Collective bargaining at group level: an autonomous level of negotiation?

Dott. Stefano Guadagno,
Assegnista di Ricerca,
Dipartimento di Scienze Sociali e Politiche - Università degli Studi di Milano
stefano.guadagno@unimi.it
+39 340 61 55 858

1 . Introduction

Among the various options adopted by the actors pursuing an optimal economic performance as well as the accommodation of the needs and demands of individual companies in a fluid and fluctuating market[1] open to global competition, two main processes have entailed significant transformations of the nature and structure of enterprises at national level and in regional and global contexts. On one hand, it is possible to outline various forms of decentralization of the enterprise, relating to the outsourcing of various activities, the use of agency work or self-employed workers or referring to the geographical scope of the externalization of production processes, both at national and cross-border level.

On the other, employers have opted to collaborate with other companies operating in the same market and performing similar or complementary activities, through the establishment of of various cooperation mechanisms which in most cases take the form of the group of enterprises. This option represents one of the tools available to companies to maintain their competitiveness and meet the new requirements imposed by a technologically evolved and globalized market, and allow employers to respond to (internal and external) flexibility and productive decentralization needs, without being necessarily forced to resort to relocation processes[2].

Even if the emergence of these trends dates back several decades, their pace and significance has increased in recent years on account of the economic setting becoming increasingly globalized, so much that the need to take into consideration these kinds of transformation options may be a necessary pre-condition for any company wishing to operate and effectively compete in the global market.

---

[1]Araki T., *The relationship between state law, collective agreement and individual contract:Japan's decentralized industrial relations with internal market oriented flexicurity*, in *University of Tokyo Journal of Law and Politics*, Vol 10 Spring 2013, p.1

[2]Minolfi F. 2014, *La contrattazione collettiva nei gruppi d'impresa: uno sguardo comparato*, p.2

Furthermore, in the international setting various agreements and arrangements such as Mercosur, NAFTA and the TTIP set as their main objectives the removal of barriers and the facilitation of free movements of capital, goods and investments, fostering market access for economic actors and the transnationalization of business and companies: in the European integration process, the creation and the consolidation of the single market, as well as the various enlargement rounds[3] carried out have entailed a significant expansion of the freedom of action (both in geographical and juridical terms) for economic operators and have been characterized by a highened mobility of undertakings of workers[4] and services[5] as well as the provision of specific frameworks in the area of company law[6].

The legal responses and juridical solutions adopted by social and political institutions at the various level do not however evolve as fast as the economic dynamics governing these processes of enterprise transformation: on one hand, the various regulatory frameworks have different boundaries - not seldom overlapping - and for the most part they need to interact with the different national legal systems involved.

Moreover, while it is possible to highlight regional developments, institutional frameworks and policies remain largely based and operating within the domestic setting, without providing control or oversight on transnational or global markets or addressing cross-border inequalities and imbalances. The latter are bound to raise the level of competition between economic actors, to create more political friction between countries and Governments involved, and to increase the contrast between the promotion of economic aims with the pursuit of social objectives through the adoption of domestic or international labour law instruments.

In the EU setting in particular it must be considered that on account of the interactions between the social policy decision-making provisions of the Treaty and the exclusion of certain key areas of labour law from the EU competences, the national diversities not seldom overcome the curdling of the European Social Model around shared values and fundamental rights. Labour law and social policy remain deeply rooted in the individual Member States legal systems and IR traditions, while the EU internal

---

[3]Defined as "a laboratory of globalization in one continent". See Dølvik J. E. 2008, *Mobility of Labor and Services across the Baltic Sea after EU Enlargement: Trends and Consequences*, CES WP Series #161, p.3

[4]See Dirr. 96/71, 2008/104 and 2014/67

[5]See Dir. 2006/123

[6]See Reg. 2157/2001 and Dir. 2001/86 on the European company (SE) and Reg. 1435/2003 and Dir. 2003/72 on the European Cooperative Society (SCE)

market law, based on the four Treaty freedoms, promotes cross-border movement of economic factors throughout the Union and the removal of obstacles by the MS[7].

These considerations appear of particular relevance because the various strategic options carried out - chiefly by the management's side and therefore linked to fundamentally economic aims and objectives rather than social considerations or the accommodation of workers' needs and demands - inevitably have an impact on individual rights and reflect themselves and on the structure of collective labor relations.

The establishment of a group of enterprises - both at national level and in a European setting - represents a significant transformation of productive organization and of the corporate structure based on potentially complex relations between the various companies involved, developing both in a hierarchical top-down sense but also in a horizontal dimension. Employers may adopt more flexible options in the organization of their economic activities, which potentially result in a more pronounced flexibility of the labor management tools and collective relations practices in particular when the general absence of legal frameworks concerning collective bargaining for the group of enterprises is taken into account.

Over the last years, collective bargaining at national and supranational group level (an in particular in the European setting) has nonetheless increased, with a peak in the late '90s and early '00s; the lack of any legal framing, however, constitutes a limit on the options which can be adopted in pursuing the accommodation of the needs of companies and may significantly hinder the development of bargaining practices aimed in particular towards the promotion of working conditions and the protection of labour standards and rights[8] along supply chains and beyond national borders[9].

This is particularly true for Transnational Company Agreements (TCAs), which do not fit into any of the various legal categories provided by domestic or international labour law and have been established drawing inspiration from various items of domestic and European collective labour law[10].

---

[7]Hendrickx F. 2009, *Trade Union Rights in a Free Market Area: The EU Experience in Laval and Viking*, in Blanpain R., Bromwich W., Rymkevich O., Spattini S. (eds.), *The Modernization of Labour Law and Industrial Relations in a Comparative Perspective*, p.55

[8]Jagodzinski 2012 in Schömann I., Jagodzinski R., Boni G., Clauwaert S., Glassner V., Jaspers T., *Transnational collective bargaining at company level - A new component of European industrial relations?,* ETUI, p.8

[9]IGLP Law and Global Production Working Group 2016, *The role of law in global value chains: a research manifesto* in *London Review of International Law*, Volume 0, Issue 0

[10]Schömann I. in Schömann et al. 2012, p.219

The often flexible solutions and the mechanisms established by the various parties and actors involved run the risk of increasing legal uncertainty and may accentuate the diversity between collective bargaining systems; dedicated regulatory frameworks would address a series of current issues and respond to a number of questions with respect to the nature of these instruments, their main features and content, as well as their legal effects and the possibilities for their application and enforcement. An effective regulation of the phenomenon would therefore allow the development of group bargaining beyond individual experiences and the evolution of specific negotiating strategies, strengthening the capacity of trade unions to act transnationally and ensuring in particular the protection of workers involved in complex business structures.

2. National groups and decentralized collective bargaining.

While a certain degree of collective bargaining at group level has developed in various national settings as an intermediate bargaining model, it must also be underlined that - beside some specific cases - the legal frameworks on the matter are generally lacking or inadequate and trade unions structures and action have developed in a way which does not take into account the specific level of the group of undertakings[11]; furthermore, employers appear unwilling to accept bargaining for the group as a whole and prefer to negotiate different agreements at company or plant level. In fact, the recent trends aiming at the decentralization of collective bargaining represent some of the most pervasive interventions in the field of collective relations[12], hindering trade union action in their fundamental wage setting role, but also in other areas such as the working time arrangements and the use of temporary employment.

Two are the main aspects that need to be underlined; *in primis,* the norms regulating collective bargaining systems and procedures sit at the *core* of the national labour law and IR frameworks, and are strictly connected with the main features and the evolution of the contexts in which they produce their effects.

The *decentralization of collective bargaining* and the individualisation of the work relationship entail the risk of a decrease in workers' protection and the unbalancing of bargaining powers towards the management's side, especially when it is considered that some recent reforms increase the prerogatives for employers and managers to unilaterally set the terms and modify the terms and conditions of employment set by the

[11] Perulli A., *Diritto del lavoro e decentramento produttivo in una prospettiva comparata: problemi e prospettive,* in *RIDL,* A. XXVI Fasc.1-2007, p.50. In some cases, however, it is possible to identify special forms of representation and coordination within group of enterprises linked in particular to health&safety issues

[12] In Spain, since the recent labour market reforms carried out in 2012, company level agreements acquired priority of application; it is therefore possible to negotiate worse conditions than those defined at sectoral level (among the matters there are the basic wage, working time -including shifts and overtime- hiring practices, etc.), see Real Decreto ley 7/2011. A similar trajectory can be identified in the Italian experience; company agreements can deviate from the the ones negotiated at higher level and can even derogate from legislative provisions, although it can do it only at specific conditions and on the subjects listed by the law (and respecting the rights protected by the Constitution and the EU framework). See Decree nr. 138/2011, art.art.art.art.8. Moreover, the El-Khomri project currently being discussed by French legislative bodies presents as its main feature the possibility for company-level agreements to derogate from sectoral collective agreements and also from the rules of the *Code du travail*

agreement[13]. From this strengthened position employers may be able to put significant pressure on labour standards and on the exercise by workers and their representatives[14] of the rights to which they are entitled, hindering their effectiveness and increasing precariousness and inequality.

The context of rigour and austerity consequent to the economic and financial crisis has significantly accelerated the pace and the reach of deregulatory interventions in labour law, which in some cases have been specifically requested of the national governments of the Member States in economic difficulties[15].

Therefore, even in the case in which a legal frameworks includes a set of provisions which specifically refer to group collective bargaining and regulate some of its features[16], this recognition is not *per se* sufficient to define the existence of an intermediate level of negotiation allowing the definition of common standards in all the various companies and counteract the decentralization of collective bargaining. In order to identify a specific level of negotiation and to affirm its autonomy, it is necessary to verify its specialization with respect to the higher levels and its ability to conform the lower level agreements[17]. In particular, the agreement reached at the level of the individual company should not be able to deviate from the contents of the deal signed at group level, whether regulating

---

[13]This possibility is now explicitly provided in the Spanish system by the so-called *clausula de descuelgue salarial*. (art.85.3,c) of the ET). The modification cannot be however implemented unilaterally by the employer but must derive from an agreement with workers' representatives or from the mediation by the labour authority. Furthermore, such a modification is linked to specific business reasons or economic circumstances and can only be carried out for a limited period of time

[14]Davezies P. 2014, *Individualisation of the work relationship: a challenge for trade unions,* ETUI Policy Brief N°3/2014

[15]The most significant changes have been implemented with regards to working time, working time arrangements, atypical work, dismissal and redundancy rules, IR structures and procedures; while the interventions in the former two areas appear as temporary, the reforms on redundancy rules and collective bargaining systems represent more permanent modifications. In other cases the role of the social dialogue institution has been reduced and the trade unions rights and prerogatives have been transferred to different bodies such as works councils and workers' representatives. See Clauwert S., Schömann I. 2012, *The crisis and national labour law reforms: a mapping exercise*, ETUI Working Paper 2012.04

[16]The French law 4 May 2004 has formally recognized the "accords de groupe" which were previously mentioned in the the Labour Code only with regard to the the possibility of concluding group agreements in specific areas (such as incentive wages) and, more importantly, were assimilated by the Cassation Court to company agreement. The legislative intervention, while reaffirming that such agreements are subject to the same principles regulating company-level bargaining, provides that the negotiation is carried out between the employer of the main company and representatives of the other companies of the group and trade union coordinators taken from the trade union representatives (*délégués syndicaux*) of the companies involved, and also states a series of formalities and procedural requirements needed for its validity. See Meriaux O., Kerbourc'h J.-Y., Seiler C. 2008. *Evaluation de la loi du 4 mai 2004 sur la negociation d'accords derogatoires dans les entreprises*. Document d'Etude DARES n.140

[17]Minolfi 2014, p.6

core wage and working conditions[18] or rather focusing on specific aspects of the employment relationship (as training opportunities for workers or redundancies), or setting standards and procedures in fields such as health &safety and technological innovation[19].

The critical issue when it comes to collective bargaining in a group of enterprises is represented by the possibility of lower level agreements to derogate to deviate *in pejus* from the rules set by legislation or by a collective agreement of higher level: in this sense it is possible to highlight the Spanish case, in which the *convenios colectivos* at group level are regulated[20], but the company-level agreement can, in fact, derogate from them and set lower standards and condition. Similar group agreements, while allowing the accommodation of specific interests, do not appear able to effectively modify the trends already in place in most national settings, which have been based and justified on the position that enhanced flexibility of the labour markets represents one of the best responses to the fluctuations of the modern economic systems and have resulted in the implementation of the large-scale deregulatory reforms which have entailed the decentralization of collective bargaining from national or sectoral to company level[21].

[18]It has been underlined how the standard setting by group agreements could raise questions when the various companies involved in the negotiation operate in different production sectors, at least from the point of view of national/sectoral collective agreements applied. The definition of working and employment conditions for all the various entities would therefore cause a problem of consistency in the connection between contractual levels. Bavaro V., Laforgia S. 2014, *Contrattazione collettiva e "prossimità delle imprese". La struttura del contratto collettivo di filiera, distretto, rete d'imprese (*online at http://www.diprist.unimi.it/Reti_impresa/papers/14.pdf), p.8

[19]For a recent example in the Italian setting see Interpello Ministero del Lavoro nr. 17/2014, 6 october 2014

[20]Estatuto de los Trabajadores, art.87.1

[21]See on the subject Bellomo S. 2015, *Transformation and Functional Evolution of the Collective Bargaining* http://islssl.org/wp-content/uploads/2015/10/Italy-StefanoBellomo.pdf

3. Group bargaining in the EU: main issues and challenges

As noted, at supranational level a steadily increasing number of collective agreements[22] have been negotiated and signed between global unions and workers' representative bodies and management of MNCs through various forms of collective bargaining[23]. However, given the wide diversity of the norms on collective bargaining and with respect to the legal nature and status of agreements between labour and management, it is not possible to identify a common *core* on which the parties to a transnational company agreement - which by definition spans different countries and interacts with several legal systems - may base their decision to enter negotiations or from which they can derive a binding effect for the agreement reached[24].

At EU level, notwithstanding the relevance of this setting in the context at hand[25] as well as a long-standing interest by EU institutions and social partners in fostering the development of a clear set of rules on the matter, no concrete result has been achieved[26]; therefore no framework for EFAs is in place, with the consequence that a series of very important issues pertaining to their constitution, functioning and enforcement still remain in need of a clarification in order for this instrument to represent an integral part of the European IR system.

---

[22]The extremely varied "nomenclature" on the matter uses a wide set of terms combined to give birth to a series of definitions and acronyms not seldom referring to the same kind of instrument and dependent on the position of the actors involved in the negotiations (EIFs, EWCs and national trade unions). Jagodzinski 2012, p.28

[23] See da Costa I., Pulignano V., Rehfeldt U., Telljohann V., *Transnational negotiations and the Europeanization of industrial relations: Potential and obstacles* in *EJIR* 2012-18 and Blanpain R., Marassi S. 2015, *Globalization and Transnational Collective Labour Relations. International and European Framework Agreements at Company Level*, Kluwer Law International

[24]In some istances "model agreements" have been elaborated by global and European unions to support their affiliated organizations in negotiating, signing and implementing TCAs: these agreements cannot be however considered as mandatory but only provide a working structure and guidance on existing TCB practices

[25]In particular, it must be considered the legal seat of many of the MNCs involved in the signature of such agreements is represented by EU countries and the potential for legal regulation on the matter. See in particular art.5.2 TEU, art.7 TFEU (principle of conferral of powers), artt. 4.2, 5.3 and 153.1 TFEU (EU competence on internal market and social policy): another potential option relies on the provisions on social dialogue (Artt. 155.2 and 152 TFEU) supported by art.28 CFREU

[26]See Ales E., Engblom S., Jaspers T., Laulom S., Sciarra S., Sobczak A., Valdes Dal-Re F. 2006 *Transnational collective bargaining: past, present and future. Final report*, Eurofound 2009, *Multinational companies and collective bargaining*, Papadakis K. (ed. by) 2011 *Shaping Global Industrial Relations.The Impact of International Framework Agreements*, Eichhorst W., Kendzia M.J., Vandeweghe B. 2011, *Cross-border collective bargaining and transnational social dialogue*, European Commission 2012, *Report - Expert Group – Transnational company Agreement* and Sciarra S., Fuchs M., Sobczak A. 2013, *Towards a Legal Framework for Transnational Company Agreements - Report to the ETUC*

With regards to the subjects involved in the negotiation, a critical aspects is represented by the legitimacy of the negotiating agents; In order to ensure a genuine negotiation it is necessary avoid a top-down approach, which would interfere with the national dimension in which the agreements concretely take place, by involving all actors involved in the negotiation. It is therefore necessary to establish a system that can ensure a proper mandate from all relevant national bodies[27] and allows to select actors which can effectively and fairly represent workers opinions, and are able to resist control and intervention by employers.

Within the various proposed frameworks the role and entitlements linked to the constitution of EFAs are usually assigned to trade unions rather than other representative bodies such as the EWCs[28], which have nonetheless made use of their prerogatives[29] to negotiate transnational agreements[30] and monitor their application. While the EWCs are not necessarily adequate and reliable tool for collective bargaining at cross-border level may be founded, and it is only for the trade unions to create the link between their membership and the negotiation with the management side, in several cases TCB has been conducted by *ad hoc* trade union committees usually led by a dominant actor such as the unions of the parent company or even by the management itself.

The definition of cooperation mechanisms and networking tools between unions and EWCs could yield positive effects in consolidating effective negotiations at the transnational level, given the latter's bargaining experience acquired through the evolution of their role and their technical capacity in dealing with many aspect linked with the specific features of MNCs, deriving form their embeddedness and involvement in transnational settings but also from specific training programs implemented in order to enhance the competences of its members.

For what it relates to the contents of the negotiation, the main issues concern the fact that most agreements mention (ILO) *standards*, (UN) *principles*, (OECD) *guidelines*:

---

[27] van Hoek A. A. H., *Finding a legal framework for transnational collective agreements through international private law,* CSECL Working Paper No.2016-02

[28]Perulli A., *Contrattazione transnazionale nell'impresa europea e CAE: spunti di riflessione* in *Dir. rel. ind.,* fasc.2, 2000

[29]While, according to the legal framework set by EWC Directives (94/45 and 2009/38) such prerogatives do not include of foresee any involvement in TCB (leaving unanswered the question over their legal capacity to negotiate) EWCs are the only form of workers representation at transnational company level. Hassel A. 2015, *Workers' Voice and Good Corporate Governance in Transnational Firms in Europe - Open Questions*, p.19

[30]Frosecchi G., *GDF Suez Transnational Collective Agreement on Health and Safety: EWC as negotiating agent and the relevance of the ETUF leading role,* WP CSDLE Massimo D'Antona.INT–119/2015, pp.14 and ff. and Gabathuler H. 2015, *European Works Councils and transnational company agreements on restructuring*

these represent very "soft" and ultimately non-binding instruments, and do not refer to wages and working conditions but rather to the establishment of more elementary labour rights, linked to the concept of decent work. At EU level the regulation of labour rights [31]should be carried out within the classical relationships and dynamics of European integration: EFAs could play however play a complementary role when utilized as a supporting tool in setting functionalized measures in the definition of specific subjects such as the promotion of health&safety or work/life balance.

Granting these agreements a different scope than domestic bargaining would also allow to avoid the overlapping of this further level of negotiation with the existing hierarchical bargaining structures and ensure the compatibility of the contents of the EFAs with the standards set at national level.

In this sense, the question of the binding effect of the transnational texts does not appear of fundamental relevance, given that these agreements do not intend to regulate working conditions across national frameworks; however, a "soft" approach[32] appears unsuitable for addressing the effective implementation of EFAs. The cross-border effectiveness, implementation and enforcement represents some of the main unsolved issues[33] which hinder the development of these instruments and can be directly traced to the lack of formal and legal rules.

The creation of a legal framework for EFAs undoubtedly represents a highly complex task but would allow this kind of agreements to become an effective IR tool to address the power balance between management operating at trans-national level and nationally rooted labour, in particular going beyond an enforcement based on customary rules or voluntary options, which do not appear sufficient to reduce the legal uncertainty affecting these instruments.

However, the provision of uniform legal effect must take into account the significant diversity of the legal systems governing collective agreements in place in the various Member States: an intervention of this kind would represent an invasive interference with the national collective bargaining systems and would also present the risk of creating a

---

[31]Based on international standards, the EU Treaties, the CFREU, and in specific items of secondary EU law

[32]Fichter M., McCallum J.K. 2015, *Implementing global framework agreements: the limits of social partnership* in *Global Networks 15, supplemental issue*

[33]Lo Faro A. 2011, *Bargaining in the Shadow of "Optional Frameworks"? The Rising of Transnational Collective Agreements and EU Law*, *EJIR*

fragmented framework of collective agreements with different legal effects (depending on the level of negotiation) within the same geographical area[34].

A viable regulatory option could be represented by the conferral to the EFA of the same legal effect of (company) agreement concluded at national level; such a solution would undoubtedly take into due consideration the differences in the national industrial relations and labour law systems and create a straightforward connection between the result of the European bargaining with structures and practices already in place in the domestic setting.

However, this framing would only partially provide the required uniformity in the implementation of framework agreements, and does no appear sufficient to address and solve the continuing issues concerning the enforceability of EFAs, both within the trade union structures involved in the negotiations and their potentially dissenting affiliates at national level[35], but also with respect to the tools available to the trade unions against employers in breach of the provisions of the agreement reached on the basis of the various national frameworks in which the agreement produces its effects[36].

---

[34]Moreover, an intervention of this kind would not be able to address the continuing differences in collective bargaining systems when non EU-actors are involved in negotiation alongside Union counterparts. Zimmer 2012 in Salvo Leonardi (eds.), *European Action on Transnational Company Agreements: a stepping stone towards a real internationalisation of industrial relations?*, p.33, Cafaggi F. 2013, *The Regulatory Functions of Transnational Commercial Contracts: New Architectures*, in *36 Fordham Int'l L.J.*

[35]This critical aspect could be addressed and partially prevented through effective selection and mandate procedures, allowing an effective involvement of national trade unions enabling the European trade union federations at EU level to negotiate on their behalf (see above with reference to legitimacy of the negotiating agents for EFAs), as well as resorting to tools and instruments of international private law to ensure the adhesion of the national affiliates of the decisions undertaken by at supranational level and their compliance in implementing the framework agreement. Peruzzi M. 2014, *Collective Power Across The Borders: the Case of Labour Representation in European Framework Agreements*

[36]In this perspective the provision of a dispute settlement mechanisms may also be deemed necessary given that similar national systems already may not be applicable in a transnational setting and that, while in private international law it is possible to identify conflict-of-laws rules regarding individual employment contracts, no such references exist in relation to collective agreements.