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THE POST-NATIONAL CONSTELLATION OF INDUSTRIAL  
RELATIONS SYSTEMS IN THE EUROPEAN LEGAL ORDER

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**Abstract**

This paper develops a new interpretation of the norms of the Treaty of Lisbon to find the juridical basis for an autonomous system of European industrial relations. In particular, the study explores the question of whether the provisions in EU law (art. 152, 154 and 155 TFEU and art 28 Charter FSR) could constitute a sufficient basis for granting social parties the power to regulate sectors under their competence (such as social policy) through collective bargaining, without the involvement of European institutions. In so doing, the author advances the hypothesis of an extra-institutional system of rule-making, the efficacy of which is measurable over time, depending on the agreement's degree of propagation, outside of the dual-logic hermeneutic approach (binding vs. non binding).

Despite the as yet only embryonic capacity of trade unions to coordinate among themselves, the author gives some examples of the autonomous development of European collective bargaining to support the hypothesis, looking also at the transnational level. In the light of the theoretical framework and autonomous negotiations, the author argues that there is a new mode of normative regulation, made by social partners and aimed at achieving social policy objectives.

**Keywords**

Autonomous negotiations; EU law; theoretical framework; extra-institutional system of rule-making; social policy objectives.

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## 1. Introduction.

A study of collective autonomy in the European context leads to the heart of the traditional dynamic between autonomous and heterogeneous sources of law, and therefore it requires the choice of a perspective such as that of social partners, since the scenario under analysis is totally new and is not comparable to that of traditional State orders. By looking at the EU legal order and the praxis of social actors, this paper aims to find signs of collective European actors “living law” and discover the basic directions along which the social partners intend to move, beyond their involvement in the political strategies of supranational institutions. Starting with a brief historical overview of trade union participation in institutional activities, and a look at the norms in the EU Treaty, especially art.155, we try to identify the existence of a growing extra-institutional system of norms created by social partners. This system is still in its infancy and may not be open to the same hermeneutic approach applied to positive law passed by institutions. While studying this system, two things should be borne in mind: (i) the only antidote to the risks of economic globalization is a strengthening of collective industrial relations in Europe; and (ii) dialogue among trade unions, rooted in the history of Europe, constitutes a significant element in the democratic government of socio-economic structures, as well as being potentially the most important factor in modernization. Given these assumptions, the basic intention is to identify the new scenario of post-national relations which has opened up for trade unions in Europe.

## 2. Collective autonomy and institutions: the path towards multi-dimensional dialogue.

Until the moment that an “official meeting” took place between the social regulatory system and the European order – which historically occurred with the inclusion of Agreement on Social Policy reached in the Treaty of Lisbon – all the progress made in terms of this dialogue was “confined” to the field of informality. As new regulatory developments have unfolded towards collective autonomy and, especially during recent years, different models have been introduced, interpreters, having analytically examined the phenomena, are trying to grasp, *de iure condito*, the points of intervention by the supranational institutions in the arena of confrontation between collective plaintiffs and, *de iure condendo*, understand the current innovative scope of the paths that lead to autonomy.

With the Treaty of Lisbon, the European Union strengthened the role of social dialogue as a centrepiece of the European social model and a tool for cohesion: the new Art. 152 TFEU begins by underlining the commitment of the European Union to promoting the role of European social partners and to encouraging social dialogue<sup>1</sup>, and then, through the formalisation of the Tripartite Social Summit<sup>2</sup>, it goes on to complete the European dimension with the usual negotiation procedures followed at the national level<sup>3</sup>. The new rule is part of a complex normative background<sup>4</sup>, composed on the one hand of art. 154-155 TFEU and on the other of the Charter of Fundamental Rights of the European Union, with the new effectiveness conferred to it by the Lisbon Treaty<sup>5</sup>. In this broader legal

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<sup>1</sup> See *Commission staff working document on the functioning and potentials of the European sectoral social dialogue*, [SEC (2010), 964 final, 22.07.2010].

<sup>2</sup> Council Decision, 2003/174/EC, *Establishing a Tripartite Social Summit for Growth and Employment*.

<sup>3</sup> See Communication from the Commission, *Towards a Single Market Act for a Highly Competitive Social Market Economy*, [COM (2010) 608 final].

<sup>4</sup> On European social rights after the Treaty of Lisbon, see F. HENDRICKX, *European Labour Law after the Lisbon Treaty: (Re-visited) Assessment of Fundamental Social Rights*, *Bulletin of Comparative Labour Relations*, 2011, 78, 75ff.; S. GIUBBONI, *Social Europe after the Lisbon Treaty. Some Sceptical Remarks*, *European Journal of Social Law*, 2011, 4, 246.

<sup>5</sup> The Charter is given legal recognition by art. 6.1 TEU, as amended by the Treaty of Lisbon. It is therefore an integral part of Union law, setting out the recognition of the right to negotiate and conclude collective agreements as a fundamental social right, see B. VENEZIANI, *Lisbon Treaty and Labour Law: New Developments but Old Traditions*, *Bulletin of Comparative Labour Relations*, 2011, 78, 167, and Commission Communication, *Strategy for the effective implementation of the Charter of fundamental rights by the EU*, [COM(2010) 573, 19.10.2010].

framework, collective autonomy officially receives “constitutional consecration”<sup>6</sup>, which was previously lacking and which usefully allows us to read over the fundamental legislative landmarks that characterize industrial relations in the Union: art. 154 and 155 TFEU.

Despite the fact that until the last century collective bargaining was “absorbed” within the regulatory spaces of the European order, a careful reading of the models in the Treaties explicitly reveals the possibility of the existence of self-regulatory processes (collective negotiations); being inherently pluralistic in terms of measures, means, offices and objects, such processes lead to unpredictable results and are left in the hands of social partners.

It is as if the entrance to the “public” institutional building were equipped with a revolving door through which collective actors have easy access, thanks to the Commission, and moreover they also benefit from an exclusive way out, which enables them to take the regulation of social policy away from the institutional level and into a private sphere.

On the other hand, social partners have become more aware – partly as a result of the opportunities for comparison gained during the integration process – and have not let slip the opportunity to launch along with the new millennium, an era of industrial relations which is more in line with those pluralistic systems that are historically and structurally characterized by a high level of voluntarism and a minimal degree of legalization<sup>7</sup>.

Institutional collective bargaining has had an indirect influence rather than a direct impact on this evolution: we cannot exclude that social partners have had the opportunity to ‘get to know each other in a better way’ and ‘mutually appreciate one another’” through their connection with institutions; at the same time we can speculate that they have gained awareness of their obligations and considered the consequences that may arise from the existence of more structured negotiation phases in the European scheme.

This is probably the genesis of the whole universe of agreements, which differ in name, form and procedure, and which exponentially increase the breadth of regulative sources on the European scene, and find a particular source of legitimacy, as well as a crucial link with the European order, in art. 155 TFEU within the broader context of other norms.

Therefore, from a theoretical point of view, rather than surveying the sources associated with classic institutional processes it becomes more interesting to look at the recent developments regarding a more autonomous European Social Dialogue’ which has shown great regulatory vitality and has contributed to creating a broader and more diverse system of industrial relations in Europe.

### **3. The hypothesis of an extra-institutional system of rule-making.**

Recognition of the collective agreement in all its various forms can be the ideal meeting point between the still unfulfilled desire to overcome the EU regulatory *impasse* and the search for a new political and democratic legitimization<sup>8</sup> which does not neglect a better articulated and differentiated system of principles. In order to verify the level of autonomy of European collective bargaining, it is necessary to reinterpret, within the system of EU principles, collective bargaining not only as a succession of acts and procedures, as provided for by the meagre legislation in the Treaty (Arts.154-155, and also the new Arts. 152 and 28 Charter of Nice after Lisbon) but also according to “a real autonomous process of bargaining”, regarding which Article 155 in particular demonstrates a considerable receptiveness. In the light of this reflection, it would seem appropriate to consider the regulations in

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<sup>6</sup> B. VENEZIANI, *L'art. 152 del trattato di Lisbona: quale futuro per i social partners?*, *Rivista Giuridica del Lavoro*, 2011, 1, 255.

<sup>7</sup> D. SCHIEK, *Autonomous Collective Agreements as a Regulatory Device in European Labour Law: How to Read Article 139 EC*, *Industrial Law Journal*, 2005, 1, 26; *contra* A. LO FARO, *La contrattazione collettiva transnazionale: prove di ripresa del dialogo sociale in Europa?*, *Giornale di Diritto del Lavoro e delle Relazioni Industriali*, 2007, 3, 562.

<sup>8</sup> J. B. FICK, *Not Just Collective Bargaining: the Role of Trade Unions in Creating and Maintaining a Democratic Society*, *Journal of Labour and Society*, 2009, 12, 249 ff.

the Treaty concerning social partners as a multifunctional means<sup>9</sup> of creating laws, implemented on a principle of horizontal subsidiarity<sup>10</sup>, immanent to the EU legislative system, and understood as a method of co-operative legislative production to use where it is believed it could better achieve an objective.

A preliminary question concerns the hypothesis under which Art. 155 TFEU could be considered the tangential point between the supra-national legal order and the system of social regulation of European industrial relations. The formula used in the Treaty provision establishes a legal pluralism of entities and means of legal production in which public and private patterns of regulation are intertwined. The inclusion of negotiation processes, and the simultaneous recognition of the autonomy of trade unions as intermediate associations, implies an extra-institutional system of rule-making; in such a context, it would seem that the idea that the process of *europeanisation* is partly responsible for private entities operating in civil society and influencing socio-economic processes cannot be denied.

According to this hypothesis, art. 155 TFEU operates as a sort of open rule of reference, specifying neither entities, broadly identified as *management and labour*<sup>11</sup>, nor instruments, generally included in the expression *contractual relations, including agreements*<sup>12</sup>.

Considering such an interpretation as the legal basis that allows regulatory processes to be triggered, at the supranational level, with a hybridization between public and private regulation<sup>13</sup>, is it possible to include all negotiating relations at the European level, including transnational agreements regarding the industry and enterprise sectors, within the European ambit, in the operative scope of the provision?<sup>14</sup> If, in fact, the law allows the development of autonomous negotiation, as a consequence of this connotation it is possible to assert that the breadth of the entities and of the tools covered does not easily exclude any of the interactions between *management and labour*<sup>15</sup> that are present at the traditional levels of industrial relations, from the intra-sectoral level to the enterprise level, passing through the sectoral one. On the other hand, given the existence of a European system of industrial relations, how can we exclude some manifestations of this system and include others? On the grounds of which laws can we limit the application of a bare provision like Art. 155.1 TFEU? According to the hypothesis that Art. 155 TFEU is a formal “recognition of other types of social rule production”, using Teubner’s words<sup>16</sup>, then the task of better defining the framework in which it can act as an ‘auxiliary’ norm is left only to the ruling of the social partners.

Moreover, if the option, foreseen in Art. 155 TFEU, of including autonomous agreements, at inter-sectoral and sectoral level as in the famous saying “autonomous social dialogue” is out of the question, one might legitimately think, on the grounds of such a juridical base<sup>17</sup>, that collective actors

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<sup>9</sup> At first, it aimed to solve the difficulty of legislating at a supranational level (the agreement as an institutional source of law) and to stimulate a workable European system of industrial relations (the agreement as a social source of law).

<sup>10</sup> Through the principle of autonomy, the new art. 152 TFEU seems to strengthen horizontal subsidiarity as the key to developing social policies, see G. FONTANA, *Libertà sindacale in Italia e in Europa. Dai principi ai conflitti*, WP C.S.D.L.E. “Massimo D’Antona”.INT – 78/2010, 32.

<sup>11</sup> O. KAHN-FREUND, *Labour and the law*, London, Stevens & Son, 1972, 5.

<sup>12</sup> We cannot consider the noun *agreement* as a counterpart of *collective agreement*, cf. E. FRANSSSEN, *Legal Aspects of the European Social Dialogue*, Antwerp, Intersentia, 2002, chapter 5, 102; cf. Communication from the Commission *Partnership for change in an enlarged Europe - Enhancing the contribution of European social dialogue* [COM(2004) 557 final - not published in the Official Journal], 13-14.

<sup>13</sup> B. CARUSO, *Sistemi contrattuali e regolazione legislativa in Europa*, *Giornale di Diritto del Lavoro e Relazioni Industriali*, 2006, 4, 612.

<sup>14</sup> D. SCHIEK, *Transnational Collective Labour Agreements in Europe and at European level – Further Readings of Article 139 EC*, in M. RÖNNMAR (ed.), *EU Industrial Relations v. National Industrial Relations*, Wolters Kluwer, The Netherlands, 2008, 83 ff.

<sup>15</sup> O. KAHN-FREUND, *Labour and the Law*, 6.

<sup>16</sup> G. TEUBNER, *Foreword: Legal Regimes of Global Non-state Actors*, ID. (ed.), *Global Law Without a State*, Aldershot, Dartmouth, 1997, xiv.

<sup>17</sup> The research report of E. ALES, S. ENGBLOM, T. JASPERS, S. LAULOM, S. SCIARRA, A. SOBCHAK, F. VALDÉS DAL-RÉ, *Transnational Collective Bargaining: Past, Present and Future*, February 2006, p.36ss

are qualified to arrange “an optional framework for transnational collective bargaining at either enterprise level or sectoral level”<sup>18</sup>. This would provide a platform through which they could strengthen their ability to act at the transnational level, and a fertile regulative space in the complex European economic and social integration<sup>19</sup>. Although endorsed by the Commission, so far the hypothesis stated above has not been endorsed by the social partners, who have decided not to negotiate an *ad hoc* framework agreement. On closer inspection, however, the idea of a juridical protocol for transnational collective bargaining could be seen as an unnecessary step when we recall that even for autonomous and voluntary<sup>20</sup> agreements at the inter-sectoral and sectoral levels no integrative regulation exists. Thus, in this interpretation there is no preclusion of the idea of including transnational agreements at sectoral and enterprise levels stipulated by the parties considered representative of the European order in this second “legal category”. In many cases, the negotiating agents that actively operate at the sectoral level coincide with the same actors recognized in European bargaining circuits, i.e. European Federations.

As regards the enterprise level, the point instead is to verify their derived<sup>21</sup> capability to negotiate, even jointly with the European Federations category, rather than the representatives of European Works Councils – which is part of their representing workers in transnational enterprises and groups of European dimensions. Certainly, the consideration still stands that the supra-national nature of transnational agreements makes an important contribution, aiming to augment the interaction between industrial relations actors in Europe and promote the exchange of experiences and best practices; moreover, it also helps the spread of European social policy.

The presence of a composite plethora of collective actors repeats at the European level the dynamic that the gravitational centre of rule-making is not found exclusively in public law but in “society” itself<sup>22</sup>. Such complex rule-making is hardly comparable with the traditional rules of law<sup>23</sup>, thus making it hard to identify the “essence” of an autonomous legal order; rather, we must try to reconstruct the path that leads to the production and implementation of the outcomes of bargaining.

Such legal production is a bearer of values and transversal principles, rather than of precise rules and structures, and is more flexible and adaptable to individual contexts, more situated than centralized<sup>24</sup>. The objective delay in relevant manifestations of autonomous bargaining at the European level is a consequence of political-economical and cultural factors, and also of a limited and limiting perception of such production as an arena for conflicts of interests, ignoring the proactive aspect of the redefinition of new interests. Nevertheless, Europe is witnessing an easing of regulative interference and a simultaneous strengthening of the regulatory function which is devolved to social partners with the aim of democratizing the rule-making process. Such a perspective reveals at least two propulsive spurs, both addressed towards a neo-revival of collective bargaining in Europe but

(Contd.) \_\_\_\_\_

(<http://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPageId=214>) identifying Art. 94 TEC as the only possible legal basis on which a regulation could be grounded, but maybe a better one is represented now by Art. 155 TFEU.

<sup>18</sup> Communication from the Commission *The Social Agenda* [COM(2005) 33 final - Not published in the Official Journal], 8.

<sup>19</sup> The field covered is strictly European for most of the *transnational texts* concluded in multinational companies, cf. E. BÉTHOUX, *Transnational Collective Bargaining in Europe: Development and Issues at Company Level*, [www.europeetsociete.com](http://www.europeetsociete.com), 12; S. SCIARRA, *Transnational and European Ways Forward for Collective Bargaining*, WP C.S.D.L.E. “Massimo D’Antona”.INT – n.73/2009, 4-5; ID., *Collective exit strategies: new ideas in transnational labour law*, *Jean Monnet Working Paper*, 2010, 04.

<sup>20</sup> The distinction was made in the Communication from the Commission, *Partnership for change in an enlarged Europe...*, 10.

<sup>21</sup> Cf. the *Substantive Agreements*, concluded by EWCs (<http://www.ewcdb.eu/agreements.php>).

<sup>22</sup> E. EHRLICH, *Principles of the Sociology of Law*, Cambridge, Harvard University Press, 1936, 390.

<sup>23</sup> E. FRANSSSEN, *Legal Aspect of the European Social Dialogue*, 101ff.

<sup>24</sup> V. GLASSNER, P. POCHE, *Il coordinamento transnazionale della contrattazione collettiva. Limiti, sfide e prospettive future*, *Lavoro e Diritto*, 2010, 4, 447; A. DUFRESNE, *Wage Co-ordination in Europe: Roots and Routes*, *Wage Policy in the Eurozone*, 2002; A. DUFRESNE, E. MERMET, *Evolutions de la Coordination des Négociations Collectives en Europe*, ETUI Working Paper Dwp 2002.01.02.

coming from opposite directions: from the bottom, Union organizations, and also at a national level; from the top, EU Government.

#### **4. In the shadow of the effects: a gradation of effectiveness.**

The close interconnection between action programmes involving the private sphere and those that concern the public one cannot result *tout court* in a perfect overlap between the two, neither in terms of the content of the action nor regarding its effectiveness. From the first point of view, it is appropriate to point out that an analysis of non-statutory agreements shows the constitution of a bottom-up process that operates in sectors of governance in which traditional legislation does not operate<sup>25</sup>, while from the second point of view the situation is more complex and directly involves the theoretical approach underlying this paper. In fact, if on the one hand we can sustain the idea that an agreement made by social partners which has merged with a decision by the Council could partly compromise the connotations of autonomy, obtaining a binding effect through a traditional act of legislation (Directive), on the other hand the same observation does not hold for acts that remain confined to inter-personal social relations, also regarding their implementation; such acts cannot *a priori* be excluded from legal effectiveness, but they can be included in a graded range of bindingness involving agreements autonomously stipulated by the parties.

In other words, this second sphere of bargaining relations would imply an escape from the dual logic of binding vs. non-binding<sup>26</sup> typical of a legal hermeneutic approach, with the aim of entering a diverse scenario in which the efficiency of any single bargaining is connected to the binding obligations that the parties agree to confer on it<sup>27</sup>, which are measurable over time, and depend on their degree of propagation<sup>28</sup>. Otherwise, the results of the collective bargaining could be considered irrelevant and devoid of any effect due to the mere fact of their not being incorporated in a legislative act. This would be an unrealistic assessment if we reflect on the fact that (i) the vast landscape of autonomous bargaining, despite its objective difficulties, undoubtedly offers “potential benefits and (...) that all the players involved have an interest in making (it) work”<sup>29</sup>, and (ii) many systems of industrial relations (e.g. Italy) are living without a specific legal rule regarding the final effectiveness of agreements.

The legal nature of collective bargaining has been debated ever since the APS, and many observers have shown serious doubts over the options for autonomous implementation, since their application would depend on the capability of European social partners to bind national bargaining actors and, as a consequence, on the power of national actors to ensure the application of measures set out collectively. In addition, the instruments available to the players in industrial relations, and in particular the regulatory impact of the collective agreement on individual employment would be profoundly unequal from one Member State to another.

The adoption of some independent agreements has rekindled the legal debate on their effectiveness, with solutions ranging from rigorous positive law, focusing on a larger institutional basis, to a more original legal framework. Leaving aside the doctrinal options which are reductive of

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<sup>25</sup> S. SMISMANS, *The European Social Dialogue in the Shadow of Hierarchy*, *Journal of Public Policy*, 2008, 1, 164; A. BRANCH, *The Evolution of the European Social Dialogue Towards Greater Autonomy: Challenges and Potential Benefits*, *International Journal of Comparative Labour Law and Industrial Relations*, 2005, 2, 337: “Another important factor in assessing the shift towards greater autonomy is the fact that the social partners are choosing to pursue numerous *autonomous initiatives entirely and pro-actively in areas where no Commission initiatives are foreseen*”.

<sup>26</sup> S. WEBER, *Sectoral social dialogue at EU level. Recent results and implementation challenges*, *Transfer*, 2010, 4, 505.

<sup>27</sup> In this sense, in the context of art. 155 TFEU, the *Agreement on Workers' Health Protection through the Good Handling and Use of Crystalline Silica and Products containing it* (published in the OJ C 279, 17 November 2006) inaugurates a new form of efficacy, since it contains a specific clause (Art.2.3) to confer direct effects.

<sup>28</sup> It would be more correct to write controlled diffusion, since many of the agreements negotiated are monitored through *follow-up reports*, which actually deal with publicising and control of effectiveness. This reading allows us to compare negotiating efficiency to effectiveness, without necessarily confusing the two levels; these levels, although distinct, appear to be so *interfering* that they reshape the regulatory trajectory of the effects of European collective negotiation.

<sup>29</sup> A. BRANCH, *The Evolution of the European Social Dialogue Towards Greater Autonomy...*, 338.

the effects of autonomous bargaining, we need to recall the orientation that values autonomous regulation at its best (ex Art. 155.2 TFEU), proposing an interpretation aimed at “rewarding” European social partners as the main actors in the implementation of European bargaining. A literal analysis of the regulatory text, focusing on its paratactic structure, implicit in the conjunction *and*, supports a “biased” interpretation of the role of European social partners and its only limit is the adoption of an implementation method that does not conflict with the regulative principles and specific National traditions. If Art. 155 TFEU and the whole framework behind it recognizes the fact that regulations deriving from public institutions are not the only possible form of social regulation, “as a consequence, publicly generated law is not only capable of structuring social rules, but may also be receptive to such social rules, acknowledging their general applicability”<sup>30</sup>. In other words, the provision of the Treaty “absorbs” autonomous regulation and accepts its relevance as a source<sup>31</sup>.

A weaker version of this view, although referring to the same theoretical option, tries to preserve the possibility for national social actors to carry out implementation, reiterating however the centrality of the European partners, who will take on the delicate task of drawing up the administrative clauses of agreements which establish a procedural framework<sup>32</sup> for intermediate national entities to refer to.

Art. 155 TFEU provides the possibility for agreements to use clauses in which the parties may specify their desire to create or not create a self-executing agreement. In the first hypotheses we can anticipate “strong procedures for monitoring and follow-up as well as some attempts to identify for whom it is intended and a procedure for dispute settlement (...). The agreement bypasses the need for national transposition in terms of national agreements or national law”<sup>33</sup>. In the second case, the parties do not “intend to create a self-executing agreement”, stipulating clauses that need national transposition.

According to this approach, a lack of implementation on a national level is not likely to undermine the effectiveness of a European agreement *ex Art. 155 TFEU*<sup>34</sup>. In this case, the direct effect can be attributed to the autonomous nature of social dialogue, or rather to the prerogative of European collective bargaining to influence industrial relations at a national level, as if the contents had been transposed using traditional criteria provided for in the legal framework of the States. However, the limit that remains concerns the direct effect, which may occur only when the parties agree on *ad hoc* clauses in the understanding that aim to put into effect all that has been agreed on.

This reasoning is based on the idea that collective bargaining is a fundamental right in European law and it implies that collective agreements should be equipped with enforceable devices from their conclusion: the emphasis is placed on the right to collective bargaining and a kind of *Soziale execution* is implied, without the interference of institutions, allowing autonomous bargaining to be a realistic and effective alternative to implementation through a decision of the Council. Although a direct effect emanates from the negotiating action of European social partners, and although such an interpretation allows the inclusion of European negotiations in national regulations on collective labour relations, a consequent implication – with different efficiency in different contexts regarding acts of a private nature (voluntary systems vs. systems with a legal framework) – would be the importation of an

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<sup>30</sup> D. SCHIEK, *Autonomous Collective Agreement as A Regulatory Device in European Labour Law: How to Read Article 139 EC?*, *Industrial Law Journal*, 2005, 1, 53.

<sup>31</sup> “For labour law agreements, this approach is especially adequate, because the different national traditions of the Member States all include some form of autonomous regulation. If we look back in history, we realise that *the collective agreement first came about in all legal orders as a social fact and only later did it become recognised in law*”, D.SCHIEK, *Autonomous Collective Agreement...*, 53; A. JEAMMAUD, *Per una discussione sulla contrattazione collettiva europea dal punto di vista degli ordinamenti nazionali*, A. LETTIERI, U. ROMAGNOLI (eds), *La contrattazione collettiva in Europa*, Roma, Ediesse, 1998, 71.

<sup>32</sup> O. DEINERT, *Self-Executing Collective Agreements in EC Law*, M. DE VOS (ed.), *A Decade Beyond Maastricht: The European Social Dialogue Revisited*, The Hague, 2003, 43.

<sup>33</sup> E. LÉONARD (ed.), *New structures, forms and processes of governance in European industrial relations*, Luxembourg, Office for Official Publications of the European Communities, 2007, 39.

<sup>34</sup> O. DEINERT, *Modes of implementing European Collective Agreements and their impact on collective autonomy*, *Industrial Law Journal*, 2003, 323.

agreement, adopting patterns of uniform affiliation and linear relations of membership and responsibility. Probably the biggest limitation that collective actors need to overcome is their embryonic capacity to coordinate. Nevertheless, a reduction in the determination of social partners towards a mere expression of private mediation, even though aiming at collective goals, means contradicting the aspirations of union relations to go from an extra-legal order resource to an authentic exercise in autonomy.

The questionable side of this operation is the failure to explain, in legal terms, the phenomenon of spontaneous social application to which the legal framework identified attributes formal relevance<sup>35</sup>. Once the relationship between the role of the source and the negotiation timing of industrial relations has been qualified as legally irrelevant, it becomes practically impossible to justify, in technical terms, why and how the parties to individual relationships feel constrained to apply the regulative dispositions included in autonomous collective agreements. Spontaneous social application, far from being a feature of industrial relations, is undoubtedly one of the dependant variables during the phase of administration of contracts and of balancing the power between social partners. In the end, by removing all the elements of “flexibility” or “inconsistency” of conventional enforcement, we end up mistaking the legal effect of the contract, considered like a written act within the legal order, with what is a social effect of bargaining, considered a *faktisches Prozess* of social regulation<sup>36</sup>.

## 5. Examples from the praxis: which kind of vitality?

This interpretation opens the way to European bi-partisan action with various negotiating aspects. On a practical level, social actors can adopt various valid tools in relation to the *ambit* of reference (inter-sectoral, sectoral or corporate). Regardless of the nomenclature given by the Commission and beyond the *nomen juris* designated for certain arrangements, the doctrine<sup>37</sup> makes a distinction between *common positions* and *mutual undertakings*. The first are documents shared among social partners, aiming primarily at influencing European public social policy actors, which correspond to those that, in the classification of the Commission, can be categorized as *joint opinions*. All other such documents can be considered mutual commitments between interest groups with implications for their members; that is, with clauses directed at the members of each social coalition. In this category, a distinction can be drawn between actual agreements, recommendations, and various tools like procedural texts.

The vitality of European social dialogue can be evaluated by using a wide range of regulation-like texts, which are the only indicators capable of highlighting the activism of social partners<sup>38</sup>. The result of such testing may be limited if one considers the restricted number of binding texts, but, according to the perspective of gradual and differentiated efficiency specified above, such quantitative indicators are our main source of knowledge to fully understand the paths towards autonomous bargaining. The type of text depends on the exchange dynamics within the sectoral committees and among the organizations that take part in them.

For example, a social actor might consider that an issue regarding equal opportunities requires stronger legislative measures, whereas a different issue could be addressed through guidelines, more likely to adapt to national production contexts or those of single enterprises. This theory encourages the drawing up of framework texts and codes of conduct, rather than agreements in a traditional sense. As some scholars have noted<sup>39</sup>, while the results may seem disappointing when compared to national

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<sup>35</sup> A. JEAMMAUD, *Per una discussione sulla contrattazione collettiva europea...*, 71.

<sup>36</sup> S. SIMITIS, *Die faktischen Vertragsverhältnisse als Ausdruck der gewandelten sozialen Funktion der Rechtsinstitute des Privatrechts*, Frankfurt am Main, Klostermann, 1957, 56ff.; K. RENNER, *Die Rechtsinstitute des Privatrechts und ihre soziale Funktion. Ein Beitrag zur Kritik des bürgerlichen rechts*, mit einer einleitung und anmerkungen O. KAHN FREUND, Stuttgart, Fischer, 1965, III<sup>e</sup> ed.

<sup>37</sup> P. Pochet, *Sectoral Social Dialogue? A Quantitative Analysis*, *Transfer*, 2005, 3, 320 ff.

<sup>38</sup> *Industrial Relations in Europe 2010*, 3 March 2011, (<http://ec.europa.eu/social/main.jsp?catId=329&langId=en&furtherPubs=yes>, Chapter 6).

<sup>39</sup> P. MARGINSON, K. Sisson, *European Integration and Industrial Relations. Multilevel Governance in the Making*, Basingstoke, Palgrave Macmillan, 2004, 25-26 and 54ff.

regulations, which are based on established traditions of hard regulation, they are actually a starting point for understanding the diverse and fruitful autonomous negotiating action at the European level. Clearly, such devices do not have the same regulatory value as a national agreement, especially concerning the areas of intervention (e.g. the traditional issues regarding salaries have been discussed only in particularly active sectors<sup>40</sup>); nevertheless, the issues covered by these negotiations touch sensitive keys of employment relationships (e.g. health and safety or professional training)<sup>41</sup>. The many implications deriving from new regulatory schemes (Open Method of Coordination, information exchange, benchmarking) find substance in the use of new-generation texts, such as voluntary agreements and recommendations that rely on follow-up reports.

The first step in this direction, at an inter-professional level, was developed in the *Framework of actions for the lifelong development of competencies and qualifications* (28 February 2002), identifying several priorities in the field of education, which the social partners have started developing at a national level, annually reporting the progress made<sup>42</sup>. In the sectoral dimension too, similar devices have been used extensively, particularly codes of conduct for the promotion of initiatives, accompanied by effective controls on their subsequent application. In the field of sugar production, for example, the document *Corporate social responsibility in the European sugar industry. Code of conduct, annex I - examples of good practice* (7 February 2003) was adopted, including the same procedural monitoring<sup>43</sup> devices highlighted and combining specific reconnaissance interventions with further prospects for development. Framework agreements inspired by the Open Method of Coordination<sup>44</sup> are so tightly intertwined with the follow-up system that, while establishing broad principles and aiming at negotiations and/or national or regional legal systems in every Member State, they are binding in honour only. The follow-up procedures used for monitoring the implementation phase are diversified too: statistical surveys, annual reports, conferences, codes of good practice and website databases. Their independent nature would seem to make them promoters of pervasive good will. This is the reason why it is difficult to gauge the real impact of such texts on the ability of autonomous collective negotiation to achieve pre-determined targets. However, the wide range of topics covered by these new-generation texts is testimony to the propensity of these flexible tools to obtain a fair effect of generalized extension and penetration in national labour systems. Such an effect is hardly imaginable for what is traditionally understood as an agreement.

In the past two years, European social partners have confirmed their ability to fulfil their commitments and to forge industrial relations in the EU according to procedural innovations regarding the system and also the topics covered in the *Framework agreement on harassment and violence at work*<sup>45</sup>, and at least one other agreement on *inclusive labour markets*, signed in December 2009 and presented on 25 March 2010 on the occasion of the Tripartite Social Summit<sup>46</sup>.

Another example of virtuous versatility is offered by the representatives of the employers and employees of many sectors (trade, local governments, hospitals and private security) which are characterized by having relations with third parties (clients, patients and others), who have followed a

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<sup>40</sup> The economic crisis has brought the issue of the role of wage policy back to the heart of the new Europe 2020 agenda, in order to counter the competitive imbalances among Member States. It has proven to be a critical issue against which unions must measure themselves, although the basic limit is related to the different national systems of industrial relations, some of which are centralized, while others located at a corporate level. Cf. V. GLASSNER, P. POCHET, *Il coordinamento transnazionale della contrattazione collettiva...*, 445 ff.

<sup>41</sup> P. LEISINK, *The European Sectoral Social Dialogue and the Graphical Industry*, *European Journal of Industrial Relations*, 2002, 1, 103.

<sup>42</sup> A first follow-up report on 14 March 2003; a second on 5 March 2004; a third on 1 March 2005; and an Evaluation report on 27 April 2006.

<sup>43</sup> All the Reports are available on the website <http://ec.europa.eu/social/main.jsp?catId=521&langId=en>.

<sup>44</sup> "The future of labour law at the European level depends entirely on the open method of coordination", R. BLANPAIN, *The End of Labour Law?*, *Bulletin of Comparative Labour Relations*, 2008, 65, 10. See *Industrial Relations in Europe 2008*, published on 31 March 2009 (<http://ec.europa.eu/social/main.jsp?catId=329&langId=en&furtherPubs=yes>), 131.

<sup>45</sup> Available at website <http://ec.europa.eu/social/main.jsp?catId=521&langId=en>.

<sup>46</sup> *Industrial Relations in Europe 2010*, 180 ff.

multi-sectoral initiative, complementing the inter-sectoral agreement, in order to integrate the general agreement with the specific needs of other sectors<sup>47</sup>. The case is unusual because it concerns a sectoral negotiation over what had already been agreed upon at an inter-sectoral level and it shows the potential for enhanced cooperation among several sectoral Committees and regarding different areas of bargaining. Another example of multi-sectoral cooperation is the *Joint declaration of UNI-Europa, EFFAT, ETUF-TCL and COESS, FERCO, EFCI and EURATEX "Towards Responsible Awarding of Contracts"*, signed on 18 April 2008, which represents an action of awareness on the adjudication of socially responsible procurements. During these same years in the sectoral ambit, numerous autonomous actions have been recorded concerning transversal topics<sup>48</sup> in relation to overt topics that dominate national contractual agreements. Such matters are not measurable in the short term, but can be screened in the long run, not only because they cut diagonally across the core *issues* of employment – think of the implications of embracing a matter like corporate social responsibility – but also because through procedural schemes, solutions regarding the individual rights of workers can be intertwined with public measures in order to modernize the labour market. Occupational mobility, for example, has become one of the main subjects of European bargaining and, at the same time, one of the key pillars of the Union, when seen in the light of the freedom of movement of workers. Although at this stage only 2.2% of the citizens of the European Union live and work in a Member State other than that of origin, through qualification passports it is possible that the competencies they acquire are made compatible. The management of issues such as health, security and gender equality continues to strongly attract the interest of social partners at the European level. In particular, work place health and safety practices in enterprises can benefit from the recommendations and practical guides directed at the specific situations of each sector<sup>49</sup>. In the context of gender equality, social parties from various sectors have developed some innovative tools, including guidelines for gender action plans, useful for supporting initiatives by local and regional governments and for encouraging a shared and sustainable approach to discussion by social partners. In other contexts, social partners have adopted ambitious political orientations accompanied by a work plan (railway sector<sup>50</sup>) or even by actual practical *tool kits* for the management of human resources (electricity<sup>51</sup> and telecommunications<sup>52</sup>).

### **5.1. A glance at transnational agreements.**

A growing number of multi-national companies have embarked along the road towards the negotiation, at a transnational level, of joint texts and actual agreements, defined as the tip of the iceberg of trading within the EWCs<sup>53</sup>. A matter that is pertinent at both the sectoral level and the ambit of enterprises is that of Corporate Social Responsibility (CSR)<sup>54</sup>, a key topic for the juridical and economic development of the European industrial relations system. In fact, it is a melting pot of

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<sup>47</sup> The guidelines adopted on 30 September 2010 will be promoted within the Member States at all appropriate levels taking account of national practices. The parties will prepare a joint progress report in 2012 and a final joint evaluation will be undertaken in 2013, see *Industrial Relations in Europe 2010*, 196.

<sup>48</sup> Economic policies, Sustainable development, CSR, Employment, Enlargement, Working conditions, Social aspects of Community policies, Health and safety, Training and Lifelong Learning, Social dialogue, Working time, Mobility, Gender Equality, Public Procurement, Undeclared Work.

<sup>49</sup> Cf. *Policy statement on Health & Safety and Training*, 13 December 2006, signed by EURELECTRIC - EPSU – EMCEF; *Musculo Skeletal Disorders - Introduction and Review of Good Working Practices in Telecoms*, 1 October 2007.

<sup>50</sup> Cf. *Joint recommendations for a better representation and integration of women in the railway sector*, 12 June 2007.

<sup>51</sup> Cf. *Equal Opportunities And Diversity Toolkit/Best Practices Guide*, March 2007.

<sup>52</sup> Cf. *Diversity at work*, 1 May 2007.

<sup>53</sup> EWCB, *GM, Ford and GE cases highlight EWCs' bargaining role*, in *European Works Councils Bulletin*, March/April 2005, 56, 7ff.

<sup>54</sup> Ex multis L. COMPA, *Corporate Social Responsibility and Workers' Rights*, *Comp. Lab. Law and Pol. Jour.*, 2008, 1, 1 ff.; O. DE SCHUTTER, *Corporate Social Responsibility European Style*, *European Law Journal*, 2008, 2, 203 ff.; J. ORBIE, O. BABARINDE, *The Social Dimension of Globalization and EU Development Policy: Promoting Core Labour Standards and Corporate Social Responsibility*, *Journal of European Integration*, 2008, 3, 459 ff.

issues, where the combination of core labour standards and the organizational strategies of production are strongly intertwined, to the point of testing the pace of European collective bargaining. One of the testing issues concerns the verification of a possible extension of the “European model” of worker protection. “In this regard, some interesting experiences have been outlined in reference to the content of individual rights recognized by the employers. Some clauses are expected to extend, at least in part, rights that descend from the employees of the company based in the EU to the employees of subsidiaries located in countries outside the European Union”<sup>55</sup>, either through legal or negotiating devices<sup>56</sup>, ensuring a level of protection that is greater than that afforded under the discipline of local labour law.

An important role, both in ensuring the effectiveness of the commitments taken and in defining more homogeneous contents in relation to the protection of workers and of the working environment, is played by the European Trade Unions in different sectors and by the EWCs, which through Substantive Agreements deal mainly with matters like the effects of restructuring – through declarations of principle on how to manage changes<sup>57</sup> or detailed decisions on the programmes for the industrial restructuring of personnel management<sup>58</sup> – or specific aspects of corporate policy, including preventative measures regarding health and safety for employees in the workplace and the protection of personal data.

In this sphere of bargaining there are significant agreements in which the signatories have assumed the delicate task of drawing up a procedural framework within which to regulate future negotiations<sup>59</sup>, or to jointly manage the ‘Anticipation of change’<sup>60</sup>, or even to implement basic social rights, e.g. the freedom of association and the right to collective bargaining<sup>61</sup>.

The first example is relevant for two reasons. First, it is a valuable attempt to compensate for the persistent lack of a legal framework. The agreement is technically a regulatory platform for transnational collective bargaining, aiming to define a framework of certain and uniform rules to be applied at the micro level (company). This does not imply a fragmentation of negotiation methods, but rather a clearly emerging interest on the part of social partners in agreeing on procedural rules for future negotiations<sup>62</sup>. This kind of regulation involves a certain ‘complicity’ *with* and *between* the national industrial relations systems in order to operate. Secondly, regarding the content, starting with its preamble the agreement aims to develop an efficacious high-quality social dialogue at the European

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<sup>55</sup> S. SCARPONI, *Globalizzazione e responsabilità sociale delle imprese transnazionali*, *Lavoro e Diritto*, 2006, 1, 159-160.

<sup>56</sup> For example, the *Agreement of EDF Group Corporate Social Responsibility*, 17 May 2005 (<http://www.ewcdb.eu>); cf. *International CSR consultative committee set up at EDF*, *European Works Councils Bulletin*, May/June 2005, 57, 11 ff.

<sup>57</sup> Cf. the *Agreement on the AXA Group European Works Council*, 6 October 2005, <http://www.ewcdb.eu/agreements.php>; and the *Agreement on the AXA Group European Works Council*, 29 June 2009, [http://www.cegaxa.com/fileadmin/comptes\\_rendus\\_CEG/Accords/Accord\\_CEG\\_AXA\\_2009\\_V6\\_Final-EN.pdf](http://www.cegaxa.com/fileadmin/comptes_rendus_CEG/Accords/Accord_CEG_AXA_2009_V6_Final-EN.pdf), Clause 7 (*Applicable Law*) and Schedule 1 (*Document relating to the dialogue between labour and management at the AXA Group in Europe*), point 3 (*Pledges to employees, particularly in the case of major organizational changes*), principle 4. See *The AXA insurance group and its EWC have recently agreed a set of Europe-wide principles to govern the handling of business restructuring and other issues*, *European Works Councils Bulletin*, July/August 2005, 58, 14 ff.

<sup>58</sup> M. CARLEY, M. HALL (eds), *European Works Councils and Transnational Restructuring*, Luxembourg, European Foundation for the Improvement of Living and Working Conditions, 2006, <http://www.eurofound.europa.eu/publications/htmlfiles/ef0683.htm>.

<sup>59</sup> *Agreement relating to procedure for labour negotiations at European level*, signed in Paris on 28.09.2010, between the EADS Group and the national trade unions of France, UK, Germany and Spain, *European Employment Review*, 11.11.2010.

<sup>60</sup> One of the most significant and recent is the *Agreement on the anticipation of change and developments*, signed between Alstom and EMF (European Metalworkers Federation) on 24.02.2011, *European Employment Review*, 14.04.2011.

<sup>61</sup> *Global Framework Agreement for the development of good working relations in Norsk Hydro ASA operations worldwide*, signed on 15.03.2010 between Norsk Hydro ASA and IMF/ICEM (International Federation of Chemical, Energy, Mine and General Workers’ Unions), <http://www.icem.org/en/69-Global-Framework-Agreements/4321-ICEM-IMF-Norwegian-Unions-Sign-Global-Social-Accord-with-Norsk-Hydro>.

<sup>62</sup> In this sense the suggestion of the Commission aimed at encouraging social partners to agree on an optional framework for transnational collective bargaining at company and sectoral level seems to be accepted, although not at a suitable level [COM (2005), 33 final], 8.

level<sup>63</sup>, defining subjects, objects and voting procedures. To achieve this purpose it contains a number of administrative clauses which the national intermediate bodies, the EWCs, the European federations (in this case the EMF) and the relevant group of companies must respect for the constitution of a European Negotiating Group on issues of transnational importance. Numerical criteria are identified (art. 4) for the appointment of the negotiator on behalf of workers with the aim of preventing conflicts in the definition of the workers' delegations; and also the timing and techniques for conducting the negotiations are defined for management<sup>64</sup>. A twofold benefit arises: on the workers' side there is the establishment of a single body which combines the national interests of workers with sectoral and enterprise ones, and which decides according to the principle of a two-thirds majority; on the other side, a single employer takes charge of respecting the content for the whole multinational group and all the undertakings within it, with clarity about the identity of the counterparty, the negotiating rules and the procedure for agreements.

Moving from a procedural source to substantial ones, the themes of the other two agreements are prominent as they affect the main topic of labour relations: on the one hand, the assumption of specific commitments to protect employment in times of crisis, also providing detailed mechanisms for disseminating and monitoring<sup>65</sup> the content of the agreement; on the other hand, an enhanced protection of rights in the workplace<sup>66</sup> together with appropriate procedures for resolving disputes<sup>67</sup>. Other kinds of agreements are distinguished by a full interaction between national and European social actors, and also global ones<sup>68</sup>. This is not a secondary factor, since a main weakness highlighted by scholars studying transnational collective bargaining at the enterprise level is a peculiar kind of jealousy on the part of the national unions towards the European federations in conducting negotiations with multinational enterprises<sup>69</sup>.

The unions are now faced with a dilemma: on the one hand, they have to implement their supranational ability to negotiate within multinational companies by rediscovering their alliance with the EWCS (and WWCs); on the other hand, they must be vigilant not to lose their 'control' of agreements developed within companies<sup>70</sup>, actively collaborating for their effectiveness. An aptitude for transnational coordination is a challenge that the unions cannot escape, being the only suitable method to plug the increasing asymmetry between the representation of capital and labour interests in the context of the European market and beyond.<sup>71</sup>

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<sup>63</sup> In line with this, some studies have identified a shift from a quantitative to a qualitative approach in signing the European framework agreements, V. TELLJOHANN - I. DA COSTA - T. MÜLLER - U. REHFELDT - R. ZIMMER, *European and international framework agreements: new tools of transnational industrial relations*, *Transfer*, 2009, 515.

<sup>64</sup> S. SCIARRA, *Uno sguardo oltre la fiat. Aspetti nazionali e transnazionali nella contrattazione collettiva della crisi*, *Rivista Italiana di diritto del lavoro*, 2011, III, 177.

<sup>65</sup> Artt. 5-6-7 of the Alstom agreement.

<sup>66</sup> In this respect see the short agreement signed on 15.12.2010 between AB Electrolux and IF Metall, Unionen and IMF, which aims at thwarting the phenomenon of 'yellow' unions.

<sup>67</sup> Art. 7 of the Norsk Hydro ASA agreement.

<sup>68</sup> *Agreement of France Telecom's Worldwide Works Council*, signed in Paris on the 23.06.2010, for the group France Telecom.

<sup>69</sup> The procedures of the mandate in the EMF case are examined by T. MÜLLER, H.W. PLATZER, S. RÜB, *European Collective Agreements at Company Level and The Relationship Between EWCs and Trade Unions - Lessons From The Metal Sector*, *Transfer*, 2011, 222 ff.

<sup>70</sup> Some economist scholars, using complex equations, have demonstrated that cooperation among different intermediate bodies is easier if there are similar working conditions and salaries; collaboration is instead very difficult when there are important differences which create irreconcilable contrasts between winning and losing unions, C. ECKEL, H. EGGER, *The Dilemma of Labor Unions: Local Objectives vs. Global Bargaining*, 2011, [http://www.vwl2.uni-bayreuth.de/en/downloads/Eckel\\_Egger.pdf](http://www.vwl2.uni-bayreuth.de/en/downloads/Eckel_Egger.pdf) 2011.

<sup>71</sup> The answer to the international market has to be international as well, B. HEPPLER, *Labour Laws and Global Trade*, Hart Publishing 2005.

## 6. In search of new modes of normative regulation.

In the light of what has emerged from this reasoning on the crucial issues encountered in autonomous negotiations, it seems fair to say that one of the targets of the new method of management of interests examined is the protection of the expectations that the social system of industrial relations recognizes and approves, and generally defines as legitimate. Undoubtedly, the fundamental principle of *pacta sunt servanda* is part of any account of the matter, although not sufficient by itself to explain the situation completely. Every instance of conflict between claims sustained by social powers results in a confrontation with the legal orders, in this case the European Union, over the definition of boundaries. The interest of businesses in managing the production of goods or the provision of services on the basis of pre-defined costs and estimated risks is the exact equivalent of the interest that workers have in planning their existence and that of their families and in being protected against events that may affect their quality of life.

Therefore, at best, legislative intervention can play an auxiliary role of active assistance to negotiation, but the countervailing force actually leads to the establishment of agreements, using regulative tools of the social matrix. In such cases, the baton is passed from the public sphere to the private. Autonomous bargaining also becomes a legal *medium* for the achievement of social policy objectives pursued by the order. For example, on boundary matters such as flexibility or employment, where social parties were able to introduce experimental contents, they have become the protagonists of actions and methods aimed at influencing the actions of European institutions. However, it is quite evident that the free contractual initiatives of the different parties are likely to be weakened in as much as social actors are relegated to the role of interfaces with the European Commission. In other words, the circumstance that collective bargaining can be considered a vehicle for European social policies cannot justify it totally merging with institutional mechanisms, with the possibility of it losing its autonomy and gaining the known features of institutional social dialogue instead.

An understanding of this step is crucial, not only to keep a distance from a functional approach inherent to an “integrated process”, but also to learn how the social system created by the European collective actors operates with more concrete results. One innovative contribution actually derives from those “historical” attributes which are typical of the process of collective bargaining, which genuinely descend from autonomy and which are due to the traditional targets of labour protection and the organizational regulation of capital. The areas subject to regulation – realities in which mere market logics are predominant – contribute to modifying collective negotiation into an activity engaged in the management of processes, instead of defining institutions as in the past. The trend towards a new regulatory norm of sectoral and corporate industrial relations is a clear sign of a change of direction, both in terms of the tools used and the topics selected. From the point of view of voluntary collective action, even a negotiation that governs training in an industry or business responds to needs to guarantee and protect the rights of workers, especially if the negotiation registers significant effects on the wage system and, more generally, on labour conditions. Just as the reasons justifying an agreement that delineates social measures and the principles regulating industrial restructuring are to be placed on a higher level of organizational change.

The difficulties encountered in the study of heterogeneous negotiating products highlight how any attempt to classify them *ex ante*, according to a specific function in relation to their scope of relevance (inter-sectoral, sectoral or corporate) risks appearing only a mannerist operation. Instead, it would be interesting to verify *ex post* the organizational and/or protection functions accomplished in the light of the regulatory processes decided on by the parties, the themes and the formulas used – hortatory (*advisory*)<sup>72</sup> or obligatory (*mandatory*)<sup>73</sup> – and see how, through fundamental actions such as monitoring (follow-up), high levels of effectiveness can be achieved.

The idea of a “normative pluralism” rests on an empirical concept of social power, which remains the only criterion for measuring the ability of organized interests to assert themselves. It is a model

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<sup>72</sup> Cf. *Joint position - New structures, job security and employability*, Deutsche Bank Group (March 1999), CARLEY M., HALL M. (Eds), *European Works Councils and Transnational Restructuring*, 27-28.

<sup>73</sup> Cf. *Joint Position – Principles and Management of the social dialogue in Europe*, AXA Group (April 2005), CARLEY M., HALL M. (eds), *European Works Councils and Transnational Restructuring*, 29-30.

that stabilizes a circular process of implementation, one that is able to connect power with the action that collective actors claim for European institutions, that can create a connection between the process of legitimization of social actors and the order's social policies. In order to evaluate the normative dimensions of such a process it becomes crucial to understand the *means* by which social power is expressed and how it confers power on certain collective interests.

## 7. Concluding remarks.

Over the past ten years, collective bargaining has experienced significant quantitative and qualitative transformations that have radically changed the original functions that drove its rise and development under the protective wing of the leading supranational bodies. Recent developments of a *social communicative action*, which promotes the initiatives of collective partners and vivifies a *negotiating language* based on a reciprocal and comprehensive exchange of information among parties, are the proof of a normative rationality that is distant from the usual techniques for obtaining the consent of intermediate bodies. Analysis of the different types of negotiating agreements among actors that strategically interact needs to be focused on the regulative power that underlies bargaining, especially in the autonomous negotiation version of it. The bargaining that arises from new-generation voluntary autonomous negotiation is the consequence of a cooperative availability of actors oriented towards targeted results. Such bargaining is connected to rules intended as empirical restrictions (monitoring of agreements) and rational limitations (non-regression clauses in the agreements): it is a dynamic competition between contractual expectations and innovative themes on the one hand, and a negotiating will that is driven by social regulations, on the other.

When the European Commission, starting in 1998<sup>74</sup> with the aim of promoting and developing social dialogue decided to follow the idea of expanding multi-party communication in parallel with European institutions, to make it more effective and more in tune with real collective bargaining at the European level, there is no denying that past negotiations give solid evidence that it was creating a new form of freedom, the fifth, we could say, to appear on the European horizon: "the freedom to circulate documents"<sup>75</sup>. The emergence of a European and transnational dimension in Europe has been accelerated both by the inducements coming from institutions and by the growing autonomous interplay between employers and trade unions. A cross-border dimension is emerging at sectoral and enterprise level which could assume the form of mere coordination and exchange of information, or more effectively the characteristics of a genuine negotiation with various degrees of regulation, from softer to harder. If employers often prefer the company level as a way of decentralizing the bargaining process, especially for multinational enterprises, the sector is the soil where unions have mostly attempted coordination initiatives with the aim of linking national systems of industrial relations and limiting bear-market competition (or social dumping) in the cost and conditions of employment.<sup>76</sup>

Finally, the geometries of social dialogue could expand or shrink reflecting the different interests of management and labour in the area of European social regulation. Managing the uncertainties

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<sup>74</sup> Cf. Communication from the Commission *Adapting and Promoting the Social Dialogue at Community Level* [COM(1998) 322 final].

<sup>75</sup> H. COLLINS, *The Freedom to Circulate Documents: Regulating Contracts in Europe*, *European Law Journal*, 2004, 6, 802-803: "The regulatory technique of promoting *autonomous agreements* that fix the ancillary terms of model standard form contracts can secure this *fifth freedom*, without the need to harmonise substantive laws. (...) But the *legitimacy* of a modern regulatory system must rely more on its achievement of acceptable substantive outcomes and its degree of transparency and democratic participation, and rather less on its formal legal rational qualities. (...) What is required for positive integration rather is the employment of modern regulatory techniques such as autonomous agreements in order to secure the free circulation of fair documents".

<sup>76</sup> T. SCHULTEN, *Europeanisation of Collective Bargaining. Trade Union Initiatives for the Transnational Coordination of Collective Bargaining*, in B. KELLER - H.W. PLATZER (eds), *Industrial Relations and European Integration. Trans- and Supranational Developments and Prospects*, Ashgate Publishing, 2003, 113.

associated with globalization may lead to a reverse process of de-globalization<sup>77</sup>, or building a common trade union grammar as a vehicle of European integration, given that “management by agreement is preferable to management by diktat”.<sup>78</sup>

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<sup>77</sup> This word, which summarizes criticism against the globalization process, was coined by the Philippine economist W. BELLO, *Deglobalization. Ideas for a new world economy*, Zed Books, 2002.

<sup>78</sup> R. HYMAN, *Social dialogue and industrial relations during the economic crisis. Innovative practices or business as usual?*, ILO Working Paper, no.11/2010, 11.

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