available on the subject of EWC functioning, see: Jagodzinski, R.: op.cit.; Waddington, J.: "European works councils: the challenge for labour", *Industrial relations journal*. Vol. 42, Issue 6, 2011, pp. 508-529; Dorssemont, F. (Ed): *The recast of the European Works Council Directive*, Intersentia, Antwerp, ETUI, Brussels, 2010; Vitols, S.: *European Works Councils: an assessment of their social welfare impact*, ETUI, Brussels, 2009; Jagodzinski, R., Kluge, N. and Waddington, J. (Eds): *Memorandum European Works Councils*, ETUI, Brussels, 2008; European Foundation for the Improvement of Living and Working Conditions: *European Works Councils in practice. Background Paper*, Foundation for the Improvement of Living and Working Conditions, Dublin, 2008; Carley, M. and Hall, M.: *European Works Councils and transnational restructuring*, European Foundation for the Improvement of Living and Working Conditions, Office for Official Publications of the European Communities, Luxembourg, 2007.

[321] A summary of the main deficiencies, as well as a series of recommendations to revise Directive 94/45, can be found in Jagodzinski, R., Kluge, N. and Waddington, J.: op.cit.

Organizations delayed the process for 10 years until the new revised Directive was finally approved in 2009[322].

This text has been welcomed by the ETUC, since it includes several positive developments such as[323]: stronger definitions, especially on information and consultation; recognition of the transnational competence of the EWCs; new rules linking various levels of representation; recognition of the competencies of employees' representatives; a stronger role for trade unions; and better rules for the establishment of EWCs. Beyond these developments, EWCs should nonetheless be considered as an "institution in process" whose future efficiency will depend both on the extension of their coverage and a real improvement of their functioning.

As well as the EWCs, another point worth mentioning is the role of workers' participation in companies under European Company (SE) Statute[324], whose number raised to 1,136 in 2012[325]. The assessment of this process provides a somewhat ambiguous picture owing both to the low number of European companies and the variety of experiences. Nonetheless, several studies agree that SEs offer a good potential for extension of workers' participation and involvement rights, therefore contributing to consolidate the process of Europeanisation of industrial relations[326].

2.4 Transnational collective bargaining at company level

Finally, another relevant aspect that has become increasingly important in recent years relates to *transnational collective bargaining at company level*, which is the subject matter of this report. The remaining of the chapters provides an in-depth analysis of the different issues related to the processes and the results obtained so far in this area, as well as the challenges and limitations to be faced over the next few years.

In any case, a general assessment highlights a modest but positive evolution of transnational collective bargaining at company level, as evidenced by the signing of 215 framework agreements (at both international and European level)[327].

The main strengths and weaknesses of this process can be identified through examination of the specialized literature[328]. On the one hand, there is agreement on the importance of

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[322] *Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast)*, Official Journal of the European Communities, 16/5/2009.

[323] ETUC: *On the Offensive for More and Stronger European Works Councils. The New European Works Councils Directive ("Recast")*, Brussels, 2008.

[324] *Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE)*, Official Journal of the European Communities, 10/11/2001; *Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees*, Official Journal of the European Communities, 18/02/2003.

[325] European Company Database, ETUI (April 4, 2012).

[326] Rehfeldt, U.: *Employee involvement in companies under European Company Statute*, European Foundation for the Improvement of Living and Working Conditions, Office for Official Publications of the European Communities, Luxembourg, 2011; Stollt, M. and Kluge, N.: "The potential of employee involvement in the SE to foster the Europeanization of labour relations", *Transfer*, 17 (2), 2011, pp. 181-192.

[327] European Commission: Database on transnational company agreements (April 4, 2012).

[328] Clauwaert, S. and Schömann, I.: op.cit., 2011; Schömann, I.: "The Impact of Transnational Company Agreements on Social Dialogue and Industrial Relations", in Papadakis, K. (Editor): *Shaping Global Industrial Relations. The Impact of International Framework Agreements*, Palgrave Macmillan and ILO, Hampshire, 2011, pp. 21-37; Weltz, Ch.: "A Qualitative Analysis of International Framework Agreements: Implementation and Impact", in Papadakis, K. (Editor): *Shaping Global Industrial Relations. The Impact of International Framework Agreements*, Palgrave Macmillan and ILO, Hampshire, 2011, pp. 38-60.; Teljohann, V., Da Costa, I., Müller, T., Relfheld, U. and Zimmer, R.: *European and international framework agreements: practical experiences and strategic approaches*, European Foundation for the Improvement of Living and Working Conditions, 2009; Keune and Schmidt: op.cit., 2009.

transnational collective bargaining to promote Europeanisation of industrial relations, both in terms of process −contributing to enhance governance in companies− and contents of agreements and their impact on employment, working conditions and extension of labour rights.

On the other hand, it has been pointed out that the consolidation and enhancement of the process is faced by several barriers to the transnational dimension of collective bargaining, such as: (a) legal, political or social barriers in many countries which limit trade union freedoms, the right to organise and their capacity to engage in collective bargaining; (b) the increase of informal, casual and precarious work, as well as the decline of union membership in many countries; (c) priorisation of national approaches in the trade unions' strategies over the transnational dimension, which is seen as a secondary option; (d) lack of international legal frameworks to regulate transnational collective bargaining and make agreements enforceable by the signing parties; and (e) the reluctance or even rejection of many employers to engage in transnational collective bargaining.

Besides the above obstacles, there are also problems for the application of transnational agreements in adverse economic conditions characterised by a significant increase in company restructuring[329]. This situation favours individual strategies over cooperative solutions at company and/or work centre and national level.

Along these lines, the comparative empirical analysis of various experiences provides some lessons for the future, such as[330]: (a) the effective implementation of transnational framework agreements requires the creation of a legal and institutional framework, or alternatively the establishment of clear rules by the signatory parties; (b) there is still room for the development of new agreements, both in the European Union and other countries; (c) it is important to strengthen trade union capacities, exchanges and cross-border cooperation; (d) the content of framework agreements should be expanded so as to go beyond core labour standards and address practical questions such as anticipation and management of industrial change; and (e) international trade union federations and the management of multinational companies need to rationalise their activities so as to improve their capacities in terms of follow-up to framework agreements.

3. Reinforcing transnational trade union cooperation against the crisis and social dumping

Trade unions have traditionally favoured the European integration project −in different degrees depending on the geographical area−, but this attitude started to show signs of gradual deterioration in the final years of the last decade. This can be explained by three different reasons.

1) Firstly, the failure of the Lisbon Strategy aimed at turning Europe, by 2010, into the most competitive economy of the world, with more and better jobs, on the basis of a transition to a knowledge-based economy, while at the same time defending social cohesion and a greater involvement of the social partners. This failure is evidenced not only by the fact that that the goals set have not been fulfilled, but above all by the consolidation of a fragmented social and economic model which is based on the creation of atypical and precarious jobs, a declining share of wages in GDP and an increase in personal income differentials[331].

2) Secondly, the clear neoliberal drift of the European project as evidenced by the 2005 mid-term review of the Lisbon Strategy, which focuses on competitiveness at the expense of

[329] See contributions of Udo Rehfeld and Isabela da Costa in this report.
[330] Papadakis, K.: "Introduction and Overview", in Papadakis, K. (Editor): *Shaping Global Industrial Relations. The Impact of International Framework Agreements*, Palgrave Macmillan and ILO, 2011, pp. 12-13.
[331] European Trade Union Institute: *Benchmarking Working Europe 2009*, ETUI, Brussels, 2009; Magnusson, L.: *After Lisbon -Social Europe at the crossroads?*, Working Paper 2010.01, ETUI, Brussels, 2010.

social and environmental issues. This asymmetry is also present in the European 2020 Strategy.

3) Finally, the repercussions of some controversial rulings by the Court of Justice of the European Union that, as already mentioned, establish the supremacy of trade law over employment law, so contributing to further deterioration of the already weak social dimension of the European project.

The trade unions' wariness has increased with the advent of the Great Recession, particularly after the decisions adopted by EU Institutions and national governments in a double dimension: imposition of austerity measures that not only place the social costs of the crisis on workers and the most disadvantaged segments of the population, but also considerably slow down the possibilities of economic recovery; and initiatives aimed to enhance European economic governance that, among other things, have a direct effect on the social partners' autonomy in collective bargaining.

Trade unions have reacted to this situation with a series of initiatives −including considerations, proposals and mobilisations− that, against the traditional discussion on "More or Less Europe," seek to bring about a change of course towards *a new model of Europe*.

In 2009, the European Trade Union Confederation called for a "*New Social Deal in Europe*[332]" organized along five main lines of action: (a) investment in an expanded economic recovery plan committed to more and better jobs; (b) strengthening of welfare systems to provide more security and avoid social exclusion; (c) reinforcement of workers' rights and an end to the "short-term" market principles; (d) strengthening of collective bargaining and wage formation mechanisms as an alternative to wage freezes and nominal wage cuts; and (e) effective regulation of financial markets.

The defence of the workers' participation rights is one of the basic points of this proposal, since the ETUC considers that one of the main lessons to be learned from the present situation is that "*a stronger participation of workers in strategic business decisions which are often taken at European or global level is necessary and the current crisis must be considered as opportunity to strengthen worker involvement to strengthen the long-term viability and sustainability of companies*[333]".

This is the context of the present debate on the Europeanisation of industrial relations. Against those who express an unconditional commitment to the European project or are in favour of "renationalising" trade unions action, it is possible to defend a different way: *reinforcing coordination and transnational cooperation among European trade unions to prevent further cuts in wages and working conditions −which would inevitably lead to the generalisation of dumping− while at the same time promoting an alternative model of European Union based on more sustainable economic, social and environmental principles*.

A detailed explanation of this kind of proposal, including its relevance for the different aspects integrated under the umbrella term of Europeanisation of industrial relations, would exceed the objectives and scope of this text. Nonetheless, it is possible to mention some general points by way of conclusion:

- establishment of *minimum European standards of workers' participation rights* in order to strengthen implementation of information and consultation rights across the European Union;
- enhancement of the existing legal instruments and procedures for European social dialogue on its different levels, in particular in some countries, as recently proposed by the European social partners[334];

[332] ETUC: *Towards a New Social Deal in Europe* (8/5/2009).
[333] *ETUC Resolution on workers participation at risk: towards better employee involvement* (7-8/12/2011), p. 3.
[334] ETUC/CES, BUSSINESSEUROPE, UEAPME and CEEP: *Work Programme of the European Social Partners 2012-2014*.

- finally, and regardless of eventual legal developments, improvement of the performance of European social dialogue on its different levels.

In this sense, the opinions expressed by national trade unions provide some key recommendations such as[335]:

a) strengthening the link between cross-sector and sectoral social dialogue because both should be regarded as mutually supportive;

b) increasing the "visibility" of European social dialogue and improving the dissemination of concrete outcomes in the public sector at the European as well as national level;

c) developing a joint understanding of the role and specific nature of the different types of instruments that have been applied and tested during the last 15 years;

e) improving the transparency of mechanisms, procedures and decision taking in the context of European social dialogue for national member organizations and vice-versa;

f) strengthening the capacity as well as competence of European social dialogue structures and institutions;

g) continuing the support for capacity-building, mutual learning and exchange of experience in regard to strengths, weaknesses, opportunities as well as threats of national social dialogue; and

h) taking into account the specific needs of certain groups of national social partners, e.g. in the public sector or in the micro an small enterprise sector.

To sum up, we consider essential to promote the strengthening of social dialogue processes at all levels and geographical areas ─including the transnational level─ as a key element of European policies. This is particularly true within the present historical context, when the crisis −and the failure to find a cooperative solution for economic recovery at European level− has caused a significant citizen disaffection towards the European integration project.

[335] Voss, E. (Wilke, Maak and Partner): *European Social Dialogue: Achievements and Challenges Ahead. Results of the stock-taking survey amongst national social partners in the EU Members States and candidate countries*, ETUC, BUSINESSEUROPE, UEAPME and CEEP, 2011, p 49.