# THE EVOLUTION OF COLLECTIVE BARGAINING: OBSERVATIONS ON A COMPARISON IN THE COUNTRIES OF THE EUROPEAN UNION

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## I. COLLECTIVE BARGAINING AND THE VALUE OF THE COMPARATIVE APPROACH

This article aims to present a comparative legal analysis of collective bargaining and its evolution in a large number of European countries.

National debates on collective bargaining systems and the role of labor law in shaping their evolving structure are sometimes influenced by an excessively self-referential tendency that leads the protagonists to isolate themselves from the broader context and remain trapped within the mesh of a contingent analysis. In attempting to look beyond national debates the intention is certainly not, however, to negate their specific and in some respects unique nature. Rather, the aim is to place them in the context of common trends shared by other countries and to demonstrate their link with external factors such as the impetus toward forms of supranational coordination or the pressure of Community obligations. The comparative approach facilitates an understanding of changes occurring at both national and supranational level and enhances progressive interpretations of existing laws.

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If we look back and make a fresh historical analysis of the evolution of collective bargaining in European countries, we find that an innovatory impetus emanated, in the early 1960s, from the High Authority of the European Coal and Steel Community (ECSC), which funded a comparative study in the then six Member States.[1] The topicality of the method adopted in that study consists in favoring the search for similar lines of development within the market sectors of reference, pointing to the close links that each collective bargaining system has with national legal orders.

What Giugni describes as the "integration" of bargaining systems into economic and legal systems depends on a great many variables such as the ideology characterizing trade union movements and the weight of institutions active in the labor market. Where such integration occurs, one of the consequences is the spread of similar rules and practices governing collective bargaining across all the main sectors of the economy. Further elements of uniformity are introduced under the effect of centralized agreements, more and more of which are signed as more sectors become uniform. It is this situation, found in many western European countries, which prompts Giugni to emphasize that the United States and the United Kingdom constitute examples that cannot easily be included in a straightforward legal comparison owing to the differing distribution of collective agreements in areas of economic activity and to the different history and composition of their trade union movements.[2]

It almost goes without saying that the methodological premises adopted by Giugni remain valid, despite the major changes that have since taken place in national collective bargaining systems. The need for caution in comparing the U.S. system and the U.K. system with continental systems is still very real and often referred to in today's literature.[3]

A keen interest in collective bargaining is also to be found in the first and highly significant experiment in comparative research headed by Otto Kahn-Freund in the early 1960s.[4] The topics studied in it

1. G. Giugni, L'evoluzione della contrattazione collettiva nelle industrie della Comunità 1953-1963 (Eur. Coal & Steel Cmty. 1967); Collana di diritto del lavoro (Eur. Coal & Steel Cmty.) (this was published under the auspices of the High Authority).

2. Giugni, *supra* note 1, at 2–3.

3. With regard to the current Italian debate, this gives justification for expressing some doubt regarding the selection of "company cases" presented by P. ICHINO, A CHE COSA SERVE IL SINDACATO? (Milan 2005). A different point of view, with references to the Italian case and the comparative debate is in B. Caruso, *Sistemi Contrattuali e Regolazione Legislative in Europa*, GIORNALE DI DIRITTO DEL LAVORO E DI RELAZIONI INDUSTRIALI 581 (2007).

4. *See generally* LABOUR RELATIONS AND THE LAW. A COMPARATIVE STUDY 1 (Otto Kahn-Freund ed., 1965) [hereinafter LABOUR RELATIONS AND THE LAW] for the especially

include the connections between statute law and voluntary systems of regulating pay and other labor standards, but above all it is pointed out that comparative legal studies are essential to an understanding of the processes of supranational harmonization.

Hence, there is solid support from the most authoritative European scholars for an undeniable common link between collective bargaining systems solely by virtue of their being driving forces within national economic systems brought together in a common market.

Let us take Italy as an example. Giugni's comparative work had an influence in the shaping of collective bargaining levels. In 1962 an innovative agreement (Protocol) was signed allowing decentralized plant bargaining to take place. Procedural clauses (*clausole obbligatorie*) were agreed upon in order to limit the matters to be dealt with at plant level. A hierarchical structure of the system was maintained, since the national sectoral agreement continued to play a significant role in setting normative standards. This innovation, at first opposed by the largest trade union confederation CGIL, was then accepted as a most efficient model, capable of satisfying different union ideologies. CGIL pursued the aim of widespread solidarity among workers and found the national agreement an indispensable tool for this. The trade union confederation CISL was more open to the plant level as a way of introducing some differentiation in wages linked to productivity and adapting some standards to specific organizational needs. Articulated bargaining as based on the model of this Protocol was the product of an industrial relations culture that was already mature and capable autonomously of overcoming very pronounced ideological obstacles among the trade unions and probing, through skillful use of procedural clauses inserted in collective agreements, the interests of the employers' associations. Although it did not slavishly imitate foreign models, it nevertheless embraced an understanding of similar phenomena that had been tried in other European countries.

If we take a leap forward to the early 1990s, another "father" of the comparative approach in labor law takes us by the hand in pointing out new paths to be followed.[5] From the "Swinging Sixties" onward, the history of labor law—and with it the history of collective bargaining—has certainly not been marked by catchy tunes impressed on the memory as the indelible stamp of an epoch filled with novel

relevant editor's "Introduction" that abounds in recommendations that are still valid today for the correct approach to a comparative method.

5. Lord Wedderburn, *Inderogability, Collective Agreements and Community Law*,21 INDUS. L.J 245 (1992).

developments. The sometimes confused and undoubtedly complex evolution of the subject carries with it interpretational difficulties caused by the progressive inroads made by a strong and inviolable system of inderogable rights. Comparative research has to confront structural problems such as the differing personal coverage of collective agreements and the differing ranking assigned to them in the hierarchy of regulatory sources.

In sketching the often uncertain boundaries of these ideas, Lord Wedderburn proposed thinking around "poles of strong or weak inderogability"[6] that, while taking account of the diverse functions of collective agreements as recognized within individual systems, would nevertheless have preserved for the collective agreement a status as an instrument regulating employment relationships. This study revealed the subsidiary function performed by collective agreements with respect to statute law, that of introducing derogations *in melius* but also *in peius*. It did so against the background of the uncertain developments in Community law, which at that very time, the start of the 1990s, confirmed the atypical nature of the solutions adopted at the supranational level. What was taking shape at that level was a highly specific system of collective relationships between the social partners and the European institutions, having no significant impact on national systems yet destined to become an important locus for dealings between supranational collective organizations.

Taking our cue from these examples of legal comparison, selected so as to remind the reader that collective bargaining has constantly attracted the attentions of scholars who have a very lively interest in grasping the evolution of legal systems as a whole, we can turn our gaze to the present-day panorama of comparative studies.

The first thing to be said about these studies is that they focus on detailed legal analysis of collective agreements and the bargaining agents who conclude them, in confirmation of the ever-increasing attention being paid to the outcomes achieved by bargaining and not merely to the description of procedures.[7]

6. *Id.* at 263.

7. *See*, *e.g.*, COLLECTIVE BARGAINING IN EUROPE (Ministerio de Trabajo y Asuntos Sociales 2005); *see also* the numerous publications funded by the European Trade Union Confederation. In particular, see *Collective Bargaining in Europe 2001* (European Trade Union Institute, G. Fajertag ed., 2002); E. Mermet & G. Gradev, *Collective Bargaining in Europe 2002* (European Trade Union Institute, 2002); R. Janssen & G. Gradev, *Collective Bargaining in Europe 2003/2004* (European Trade Union Institute, 2004).
The European Industrial Relations Observatory (EIRO) is an inexhaustible source of information. For a recent example see *Changes in National Collective Bargaining Systems Since 1990*, *available at* http://www.eiro.eurofound.eu.int/2005/03/study/tn0503102s.html.

A less profitable area of research is that pursued by those who, in the study of European industrial relations, opt instead to place the focus on outcomes in terms of *governance* and thereby undervalue the role of labor law in the integration process, confining themselves to describing a multi-level industrial relations system that is not well defined.[8] The kind of information most useful to an understanding of the processes of European integration is obtained, rather, from the study of bargaining levels and, more importantly, of the new content emerging in more or less homogeneous forms in collective agreements, often as a consequence of the transposition of European Directives.

In addition, both labor lawyers and industrial relations scholars focus on the study of pay policies, especially following the introduction of the single European currency.[9] Centralized agreements, found in many European countries, are also studied systematically by those who strive to comprehend the variety of solutions adopted by collective actors.[10]

Contemporary comparative research does not mask the difficulties inherent in collecting and analyzing comparable data. One such difficulty is posed by the as yet incomplete development of collective bargaining systems in some of the new Member States. This encourages an increasingly extreme method of functional equivalence between the legal institutes being analyzed and a growing emphasis on qualitative analysis that gives prominence to the social relevance of collective agreements as well as their legal status.

The need to disseminate unambiguous information among those who benefit from the results of comparative studies is ever more pressing. A correct use of comparison offers a good chance of triggering a profitable process of mutual learning and, if possible, cooperation between national collective actors, particularly those who

8. P. MARGINSON & K. SISSON, EUROPEAN INTEGRATION AND INDUSTRIAL RELATIONS (2004).

9. *See Collective Bargaining and Wages in Comparative Perspective*, BULL. COMP. LAB. REL. (special issue, T. Blanke & E. Rose eds., 2005); Colin Crouch, *National Wage Determination and European Monetary Union*, *in* AFTER THE EURO 203 (C. Crouch ed., 2000); THE IMPACT OF EMU ON INDUSTRIAL RELATIONS IN THE EUROPEAN UNION (Finnish Industrial Relations Association, T. Kauppinen ed., 1998). Critical remarks on wage moderation policies in the EU 15, not leading to significant increases in employment, are presented in a survey of collective bargaining trends carried on by ETUC. *See Collective bargaining trends in Europe*, 391 EUR. INDUS. REL. REV. 27 (2006).

10. L. Baccaro & M. Simoni, *I governi e la concertazione. Perché alcuni la vogliono altri no*, QUADERNI RASSEGNA SINDACALE 97 (2006), who use for their research the information published in *European Industrial Relations Review*, now an indispensable source for legal comparison as well.

set out to propose innovative formulas for coordination on a voluntary basis.[11]

## II. AUTONOMY OF COLLECTIVE BARGAINING SYSTEMS

By "collective bargaining system" we mean the complex network of relationships between bargaining agents at the various levels where negotiations are carried on. Norms and procedures come together in the system so as to vest specific negotiating powers in those who bargain, especially in situations where the outcome of bargaining consists in the reduction of normative standards or a different distribution of some resources.

For these reasons, the more recent evolution of collective bargaining in the major European countries is frequently tied up with the question of the "representativity" of trade unions. This enables the commentator to appreciate how the importance of trade union pluralism, viewed as an historical fact as well as a social phenomenon to be regulated, changes in different national realities. In the United Kingdom, in a kind of countertrend to other countries, there is concerned discussion of the possible decline of the trade union in favor of elected representative structures. There is criticism of the absence of "representativity" criteria in designating bargaining agents for derogation agreements, especially those provided for as sources of renvoi by rules transposing certain European Directives.[12]

In the analysis presented here, the term "evolution" carries no value judgment whatever and lends itself to a description of the changes that have occurred, accompanied by as objective an explanation as possible of the economic and institutional reasons preluding those changes. Again, it is Kahn-Freund who reminds us—as if to arouse the awareness of those who venture to make opportunistic or strategic comparisons—that the factors that most influence collective bargaining and, above all, are the only ones providing a valid basis for posing questions relevant to a comparison

11. In 1997 the German Metalworkers' Union proposed a pay policy "coordination rule" at transnational level, entrusted to observance by other national sectoral unions on a purely voluntary basis, using a database made accessible to the affiliated actors. Background empirical research on this subject can be found in T. Schulten, *On the Way Towards Downward Competition? Collective Bargaining under the European Monetary Union*, *in* COLLECTIVE BARGAINING UNDER THE EURO: EXPERIENCES FROM THE EUROPEAN METAL INDUSTRY 17 (European Trade Union Institute, T. Schulten & R. Bispinck eds., 2001).

12. P. Davies & C. Kilpatrick, *UK Worker Representation After Single Channel*, 33 INDUS. L.J. 121 (2004).

of the legal status, effective scope and normative and procedural function of collective agreements are political and economic factors.[13]

From this evolutionary perspective, given the numerous changes that have occurred on the supranational scene as a result of the increasingly advanced integration of the European market and the introduction of the single currency, it is useful to scrutinize in more detail a concept very dear to labor lawyers everywhere: autonomous collective bargaining.

The autonomy of a collective bargaining system is measured comparatively in relation to the degree of incisiveness exhibited by statute law, whether as an instrument of support for voluntary negotiating systems or as a substitutive regulatory instrument, or one fulfilling a purely alternative and subsidiary role with respect to solutions freely adopted by the collective actors. It was a central concept in the development of European labor law during the immediate post-war period, around which the rules of democratic systems for the representation of interests were constructed and barriers against legislative intervention violating freedom of association were erected.

In Italy and Germany, the achievement of autonomous collective bargaining signified the abandonment of rules inherent in authorization regimes. And in Spain, recognition of the right to bargain collectively as enshrined in Article 37(1) of the 1976 Constitution, in parallel with freedom of association, paved the way for endowing collective agreements with *erga omnes* applicability.

It is on the strength of the principle of collective autonomy, as given concrete shape in a strong normative function of collective agreements, that countries such as Italy, Germany, and Sweden did not consider it necessary to adopt legislation on a national minimum wage.

In the United Kingdom the repeal of the 1946 Fair Wages Act, which took place in the early 1980s with the advent of Thatcherism, followed in 1993 by the abolition of the Wages Councils, both of them equally traumatic events for labor law in that country, give grounds for critical assessments of the strength of purely voluntary collective bargaining systems when exposed to the sometimes raging wind of changing governments or market pressures. This may explain why the well-known "collective *laissez-faire*" formula, as an emblem of the virtuous relationship underlying the relationship between statute law and collective agreements, is not readily comparable to the

13. LABOUR RELATIONS AND THE LAW, *supra* note 4, at 5–6.

continental notion of collective autonomy, firmly rooted in the implementation of constitutional rights.

Furthermore, autonomy is a concept well suited to describing the position of the social partners within trilateral negotiations with governments or other public authorities. Even when such arrangements do not prelude the conclusion of collective agreements in the strict sense—as Finnish commentators, for example, proudly loyal to a self-sufficient model of collective bargaining, are quick to emphasize—they give rise to the formation of a consensus reached bilaterally, in accordance with rules chosen autonomously by the collective actors.

Ireland boasts a long-established tradition of this kind, dating back to the second half of the 1980s, with trilateral agreements ranging from economic measures to social policy reforms. The ambitious nature of this concertation model is demonstrated by the progressive inclusion in the negotiating process of representatives of civil society, confirming the political relevance of centralized pacts that increasingly go beyond the confines of exclusively industrial relations logics.[14]

Germany, although offering a scenario less propitious to the conclusion of trilateral pacts,[15] is notable for the "Alliance for Work," a pact that was signed in 1996 by the Kohl administration and the social partners and then survived the change of government in 1998.

Among the new Member States, in Malta concertation is intertwined with the notion of social dialogue; in Slovenia an innovative wage policy agreement was reached covering the years 2004–2005; and Hungary boasts an agreement reached in 2002, with the participation of a centralized consultative body, in order to launch important labor law reforms and allow derogations from the rules of the Labour Code on collective redundancies and to set minimum wage levels.

Likewise in Bulgaria and Romania, countries that have most recently become members of the EU, the practice of centralized pacts and social dialogue coincides with the launch of new democratic regimes and is mainly focused on measures to combat inflation.

14. Baccaro & Simoni, *supra* note 10, at 131–32, in drawing the conclusions of a study carried out on general trends in European countries and national cases selected on the basis of specific characteristics.

15. L. Baccaro & S. Lim, *Social Pacts as Coalitions of "Weak" and "Moderate": Ireland, Italy and South Korea in Comparative Perspective*, Discussion Paper 162/2006 (Int'l Inst. Lab. Stud. 2006) (quoting W. Streeck & A. Hassel, The Crumbling Pillars of Tripartitism (Cologne Max Planck Institute 2002, unpublished)).

## III. FOUR CRITERIA TO BE ADOPTED IN THE COMPARATIVE ANALYSIS OF COLLECTIVE BARGAINING

Thus, from both an historical and a comparative perspective, autonomy of collective bargaining seems to be a good that must be safeguarded. This perception derives from the study not only of national systems that are anchored to the so called principle of *favor*—in the Latin word—toward the employee but also of systems in which a stronger element of rationalization has taken over in regulating the relationship between bargaining levels in order to allow derogations from the previously mentioned principle.

This leads us to single out, as the guiding thread of an analysis of the trends in progress in the countries of Europe, four interpretative criteria used as keys to examining across the various countries where the changes have taken place.[16] These criteria are helpful in ensuring the right approach to our comparative survey and allow us to confirm the relevance of the legal method in the study of collective bargaining. It can already be said at this stage that observation of the more controversial phenomena to have emerged from comparison of the major European systems demonstrates the centrality of the collective agreement in the regulation of employment relationships and the widespread need to strengthen its multiple functions, in a judicious balance with statute law.[17]

There is also confirmation of the widespread presence throughout the EU countries of a national bargaining level, known by differing names but assigned a similar function. The decentralization of bargaining levels, a tendency common to the majority of countries but carrying different connotations in the new Member States, is a phenomenon that has its own specific features in each national system.

The tendency to strengthen the role of statute law, as if intending to lend reassuring support to the autonomous evolution of bargaining systems, should not be perceived as a retrograde development compared with previous regulatory arrangements. We need only recall, in confirmation of a slow and searching process of comparative evaluation of the changes in progress in European legal systems, the debate on the juridification of labor law that took place in the mid-1980s at the doing of a number of protagonists of European legal

16. I am grateful to M. Fuchs for this suggestion, which I have extended, taking my cue from the National Report on Germany compiled by him as part of the research project cited at the start of this article.

17. Since the reform of 2004 France is an example, albeit a controversial one, to be cited in this connection. See the contributions published in DROIT SOCIAL (June 2004).

culture.[18] It was not by chance that that debate was initiated, as a contribution to the theory of reflexive law, at the time when the shortcomings of welfare states had been dramatically revealed.[19]

The more considered evaluation emerging today, unlike previous experiences in which a perhaps excessive regard for the spontaneous phenomena in bargaining arrangements prevailed, is linked to the extraordinary interaction that has occurred between the law and collective agreements. Nowadays, the "hybridization"—to borrow Teubner's terminology—of the collective agreement, not a new phenomenon for labor law, is taking on particular colors under the influence of European law. The many varieties of solutions existing today reflect national characteristic traits that are deeply rooted, with shades of particular interest in the case of the choices made in the Scandinavian countries, countries in which the role of collective agreements as privileged sources in the regulation of employment relationships has remained untouched.

The relationship between the law and collective agreements[20] is also a lens through which we can observe the evolution of the regulatory techniques most widespread in European labor law. The connection between national sources of regulation of employment relationships as the fruit of autonomous choices made by national legislators, or of choices induced by compliance with the obligations of EU membership, is emerging in the major systems as the most salient factor to bear in mind.

Before embarking on this exercise in comparison, we shall look at the four criteria adopted as the basis for our legal analysis.

### *A. Freedom of Association*

Freedom of association is the most important principle underlying bargaining autonomy, and also the constitutional presumption that allows collective bargaining to be ranked in its own right in national legal systems. It represents the first criterion to be adopted in sketching the profile of a bargaining system and

18. *See* S. Simitis, *Juridification of Labor Relations*, *in* JURIDIFICATION OF SOCIAL SPHERES 113 (G. Teubner ed. 1987); J. Clark & Lord Wedderburn, *A Universal Trust? The British Experience in Labor Law*, *in* JURIDIFICATION OF SOCIAL SPHERES 163 (G. Teubner ed. 1987); G. Giugni, *Juridification: Labor Relations in Italy*, *in* JURIDIFICATION OF SOCIAL SPHERES 191 (G. Teubner ed. 1987).

19. *See* R. Prandini, *La "Costituzione" del Diritto nell'epoca della Globalizzazione. Struttura della Società-mondo e Cultura del Diritto nell'opera di G. Teubner*, *in* LA CULTURA DEL DIRITTO NELL'EPOCA DELLA GLOBALIZZAZIONE 191 (G. Teubner 1987).

20. See *infra* ¶ 4.

establishing the movable boundary between statute law and collective agreements.

Freedom of association is still overbearingly at the center of reformist maneuvers aimed at enlarging the space given to collective bargaining by renvoi from the law and conferring greater powers on bargaining agents, so as to enable margins of deregulation not in conflict with fundamental rights such as the right to health and safety at work or to equal pay.[21]

For example, the French *Loi Fillon* of May 4, 2004,[22] introducing the majority principle—namely, the principle of a consensus of the organizations representing the majority of employees in order to allow company-level bargaining in derogation from bargaining at the branch or higher level—is a clear sign of a civil law system adapting to a turbulent trade union pluralism likely to create situations where bargaining activity could be brought to a standstill. It is not insignificant that this sign is given in respect of a hierarchy of collective sources in which national agreements nevertheless rank first. However, a significant proportion of commentators point to the dangers inherent in the *Loi Fillon*, which has reduced the scope of the "*favor* principle" by limiting it to only four, albeit wide-ranging, matters entrusted to bargaining at national level.[23]

In Germany, too, the function of decentralized agreements in derogating from national agreements is expanding. There is an ongoing debate, not without divided opinions among scholars, on the constitutionality of the proposals being circulated and the advisability of reforming the entire collective bargaining system, with the

21. *See* G. Davidov, *Collective Bargaining Laws: Purpose and Scope*, 20 INT'L J. COMP. LAB. L. & INDUS. REL. 81 (2004) for an analysis ranging beyond the EU countries. For an original approach revisiting the import of Art. 11 of the European Convention on Human Rights with reference to the British *Wilson and Palmer* case, see K. Ewing, The Implications of Wilson and Palmer, 32 INDUS. L.J. 1 (2003). The author points out the passages in the Strasbourg Court's ruling in that, although not recognizing the right to bargain collectively as an essential element of freedom of association, it acknowledges the fact that this freedom finds expression as a right of employees to be represented by trade unions, including for the purpose of initiating negotiations with the employer, albeit without imposing on the latter an obligation to negotiate. For a different perspective, see PAUL DAVIES, MARK FREEDLAND, TOWARDS A FLEXIBLE LABOUR MARKET 117–18 (2007).

22. J. PELISSIER, A. SUPIOT & A JEAMMAUD, DROIT DU TRAVAIL 956–57 (22d ed. 2004); Alain Supiot, *La Riforma del Contratto Collettivo in Francia. Riflessioni sulla Trasformazione del Diritto*, 27 GIORNALE DI DIRITTO DEL LAVORO E DI RELAZIONI INDUSTRIALI 155 (2005).

23. Supiot, *supra* note 22, at 164–65, gives an account of the position taken up by the Constitutional Council whereby implementation of the *favor* principle, as not being a fundamental principle of constitutional rank, falls within the province of the legislature.

introduction of corrective measures anchored to the majority principle or to exercise of the veto right by qualified minorities.[24]

In Poland a singular confrontation is in progress among scholars concerning the legal status of collective agreements signed by employees' representatives and the buyers of companies undergoing privatization. In 1993 the Polish Constitutional Court held these agreements constitutional, as an expression of freedom of association. However, there is also an ongoing debate in this country concerning derogations from statutory standards that are being introduced by collective agreements despite this practice being considered *contra legem*.

### *B. Collective Status of Bargaining Parties*

It is not superfluous to emphasize that in identifying the interests on which collective bargaining is based it is useful to verify that the bargaining agents concerned are collective. Even in cases where it is an individual employer and not an employers' association at the negotiating table, the presence of collective employee organizations marks the start of negotiations whose final outcome is deemed under national legal systems to have meaningful effects regarding the regulation of employment relationships.

This second criterion suggested as a key to a comparison of collective bargaining systems is becoming all the more central in view of the increasingly widespread practice of personal negotiation between employers and individual employees, in the absence of collective agreements or in derogation from them. Examples of this trend are not virtual but common in a number of real-life national situations.

In addition to detracting from the significance of the normative function of collective agreements viewed as sources parallel with, if not assimilable to, statute law, the individualization of bargaining leads to an uncontrolled differentiation of the standards being applied and a potential erosion of employees' rights.

This is evinced by several recent rulings by the European Court of Justice regarding protection of the fundamental right to health and safety at work. Displaying a new attentiveness to the relevance of

24. R. Santagata, *La Contrattazione Collettiva in Germania: Tecniche di Decentramento e Vincoli Costituzionali*, 27 GIORNALE DI DIRITTO DEL LAVORO E DI RELAZIONI INDUSTRIALI 654 (2005).

collective agreements in the system of sources of law,[25] the Court takes a concerned look at the deregulatory trends in progress in some countries and the difficulties encountered by individual employees in discovering precisely which employment conditions are applicable. In some rulings delivered in reply to preliminary references made by British courts it is possible to detect in the Court's words a mistrust of collective sources that are not always accessible to individuals and in any case not as well known as normative sources.[26]

### *C. The Normative Function of Collective Agreements*

This third criterion goes to the very heart of collective bargaining systems and makes it possible to compare, on the basis of functional equivalence, very diverse mechanisms for endowing collective agreements with *erga omnes* effect.

There are at least two countries, Italy and Denmark, in which such effect is achieved without specific legislation. The *de facto* regime in which collective agreements operate is not without relevance as regards the transposition of European Directives.

In Italy the trilateral "Christmas Pact" of 1998 provided for specific transposition procedures, indicating that the legislature should take account of what had been agreed between the collective parties. In Denmark the threat of the Commission initiating infringement proceedings for failure to transpose the Working Time Directive correctly induced the social partners to accept a kind of extension of the effective scope of collective agreements via statute law.

A different example is to be found in the case of Ireland, a system in which, under a provision of the 1946 Industrial Relations Act (albeit almost never used by the social partners), non-binding collective agreements can *ex lege* be registered by the Labour Court, if

25. For a case in which, in ruling on a preliminary reference submitted by a German court, the ECJ broaches the question of the possibility of derogating from maximum weekly working hours in a sectoral or company-level collective agreement, see C-397/01 Pfeiffer v. Deutscher Rotes Kreuz, Kreisverband Waldshut, 2004 E.C.R. I-8835. Innovatively, the Court states that the obligation on national courts to interpret rules in conformity with Community law applies to the whole body of rules of national law, including collective agreements.

26. *See* cases C-131/04 and C-257/04, C.D. Robinson-Steele v. R.D. Retail Services Ltd., Michael Jason Clarke v. Frank Staddon Ltd. and J.C. Caulfield, C.F. Caulfield and K.V. Barnes v. Hanson Clay Products Ltd., 2006 E.C.R. I-2531, the ECJ examines preliminary references submitted by British courts requesting a ruling on derogations introduced by individual contracts of employment or collective agreements regarding effective enjoyment of the right to paid holidays as replaced by a compensatory payment in lieu. Also in a case from the Netherlands, C-124/05 Federatie Nederlandse Vakbeweging (FNV) v. Staat der Nederlanden, 2006 E.C.R. I-3423, the Court emphasizes that derogations from the right to enjoy paid holidays may not be introduced via collective agreements.

the signatory collective parties so wish, in order to extend their effective scope to cover all employees of the class, type, or group to which they relate. And following an amendment introduced in 2004 the Labour Court can, by binding decision of its own, order an employer with whom no collective bargaining arrangements are in place to apply the pay and other conditions of employment of the market sector in which he operates or of a similar sector.

### *D. The Procedural Function of Collective Agreements*

The fourth suggested criterion marks the more recent evolution of collective bargaining. Although the procedural function of collective agreements may well be considered merely complementary to their normative function, it takes on a distinct importance in systems in which the approach to collective bargaining adopted either by the law or by the collective actors themselves is highly formalized. We need only think of the way in which it may predetermine the content of decentralized collective agreements, or of the mechanisms for delegating certain matters from the centralized level to other bargaining levels.

The criterion in question takes on particular relevance within systems of trilateral bargaining such as, for example, Italy's "Ciampi" Protocol of 1993 and Spain's *Acuerdo Interprofesional* of 2003. And again in Spain, the tripartite agreement signed in July 2004 by the new Socialist Government sets itself similar objectives, confirming the recurrence of this form of bargaining in the Spanish system independently of the political orientation of the government in office.

Another example to be cited is in the Netherlands, where the 1993 Agreement significantly entitled "A New Direction" indicates the importance of enlarging opportunities for decentralized bargaining, starting from centralized bargaining. A similar tendency is discernible in Sweden, where in 1997 a wide-ranging agreement (the "Industry Agreement") on bargaining procedures was reached between the main trade union and employers' confederations with the objective of setting precise and programmable expiry dates for pay policies.

In Hungary the articulation of collective bargaining between different levels is left to the option of the bargaining agents, despite the fact that the law confers binding effect on both national and company-level agreements.

These examples are notable for the variety of solutions produced by agreements with a purely procedural content. Such agreements

create a network of reciprocal obligations between the signatory organizations even with a view to general objectives to be achieved, for example controlling inflation through decentralized pay restraint policies, a practice that the Nordic countries share with some of the new Member States.

The potentialities inherent in the procedural function of collective agreements have yet to be discovered at transnational level. The attempts at coordination of pay policies launched by the Doorn Group, and those pursued in the late 1990s on the initiative of the German Metalworkers' Union,[27] were based on the presumption of a common interest of national bargaining agents in observing guidelines agreed at supranational level.

The common factor underlying these initiatives is that they bank on an emergent notion of transnational collective interest that is not entirely foreign to the language of several European Directives.[28] There is nothing to prevent new areas being explored in future for developing the coordination of bargaining agents, with or without the support of European law.

Major procedural agreements, still very widespread and certainly not abandoned by the employers' associations,[29] are not yet relics of the past, as those seem to think who champion an extremist modernization of national systems that eschews a more broadly based formation of consensus in favor of decentralized levels alone.[30]

27. *See supra* note 11; for a description of the mode of operation of the Doorn Group, made up of trade union confederations of Belgium, the Netherlands, Germany, and Luxembourg, see D. Sadowski, O. Ludewig & F. Turk, *Europeanization of Collective Bargaining*, *in* INTERNATIONAL HANDBOOK OF TRADE UNIONS 465 (J.T. Addison & C. Schnabel eds., 2003).

28. We need only mention the notion of "transnational information and consultation of employees" that inspires Directive 94/45, *available at* http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31994L0045&model=guichett, on European Works Councils and that of the "transnationalization of the employment relationship" as functional to the transnational provision of services and referred to in Directive 96/71, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996L0071:EN:NOT, on Posted Workers. Some of these topics are discussed in an article presaging current-day developments. *See* A. Lyon-Caen, *La Négociation Collective dans ses Dimensions Internationales*, 4 DROIT SOCIAL 352 (1997).

29. For a comparative analysis based on some national cases, see A. VATTA, GLI IMPRENDITORI E LA CONCERTAZIONE IN EUROPA (2001).

30. In the case of Italy we need only cite the new spate of central agreements at confederation level (i.e., covering all employers and employees) that began immediately after the promulgation of Decree 276/2003, introducing major reforms of the labor market: the Agreement of November 13, 2003 on training/work experience contracts; the Agreement of February 11, 2004 on transitional rules for first-time employment contracts; and, equally significant, the Agreement of March 3, 2004 on the small-scale craft trades sector.

## IV. REGULATORY SCHEMES AND MAIN EVOLUTIONARY TRENDS OF COLLECTIVE BARGAINING

Mention has already been made of the difficulties of producing comparable data in studies of national collective bargaining systems, owing to the profound differences that mark the history of trade union movements and to the strong social and institutional implications by which both legislators and economic actors are guided in very different ways.

To this there must be added the fact that no potential—and for the present purely hypothetical—Community intervention aimed at introducing a new transnational level of collective bargaining could ever replace the national rules and practices currently in force or, still less, initiate a process of their harmonization. The optional nature of the "framework for transnational collective bargaining at either enterprise level or sectoral level," confirmed in the European Commission's own words,[31] has also been illustrated in the recent study by a group of experts.[32] It is therefore beyond dispute that each bargaining system forms part of the legal order from which it originated as an unalterable given, left in the exclusive and well-informed hands of national collective actors and institutions.

Since the use of national "models" of collective bargaining does not sit happily with the notion of the evolution of bargaining that is central to the present comparative study, it seems more helpful to attempt to describe a number of evolutionary trends in progress by using regulatory schemes.

Rather than giving a static snapshot, schemes lend themselves to being read as a dynamic picture, i.e., one that captures the choices and proposals for change made by the collective actors. The adjective "regulatory" indicates that the schemes incorporate diverse functions, all of them directed toward the creation of rules, be they binding or purely procedural.

As we shall see, regulatory schemes are interconnected and in some cases may partly overlap, confirming the complexity of any attempt at comparative analysis in this field.

The present attempt to classify collective bargaining activity and its outcomes in terms of collective agreements endowed with a specific

31. Communication from the Commission on the Social Agenda (9 February 2005) 8.

32. E. Ales et al., *Transnational Collective Bargaining: Past, Present and Future. Final Report* (EURO. COMMISSION, DG EMP., SOC. AFF. & EQ.OPPORTUNITIES, UNIT D2, February 2006). Summaries of the Report in French, and German are published in DROIT SOCIAL 623 (2007); ZESAR 150 (2007).

relevance in national systems is also prompted by the intention to give greater prominence to the binding effects emanating from those systems. To use what is perhaps non-technical language but one parallel to that of the social sciences, we may talk of legal indicators, i.e., features derived from the analysis of individual systems that are useful in comparing collective agreements as regards their resultant effects for individual employment relationships.

An innovative sociological study of the spread of collective bargaining in European countries as a means of regulating employment relationships focuses on new ways of measuring coverage by collective bargaining, adopting indicators that complement figures on union density.[33]

The coverage rate is defined as the number of employees to whom collective agreements apply as a proportion of all wage- and salary-earners working under a contract of employment in the various areas of economic activity. In other words, the figure on union density, from which it is possible to infer the application of collective agreements to union members, needs to be compared with an indicator that illustrates "the real rather than potential extent to which employees are subject to union-negotiated terms and conditions of employment."[34]

The purpose is to understand why there is a gap between union density and the coverage rate of collective agreements. It may be that bargaining agents simply do not include all employees working in the area to which the collective agreement relates; or there may be a deliberate decision to exclude certain groups, such as those with non-standard contracts and with reduced working hours; there may also be exclusions that are dictated by the law, for example in the case of public sector employment or certain employee categories. In addition, there may be a discrepancy in the expiry dates of collective agreements and the procedures for their renewal.

Once all the necessary adjustments have been made, the study in question finds that in the EU countries the figure for the coverage rate of collective agreements is significantly higher than the figure for union density. It also confirms, taking account of the various procedures for the extension of collective agreements and other mechanisms that determine their applicability, that the role of national or "multi-employer" agreements has been preponderant and

33. J. Visser, *Patterns and Variations in European Industrial Relations*, *in* EUROPEAN COMMISSION, INDUSTRIAL RELATIONS IN EUROPE 2004 11 (Off. Official Pub. Euro. Communities, 2004).

34. *Id*. at 30.

has provided economic systems with stability, particularly in absorbing idiosyncratic shocks linked to crises in individual companies or groups of companies.[35]

What will be said below in analyzing the regulatory schemes adopted as a means of illustrating the evolution of collective bargaining in the major EU countries largely coincides with the results arrived at by Visser. Two aspects need to be pointed out. The first concerns the difficulty of defining decentralized bargaining in unambiguous terms; the second, closely linked to the first, has to do with the variety of possible solutions for endowing collective agreements with generalized applicability.

Decentralization of bargaining, pictured by some as an escape route from national agreements, is often the result of centralized choices aimed at avoiding competitive elements in pay policies. The example of the United Kingdom remains isolated in comparative terms and appears to give rise to divided opinions.

From the mid-1980s onward in this country the withdrawal from collective bargaining of a number of companies, mainly in several industrial sectors, was significant enough to represent, according to some commentators, a decline in bargaining at all levels.[36] Whereas single-employer bargaining is on the increase, more localized bargaining at establishment level is becoming less important, thereby including large numbers of employees in the same decentralized agreement. This trend is referred to by other authors as a centralization of bargaining at company level, with a move away from national agreements.

Conversely in Austria, a country with a very different tradition of cooperation between the collective actors, reference is made to "organized decentralization" as a phenomenon linked to the inclusion in national agreements of "opening-up clauses" allowing delegation to the company level similar to that provided for in the German system.

In Spain trade unions are aiming to gain more control over decentralized bargaining in view of the high percentage of agreements signed by works councils. In Ireland the drop in union membership in multinationals serves to explain an opposite trend in the form of a reduction in decentralized agreements.

In Poland the emergence of free trade unions, most notably Solidarność, encouraged the decentralization of bargaining, not

35. *Id*. at 32–35.

36. R. Hyman, *The Rise and Decline of Collective Bargaining as a Mechanism of Employment Regulation in Britain*, *in* COLLECTIVE BARGAINING AND THE SOCIAL CONSTRUCTION OF EMPLOYMENT 187, 187–204 (M. Alauf and C. Prieto eds., 2001).

without fears on the part of the government authorities, who were anxious, rather, to pressurize enterprises that were still state-owned toward sectoral bargaining in line with more traditional and reassuring patterns of representation.

As regards endowing collective agreements with generalized scope—and hence increasing the number of individuals to whom they apply—it should be noted that in some cases, for example in Hungary after the adoption of the new Labour Code in 1992, the reasons underlying an increase can be wholly contingent. Again in the case of Hungary, only three years later the number of collective agreements fell as a result of restrictive measures imposed by the Ministry of Finance.

In Italy, legal intervention in the public sector caused the coverage rate of collective agreements to rise above the figure for union density.

In Sweden, as indeed in Italy in the private sector despite the differing presumptions inherent in their systems, the courts play a fundamental role in ensuring the enforceability of collective agreements even when employers do not belong to an employers' association or employees are not union members.

Many central European countries witnessed a decline in the coverage of collective agreements during the period of transition to a market economy. This gave rise in many cases to the use of state registration of collective agreements in order to stabilize their normative function.

In continuing this line of thought and relating it to the findings of the sociological study mentioned earlier, an attempt will be made in the following paragraphs to offer a variegated, if not entirely exhaustive, picture of the ways in which statute law and collective agreements are linked.

### *A. Scheme I: Collective Agreements Precede Legislation*

This regulatory scheme includes examples in which, by virtue of its autonomy and particular incisiveness in regulating certain matters, collective bargaining is able to exert a positive influence on the legislature.[37]

37. It is quite a different matter to provide for consultation of the social partners before adopting legislation. One such example is to be found in Art. 525 of the new Portuguese Code, which holds unconstitutional any legislation that is adopted without observing the prior consultation procedure.

In France a central confederation-level agreement on lifelong access to vocational training was signed in 2003. Its main innovation consisted in providing for an "individual right" to training and indicating new ways of enforcing such a right. It was followed in 2004 by a statute inspired by the agreement that links the right to vocational training with the European Employment Guidelines.

Still in France, the ground for the adoption of the *Loi Fillon* mentioned earlier was prepared by the central confederation-level agreement of 1995 on the reorganization of bargaining levels that was renewed in 1999 and then formulated in 2001 as a "joint option" of the social partners.

In Greece it is common practice for statute law simply to ratify what is laid down in collective agreements regarding health and safety at work, measures to combat unemployment, and vocational training.

In Sweden a collective agreement signed in the mid-1980s challenged the absence of legislation on temporary-employment agency work and introduced pay and other terms and conditions of employment for agency employees. The first piece of legislation on the subject was adopted in 1991, followed in 1993 by a second Act that removed the remaining restrictions on the use of this new employment relationship. Innovative agreements have since been signed in the 2000s aimed at progressively reducing the differences in treatment between such temporary workers and permanent employees as regards both the hours of work guaranteed and rates of pay.

In Ireland the matters covered by the centralized agreement on the "Sustaining Progress 2003–2006" program include a commitment on the government to amend the legislation on maternity and parental leave. This enabled the government to "armor-plate" a 2003 bill on maternity protection against any opposition, on the grounds that it reflected express agreement by the social partners.

In Finland the 2005–2007 Income Policy Agreement identifies the main areas in which new initiatives were to be taken by the government. For example, emphasis was put on "change security"—namely measures to be addressed to workers that had been made redundant—and on the improvement of family leave.

And in the case of Italy, to mention just one example, it was a national agreement signed between the confederations in 1996 that paved the way for the eventual adoption in 2002 of legislation transposing the European Works Councils Directive.

Without venturing to reach generalized conclusions, given (among other things) the diversity of the formulas adopted in the

examples cited, emphasis needs to be placed on the viability of centralized bargaining as an instrument of wide-ranging agreements and its propensity, at least in some national contexts, for acting as a point of reference for the legislators.

### *B. Scheme II: Collective Agreements are Subject to Legal Measures Extending their Applicability*

The German legislature is notable for a meticulous approach to dictating criteria for the extension of collective agreements to cover non-organized employers and employees. A request for such extension, submitted to the Minister for Labour—either at federal or at *Land* level—must originate from at least one of the parties to the collective agreement and be approved by a committee composed of three representatives from employers' and trade-union organizations, by a simple majority, provided (as required by law) at least 50% of all employees working in the area of employment concerned would be covered by the extended agreement.

In Italy the public sector is again notable for a solution peculiar to itself owing to the introduction of ARAN, a body representing *de iure* all public employees, as a bargaining agent.

In Romania and Slovenia collective agreements are subject to an official registration system, while in Bulgaria and Hungary there is extension by Decree.

In the Czech Republic an anomalous ruling by the Constitutional Court in 2004 held the ministerial procedure for the *erga omnes* extension of collective agreements to be in breach of the signatory parties' contractual freedom. For similar reasons, extension of the applicability of national agreements to non-signatory parties has also met with criticism from scholars and the social partners in Poland.

The *favor* principle is alive and well in most of the new Member States and also in the candidate countries. National courts sometimes add a novel touch, as in the case of Estonia, where derogability *in melius* has been deemed to accommodate even the creation of new rights via collective sources, provided there is no conflict with the spirit of the law.

In Greece and Cyprus too a hierarchical criterion governs the relationship between sources, in full observance of the *favor* principle.

### *C. Scheme III: Statute Law and Collective Agreements are Complementary Sources*

The most interesting examples falling under the heading of this regulatory scheme are to be found in Nordic systems such as those of Denmark and Sweden. Such systems embody the notion of "semi-mandatory law" in which statute law performs a role subsidiary to collective agreements, provided the labor protection standards involved are at least equal.

Reference has already been made to Denmark, where the traditionally voluntary status of collective agreements has had to be adapted to accept the need to use legislation to confer generalized applicability on sources transposing European Directives. One such example concerns the eventual transposition, in 2001, of the Part-time Work Directive. Using a procedure regarded as exceptional for Danish labor law, the legislature extended the major collective agreements containing clauses regulating part-time work to give them *erga omnes* effect.

This solution is a recurrent one in the Nordic countries, albeit using different formulas. In Sweden the relationship becoming established between statute law and collective agreements for the transposition of directives does not permit derogations from the minimum standards laid down by European sources.

Next, we can point to a relationship of interdependency between statute law and collective agreements in the rules governing derogations. For example, this happens in Sweden with regard to fixed-term contracts, where derogation can also take place at a decentralized bargaining level. A similar solution is to be found in the Netherlands, in the original terms of the 1999 Flexibility and Security Act. The Dutch Supreme Court ruled that derogations agreed on collectively are lawful and therefore binding on individual contracts of employment.

Even in Portugal, where a new Labour Code was introduced in 2003, the principle of derogability either *in melius* or *in peius* through collective agreements applies. Unusually for this national system, the role of statute law is becoming residual owing, among other things, to a system of compulsory arbitration for dispute resolution.

The choice made by the U.K. legislature is less straightforward. The Regulation transposing the Directive on fixed-term contracts provides that the upper limit on the number of renewals may be

removed in decentralized agreements whose collective status is questioned by some scholars.[38]

The Irish formula seems less controversial, in stipulating registration of collective agreements by the Labour Court whenever they introduce more flexible standards than those laid down by law. In such cases the Court also verifies that the agreements concerned are not in breach of European law.

## V. CONCLUSIONS AND PROSPECTS FOR THE FUTURE

The observations developed so far on the basis of valuable documentation to which, for brevity's sake, no reference has been made other than in the opening footnote, allow a number of conclusions to be drawn.

The evolution of collective bargaining exhibits some important common features in the major European countries. The elements of convergence are intertwined with the four criteria selected as keys to a comparative analysis. Since these criteria coincide with the founding principles of labor law in Europe, it can be confirmed that the solidity of the foundations certainly does not constitute an obstacle to changes. On the contrary, the constitutional principle of freedom of association seems to act as a flywheel driving virtuous processes of consensus creation, in centralized agreements—still very significant on the recent scene—and also in national and decentralized bargaining.

The vitality of collective bargaining, notwithstanding the contradictions increasingly creeping into national systems, depends on the channel of communication that links statute law and collective agreements together and that has never dried up. Whenever a voluntary source, as an expression of collective autonomy, asserts itself as a normative source with respect to a broad class of addressees, it offers the legislature a great deal of room for verification and detailed treatment. It may be observed that there are numerous national systems in which collective agreements are, in various ways, absorbed into formal acts, and others in which they stand on their own feet with the support of case-law interpretation. It is for this reason that, despite the urgency of opening up scope for decentralized bargaining, national legal orders seem inclined to keep national agreements alive, even if under diverse names.

38. C. Kilpatrick, *Has New Labour Reconfigured Employment Legislation?*, 32 INDUS. L.J. 159 (2003). What are known as "workforce agreements" can also exist in the absence of collective agreements and thus be reached in a situation of imbalance between the contracting parties, particularly when the number of employees involved is small.

The debate on "opening-up clauses," initiated in Germany but not unknown to other systems,[39] is emblematic. In view of a spread in bargaining introducing derogations even *in peius* from national agreements, there is discussion among scholars in Germany on the advisability of reforming the BetrVG (Works Constitution Act) in order to ensure the presence of representative bargaining agents and not just works councils. It hardly needs emphasizing that this reformist logic does not bypass the national agreement, but rationalizes its function.

The impact of the single currency in favoring pay policies linked to productivity increases has been less significant than predicted.[40] However, pay restraint motivated by reasons of austerity and the fight against inflation is frequently practiced by collective actors in both the old and the new Member States, within broad and concerted bargaining schemes often based on referral clauses delegating the matter from national agreements to decentralized agreements.

Productivity, on the other hand, also depends on optimizing the use of employees' skills, an objective better achieved, as seen in France, through major centralized agreements that fix the general criteria to be specified in particular local realities. This, as has rightly been noted, entails identifying those on whom productivity increases actually depend, when part of the production process is external to the company and possibly even outside the country in which it operates. Such broadening of horizons should induce bargaining agents at the decentralized level to become thoroughly acquainted with the segmentation of the labor market.[41]

As can be seen, the decentralization of bargaining is a complex phenomenon that has to be observed from more than one viewpoint. The gaps in the comparison are due to the lack of comparable data, but above all to the volatility of information on the parties who could potentially fall within the scope of application, especially from the perspective of a drastic reform of its functions.

39. *See* L. Bellardi, *Sindacato e Contrattazione Collettiva: Ragionando di Future Riforme*, QUADERNI RASSEGNA SINDACALE 186 (2006) for the notation that a similar idea for reforming the Italian collective bargaining system was contained in the final report of a committee set up to examine the 1993 Protocol and chaired by Giugni, a document that needs to be read anew in the context of the current debate and in the light of trends in other countries.

40. This is confirmed not only by the national reports compiled for the present research project but also by Baccaro & Simoni, *supra* note 10, who in their turn emphasize the frequent recourse to concertation at national level in response to the macroeconomic regime in which the European Central Bank operates. *See also* Vatta, *supra* note 38.

41. L. Gallino, *La Funzione dei Contratti Collettivi*, LA REPUBBLICA, Feb. 7, 2006, at 21.

It would therefore be useful for the national social partners to promote, more systematically than already happens for some sectors, the collection of comparable data on decentralized bargaining. The greater the likelihood of this coming about, the more progress is made by the initiative on the part of large European-scale companies to entrust bargaining powers to European Works Councils (EWCs).[42] Rather than demonizing this expanding practice, trade-union organizations could govern it through forms of transnational coordination, aligning themselves with EWCs, where it does not already happen as a result of a decision to that effect by the national legislature or social partners.

Were decentralized bargaining to represent the fulcrum of industrial relations policies coordinated at the supranational level, it could function as an observatory of current deregulatory trends so as to promote processes for the harmonization of labor standards, rather than competition between them. This could take place without depriving national agreements of their inherent autonomy—as regards both procedural presumptions and the legal consequences connected with rules on their applicability—but simply providing guidelines agreed at transnational level. European integration, as the history of labor law shows us, is also being achieved through a process of reconciling industrial relations cultures within increasingly advanced forms of mutual learning. It is undeniable that the use of derogation agreements at the decentralized level is a common trend in collective bargaining and, as such, one warranting the attention of reformists who are aware of more than purely national implications.

The transnational dimension of collective bargaining[43] could, in the future, acquire greater visibility as regards the widespread instances of the mobility of employees posted abroad in the context of the provision of services. A request for a preliminary ruling submitted by the Swedish Labour Court to the European Court of Justice has raised the controversial question of the extension of the applicability of collective agreements to posted workers, in accordance with Directive 96/71.

In the case in question, i.e., the *Laval* case, the description of the facts that have led to the controversy demonstrates that the

42. An account of these trends, and of the European dialogue at sector level which in some circumstances intersects with them, is given in the Final Report of the group of experts cited above in footnote 32.

43. *See* COLLECTIVE BARGAINING IN EUROPE, *supra* note 7, Part II; *see also* LA DIMENSIÓN EUROPEA Y TRANSNACIONAL DE LA AUTONOMÍA COLECTIVA ( A. Baylos Grau ed., 2003); Lyon-Caen, *supra* note 28, anticipatory comments.

potentialities of a new transnational collective bargaining need to be debated outside narrow academic circles.[44] The legal proceedings instituted by the Latvian construction company Laval un Partneri Ltd., which had won a contract to carry out building work on a school in a Swedish town, arise from the lack of a positive outcome to the negotiations with this visiting provider of services that were initiated by a Swedish trade union with a view to avoiding social dumping and ensuring equal treatment. The question on which the Court of Justice has to rule, namely the lawfulness of the forms of industrial action subsequently taken by Swedish unions and their possible conflict with the freedom to provide services, cannot obscure the presumptions underlying the dispute between the Latvian company and the Swedish unions.

Were transnational collective bargaining to become an operational instrument steered by the social partners, it could become a clearing house for divergent interpretations of the agreed rules applicable to posted workers. This would need to be based on presumptions shared by national trade union organizations in accordance with a coordination scheme to be established in the major market sectors of reference.

It is reported that a number of cases have occurred of workers from the new Member States employed in some Nordic countries at the worst conditions of pay. To avoid social dumping, a phenomenon that has not been witnessed in the EU 15, some trade unions are seeking cooperation agreements aimed at providing mutual assistance and exchanging information, with regard to workers posted from one country to the other.[45]

One final point has to do with the extension of the applicability of collective agreements to cover temporary workers, whether they be agency workers or individuals employed by companies as casual workers. In some countries—for example Sweden, Finland, and Austria—collective agreements provide for certain guarantees. The Netherlands is well known for its "phased" legislation designed so as to reward agency workers, once a certain number of years has passed,

44. Reference OJ C281, 12-11-2005, 10; Opinion of the Advocate General Mengozzi delivered on 23 May 2007, devoting significant attention to the Swedish system of collective bargaining. *See* R. Eklund, *The Laval case*, 35 INDUS. L.J. 202 (2006); G. Orlandini, *Diritto di Sciopero, Azioni Collettive Transnazionali e Mercato Interno dei Servizi: Nuovi Dilemmi e Nuovi Scenari per il Diritto Sociale Europeo*, 45 WP C.S.D.L.E. MASSIMO D'ANTONA (2006); T. Sigeman & R. Inston, *The Freedom to Provide Services and the Right to Take Industrial Action—An EC Law Dilemma*, 2 JURIDISK TIDSKRIFT 365–74 (2006/2007).

45. 391 EURO. INDUS. REL. REV. 3 (Aug. 2006).

by approximating their pay and other terms and conditions of employment to those enjoyed by other employees.

To conclude, the future prospects of collective bargaining cannot but depend on the clarity of rules conferring powers on those who bargain. Only transparent presumptions of industrial democracy can serve as a foundation for the future of collective agreements that are innovative in terms of content and open to the inclusion of new parties in their coverage.

In setting out to extol the value of comparison, as announced at the start of this article, the intention was to look beyond the context of national debates in a quest for suggestions capable of enriching current discussion and, if necessary, moderating certain polemic attitudes. In looking at experiences elsewhere and sketching the evolutionary features of collective bargaining, comparison has been used as a "cognitive" instrument.[46] The comparative method has been practiced by European scholarship, and has helped national lawyers to comprehend the European system in its early days. All this gives reason to hope that present-day research will likewise back the wish to introduce innovation and change with a beneficial anxiety to learn from one another.

46. As indicated by S. Simitis, in S. Sciarra, T. Treu, M. Weiss, Spiros Simitis, *Giurista Europeo*, 28 GIORNALE DI DIRITTO DEL LAVORO E DI RELAZIONI INDUSTRIALI 330 (2006)