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Trade Unions in the EU Facing Global Companies:  
Legal Obstacles and Innovations

Marie-Ange Moreau and María Esther Blas López



**EUROPEAN UNIVERSITY INSTITUTE  
DEPARTMENT OF LAW**

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**MARIE-ANGE MOREAU AND MARÍA ESTHER BLAS LÓPEZ**

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## **Abstract**

In the European Union, a set of legal instruments was developed to enhance social partners' actions. Here, we consider whether these instruments encourage, at Community level, efficient trade union actions in response to the strategies deployed by multinational firms at international level.

In the first part, this paper synthetically illustrates that, despite these positive developments, some considerable legal obstacles remain in the European Union. In contrast, the second part presents some interesting and innovative experiences. A precise evaluation of their results is still difficult to make, because they are related to emerging legal norms whose appropriation by social partners is still in its early stages.

## **Keywords**

European trade unions – global companies – multinational companies strategies – European social dialogue – trans-national collective bargaining – European Work Council – European Company (SE)

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## ***Trade Unions in the EU Facing Global Companies: Legal Obstacles and Innovations* (\*)**

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### **Introduction**

Since its beginnings, trade unionism has aimed to have an international dimension. The First International, created in London in 1864, and transferred to New York by Marx, before disappearing in 1876, can be seen as the point of reference which inspired trade unions in their international organisation processes (Landier & Labbé 2004). However, Marx's internationalist ethos 'has repeatedly been contrasted by division and rivalry along ideological and national lines, and in practice the evolution of trade union movements has been intrinsically intertwined with processes of nation-state formation' (Dølvik, 1997a, 9). In other words, trade unions do not evolve separately from either employers' organisations or the State (Mouriaux 1998).

Traditionally, trade unions' actions have been firmly rooted within national territories, and are characterised by dynamics peculiar to workers' communities facing a particular working environment and similar working constraints. Trade unions' national identities explain the high degree of difficulty for a European autonomous trade union action to emerge (Moreau 2002). The specificity of national trade unions' actions also relates to the different historical backgrounds in the field across the European Union (EU) Member States. Hence, trade unions' actions have evolved according to very distinct models: predominance of ideological commitments (e.g. Belgium, Cyprus, France, Italy, Lithuania, Luxembourg, the Netherlands, Portugal or Spain)<sup>1</sup>, of a unique confederation (e.g. United Kingdom, Austria, Greece, Leetonia, Slovakia, Czech

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<sup>1</sup> See the special issue on Trade Unions' Representation in Europe, *Chronique Internationale IRES*, n° 68, January 2001.

Republic or Slovenia) or of professional sectors (e.g. Denmark, Sweden and Finland, but also Malta, Germany, the Netherlands or Slovenia)<sup>2</sup> have characterised trade unions' construction (Moreau, 2002, 2006). In some countries, trade unions have participated in the elaboration of labour law through conventions and tripartite processes (Sweden, the Netherlands) whereas in other, States have retained a dominant role in this field (France, Spain). Furthermore, other factors have contributed to intensifying trade unions' specificities, such as the legal framework concerning the recognition of trade unions' actions (in the United Kingdom for example)<sup>3</sup> or the political context (impact of Franco's dictatorship in Spain) (Moreau 2002). One can say that this fragmentation along historical, ideological, political, sociological and legal lines has turned to be the Achille's heel of trade unionism at the international level.

As Dølvik argues, 'today economic globalisation and regional political integration have again placed the issue of cross-border labour cooperation at the centre of trade union debates. Faced with internationalisation of capital, production and markets, historical achievements of organised labour in the advanced industrialised, nation-states are threatened by erosion' (Dølvik 1997a, 9). The difficulties in facing this new economic and social situation have resulted in pressures on trade unions – the explicit or implicit threat by the employer to shut down its operation and move its production elsewhere – and in a trade union membership decline. Furthermore, 'trade union action to resist companies' decisions at a supranational level continues to be very difficult to organise. There are important differences between national laws dealing with unions [...]. Different ideologies, as well as the lack of international solidarity of a union movement structured within national borders' (Moreau and Trudeau 2000, 77). The decrease in industrial activities and the increasing importance of services, the decline of large companies and the predominance of SMEs, privatisation operations, the growth of the unemployment rate and the transformations of enterprises have all affected the EU countries to varying degrees and at varying paces, and invite a redefinition process, taking into account the national context within a framework of Europeanisation.

The Europeanisation of Trade Unionism should be observed in the light of the socio-political framework of European integration. More precisely, contrary to the scenario observed in other parts of the capitalist world, market internationalisation in Western European countries has been associated with a long-term process of political integration in the framework of the European Community.<sup>4</sup> As Dølvik underlines, 'not without scepticism most trade unions in the Member States have supported European integration, assuming that market integration would be accompanied by a build-up of political authority, enabling cross-border labour market regulation'. However, social policy competences of the European Community remained very limited. As inter-governmentalism prevailed over supra-nationalism, trade unions have sought to influence national governments, in particular to oppose to certain particular community policies. Therefore, 'trade unions became increasingly entrenched in institutional structures of the nation-states' (Dølvik 1997a, 9) and their actions remained limited to national

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<sup>2</sup> Concerning Germany see Hege 2000, 66.

<sup>3</sup> See Fulton 2000, 82.

<sup>4</sup> The internationalisation of exchanges being one of the three distinct stages –international economy, the multinational economy and the global economy– of the economic globalisation, each of which corresponds to different concepts and expressions of labour law (Moreau and Trudeau 2000).



borders also within the European Community. Contrary to the evolution observed at national levels, where the class struggle and workers mobilisation inspired national trade unions, the emergence of a European trade unionism occurred on the basis of some political (European Social Policy) and institutional reforms (European Social Dialogue) (Dølvik 1997b, 149). In the context of the European market, a supranational lobbying organisation slowly evolved: the European Trade Union Confederation (ETUC),<sup>5</sup> which brings together all major confederations and eleven European industry federations. Some authors underline that trade unions at European level in this way became an authority to create consensus instead of bearing socio-political conflict and struggle. (Gobin 2000, 145).

There have been great difficulties for trade unions in coping with the global dimension of the market (for instance in relation to the debates on delocalisation and restructuring) and the strategies that multinational companies (MNCs) deploy at the global level.

## **1. The obstacles to the adaptation of European trade unions to the MNC strategies**

While Member States are coordinating their actions at European level in order to deal with economic globalisation in an effective manner, unions are facing many obstacles in doing so. In addition to the above mentioned barriers (ideological, political and national diversity), as well as the decrease in union membership, some other aspects, such as the current notion of representativeness at the European level, the transformation of the ETUC into a social partner and the absence of institutional evolution, represent additional important obstacles.

### ***1.1. Construction on the basis of national representativeness with national actions***

#### *External and internal barriers hindering a critical ETUC action*

From the beginning, the ETUC professed a strategy able to broaden its representativeness, and operated by external growth as well as by internal re-organisation processes (Braud 2000). Still, despite a forty years long process of European trade union integration, and with an Executive Committee including all national trade unions leaders at a confederal level, the ETUC has not succeeded in establishing a balance of power favourable to the workers community within the EU institutional framework (Gobin 2004; Taylor and Mathers 2004). One must not forget that obstacles were, and still are, considerable. From the external point of view, the ETUC has to cope with the absence of a coherent corresponding nation-state, and with the lack of willingness on the part of employers' organisations to bargain at the European level. At the internal level, a series of barriers can also be mentioned, amongst which: the diversity in trade unions' forms in Europe (Dølvik 1997a; Gobin 1998; Moreau 2002) and the different interests within the ETUC that weaken its position in

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<sup>5</sup> On the origins of the European trade unionism, see Braud 2000, 107. The ETUC include today 76 members' organisations from 34 countries of the Western, Central and East Europe, and 11 trade unions federations. ETUC represents the interests of 60 millions of workers.

front of employers organisations (Balme and Chabenet 2000); the reluctance of the national confederations to transfer greater resources and stronger negotiation mandates to the ETUC; the distribution of responsibilities between the ETUC and European trade union committees; the economic dependency on the European Commission; and last but not least, the difficulty to develop a transnational identity across workers' communities or to articulate a more positive vision of Social Europe (Waddington, Hoffmann, *et al.* 1997).

### *Barriers to actions at the European level*

The ETUC focussed on institutional building and relations, and was criticised for having disregarded collective action or mobilisation, despite some well-known counter examples (Renault, Alstom, European Social Forum). As Hyman notes, 'almost universally, unions emerged as social and economic order, depending for their effectiveness on their ability to persuade first their own constituents but also the broader community, of the legitimacy of their vision and their objectives. With the time, however, unions became increasingly dependent for their survival on institutionalized internal routines and formalized external relationships with employers and governments' (Hyman 2005, 35). Unions' engagement in the EU is one more example of the mentioned institutionalisation process, which also concerns civil society through the civil dialogue launched in 1994.<sup>6</sup>

From another perspective, as civil society was structuring itself and the NGOs multiplying, the ETUC has been developing a specific partnership policy, in particular through the Platform of the European social NGOs, and the Permanent Forum of Civil Society. These partnerships, with more of a civic than strictly social character, were essentially related to the 1996 Inter-Governmental Conference (IGC) institutional reform and the European Charter of Fundamental Rights. In this regard, Taylor and Mathers emphasise the 'possibilities for the ETUC to embrace the variable geometry of European trade unionism and to develop a 'hybrid' form of identity which reflects the multidimensionality of distinct national forms and traditions' (Taylor and Mathers 2004, 269).

### *The absence of a clearly defined notion of representativeness*

Since the signature of the Agreement on Social Policy to the EC Treaty, the social partners have begun to acquire a key role in the European construction process. However, their new position of potential legislators brought some criticism. This is the reason why, little time after the entry into force of the Maastricht Treaty, the Commission provided three representativeness criteria for the consultation procedure (COM (93) 600 final): (1) the organisations should be cross industry or relate to specific sectors or categories and be organised at European level; (2) consist of organisations which are themselves an integral and recognised part of Member State social partner structures and with the capacity to negotiate agreements, and which are

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<sup>6</sup> 'The White Paper on European governance (European Commission 2001) can be viewed as in part a project to gain the EU some of the legitimacy of popular social movements drawn into partnership, while diminishing the latter's spontaneity and accentuating their bureaucratic aspects' (Hyman 2005, 35).

representative of all Member States, as far as possible; (3) to have adequate structures to ensure their effective participation in the consultation process.

In spite of several studies concerning the concept of representativeness of the social partners in the different EU member States,<sup>7</sup> and despite the fact that the Commission regularly insists on the need for widening and updating these studies (see COM (2004) 557 final), the three criteria proposed in 1993 still prevail. Nevertheless, the concept of representativeness of the European Social partners is still raising some doubts. First of all, the criteria were established by the Commission through a communication, which is a non-binding instrument. In addition, other qualms are raised by the legality of a Community act that would give legal effect to an agreement negotiated and concluded by only the ETUC on the workers' side (or by the UNICE and CEEP on the employers' side), without involving all representative organisations in the negotiation (Lyon-Caen, 1997).<sup>8</sup> Finally, the representation of autonomous interests is not promoted in the criteria proposed by the Commission.

Yet, the effective representation of collective interests at the European level would contribute to reinforcing the legitimacy of the collective agreements bargained according to the current procedure. Admittedly, the Commission might defend the flexibility of the criteria of representativeness arguing that social partners have not completed their own structuring, that it is important to respect their autonomy, or that the concept of representativeness itself is particularly variable from one Member State to another (Moreau 1999). Nevertheless, the flexibility of these criteria ('as far as possible', point 2) poses the question of legitimacy, a matter of critical importance when the Community legislators are circumvented during the collective bargaining process. In fact, since 1997, the European Parliament has stated in several resolutions that the social dialogue should not be a systematic substitute for the legislative procedure on social policy issues and claimed to be, at the very least, co-decision maker, on the same level as the Council in the implementation of the agreements.<sup>9</sup>

At the moment, it seems that the Commission, just like Community jurisprudence, has avoided any in-depth debate on the representativeness of European social partners. The position of the Commission on representativeness was relayed in 1998 by the Community jurisprudence through a decision which refused to recognise the existence of a *right* to negotiate for the organisations taking part in the phase of consultation, preferring to refer to a 'faculty of negotiation' when the organisations consulted in

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<sup>7</sup> Report on the representativeness of the European partners organisations 1999, IST, 2.

<sup>8</sup> In most Member States there are independent unions outside the confederal mainstream of representative and recognise unions, especially among professionals, managers and high ranking civil servants (Industrial Relations in Europe Report 2004).

<sup>9</sup> European Parliament Resolution on the new social dimension of the Treaty on European Union, [1994], OJ C77/30; European Parliament Resolution on the Application of the Agreement on Social Policy [1994], OJ C205/86; European Parliament Resolution on the Commission proposal for a Council Directive on the framework agreement concluded by UNICE, CEEP and ETUC on parental leave [1996] OJ C96/284; European Parliament Report on Participation of Citizens and Social Players in the Union's Institutional System, A-4338/96, 29 October 1996, at point 16; European Parliament, Report on the Commission Proposal for a Council Directive concerning the framework agreement on Part-time work concluded by UNICE, CEEP and ETUC, A4-352/97, 24 November 1997. On the exclusion of the European Parliament see Reale 2003, 23.

accordance with article 138, paragraphs 2 and 3, are not institutionally recognised.<sup>10</sup> Thus, if any European social partner has the faculty to open such negotiations, should it be concluded that only the institutionally recognised social partners (ETUC, UNICE/UEAPME, and CEEP) have an effective right of negotiation? This ambiguity stresses the need for consolidating the representativeness definition of European social partners.

The above mentioned decision also delivered interesting contributions. Foremost, it confirmed the ‘admissibility of the action of the representative organisations on the European level, [...] cornerstone in the organization of the jurisdictional guarantees offered by the Community legislation’. Further, the decision established the conditions of validity of the agreements on the concept of ‘cumulated representativeness’. Finally, it drew ‘the lines of a legal control *a posteriori* of the collective agreements signed by the European social partners’ (Moreau 1999, 54, 59; Bercusson 1999), entitling the European Court of Justice (ECJ) to evaluate the implementation of the procedure by the Commission. Still, one could wish that the democratic legitimacy of the EU procedures go beyond a legal control *a posteriori* on the formal capacity of the social actors, and take place also *a priori*. In that case, the solidity of the concept of representativeness once more turns out to be a crucial issue.

## ***1.2. Difficulties in taking into account MNC strategies in the framework of the European Social Dialogue***

### *Employers’ side v. Workforce side*

In labour relations, the changes triggered by globalisation have great consequences that must be taken into consideration. The most important changes are to be found on the employer’s side<sup>11</sup> Employers are no longer national companies, but rather international groups with strategies of international division of labour: possibilities for new global organisation by the creation of ‘global networking’, choice of economic activities’ location/relocation by “global switching”, concentration of specific functions (research and development, finances, etc.) and choice of sites by ‘global focusing’ (Moreau 2005a). The workforce is still located at national sites and plants but the activities become volatile (Mucchieli 1998) and the decisions are taken not at the national level but at the global one. The consequences are that national labour laws and the national systems of industrial relations are poorly equipped to face those transnational relations created by the MNCs (Moreau 2005a).

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<sup>10</sup> “[...]Article 3(2), (3) and (4) and Article 4 of the Agreement do not confer on any representative of management and labour, whatever the interests purportedly represented, a general right to take part in any negotiations entered into in accordance with Article 3(4) of the Agreement, even though it is open to any representative of management and labour which has been consulted pursuant to Article 3(2) and (3) of the Agreement to initiate such negotiations”, (UEAPME) v Council of the European Union, Aff. T/135/96.

<sup>11</sup> Traditionally the employer is the manager of the corporate structure, with exceptions based on the definition by the judge on the community of workers on which the employer exercise its authority. But it is very difficult where there is a complex organisation of companies, as MNCs are, to lift the veil and identify one unique employer (Moreau 2004a)

*The transformation of Trade Union's action framework at the European level*

In Europe, the action field of social partners, and in particular of the trade unions, has undergone important transformations in response to the internationalisation of enterprise. Following the evolution of companies' activities, the latter's action is being deployed and co-ordinated at supranational level. Undoubtedly, these transformations pose a set of questions at two different levels: first, within the framework of the European social dialogue,<sup>12</sup> and, second, at the level of community-scale undertakings and European companies requiring new forms of transnational representation (see Blas-López 2006a).<sup>13</sup> Undoubtedly, the EU appears to be a key place for the evolution of transnational norms (Moreau 2003). In terms of evolution, it must be highlighted that even if the new European social regulations (as a result of the European social dialogue process) suffer from a somehow limited implementation, they certainly push for a broader evolution in the field of international bargaining, providing interesting theoretical elements for the shaping of responses to the challenges of globalisation (Moreau 2005a). Nevertheless, it is true that important limitations can be recognised regarding the interrelation between the European social dialogue and MNCs. First, the synergies between the European social dialogue and the internal organisation level of the firms are limited (for instance, the relation between the sectoral social dialogue and the European work council – COM (2004) 557 final – and between the social dialogue and the firm policies promoting corporate social responsibility). Second, only a very limited harmonisation has taken place, since only a very limited number of European collective agreements have been converted into Directives. Third, there is also a limited harmonisation due to the frequent adoption by social partners of “new generation” texts: autonomous agreements (139.2 TCE) and process-oriented texts, which make recommendations of various kinds (frameworks of action, guidelines, codes of conduct and policy orientations).<sup>14</sup> Fourth, firms' globalisation dealt with ‘soft law’ responses (negotiated codes of conduct), but there is an asymmetric balance of power between labour and management at the European level. One can conclude that while European social partners have been given an important role in developing agreements that are subsequently legislated, European trade unions' action is still very limited, especially in the light of the building up of a European solidarity within its institutional framework.

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<sup>12</sup> While the emergence of the labour movement in response to industrialisation appeared as a fundamental step for the protection of social needs, in turn the European social dialogue arose in response to the new threats that globalisation has encompassed for labour law at European level (Blas-López 2006b).

<sup>13</sup> The objective for the transnational structures of workers representation is to reach an agreement, through the social dialogue, on the workers information and consultation procedures within the European company, group or cooperative.

The agreement can also include provisions concerning the involvement of workers at the management level. The quality and relevance of the information provided to the representatives is a basic condition to ensure the efficiency of the social dialogue (Moreau 2005a). Information must enable the representatives to express their views, in particular regarding (i) the European/global economic situation and (ii) transnational employment issues. The Directive sets guidelines, but the social actors are free to give more prominence to the workers participation. This function of information and consultation is oriented, by other Directives, to the possibility of concluding agreement and precisely for the European company in exceptional cases (Vasquez 2003, Laulom and Vigneau 2005).

<sup>14</sup> See COM (2004) 557 final ‘Partnership for change in an enlarged Europe: Enhancing the contribution of European social dialogue’, 12.8.2004, p. 7.

One could say that there is a significant potential, but which is far from being fully exploited.

### ***1.3. Absence of institutional evolution: no construction of a European solidarity in the Treaty establishing a Constitution for Europe***

#### *Trade union action: supposedly real or not?*

The right to strike, the right of association and salaries aspects are excluded from the Community competences. The clause of article 137.2 TCE is converted into article III-210.2 of the Constitutional Treaty as a modest flexibility element (possibility to extend to social issues the qualified majority decision mode).

One can wonder what European workers have in a representational organisation that does not even enjoy the formal recognition of the right of association and of union action, in particular of the right to strike.<sup>15</sup> If article 28 of the EU Fundamental Rights Charter (Treaty of Nice) (Article II-88 of the Treaty establishing a Constitution for Europe) recognises the right to strike, article 137.5 TCE (Article III-210.6 of the Treaty establishing a Constitution for Europe) excludes from the scope of application of article 137 wages, the right of association, the right to strike and the right of lockout. These aspects stand in the way of the establishment of an adjusted balance of power within the framework of collective bargaining. Indeed, while ‘the possibilities of legislative intervention of the EU on social matters are limited’ (Ziller 2005, 197), so that the right to strike and the right of association are directly excluded from the European competence, European trade unionism needs a base of rights to be recognised and protected by norms, otherwise it would risk draining its core essence out (Gobin 2004).

#### *Difficulty to conciliate with the recognition of the fundamental rights on the European Constitution*

Although the main stages of the construction of social rights in Europe demonstrate an irresistible increase in the strength of fundamental social rights, a clear paradox was highlighted: ‘the construction of fundamental social rights has been within the vertical and hierarchical normative structure of states, who are guarantors of, and charged with ensuring respect for, these social rights, whereas the ‘privileged’ actors in the context of economic globalization are transnational companies that operate on the horizontal, economic plane’ (Moreau 2005c, 369). There is a difficulty in conciliating the absence of these rights (right to strike and right to association which do not fall within the scope of Community competence) with the recognition of fundamental rights in the European Constitution. Nonetheless, fundamental social rights are an essential part of the European social model, which determines the conditions under which companies can set up business on the European market, and the role of the European Court of Justice has been crucial in protecting those rights ‘in the face of economic freedoms and competition law’ (Rainelli, Boy and Ullrich 2003).<sup>16</sup>

One of the features of Industrial relations in Europe is the massive diversity across European countries (between companies and sectors and also in social and regional

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<sup>15</sup> Braud 2000.

<sup>16</sup> See in particular De Schutter 2002, Bercusson 2003.

terms), complicating the task of national law-makers and making centralised solutions within national borders more difficult. As a consequence, harmonisation in the field of labour law and social policy in the EU is even more complicated (Visser 2004). However, the importance of transnational social norms is a key element that could reinforce unions' action and that will be discussed in the second part of this paper.

## **2. Innovative actions in the context of globalisation: supposedly or really such?**

Economic globalisation leads to the identification of new answers in terms of regulation, such as the creation of new regulatory techniques as well as the identification of legal norms. Therefore, social regulation within the context of globalisation is a new challenge, giving rise to a set of theoretical questions (Murray and Trudeau 2004).

First, globalisation motivates the *search for new regulation* that responds to the specificities of the dominant model of MNCs. The key idea is the following one: if the employers' power is transnational, the workers' rights should also be recognised at a transnational level. If labour relations apply to a transnational dimension, social norms must also be developed not only at the national level but at the transnational level.

Second, innovative *European social transnational norms* are characterised by an originality that is in line with the theoretical features of the transnational social norms, taken as a response to globalisation (Moreau 2004).

The issue at hand is to evaluate to what extent these legal instruments encourage efficient actions from trade unions in response to the strategies deployed by MNCs?

### **2.1. New regulation answers: the search for convergence within the European Employment Strategy (EES)**

#### *The Open Method of Coordination*

Within the framework of the European Employment Strategy (hereinafter EES),<sup>17</sup> the social partners' modes of action are different from those within the social dialogue framework: the coordination of national employment policy at European level is based on the Open Method of Co-ordination (hereinafter OMC). The OMC is a voluntary process that all Member States have committed themselves to pursuing in the context of the Lisbon Strategy; it is designed to help Member States to progressively develop their own policies.<sup>18</sup> It is 'composed of different phases, each one deeply marked by a

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<sup>17</sup> See Council Decision of 22 July 2003, JO L 197/13, 5.08.2003, Council Decision of 4 October 2004, JO L 326/45, 29.10.2004. See also Annexe, COM (2003) 663 final of 6.11.2003 'Progress in implementing the Joint Assessment Papers on employment policies in acceding countries' and COM (2005) 141 final, 'Integrated Guidelines for Growth and Jobs' (2005-2008) of 12.4.2005.

<sup>18</sup> Lisbon conclusions, point 37.

common feature: co-ordination. The very structure of OMC relies on the presence of a supranational actor able to co-ordinate.’ (Regent 2003, 2)

The setting of employment guidelines at European level and the drafting of national action plans is an iterative process assessment (see Sciarra 1999; Dehousse 2002; De la Porte 2002; De la Porte et Pochet 2002; Radaelli 2003; Regent 2003).<sup>19</sup> The OMC has turned out to be an essential tool on the elaboration of European policies (Goetschy 2003), complying with the necessity of developing the European governance with twenty-five Member States. The OMC is used within specific fields where Member States want to keep their sovereignty and decline any restricting legislation (e.g. taxes, retirements). In other words, the OMC is used when there is little scope for legislative solutions or there is a will of deepening a specific political coordination (as for example education) (Moreau 2005).<sup>20</sup>

#### *Limited participation of the trade unions beyond the elaboration of the national plans*

In relation to the application of the OMC in the framework of the EES, social dialogue structures were established at national level with the social partners. Thus, in several Member States, national employment action plans are elaborated in the framework of tripartite negotiations. However, social partners’ interventions turn out to be restricted to punctual contributions of consultative order (Moreau 2005). Trade unions are involved into the conception phase, but their participation to the implementation and evaluation phases remains limited. In addition, there is a varying participation of trade unions from one Member State to another.

Then, whereas at institutional level the OMC is frequently considered an important progress for participative democracy, it is offering a very limited role to European trade unions. This situation contrasts with the important role and power of European trade unions within the European social dialogue. If the OMC tends to be presented as the appropriate tool for an integrated approach toward an economic and social renewal, social partners, and in particular trade unions, could be involved at a higher degree to achieve its objectives.

Moreover, the EES is oriented from the outset towards economic objectives promoting market competitiveness.<sup>21</sup> Two reports, characterised by different ideological lines, have converged in their conclusions indicating that the economic objectives of the EU could not be achieved without more flexibility, which supposes a deregulation of the labour

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<sup>19</sup>Under a Commission proposal, the Council adopts each year a series of employment guidelines describing the common priorities for the Employment Policies of the Member States. Each one of them works out a annual action plan at national level exposing the way in which the common orientations are brought in practice to the national level. The Commission and the Council examine the national action plans (NAPs) and present a report on employment. On this basis, the Commission prepares a new proposal of employment guidelines for the following year. It, thus, acts as an iterative process, since the national action plans must integrate the employment guidelines, while those guidelines take as a starting point the good practices observed at community level.

<sup>20</sup>European Commission, European Governance - A White paper, COM (2001) 428 final, Brussels, 25.07.2001, pp. 21-22.

<sup>21</sup> On the objectives of the EES see Goetschy 1999.



market.<sup>22</sup> Consequently, it seems there is a contradiction between the EES economic lines and the development of minimal standards harmonised within the framework of the construction of a European social dimension (Moreau 2005).<sup>23</sup>

A series of conclusions can be drawn concerning the EES. In particular, it led the governments to open up to the social policies followed in other Member States, supporting the Europeanisation of the policies through the exchange of good practice. There is, indeed, an important learning process stemming from the social diversity at European level, given the different employment policies established in other Member States (Moreau 2005). However, no convergence of the social norms at community level is easily observable (Sciarra Report 2004). In the majority of the countries, the labour markets instead experience reforms going in the direction of increased flexibility and precariousness.<sup>24</sup> Finally, one can observe an undeniable shift, a kind of tension, between the orientations of the EES, aiming at increasing the competitiveness of the EU through the development of new flexibilities, and the European social dialogue, focused on the protection of the workers' rights and granting social partners a very important role in the development of European social norms. (Moreau 2005; Blas-López 2006a). In other words, the institutional recognition of social dialogue has opened the avenue of collective bargaining as source of European social law. Some authors have argued that a coherent manner to put the EES at the same level that the social dialogue procedures would be to translate into terms of rights the economic objectives, to find 'a language of rights' (Sciarra 2004, 18). The establishment of links between the various European procedures concerning social policies could give an impulse to the role of the trade unions concerning the new methods of social regulation at European level (Moreau 2005).<sup>25</sup>

## **2.2 The way towards trans-national structures**

### *The instructive case of the European Union*

MNCs have gained a significant experience in the field of transnational collective bargaining, which was introduced in 1986 as a result of the internationalisation of employment, and without any legal framework (Moreau 2005b). In particular, global firms, characterised by new complex organisations (Daugareilh 2000), faced new challenges regarding the creation of global synergies between workers. Progressively, transnational social issues have made their way from the first European agreement

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<sup>22</sup> See 'Facing the challenge: The Lisbon strategy for growth and employment' Report from the High Level Group chaired by Wim Kok. November 2004. Available at <http://europa.eu.int/growthandjobs/pdf/2004-1866-EN-complet.pdf>. See also 'An agenda for a growing Europe. Making the EU Economic System Deliver', Report of an Independent High-Level Study Group established on the initiative of the President of the European Commission. Chairman of the Group: André Sapir.

<sup>23</sup> The approach adopted within the EES could call into question the principles affirmed in the Charter, see Sciarra 2005.

<sup>24</sup> For the difficulties presented by the SEE, notably the absence of sanctions to the Member states which do not adhere to guidelines, modest financial resources on behalf of the EU, the subordination of the EES to the economic and monetary policies and the uncertainty of jobs created, see Goetschy 1999, 134,135.

<sup>25</sup> However, it does not exist institutional connection between the social dialogue (bipartite or tripartite) and the EES procedure (Smismans 2003).

creating a European work council (in 1986, Danone company) to the European Work Council Directive in 1994. Three Directives were adopted to respond to the requirements of employment's internationalisation at European level:

- The Council Directive 94/45/EC of 22 September 1994,<sup>26</sup> on the establishment of a European Work Council or a procedure in Community-scale undertaking and Community-scale groups of undertaking for the purpose of informing and consulting employee (hereinafter, EWC Directive). This Directive creates, on the principle of the autonomy of the social actors who represent all the workers and companies established in the European Union, a transnational representation of workers on transnational question of employment.
- The Council Directive 2001/86/EC of 8 October 2001 supplementing the statute for a European Company (SE) with regard to the involvement of workers. This Directive creates the social model for the European Company which relies on the capacity of workers representatives of the different countries involved in the European Company to establish an autonomous statute for the representation of workers in a new SE.
- The Council Directive 2003/72/ EC of 22 July 2003 supplementing the Statute for a European Cooperative Society, with regard to the involvement of Workers. It is almost the same statute for a European non-profit society which will group different cooperatives established in different countries in one European cooperative Society.

These three Directives aim at providing a unified framework for the transnational representation of workers adapted to the global/European firm. They were forged according to a 'common model' and confirm that European labour laws are able to adapt the representation of workers to the MNCs conditions (Rodière 2002, Hepple 2005, Moreau 2005a, Blas-López 2006a). It is still early to identify clear outcomes from the European Company Directive: few companies have had recourse to it and not always with successful results (see Moreau 2005a). However, regarding the EWC Directive, a significant development took place. EWC 'is becoming a partner of social innovation and an expert of transnational social dialogue' (Moreau 2005a, 10). Nevertheless this movement is still in emergence and remains limited to some firms (Daugareilh 2005) holding a weak position regarding the transnational decision powers within the European global firm.

*The EWC as a place for a trans-national dialogue, for an international collective bargaining and for facilitating trans-national actions*

Is the European Work Council a channel for trans-national union action? The deepening of the process of companies' concentrations, trans-border fusions, absorptions and associations –in other words, the transnationalisation of the companies and of the groups of companies resulting from the functioning of the internal market– has increased the need for harmonising social regulation within the EU. However, the procedures of information and consultation of workers were characterised by certain heterogeneity from one Member State to another. After twenty years of debate and confrontation, the EWC Directive was adopted giving the right to workers to be informed and consulted about the decisions affecting their future, therefore representing

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<sup>26</sup> Council Directive 94/45/EC, OJ L 254/64.

an important step towards the trans-nationalisation of the worker's rights at the European level (Laloum 1995, Rodière, 1995).

The 1994 EWC Directive has definitely contributed to bringing together economic and social aspects through the institutionalisation of a structure of trans-national representation of workers making it possible to set the bases of a transnational union action, and having the potential to reinforce a trans-national conscience among the workers (Moreau 1997, 503).<sup>27</sup> The EWC indeed constitutes a place of trans-national negotiation ('a place of transnational dialogue') and more generally 'a place of development of specific trans-national norms suitable for the international group' ('a place for collective bargaining') (Moreau 2003, 82). Despite the important role of the European trade union organisations in the negotiation of voluntary agreements, no substantial place is made for them by the EWC Directive. Thus, the representation of the workers is based on their national representatives, in the Special Negotiation Body (hereinafter, SNB) or in the EWC. As a consequence, this situation did not make possible for European trade unions to acquire a specific role of negotiation: they are invited, only optionally, as an expert (Moreau 2002). The revision of the Directive, deferred since the end of 1999, could be an opportunity to formally recognise the role of European trade union organisations (Blas-López 2006a). To conclude, the establishment of the EWC has been one of the first steps towards the protection of workers within European companies. It has also supported the evolution of national union action towards union action founded on coordination at transnational level. However, the weakness of the EWC position within industrial relationships raises some questions regarding the possibility of the emergence of a true transnational model (Blas-López 2006a). The revision of the Directive is presented as an opportunity to increase their resources and competences in order to build for them a place of representation at the transnational level, and which in addition could support the consolidation of a transnational union action ('a place facilitating trans-national actions') (Moreau 2005c).

#### *Collective bargaining and European company (SE): a limited application?*

Beyond the EWC Directive, a series of Community rules specific to the European company (SE) are also taking part to the emergence of a trans-national union action. The Directive on the implication of workers in the SE imposes the conclusion of an agreement on the representation and participation of workers before to the establishment of a European company. At this stage of transposition and, especially, of the application of the SE regulation and the Directive on the implication of workers, one lacks the critical distance to evaluate its developments and consequences. However, it is possible, in particular, to identify some subjects whose study would provide interesting elements of analysis: the interest from companies in this new possibility of association; the level of savings truly permitted by the SE in terms of administrative and legal costs; the consequences of the specific absence of mode of taxes; the preferences of companies concerning the manner of organising the implication of the workers. Lastly, one should not neglect considering the number of SEs set up, their evolution - in time and space -

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<sup>27</sup> See TGI de Nanterre du 4 avril 1997, Comité de Groupe Européen Renault (C.G.E) c. / Société Renault ; Cour d'Appel de Versailles du 7 mai 1997, Sté. Renault SA c./Comité du groupe européen Renault (CGE) et Fédération européenne des métallurgies (FEM). See also the case 'Bofrost', C-62/99 du 29 mars 2001: the ECJ asserted that the workers' representatives had a right for the preliminary information in the negotiation, independently of the modalities of constitution of the group.

and, finally, the number of workers actually concerned with one form or another of implication in the company (Blas-López 2006a). These new legal instruments, of different but complementary nature, aim 'to facilitate the integration of the European company in the various Member States by respecting the specificity of the social questions' (Moreau 2001, 975). Symbolising the inter-relationship between the challenges of the economic globalisation and the respect of the undeniable needs for social, these instruments of integration characterise in an exemplary way the new grounds of action which are opened to trade unions.

What are the consequences of the implementation of this device, not only at the national level but also on the level of Community social rights? At the national level, a kind of "deterritorialisation" of collective rights is occurring, since 'workers of an establishment located in a country being unaware of workers' participation in the decision-making bodies will be able to benefit from the representation bodies of the European company that employs them'. Also, the implementation of this new device could contribute to our further reflection on representativeness of workers at community level. With regard to European social rights, this Directive corresponds to the crossing of an important stage of European integration. It also represents a fundamental projection towards the consolidation of a Community-level social right within transnational corporations; for the transnational nature of the companies there is the adequate answer of transnational provisions tending to protect the workers rights. Finally, within the EU, this Directive attests a real capacity of adaptation of the social standards to the context of transnationalisation of the companies' operations (Moreau 2002).

Lastly, it is important to underline that the EWC and the SE Directives, even if they have a very limited field of action (applying only to European and global firms established in at least two Member States), provide an interesting legal framework. The latter is still under construction and the transnational enforcement of these norms is a possibility that has been illustrated in few cases (Renault, Bofrost) before the ECJ (Moreau 2005a).

### **2.3 *Towards the creation of a trans-national bargaining framework?***

In Europe, several reasons explain why it has been difficult to think about a transnational bargaining framework. First, one can point out the lack of a common basis, in other words, the existence of different schemes of collective bargaining. Second, the fact that collective bargaining takes place at different levels (national, sectoral and firm level). Third, the existence of different actors involved in collective bargaining at different levels and in different systems, and, fourth, the diversity of forms of enforcement and application of the agreements (voluntary or general implementation). Yet, it seems obvious that increasing economic integration, competition in a larger European context and the final stage of the European Monetary Union fundamentally affect the ability of social partners, in particular trade unions, to pursue their objectives in a national context. The coordination of collective bargaining agendas, strategies, objectives and outcomes is becoming more and more important<sup>28</sup>

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<sup>28</sup> Among the reasons: the importance of social protection as 'competitive disadvantage', cross-border competition in frontier regions, general mobility of factors of production and the increasing number of Community-scale undertakings. See European Commission 2004, 'The issue of transnational collective

However, few legislative tools are currently at the disposal of social partners to formalise the conduct and the results of transnational collective bargaining initiatives.<sup>29</sup> In the Social Agenda 2005-2010, the Commission stated its intention to create an optional framework for transnational collective bargaining.<sup>30</sup> The Commission initiative aims to supplement the structure of European social dialogue, on the basis of articles 138 and 139 of the Treaty. In December 2005, the ETUC Executive Committee adopted a resolution on the coordination of collective bargaining in 2006. In this resolution the ETUC expressed that ‘a framework of reference may be useful, though the criteria envisaged for its implementation and efficiency must be clear and precise’. The ETUC also expressed its disagreement with the working method and deplored UNICE’s opposition to this initiative<sup>31</sup> The ETUC also pinpointed several key aspects of this framework. First, the negotiating mandate and the right to sign transnational agreements must remain solely and strictly a trade union right, owing to their representativeness, long recognised by the Commission. Second, this new level must fit in the existing structure of collective agreements negotiated at various levels, but without changing or interfering with national powers and responsibilities, adding to and enriching the overall framework of negotiation already available. Third, concluded agreements must not be allowed to adopt the lowest common denominator from clauses already negotiated in collective agreements or national legislations. Concerning these points highlighted by the ETUC, the Commission underlined that

‘[it] plans to adopt a proposal designed to make it possible for the social partners to formalise the nature and results of transnational collective bargaining. The existence of this resource is essential but its use will remain optional and will depend entirely on the will of the social partners’.

Further, some of the most important aspects of the Community action concern for instance the nature, the legal effect and the scope of Community initiative, the possibility to transform the collective agreement into Directives, its content, its different levels (firm, sectoral/regional, and European levels), requirements with regard to the issue of representativeness, bargaining procedure and legal effects (uniform definition at Community level or by reference to national legal systems?). The role of the jurisprudence of the ECJ will be an essential element in a transnational bargaining framework. The Court of Justice’s specialisation in the field of labour law could be highly desirable as expressed by the ETUC in 2005, and possible sanctions and means of recourse, as well. For instance, direct applicability of autonomous agreements if they do not enter into force within a reasonable time limit could be a reasonable solution to this kind of problem. From a political point of view, a strong opposition has already been expressed by employers’ associations, for they apprehend that a Community

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bargaining and the future Social Policy Agenda’, DG EMPL, 23.6.2004, p. 1. On the issue of the international collective agreement see Daugareilh 2005.

<sup>29</sup> Furthermore, it seems that trade unions and employers’ associations are not very interested in such a European framework. The Communication from the European Commission in February 2005 concerning the social agenda had very negative reactions from social partners.

<sup>30</sup> COM (2005) 33 final on ‘The Social Agenda’, 9.2.2005: ‘It will give the social partners a basis for increasing their capacity to act at transnational level. It will provide an innovative tool to adapt to changing circumstances, and provide cost-effective transnational responses. Such an approach is firmly anchored in the partnership for change priority advocated by the Lisbon strategy.’

<sup>31</sup> See ETUC, 8.12.2006.

initiative would strengthen the bargaining position of trade unions, and, as the ETUC has underlined, it ‘must figure within a consistent framework that strengthens and regulates industrial relations at European level with an eye to bolstering the European social dialogue’.

## Conclusion

First, one can plausibly argue that there is limited control on the decisions that global firms make at the international level due to the traditional national action field of trade unions, firmly rooted in different historical backgrounds across the EU. In spite of the Europeanisation process of trade unionism, it seems that there is a great difficulty for trade unions in coping with the global dimension of the market. Most of these difficulties (in addition to ideological and political barriers) arise from certain significant obstacles to an adjustment of European trade unions to the MNCs’ strategies.

A construction on the basis of national representativeness with national action that constitutes a barrier to a genuine European-level action and, what is more, a obstacle in outlining a clearly defined notion of representativeness at the European level.

Secondly, there exist the difficulties in taking into account MNC strategies in the framework of the European Social Dialogue. The changes created by globalisation in labour relations (employers and workforce sides) have had the consequence that national labour laws and national systems of industrial relations are powerless to respond to those transnational relations created by the MNCs. However, the EU appears to be a key place for the evolving of transnational social norms that certainly push for a broader development in the field of international bargaining, in spite of its limitations. In other words, European social partners have been given a key role to play, so there is a big potential, but it is far from being fully exploited.

Lastly, the absence of institutional evolution (absence of establishment of an adjusted balance of power within the framework of collective bargaining at European level) limits trade union action, and is difficult to reconcile with the recognition of fundamental rights in the European Constitution.

Furthermore, it seems that there is also a limited grip on the major social issues: individualisation of working relations, working flexibility and uncertain employment, relocation of activities or restructuring. The identification of new social regulation is a threat in the context of a globalised economy. These new regulatory techniques and legal norms must be able to respond to the specificities of the governance model of MNCs. Accordingly, at the European level there is a search for minimal and harmonised labour standards through the European social dialogue and transnational social norms. Indeed, the quasi-legislative role given to trade unions is a key element in the search for new regulation. Yet, on the other hand, and this is what appears through the EES, there is a drive towards new flexibilities, which represents a contradiction between its orientation, aiming at increasing the competitiveness of the EU and offering trade unions a very limited role beyond the elaboration of national plans, and the European social dialogue, focused on the protection of the workers’ rights and granting social

partners a very important role to play in the evolution of the 'European social model' even if their action is still very limited.

Finally, as the ETUC has pointed out, the Community initiative meets an indubitable need as it 'must figure within a consistent framework that strengthens and regulates industrial relations at European level with an eye to bolstering the European social dialogue'. The questions concern its nature, content, legal effect, and the role of the ECJ in its interpretation. Regarding trade unions, their role is fundamental in the development of a transnational collective bargaining within the EU framework.

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