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Theoretical, Comparative and Cross-border perspectives on the Legal Regulation of Collective Bargaining

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ANDREA IOSSA
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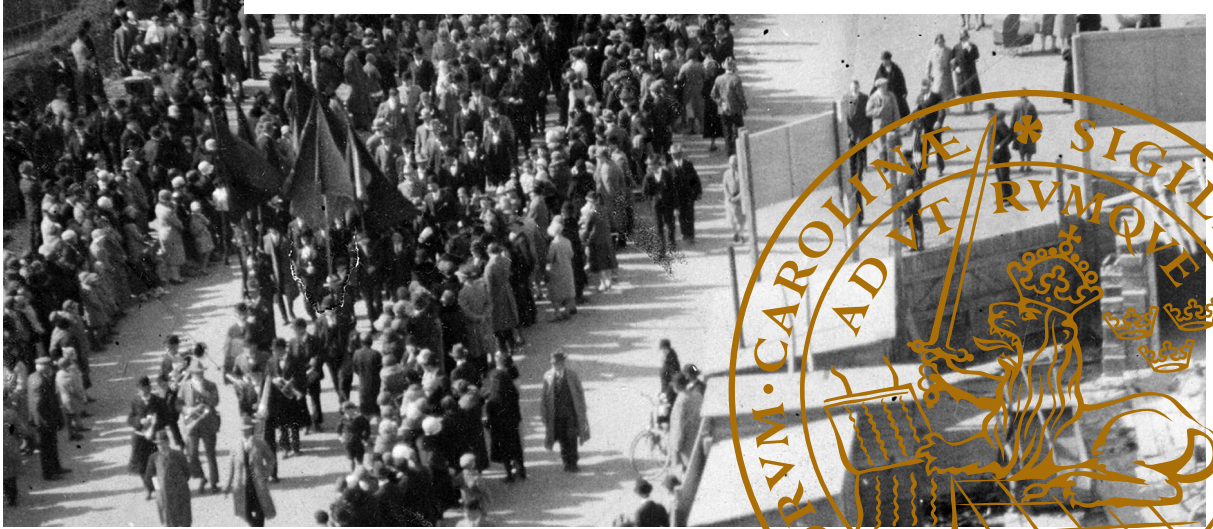

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Andrea Iossa

LUND
UNIVERSITY

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Abstract:

'Collective Autonomy in the European Union' explores the question of collective autonomy by investigating the relationship between collective bargaining and legal regulation and its current evolution in the national contexts and in the EU internal market. The thesis aims at achieving a comprehensive understanding of the notion, function and exercise of collective autonomy and collective bargaining, and it argues that collective autonomy and collective bargaining in contemporary Europe present challenges that alter their basic features. To this end, the thesis undertakes a multifaceted analysis integrating three perspectives: a theoretical perspective analysing and combining the conceptual elements of collective autonomy and collective bargaining as defined in industrial relations theories, labour law theories, and in the discourses on global labour rights; a comparative perspective analysing how collective autonomy and collective bargaining have found legal regulation in the Italian and Swedish labour law and industrial relations contexts; a cross-border perspective examining how the EU regulation of the internal market freedoms of establishment and to provide services impacts on the features of collective autonomy and collective bargaining.

By combining elements of international, European and comparative labour law, EU internal market law, and industrial relations, this thesis explores the unique features of collective autonomy and collective bargaining as socio-economic mechanisms having a normative power, whose functioning is however influenced by legal dynamics. Eventually, it examines the transformation that the foundations of collective autonomy and collective bargaining undergo in relation to the challenges deriving from both the processes of company-level decentralisation and the dynamics of the cross-border scenarios in the EU internal market. Ultimately, the thesis contributes to advancing the understanding of the foundations of collective autonomy and to exploring its operations beyond national borders.

Key words: collective autonomy, collective laissez-faire, collective bargaining, Italy, Sweden, industrial relations, European labour law, comparative labour law, collective labour rights, cross-border economic freedoms, freedom of establishment, posting of workers, decentralisation of collective bargaining, cross-border collective bargaining, cross-border collective action

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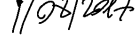
Signature  Date 

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Coverphoto by courtesy of Arbetarrörelsen Arkiv i Malmö

Unknown author, Demonstration for the International Workers' Day (Malmö, May 1st, 1930).

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To my father Vincenzo Iossa,
who in the short time he had, taught me irony and seriousness

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United Kingdom

British Airways and International Consolidated Airlines Group SA v Sindicato Espanol de Pilotos de Lineas Aereas and the International Federation of Airline Pilots Association (SEPLA) [2013] EWHC 1657 (Comm) [2013] 2 CLC 65

Govia GTR Railway Ltd v Associated Society of Locomotive Engineers and Firemen [2016] EWCA Civ 1309

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Prop. 1975/76:105 med förslag till arbetsrättsreform

Prop. 2009/10:48 Åtgärder med anledning av Lavaldomen

Prop. 2016/17:107 Nya utstationeringsregler

Collective Agreements

Italy

1993 – Protocollo sulla politica dei redditi e dell'occupazione, sugli assetti contrattuali, sulle politiche del lavoro e sul sostegno al sistema produttivo

1993 – Accordo interconfederale per la costituzione delle RSU

2009 – Accordo interconfederale 15 aprile 2009 per l'attuazione dell'accordo-quadro sulla riforma degli assetti contrattuali del 22 gennaio 2009

2010 – Contratto collettivo specifico di lavoro di primo livello per lo stabilimento di Pomigliano tra Fiat S.p.A. e le OO. SS. Nazionali e territoriali di Napoli di FIM-CISL, UILM-UIL, FISMIC, UGL Metalmeccanici e l'Associazione Quadri e Capi Fiat

2010 – Contratto collettivo specifico di lavoro di primo livello per lo stabilimento di Mirafiori tra Fiat Group Automobiles S.p.A. e i rappresentanti delle Segreterie nazionali e della provincia di Torino di FIM, UILM, FISMC, UGL Metalmeccanici e l'Associazione Quadri e Capi Fiat

2011 – Accordo interconfederale fra Confindustria e CGIL, CISL e UIL del 28 giugno 2011

2013 – Protocollo d'intesa Confindustria-CGIL-CISL-UIL su rappresentanza e democrazia del 31 maggio 2013

2014 – Testo Unico sulla Rappresentanza Confindustria – Cgil, Cisl e Uil

2015 – Contratto collettivo specifico di lavoro tra FCA N.V. e CNH Industrial N.V. e FIM-CISL, UILM-UIL, FISMIC, UGL Metalmeccanici e l'Associazione Quadri e Capi FIAT

2015 – Accordo di rinnovo CCNL per gli addetti all'industria chimica, chimico-farmaceutica, delle fibre chimiche e dei settori abrasivi, lubrificanti e GPL

2016 – Ipotesi di Rinnovo per il Contratto collettivo nazionale di lavoro (CCNL) settore metalmeccanico per le lavoratrici e i lavoratori addetti all'industria metalmeccanica privata e alla installazione di impianti

Sweden

1938 – Huvudavtal mellan Svenska Arbetsgivareföreningen och Landsorganisationen i Sverige

1982 – Utvecklingsavtalet SAF-LO-PTK

1997 – Industriavtal - Samarbetsabvtal om Industriell Utveckling och Lönebildning

2013 – Kemiska fabriker. Kollektivavatal 2013.4.01 – 2016.03.31

2013 – Stål- och Metallavatalet 2013 – 2015

1.Introduction

1.1. Collective autonomy and collective bargaining: evolving aspects of labour law and industrial relations

This thesis investigates how collective autonomy and collective bargaining have evolved and are evolving in Europe. Its aim is to achieve a comprehensive understanding of the basic foundations and developments of collective autonomy and collective bargaining, and of the challenges they currently face in the context of the European Union. To this end, the thesis explores the conceptual aspects of collective autonomy and collective bargaining, their legal regulation in two illustrative national contexts (namely, Italy and Sweden), and the impact on them of the legal regulation of the EU economic freedoms in the cross-border dimension of the EU internal market.

Generally speaking, collective autonomy represents the scope that the legal system confers on the industrial relations actors for the regulation of the labour market. Collective bargaining is a socio-economic phenomenon pursued by the collective subjects of industrial relations, which culminates in the regulation of employment and working conditions. Its dynamics and outcomes have established legal regulations within the national legal systems – and recently also beyond. In this sense, collective autonomy finds its rationale within the relationship between the collective dimension of industrial relations and the legal system. This thesis intends to highlight several tensions within the realm of collective autonomy, whose conceptualisation derives from a legal understanding of a socio-economic phenomenon such as industrial relations.

Both collective autonomy and collective bargaining are fundamental aspects of labour law and industrial relations – which are fields of conflict and compromise. The evolution of employment and working conditions has been marked by moments of harsh conflict and moments of peaceful – though temporary – compromise. Conflict and compromise are expressed through collective action and collective bargaining, respectively, which, alongside the right to organise, constitute the legal bases of an industrial relations system. The evolution of a capitalist system of production and the Industrial Revolution have produced two collective social

powers – the employer and the workers – whose interests are oppositional and conflictual. From its inception, labour law has dealt with conflict, both as the spark from which it has originated and as an inherent element of labour relations that it is meant to regulate. At the same time, the conflict constitutes the reason for engaging in collective bargaining, which, in its turn, is finalised at the end of the conflict.

Historically, labour law has had the task of 'channelling' those power relations into legal forms.[1] Collective bargaining constitutes one of the mechanisms through which conflict is transformed into legal rules.[2] Originally arising within factories or plants, the scope of collective action and collective bargaining has progressively expanded at the national level, in conjunction with the formation of country-wide collective organisations. The deployment of collective bargaining machineries at the national level has been a characteristic feature of labour law and industrial relations in the 20th century. The globalisation of the economy has not altered those basic aspects. Rather, it has amplified the inherent inequalities of the subjects involved in industrial relations. This is also due to the decreased centrality of the State as supreme regulatory body of the economy, deriving from the increasing processes of globalisation, as well as from the flexibilisation and privatisation of the economy.[3] In the globalised market, new actors emerge, such as multinationals and global corporations, which are often outside the reach of the State's regulatory power.[4] Although the economic development driven by multinational companies has in certain cases contributed to the extension of union culture and improving working conditions,[5] the globalisation of the economy has blurred the economic borders between countries. Instead of leading towards an upward uniformity of labour and employment standards, the loosening of the economic borders has determined their fragmentation and given rise to a potential 'race to the bottom'.[6] The territorial application of labour law – i.e. 'the principle of territoriality' referring to the uniform application of the labour rules on the labour market[7] – is challenged by the

[1] Alain Supiot, *The Spirit of Philadelphia. Social Justice vs. the Total Market* (Verso 2012) 112.

[2] Julia López, Consuelo Chacategui & César G. Cantón, "From Conflict to Regulation: The Transformative Function of Labour Law" in Guy Davidov & Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2013) 344–62.

[3] Kathrine V.W. Stone, "Flexibilization, Globalization, and Privatization: Three Challenges to Labour Rights in Our Time" (2006) 44 *Osgoode Hall Law Journal*, 77–104.

[4] Henry Arthurs, "Corporate Self-regulation: Political Economy, State Regulation and Reflexive Labour Law" in Brian Bercusson & Cynthia Estlund (eds), *Regulating Labour in the Wake of Globalisation* (Hart 2007) 19–36.

[5] Beverly J. Silver, *Forces of Labor. Workers' Movements and Globalization since 1870* (Cambridge University Press 2003); Laura Mosley, *Labor Rights and Multinational Production* (Cambridge University Press 2011).

[6] Sandro Mezzadra & Brett Nielson, *Borders as Method, or, the Multiplication of Labor* (Duke University Press 2013) 63.

[7] Simon Deakin, "Regulatory competition after Laval" (2008) 10 *Cambridge Yearbook of European Legal Studies*, 581–609, 593.

movement of capital on a global scale.[8] The possibility for companies to easily cross national borders in order to relocate or to conduct their economic activities constitutes a significant challenge to the functioning of industrial relations.

The EU internal market is not immune from the dynamics of economic globalisation. Rather it is the crucible of the tensions between the national regulation of employment and the transnational force of capital, represented by the economic operations of outsourcing, merging, and transfer of undertakings.[9] Supported by a legal regulation put in place in order to abolish national economic borders, the ability of capital to cross national borders allows enterprises to escape rigid regulations on labour and employment set by national legal frameworks.[10] In this context, the conflict-compromise dynamics between industrial relations actors become borderless – in the sense that they occur in a new space in which the State can no longer operate as the supreme regulatory power, but where the conflicts of interests remain unaltered.[11] The social powers of employers and workers are confronted with new dynamics that affect the classical legal understanding of industrial relations. Therefore, the regulation of the EU internal market (a globalised and borderless economic space) opens up new territories in which the features of collective autonomy and collective bargaining undergo a transformation.

1.2. Aim and research questions

The aim of this thesis is to achieve a comprehensive understanding of the notion, function and exercise of collective autonomy and collective bargaining, and of the challenges that they present in contemporary Europe. To this end, the thesis undertakes a multifaceted and integrated analysis that explores their conceptual and theoretical aspects and their current evolution in the national contexts and in the EU internal market. The analysis is carried out from three perspectives. First, a theoretical and conceptual analysis of collective autonomy and collective bargaining, combining labour law and industrial relations theories with the discourse on global labour rights. Second, a comparative analysis of collective autonomy and collective bargaining in the labour law and industrial relations contexts of Italy and Sweden. Third, an analysis of the cross-border dimension of the EU internal market, in which EU law and the regulation of economic freedoms

[8] Guy Mundlak, "De-territorializing Labour Law" (2009) 3 *Law & Ethics of Human Rights*, 188–222.

[9] See Bob Hepple, *Labour Law and Global Trade* (Hart 2005) 172.

[10] Antonio Lo Faro, "'Turisti e vagabondi': riflessioni sulla mobilità internazionale dei lavoratori nell'impresa senza confini" (2005) 19 *Lavoro e Diritto*, 437–73.

[11] Judy Fudge & Guy Mundlak, "Justice in a Globalizing World: Resolving Conflicts between Workers' Rights beyond the Nation State" in Yossi Dahan, Hanna Lerner & Faina Milman-Sivan (eds), *Global Justice and International Labour Rights* (Cambridge University Press 2016) 121–58.

interplay with the national labour law and industrial relations frameworks. In each of these perspectives, the research addresses the following legal questions.

In respect of the theoretical and conceptual aspects of collective autonomy and collective bargaining, including the discourse on global labour rights, the thesis addresses questions concerning the understanding and conceptualisation of industrial relations from a legal perspective and the role that the legal system and its sources play in the development and evolution of industrial relations. In this sense, the analysis of collective autonomy and collective bargaining in the discourse on global labour rights serves to highlight the evolution of the impact of legal regulation in the contemporary global context and the developments in labour law scholarship related to the presence and interaction of different legal sources dis-anchored from the national contexts.

In respect of the comparative analysis of the Italian and Swedish contexts, the analysis revolves around the basic pillars of collective autonomy: representation, the collective agreement, and collective action, whose features are investigated in their relation to the processes of collective bargaining. From this perspective, the legal questions concern the identification of the modalities of legal regulation of representation, collective agreement and collective action; the legal mechanisms that the legal system provides for the recognition of the normative effects of collective autonomy; and the challenges that currently confront collective autonomy at a national level.

In respect of the cross-border dimension of the EU internal market as defined above, the thesis addresses questions about the interplay between EU law on economic freedoms and national systems of collective labour law and industrial relations. More specifically, the analysis of this perspective explores questions concerning the legal foundations for collective autonomy and collective bargaining in the EU legal system; the implications brought about by the exercise of the freedom to establish and provide services; and the transformation of the features of collective autonomy in the context of the cross-border dimension of the EU internal market.

These three perspectives are integrated, and the answers to the questions posed in each of them contribute to the overall aim of this thesis and to its arguments. A comprehensive understanding of collective autonomy and collective bargaining and of the challenges they face in Europe would not be possible without the definition of their theoretical and conceptual aspects, without the analysis of their regulations in the national contexts (i.e. the contexts in which such social dynamics have found their primary legal regulation) as well as in international and European labour law, and without the comprehension of the impact of the dynamics stemming from the legal regulation of the EU internal market.

1.3. Methodological and conceptual framework

1.3.1. European labour law and legal method

The present study is envisioned within the field of European labour law, which is, as described by Bercusson, 'influenced by the symbiosis of national labour law and EC labour law, and the interaction of law and context'.[12] The norms and provisions that form the basis of European labour law stem from different legal sources, such as the EU Treaties and Charter, the European and international labour rights and human rights conventions, the national legal orders, and the collective agreements set by the labour market parties both at EU and national level. This complexity, reflected in the three perspectives considered here, allows for several methodological choices with regard to both the way in which the study is approached and the materials that will be analysed. This thesis will set this study within a legal-pluralistic framework. This methodological choice is strategically made in order to achieve a multifaceted analysis of the topic, which not only stresses its complexity but also challenges the legal understanding of collective autonomy and collective bargaining as subordinated to market-oriented priorities.

In dealing with a multi-dimensional context such as the EU and with a complex field such as labour law, a research project needs to adopt a perspective that reflects the complexity of the social phenomena and their legal regulation, and permits the exploration of the different layers and dimensions involved. As stressed by Tuori, the EU integration process is not 'an image of a linear, pre-determined and harmonious evolutionary process'.[13] Rather, Tuori identifies a series of conflictual relationships within the EU system, referring to the 'constitutionalisation' processes of its different core dimensions, among which the 'social constitution' has always been and remains the most underdeveloped and unaccomplished.[14] He refers to the European Constitution as a 'discursive phenomenon', whose legal understanding requires an analysis of the different actors involved such as 'European and Member-State legislators and judges, as well as scholars of European law'.[15] In his conclusions, Tuori also refers to the need for legal scholarship to utilise

[12] Brian Bercusson, "The Conceptualisation of European Labour Law" in Brian Bercusson, *European Labour Law* (2nd edn, Cambridge University Press 2009b) 78–98, 78.

[13] Karlo Tuori, "The Relationality of European Constitution(s). Justifying a New Research Programme for European Constitutional Scholarship" in Ulla B. Neergaard & Ruth Nielsen (eds), *European Legal Method – Towards a New European Legal Realism?* (Djøf 2013) 23–36, 33.

[14] The other constitutional dimensions that Tuori identifies are: the economic constitution; the juridical constitution; the political constitution; and the security constitution, Tuori in Neergaard & Nielsen (2013) 24.

[15] Tuori in Neergard & Nielsen (2013) 34.

interdisciplinary perspectives in studying the EU system, due to its 'theoretic-methodological premises', without however renouncing its self-sufficiency.[16]

The present study encompasses elements of EU law and of national and international labour law. It also combines a study of labour law with elements from the industrial relations field of study, and it integrates legal analysis with theoretical and conceptual aspects. This multiple methodological approach reflects the multifaceted analysis undertaken in order to understand the contemporary situation of collective autonomy and collective bargaining in Europe. It also captures the multi-dimensional reality of European labour law and industrial relations as fields in which supranational, national and transnational elements interplay and overlap.[17]

According to the Treaty on the Functioning of the EU (TFEU), labour law (and social policy) is among the competences shared between the EU and the Member States. However, fundamental aspects of labour law and industrial relations – such as collective labour rights of association, bargaining and action, as well as pay – are excluded from the legislative competences of the EU by Art. 153.5 TFEU. In these areas, as in other areas of national exclusive competence, a regulative action of the EU is to be excluded, even though, as interpreted on several occasions by the Court of Justice of the European Union (CJEU), this does not mean that the national regulations in those areas can disregard EU law.

Already in the *Van Gend en Loos* and *Costa v Enel* rulings, the CJEU affirmed that EU law had direct effect in the legal orders of the Member States and was to be given primacy over national law. The principles of supremacy and direct effect, which enabled an understanding of EU law as a 'new legal order', have since become the linchpins of the legal integration between the EU system and the Member States' systems – and therefore the methodological cornerstones of the 'one big system' conceptual model.[18]

This model, however, focuses on the interactions between EU law and the national legal orders. It does not comprise other legal material that is relevant to the present study. Labour law in Europe is also affected by the Council of Europe instruments, such as the European Convention of Human Rights (ECHR) and the European Social Charter (ESC), and by the Conventions adopted by the International Labour Organisation (ILO). These sources are binding for the national legal systems, but their status in the EU legal system is not clear, even though the rights of the ECHR are general principles of EU law according to Art. 6.3 TEU. In dealing with the protection of collective labour rights, the most important achievement deriving from the case law of the European Court of Human Rights

[16] Ibid.

[17] See Paul Marginson & Keith Sisson, *European Integration and Industrial Relations. Multi-level Governance in the Making* (Palgrave Macmillan 2006).

[18] Ruth Nielsen, "Towards an Interactive Comparative Method for Studying the Multi-layered EU Legal Order" in Ulla B. Neergaard & Ruth Nielsen (eds), *European Legal Method – in a multi-level EU legal order* (Djøf 2012) 89–116, 93.

(ECtHR) is the recognition of a right to collective bargaining and of collective action in the scope of Art. 11 ECHR on freedom of trade union association.[19] In its case law, the Court has arrived at this conclusion by interpreting the Convention in the light of the other international labour law sources. In this way, the ESC and the ILO Conventions have become indirectly binding in the EU legal system.

However, the Opinion of the Full Court of the CJEU of December 2014 on the draft agreement for the accession of the EU to the ECHR, foreseen by Art. 6.2 TEU, has raised doubts over the status of the ECHR as a source of law within the EU, and of the judgments of the ECtHR as binding on the CJEU.[20] In its Opinion, the CJEU affirms that the unique features of the EU system rely upon its unique aims and structure, whose achievements and autonomy would prevent making its legal provisions subject to the scrutiny of a court such as the ECtHR. According to the CJEU, the autonomy of EU law would be challenged by the full accession to an external legal system, equipped with its own court, whose rationale and aims (i.e. the protection of human rights and freedoms) might produce a shift in the institutional balance of power within the EU system and between the EU and the Member States. Consequently, the CJEU affirms that the 'jurisdiction to carry out a judicial review of acts, actions or omissions on the part of the EU, including in the light of fundamental rights, cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU'.[21] The coherence and consistency of the EU legal system needs to 'process' and 'filter' the external sources, in particular those dealing with fundamental rights, in order not to alter the equilibrium between the legal norms set by the interpretation of the Treaties of the CJEU. The Court demonstrates a legal-pluralist understanding that is functional to the preservation of the autonomy of EU law.[22]

The research project on 'European legal method' conducted by Neergaard and Nielsen, with contributions from several scholars, stresses that a legal study of the EU system can be approached from different perspectives highlighting different aspects and problematic issues, as well as reflecting various conceptualisations of the EU system itself. The concepts of 'legal realism' and 'legal pluralism' represent two of the main methodological approaches in addressing the study of the EU legal system. In the taxonomy provided by Barber, a 'legal realist' approach to law refers to examining either 'the operation of law in society' or 'the operation of law in

[19] *Demir and Baykara v. Turkey* (App no. 34503/97), Judgment of 12 November 2008 and *Enerji Yapi-Sol Sen v. Turkey* (App no 68959/01), Judgment of 21 April 2009.

[20] Opinion 2/13 of the Court (Full court) EU:C:2014:2454.

[21] Opinion 2/13, para 256. Here the CJEU refers to its previous Opinion 1/09 of the Court (Full Court) EU:C:2011:123.

[22] In this sense, Piet Eeckhout, "Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?" (2015) 38 *Fordham International Law Journal*, 955–92, 992.

courts'.[23] In both cases, the analysis is intended to obtain a better understanding and systematising (and eventually advancing suggestions for improving) the operation of law within a legal system. Legal pluralism, on the other hand, can have two approaches: one examining 'the relationship between state law and other normative systems'; and one 'focused on inconsistency, or contradiction, between rules' in the sense of considering the different rules applicable to a single factual situation.[24] Both instances of legal pluralism are relevant in order to capture the complexity of phenomena such as collective autonomy and collective bargaining in a complex context such as the EU.

1.3.2. Legal pluralism and collective autonomy in the EU

The study of collective autonomy in the EU shall be conducted through a methodological approach that privileges the coexistence of several sources regulating the exercise of collective labour rights and the autonomous normative potential of collective bargaining. The defining characteristic of legal pluralism is the presence, in the same geographical space and at the same time, of two or more different legal orders.[25] In this sense, Griffith has defined legal pluralism as 'the coexistence within a social group of legal orders which do not belong to a single "system"'.[26] This statement describes how social phenomena such as industrial relations can be subjected to different rules according to the national legal systems, the EU legal system, and the international and European conventions. An identical situation or act – such as a strike or a collective agreement – can be judged differently depending on the objectives and values of each legal order concerned.[27]

At the same time, the relationship between state law and the normative autonomy of the industrial relations parties is at the core of collective autonomy, which constitutes the theoretical framework of the present project. Collective autonomy is an autonomous system of norm production that creates the rules to be applied to the

[23] Nicholas W. Barber, "Legal Realism, Pluralism, and their Challengers" in Neergaard & Nielsen (2013) 189–209, 190.

[24] Barber in Neergaard & Nielsen (2013) 195–96.

[25] Boaventura De Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (LexisNexis 2002) 89; Boaventura De Sousa Santos, "Law: A Map of Misreading. Toward a Postmodern Conception of Law" (1987) 14 *Journal of Law and Society*, 279–302.

[26] John Griffiths, "What is Legal Pluralism?" (1986) 24 *Journal of Legal Pluralism*, 1–55, 8.

[27] Generally, Henrik Zahle, "The Policentrity of the Law or the Importance of Legal Pluralism for Legal Dogmatics" in Hanne Petersen & Henrik Zahle (eds), *Legal Policentrity: Consequences of Pluralism in Law* (Dartmouth 1995) 185–200; Sally Engle Merry, "Legal Pluralism and Legal Culture: Mapping the Terrain" in Brian Z. Tamanaha, Caroline Sage & Michael Woolcock (eds), *Legal Pluralism and Development* (Cambridge University Press 2012) 66–82.

employment relationship and to industrial relations.[28] Already in 1910, Romano identified the normative prerogative of the parties involved in collective negotiations as the expression of an autonomous legal order challenging the authority of the State's law.[29] According to Romano, the establishment of settled rules by means of a collective agreement creates 'two distinct legal orders', for which the same normative act – the contract signed between workers and employers – is a private contract in the case of the State's order and the system itself for the 'particular order' constituted by employers and workers.[30] In the light of this discussion, the present project is conceived within a legal-pluralistic framework. A legal-pluralistic approach is appropriate, because it allows us to see that, on the one hand, the exercise of collective labour rights can be regulated differently depending on the aim of the legal system itself, and, on the other hand, collective autonomy possesses autonomous normative capabilities to regulate employment.

From a legal-pluralistic perspective, a collective agreement – the outcome of the normative capability of collective autonomy – can be considered as an obstacle to the free development of the EU internal market if interpreted from the perspective of the EU Treaties. But it can constitute the fundament of a system of industrial relations if considered from the perspective of the parties; and it can constitute a private law contract regulating the employment relationships if viewed from the perspective of the national legal system. It can further be deemed an instrument for protecting essential labour rights – such as the right to organise – and at the same time basic human rights – such as freedom of association – if conceived within other legal orders, such as the ILO or the ECHR. For the aims of the present study, it is therefore important to analyse the EU legal order as one of a plurality of legal orders which interact within the national legal orders of the Member States. This perspective is particularly pertinent in the field of labour law and industrial relations, in which national legal systems, the EU legal system, and international labour rights and human rights conventions interact. In this sense, Bücker, Dorssemont and Warneck stress that 'industrial relations – irrespective of the level at which they take place – are governed by a variety of conflicting legal frameworks. In such a network, there are a number of different institutional actors playing a role as architects of relevant legal frameworks'.[31] The rationale of industrial relations as a normative

[28] See Niklas Bruun, "The Autonomy of Collective Agreement" (2002) Report to the VII European Regional Congress of the International Society for Labour Law and Social Security.

[29] See Santi Romano, "Lo Stato moderno e la sua crisi" (originally in 1910 *Rivista di diritto pubblico*) in Santi Romano, *Saggi di diritto costituzionale* (1969 Giuffrè) 5–26.

[30] Santi Romano, *L'ordinamento giuridico. Studi sul concetto, le fonti e i caratteri del diritto* (Mariotti 1917, re-published Gale 2013) 115.

[31] Andreas Bücker, Filip Dorssemont & Wiebke Warneck, "The Search for a Balance: Analysis and Perspectives" in Andreas Bücker & Wiebke Warneck (eds), *Reconciling Fundamental Social Rights and Economic Freedoms after Viking, Laval and Rüffert* (Nomos 2011) 315–405, 375.

system is challenged by the rationale of EU law, which in its turn is challenged by the rationale of the other systems, such as the ECHR, the ESC, and the ILO.

1.3.3. Sources and materials

The legal research of this thesis is based on the analysis of legal materials such as statutory provisions, case law, preparatory works, and legal doctrine. As for the European and international sources related to the discourse on global labour rights, the analysis focuses on the provisions concerning freedom of association, right to organise, right to collective bargaining and collective action enshrined in the ILO Conventions, the ESC, the ECHR, and the EU Charter of Fundamental Rights. In addition, the case law of the related monitoring and judicial bodies is considered, including the ILO Committees of Experts on the Application of Conventions and Recommendations (CEACR) and on Freedom of Association (CFA), the European Committee of Social Rights (ECSR), the European Court of Human Rights (ECtHR), and the Court of Justice of the EU (CJEU).

As for the national contexts, the legal analysis focuses on the provisions regulating collective bargaining in Italy and Sweden, including constitutional provisions and statutory acts as well as case law. The comparative analysis takes into account the rulings of the Italian Constitutional Court and of the Italian *Corte di Cassazione* (the last judicial instance in the Italian court system)[32] that are relevant in the definition of the main legal aspects related to collective bargaining, as well as the rulings of the Swedish Labour Court. In some cases, the original ruling has been examined, whereas in other cases the research has benefited from landmark judgments having been translated into English.[33] The literature includes sources in Italian and in Swedish as well as in English. As a matter of fact, the relevance and specific features of the Swedish context have produced a vast amount of important literature that is available in English on account of the interest of the international audience in the specific characteristics of the Swedish labour law system.

As for the EU context, the legal analysis concentrates on EU primary and secondary law, on CJEU's case law, and on the most relevant academic literature and doctrine. The primary law of the EU includes both the provisions of the Treaty and the articles of the EU Charter of Fundamental Rights. The analysis focuses on those norms of primary law dealing with issues related to collective autonomy and collective bargaining. Among the secondary law of the EU, which includes both directives and regulations, the research takes into consideration legislation that

[32] According to Art. 65 of Act 12/1941, the Court has the objective of ensuring the correct application of the law, its uniform interpretation, and its unity, as well as the respect of the jurisdictional competences.

[33] In particular, it has been used Ronnie Eklund, Tore Sigeman & Laura Carlsson, *Swedish Labour and Employment Law: Cases and Materials* (Iustus 2008).

recognises the role of collective bargaining in the regulation of labour law and social policy matters. An important part of the research on the EU context is focused on the Directive 96/71 concerning the posting of workers in the framework of the provision of services. As for the case law of the CJEU, the study addresses the landmark cases that have dealt with the regulation of economic freedoms to establish and provide services, as regards both the definition of their general features and the recognition of collective autonomy as an obstacle to their exercise.

1.3.4. Conceptual bases of collective autonomy and collective bargaining

This study is conceived within the conceptual framework of collective autonomy. The emergence, in conjunction with the Industrial Revolution, of collective social groups concerned with the setting of employment conditions constitutes the essence of the modern conception of labour relations as evolved from the master-servant to the employer-employee relationship in Europe.[34] Consequently, the legal systems of the States had to deal with the legal regulation of the socio-economic relationships generated by collective organising, collective bargaining and collective action. Collective labour law thus constitutes a 'legal understanding' of industrial relations. The legal regulation is a 'reaction' to the emergence of the social phenomena of labour relations. Industrial relations, historically and conceptually, come 'before' labour law, whose creation has had the aim of regulating the social relationships established by the collectivisation of employment and industrial production in Europe.[35]

The social dimension of industrial relations has been 'translated' into a legal dimension. Accordingly, an autonomous and self-conducted form of regulation developed in the field of labour and employment law along with the State's legislative action. In this regard, Supiot notes that the establishment of a collective regulatory technique represents the feature that characterises labour law and that solved the impasse of individual subordination in employment by setting rights and obligations.[36] Similarly, Hepple affirms that 'labour law is created not only by the state (executive, legislature and judiciary) but also by autonomous groups, in particular employers and trade unions'.[37] The autonomous production of norms rests

[34] Bruno Veneziani, "The Evolution of the Contract of Employment" in Bob Hepple & Bruno Veneziani (eds), *The Transformation of Labour Law in Europe. A Comparative Study of 15 countries 1945–2004* (Hart 2009) 31–72.

[35] See Thomas Anton Kochan, *Collective Bargaining and Industrial Relations. From Theory to Policy and Practice* (Irwin 1980).

[36] Alain Supiot, *Critique du droit du travail* (Presses Universitaires de France 2011) 124.

[37] Bob Hepple, "Introduction" in Bob Hepple (ed) *The Making of Labour Law in Europe. A Comparative Study of Nine Countries up to 1945* (first published 1986, Hart 2010) 10.

upon the social phenomena of collective organising, collective action and collective bargaining, which emerged in industrial societies during the 19th century and towards which the law of the State has had – and still has – various and changing policies and approaches.[38] In this sense, Kahn-Freund recalled that industrial relations are social phenomena whose existence is not, in theory, dependent on the law; yet their functioning is shaped by the law.[39] Therefore, the lack, the presence, or the implementation of law regulating the power relationships between the social powers representing the conflictual interests in the labour market, result in different outcomes as regards the formation and evolution of labour relations in society.[40] The autonomy of those social powers, and of the representing organisations, is influenced by, and to a large extent created in relation with, the law. The need for the law to 'understand' the social phenomena of collective organising and bargaining has brought these social phenomena within the legal framework, ultimately creating the conditions for a conceptual understanding based on the notion and function of *autonomy*. The autonomy of industrial relations is thus a product of their relations to the law.

The spontaneous emergence of collective subjects representing the individuals involved in labour relations stemmed from the inherent conflictual interests borne by those subjects. The deployment of such a conflict has put the legal system in the position of regulating the socio-economic dynamics generated by industrial relations in order to contain conflict and produce rules that are capable of managing the practice of such relations.[41] The historical characteristics of the relationship between law and industrial relations have favoured – or forced – specific patterns of development.[42] The interventionist or abstentionist attitude of the State has the potential to alter the equilibrium between the labour market parties and the power relations in the bargaining process. The discourse on collective autonomy places excessive emphasis on this aspect.

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[38] Antoine Jacobs, "Collective Labour Relations" in Hepple & Veneziani (2009) 201–32.

[39] Otto Kahn-Freund, "Trade Unions, the Law, and Society" (1970) 33 *The Modern Law Review*, 241–67; Otto Kahn-Freund, "Industrial Relations and the Law – Retrospect and Prospect" (1969) 7 *British Journal of Industrial Relations*, 301–16.

[40] Folke Schmidt, *Law and Industrial Relations in Sweden* (Almikvist & Wiksell 1977) 14.

[41] However, the extreme juridification of industrial relations is to be avoided. As described by Teubner in relation to the juridification of social spheres, juridification is 'a process in which human conflicts are torn through formalization out of their living context and distorted by being subjected to legal processes'. In this way, social conflicts are 'expropriated' and 'mutilated' by the law, see Gunther Teubner, "Juridification – Concepts, Aspects, Limits, Solutions" in Gunther Teunber (ed) *Juridification of Social Spheres. A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law* (de Gruyter 1987) 3–48, 7 and 8.

[42] An example of this dynamic as regards England is given in William Brown & Sarah Oxenbridge, "Trade Unions and Collective Bargaining: Law and the Future of Collectivism" in Catherine Barnard, Simon Deakin & Gillian S. Morris (eds), *The Future of Labour Law. Liber amicorum Bob Hepple QC*, (Hart 2004) 63–78.

1.3.5. The comparative method in labour law and industrial relations research

The use of the comparative method is particularly suited to highlight the complexity and global nature of the legal regulation of labour and industrial relations.[43] Consequently, and in line with an approach integrating labour law and industrial relations in the EU multi-dimensional context, the comparative method assumes a central relevance in this study. The inherent capacity of the comparative method to relate domestic law and practices to the socio-economic, political, cultural and historical contexts, makes the comparative method of analysis a particularly appropriate methodological tool for studying the fields of labour law and industrial relations.[44] A consideration of those aspects is fundamental to a comparative analysis of labour law and industrial relations[45] especially in order to avoid what Kahn-Freund terms 'legal transplanting', i.e. the misuse of the comparative method in order to enable the identification of the 'best solution' for a country on the basis of the comparison. Instead he has suggested that the use of the comparative method 'requires a knowledge not only of the foreign law, but also of its social, and above all its political, context'.[46] For this reason, the study of comparative labour law cannot be limited to the analysis of different legal institutions, but rather must go beneath the surface by comparing the functions that those legal institutions perform in the social contexts considered.[47] At the same time, the comparative method is central to the European integration process, where the harmonisation of national legislations is led by a constant comparative relation between national legal orders and the EU legal order, and between national legal orders themselves, which Caruso identifies as 'cross-fertilization'.[48]

Furthermore, the comparative method can be used to understand different regulatory answers to specific challenges, such as the globalisation of the economy

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[43] Peer Zumbasen, "Transnational Comparison: Theory and Practice of Comparative Law as a Critique of Global Governance" in Maurice Adams & Jacco Bomhoff (eds), *Practice and Theory in Comparative Law* (Cambridge University Press 2012) 186–211.

[44] Bruno Caruso & Mariagrazia Militello, "L'Europa sociale e il diritto: Il contributo del metodo comparato" (2012) Working Paper CSDLE "Massimo D'Antona" INT – 94/2012, 12–13.

[45] See Reinhold Fahlbeck, "Guest Editorial – Reflections on Industrial Relations" (1996) 12 *The International Journal of Comparative Labour Law and Industrial Relations*, 289–313, 312. Fahlbeck introduces the issue of comparison in the industrial relations field by affirming: "[n]othing is more pleasurable than the comparative method when studying industrial relations", ibid., 307.

[46] Otto Kahn-Freund, "On Uses and Misuses of Comparative Law" (1974) 37 *The Modern Law Review*, 1–27, 27.

[47] Roger Blanpain, "Comparativism in Labour Law and Industrial Relations" in Roger Blanpain (ed) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (Kluwer 2010) 1–24, 12.

[48] Bruno Caruso, "Changes in the Workplace and the Dialogue of Labor Scholars in the 'global village'" (2007) 28 *Comparative Labor Law & Policy Journal*, 501–45, 511–12.

and economic integration.[49] The progressive emergence of new scenarios for collective labour law which do not pertain to purely domestic contexts, but that go beyond national borders, brings about the interaction (sometimes the clash) between different dimensions of industrial relations and between different legal systems, whether national or supranational. The comparative method is a suitable tool for highlighting such tendencies because of its intrinsic function of creating networks and connections between distinct legal orders. Stone stresses that the pressures on labour law coming from globalisation, flexibilisation, and privatisation mean that in order 'to effectively protect labor rights, it is necessary to be comparative in method, transnational in perspective, and local in action'.[50] In accordance with Stone's view, the necessity of a comparative approach in labour law research is led by the aim of stressing the differences between the domestic contexts in order to acquire different strategies for responding to the current challenges faced by labour.[51]

The present work encompasses the analysis of national contexts – Italy and Sweden – and the analysis of the EU context, although it is limited to the cross-border dimension of the EU internal market, which binds together the national frameworks for collective labour law and industrial relations with the EU framework for the exercise of cross-border economic freedoms.

The choice of the national contexts is essentially based on the fact that both Italy and Sweden have a strong and rooted tradition of collective autonomy, whose evolution has nevertheless taken different paths and patterns. The Swedish system of industrial relations belongs to the so-called Nordic – or Scandinavian – model,[52] whose common features regard the traditional neutrality of the State and the mutual recognition by trade unions and employers of reciprocal prerogatives and freedoms, such as the managerial prerogative to run a business and the freedom to organise.[53] Collective bargaining is conducted in a 'spirit of cooperation',[54] which reflects the general collective agreements signed already in the first decades of 20th century (1906 and 1938) by trade unions and employers' associations.[55]

Unlike the Swedish tradition of continuity, in Italy the development of the industrial relations system has been affected by historical events preceding the birth of the Republican State. In fact, the features of the industrial relations system and

[49] Caruso & Militello (2012), 25.

[50] Kathrine V.W. Stone, "A New Labor Law for a New World of Work: The Case for a Comparative-transnational Approach" (2007) 28 *Comparative Labor Law and Policy Journal*, 565–81, 566.

[51] Stone (2007) 581.

[52] Ole Hasselbalch, "The Roots – The History of Nordic Labour Law" (2002) 43 *Scandinavian Studies in Law,* 11–35.

[53] Reinhold Fahlbeck, *Employee Participation in Sweden: Union Paradise and Employer Hell or…?* (Juristförlaget 2008).

[54] Birgitta Nyström, "The Evolving Structure of Collective Bargaining in Sweden 1990–2003" (2003) Report to the EU Commission, 7.

[55] Reinhold Fahlbeck & Johann B. Mulder, *Labour and Employment Law in Sweden* (Juristförlaget 2009) 14–15.

trade union law (*diritto sindacale*) derive from the reaction to the corporatist system imposed by the fascist regime (1922–43). If the corporatist system was based on the absence of trade union plurality and freedom and the criminalisation of strike actions, the system set by the Republican Constitution (1948) is based on trade union freedom and pluralism and a wide protection of the right to strike.[56] Conflict and a confrontational attitude characterise the relationship between trade unions and employers' associations, which however produce practices of joint self-regulation.[57] The Italian system is widely based on collective autonomy: Italian labour law scholars strongly contributed to the theoretical definition of the notion of collective autonomy as an expression of organised collective private interests self-regulating the industrial relations and employment spheres.

The Swedish system of industrial relations is considered to belong to the Nordic stream of 'neo-corporatism', in which trade unions and employers cooperate with the aim of jointly contributing to the wealth of national economy. The level of institutionalisation in these systems is usually high if compared to other systems, such as the Italian system, in which unions are strong and active but not framed in an institutionalised setting.[58] On the trade union side, Sweden's long-lasting experience of social-democratic governments has contributed to the establishment and development of a trade union movement heavily embedded in the management of the public – economic – sphere.[59] In contrast, the dramatic events of Italian history and the different ideologies embraced by the main Italian trade unions have resulted in a fragmented system in which the trade union movement has mainly played an oppositional role in relation to government policies.[60] The Swedish and the Italian trade union movements also differ in terms of their organising structure: the Swedish context is characterised by separate confederations divided according to sectors; whereas the Italian context is characterised by a pluralistic movement with union confederations competing in the same sectors and differentiating on political and religious grounds.[61] On the employer side, in contrast, there is more

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[56] Gian Guido Balandi, "From Corporatism to Freedom of Association: A Note about Italy" (2011) 32 *Comparative Labour Law & Policy Journal*, 925–32.

[57] Gian Primo Cella & Tiziano Treu, *Relazioni industriali e contrattazione collettiva* (il Mulino 2009).

[58] See Colin Crouch, "Neo-corporatism and Democracy" in Colin Crouch & Wolfgang Streeck (eds), *The Diversity of Democracy. Corporatism, Social Order and Political Conflict* (Edward Elgar 2006) 46–70.

[59] See Martin Upchurch, Graham Taylor & Andrew Mathers, *The Crisis of Social Democratic Trade Unionism in Western Europe. The Search for Alternatives* (Routledge 2009) 27; Richard Hyman, *Understanding European Trade Unionism. Between Market, Class & Society* (Sage 2001) 46–47. See also the analysis of the solidaristic features characterising both sides of the labour market and their collaboration in the comparison with the US system, in Peter Swenson, *Capitalists against Markets. The Making of Labour Market and Welfare States in the United States and Sweden* (Oxford University Press 2002).

[60] Hyman (2001) 143.

[61] Gian Primo Cella & Tiziano Treu, "National Trade Union Movements" in Blanpain (2010) 483–522, 486.

similarity between the two contexts: in both Sweden and Italy, there are cross-sectional employer associations, as well as several sectoral associations, which have the task of negotiating, on behalf of the employers, working and employment conditions, including wages.[62] That the two systems share a number of relevant features, but nonetheless differ substantially in important respects, makes them an interesting topic of comparison from the perspective of collective autonomy.

Although primarily regulated at the national level, a collective dimension of labour law has also become an important element of the 'institutional architecture' of the so-called European social model.[63] In this sense, Bercusson highlights that the presence of substantial and procedural provisions concerning the collective dimension of labour law – including European social dialogue, statutory forms of employee representation such as the European Works Councils (EWCs), and collective labour rights – constitute a solid framework for the development of a 'European collective labour law'.[64] Those aspects are now framed in the context of the Treaty of Lisbon, which is characterised by a more prominent social dimension of the EU objectives.[65] The EU legal framework contains rules recognising the exercise of collective labour rights (e.g. Art. 28 EU Charter), rules establishing consultation between the European social partners, such as the European social dialogue (e.g. Art. 154 TFEU) and providing for the employees' rights of information and consultation at company level both within multinational companies (Directive 2009/38 on the European works councils) and at national level (Directive 2002/14 on information and consultation rights). In this sense, the EU constitutes a multi-dimensional context for the exercise of industrial relations by different actors.[66] The adoption of rules regulating the industrial relations practices established within the EU context contribute to the shaping of a European system of industrial relations that interacts with the national systems. Nevertheless, along with those practices both fostered and regulated by EU law, the EU internal market gives rise to a further dimension – the cross-border dimension – in which the

[62] Gary Rynhart & Jean Dejardin, "National, Regional and International Employers' Organizations" in Blanpain (2010) 43–70, 48–49.

[63] Brian Bercusson, "The Institutional Architecture of the European Social Model" in Bercusson (2009e) 261–85, 277.

[64] Brian Bercusson, "A Framework of Principles and Fundamental Rights for European Collective Labour Law" in Bercusson (2009f) 288–330.

[65] See Filip Dorssemont, "Values and Objectives" in Niklas Bruun, Klaus Lörcher & Isabelle Schömann (eds), *The Lisbon Treaty and Social Europe* (Hart 2012) 45–59.

[66] The present EU framework has overcome the lack of recognition of collective labour rights and the absence of an autonomous social dimension, which were deemed to be obstacles to the establishment of a European system of industrial relations, see Wolfgang E. Lecher & Hans-Wolfgang Platzer (eds), *European Union – European Industrial Relations? Global Challenges, National Developments and Transnational Dynamics* (Routledge 1998); Marco Biagi (ed) *Towards a European Model of Industrial Relations?* (Kluver Law International 2001).

national frameworks of industrial relations and collective labour law interact with the EU rules on cross-border economic freedoms.

1.3.6. The *Viking* and *Laval* case law

The spark for the project has come from the controversial rulings of the CJEU in the *Viking* and *Laval* cases.[67] Due to their relevance, those cases have been commented on from different angles and perspectives, emphasising and stressing their implications both for the national and for the EU systems. Those rulings still influence the development of industrial relations at national and EU level, and remain at the centre of the European debate. Although the facts and the interpretation of the CJEU are well known, their relevance for the present work calls for a recapitulation of their circumstances and the legal aspects they raise.

The facts of the *Viking* case concern a Finnish ferry company operating in the Baltic Sea (Viking Line) that in 2003 wanted to reflag one of its vessels in Estonia. The operation aimed at applying to the Finnish crew the conditions of employment stated in the Estonian collective agreement in order to compete with the Estonian companies. Against this delocalisation, the Finnish trade union of maritime workers (*Suomen Merimies-Unioni ry*) started a collective action. The action was backed-up by the International Transport Workers' Federation (ITF), which issued a document calling on its members to boycott Viking Line, in accordance with the global policy of fighting against the 'flag of convenience' practice. Against these actions, Viking Line complained to a Finnish court and to the Commercial Court in England (as the ITF's main seat is in London) and initiated a conciliation proceeding with union. In the meantime, in 2004, Estonia joined the EU, which made the EU rules on the internal market applicable to the dispute. As a consequence, the English court ruled that the actions constituted restrictions to Viking Line's freedom of establishment as protected by Art. 49 TFEU. The unions appealed against this decision and the Court of Appeal referred to the CJEU to assess the alleged violation of the economic freedom of establishment enjoyed by Viking Line.

The reference for preliminary ruling filed by the English court concerned three sets of questions. The Court asked the CJEU, firstly, whether the exercise of a collective action would fall within the scope of the Treaty's provision on freedom of establishment; secondly, whether the provision on freedom of establishment would be applicable between private parties, such as a trade union and a company, i.e. whether it has horizontal direct effect; and finally, whether a collective action would constitute a restriction to the exercise of freedom of establishment and, if so,

[67] For an overview of those cases, see Frank Hendrickx, "Beyond *Viking* and *Laval*: The Evolving European context" (2011) 32 *Comparative Labor Law & Policy Journal*, 1055–77; Anne C. L. Davies, "One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ" (2008) 37 *Industrial Law Journal*, 126–48.

whether it could be justified. As for the first issue, the CJEU ruled that the collective action would fall within the scope of economic freedoms of establishment, thus dismissing the claims of an exclusion based on the limit to the EU regulatory competences, on the status of fundamental right, and on the inherent limitative nature of collective action (in analogy with *Albany*). As for the second issue, the CJEU recognised the horizontal direct effect of freedom of establishment on the grounds of the legal autonomy of the trade unions, expressed through the exercise of the collective labour rights aiming at the regulation of labour and employment. On the basis of its previous case law on restrictions to the freedom of movement placed by associations or organisations not governed by public law, the Court affirmed that the purpose of the provisions on economic freedoms would be hindered if their exercise could be restricted by private law bodies by virtue of their legal autonomy. On the third issue, the CJEU firstly equalised the collective action to the measures potentially constituting restrictions to the exercise of freedom of establishment. Secondly, it recognised the protection of workers as a legitimate aim in principle justifying a restriction to economic freedoms and falling within the social purpose of the EU. Nevertheless, it concluded that the collective action shall comply with the proportionality test applied to the measures restricting the economic freedoms. On this basis, the CJEU instructed the national court to assess the criteria of proportionality of the collective action.

The *Laval* case shared many of the same legal issues. The facts concerned a Latvian construction company that in 2004 (the year in which Latvia joined the EU) posted some of its employees to Sweden in order to build a school in the suburbs of Stockholm after having won a tender. The Swedish trade union of the construction sector (*Byggnads*), in accordance with the Swedish law in force at that time, asked the company to enter into a collective agreement in order to apply to the posted workers the same conditions of the Swedish workers, in particular the hourly wage levels. Laval refused the requests of the Swedish trade union and instead entered into a collective agreement with the Latvian union. In response, the union undertook a collective action in the form of a worksite blockade in order to force Laval to enter into negotiations. The company asked the police for assistance, but the request was dismissed, since the action was lawful and in compliance with Swedish law. In December 2005, a mediation procedure was initiated, but Laval again refused to sign a collective agreement that would have had the effect of imposing a social truce. Later, the electrician workers trade union (*Elektrikerförbundet*) also joined the action by undertaking a (lawful) sympathy strike. Eventually, the Latvian workers had to leave because Laval was not able to pursue the construction service. It did, however, refer to the Labour Court, demanding that the collective action be deemed in violation of its freedom to provide services as ensured by EU law. The Swedish Labour Court forwarded the issue to the CJEU.

The reference for a preliminary ruling sought answers to two questions: on the one hand, whether the collective action would constitute a restriction to the posting

of workers in the context of the freedom to provide services in the light of the Directive 96/71 (i.e. the directive on posting) and its implementing law; on the other hand, whether the prohibition set by the Swedish Co-determination act to undertake collective action against a company bound by a collective agreement would also be valid for collective agreements signed in another country, despite the provision stating that such a peace obligation would not apply to collective agreements outside the scope of the act (i.e. foreign companies). The reply to the first question had been particularly complex, since it intersected with the Swedish regulation of posting and with the Swedish system of collective bargaining, which despite being the primary mechanism of wage setting, lacks *erga omnes* collective agreement. The CJEU recognised that the collective action was aimed at forcing the company to sign a collective agreement for applying terms and conditions of employment that were outside the scope of the directive on posting and higher than the minimum ones – as instead indicated by Art. 3.1 of the directive on posting. After having reiterated the arguments already exposed in *Viking* concerning the application of EU law to the collective action and the horizontal direct effect of the provision on freedom to provide services, the Court concluded that the collective action at stake was to be deemed a restriction to Laval's freedom to provide services in the EU internal market. Although justifiable in principle because of the aim to combat social dumping (a legitimate aim, according the CJEU, falling within the social scope of the EU Treaty), the action was nevertheless disproportionate, since it tried to force the company to negotiate the wage levels rather than asking for the application of wages known in advance, and since it aimed at applying conditions of work going beyond the minimum terms set by the directive on posting. As for the second question, the Court briefly reached the conclusion that the exclusion from the social peace obligation of collective agreements outside the scope of the Co-determination act (i.e. collective agreements signed by foreign companies in their countries of origin) constituted a discriminatory measure that could not be justified by the aim of combating social dumping, which was not considered to constitute a sound basis for public policy, public security or public health.

1.3.7. Defining the cross-border dimension of the EU internal market and its scenarios

The situations highlighted by the *Viking* and *Laval* case law constitute the core of the definition of the cross-border dimension of the EU internal market adopted in this thesis. It pertains to the interplay between the exercise of the economic freedoms of establishment and providing services as protected by the TFEU and the national frameworks of collective labour law and industrial relations. The cross-border dimension concerns industrial relations that transcend national borders and/or involve actors that do not belong to the same national contexts.

The term 'cross-border' is usually adopted in the labour law field to describe situations of conflict of rules and/or jurisdictions,[68] or collective dynamics not confined to national boundaries.[69] In the industrial relations field, the term mostly refers to the trade unions' unilateral attempts to coordinate collective bargaining strategies between trade unions of different countries.[70] In the present study, by contrast, the 'cross-border dimension' defines the dimension of industrial relations stemming from the interplay between the exercise of EU economic freedoms of establishment and providing services and the national collective labour law and industrial relations frameworks.

The situations that emerged in the *Viking* and *Laval* disputes might have been deemed national disputes: in the *Viking* case, the dispute concerned a delocalisation that had not yet occurred; in the *Laval* case, the dispute could simply have been related to the application of Swedish working conditions to persons working on Swedish soil. Nevertheless, the logic of the EU internal market has transformed these disputes into cross-border disputes, since they concern the exercise of the cross-border economic freedoms. The present study, while neither agreeing with the outcomes of the CJEU's rulings nor approving of the all-encompassing logic of the EU internal market, intends to base a definition of the 'cross-border dimension' on this logic in order to demonstrate how the socio-economic dynamics stemming from the economic freedoms of establishment and providing services affect and alter the functioning of collective autonomy and collective bargaining.

EU law fosters process of delocalisation, outsourcing and subcontracting, and the *Viking* and *Laval* cases highlight how these processes expose national frameworks and collective autonomy to challenges that concern the role of the industrial relations actors and the resistance of national wage and employment standards.[71] These cases concern economic operations that imply the application of labour standards lower than those applied in the places in which the economic activity would actually be performed. From another perspective, these cases concern the conflict between the exercise of the economic freedoms by the companies and the exercise of the collective labour rights by the trade unions and workers. Further, the

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[68] See for instance, Hepple (2005) 172; Sten Evju, "Cross-border Services, Posting of Workers, and Jurisdictional Alternation" (2010) 1 *European Labour Law Journal*, 89–98.

[69] An example in the labour law field is given in Brian Bercusson, "Implementation and Monitoring of Cross-border Agreements: The Potential Role of Cross-border Collective Industrial Action" in Konstantinos Papadakis (ed) *Cross-border Social Dialogue and Agreements: An Emerging Global Industrial Relations Framework?* (ILO 2008) 131–57; for the industrial relations field, see James Arrowsmith & Paul Marginson, "The European Cross-border Dimension of Collective Bargaining in Multinational Companies" (2006) 12 *European Journal of Industrial Relations*, 245–66.

[70] Nikolaus Hammer, "Cross-border Cooperation Under Asymmetry: The Case of an Interregional Trade Union Council", (2010) 16 *European Journal of Industrial Relations*, 351–67; Vera Glassner & Philippe Pochet, "Why Trade Unions seek to Coordinate Wages and Collective Bargaining in the Eurozone: Past Developments and Future Prospects" (2011) ETUI Working Paper, 2011.03.

[71] See Silvan Sciarra, *L'Europa e il lavoro* (Laterza 2013) 71.

cases highlight the tensions stemming from the process of EU enlargement in which now countries with very different social and labour standards coexist. In the EU legal system, the economic freedoms are pillars of the establishment of the internal market; whereas the collective labour rights are fundamental rights of the EU enshrined in the EU Charter of Fundamental Rights.

The *Viking* and *Laval* case law has also been referred to in the BALPA case, which represents a further example situation of the cross-border dimension. In 2008, the British Airlines Pilots Association (BALPA), the union organising the pilots of the UK-based company British Airways, challenged the decision of the company to open a new subsidiary in Paris and Brussels operating on routes towards the US. Consequently, the refusal of British Airways to apply to the subsidiary's employees a collective agreement signed with BALPA in 2003 led to the decision by the union to undertake a collective action. Although undertaken following the procedural rules of English law, the action was withdrawn due to the threat of being sued by British Airways on the grounds of the *Viking* and *Laval* case law as restriction to the exercise of the freedom of establishment.

The Viking, Laval, and BALPA disputes share a common denominator: the displacement of economic activities across national borders and the ensuing implications for collective labour law and industrial relations. The freedom of establishment and to provide services represents the lynchpin of economic practices, such as delocalisation and outsourcing, which affect the functioning of collective autonomy and collective bargaining at the national level. These economic practices are undertaken by what Barnard and Snell have defined as the 'migrant company', i.e. the economic subject that is entitled, according to EU law, to migrate into a different State in order to perform economic activities.[72]

These activities, undertaken on the basis of the freedom of establishment and of providing services, give rise to a certain number of cross-border scenarios in which collective autonomy is put under pressure. These scenarios are relevant in the analysis of the challenges that collective autonomy and collective bargaining face not only in the cross-border dimension of the EU internal market, but also in the national dimension. A first scenario is represented by the *relocation of an economic activity* (or cross-border delocalisation) in a Member State. In the EU legal system, this operation is protected by the freedom of establishment, which allows companies to decide in which State to install their main seat and therefore which standards it should apply in relation to employment. A 'migrant company' can exercise this freedom in order to relocate its production in a country having social and labour standards, including wages, lower than the standards of the country of origin. Two potential challenges to collective autonomy and collective bargaining arise. On the

[72] Catherine Barnard & Jukka Snell, "Free Movement of Legal Persons and the Provision of Services" in Catherine Barnard & Steve Peers (eds), *European Union Law* (Oxford University Press 2014) 403–42, 404.

one hand, the freedom of establishment, exercised as a freedom to relocate, might be used as a threat in collective negotiations, which might lead the workers to negotiate downwards. This could even be a strategy of the social partners in order to attract foreign investment, so as to generate a 'race to bottom' of labour and employment standards. On the other hand, the exercise of collective labour rights against relocation could be – and has been – deemed an obstacle to the freedom of establishment.

A second scenario concerns the *posting of workers in the context of freedom of providing services*. In this scenario, particularly common in labour intensive sectors such as construction,[73] a company established in a Member State of the EU posts workers to another Member State that has more favourable employment and labour conditions in order to perform a temporary economic activity. In most cases, the posting occurs as a consequence of a contract signed between two companies or as a result of a tender. The possibilities of being awarded the tender increase because of the lower costs of labour that the posting company might have due to its country of origin. As in the previous scenario, collective autonomy would be affected by the pressures on collective bargaining stemming from the possibility of outsourcing an economic activity to companies located in another Member State. In addition, the cross-border posting, especially in the light of the *Laval* case, poses challenges to the territorial application of labour rules and employment standards set by collective autonomy because of the risk that an economic actor can operate in the territory of a country under the employment regime of its country of origin.

The combined use of freedom of establishment and to provide services gives rise to a third cross-border scenario, which concerns the *phenomenon of 'letter box companies'*. This practice relates to situations in which a company firstly decides to exercise its freedom of establishment and re-establishes itself, or part of its activities, or creates a branch, in a country with low social and labour standards. Secondly, the company undertakes the performance of economic activities, usually providing services on a temporary basis, in the market of countries with higher standards by applying the labour and employment standards of the country of establishment. This operation can be conducted by outsourcing parts of the main activities to controlled companies located in another State. Or it can also be conducted by posting workers in the territory of the original country from the country of new establishment.[74] In this scenario, the cross-border posting 'has in effect become the "core business" of a number of specialised firms that rely on cross-border wage and labour cost differentials to undercut businesses and workers

[73] Fabrizio Bano, "La circolazione comunitaria dei servizi labour intensive" (2008b) 1 *Lavoro e Diritto*, 7–36.

[74] Karsten Engsig Sørensen, "The Fight Against Letterbox Companies in the Internal Market" (2015) 52 *Common Market Law Review*, 85–118, 97.

permanently established and operating in host Member States'.[75] In these three cross-border scenarios, the autonomy of collective bargaining is challenged by the necessity to confront the economic power of the 'migrant company' to move across borders.

1.3.8. Delimitations

The multiple facets that this work encompasses highlight a complexity that necessarily requires some delimitations. The aspects of the project described so far have already highlighted a series of methodological and conceptual choices that help to define the contours of the research. However, more must be said in order to clarify and delimit the object of the study.

A first and fundamental delimitation concerns the choice to focus on collective bargaining. The legal understanding of collective autonomy also includes the right to organise and the freedom of association, as well as the right to take collective action and strike. However, the present study focuses on collective bargaining as the primary expression of the normative capability of collective autonomy. For reasons of time and space, the legal issues related to freedom of association, right to organise and collective action are taken into account only insofar as they regard the dynamics of collective bargaining. For instance, in dealing with the ECHR, the ESC, and the ILO Conventions, the freedom of association and the right to organise are considered as premises for the development of machineries for collective negotiations and as legal sources for the recognition of a right to collective bargaining. Similarly, in the comparative analysis of the national contexts, the legal aspects of representation and representativeness and of collective action are analysed, respectively, as premises for the access to collective bargaining and as object of its regulatory prerogatives. The focus on the legal regulation of collective bargaining also entails that the discussion of other aspects of the legal regulation of industrial relations – such as issues of the proportionality of collective actions or of the trade union liability in case of unlawful strikes – is limited to contexts in which they are relevant for understanding the overall consequences on collective autonomy and collective bargaining.

A further delimitation concerns the issue of the rights of information and consultation. In the conceptual and theoretical account of collective autonomy and collective bargaining, these elements of industrial relations are not taken into consideration because they do not reflect dynamics of bilateral negotiations, but rather are practices of employees' involvement in managerial decisions. In the national context, however, these elements are discussed (albeit tangentially),

[75] Nicola Countouris & Samuel Engblom, "Civilising the European Posted Workers Directive" in Mark Freedland & Jeremias Prassl (eds), *Viking, Laval and Beyond* (Hart 2014), 279–93, 282.

because of the relevant role they perform in the national system of industrial relations, which in some cases results in negotiation practices, as for instance in case of collective redundancies.

For similar reasons, the analysis of the EU context also mentions the directives on the rights to information and consultation and on the European Works Councils (EWCs), as well as the Treaty's provisions referring to the European social dialogue. The project does not deal with the freedom of movement of workers. The focus of the analysis of the EU internal market is the cross-border dimension linked to the exercise of the economic freedoms of establishment and providing services. Therefore, the freedom of movement for workers is excluded insofar as it pertains to the regulation of individual subjects (workers) moving across the borders, rather than a collective subject of industrial relations (the company).

Furthermore, the project does not in principle deal with issues related to private international law. This branch of law mainly deals with matters of jurisdiction, such as the localisation of the competent court in case of private law conflicts that can be related to more than one national legal system, i.e. it deals with the definition of the court that can legitimately adjudicate a case. Questions of power relationships are not alien to private international law: the identification of the legal system whose rules shall apply to a cross-border dispute brings about a series of political consequences – especially in the labour sphere, in which for instance the identification of the labour law regime applicable to a collective action can be crucial for its lawfulness.[76] However, as van Hoek notes, 'the rules of jurisdiction are not primarily concerned with the cross-border character of the relationship as such, but with the peculiarities of the parties and their legal claims'.[77] Although collective interests can also be highlighted through private international law, the latter does not contribute to the framework of this thesis in terms of analysing the evolution of collective autonomy in the context of the EU internal market and its law. The cross-border perspective of this study is not concerned with issues related to national jurisdictions and conflict of rules. Rather, it envisions a scenario 'in the making' for industrial relations based on the legal regulation of EU internal market law.

[76] See, for instance, the case of labour disputes in the maritime sector, in Laura Carballo Piñero, *International Maritime Labour Law* (Springer 2015), 229.

[77] Aukje van Hoek, "Private International Law. Aspects of Collective Actions – Comparative Report" in Filip Dorssemont, Teun Jaspers & Aukje van Hoek (eds), *Cross-border Collective Action in Europe: A Legal Challenge* (Intersentia 2007) 425–68, 430.

1.4. The contribution to European labour law scholarship

The literature about collective autonomy and collective bargaining in the EU is vast and complex, and it concerns the fields of both labour law and industrial relations. In the industrial relations field, the research has mainly focused on the relations between employers' associations and trade unions in the cross-sectoral and sectoral European social dialogue, the relations within the European trade union movement, and the relations between the EWCs and the national and European trade union federations.[78] As for the European social dialogue, the industrial relations research focused on the different aspects of the procedures,[79] the contents and the nature of the actors and outcomes,[80] as well as the quantitative and qualitative impacts of the European framework agreements at national and transnational levels.[81] The research on collective negotiations within the multinational companies focused on the nature of both the actors involved and the collective agreements achieved.[82] Particular attention has been paid to the EWCs, which, despite the lack of a legal entitlement, have acquired a de facto bargaining role in negotiating collective agreements in multinational companies or groups. This role has led EWCs to be described as both

[78] Glassner & Pochet (2011); Paul Marginson, "Industrial Relations at European Sectoral Level: The Weak Link?" (2005) 26 *Economic and Industrial Democracy*, 511–40; Deborah Hann, "The Continuing Tensions between European Works Councils and Trade Unions: A Comparative Study of the Financial Sector" (2010) 16 *Transfer*, 525–40.

[79] Stijn Smismans, "The European Social Dialogue in the Shadow of Hierarchy" (2008) 28 *Journal of Public Policy*, 161–80.

[80] It has been stressed that the switch towards practices of social dialogue has corresponded to a switch towards 'softer' and more consensual issues, such as health and safety and non-discrimination, disadvantaging 'harder' issues, such as wages and working hours, see Berndt Keller & Sabrina Webber, "Sectoral Social Dialogue at EU level: Problems and Prospects of Implementations" (2011) 17 *European Journal of Industrial Relations*, 227–43. Equally, the 'softness' is reflected in the adoption of recommendations and joint texts instead of collective agreements, see Marginson (2005).

[81] See Stefan Clauwaert, "2011: 20 Years of European Interprofessional Social Dialogue: Achievements and Prospects", (2011) 17 *Transfer*, 169–79; Sabrina Weber, "Sectoral Social Dialogue at EU level – Recent Results and Implementation Challenges" (2010) 16 *Transfer*, 489–507; Volker Telljohann et al., "European and International Framework Agreements: New Tools of Transnational Industrial Relations" (2009) 15 *Transfer*, 505–25. On the impact of the cross-sectoral and sectoral European social dialogue on national industrial relations systems, see Trine P. Larsen & Søren Kaj Andersen, "A New Mode of European Regulation? The Implementation of the Autonomous Framework Agreement of Telework in Five Countries" (2007) 13 *European Journal of Industrial relations*, 181–98; Thomas Prosser, "The Implementation of Telework and Work-related Stress Agreements: European Social Dialogue through 'soft-law'?" (2011) 17 *European Journal of Industrial Relations*, 245–60.

[82] Paul Marginson & Guglielmo Meardi, *Multinational Companies and Collective Bargaining* (Eurofound 2009).

instruments for developing the 'Europeanisation' of industrial relations[83] and as fundamental tools at trade unions' disposal for counterbalancing the economic side of the European integration process.[84]

In labour law scholarship, the attention focused on the legal nature of the framework agreements concluded within the machinery of the cross-sectoral and sectoral European social dialogue, as well as on the legal nature of the transnational collective agreements. As for the first aspect, the autonomy of the European social partners has been questioned, since the intervention of the EU legislator and/or the need to rely upon the national procedures are required elements for the implementation of the European framework.[85] The meaning of 'autonomy' in the European Social Dialogue has been conceptualised in procedural terms and as a form of supranational social governance.[86] As for the issue of transnational collective bargaining, labour law scholarship has debated the lack of a legal framework. Scholars are divided between those who sustain the need for the adoption of an EU legal framework,[87] and those who instead promote a different reading of the Treaty provisions on the European social dialogue in order to provide a legal basis for negotiating and implementing the collective agreements.[88] The adoption of a legal framework for transnational collective agreements has been considered as a necessary step in adapting the European market to globalisation[89] and as a vital tool for filling the legal gap in which employees representing bodies

[83] See, inter alia, the contribution of the comparative study Markus Hertwig, Ludger Pries & Luitpold Rampeltshammer (eds), *European Works Councils in a Complementary Perspective* (ETUI 2009).

[84] Jürgen Hoffman & Reiner Hoffmann, "Prospects for European Industrial Relations and Trade Unions in the Midst of Modernisation, Europeanization and Globalization" (2009) 15 *Transfer*, 389–417; Barbara Tully, "Organising across Borders: Developing Trade Union Networks" in Ian Fritgerald & John Stirling (eds), *European Works Councils. Pessimism of the Intellect, Optimism of the Will*? (Routledge 2004), 165–77.

[85] Olaf Deinert, "Mode of Implementing European Collective Agreements and their Impact of Collective Autonomy", (2003) 32 *Industrial Law Journal*, 317–25; Nuria Ramos Martìn & Jelle Visser, "A more 'autonomous' European Social Dialogue: The Implementation of the Framework Agreement on Telework" (2008) 24 *The International Journal of Comparative Labour Law and Industrial Relations*, 511–48.

[86] Marco Peruzzi, "Autonomy in European Social Dialogue" (2011) 27 *The International Journal of Comparative Labour Law and Industrial Relations*, 3–21; Antonio Lo Faro, *Funzioni e finzioni della contrattazione collettiva comunitaria* (Giuffrè 1999).

[87] Edoardo Ales et al., *Transnational Collective Bargaining. Past, Present, Future,* (2006) Final report to the European Commission, Directorate General Employment, Social Affairs and Equal Opportunities; Edoardo Ales, "Transnational Collective Bargaining in Europe: The Case for Legislative Action at EU level" (2009) 148 *International Labour Review*, 149–62.

[88] Dagmar Schiek, "Transnational Collective Labour Agreements in Europe and at European level – Further Reading of Article 139 EC" in Mia Rönnmar (ed) *EU Industrial Relations v. National Industrial Relations. A Comparative and Interdisciplinary Perspective* (Kluwer 2008), 83–103.

[89] Isabelle Schömann, "Transnational Collective Bargaining: A Tool in the Service of the Lisbon Strategy?" (2006) 12 *Transfer*, 297–301.

such as the EWCs pursue collective negotiations at a transnational company level.[90] It has also been stressed that the adoption of such a legal framework would affirm the transnational nature of such agreements, as their implementation would not need to rely on national mechanisms.[91]

The major streams of research concern the European social dialogue and transnational collective bargaining. It emerges that the (non-national) industrial relations dynamics within the EU are usually classified according to a three-fold structure including the cross-sectoral dimension of the European social dialogue, the sectoral dimension of the European social dialogue, and the transnational negotiations occurring within multinational companies and groups.[92] This thesis, instead, intends to highlight the evolution of collective autonomy and collective bargaining in the cross-border dimension of the EU internal market, as emerged in the *Viking* and *Laval* disputes, which constitutes a particularly fertile stream of research in the labour law field.

The *Viking* and *Laval* case law marked a division between two eras in labour law scholarship. Before *Viking* and *Laval*, commentators shared a vision of hope towards the social improvements stemming from the construction of the EU. The critics addressed an evolution of the EU integration project that was skewed towards the economic side and argued for more space for the social side of integration. However, the social policy provisions included in the EU Treaty appeared as opportunities to widen the scope for social actors to scale up their activities in the European scenario. This vision found some success in the adoption of the EU Charter of Fundamental Rights in 2000. The wide space it offered to social and labour rights was seen as an important achievement in the development of the social side of integration. The adoption of the Treaty of Lisbon in December 2007, which made the Charter legally binding and reformulated the aim of the EU internal market in terms of a 'social market economy', contributed to the perception of the definitive achievement of a more socially-oriented EU.

However, at the same time as the signing of the Lisbon Treaty, the *Viking* and *Laval* case law appeared. The disapproval of (or at least the scepticism towards) these rulings among labour law scholars and commentators has been almost unanimous. Through those cases, the CJEU had strongly intervened in the evolution of the EU by privileging its economic side to the detriment of the social side. The status of the social objectives and of the collective labour rights had been downsized in the EU legal system and subjected to complying with the economic freedoms of

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[90] Romuald Jagodzinski, "Involving European Works Councils in Transnational Negotiations – A Positive Functional Advance in their Operation or Trespassing?" (2007) 14 *Industrielle Beziehungen / The German Journal of Industrial Relations*, 316–33.

[91] Antonio Lo Faro, "Bargaining in the Shadow of 'optional framework'? The Rise of Transnational Collective Agreements and EU law" (2012) 18 *European Journal of Industrial Relations*, 153–65, 159.

[92] For a schematic description of these definitions, see John Gennard, "Developments of Transnational Collective Bargaining in Europe" (2009) 31 *Employee Relations*, 341–46.

establishment and providing services. The recognition of the right to collective action as a fundamental right of the EU legal system was welcomed; but its contextual subjugation to the exercise of economic freedoms was condemned and indicated as the signal of the neo-liberal turn in the project of European integration. The present work shares those concerns, but at the same time it intends to offer new perspectives on the *Viking* and *Laval* case law on the grounds of a conceptual understanding of collective autonomy.

Those cases have stimulated several reflections on different levels and from different perspectives. Many studies, often edited volumes with several contributors, have been produced, in which the analysis has focused on the balance between the economic and the social side of the EU integration project or of the EU legal system; on the interplay in EU law between the exercise of collective labour rights and the exercise of the economic freedoms; and on the impact (real or potential) of that case law in different national contexts.[93] Other studies have been conceived within one of the most relevant contexts to emerge from those cases, such as the posting of workers.[94]

Even though the subjects related to the *Viking* and *Laval* cases have been explored in detail, this study intends to 'fill a gap' in European labour law scholarship concerning the evolution of the legal regulation of industrial relations, and in particular that of collective bargaining, from the national to the cross-border dimension in the light of a theoretical framework grounded on the concept of collective autonomy. The analysis is framed within the rationale of collective autonomy and it has a strong and developed theoretical framework that combines labour law theories and industrial relations theories. This study intends to adopt the concept of 'collective autonomy' as an analytical tool for interpreting the current evolution of labour, just as Ruth Dukes did so in her work with the concept of the 'labour constitution'.[95] The integration of the legal discourse on global labour rights contributes in expanding both the legal understanding of collective autonomy and the analysis of the international and European labour law sources, which are here combined with an industrial relations perspective. The study further analyses the

[93] Inter alia, Mark Freedland & Jeremias Prassl (eds), *Viking, Laval and Beyond* (Hart 2014); Andreas Bücker & Wiebke Warneck (eds), *Reconciling Fundamental Social Rights and Economic Freedoms after Viking, Laval and Rüffert* (Nomos 2011); Edoardo Ales & Tonia Novitz (eds), *Collective Action and Fundamental Freedoms in Europe. Striking the Balance* (Intersentia 2010); Mia Rönnmar (ed) *EU Industrial Relations v. National Industrial Relations. A Comparative and Interdisciplinary Perspective* (Kluwer 2008); Aurora Vimercati (ed), *Il conflitto sbilanciato. Libertà economiche e autonomia collettiva tra ordinamento comunitario e ordinamenti nazionali* (Cacucci 2009); Filip Dorssemont & Teun Jaspers & Aukje van Hoek (eds), *Cross-border Collective Action in Europe: A Legal Challenge. A Study of the Legal Aspects of Transnational Collective Actions from a Labour Law and Private International Law Perspective* (Intersentia 2007).

[94] Marco Rocca, *Posting of Workers and Collective Labour Law: There and Back Again. Between Internal Market and Fundamental Rights* (Intersentia 2015).

[95] Ruth Dukes, *The Labour Constitution. The Enduring Idea of Labour Law* (Oxford University Press 2014).

legal regulation of collective autonomy and collective bargaining in the national contexts, which constitute the contexts in which industrial relations have received legal regulation, and thus are the contexts in which the notion of collective autonomy has taken place. The integrated and analytical comparison between Italian and Swedish collective labour law and industrial relations also constitutes a valuable contribution in itself, since (as far as I am aware) no comprehensive studies have thus far addressed those two systems in such a manner. Finally, the thesis explores the evolution of collective autonomy and collective bargaining in the socio-economic context of the cross-border dimension of the EU internal market in order to capture their changing features. The methodological choice of a multifaceted and integrated analysis marks this study's contribution to the field of European labour law scholarship. Further, it intends to integrate a labour law analysis with an industrial relations perspective in a context outside the borders of the State.

1.5. The socio-economic and political background

The economic crisis of 2008 and its impact on labour standards represent one socio-economic and political background of this research project. The present moment in Europe is characterised by a crisis which is not merely economic and financial; it also involves a crisis of democracy as well as of the social standards achieved in European countries. Yet the efforts of the so-called 'Troika' (European Commission, European Central Bank and International Monetary Fund) have only concerned the adoption of measures for reinforcing the supranational economic governance of the national markets with the aim of fostering both competitiveness and, by consequence, employment, without however taking into consideration the role of the social partners.[96] At EU level, the risk of failure of several countries of the Euro-zone brought about the adoption of a mechanism (the European Stability Mechanism) in order to provide those countries with financial bail-outs – a scenario not foreseen in the Treaty. Furthermore, the supranational economic governance has been strengthened through the adoption of a treaty (the Fiscal Compact) intended to foster budgetary discipline by imposing on the Contracting Parties the balance or the surplus of their public budgets.[97] The two treaties reinforce the supranational

[96] See Stefan Clauwert & Isabelle Schömann, "European Social Dialogue and Transnational Framework Agreements as a Response to the Crisis?" (2011) 4 ETUI Policy Brief.

[97] Art. 3.1 Fiscal Compact. For a detailed analysis of the Fiscal Compact, see Steve Peers, "The Stability Treaty: Permanent Austerity or Gesture Politics?" (2012) 8 *European Constitutional Law Review*, 404–41. For a general overview, see Janine Leschke & Maria Jepsen, "Introduction: Crisis, Policy Responses and Widening Inequalities in the EU" (2012) 151 *International Labour Review*, 289–312; Amy Verdun, "The Building of Economic Governance in the European Union" (2013) 19 *Transfer*, 23–35.

control on national budgets by limiting the discretion of national political and economic actors in domestic social and economic policy decisions. Nevertheless, social policy is not given any consideration by those instruments. In this regard, Barnard has commented that they restate the monetarist argument that sees the stability of economic policy as the best promoter of social growth.[98]

The responses to the crisis have also regarded the specific conditions imposed on those countries (Latvia, Cyprus, Ireland, Spain, Portugal and Greece) that have received economic assistance. The conditions for the bailout loans consisted in concluding so-called Memoranda of Understanding stating the reforms to be introduced at national level with a view to controlling and reducing public deficits and public expenditures. These austerity measures aim at the 'internal devaluation' of national economic systems and they have a strong impact on labour and social legislations and policies. The term 'internal devaluation' describes the mix of measures indicated by the Troika as substitutive of currency devaluation. It aims at containing inflation by cutting employment and wages and by making labour and social legislations more flexible, for instance by liberalising the welfare state and labour market and by cutting state expenditure through reforming the pension systems.[99] Besides sharpening existing problems of democracy within the policy-making process of the EU,[100] these measures have a direct impact on national industrial relations systems.[101] A mapping made by the ETUI has shown the common effect of deconstructing the national industrial relations systems by imposing the decentralisation of collective bargaining and deregulating industrial relations issues, such as the representativeness of trade unions and the inderogability of the sectoral collective agreements.[102]

The crisis hence represents a moment of political and social change. There is the risk that, in the name of economic recovery and under the slogan 'There Is No Alternative', the European countries could experience a 'backward development', which would affect the living and working conditions of European citizens and workers.[103] In this context, the neo-liberal drift of the European integration project

[98] Catherine Barnard, "The Financial Crisis and the Euro Plus Pact: A Labour Lawyer's Perspective" (2012b) 41 *Industrial Law Journal*, 98–114. 103.

[99] See Klaus Armingeon & Lucio Baccaro, "Political Economy of the Sovereign Debt Crisis: The Limits of Internal Devaluation" (2012) 41 *Industrial Law Journal*, 254–75.

[100] Philippe Pochet & Christophe Degryse, "Monetary Union and the Stakes for Democracy and Social Policy" (2013) 19 *Transfer*, 103–16, 110–11.

[101] See the example of Portugal in Hermes Augusto Costa, "From Europe as a Model to Europe as Austerity: The Impact of the Crisis on Portuguese Trade Unions" (2012) 18 *Transfer*, 397–410.

[102] Stefan Clauwert & Isabelle Schömann, "The Crisis and National Labour Law Reforms: A Mapping Exercise" (2012) ETUI Working Paper 2012.04.

[103] Alain Supiot, "Possible Europes. Interview with Marc-Olivier Padis" (2009) 57 *New Left Review*, 57–65.

highlighted by Crouch[104] and Supiot[105] raises many concerns as regards the aggressive policies of labour market deregulation that this implies.[106] Neo-liberal ideology entails the progressive dismantlement of any rigidity that might slow down the functioning of the market, from the State's regulation of employment protection to the collective regulation of labour conditions.[107] As for the collective dimension of labour, Crouch notes that 'neoliberals are unequivocally hostile to trade unions, which seek to interfere with the smooth operation of the labour market'.[108] The exercise of collective labour rights is hence challenged by this socio-economic and political context. But, as Rigaux points out, 'the first objective of labour law is to restrain and correct the free labour market and the ensuing social competition', just as the exercise of collective labour rights should aim 'at improving the employee's position'.[109] In the light of this, a study of collective autonomy and collective bargaining in the EU is necessary in order to reaffirm the centrality of these regulatory techniques of the labour market.

1.6. Outline

The thesis is structured according to its three-fold perspective. The subsequent chapters are as follows: Chapter 2 addresses the theoretical and conceptual analysis of collective autonomy and collective bargaining. It deals with labour law theories, industrial relations theories, and the discourses on global labour rights, respectively. Chapter 3 provides a comparative analysis of the Italian and Swedish contexts. It consists of an integrated analytical study of the relevant features of the national regulation of collective autonomy and collective bargaining. It discusses the general features and evolution of the Italian and Swedish systems, the legal regulation of the representation of the collective bargaining actors, the legal recognition of the normative effects of the collective agreement, the regulation of collective action in relation to collective bargaining, and the challenges that collective autonomy and

[104] Colin Crouch, "Entrenching Neo-liberalism: The Current Agenda of European Social Policy" in Nicola Countouris & Mark Freedland (eds), *Resocialising Europe in a Time of Crisis* (Cambridge University Press 2013) 36–60.

[105] Alain Supiot, "Conclusions: Europe's Awakening" in Marie-Ange Moreau (ed), *Before and After the Economic Crisis. What Implications for the 'European Social Model'?* (Edward Elgar 2011) 292–309.

[106] Luciano Gallino, *La lotta di classe dopo la lotta di classe* (Laterza 2012).

[107] Gregor Gall & Richard Hurd & Adrian Wilkinson, "Labour Unionism and Neo-liberalism" in Gregor Gall, Richard Hurd & Adrian Wilkinson (eds), *The International Handbook of Labour Unions: Responses to Neo-liberalism* (Edward Elgar 2011) 1–12.

[108] Colin Crouch, *The Strange Non-death of Neoliberalism* (Polity Press 2011) 18.

[109] Marc Rigaux, *Labour Law or Social Competition Law? On Labour in its Relation with Capital through Law* (Intersentia 2009) 27 and 17.

collective bargaining face in the national dimension. Chapter 4 deals with the cross-border dimension of the EU internal market. It analyses the legal foundations of collective autonomy and the general features of the exercise of the freedom of establishment and providing services in EU primary and secondary law and in the case law of the CJEU. The chapter also explores the cross-border scenarios for collective autonomy and collective bargaining in tandem with the economic freedoms. It explores the challenges to collective autonomy and collective bargaining that stem from those scenarios. Finally, Chapter 5 contains a concluding analysis in which the main findings in each of the perspectives explored are discussed and in which these findings are integrated in order to fulfil the aim of the thesis and to answer its research questions.

2. Theories and discourses on collective autonomy and collective bargaining

2.1. Introduction

This chapter intends to provide a theoretical and conceptual analysis of collective autonomy and collective bargaining, combining industrial relations and labour law theories with the discourse on global labour rights. Collective autonomy and collective bargaining represent an interdisciplinary topic, dealing with matters related to industrial relations, labour law and, more recently, human rights.[1] In this sense, the aim is to conduct an integrated analysis, combining industrial relations, labour law theories and the discourse on global labour rights, in order to highlight the understanding of collective bargaining from a legal perspective, the role that the legal system does or should play in shaping the evolution of industrial relations, and the contribution to those issues stemming from the international and European labour law sources as interpreted by the case law of non-national judicial and monitoring bodies.

The sections on industrial relations and labour law theories mostly refer to scholars from British and Italian academia. This is mainly due to the specific attention paid by those scholars to the conceptualisation of collective autonomy and collective bargaining. The contexts in which those scholars have operated play a further role: the British and the Italian contexts are both characterised by a low degree of statutory regulation. This has favoured a research interest towards the autonomous and voluntary exercise of collective bargaining that has fostered an advanced conceptualisation of collective autonomy. In other contexts, such as Sweden for instance, a different origin and evolution of the industrial relations system based on the mutual recognition and cooperation between labour market

[1] See for instance the relevance attributed by Blackett to collective autonomy in advancing the rights and working conditions of domestic workers in light of the ILO Convention n. 189, Adelle Blackett, "Transnational Labour Law and Collective Autonomy for Marginalized Workers: Reflections on Decent Work for Domestic Workers" in Adelle Blackett & Anne Trebilcock (eds), *Research Handbook on Transnational Labour Law* (Edward Elgar 2015) 230–43.

parties, as well as a high degree of institutionalisation, have determined a more pragmatic approach towards the study of collective bargaining, mainly related to studies on the labour market dealing with wage formation mechanisms and human resource management.[2]

The section on the discourse of global labour rights explores the sources and case law stemming from non-national legal systems, which comprise the ILO Conventions and their interpretation given by the ILO Committees, the European Social Charter and the case law of the European Committee of Social Rights, the European Convention of Human Rights and the case of its court, and finally, the EU Charter on Fundamental Rights and the case law of the CJEU concerning collective labour rights. This analysis serves to 'update' the theoretical and conceptual accounts outlined by labour law and industrial relations theorists. The increased relevance that the presence of several legal orders and legal sources has acquired in academic discourse – as well as in the practice – indicates that labour rights can no longer be considered as merely a matter of national law. The legal regulation of collective autonomy and collective bargaining has evolved from the national level to the global level. The standards ensured to the exercise of collective labour rights at the national level have evolved accordingly to include international legal sources. From a legal-pluralistic perspective, this means that the same socio-economic phenomena, such as collective bargaining, can be interpreted differently depending on the legal system taken into consideration. The exercise of collective labour rights finds its regulation in international and European legal sources, which on the one side exert pressure on national regulation and legal production, and on the other provide (at least in several cases) for a stronger legal basis for grounding claims against the rapid deterioration of standards.[3]

The chapter is structured as follows: Section 2.2 analyses collective autonomy and collective bargaining from the perspective of industrial relations theories. Section 2.3 deals with the labour law theories in order to discuss how labour law scholars have understood and conceptualised collective autonomy and collective bargaining. Section 2.4 deals with the discourse of collective autonomy as a global labour right and is based on an analysis of the aforementioned international and European legal sources. Section 2.5 concludes.

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[2] Nils Elvander, *Industrial Relations. A Short History of Ideas and Learning* (National Institute for Working Life 2002) 39.

[3] Inter alia, Klaus Lörcher, "Legal and Judicial International Avenues: The (Revised) European Social Charter", and Keith Ewing & John Hendy, "International Litigation Possibilities in European Collective Labour Law: ECHR" in Niklas Bruun & Klaus Lörcher & Isabelle Schömann (eds), *The Economic and Financial Crisis and Collective Labour Law in Europe* (Hart 2014) 265–94 and 295–321.

2.2. Collective autonomy and collective bargaining in industrial relations theory

2.2.1. Introduction

The intention of this section is to conduct an analysis of industrial relations theories that have been influential in conceptualising the main aspects of collective autonomy and collective bargaining. The section begins by considering the works of the Webbs and of Selig Perlman as early attempts to study the phenomena of industrial relations and collective bargaining. Then, it discusses the conceptualisation of the system of industrial relations developed by John T. Dunlop and refers to the 'pluralist school' of industrial relations, also known as the 'Oxford School', represented by Allan Flanders and Hugh Clegg. Finally, it considers the 'radical or critical stream' represented by Richard Hyman and Colin Crouch.

The major schools of industrial relations have been classified according to a 'frame of reference' developed by Fox, who distinguished a 'unitarist', a 'pluralist', and a 'radical' stream of industrial relations scholarship.[4] The 'unitarist' stream assumes the correspondence between the interests of the employees and those of the employer/management. Although descending from the application of management theories developed in the early 1900s, it has been a minority stream of industrial relations scholarship until the emergence of studies oriented towards human resources management.[5] Instead, the 'pluralists' and the 'radicals' consider the employment relationship to be basically characterised by a conflict of interests. However, their views diverge as to how best to overcome such a conflict. The 'pluralists' indicate in the instrument of collective bargaining the primary way to overcome conflict by finding a compromise. The 'radicals' instead theorise the conflict as the practice of workers' emancipation and praise individual as well as collective resistance at the workplace.[6] The present work does not take into consideration scholars belonging to the 'unitarist' stream, since their analyses place less emphasis on collective bargaining and the conflict of interest.

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[4] The concept of 'frame of reference' is based on a distinction of the different approaches to the study of industrial relations based on the understanding of conflict and on the instruments to be developed for overcoming it, see recently Edmund Heery, "Frames of Reference and Worker Participation" in Stewart Johnstone & Peter Ackers (eds), *Finding a Voice at Work? New Perspectives on Employment Relations* (Oxford University Press 2015) 21–43.

[5] Bruce E. Kaufman, "Paradigms in Industrial Relations: Original, Modern and Versions In-between" (2008) 46 *British Journal of Industrial Relations*, 314–39, 328–29; Alan Geare et al., "Exploring the Ideological Undercurrents of HRM: Workplace Values and Beliefs in Ireland and New Zealand" (2014) 25 *The International Journal of Human Resource Management*, 2275–94, 2277.

[6] Paul Edwards, "The Employment Relationship and the Field of Industrial Relations" in Paul Edwards (ed), *Industrial Relations. Theory and Practice* (Blackwell 2003) 1–36, 10–11.

The Webbs are universally recognised as forerunners in the study of industrial relations. They approached the emerging phenomenon of labour organising in the second half of the 19th century, in the aftermath of the Industrial Revolution, which brought to the main political and social scene new actors – such as the proletariat, the trade union, and the capitalist employer.[7] Initiated outside the academy, their work contributed to the shaping and founding of industrial relations as a field of study by, for instance, distancing itself from an economic approach to the study of trade unions as actors in the labour market. Rather, they adopted an empirical method based on fieldwork, which introduced sociology into the study of industrial relations. The Webbs were members of the socialist and progressive association, the Fabian Society, and helped found the London School of Economics and Political Science in 1895.

Also very influential in the development of industrial relations is the work of Selig Perlman and in general that of the so-called Wisconsin School of industrial relations, established by John R. Commons who acquired direct knowledge of the industrial relations dynamics by being a trade union member while he was working as typographer.[8] This school considers collective bargaining as the means for the lower classes to improve their conditions and gain a share of power within society. Their idea of trade unionism and collective bargaining is thus grounded on pragmatism and the rejection of ideological claims. This approach also derived from an acquaintance with the US labour movement and in particular with its leader and secretary of the American Federation of Labor (AFL), Samuel Gompers, who set the strategy of the trade union front on pragmatic revindications.[9] The study of industrial relations of the Wisconsin School focused on the actors, norms and rules governing and influencing the functioning of collective bargaining, rather than on the economic aspects. In this sense, the school has inaugurated the stream of 'institutionalism' in the study of industrial relations.[10]

The institutional approach is particularly evident in the work of John T. Dunlop. His work has mainly focused on the need to develop an analytical framework able to capture the interaction of the different actors involved and the rules that such interactions generate. The theory developed by Dunlop concerns the definition of a 'taxonomy' of industrial relations or a conceptual framework that could be used in order to pursue comparative works among different countries as well as among different sectors.[11] Despite his influence in the field and the critiques to which he

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[7] Bruce E. Kaufman, *The Global Evolution of Industrial Relations. Events, Ideas and the IIRA* (ILO 2004) 15.

[8] Elvander (2002) 17. Commons was also in Roosevelt's entourage in the years in which the US Presidency developed and implemented the 'New Deal' economic project.

[9] Kaufman (2004) 99. See also Selig Perlman, *A History of Trade Unionism in the United States* (1922), (first publication 1922, The Echo Library 2006) 146.

[10] Elvander (2002) 18.

[11] Kaufman (2004) 252.

was subjected, Dunlop did not directly take part in the public debate about industrial relations that its work contributed in raising in the US.[12] He was later appointed chairman of the Commission on the Future of Management-Worker Relations (also known as the Dunlop Commission) set up by President Clinton in 1993 for discussing labour and employment policies.[13]

Although not dealing with conflict in industrial relations and overlooking the individual employment relationship in the system,[14] the 'systematisation' of the study of industrial relations developed by Dunlop has been particularly influential in the work of Flanders and Clegg. Dunlop's concept of the 'industrial relations system' is a prerequisite for the 'pluralist' approach, placing collective bargaining at the centre of the system as the process producing rules regulating the relationship between the collective actors.[15] Unlike Dunlop, however, Flanders's and Clegg's works emphasise the coexistence of different and conflicting interests in society that seek to find a 'compromise' in the arena of industrial relations through collective bargaining.[16] Both Flanders and Clegg were supporters of the Labour Party in the political debate and both participated, along with Kahn-Freund, in the Lord Donovan Commission formed in 1968 by the Labour cabinet with the aim of assessing the state and evaluating the prospects of industrial relations in Great Britain.[17]

Although educated in the same school of industrial relations, Hyman distanced himself from the main ideas of the masters of the school by shifting his approach to industrial relations towards Marxism.[18] His Marxist analysis of industrial relations contributed to the 'radicalising' of this field of study and was particularly influential among the young trade union officers in the 1970s.[19] Moving from Warwick (where the Oxford School migrated to in the late 1970s[20]) to the London School of Economics, Hyman became one of the most influential figures in industrial relations following his founding (in 1995) of the *European Journal of Industrial Relations*.[21]

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[12] Elvander (2002) 21–22.

[13] Kaufman (2004) 335–36.

[14] Bruce E. Kaufman, "Employment Relations and the Employment Relations System: A Guide to Theorizing" in Bruce E. Kaufman (ed), *Theoretical Perspectives on Work and the Employment Relationship* (IRRA 2004) 41–75, 48.

[15] Richard Hyman, "Industrial Relations in Europe: Theory and Practice" (1995) 1 *European Journal of Industrial Relations*, 17–46, 21.

[16] See Peter Ackers, "Rethinking the Employment Relationship: A Neo-pluralist Critique of British Industrial Relations Orthodoxy" (2012) 25 *The International Journal of Human Resource Management*, 2608–25, 2612; see also Heery (2015), 21–43.

[17] Dukes (2014) 77.

[18] Elvander (2002) 11.

[19] Gregor Gall, "Richard Hyman: An Assessment of his Industrial Relations: A Marxist Introduction" (2011) 36 *Capital & Class*, 135–49.

[20] Elvander (2002) 9–10.

[21] Kaufman (2004) 461.

In general, Hyman has remained outside mainstream politics, preferring to side with social movements and rank and file unions. Usually grouped with Hyman for his leftist approach to industrial relations, Colin Crouch has played a fundamental role in advancing the study of industrial relations and in its dissemination outside the UK.[22] In particular, he focused on the origins and early developments of industrial relations in Europe as well as with the comparative analysis of the European countries' systems. On the one hand, Hyman has analysed the political and ideological features of the emergence of the trade union phenomenon in Europe, highlighting its strong socialist (and generally leftist) roots.[23] On the other, Crouch has provided a systemisation of the industrial relations systems in the European countries according to the degree of centralisation of the systems affirmed in their historical evolution.[24] Hyman and Crouch also share an attention to the comparative understanding of industrial relations in Europe, to the analysis of the relationship between industrial relations actors (and social actors in general) and the EU, and to the critique of neo-liberal ideology as a factor undermining the trade unions.

2.2.2. The emergence of trade unionism and collective bargaining

The emergence of collective labour relations is one of the results of the socio-economic changes brought about by the Industrial Revolution, which modified the processes and modalities of economic production. The shift from the master-servant to the employer-employee relationship meant the collectivisation of workplaces and workforce and the consequent rise of collective forms of social organising mediating the plural and unbalanced relations between a single employer and her employees.[25] Their aims – or tasks – entailed: to act as workers' negotiating agent before the employer; to eliminate the downward competition among workers; to achieve better working and employment conditions; to counterbalance the accumulation of power in the hands of the capitalist employer. Thus, trade unions are intermediate social bodies mediating the relationship between the individual worker and the employer.[26]

Industrial relations is a field of studies established with the aim of analysing and understanding the processes and dynamics of collective labour relations from different perspectives. Beatrice and Sidney Webb are traditionally considered the 'parents' of the industrial relations field.[27] They are universally considered the first

[22] Kaufman (2004) 448.

[23] Richard Hyman, *Understanding European Trade Unionism. Between Market, Class and Society* (Sage 2001).

[24] Colin Crouch, *Industrial Relations and European State Tradition* (Oxford University Press 1993).

[25] Kaufman (2004) 21.

[26] Colin Crouch, *Trade Unions. The Logic of Collective Action* (Fontana 1982).

[27] Elvander (2002) 2; see Carola M. Frege, "The History of Industrial Relations as a Field of Study" in Paul Blyton et al. (eds), *The Sage Handbook of Industrial Relations* (Sage 2008) 35–53, 43.

scholars to have approached the nascent phenomena of trade union organising, collective bargaining and collective conflict.[28] Their work looked at the emerging phenomenon of the collective organisation of labour relations and conceptualised the discipline through an all-encompassing view on the different factors, elements and aspects involved in such a phenomenon.[29] The starting point of their analysis is constituted by the trade unions, which during the Webbs' time remained a relatively new social form of collective organising that was acquiring increasing influence in the socio-economic sphere.[30] The object of their study is quite broad, including several aspects of the regulation of the labour market, among which the unions represented a social force capable of intervening in or interfering with the smooth functioning of supply/demand dynamics.[31]

The Webbs are also seen as coining the term 'collective bargaining'.[32] Their analysis depicts the latter as a social phenomenon stemming from the changing nature and form of the employment relationship. In the changed economic context, collective bargaining became the method of trade unions to collectively organise the demands of the workers, who in their turn could receive an improvement in their negotiating power before the employer.[33] In this sense, the Webbs view collective bargaining as aggregating and replacing several individual negotiations. Instead of negotiating on an individual basis, the workers organise themselves in order to negotiate on a collective basis, so as to have a more powerful bargaining position.[34] Collective bargaining has therefore economic origins as a process for the regulation

[28] In this sense, Kaufman refers to them not as the 'parents' of industrial relations, but rather as the 'pioneers' of such a discipline, which would have been later labelled 'industrial relations', see Bruce E. Kaufman, "History of the British Industrial Relations Field Reconsidered: Getting from the Webbs to the New Employment Relations Paradigm" (2014) 52 *British Journal of Industrial Relations*, 1–31, 7.

[29] In their work, the phenomenon is studied in all its aspects, including history, internal organisation, relationship with the employers and with the public actor(s), the role of the law, the functioning of collective bargaining and so forth, see Beatrice & Sidney Webb, *Industrial Democracy* (Longsman 1897).

[30] The Webbs approached the study of trade unions by analysing the historical forces which led to their formation, see Beatrice & Sidney Webb, *The History of Trade Unionism* (Longmans 1894).

[31] On the several aspects of the labour market regulation treated by the Webbs, see Bruce E. Kaufman, "Sidney and Beatrice Webb's Institutional Theory of Labor Markets and Wage Determination" (2013) 52 *Industrial Relations. A Journal of Economy and Society*, 765–91. On the 'economic' roots of the Webbs' work, see David Farnham, "Beatrice and Sidney Webb and the Intellectual Origins of British Industrial Relations" (2008) 30 *Employee Relations*, 534–52, 536.

[32] Allan Flanders, "Collective Bargaining" in Allan Flanders & Hugh Clegg (eds), *The System of Industrial Relations in Great Britain* (Basil Blackwell 1954) 252–322, 252.

[33] Webbs (1897) 177–78. On trade unionism and collective bargaining as factors of socio-economic reform in the Webbs' theory, see Renaud Paquet, Jean-François Tremblay & Éric Gosselin, "Des théories du syndacalisme. Synthèse analytique et considérations contemporaines" (2004) 59 *Relations Industrielles & Industrial Relations*, 295–320, 304–05.

[34] Webbs (1897) 179. The Webbs further saw an improvement in the workers' bargaining power in the achievement of collective bargaining at town or industry level.

of the labour market led by the workers and aiming at improving their living conditions.[35] The establishment of a permanent machinery for collective bargaining is, in the Webbs' view, a major aim for the individual workers and for their unions. However, a machinery for collective bargaining requires the presence of different actors, which need each other in order to fulfil their aim. In this sense, a collective bargaining system requires the presence of the trade unions, the employer and the public actor.[36]

The progressive establishment of trade unions as social actors partaking in the dynamics of labour market regulation was later read by other scholars as the first spark for the 'making' of a system of industrial relations. For instance, the so-called Wisconsin School of industrial relations – with Commons as a forerunner – helped shape the concept of collective bargaining as an autonomous institution in charge of regulating the labour market and ensuring the improvement of working conditions for the workers.[37] The Wisconsin School adopted an economic and institutional approach to the study of collective bargaining, deeming trade unions to be economic actors and rejecting strong ideological claims in the name of an approach that Perlman defined as 'job consciousness'.[38] In this sense, the work of Perlman – a pupil of Commons – focused on the institutional and pragmatic aspects of collective bargaining. According to Perlman, collective bargaining should be a means for the lower classes to achieve an increasingly substantial share of the social power which is usually the prerogative of the higher classes, rather than a means for pursuing social and political revolution.[39] Perlman saw collective bargaining as the instrument for rebalancing the distribution of power within the labour market. In his view, collective bargaining consisted of economic dynamics between social groups aimed at finding an equilibrium among their competing interests. It is thus an institution established by the new actors that emerged in the context of broad socio-economic changes, which had increased the plurality of society.[40] Perlman also tracked a parallel between the regulation of working conditions operated by the Medieval guilds in the pre-industrial era and that operated by the unions through

[35] On the economic origins of collective bargaining in the Webbs' view, see Allan Flanders, "Collective Bargaining: A Theoretical Analysis" (1968) 6 *British Journal of Industrial Relations*, 1–26, 2–3.

[36] Webbs (1897) 179.

[37] Kaufman (2004) 90.

[38] Selig Perlman, "The Basic Philosophy of the American Labor Movement" (1951) 274 *Annals of the American Academy of Political and Social Science*, 57–63, 59.

[39] The US scholar in this sense criticised and rejected the Marxist idea of trade unions and their role in the revolutionary struggle, see Selig Perlman, "The Principle of Collective Bargaining" (1936) 184 *Annals of the American Academy of Political and Social Science*, 154–60. See also Giovanni Pino, *Uno studio su Gino Giugni e il conflitto collettivo* (Giappichelli 2014) 28.

[40] Gino Giugni, "Introduzione" in Selig Perlman, *Ideologia e pratica dell'azione sindacale* (La Nuova Italia 1956) XXX–XXXI.

collective bargaining by stressing its democratic features.[41] As a self-sufficient institution, collective bargaining ought to produce rules for the functioning of the system, and the role of the public actors – as legislator and policy-maker – should be limited to recognising the trade unions as legitimate actors in the regulation of industrial relations and the labour market by avoiding their juridification and the juridification of their relations.[42]

The early works made on both shores of the Atlantic have been particularly influential in the later conceptual development of industrial relations and collective bargaining. As for the authors considered here, Dunlop conceives of the system of industrial relations as a subsystem of the industrial society and of the social system, which coexists with other subsystems such as the economic or the political one.[43] Instead of focusing on the conflictual relations among the actors, he focuses on the industrial relations as a system producing a web of rules that govern the system itself.[44] In contrast, the pluralist school of industrial relations represented by Flanders and Clegg is grounded on the assumption that conflict is an inherent aspect of the employee-employer (as well as the labour-capital) relationship, and it is mainly concerned with the possible ways to overcome and settle such a conflict.[45] The pluralists see society as an arena in which different interests interplay and in which the balance between them is constantly ensured by compromises and negotiations, rather than by ultimate, authoritarian decisions.[46] Therefore, industrial relations and their dynamics stems from the plurality of society, whose interests find a compromise through the process of collective bargaining, which is the central institution of a system of industrial relations.[47]

The works of Hyman and Crouch are firmly grounded on a deep understanding of the diversity of the national systems shaped by the historical and political features of the countries. The national element is hence a constant in their analyses. Hyman stresses that '[the term] industrial relations is an invention of the era of the nation-state' and that consequently the study of industrial relations is 'embedded' in the historical, political, social and economic national contexts.[48] Yet he recognises that trade unions move and act within the same 'geometry' formed by a triangle between

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[41] Perlman (1936) 155–56.

[42] See Umberto Romagnoli, "Weimar e il diritto del lavoro in Italia" (2010) 24 *Lavoro e Diritto*, 181–90, 184–85.

[43] John T. Dunlop, *Industrial Relations Systems* (Harvard Business School Press 1993) 282.

[44] Stephen J. Wood et al, "The 'Industrial Relations System' Concept as a basis for Theory in Industrial Relations" (1975) 13 *British Journal of Industrial Relations*, 291–308, 295.

[45] John W. Budd, Rafael Gomez & Noah M. Meltz, "Why a Balance is Best: The Pluralist Industrial Relations Paradigm of Balancing Competing Interests" in Kaufman (2004) 195–227.

[46] See Hugh A. Clegg, "Pluralism in Industrial Relations" (1975) 13 *British Journal of Industrial Relations*, 309–16, 310.

[47] Crouch (1982) 19.

[48] Richard Hyman, "Is Industrial Relations Theory Always Ethnocentric?" in Kaufman (2004) 265–92, 272.

market, class and society.[49] Therefore it is possible to find similar patterns in different countries, in particular according to a cross-national scheme of 'variety of trade unionisms'[50] and even more specifically in the European context, where a shared understanding and similar evolution of industrial relations are present.[51] In his massive comparative historical analysis of the European systems of industrial relations, Crouch instead affirms that despite the attention to 'the specificity of national experiences, nothing is served by insisting on minute differences when these conceal an underlying and interesting similarity, particularly one that distinguishes a group of countries'.[52] Finally, both scholars share a negative evaluation of the marginalising effects of the EU integration project on the trade unions.

2.2.3. The actors of collective bargaining and their social relationships

The analysis of the nature and interactions of the actors of collective bargaining forms a central part of research and study in industrial relations theories. Historically, employers' organising has been a reaction to the process of workers' organising. Further, the dynamics of industrial relations also involve the State, both as an actor engaged into certain types of negotiations and as the actor setting the legal and policy framework in which collective bargaining occurs.

In Dunlop's view, a system of industrial relations is the arena in which these three actors operate: the workers and their organisations; the managers and their organisations; and the specialised governmental agencies, i.e. the State. These actors engage in reciprocal interactions, which are characterised by the existence of internal hierarchies. For Dunlop, the interactions between the industrial relations actors are characterised by the presence of a shared ideology as the element that binds them within the system and derives from the ideology of the larger society.[53] According to him, a system of industrial relations has to feature 'an ideology or a

[49] Hyman (2001) 4.

[50] Hyman (and Gumbrell-McCormick) has classified the trade union models in Western Europe into four types: Nordic countries (Sweden and Denmark); Central countries (Germany, Austria, the Netherlands, and Belgium); Southern countries (France and Italy); and Anglophone countries (Britain and Ireland). See Rebecca Gumbrell-McCornick & Richard Hyman, *Trade Unions in Western Europe. Hard Times, Hard Choices* (Oxford University Press 2013) 8.

[51] Hyman (2004) 277–80. Hyman talks about a 'European social model' for describing how the systems of industrial relations in Europe, with the exception of the Anglo-Saxon model as based on similar institutions and as grounded on substantially similar concepts.

[52] Crouch (1993) 4.

[53] Dunlop (1993) 54. Dunlop points out the example of voluntarism in industrial relations in Great Britain as a glaring example of a shared ideology by the industrial relations actors.

set of ideas and beliefs commonly held by the actors that helps to bind or to integrate the system together as an entity'.[54]

On the workers' side, the centre of Dunlop's theory is the organised group of workers,[55] the actions of which occur in relation with the other industrial relations subjects: the management; other peer organisations or other forms of workers' representation (e.g. works councils); the entire workforce; and the State.[56] A similar analysis is also valid for the organisations of the management's side. In this regard, Dunlop classifies four types of relationship expressed through the different degrees of authority exercised in the workplace: dictatorial; paternal; constitutional; and workers-participative management.[57] The presence or absence of statutory 'constraints' to the action of the management is an element determining which of the four types of relationship characterises the interrelation between the management and the workers' organisations.[58] The relationship with the governmental agencies is also very much influenced by the public policy. However, here Dunlop also identifies informal ties between management and the political or institutional actors as a factor determining such a relationship and the ensuing hierarchy on the management's side.[59]

The presence and interaction of different actors on the labour market also constitutes the basis of the conceptual understanding of collective bargaining developed by the pluralist school of industrial relations. The acknowledgment of a plurality of interests within the society also entails the rejection of any authoritarian attempt at social organising. Pluralism, indeed, means the differentiation of interests between the State and its citizens, as well as the necessity of plural interests within the society as a pillar of democracy.[60] In the sphere of employment relations, the theory of pluralism recognises the conflicting interests between employer and employees and the different expectations as regards the settlement of the ensuing conflict. Collective bargaining is the process through which the stakeholders self-settle the conflict of collective interests.

Trade unions interact with the management in order to promote and defend the workers' rights and conditions of work. This process is viewed by Flanders as

[54] Dunlop (1993) 53.

[55] Dunlop (1993) 14

[56] Dunlop (1993) 110–20.

[57] Dunlop (1993) 122.

[58] Dunlop (1993) 122.

[59] Dunlop (1993) 125.

[60] Hyman stresses that the first meaning mainly pertains to Flanders's reading of pluralism (along with Fox's one), whereas the second one has characterised the work of Clegg, see Richard Hyman, "Pluralism, Procedural Consensus and Collective Bargaining" (1978) 16 *British Journal of Industrial Relations*, 16–40, 26–27.

creating 'a social order in industry embodied in a code of industrial rights'.[61] This process obviously includes the management, which has its own prerogatives in dealing with the union counterpart. Nevertheless, the employer accepts a limit to its prerogative in managing the enterprise in order to establish good labour relations. Again, Flanders emphasises that collective bargaining has not only an economic aim and that this is valid for both sides of industry. Besides setting the price for buying labour, the employer is also concerned with including the trade union into a rule-making process within the enterprise, thereby establishing rules for the 'management of labour'.[62] Clegg stresses the employers' attitude and the employers' organising dynamics as particularly relevant factors in determining the degree of centralisation (or decentralisation) of the collective bargaining system.[63] As collective bargaining is a bilateral process, its dynamics are influenced by the structure and attitude of the trade unions, by the structure and attitude (or 'goodwill') of the employers, and by their interaction.

A large part of Flanders's analysis is dedicated to the role and functions of the trade unions as one of the two actors involved in collective bargaining. In line with an understanding of collective bargaining as not simply an economic process regulating labour supply and demand, Flanders's analysis has a twofold approach that can be summarised in his view of trade unions as both a 'sword of justice' and a 'vested interest'.[64] Trade unions fulfil the 'social function' of adapting the rules of the system in which they act to the changing needs of their members, but they also need what Flanders defines as a 'social purpose', i.e. the aspiration to change society for the better for the workers.[65] Trade unions therefore move along two tracks: on the one side, they act in the industrial arena in order to ensure the improvement of the status of the workers by securing rights and working conditions; on the other side, they act in the political arena in order to establish and maintain the legal and economic conditions that permit their action.[66]

In the wider society, trade unions act as conflictual agents and establish power relationships with the employer and the State. This aspect of industrial relations is highlighted by the radical stream. Hyman emphasises the political nature of regulating the labour market, due to the need to influence the State, which is the ultimate actor implementing rules and policies that affect the activities of trade

[61] Allan Flanders, "What are Trade Unions for? (1968)" in Allan Flanders, *Management and Unions* (Faber and Faber 1970) 38–47, 42.

[62] Flanders (1968) 23.

[63] Hugh A. Clegg, *Trade Unionism Under Collective Bargaining* (Basil Blackwell 1985) 54.

[64] Allan Flanders, "Trade Unions in the Sixties (1961a)" in Flanders (1970) 13–23, 15.

[65] Flanders (1961a) in Flanders (1970) 16. A critique of business unionism stems from this view on the social purpose of the trade unions, see Ibid., 18.

[66] Flanders (1961a) in Flanders (1970) 24–37, 26.

unions and ensuring the protection of labour and employment rights.[67] Trade unions are thus civic actors, which actively participate in the process of democratisation of society inside and outside the workplace and the labour market.[68]

For Hyman, the essence of union activity can be summarised in the motto 'unity is strength', which highlights the foundational idea of trade unions as the collective organisations able to enhance the dispersed power of the single worker.[69] In this sense, 'a trade union is, first and foremost, an agency and medium of power', whose 'central purpose is to permit workers to exert, collectively, the control over their conditions of employment'.[70] In its attempt to influence the decisions of the employers and the policies of the State, the union is also involved in a relationship with its members. The workers' control operated by the union is crucial for the exercise of collective power it aims at undertaking in order to counterbalance the power of the employer. In this perspective, 'it is only through the power *over* its members which is vested in the trade union that it is able to exert power *for* them'.[71] Hyman highlights the relationship between the union and its members as the marker of the union's real attitude. A union can use the power it exercises over members in order to serve external interests. Hyman is therefore sceptical about the glorification of models of industrial relations in which the unions are deeply involved in the process of job control and regulation.[72] The original democratic features of the early unions can be overturned or 'redefined' by the institutionalisation of such forces as 'guardians of organisational efficiency'.[73] In this sense, the unions might become conservative forces that limit the democratic processes within the organisation and constrain the advancement of the workers' struggle.

The conceptualisation of trade unions and employers as political forces interacting with the State is the basis of Crouch's view on industrial relations actors as organised groups representing the interests of labour and capital. His historical analysis highlights the fact that the collective organisations have naturally moved outside the boundaries of the labour market in an attempt to influence the political sphere.[74] The relationship of trade unions and employers' associations with the State is a central aspect in the development of the system of industrial relations. Political factors can inhibit or facilitate the tasks of the labour market parties, but trade unions and employers' associations have been crucial actors in the making of social policy

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[67] Hyman notes that this aspect denies the existence of pure 'business unionism' due to the need for unions to engage into the political arena in order to gain power, see Hyman (2001) 14.

[68] Richard Hyman, "Making Voice Effective. Imagining Trade Union Responses to an era of Post-industrial Democracy" in Johnstone & Ackers (2015) 265–77.

[69] Richard Hyman, *Industrial Relations. A Marxist Introduction* (Macmillan 1975) 35.

[70] Hyman (1975) 64.

[71] Hyman (1975) 65 (italics in the original).

[72] Hyman (1975) 68.

[73] Hyman (1975) 74.

[74] Crouch (1993) 298.

in the European context,[75] and not only in countries where the close relationship between trade unions and political parties has enabled the emergence of neo-corporatist models of industrial relations.[76] Furthermore, Crouch has stressed the close links between trade unions and political parties in almost all countries of Europe. The majority of trade unions have arisen under the 'protection' of a socialist or social-democratic party as the party's agent in the arena of industrial relations, as well as under the incentive of Christian-oriented parties, in conjunction with the Church's abandoning of political neutrality.[77] However, Hyman, in his recent work, highlights how these links are fading away all over Western Europe, mainly due to the decline of mass left-wing parties, but also on account of the ideological switch of those same parties and of the increased economic competition on the global scale which constrains the governments in relation to social and economic policies.[78]

2.2.4. Collective bargaining as a power-balancing machinery

Given that industrial relations are a sphere of social interactions and conflicts, their dynamics involve relations of power. The primary goal of workers' organising is to attempt to rebalance the intrinsically unbalanced individual employment relationship by forcing the employer to negotiate with a collective body – the trade union – pursuing the collective interests of the workers. This aspect is central to industrial relations theory, and all the authors considered here share the view that power and conflict are inherent in the analysis of industrial relations. Accordingly, collective autonomy is to be seen as a mechanism for achieving a rebalance of power in industrial relations – and in the larger society.

Although conflict falls mainly outside the purview of Dunlop's theory,[79] he considers the distribution of power among the actors in the larger society, influenced by public policies, as one of the most relevant aspects shaping a system of industrial relations and defining the status of the actors themselves.[80] Given the understanding of industrial relations as a subsystem of society, Dunlop considers the distribution of power in society itself as a factor shaping the industrial relations system. He does not refer to the bargaining power within the industrial relations system, which can determine the outcome of collective bargaining in terms of rules and working

[75] See Colin Crouch, "Employment, Industrial Relations and Social Policy: New Life in an Old Connection" (1999) 33 *Social Policy and Administration*, 437–57.

[76] Crouch (1993) 340.

[77] Crouch (1993) 39.

[78] Gumbrell-McCormick & Hyman (2013) 136.

[79] Dunlop (1993) 18–19. In critical terms, see George Sayers Bain & Hugh A. Clegg, "A Strategy for Industrial Relations Research in Great Britain" (1974) 12 *British Journal of Industrial Relations*, 91–113, 92.

[80] Dunlop (1993) 107.

conditions; rather, he refers to 'the distribution of power outside the industrial relations system, which is given to that system' and which 'tends to a degree to be reflected within the industrial relations system'.[81] Yet this distribution of power in society 'does not directly determine the interaction of the actors'; rather, it is 'the context that helps to structure the industrial relations system' regardless of its size. For instance, Dunlop stresses that the national-scale industrial relations system is affected by the distribution of power in the society, just as company-level industrial relations are shaped by the distribution of power within national-level industrial relations. Accordingly, the company-level labour relations differ between centralised and decentralised systems.[82]

The understanding of industrial relations as a conflictual field characterised by uneven distribution of power is at the heart of the pluralist theory,[83] which portrays collective bargaining as the instrument for democratising the employment relationship.[84] On this basis, the pluralist school focuses on the mechanisms undertaken by the industrial relations actors to regulate their conflicts.[85] As Flanders recalled, 'collective bargaining was the offspring of trade union organisation and industrial conflict'.[86] He conceives of collective bargaining as being wider than a simply economic negotiation aiming at maximising the short-term interests of the two parties involved. Rather, he views collective bargaining as a process of rule-making for redistributing power and settling the conflict.[87] In rejecting – or perhaps better, widening – the perspective of the Webbs, Flanders expands the definition and the boundaries of collective bargaining to the political dimension: in his view, collective bargaining is primarily a rule-making process which 'involves a power relationship between organisations'.[88] In this sense, Flanders opposes the Webbs' understanding of collective bargaining as a collective process replacing the individual bargaining grounded on a purely economic basis. In his theorisation, collective bargaining does not refer to the process of selling and buying labour at a

[81] Dunlop (1993) 50.

[82] Dunlop (1993) 50–51.

[83] Flanders stresses that the issue of distribution of power is a source of conflict within the industrial relations arena, which therefore does not just raise conflicts of interests, see Flanders (1968) 16. On the issue of distribution of power in industrial relations systems and the centrality of power struggle in industrial relations, see also Hyman (1975) 19.

[84] Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart 2009) 39. Bogg makes a distinction between Flanders and Clegg, in which the former is defined as a pluralist, seeing the oppositional character of collective bargaining as the main focus, where the latter is deemed a civic voluntarist, viewing collective bargaining as a deliberative process involving (to a greater extent than in Clegg's view) the notion of public interest and the necessity of supportive legislation.

[85] Allan Flanders & Alan Fox, "Collective Bargaining: From Donovan to Durkheim (1969)" in Flanders (1970) 241–76, 249.

[86] Flanders, in Flanders and Clegg (1954), 261.

[87] See Flanders (1968) 4. See also Alan Fox, "Collective Bargaining, Flanders, and the Webbs" (1975) 13 *British Journal of Industrial Relations*, 151–74.

[88] Flanders (1968) 8.

fixed price – as the Webbs meant. Rather, collective bargaining is the mechanism for setting the rules that regulate the frame in which the economic exchange between the employer and the worker occurs.[89] According to Flanders, the main difference lies in the fact that the outcome of collective bargaining, i.e. the collective agreement, 'does not commit anyone to buy or sell labour', but rather ensures 'that when labour is bought and sold […] its price and the other terms of the transaction will accord to the provisions of the agreement'. This means that 'collective bargaining is itself a rule-making process, and this is a feature which has no proper counterpart in individual bargaining'.[90] Moreover, collective bargaining is a process for increasing participation. In the workers' participation in the regulation of industry through collective bargaining, Flanders sees the most appropriate way of democratising workplaces and industry at large.[91]

The action of industrial relations actors is analysed in terms of conflict and power also in the works of Hyman and Crouch. However, their analyses stress the fact that it is the trade union actor who has to conflictually exercise its collective force in order to achieve a better distribution of power in society. For Hyman, 'an unceasing power struggle is therefore a central feature of industrial relations',[92] and the conflict is the expression of 'a fundamental and continuous antagonism of interest' in the labour market.[93] He stresses that '[d]espite familiar stereotypes of trade unions as "overmighty subjects", the reality is that even the most cohesive and strategically sophisticated of workers' collective organizations can only partly offset the structured imbalance of power which confronts them'.[94] The imbalance of power derives from the fact that the social group of the workers, unlike that of the employers, does not possess the ability to control the physical and social environment, in addition to influencing the decisions that affect such control.[95] Power and control represent the two axes of an analytical framework that can better comprehend the dynamics of collective bargaining.[96] The expression of conflict through a collective action is an attempt of the organised workers to conquer power

[89] Fox critically points out that this view misconstrues the Webbs' analysis and alters a proper understanding of collective bargaining, see Fox (1975) 157.

[90] Flanders (1968) 4.

[91] Flanders (1968) in Flanders (1970) 42.

[92] Hyman (1975) 26.

[93] Hyman (1978) 34. Here, Hyman criticises the focus on rules and procedures of the pluralist school as downplaying the relevance of the outcomes and the conditions in which such rules and procedures are set.

[94] Richard Hyman, "Changing Trade Union Identities and Strategies" in Richard Hyman & Anthony Ferner (eds), *New Frontiers in European Industrial Relations* (Wiley-Blackwell 1994) 108–39, 127.

[95] Hyman (1975) 26.

[96] Hyman (1975) 31.

in the labour-capital relationship, and it thus has a more 'socio-political rather than narrowly economic' significance.[97]

Conflict is at the centre of the models developed by Crouch for classifying the different types of industrial relations on the basis of the process of collective bargaining between organised labour and (organised) capital.[98] In his scheme, conflict is the cost that each party tries to impose on the other in order to secure a bigger share of benefits from the negotiations and it is thus the parameter to analyse the models of industrial relations according to the outcome of negotiations. If the cost of conflict will only fall on one of the parties, the system will produce a zero-sum outcome (contestation model). When the cost of conflict is instead shared, both parties will benefit from its reduction, hence the need to enter into stable and permanent relations (pluralist bargaining model). If the conflict constitutes a loss for both parties, they will cooperate in order to obtain and maintain the mutual benefit and interest (bargained corporatism). But if conflict is repressed, or if only organised labour bears its cost, the corporatism becomes authoritative (authoritative corporatism).[99] Power, and especially union power, constitutes a further variable in this classification: 'employers need to engage in a bargaining exchange going beyond simple contract only when labour has developed effective power', Crouch emphasises.[100] This means that the power of organised labour is the key feature distinguishing the different models: the more institutionalised such a power is, the more the unions are engaged in a system leading towards a 'political exchange', which transcends simple collective bargaining by including the organised labour in a wider decision-making process of national policies.[101] Crouch also observes that the trade unions have more power in systems in which the coordination among the level of collective bargaining is higher and stricter. In these systems, the trade unions have a cooperative attitude that, rather than questioning the capitalist functioning of the market, aims at adapting its logic to the needs of the workers.[102] In the systems that have a high level of institutionalisation, which Crouch defines as 'neo-corporatist', the unions maintain their power in participating in the regulation of the socio-economic sphere without abdicating from their counter-

[97] Hyman (1994) 129.

[98] Crouch stresses that '[t]he parenthesis around "organized" in the case of capital indicates that capital may appear as an individual firm, not necessarily as a group or association of firms, while labour is always collectively organized, at least informally, if it is taking part in an exchange going beyond the simple wage-effort bargain that binds individual employees to their jobs. This reflects part of the fundamental imbalance between capital and labour, in that capital automatically possesses power by virtue of its role in the employment relationship, while labour does so only if it organizes'. See Crouch (1993) 31.

[99] Crouch (1993) 31–49.

[100] Crouch (1993) 56.

[101] Like in the Scandinavian model of neo-corporatism, see Crouch (1993) 58.

[102] Colin Crouch, *Quanto capitalismo può sopportare la società* (Laterza 2013) 114.

power role.[103] The neo-corporatist systems, however, tend to have a conservative effect: the emergence of new interests in society is limited by the over-representation of the already organised powers – the unions and the employers. Nevertheless, he also underlines the efficacy of neo-corporatist systems in preventing and combating the effects of collective bargaining decentralisation.[104]

Both Hyman and Crouch emphasise how the socio-economic dynamics of globalisation have had a negative impact on the counter-power activities of the trade unions. On the one side, Hyman points out that in the globalised economy, 'national economies and national labour markets are increasingly *disembedded* from effective social regulation'.[105] The consequence is an increase in the imbalance of power between capital and labour. On the other side, Crouch highlights that the international competition between countries, already started in the 1980s and further stimulated by the globalisation of economic relations, has increased the pressures on shifting the focus of the industrial relations systems, whose actors ought to cooperate, rather than fight, in order to maintain a competitive national economy.[106] Moreover, the affirmation of 'global firms' as main actors of socio-economic development promotes the affirmation of scattered and individual interests over collective interests,[107] so as to reduce the space of organised social groups in democratic society.[108] These aspects are stressed in the cross-border dimension of the EU internal market, which constitutes the focus of Chapter 4. In particular, the company emerges as the leading actor of the dynamics of collective autonomy due to EU rules on the exercise of the economic freedoms, which influence the distribution of power in the EU internal market to the detriment of the activities of the trade unions.

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[103] Crouch (2006) 47.

[104] For an early evaluation of these trends, see Colin Crouch, "Beyond Corporatism: The Impact of Company Strategy" in Hyman & Ferner (1994) 196–222, 211.

[105] Hyman in Johnstone & Ackers (2015) 265 (Italics in the original). The 'deregulation' of the social and employment spheres occurring in most countries in Europe (but not only in Europe) has, in Hyman's view, restricted the possibility for trade unions to take an active part in defining strategies for combating the effects of the global economic crisis, see Richard Hyman & Rebecca Gumbrell-McCormick, "Trade Unions and the Crisis: A Lost Opportunity?" (2010) 8 *Socio-Economic Review*, 364–72.

[106] Colin Crouch, "The Future Prospects for Trade Unions in Western Europe" (1986) 57 *Political Quarterly*, 5–17, 11–12.

[107] Colin Crouch, *Post-democracy* (Polity Press 2004). Crouch has analysed the subject of the 'global firm' and highlighted its non-democratic nature which tries to influence the democratic process of rule-making, see Colin Crouch, "The Global Firm: The Problem of the Giant Firm in Democratic Capitalism" in David Coen, Wyn Grant & Graham K. Wilson (eds), *The Oxford Handbook of Business and Government* (Oxford University Press 2010) 148–69.

[108] Colin Crouch, *The Strange Non-death of Neoliberalism* (Polity Press 2011) 129–31.

2.2.5. Collective bargaining as an autonomous joint regulation process

Besides being a means for rebalancing the employment relationship and power within the labour market and society, collective bargaining is also the process through which the parties regulate industrial relations and the labour market itself, i.e. the working and employment conditions to be included in the individual employment contract.

Dunlop considers collective bargaining as one possible procedure for setting the rules to be applied in the management of industrial relations and labour market spheres.[109] In Dunlop's words, 'the establishment and administration of rules is the major concern of the industrial relations subsystem of society'. [110] The web of rules is created by the interaction of the actors within the system and according to their internal relations. The outcome of the industrial relations process is the creation of rules that address the determination of wages and of rights and duties within the employment relationship.[111] These rules are influenced by external factors which vary among the industrial sectors. The first factor is the 'technical context of the work place'.[112] The type of workplace as well as the type of operations, i.e. the 'nature of service performed by workers and managers',[113] characterise the type of rules governing a system of industrial relation. Both the type of workplace and the type of operations performed are dependent on the available level of technology, which determines on the one side, *inter alia*, the features of the workplace and the size of the workforce, and on the other side, the job contents and the hours of work. Different sectors have different rules governing the relations among the three actors, which are determined by the different technical contexts and conditions, which are 'decisive both to the substantive rules and to the organizational configuration and the interactions of the actors'.[114] The second factor influencing the context of an industrial relations system is the 'market or budgetary constraints'.[115] In brief, this factor concerns the nature of the market in which a company operates. The position of monopoly or the context of competition of an economic sector is a determinant influencing the rules of interactions among the actors of an industrial relations system. The nature of the market also influences the degree of centralisation of the

[109] Wood et al. (1975) 291–308, 295.

[110] Dunlop (1993) 51.

[111] Dunlop (1993) 52.

[112] Dunlop (1993) 63.

[113] Dunlop (1993) 73.

[114] Dunlop (1993) 83. The value of Dunlop's concept of industrial relations system as a method for the comparison of different sectors is highlighted by Ron Bean, *Comparative Industrial Relations. An Introduction to Cross-national Perspectives* (Croom Helm 1985) 14.

[115] Dunlop (1993) 85.

system by determining the level at which the rules of the industrial relations system are set.

The conception of collective bargaining as the primary procedure for the definition of rules within the industrial relations arena is central in the work of Flanders and Clegg. On the one side, Flanders states that studying the system of industrial relations consists in studying the rules and the institutions on which such a system is based, such as collective bargaining, which is a rule-making institution.[116] On the other side, Clegg affirms that the process of collective bargaining 'presupposes a contract of some sort between employers and workers'.[117] And as a process based on a contract, '[c]ollective bargaining is, therefore, a potent and well-designed mechanism for the protection of interests and rights'.[118] Therefore, Flanders proposes 'joint regulation' as a more suitable term for describing the actual concept of collective bargaining involving a political dimension.[119] Accordingly, he also rejects the understanding of trade unions as simply labour cartels.[120] Based on the assumption that labour is more than a commodity because it cannot be 'isolated from the life of the labourers', Flanders affirms that '[i]n negotiating collective agreements trade unions act in that dual capacity […]: as power or pressure groups certainly but also, together with employers, as private legislators', and concludes that 'one great accomplishment of collective bargaining has been its promotion of the "rule of law" in employment relationships'.[121] In this sense, the role of the trade unions is to represent the interests of the workers in the process of collective bargaining with the aim of achieving job regulation and improving workers' participation in the rule-making process, as well as in the application of those rules, in different settings, from the workplace to the industry to the political and institutional sphere of Parliament.[122]

From this perspective, collective autonomy is a process of joint regulation based on collective bargaining, which is an internal process of rule-making (to be distinguished from the legislative process, which is instead external to the system of industrial relations). Collective bargaining is ultimately concerned with the definition of both *substantive* and *procedural* rules of 'job regulation' to be applied in the employment relationship, as well as in the relationship between labour and

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[116] Allan Flanders, "Industrial Relations: What is Wrong with the System?" (1965) in Flanders (1970) 83–128, 86. Flanders underlines that the use of the notion of 'system' for defining industrial relations 'is, of course, a theoretical abstraction', Ibid., 84.

[117] Hugh A. Clegg, *A New Approach to Industrial Democracy* (Basil Blackwell 1963) 108.

[118] Clegg (1963) 109. Clegg further adds that the protection of interests and rights is 'the first requirement of any system of democracy', Ibid., 109.

[119] Flanders (1968) 10.

[120] Flanders (1968) 11.

[121] Flanders stresses the fact that the collective agreements contain rules that go further than the simple fixation of price for work by including also rules on 'dismissal, discipline, promotion or training, which cannot by any stretch of the imagination be included under price', see Flanders (1968) 12.

[122] See Flanders (1968) in Flanders (1970) 41–42.

management.[123] The core of any system of industrial relations is the process of creating rules for job regulation. Consequently, a system of industrial relations 'constitutes a normative system'.[124]

This understanding of collective bargaining is strongly opposed by Hyman. In his view, the function of unions is to challenge the power of the employer and to organise the collective struggle with the ultimate aim of destroying the capitalist system that allows the exploitation of the workers. The functioning of collective bargaining as it takes place and as it is theorised by the pluralist school is, for Hyman, a process of 'negotiations and renegotiations of order within constraints set by the capitalist economy and a capitalist state'.[125] The critical take on the study of industrial relations adopted by Hyman brought him to strongly contest a view of industrial relations confined to the aim of job regulation. According to him, such an approach results in a conservative view of industrial relations focused on 'stability and equilibrium', overlooking the impact of conflict as an overturning force, and instead considering it as merely a source of order.[126] He criticises the understanding of collective bargaining as a job regulation process outlined by the pluralist school, because of the 'institutionalisation' of conflict it brings about that constrains the potential extent of conflict.[127] Hyman, thus, envisions collective bargaining as a merely defensive process, driven by the defence of the workers' positions rather than advancing them. In line with his critical understanding of industrial relations, Hyman conceives of collective bargaining as 'an accommodation to external power', i.e. as the process through which unions find their way to agree to the demands of the employers' counterpart, who can in turn even favour the unionisation of employees.[128] In his view, the 'most substantial outcome' of the collective bargaining activities undertaken by the unions is the limitations it places on the arbitrariness of the managerial prerogatives.[129] In this light, collective autonomy appears as a process of joint regulation entrenched in the capitalist system and concerned with the maintenance of the *status quo*.

[123] According to Flanders, the clauses of a collective agreement reflect this distinction, see Flanders (1954) 86–87.

[124] Flanders & Fox, in Flanders (1970) 247.

[125] Hyman (1975) 91.

[126] Hyman (1975) 11–12.

[127] Hyman (1975) 191.

[128] Hyman (1975) 89.

[129] Hyman (1975) 192.

2.2.6. The impact of legal regulation on the autonomous collective bargaining

For the industrial relations scholars, the functioning and dynamics of collective bargaining are ultimately influenced by the substantive rules enacted by the State in its three-fold manifestation as policy-maker, legislator and jurisprudential actor. The legal framework indeed plays a major role in shaping the system of industrial relations by allowing and sanctioning certain actors' behaviours. This aspect is taken into account by the different theories considered hitherto, which highlight the central relevance of public policies, legislation and legal rules in general.

The Webbs had already introduced the issue of legal regulation into the dynamics of industrial relations and collective bargaining. Along with the 'method of collective bargaining' for setting labour and employment standards, indeed, the Webbs also discussed the 'method of legal enactment',[130] which reflects their understanding of the role of the law in relation to trade union issues as a tool for achieving workers' participation in the political sphere.[131] According to the Webbs, '[w]hether for good or for evil, it appears inevitable that the growing participation of the wage-earners in political life, and the rising influence of their organisations, must necessarily bring about an increasing use of the "Method of Legal Enactment"'.[132] They considered such a method as being particularly complicated for the trade unions due to the great number of stakeholders partaking in the process of legal enactment.[133] Yet, the results that can be achieved through this method – the legislation – are deemed to satisfy the 'trade union aspiration of permanence and universality'.[134] In definitive terms, the Webbs conclude by observing that similar results could also be achieved by the organised trades through the 'creation of a strongly centralised, and thoroughly equipped political federation confining its work exclusively to Trade Union objects'[135] – something that sounds like a centralised machinery for social dialogue.

The attention paid by Dunlop towards the rules produced in the industrial relations arena through collective bargaining does not overlook his attention towards the rules surrounding the system. He stresses that the way in which the

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[130] 'Mutual insurance' was the third method of enforcing labour and employment standards identified by the Webbs. It was a pre-collective bargaining and pre-social legislation form of enforcement based on the payment of fees by the union members themselves in order to create a common fund to be used for sick leave or unemployment benefits, for example, see Farnham (2008) 541.

[131] In this sense, Ruth Dukes, "Hugo Sinzheimer and the Constitutional Function of Labour Law" in Davidov & Langille (2013) 57–68, 63.

[132] Webbs (1897) 253.

[133] The Webbs highlight the need for the unions to advocate their claims before a large and diverse audience, including local community, public opinion, newspapers, municipalities and Parliament, Webbs (1897) 253.

[134] Webbs (1897) 255.

[135] Webbs (1897) 276.

workers' organisation interacts with those other subjects is dependent on the public policy adopted by the State as regards the basic protection of freedom to associate and right to organise, the statutory establishment of a double channel of employees' representation, and the labour market policies. Hence, the influence of State's policy, including legislation, is a crucial determining factor in the role of workers' organisations within larger society,[136] alongside the composition of the workforce.[137] Thus, Dunlop highlights 'the power of governments to direct the affairs of labor organizations, to control their finances, to prevent their formation or to dissolve the organizations, or to enhance their standing and functions in the community'.[138]

Furthermore, Dunlop points out that the rules of a system of industrial relations may significantly vary if the government's action is constricted by a statutory and constitutional framework, or if it is pursued according to practices and traditions.[139] The protection ensured to the exercise of collective labour rights constitutes a strong support for the autonomous development of industrial relations. With regard to the processes of rule-making, Dunlop identifies three types of regulation: when the rule is statutorily set; when the rule is defined by the State but included in a collective agreement; and when the rule is defined by a collective agreement and later approved by the State.[140] Finally, Dunlop emphasises the fact that 'at any one time in each national system there is a network of relations among managerial hierarchies, workers and their organizations, and governmental agencies that is highly complex', and that 'those rules of a single national industrial-relations system which are particularly dependent upon the power context and define the status of the actors tend to have considerable stability over time'.[141] If power is an influential factor in the shaping of a system of industrial relations – and in determining its degree of 'autonomy' – a determinant role in its distribution is played, in Dunlop's view, by the State and by the policies and legislations it enacts.

The relevance of legal rules and of the legal framework is also a central pillar of the pluralist school's theorisation of industrial relations. However, as for Kahn-Freund, the analysis of Flanders and Clegg, regarding the role and function of the law in industrial relations, is partially affected by the context. The British system of autonomous industrial relations and voluntary collective bargaining, whose functioning was not regulated by law, constituted the privileged observation point

[136] Dunlop (1993) 112.

[137] In Dunlop's view, solidarity is one of the most important features on the workers' side, which can be, however, challenged by the composition of the workforce in terms of national, ethnic and linguistic differences, see Dunlop (1993) 100.

[138] Dunlop (1993) 121.

[139] Dunlop (1993) 126.

[140] Dunlop (1993) 126.

[141] Dunlop (1993) 129.

for Flanders and Clegg on the role and function of the law in industrial relations.[142] Nevertheless, their perspective on the issue is wide as they very often adopt a comparative approach in order to illustrate the different modalities of interaction between law and collective bargaining/industrial relations in different countries, as well as the common features linking different national experiences.[143]

Their focus included the role of the public actor, in particular the government, in the sphere of industrial relations. Public policies and legal regulation are seen to foster or obstruct a certain path in collective bargaining dynamics influencing the general economic context of a country.[144] Moreover, the relations between trade unions and politics have formed an important part of 'the pluralist school', so as to highlight the political influence of the trade unions, whose action of representing the collective interests is therefore not confined to the economic and industrial sphere.[145] In this sense, and in line with the pluralist theory, a fundamental task of the State consists in ensuring the possibility for the social groups to pursue their own interests and to partake in political life.[146]

Both Flanders and Clegg have a clear stand on the legal regulation of industrial relations. Law should not directly regulate the functioning of collective bargaining; rather, it should constitute an auxiliary element facilitating its autonomous development. On the basis of the tradition of 'voluntarism' characteristic of the British system, Flanders expresses doubts about the legal intervention as a force of change in modifying well-established customs and habits in industrial relations. He affirms that 'it is clear that the law is a very inadequate, dangerous and dubious mean for trying to modify any established modes of conduct of trade unions, not to speak of their members in the workplace where it is likely to have little or no force whatsoever'.[147] Similarly, in analysing the relation between law and collective bargaining on the basis of a cross-country analysis, Clegg stresses that some sort of legal regulation of trade unions is a common feature in all democratic countries, so

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[142] See the different contributions compiled in Flanders (1970); see also the substantial work of Clegg on the British system, Hugh A. Clegg, *The Changing System of Industrial Relations in Great Britain* (Basil Blackwell 1979).

[143] A comparative and cross-country analysis seems to characterise Clegg's work in particular. See, for instance, Clegg (1985), where he outlines the general features of a theory of industrial relations and collective bargaining on the basis of national comparison, and Clegg (1963) where the topic of industrial democracy is explored in its theoretical and ideological basis and in its practical experiences in countries that differ greatly between one another, such as Britain, France, Yugoslavia and Israel among others.

[144] An example is the study of the relations between industrial democracy and nationalisation of industry made by Clegg, see Hugh A. Clegg, *Industrial Democracy and Nationalization* (Basil Blackwell 1951).

[145] See inter alia, Allan Flanders, "Trade Unions and Politics" (1961b) in Flanders (1970) 24–37.

[146] Clegg (1975) 310.

[147] Allan Flanders, "The Tradition of Voluntarism" (1974) 12 *British Journal of Industrial Relations*, 352–70, 365. In a similar vein, Clegg states that '[i]t is easier for the law to mould collective bargaining when it is immature and unformed than when it has grown up and taken shape', Clegg (1985) 112.

that 'legal regulation cannot be rejected on the grounds of principle', but he highlights that '[d]anger arises only when legal encroachment threatens trade unions' strength and makes possible government direction of trade unions'.[148]

As such, autonomy and voluntarism make up the cornerstones of a collective bargaining system. In order to preserve such features, the intervention of the law shall be limited to the surrounding conditions enabling the functioning of the machinery of collective bargaining. For instance, Flanders points out that legislative measures concerning statutory maximum working hours, or protection from dismissal, can facilitate a better use of collective bargaining at an industry level.[149] Based on the British example, Clegg also observes that an important role of the law would be to ensure the adoption and enforcement of health and safety provisions, to protect those subjects who are (temporarily) outside the labour market by providing them with social security.[150]

The 'prescription' of the pluralist school for a legal system favouring the autonomous functioning of collective bargaining (and therefore the functioning of collective autonomy) concerns the recognition of the voluntary character of collective agreements, mutated from the British context. In this regard, Flanders stresses that the voluntary character of collective agreement favours having the possibility to adjust the rules on employment according to the context ('permitting flexibility') and spreads responsibility among the parties in relation to the respect and application of the terms of the agreement ('encouraging responsibility').[151] As for the role of legal regulation in the settlement of labour disputes, Flanders rejects their transformation into legal disputes when related to the process of collective bargaining.[152] The task of the State should be to promote the creation of special settings for the resolution of procedural disputes on collective bargaining to be acceded on a voluntary basis in order to overcome conflicts which do not relate to collective bargaining as such.[153] Based on a cross-country comparison, Clegg concludes that the presence of a disputes settlement mechanism lowers the number of unofficial strikes, thereby favouring a proper functioning of the collective bargaining system.[154]

Hyman's analysis, by contrast, stems from his Marxist background according to which labour is a 'fictitious commodity' whose price cannot be fixed through purely

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[148] Clegg (1963) 111.

[149] Allan Flanders, "Collective Bargaining: Prescription for a Change (1967)" in Flanders (1970) 155–211, 185–86. In his words, 'a judicious use of the method of state regulation might contribute further public support to collective bargaining without threatening its voluntary character'.

[150] Clegg (1979) 290–91.

[151] Flanders (1967) in Flanders (1970) 176.

[152] Flanders (1967) in Flanders (1970) 174.

[153] This element was among the proposals advanced by Flanders in the Donovan Commission, see Bogg (2009) 42.

[154] Clegg (1985) 82.

market and economic forces. Rather, in his view, 'in market societies, the wage-labour relation is the product of social and political as well as purely economic forces'.[155] He views industrial relations as a much broader field than the one defined by the substantial and procedural rules that shape the functioning of collective bargaining and related matters. Hyman affirms that 'industrial relations is not only about disputes, negotiations and agreements over pay and related conditions – important as these undoubtedly are. It is also about the nature of these limits and the way they are determined'.[156]

The nature of the limits placed on industrial relations dynamics can be social as well as legal. Both social regulation and legal regulation play a role in setting the rules of industrial relations. In this sense, Hyman affirms that 'industrial relations can be understood as the regulation of work and employment through some combination of market forces, state intervention and collective bargaining'.[157] He thus conceives of industrial relations as 'a field of tension between market pressures towards the commodification of labour (power) and social and institutional norms which ensure its (relative) "decommodification"', in which, however, social norms, defined as 'the norms, the beliefs and values prevailing within civil society',[158] seem to have primary relevance. However, he acknowledges that even voluntarist systems of industrial relations must rely on some statutory regulations, especially as regards the definitions of criteria for assessing the representativeness of the actors involved in collective negotiations.[159] He also affirms that 'legal regulation is usually of limited practical effect unless embedded in some degree of internalisation by the industrial relations actors'.[160] For Hyman, the legal regulation ought to be concerned with constraining the authority of the employers on the employees. But the foundational structure, rooted in capitalist society, of the unbalanced relationship between employee and employer is not challenged by the legal regulation, which actually reproduces and institutionalises the status and the contracts. A sceptical attitude towards legal regulation derives from this fact. For Hyman, the asymmetry in the employment contract is reinforced by law, which ensures a certain degree of manoeuvrability for the employer in adjusting the legal obligations of the employees stemming from the employment contract to the needs of the company. In sum, the law has the ultimate effect of re-stating the power and authority of the employer in the daily life of the factories.[161]

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[155] Richard Hyman, "The Europeanisation – or the Erosion – of Industrial Relations?" (2001) 32 *Industrial Relations Journal*, 280–94, 283.

[156] Hyman (1975) 25.

[157] Richard Hyman, "Trade Unions and the Politics of the European Social Model" (2005) 26 E*conomic and Industrial Democracy*, 9–40, 10.

[158] Hyman (2001b) 285.

[159] Hyman (2001b) 284.

[160] Hyman (2001b) 285 and 284.

[161] Hyman (1975) 24.

2.3. Collective autonomy and collective bargaining in labour law theories

2.3.1. Introduction

This section focuses on the theories of Hugo Sinzheimer,[162] Otto Kahn-Freund, Francesco Santoro Passarelli and Gino Giugni, who in different times and contexts focused on the relationship between collective labour relations and the law. The theories elaborated by the four scholars are particularly interwoven: Sinzheimer, who operated in the Weimar Republic, influenced the draft of the Constitution of Weimar by coining the formula *Wirtschaftsverfassung* ('economic constitution') in order to stress the need for giving legal recognition to the emerging socio-economic phenomenon of collective labour relations. He was the mentor of Kahn-Freund, who applied the conceptualisation made by Sinzheimer to a different context – namely, Great Britain, where he had sought refuge after the Nazi take-over of Germany.[163] Here, however, Kahn-Freund distanced himself from the statutory regulation of collective labour relations developed in the Weimar Republic, in which he foresaw the precondition for the emergence of a totalitarian regime, and elaborated the theory of *collective laissez-faire*. Like Flanders and Clegg, Kahn-Freund also participated as labour law expert in the Donovan Commission set up by the British government in 1968 with the aim of assessing and revitalising the state of industrial relations.

Similarly, the theory of *autonomia collettiva privata* (collective private autonomy) elaborated by Santoro Passarelli was particularly influential on Giugni's conceptualisation of collective autonomy as *ordinamento intersindacale* (inter-organisations system). Both scholars were particularly influential in the legal and political developments and evolution of the Italian system of collective labour law and industrial relations, and both shared the concern of avoiding any returns to a totalitarian and corporatist system. Santoro Passarelli's theory has influenced the activity of judges by offering a theoretical escape from the need to refer to the provisions of the corporatist labour code, which were not eliminated after the fall of

[162] Due to linguistic reasons, the work of Hugo Sinzheimer has been studied via secondary sources rather than his original works. The analysis is therefore based on the works of Kahn-Freund, who was Sinzheimer's pupil, the recent work of Ruth Dukes, and others.

[163] See Ruth Dukes, "Otto Kahn-Freund and Collective laissez-faire: An Edifice without a Keystone?" (2009) 72 *The Modern Law Review*, 220–46, 230. The method of analysis of Kahn-Freund was in general deeply and widely comparative, see Ray Lewis, "Method and Ideology in the Writings of Otto Kahn-Freund" in Lord Wedderburn, Ray Lewis & Jon Clark (eds), *Labour Law and Industrial Relations: Building on Kahn-Freund* (Clarendon 1983) 107–26, 110.

the regime.[164] Gino Giugni, instead, actively contributed to the development of the collective labour law and industrial relations system, first by participating as labour law expert in the draft of labour law legislation and later as Minister of Employment by encouraging and achieving cooperation between the labour market parties.[165] Moreover, Giugni advanced the academic debate on industrial relations by disseminating the theories of leading US industrial relations scholars in Italy. Finally, Kahn-Freund and Giugni also had the chance to work together by participating in the Comparative Labour Law Group set up by Kahn-Freund himself.[166]

Hugo Sinzheimer elaborated his theory during the years of the Weimar Republic, when the collective dimension of labour relations was emerging and receiving a comprehensive legal translation.[167] Although having grown up in Germany and having been taken under Sinzheimer's wing, Kahn-Freund was fascinated by the British context in which trade union recognition and collective bargaining were established and grew autonomously with little involvement on the part of the law.[168] Santoro Passarelli conceived of collective labour organising as the expression of social groups that organise themselves in order to defend and pursue their interests. However, he was convinced that those organisations should find their legitimacy in the legal order of the State – as for instance in the principles of freedom of trade union organising and trade union pluralism enshrined in the Italian Constitution.[169] Although also convinced of the social origins of labour organising and collective bargaining, Giugni grounded his theory of an autonomous *ordinamento intersindacale* on the observation of the progressively increasing gap between the reality of labour relations and the constitutional and private legal norms concerning

[164] Initially, the Act abrogating the corporatist system, one of the first acts adopted after the fall of the fascist regime, R.D.L 721/1943, explicitly preserved the norms of the civil code on corporatist systems in order to protect those corporatist collective agreements in force. Nowadays, those provisions have not been officially abrogated but the Constitutional Court has declared them inapplicable.

[165] Gian Primo Cella, "Il cammino del pluralismo: Giugni e le relazioni industriali" (2007) 114 *Giornale di diritto del lavoro e di relazioni industriali*, 273–91, 280.

[166] Benjamin Aaron, "The Comparative Labor Law Group: A Personal Appraisal" (1977) 2 *Comparative Labor Law & Policy Journal*, 228–37; Otto Kahn-Freund (ed), *Labour Relations and the Law: A Comparative Study* (Stevens 1965).

[167] See Otto Kahn-Freund, "Hugo Sinzheimer 1875–1945" in Otto Kahn-Freund (ed), *Labour Law and Politics in the Weimar Republic* (Basil Blackwell 1981a) 73–107.

[168] Kahn-Freund's attention to the social history in relations with the legal and legislative developments was of course captured by the British context in which trade unions developed before political parties and their recognition was achieved before the universal male franchise, see Lord Wedderburn, "Otto Kahn-Freund and British Labour Law" in Lord Wedderburn & Lewis & Clark (1983) 29–80, 36–37. Later, Kahn-Freund reconsidered the rationale of a system in which the trade unions had little control over the actual dynamics of labour relations at the workplace level. His disillusionment with the British system of industrial relations emerged in tandem with his involvement in the commission that elaborated the 1968 Donovan Report, see Hugh A. Clegg, "Otto Kahn-Freund and British Industrial Relations" in Lord Wedderburn & Lewis & Clark (1983) 14–28, 23; Kaufman (2004) 383.

[169] See Francesco Santoro Passarelli, *Contratto collettivo e norma collettiva* (Il foro Italiano 1949).

industrial relations.[170] In this evolution, he recognised the autonomous bases for the self-regulation of the industrial relations system.

2.3.2. Juridicity and juridification of collective labour relations

The intrinsic regulatory nature and normative power (juridicity) of collective labour relations, as well as the need for the legal order of the State to regulate these social phenomena (juridification), constitute the departure point of the labour law theories and the key elements of comprehensive theory on collective autonomy. Already Sinzheimer had recognised the rule-making power stemming from the coordinated action of organised social groups. He affirmed that the creation of law is not an exclusive prerogative of the State.[171] Rather, he recognised the normative power of industrial relations actors as a fundamental factor in order to re-establish the equilibrium between the subjects involved in the employment relationship.[172] This autonomous power of the organised groups representing capital and labour is also central to the theory of collective laissez-faire elaborated by Kahn-Freund, who considered socio-economic reality as prior to the legal reality.[173] The juridicity of industrial relations ought to be acknowledged by the State, but the latter should not excessively juridify their dynamics.

For Santoro Passarelli, the collective private autonomy emerges from the relationship between private associations pursuing collective private interests. As private associations, however, the trade unions derive their legitimacy from the authority of the State's order. Their autonomy is given by the State and it is exercised within the boundaries of the State's legal system through the conclusion of a contract.[174] In his theory, the juridicity of collective labour relations is

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[170] This gap has been defined as a 'legislative deficit' or an 'insufficiency of the legislation', see Giovanni Tarello, *Teorie e ideologie nel diritto sindacale. L'esperienza italiana dopo la Costituzione* (Edizioni Comunità 1967) 84.

[171] Kahn-Freund in Kahn-Freund (1981a), 80. The formation of norms in society and the normative power of collective social groups is a key concept in the work of Sinzheimer, who transposed this observation to the labour and industrial relations spheres, see Georges Gurvitch, *Sociology of Law* (Treubner 1947) 150–51.

[172] Ruth Dukes, "Constitutionalising Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law" (2008) 35 *Journal of Law and Society*, 341–63, 346–47. Sinzheimer was inspired by the Marxist theorisation of the human bodies of the workers as the object of economic exchange in the employment relationship, see Jon Clark, "Towards a Sociology of Labour Law: An Analysis of the German Writings of Otto Kahn-Freund" in Lord Wedderburn & Lewis & Clark (1983) 81–106, 82.

[173] See Otto Kahn-Freund, *Labour Law: Old Traditions and New Developments* (Clark & Irwin 1968) 3.

[174] In this sense, the theory of collective private autonomy distances itself from the provision of the Italian Constitution intending to elevate the status of the collective agreement as the source of regulation in the employment field, see Edoardo Ghera, "L'autonomia collettiva e le trasformazioni del diritto sindacale: da Francesco Santoro-Passarelli al pluralismo ordinamentale" (2009) 23 *Lavoro e Diritto*, 351–71, 356.

subordinated to the recognition made by the State's legal order – therefore by their juridification. The juridicity of collective labour relations and the normative power of the organised socio-economic groups is the cornerstone of the theory elaborated by Giugni.[175] By observing the Italian context, Giugni noted that, despite the presence of a constitutional norm indicating how collective bargaining should be pursued (Art. 39 Const., see also Section 3.2.2), the practice went in a different direction. The actors of the system established autonomous practices of sectoral and workplace collective bargaining through self-established bodies, such as the *commissioni interne* (internal commissions) or *consigli di fabbrica* (works councils).[176] For Giugni, this provided the evidence that industrial relations are a dynamic arena, whose elements cannot be entirely understood in legal terms by simply referring to private law institutions.[177] Such considerations brought Giugni to conclude that the evolutionary and spontaneous features of industrial relations cannot be constrained by pre-existent legal categories, and the legal institutions provided by the State's legal system are not capable of incorporating all expressions of collective autonomy.[178]

He demonstrated this feature of collective labour relations through the use of a methodological tool, namely, the concept of 'primal legal order' (*ordinamento giuridico originario*).[179] This concept was developed by Santi Romano in order to describe in legal terms the normative power exercised by systems other than the State. As a constitutional lawyer and legal theorist, Santi Romano was particularly concerned with the problems related to the relationship between the State and other subjects in terms of the production of norms. Romano initially saw the emergence of professional groups – or corporatist organisations – in the socio-economic realm as undermining the supremacy of the State in terms of legal production and sovereignty over private relationships.[180] However, he considered the State to be

[175] Giugni was also part of the comparative labour law group set up by Kahn-Freund (see Aaron (1977) 228–37) and contributed to several collective works organised and edited by the German scholar, see for instance Otto Kahn-Freund (ed), *Labour Relations and the Law: A Comparative Study* (Stevens 1965).

[176] For an overview of the bodies of employees' representation autonomously established in the early years of the Italian system of industrial relations, see Aris Accornero, "Dai consigli di gestione ai consigli di fabbrica" in Alceo Riosa (ed), *Lezioni di storia del movimento operaio* (De Donato 1974) 229–46.

[177] Gino Giugni, *Introduzione allo studio dell'autonomia collettiva* (first published 1960, Giuffrè 1977) 106.

[178] Giugni (1977) 88.

[179] Gino Giugni, "Il diritto sindacale e i suoi interlocutori", in Gino Giugni, *Lavoro, legge, contratti* (Il Mulino 1989) 183–220, 205.

[180] In this context, according to Romano, the State lacked the legal instruments needed to fill the gap created by the progressive divergence between the social and the legal realities. The (relatively new) State was therefore experiencing a time of crisis. See Romano (1969) 5–26.

just one of many existing legal orders.[181] In his view, a legal order comprises a complex system of norms having a social foundation and an internal and definitive organisation. In this sense, Romano adopted the term 'institution' to describe a legal order and to highlight the contextual existence of several legal orders.[182] Although mainly referring to the Church and the international law/international community, Romano also pointed to the professional organisations, as well as to the relationships between workers and employers, as examples of the coexistence of other legal systems alongside that of the State.[183] The theory of the plurality of legal orders elaborated by Santo Romano allowed Giugni to conclude that collective labour relations are a self-functioning system that is autonomous from the State, whose legitimacy stems from internal elements.[184] Accordingly, Giugni departed from the observation that the legal reality is not limited to the exercise of the coercive power of the States to conclude that every system equipped with a basic rule on the production of norms is a closed and self-sufficient legal system,[185] formally ignoring the coexistence of other legal orders.[186] These assumptions enable the definition of the phenomenon of collective autonomy as an autonomous normative system. The juridical features of the inter-organisations system refer to the presence of rules on the production of norms (the collective agreement), a sanctioning mechanism (the strike), and a space in which those rules apply (the company or the plant).[187] The understanding of collective labour relations as collective autonomy is therefore based on the normative power recognised and attributed to the parties of those social relationships, whose legitimacy stems from internal elements.

2.3.3. The collective interests of the collective bargaining parties

The labour law theorists considered here agree on recognising the satisfaction of the collective interests of their members as the condition that allows organised social groups to engage in normative mechanisms such as collective bargaining, whose engine is the divergence of the collective interests of the parties – and thus their conflict. For instance, the 'economic Constitution' envisioned by Sinzheimer and

[181] For Romano, those theories deeming the State to be the only source of law are anti-historical, because they are oblivious to the existence of the law before the emergence of the State as a historical form of organisation, see Romano (2013) 97.

[182] See Romano (2013) 46.

[183] Romano (2013) 115 (my translation).

[184] Giugni (1977) 16.

[185] Giugni (1977) 50.

[186] Giugni (1977) 54.

[187] Giugni highlighted that the corporatist experience instead eradicated the trade unions from the space of the factories, see Gino Gugni, "Esperienze corporative e post-corporative nei rapporti di lavoro in Italia" in Giugni (1989) 27–43, 29–30.

put into practice in the short life of the Weimar Republic aimed at ensuring the material conditions for the equilibrium between the interests of capital and labour in the economy.[188] The 'collectivistic system', as defined by Kahn-Freund, was grounded on the equilibrium between employers and employees as social groups,[189] ensured through a complex and hierarchical system of workers' councils organised at district level according to sectoral criteria.[190] In the 'economic constitution', the workers were industrial citizens actively participating in economic and political life through a capillary system of representation.[191] In the practice, however, the Weimarian system of works councils evolved towards mechanisms that Kahn-Freund described as instruments of control over the employees.[192] Precisely this development was emphasised by Kahn-Freund to reaffirm the inherent existence of a disequilibrium in the employment relationship within the capitalistic economic system because of the employers' control over the means of production.[193] For Kahn-Freund, the Weimarian works councils became the machineries for welding the workers' and the employers' interests in the name of their contextual contribution to the wealth of the national economy. He denounced this development, in which he saw the ideological root of the fascist state, whose vision of a society based on 'pre-established harmony' does not imply pluralism in the different spheres of social, economic and political action.[194] In non-autonomous collective labour relations there is no space for divergent interests between the parties, since this would hamper the achievement of social harmony.

Workers and employers represent two different social groups in society, which are bearers of opposite interests that cannot be subsumed into the one of the company.[195] Nevertheless, Kahn-Freund acknowledged that '[t]here is, however, one interest which management and labour have in common': namely, that 'the inevitable and necessary conflicts should be regulated from time to time by reasonably predictable procedures, procedures which do not exclude the ultimate

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[188] Dukes notes that Sinzheimer conceived of economic democracy as inherently complementary and supplementary to parliamentary democracy. In other words, the latter could not be achieved without the former, see Dukes (2014) 18.

[189] However, Kahn-Freund stressed the inherent existence of a natural disequilibrium in the employment relationship within the capitalistic economic system because of the employers' control over the means of production, see Otto Kahn-Freund, "The Changing Function of Labour Law" in Kahn-Freund (1981b) 162–92, 169–72.

[190] Dukes (2008) 349.

[191] Michel Coutou, "With Hugo Sinzheimer and Max Weber in Mind: The Current Crisis and the Future of Labor Law" (2013) 34 *Comparative Labor Law & Policy Journal*, 605–26, 608. Also, Dukes, in Davidov & Langille (2013), 57–68, 59–61.

[192] Otto Kahn-Freund, "The Social Idea of the Reich Labour Court" in Kahn-Freund (1981c) 186–87.

[193] Kahn-Freund in Kahn-Freund (1981b), 169–72.

[194] Otto Kahn-Freund, *Labour and the Law* (2nd edition, Stevens & sons 1977) 16.

[195] Otto Kahn-Freund, "Industrial Democracy" in (1977) 6 *Industrial Law Journal*, 65–84, 76. See also Paul Davies & Lord Wedderburn, "The Land of Industrial Democracy" (1977) 6 *Industrial Law Journal*, 197–211, 198–99.

resort to any of those sanctions through which each contending party must – in case of need – assert its power'.[196] The conflict is the generator of social regulation aimed at putting an end to the conflict itself.[197]

The theorisation of collective autonomy as private autonomy is grounded on the recognition of conflictual (collective) private interests. Santoro Passarelli defines the collective interest (*interesse collettivo*) as 'the interest of a collective group of persons to achieve a benefit able to satisfy a common need'.[198] It is the combination or the synthesis – but not the sum – of the individual interests.[199] The exercise of collective autonomy is carried out for the achievement of the collective interest of the group, which is primarily a general, indivisible, and private interest concerning the economic benefit of the social group. It can be achieved and satisfied only collectively and it can be expressed by any collectivity of persons (even a temporary and occasional collectivity), but well-delimited in order to be distinguished from the general interest.[200] In the sphere of labour, the primary collective interest is the regulation of the 'competition' among workers and employers in the labour market.[201] Yet the theory of private collective autonomy emphasises that a genuine collective interest only emerges on the workers' side, which concerns freedom and dignity in employment. Whereas the private interest of the employer in maximising profit can hardly be dissociated from an individual dimension.[202] Its collective nature derives from the recognition of the employer as such as a collective entity.

The private nature of trade unions as expressions of the plurality of collective interests of different social groups represents both the conceptual achievement of the private collective autonomy theory and the logical premise of the inter-organisations system theory by Giugni.[203] The *ordinamento intersindacale* is indeed grounded on the recognition of the social nature of collective labour relations, which determines an autonomous system ruled by the self-government of the social powers represented by the collective associations of workers and employers. The

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[196] Kahn-Freund (1977) 16.

[197] Kahn-Freund affirms that '[i]n labour-management relations conflict is very much the "father of all things"', Otto Kahn-Freund, "Intergroup Conflicts and their Settlement" (1954) 5 *British Journal of Sociology*, 193–227, 195.

[198] This is the definition elaborated by Francesco Santoro Passarelli, *Nozioni di diritto del lavoro* (Jovene 1991) 47 (my translation).

[199] Mattia Persiani, *Saggio sull'autonomia privata collettiva* (Cedam 1972) 26.

[200] Tarello (1967) 30–31.

[201] Santoro Passarelli (1991) 29.

[202] According to this view, only the collective interest of the workers shall find legal protection as such in the legal order. Persiani notes that such a differentiation is present in the constitutional text, where Art. 36 Const. on the right for the worker to a just and fair remuneration ensuring a dignified life is juxtaposed to Art. 41 Const. on the freedom of enterprise, which, for its part, implies the constitutional recognition of a patrimonial interest of the employer. See Persiani (1972) 60.

[203] Edoardo Ghera, "Il contratto collettivo fonte nella dottrina" in *Studi in onore di Tiziano Treu. Lavoro, istituzioni, cambiamento sociale* (Jovene 2011) 287–306, 291.

relationship stemming from the conflicts of interests arising in the labour market between these subjects creates a system that is autonomous from the legal order of the State.[204] Therefore, the theory proposes to look at 'the living law', which is the law emerging from conflict and which is formalised in the (temporary) equilibrium of interests established by the social powers through the conclusion of collective agreements.[205]

2.3.4. The socio-legal nature and function of collective bargaining and collective agreement

The acknowledgment of the normative power of the organised groups representing capital and labour represents the conceptual basis for the socio-legal nature of the collective agreement. The collective agreement is the outcome of the process of collective labour relations aimed at finding a compromise between the collective interest by setting both rules for the reciprocal relationship between the parties and the working and employment conditions that shall be applied in the individual employment relationship.

In Sinzheimer's theory, although autonomous, the economic and social actors are hierarchically subjected to the power of the State, which ought to maintain primacy over the self-regulation of employment, whose legitimacy depends on the State itself.[206] The State should facilitate the exercise of the social power of normative production enjoyed by organised capital and labour.[207] Its ultimate role is to shape and define the boundaries of the sphere of the collective social groups, whose normative power becomes effective once it has received the legitimation via the State's legal system.[208] Through the recognition of the legal value of the collective agreements, the Weimar Reich recognised their social function as an instrument for settling the conflict.[209]

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[204] Gino Giugni, "Il diritto del lavoro e i suoi interlocutori" (1970) *Rivista di diritto e procedura civile*, 369–405, 391.

[205] Giugni (1977) 13. The theory has been interpreted as focusing on the gap between the 'living law' emerging autonomously within the space of the plant and the State's norm, which is absent aside from the non-applied constitutional provisions, see Tarello (1967) 89.

[206] Dukes (2014) 24; Sandro Mezzadra, "Lavoro e Costituzione nel laboratorio Weimar. Il contributo di Hugo Sinzheimer" (2000) 23 *Scienza e Politica*, 21–43, 34.

[207] Martine Le Friant, "Collective Autonomy: Hope or Danger?" (2013) 34 *Comparative Labor Law & Policy Journal*, 627–53, 632. As Dukes put it, according to Sinzheimer 'the primary goal of labour law could rightly be described as the facilitation of the autonomous regulation of employment relations and working life by collectivized labour and employers or employers' associations', see Dukes (2014) 23.

[208] See Dukes (2008) 347.

[209] Kahn-Freund in Kahn-Freund (1981b), 180.

The theory of collective laissez-faire of Kahn-Freund pays central attention to the socio-legal nature and function of the collective agreement. For Kahn-Freund, the employment contract expresses the divergence of interests between workers and employers. In a capitalistic society, it performs the social function of reproducing the 'property scheme' in the sphere of labour relations.[210] The contract, which is 'a command under the guise of an agreement',[211] creates a social relation in which a person is under the subordination and hierarchy of another.[212] Consequently, the social relationship between the employer – the owner – and the employee – the owned – is unbalanced and the system established within the factory is an 'absolute monarchy'[213] in which the distribution of power is massively in favour of the employer.[214] In this context, the social function of collective bargaining is to operate as a countervailing force aimed at democratising the workplace.[215] The outcome is the collective agreement, which therefore performs two functions: on the one hand, it sets rules for the relationships between organised labour and management; on the other, it sets the conditions of work to be included in the employment contract. These two functions of the collective agreement are identified by Kahn-Freund as the 'contractual' and the 'normative' standards of collective bargaining.[216] The former are 'those which govern the behaviour of the groups themselves',[217] while the latter are 'those designed to regulate the conduct of individuals'.[218] Accordingly, the collective agreement has a twofold status: it is a 'contract' placing obligations between the parties of the agreement, so as to perform an obligatory function; but it is also a 'code' setting normative standards for the individual contracts, so as to

[210] In Kahn-Freund's view, the contract of employment is one of the institutions that contribute to the establishment and continuation of the capitalistic economic system by 'cementing' the law of property which is at the basis of such a system, see Otto Kahn-Freund, "Introduction" in Karl Renner, *The Institutions of Private Law and their Social Functions* (Routledge 1949) 28.

[211] Kahn-Freund in Renner (1949) 28.

[212] Kahn-Freund in Renner (1949) 29.

[213] Especially in absence of certain legal rules constraining the power of the employer over the employee, see Otto Kahn-Freund, "Legal Framework" in Flanders & Clegg (1954) 42–127, 49–50.

[214] Kahn-Freund, in Renner (1949) 29.

[215] Otto Kahn-Freund, *Labour Relations. Heritage and Adjustment* (Oxford University Press 1979) 2. In this sense, he refers to collective bargaining in the workplace as a form of direct democracy, opposed to collective bargaining at higher levels, which by its own nature tends to overlook specific aspects of workplace labour relations and leaves normative gaps which are usually filled by the unilateral power of the management, see Kahn-Freund (1979) 8.

[216] The two functions express the interests of organised capital and labour, see Kahn-Freund (1977) 162.

[217] As for instance 'the obligation to keep peace, i.e. not to strike or to lock out with the intention of changing the terms agreed upon' or 'obligation to induce the members to conform with the normative terms of the agreement or at any rate to do nothing to induce them not to do so' or further 'mutual undertakings to establish and maintain, and also to finance, joint institutions, hiring halls, pension funds, conciliation council or arbitration boards', see Kahn-Freund (1954) 197.

[218] Kahn-Freund suggests 'wage clauses' as a common example, see Kahn-Freund (1954) 197.

perform a normative function.[219] The normative function implies that the collective bargaining process assumes a 'legislative' task, which makes the collective agreement just like 'law' in the sphere of employment.[220] Through the contractual function, instead, the signatory parties (the organisations) secure their respective and conflictual expectations with regard to profit and security and dignity of work.[221]

For Kahn-Freund, the functions of the collective agreement represent two conflicting aspirations of the organised groups: in his words, 'the contractual function of the collective agreement is mainly for the benefit of the management, and the normative function mainly for the benefit of labour'. The organisations do not negotiate on behalf of their members, but rather in order to ensure that obligations are placed on the activities of the other party (for the employer) and that uniform working conditions are applied in the labour market (for the trade union).[222] Finally, the collective agreement also constitutes an 'intragroup' instrument for limiting or eliminating the competition among enterprises in respect of labour costs – on the employers' side – and the competition among workers in relation to working and employment conditions – on the workers' side.[223]

Santoro Passarelli's theory of collective private autonomy conceives of collective autonomy as the expression of (collective) private interests pursued by the collective organisations and secured through private contracts, i.e. collective agreements.[224] The associative element is hence central: collective interests can be recognised in the legal sphere only when the individual members of a social group organise themselves. The trade unions are associations created in order to achieve the collective interest of the group and to settle the conflict arising between the collective interests at stake.[225] Through the association, the individual workers are able to create the conditions for the protection of their collective interest by subjugating their individual interests to the collective interest and by attributing to the organisation the mandate to pursue and protect this interest.[226] The collective agreements are hence concluded under the mandate given by the workers to the unions and their effects shall be limited to the members of the signatory

[219] Kahn-Freund in Flanders & Clegg (1954) 55; see also Kahn-Freund (1977) 156.

[220] Otto Kahn-Freund, "Collective Agreements Under War Legislation" (1943) 6 *The Modern Law Review*, 112–43, 115. The normative function means that '[t]he collective agreement is the embodiment of a custom, pre-determining the content of contracts of employment, unless contradicted by the express terms of those contracts', see Kahn-Freund (1943) 117. Elsewhere, the collective agreement is defined as 'the law of the trade', in Kahn-Freund (1954) 201.

[221] Kahn-Freund (1977) 49.

[222] Kahn-Freund (1943) 115.

[223] Kahn-Freund (1954) 201.

[224] Santoro Passarelli (1949).

[225] Santoro Passarelli (1991) 34.

[226] Persiani (1972) 97.

organisations.[227] Consequently, the theory of collective private autonomy emphasises the normative function of the collective agreement, as the instrument satisfying the workers' interests.[228]

Giugni's theory of *ordinamento intersindacale*, instead, places more emphasis on the obligatory function of the collective agreement, which reflects the political dimension of trade union action.[229] In the inter-organisations system, the collective agreement constitutes the 'fundamental norm' and the ultimate source of the other norms – a 'norm on the production of norms'. Its legitimacy is based on the reciprocal recognition between the collective parties and not on a recognition coming from the legal order of the State.[230] Therefore, the obligatory function of the collective agreement is the cornerstone of the system. The State's legal system is not equipped with a legal institution capable of understanding the agreement between the collective parties as more than a private contract. The inter-organisations system is 'a system grounded on the self-investiture of representativeness and of the power to regulate the economic and professional groups'.[231]

From the perspective of the inter-organisations system, the collective agreement constitutes the contractual basis of the industrial relations 'community' which enables the parties to pursue collective regulation of their reciprocal relationship as well as of the employment relationship. Thus, the collective agreement is *a iure proprio* source of legal production.[232] This understanding of the collective agreement as the source of regulation for the inter-organisations system led Giugni to emphasise its contractual or obligatory function, since it represents the function through which the parties jointly recognise the regulatory power of the collective agreement in setting the normative standards for the individual contracts.[233] The obligatory clauses highlight the dynamic nature of the relationship between the parties aiming 'at regulating the future normative production'.[234] Through the emphasis on the obligatory clauses of the collective agreement, Giugni stresses its function as an instrument of self-organisation.[235] The obligatory clauses are '"social norms" […] partially set in order to organise a "legislative activity", partially set in order to control the application of the law of the group, which constitute the bearing

[227] Santoro Passarelli (1991) 48.

[228] Persiani (!972) 168.

[229] Roberta Bortone, *Il contratto collettivo tra funzione normative e funzione obbligatoria* (Cacucci 1992) 39.

[230] Giugni (1977) 107.

[231] Giugni (1977) 125.

[232] Giugni (1977) 109.

[233] Giugni (1977) 118. See also Pino (2014) 39–40.

[234] Giugni (1977) 119.

[235] Gino Giugni, "La funzione normativa del contratto collettivo di lavoro (1968)" in Giugni (1989) 151–82, 154–55.

walls of an order, in the context of which contract and obligation become […] organising instruments of the equalised social power'.[236] The self-regulative prerogative of the collective agreement then expands its boundaries from the regulation of the employment relationship between employer(s) and workers to the regulation of the economy of a company or of a sector.[237] It is an instrument with the socio-economic objective to normalise the imperfection of the market.[238] On the employer's side, it addresses the composition of the collective conflict that hinders the process of production; whereas on the workers' side, it addresses the limitation of the competition among them.[239]

2.3.5. The collective conflict as a social norm in industrial relations

The divergence between the collective interests is expressed through conflictual actions, which represent the collective conflict from which the industrial relations system originates. At the same time, the exercise of the collective conflict is the social norm completing the system: the parties undertake collective actions in order to sanction their counterpart.

Sinzheimer recognised that in the economic sphere two types of relationship exist: a conflictual one, represented by the conflict between capital and labour and expressed in the subordination of the employee to the employer; and a cooperative one, symbolised by the common interest in the production shared by the employee and the employer.[240] The acknowledgement of conflict was central both in Sinzheimer's analysis and in the juridification of labour relations operated by the Weimar Constitution. As Kahn-Freund highlighted, 'the collectivistic system is totally unable to function unless there are organisations on both sides which have the will and the capacity to engage in conflict'.[241] The exercise of conflict through collective actions is the mechanism that allows the system to function.

Kahn-Freund himself defined the collective agreement as 'a peace treaty between social powers'.[242] The collective agreement is thus an institution established by social powers in order to create peace and end conflict.[243] The conflict derives from the intrinsic presence of a plurality of divergent and conflicting interests in society,

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[236] Giugni (1977) 116 (my translation).

[237] Giugni (1968) in Giugni (1989) 163–64. Here the influence of the understanding of the collective agreement outlined by Hugo Sinzheimer and reproduced in the Weimar Constitution is evident.

[238] Giugni (1968) in Giugni (1989) 167.

[239] Gino Giugni, "Diritto del lavoro (voce per un'enciclopedia)" in Giugni (1989) 245–92, 270–71; Giugni (1968) in Giugni (1989) 159.

[240] Mezzadra (2000) 33.

[241] Kahn-Freund in Kahn-Freund (1981b) 180.

[242] Kahn-Freund (1977) 123.

[243] Kahn-Freund in Flanders & Clegg (1954) 42.

which social groups tend to pursue.[244] Against the fascist idea of a society grounded on 'pre-established harmony',[245] the conflict ensures the autonomous development of collective bargaining. The totalitarian State eliminates – or better denies – the conflict as an artificial aspect of industrial relations. Instead, the theory of collective laissez-faire sees the conflict as the real engine of development in the socio-economic sphere.[246] The conflict is a creative force that permits both the definition of social groups and the modalities of their relations.[247] As a social sanction, the industrial action is an inherent and an essential element of collective bargaining, which ensures – as the 'ultimate means' – to both parties the ability to exert economic and social pressure on the other side.[248] The conflict is a creative force that permits both the definition of social groups and the modalities of their relations.

No particular theorisation or conceptualisation of collective conflict is present in the theory of collective private autonomy. Santoro Passarelli indeed identifies the classical distinction between disputes on rights and disputes on interests: the first type concerns a conflict regarding the interpretation and the application of a collective agreement (legal dispute on rights); the second concerns a conflict regarding the renewal of a collective agreement (economic dispute on interests).[249] In the first case, the resolution shall be attributed to the courts as it concerns the actual regulation of employment conditions in force. In this sense, the ordinary judge has the proper instruments to resolve the controversy.[250] In the other case, the controversy concerns the interests in conflict and as such should be solved by the parties in conflict. The strike is a suitable and constitutionally recognised means for the solution of these controversies.[251]

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[244] Kahn-Freund (1977) 15.

[245] Kahn-Freund (1977) 16.

[246] Bogg (2009) 9; Lewis defines the theory of collective laissez-faire as Kahn-Freund's version of industrial relations pluralism, see Lewis in Lord Wedderburn & Lewis & Clark (1983) 115.

[247] According to Kahn-Freund, the conflict 'gives rise to the formation and consolidation of groups and to the establishment of the relevant social relations as group relations', Kahn-Freund (1954) 194.

[248] 'Collective bargaining as we understand it is unthinkable without social sanctions. By this we mean that neither an employer or employers' association nor a trade union can bargain effectively and hope to enforce the observance of collective agreements, unless there is in the background the possibility to use economic and social pressure against the other side of the bargain', see Kahn-Freund in Flanders & Clegg (1954) 101.

[249] Santoro Passarelli (1991) 59.

[250] According to Santoro Passarelli, if the regulation of controversies on rights were attributed to the social partners, this would entail derogation to the principle of jurisdictional exclusivity and States' sovereignty, since it would imply the abdication of the State in its jurisdictional authority. See Santoro Passarelli (1991) 60.

[251] Santoro Passarelli recalls that the corporatist system attributed the resolution of economic controversies to the judiciary. Whereas the silence of the Constitution on economic controversies and the protection of the right to strike reserve to social partners the autonomous solution of economic labour disputes, see Santoro Passarelli (1991) 61–62.

For Giugni, the collective conflict is an inherent aspect of collective labour relations stemming from the socio-economic changes produced by the Industrial Revolution with regard to the form of employment and the collectivisation of the workforce. The conflict assumes a twofold function in the inter-organisations system. It is the origin and engine of the self-regulative mechanism remedying the unbalanced dynamics of industrial production,[252] and it constitutes a norm of the system itself. The self-sufficiency of the inter-organisations system is completed by the collective action, which constitutes the mechanism of self-sanctioning to be used by the parties to ensure the application and enforcement of the 'norms' created by the collective agreement. The collective action constitutes the instrument of self-protection of the system.[253] In a system based on the equilibrium between social powers, the strike represents the sanction to which one of the parties, more often the employers, is exposed as a consequence of the misapplication of the terms of the agreement. In this sense, the strike is an essential element of the warfare characterising the relationship between capital and labour, which ensures the balance of a system that tends to escape the legal regulation of the State.[254] Collective agreement and collective action are the social norms that enable the functioning of the company, seen as a juridical system producing rules in the sphere of labour relations and coexisting with the political and legal organisation of the State.[255]

2.3.6. The auxiliary role of law in regulating collective labour relations

The labour law theories on collective autonomy discussed thus far share an understanding of the social nature of collective labour relations, the presence of social norms regulating them, and the relevance of the process of juridification in the State's legal system. They also share a view on the law as a potential auxiliary instrument for the autonomous evolution and functioning of industrial relations.

The environment of the Weimar Republic was an inspiring milieu for the study of the relationship between capital, labour and the law.[256] The Constitution of

[252] Tarello (1967) 125.

[253] Pino (2014) 38.

[254] Tarello (1967) 124.

[255] Giugni recognises in the company a centre of organised power and organised normative production like the State, Giugni (1977) 53.

[256] The public debate concerning the regulation of labour relations in the Weimar Republic was particularly rich on account of several political schools of thought which confronted one another, see Knut Wolfgang Nörr, "On the Concept of the 'Economic Constitution' and the Importance of Franz Böhm from the Viewpoint of Legal History" (1996) 3 *European Journal of Law and Economics*, 345–56.

Weimar implied a substantial juridification of the dynamics of collective labour relations and constituted a very advanced example of a legal translation of the socio-economic relationship that emerges in a capitalist society. The protection of labour and the right to organise were constitutionally recognised and the 'economic constitution' formula elaborated by Sinzhemier was translated into legal terms by the system of works councils culminating in an economic council in charge of outlining policies and law relating to employment and labour issues.[257] The role of the State was to set specific legislation ensuring the functioning of the industrial relations system, such as the legal recognition of collective agreements and the protection of workers' representatives at the workplace.[258] In this way, the law intervened in giving full effect to collective bargaining, whose normative power was deemed to have the 'flexibility and immediacy' needed to adapt the rules to socio-economic changes.[259]

From his analysis of the relationship between the self-created norms and the State's law, Sinzheimer developed a conception of labour law as an independent discipline positioned at the intersection between private and public law.[260] However, the clear-cut separation between the State and the collective organisations went unquestioned. This distinction constituted the 'social idea' of the Weimar Republic differing from the 'social idea' of the fascist state, in which conflict and autonomy of social groups were denied and repressed by means of the law.[261] Kahn-Freund's view progressively diverged from the developments of the Weimar Republic, where trade unions were eventually included in the public-law sphere. According to him, the law plays – or should play – a limited role in the evolution of industrial relations.[262] Given the social origins of collective bargaining, Kahn-Freund considered reliance on legislation and legal sanction as a sign of the system's weakness, and of the union side in particular.[263] Therefore, sound labour relations

[257] Dukes (2008) 349.

[258] See Dukes (2014) 36.

[259] Dukes (2008) 347; see also the analysis of the German labour law made by Sinzheimer himself, in Hugo Sinzheimer & Daniel B. Shumway, "The Developments of Labor Legislation in Germany" (1920) 92 *Annals of the American Academy of Political and Social Science*, 35–40.

[260] Kahn-Freund in Kahn-Freund (1981a) 75. Dukes notes that the rejection of the law of economy as private law characterises Sinzheimer's theory and contributes to the shaping of the actual boundaries of labour law as an autonomous discipline. According to Dukes, by stressing the conception of the economy as a common concern, Sinzheimer 'made the case for the legitimacy, and even the necessity, of state involvement in its regulation', see Dukes (2014) 31.

[261] See Kahn-Freund in Kahn-Freund (1981c) 110–11. In Sinzheimer's theorisation, trade unions are private bodies performing public services by regulating common interest matters, such as the economic sphere and the employment relationship, i.e. the labour market, see Dukes (2014) 35.

[262] According to Kahn-Freund, '[l]aw is a secondary force in human affairs, and especially in labour relations', which implies that central issues, like wages for instance, should be regulated through collective bargaining. The role of the law is instead central in defining certain issues such as health and safety, see Kahn-Freund (1977) 13.

[263] Kahn-Freund in Flanders & Clegg (1954) 44.

do not need to rely on legislation and legal intervention in order to produce results. Yet, as 'technique for the regulation of social power',[264] '[t]he principal purpose of labour law, then, is to regulate, to support and to restrain the power of management and the power of organised labour'.[265] In this regard, Kahn-Freund notes that all industrial countries have experienced 'the sequence of suppression, abstention, recognition, and attempted control in the attitude of the law towards the autonomous organisations of the working class'.[266]

The legal system ought to regulate some aspects of industrial relations and collective bargaining, mainly those related to the exercise of power, such as the relationship between the individual and the organisation, the enforcement of the collective agreement, and the regulation of conflict. As to the first aspect – the representation – Kahn-Freund recognises that 'if a system of law endows the parties to a collective labour agreement with the power of creating norms binding upon individual employers and employees, it subjects these individuals to the legislative power of the trade unions and employers' organisations who are parties to the agreement'.[267] Trade unions are therefore 'private, voluntary and autonomous organisations but they discharge indispensable public functions'.[268] Therefore, besides protecting freedom of association and the right to organise,[269] the law shall safeguard the relationship between the individual and the union, by protecting the right to be a member, the right to be represented and the right to take part in union's activities, without, however, encroaching on the union's autonomy.[270]

As for the collective agreement, its status of 'contract' implies obligations on and only on the parties of the agreement. The enforceability of those obligations would then depend on the legal value attributed to the collective agreement in the legal system. In Kahn-Freund's view, the British system based on common law is an example of an autonomous system that does not rely on legal enforcement to guarantee the 'contractual' function of the collective agreement. As a normative

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[264] Kahn-Freund (1977) 14.

[265] Kahn-Freund (1977) 15.

[266] Otto Kahn-Freund, "The Illegality of a Trade Union" (1944) 7 *The Modern Law Review*, 192–205, 204.

[267] Otto Kahn-Freund, "Legislation through Adjudication" (1948) 3 *The Modern Law Review*, 269–89, 270.

[268] This definition remains valid today as regards, for instance, the regulation of the labour market or, in some countries, access to certain social benefits, such as pension funds or unemployment allowances. However, in Kahn-Freund's era, union shop or closed shop agreements were common practices imposing the mandatory membership of a union in order to be employed in a specific sector or company. In this sense, the unions also discharged the function of regulating access to employment. See Otto Kahn-Freund, "Trade Unions, the Law and Society" (1970) 33 *The Modern Law Review*, 241–67.

[269] Kahn-Freund (1977) 200.

[270] Kahn-Freund (1970). Kahn-Freund outlines a comparison between the British, the Australian and the US law in this regard by underlining that the British system is the one which has achieved the best balance between trade union autonomy and protection of the individual.

'code', instead, which is the 'very much more important role played by collective agreement in labour relations',[271] the relevance of law as an enforcing factor is crucial in the light of giving full application to the negotiated standards of employment, especially in systems in which collective bargaining functions as the primary source of employment regulation.[272] Being 'the custom or the law of the trade', the application of the normative clauses of the collective agreement shall be backed-up by the State's law in order to ensure its application to individual parties too – on both sides – who are not members of the signatory organisations.[273] Yet, in the English tradition, the collective agreement is a voluntarily negotiated and non-legally enforceable contract whose terms and conditions can be 'contracted-out' by the individual parties in the name of individual freedom of contract.[274] The acknowledgment that the English system would not conceive a legally *erga omnes* application of collective agreements led Kahn-Freund to favour the legislation's incorporation of the terms and conditions set by the collective agreement.[275] If the law aims at protecting the weaker party in the employment relationship, then it should ensure the widest and fairest application of the collectively negotiated terms of employment without encroaching on the autonomy of the parties, but ensuring that the unilateral power of the employer is restrained by providing sanctions and remedies to a violation in applying the terms of the agreement in the individual contract.[276]

With regard to the regulation of the collective conflict, Kahn-Freund relies on the classical distinction between conflict of rights and conflict of interests.[277] Industrial action – and in particular the strike – represents the alternative to the legal sanction that is necessary in order to counterbalance the power of the employer.[278] Kahn-

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[271] Kahn-Freund claims that 'the principal social function of the agreement as a code is the maintenance of wage and other standards in the interests of the workers', for both quotations, see Kahn-Freund (1977) 166.

[272] See Kahn-Freund (1954) 210.

[273] Kahn-Freund indicates that the issue of the application of an agreement shall derive from its actual use within the industry, rather than from the individual membership, see Kahn-Freund in Flanders & Clegg (1954) 58.

[274] See Kahn-Freund in Flanders & Clegg (1954) 60.

[275] Kahn-Freund (1977) 181.

[276] Kahn-Freund (1977) 178.

[277] Kahn-Freund (1954) 205. Kahn-Freund stresses that such a distinction is sharper in industrial relations systems in which the law plays a more relevant role, as in France and Germany; by contrast, the distinction is less clear in contexts in which collective bargaining is more autonomous, due to the absence of legal sanctions as enforcing factors in the conflict of rights, as in Great Britain, see Kahn-Freund (1954) 206.

[278] 'The concentrated power of accumulated capital can only be matched by the concentrated power of the workers acting in solidarity', see Otto Kahn-Freund & Bob Hepple, *Laws Against Strike* (Fabian Society 1972) 6. According to Kahn-Freund, the restrictions on social sanctions should go hand in hand with the expansion of legal sanctions in order to ensure the enforcement of the collective agreement, see Kahn-Freund in Flanders & Clegg (1954) 83.

Freund distinguishes two attitudes of the law: it can recognise the strike as a freedom, so to exempt the individuals from civil and criminal liability deriving from the breach of the employment contract; or it can see the strike as a fundamental right, so that the State shall ensure its exercise by positive means.[279] Regardless of the choice in operation, the legal system shall ensure the effectiveness of such an instrument within the industrial disputes. Nevertheless, the exercise of industrial action cannot be absolute. Restrictions and limitations should be admitted for protecting the individual subject – as well as a third party not involved in the dispute – from excessive exercise of a collective power.[280] In this sense, the law shall protect the individuals while not preventing the collective use of industrial action.

A public function or role or even public recognition of the trade unions is rejected in the theory of collective private autonomy by Santoro Passarelli, as a legacy of the corporatist regime.[281] Trade unions are instead defined as private associations, originating from the decision of social groups to organise themselves in order to pursue their collective interests. This understanding of trade unions has direct implications for the view of the collective agreement. Being a contract signed by a private association, it has a private nature.[282] This means that it cannot produce legal effects for subjects who are not members of the signatory associations.[283] In the framework of collective private autonomy, the collective agreement is intended as a 'labour collective agreement of civil law' (*contratto collettivo di lavoro di diritto comune*) in order to stress its private-law nature and to distinguish it from the public-law corporatist collective agreement.[284] The role of the legal system is therefore to

[279] In outlining such a distinction, Kahn-Freund and Bob Hepple refer to different national systems: the British one as an example of the 'freedom' model, and Italy and France as examples of the 'right' model, see Kahn-Freund & Hepple (1972) 9. See also Kahn-Freund (1977) 355.

[280] In general Kahn-Freund notes that '[t]he dominant theme of this branch of law is the struggle between those (individuals or groups) who wield the economic power and the interest of those likely to suffer by its exercise', see Kahn-Freund in Flanders & Clegg (1954) 102.

[281] The corporatist regime recognised a public function to the trade unions and employers' associations. In this context, the corporatist lawyers recognised frankly the fact that trade unionism, after being first a crime and then a right, became an obligation, see Francesco Carnelutti, *Sindacalismo* (Diritto del Lavoro 1927) 5. In the corporatist regime there was no recognition of collective interests: the authority of the State had to prevail over the autonomy of collective labour relations, and the economic interests of the professional groups were denied in the name of the general interest of the State, see Umberto Romagnoli, "Francesco Carnelutti, giurista del Lavoro" (2009) 23 *Lavoro e Diritto*, 373–401. Instead, according to Santoro Passarelli, there is no freedom in exercising a public function, see Francesco Santoro Passarelli, "Autonomia collettiva e libertà sindacale" (1985) *Rivista Italiana di Diritto del Lavoro*. However, the partial rejection of the recognition operated by the Italian Constitution as regards trade unions and collective bargaining in the light of a totally private nature of such organisations has also been criticised as operating a 'de-constitutionalisation' of collective labour law, see Gaetano Vardaro*, Contrattazione collettiva e sistema giuridico* (Jovene 1984) 61.

[282] Santoro Passarelli (1949)

[283] Santoro Passarelli (1991) 49.

[284] Tarello (1967) 53.

attribute the legal effects to the production of social norms operated by the collective parties.

The rejection of the statutory regulation of collective labour relations is also a fundamental feature of the inter-organisations system theorised by Giugni. Statutory regulation is deemed by Giugni to be a non-suitable factor for regulating industrial relations and employment because of its rigidity. Industrial relations are social phenomena strongly conditioned by the socio-economic reality, and as such they change and tend to escape the rigid regulation of State's law. According to Giugni, 'nothing can be more detrimental to the economic equilibrium of a country than a system of industrial relations stiffened within a legal structure, no matter how established, in which the seeds of a stabilised tradition start to germinate'.[285] Rather, the legislative developments should reflect the political culture of the trade union movements.[286]

In the inter-organisations system theory, industrial relations constitute a system that is separated from the State, and yet which coexists with it.[287] The two systems represent 'two forms of juridicity not yet integrated'.[288] Nevertheless, coexistence does not necessarily correspond to indifference. The inter-organisations system indeed functions as a channel for transferring into the State's legal system the normative contents produced by the parties.[289] The collective agreement represents the fundamental norm of the inter-organisations system, but this does not mean that the collective agreement cannot be recognised by the legal order of the State. The State recognises the legal nature of collective autonomy by acknowledging the possibility of setting norms through the autonomous activity of collective bargaining. Hence, the action of the State is limited to ascertain the normative power of the agreement itself.[290] In other words, the recognition is not the precondition for the normative activity of collective autonomy, but it permits the inclusion of the collective agreement within the sources of the legal order.[291] In this way, the original

[285] Giugni (1977) 138 (my translation).

[286] Giugni grounds this statement on a comparative examination of the participation and co-determination in the different European countries. He points out that systems in which the legislation favours the participation of employees in the enterprises are also those in which the trade union movements assume a more cooperative attitude, see Gino Giugni, "Sindacato, democrazia industriale, governo dell'economia", in Paolo Montalenti (ed), *Operai ed Europa. La partecipazione dei lavoratori alla gestione dell'impresa* (Frano Angeli 1981) 132–39, 135.

[287] In critical terms, Vardaro points out that the adoption of the theory of the plurality of legal orders reduces the innovative extent of the theory of inter-organisations system by considering the industrial relations system as a 'particular system included within the boundary of the State's system', see Vardaro (1984) 98.

[288] Giungi (1977) 105.

[289] Edorado Ghera, "Gino Giugni e il metodo giuridico" (2007) 114 *Giornale di Diritto del Lavoro e di Relazioni Industriali*, 265–72, 268.

[290] Giungi (1977) 106.

[291] Giungi (1977) 107.

juridical feature of the *ordinamento intersindacale* becomes legality for the State.[292] The collective agreement has therefore a 'bivalent normative value':[293] in the inter-organisations system, it represents the pivot of the system and it has a mandatory efficacy; whereas in the State's legal system, it produces effects limited to the members of the signatory parties and in this sense it remains within the domain of private law.[294] In other words, the legal order of the State *finds* the collective agreement as social fact and decides to regulate it by attributing the value and the status of a private contract.[295]

The task of the State is to remove the conditions of imbalance and inequality of the employment relationship by recognising the obligations set in the collective agreement.[296] This operation may risk curtailing the autonomy and self-sufficiency of the inter-organisations system by adopting private law institutions so as to 'justify' the existence of a collective agreement and position it within the State's legal system.[297] Nevertheless, Giugni pragmatically admits the need for the collective agreement to be acknowledged by the State in order for it to operate as an effective remedy to the unavoidable fragmentation of the labour market deriving from the voluntary nature of trade union associations and collective bargaining.[298] In 1970, the adoption of the Workers' Statute, whose drafting saw the direct involvement of Giugni himself, represented the acknowledgement of the connected duality between the inter-organisations system governed by the collective autonomy and the State's system. This piece of 'supporting legislation' finally recognised the already practised workplace trade union activity, thus giving statutory recognition to autonomously developed practices.[299] In this sense, the State recognises and preserves the autonomy of the industrial relations system.

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[292] The provisions of the Italian Constitution are intended as the legal translations of the basic social norms that ensure the functioning of the inter-organisations system, see Vardaro (1984) 68.

[293] Giugni even theorises a 'polyvalent normative value', that is, a social fact producing normative effects in more than one legal order, see Giungi (1977) 82. See also Edoardo Ghera, "Il contratto collettivo tra natura negoziale e di fonte normativa" (2012) 2 *Rivista Italiana di Diritto del Lavoro*, 195–246.

[294] Ghera (2011) 107.

[295] Mario Giovanni Garofalo, "Per una teoria giuridica del contratto collettivo. Qualche osservazione di metodo" (2011) 132, *Giornale di Diritto del Lavoro e di Relazioni Industriali*, 516–42, 518. Garofalo highlights the unresolved problem of the legal status of the collective agreement within the hierarchy of sources of law.

[296] According to Giugni, such recognition would constitute 'the guarantee of the freedom of the worker', see Giungi (1977) 89.

[297] Giungi (1977) 138. See Vardaro (1984) 108.

[298] Giugni positively evaluates attributing *erga omnes* value to the minimum standards set by the collective agreement in order to protect both the affiliated employers and the employees from social dumping, unfair competition and exploitation, see Gino Giugni, "La validità "*erga omnes*" del contratto collettivo" in Giugni (1989) 83–119, 104.

[299] Mario Rusciano, *Contratto collettivo e autonomia collettiva* (Utet 2003) 120.

The establishment of a branch of law entirely concerned with the law stemming from the inter-organisations system – trade union law or *diritto sindacale*[300] – constitutes the definitive recognition of the normative force of industrial relations and collective bargaining. Giugni states that such a branch of law ought to be grounded on three pillars, whose exercise the State shall protect. These pillars are freedom of association, collective bargaining and the collective agreement, and the collective action, intended as self-protection (*autotutela*) of the system itself.[301] As for freedom of association, the State shall ensure the possibility to exercise (or not) such a right to the individual.[302] As for the collective agreement, as said, the State shall recognise the functions that it performs within the inter-organisations system as an instrument of peace and equilibrium between social powers by attributing legal effects to its terms.[303] As for the collective action, the most important achievement has been its qualification as right. Its regulation shall regard finalities, modalities, the entitlement and the cooling-off procedures.[304] However, Giugni stresses that the nature of the strike as social phenomenon requires political evaluations and mediations rather than legal means. The strike is a social phenomenon occurring *outside* the legal framework, without, however, aiming to subvert it.[305] The ultimate task of the State is to preserve its exercise, and not to orient it.[306]

2.4. Collective autonomy and collective bargaining as global labour rights

2.4.1. Introduction

The discourse on global labour rights stems from the study of human rights and entails a legal-pluralistic understanding of the several sources belonging to different legal systems that regulate a socio-economic phenomenon such as the exercise of collective labour rights. The analysis focuses on the sources related to the

[300] Giugni defines *diritto sindacale* as a 'system of norms constituting the framework of the activity of the organised group', see Giugni (Diritto del Lavoro) in Giugni (1989) 264. Giugni affirms the universality of this branch of law, which is, however, expressed in different forms depending on historical, political and economic variables, Ibid., 265.

[301] Giugni (Diritto del Lavoro) in Giugni (1989) 267.

[302] Giugni refers to the freedom of association as a question concerning the individuals in their relations with the trade union. In this sense, he also includes the necessity to preserve the negative freedom of association, see Giugni (Diritto del Lavoro) in Giugni (1989) 267–68.

[303] Giugni (Diritto del Lavoro) in Giugni (1989) 270–71.

[304] Giugni (Diritto del Lavoro) in Giugni (1989) 278.

[305] Giugni (Diritto del Lavoro) in Giugni (1989) 280.

[306] Pino (2014) 29.

International Labour Organisation (ILO), the Council of Europe, and the EU, and on the interpretation given by their judicial or quasi-judicial bodies.

Created in 1919 as part of the post-WWI world order, and reformed in the ensuing years, the ILO is a supranational organisation concerned with labour issues. Its specific nature has not changed since it became a specialised agency of the newly formed UN, in 1946.[307] The salient feature of the ILO is its tripartite labour standard-setting process. Though the ultimate decision upon the ratification of the international Conventions rests with the States, the responsibility for drafting, voting, monitoring and enforcing labour standards is shared by the social partners and governments. The ILO's main instruments – Conventions and Recommendations – are adopted through negotiations between representatives of the workers, employers and governments, but must be ratified by the domestic legislative body in order to bind the States and must receive a certain number of ratifications in order to enter into force.[308] Further, the supervisory mechanism has a tripartite structure including a tripartite Conference Committee on the Application of Standards, which receives the State reports from the Committee of Experts on the Application of Conventions and Recommendations (CEACR), and the Committee of Freedom of Association (CFA), formed in 1951, which deals with cases concerning violations of the freedom of association.[309]

The Council of Europe was founded in 1949 in the wake of the peace process in Europe after the Second World War by ten countries,[310] and today it includes 47 Member States. It is a regional organisation typically structured around the preponderance of the intergovernmental element: decisions are taken uniquely by arrangements between States and with the consensus of governments.[311] No involvement of social partners is conceived. As for collective labour rights, two relevant conventions have been adopted within the Council of Europe: the European Convention on Human Rights and Fundamental Freedoms (ECHR), adopted in 1950, and the European Social Charter (ESC), adopted in 1961 and revised in 1996. A first difference between the two consists in their binding value. The ECHR is

[307] For a brief but exhaustive description of the historical development of the ILO, see Tonia Novitz, *International and European Protection of the Right to Strike* (Oxford University Press 2003) 95–106.

[308] Hepple (2005) 30.

[309] For an overview of ILO supervisory machinery, see ILO, *Handbook of Procedures Relating to the International Labour Conventions and Recommendations* (ILO 2012).

[310] Belgium, Denmark, France, Ireland, Italy, Luxembourg, Norway, Netherlands, UK and Sweden.

[311] The structure is composed of a Committee of Ministers, a Parliament Assembly and a Secretariat. The first one is made up of the Ministers of Foreign Affairs of Member States and it takes binding decisions on the internal organisation and arrangement of the CoE, setting special committees and addressing resolutions and recommendations to Member States. The Parliament Assembly is the deliberative body of the CoE and is formed by representatives of national Parliaments. It can discuss any subject falling under the competences of the CoE and can address recommendations to the Committee of Ministers. Finally, there is the Secretariat that has an administrative role of giving support to the other and more political bodies of the CoE.

entirely binding for the Contracting Parties, whereas the revised ESC provides for a core of provisions comprising 9 articles and the Member States of Council of Europe shall accept and ratify at least 6 of them and an additional number of articles or numbered paragraphs by which to be bound.[312] The total number of articles or numbered paragraphs by which every state has to be bound cannot be fewer than 16 articles or 63 numbered paragraphs in order to be party of the Charter.[313] A second difference relates to the supervisory machinery. The ECHR has a judiciary procedure that permits individuals, after having exhausted all the internal levels of justice, to complain to the European Court on Human Rights; whereas the ESC provides for both a mechanism based on a monitoring system of national reports and a collective complaints system before a supervisory body – the European Committee of Social Rights (ECSR).[314] This means that an individual cannot seek protection before the ECSR.

The EU context has to be read in connection with the primary objective set by the 1957 Treaty of Rome, i.e. the establishment of a common market through the merging of the domestic markets of the Member States. The EU project was informed by the ordo-liberal dogma, according to which the social aspects of integration would be achieved naturally as accessories to the economic aims.[315] Therefore, a discourse on labour rights at the EU level emerged only later. Furthermore, the presence of documents such as the ECHR and the ESC, to which the original EU Member States were bound by their membership to the Council of Europe, has to a certain extent slowed down the process of equipping the EU with a comprehensive 'fundamental rights' document.[316] A first step towards the recognition of fundamental rights, and in particular of social rights, in the EU was the adoption of the Community Charter of Fundamental Social Rights of Workers on 9 December 1989. It was adopted as 'solemn proclamation' with a declaratory, but not mandatory, effect and it was limited to those social rights inherent to

[312] The provisions concerning the right to organise (art. 5) and the right to bargain collectively (art. 6) are included in the 'hard core' provisions of the Charter, which are Articles 1, 5, 6, 7, 12, 13, 16, 19 and 20.

[313] Part III, Art. A of (R)ESC.

[314] See Stefan Clauwaert, "The Charter's Supervisory Procedures" in Niklas Bruun, Klaus Lörcher & Isabelle Schömann & Stefan Clauwaert (eds), *The European Social Charter and the Employment Relation* (Hart 2017) 97–144.

[315] Hepple (2005) 199–201; Simon Deakin, "The Lisbon Treaty, the *Viking* and *Laval* Judgements and the Financial Crisis: In Search of New Foundations for the Europe's 'Social Market Economy'" in Bruun, Lörcher & Schömann (2012) 19–43, 21–23; Stefano Giubboni, *Social Rights and Market Freedoms in the European Constitution. A Labour Law Perspective* (Cambridge University Press 2006) 29; Christian Joerges, "What is Left of the European Economic Constitution?" (2004) 13 EUI Working Paper Law, 14–17.

[316] See Csilla Kollonay-Lehoczky, Klaus Lörcher & Isabelle Schömann, "The Lisbon Treaty and the Charter of Fundamental Rights of the European Union" in Bruun, Lörcher & Schömann (2012) 61–104, 62.

working persons.[317] The adoption of the Charter of Fundamental Rights of the EU, proclaimed on 7 December 2000, was a further and decisive step towards the recognition of an EU-level protection of fundamental rights. Although it was approved as soft law lacking binding legal value,[318] the Commission itself indicated that the Charter would have been able to produce legal effects in the EU system.[319] The Charter has become legally binding in 2009, through the Treaty of Lisbon, which gave it the same legal value as the Treaties.

2.4.2. Collective labour rights as human rights

A classical distinction in the discourse about rights sees civil and political rights on the one side, and social and labour rights (or socio-economic rights) on the other. This divide stems from an historical understanding of rights as given by the State to individuals in order to partake in the life of the community. Civil and political rights are usually defined as 'first generation rights' because of their earlier appearance in the relationship between the State and individuals. They have been conceived as to protect the individuals from arbitrary intervention of the authority in their personal sphere as well as to ensure free political participation. Social and labour rights are instead usually defined as 'second generation rights' because of their later appearance, which stemmed from the emergence of the so-called 'social question'. They have been conceptualised and enacted as to ensure the welfare of the individuals and improve their living conditions.[320] The discourse about rights is therefore strictly linked to the historical evolution of the form of the State and of the relationship between the State and individuals, which connects the discourse of rights to the discourse on citizenship.[321]

In the traditional account, the two categories of rights also differ in relation to the task that the State has in order to secure them. On the one side, the civil and political rights entail the non-intervention of the State, which shall abstain from interfering

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[317] Brian Bercusson, "The European Community's Charter of Fundamental Rights of the Workers" (1990) 53 *The Modern Law Review*, 624–42, 626–27.

[318] Stefano Giubboni, "Diritti e politiche sociali nella "crisi" europea" (2004) Working Paper 30/2004 C.S. Massimo D'Antona. See also EU Commission, "The new Social Policy Agenda does not seek to harmonise social policies. It seeks to work towards common European objectives and increase co-ordination of social policies in the context of the internal market and the single currency", COM (2000) 379 final, 7.

[319] EU Commission, "Communication from the Commission on the legal nature of the Charter of Fundamental Rights of the European Union" COM (2000) 644 final.

[320] See Christian Tomuschat, *Human Rights. Between Idealism and Realism* (2nd edn, Oxford University Press 2008) 26.

[321] The obvious reference is to Thomas H. Marshall, *Citizenship and Social Class* (Cambridge University Press 1959). Marshall identifies the nineteenth century as the era of the civil and political rights and the twentieth century as the era of socio-economic rights (although overlapping), see Marshall (1959) 14.

in the sphere of freedom of the individual by, for instance, adopting legislation limiting the freedom of speech or the freedom to contract and property. On the other side, the socio-economic rights require the State to undertake specific measures so as to ensure the actual enjoyment of the rights by the individuals, for instance by adopting special legislation tackling the conditions of poverty and unemployment, or creating special agencies in charge of dealing with childhood problems.[322] Negative action versus positive action as well as the justiciability before a court mark the traditional divides between the categories of civil and political rights on the one side, and social and labour rights on the other.[323]

In the academic discourse, such a division has been blurred. For instance, it has been argued that the protection of social rights contributes to a well-functioning market.[324] Or it has been stressed that the protection of commonly acknowledged civil and political rights – such as the right not to be tortured and the right to a fair trial – actually requires the State to take positive actions, such as the training of judges and police officers and the establishment of tribunals.[325] Moreover, it has been demonstrated that labour rights are as compelling, stringent and universal as human rights.[326] Finally, it has been noted that in the context of globalisation, the protection and the promotion of social justice against socio-economic inequalities have become matters related to the rights of citizens to participate in political life.[327]

Although the discourse on human rights has progressively shifted in order to include socio-economic rights, collective labour rights – freedom of trade union association, the right to organise, the right to collective bargaining and the right to collective action – represent a special category on account of their unique features. First, collective labour rights are rights that are enjoyed individually but exercised collectively: freedom of trade union association cannot be considered simply as an individual right. In order to be effective, its exercise has to be coupled with the possibility of exercising the right to collective bargaining and the right to collective action, whose exercise, at the same time, presupposes the exercise of the right to freedom of trade union association.[328] Second, the exercise of such rights entails the

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[322] On the issue, see Simon Deakin, *Renewing Labour Market Institutions* (ILO 2004) 40–42.

[323] Tonia Novitz & Colin Fenwick, "The Application of Human Rights Discourse to Labour Relations: Translation of Theory into Practice" in Tonia Novitz & Colin Fenwick (eds), *Human Rights at Work. Perspectives on Law and Regulation* (Hart 2010) 1–38, 8.

[324] Simon Deakin, "Social Rights in a Globalized Economy" in Philip Alston (ed), *Labour Rights as Human Rights* (Oxford University Press 2005) 25–60.

[325] Virginia Mantouvalou, "Are Labour Rights Human Rights?" (2012) 3 *European Labour Law Journal*, 151–72.

[326] Hugh Collins, "Theories of Rights as Justifications for Labour Law" in Davidov & Langille (2013) 135–55, 140–44. See also Mantouvalou (2012) 163.

[327] Novitz (2003) 45.

[328] In this sense Leader identifies the definition of the right to freedom of association at the crossroads between the collectivistic thesis and the individualistic thesis. See Sheldon Leader, *Freedom of Association: A Study in Labor Law and Political Theory* (Yale University Press 1992) 31.

breakdown of others' civil and political rights, including the individual rights of the trade union members: as noted by Barbalet, a 'trade union can only function properly if the rights of their individual members are subordinate to the rights of the collectivity, and in their operation they frequently infringe the rights of property and contract by preventing manufacture and trade through strike action'.[329] Therefore, the exercise of collective labour rights implies the limitation of other rights, which can prove problematic in the context of liberal democracies. Third, their exercise does not relate to the relationship between the State and the individual, but rather to the relationship between two private parties – the workers and their organisations and the employers. In this regard, Marshall notes that 'trade unionism has, therefore, created a secondary system of industrial citizenship parallel with and supplementary to the system of political citizenship'.[330] Collective labour rights thus pertain to a sphere that – in theory – lies outside the State's reach, pertaining to social dynamics between private parties in the economic realm. Fourth, the exercise of collective labour rights requires the State to remain neutral in labour disputes, in order not to hamper the autonomy of the parties. But at the same time, the State is called on to ensure the conditions for the autonomous and voluntary exercise of the collective labour rights by, for instance, putting in place a machinery for collective bargaining or protecting the right to strike. Fifth, for the organised workers, the exercise of collective labour rights has the socio-economic objective of improving their working and employment conditions, but it also has a civil and political aim in promoting the democratisation of the workplace and the participation of the workers in the life of a country.[331]

Despite such conceptual features that make collective labour rights unique, in the legal discourse they have been traditionally relegated to the sphere of socio-economic rights mainly as a result of the different nature and status of the instruments in which they are enshrined. For instance, the UN system distinguishes between civil and political rights and socio-economic rights, respectively enshrined in the International Covenant on Civil and Political Rights (ICCPR) and in the International Covenant on Economic, Social and Cultural Rights (ICESR), both adopted in 1966. Similarly, the Council of Europe initially adopted the ECHR in 1950 and later accompanied it with the ESC in 1961.[332]

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[329] Jack M. Barbalet, *Citizenship: Rights, Struggle, and Class Inequalities* (University of Minnesota Press 1988) 26.

[330] Marshall (1959) 44.

[331] Novitz (2003) 57.

[332] Also in the context of the Organisation of American States there is a different classification of human rights and socio-economic rights: the American Convention of Human Rights (ACHR, 1969) was only later supported by a socio-economic rights document, such as the Additional Protocol in the area of Economic, Social and Cultural Rights (known as the Protocol of San Salvador), adopted in 1988. See Tonia Novitz, "Protection of Workers Under Regional Human Rights Systems: An Assessment of Evolving and Divergent Practices" in Novitz & Fenwick (2010) 409–38, 418–21. A different discourse should be used in reference to the African Charter of Human and People's rights,

The freedom of trade union association constitutes a fundamental exception. For instance, the Universal Declaration of Human Rights includes the right to form and join a trade union among the labour rights enshrined in its Art. 23, while Art. 22 of the ICCPR mentions the right to form and join a trade union for the protection of interests as part and parcel of a broader freedom of association. A more detailed articulation appears in the formulation of Art. 8 of the ICESCR, which, along with the freedom of trade union association for the individuals in order to promote and protect their social and economic interests, also mentions the right of trade unions to establish national federations and confederations that have the right to form and join international trade union organisations. Moreover, the Covenant states that union membership can only be subject to the internal rules of the organisations and that the right of trade unions to function freely can only be limited by restrictions that are necessary in a democratic society.[333]

The clear-cut distinction between human rights and socio-economic rights has progressively faded away in the wake of the process of revitalisation that the ILO has experienced in aftermath of the end of the Cold War, when the traditional and ideological association of the social and labour rights with the socialist values expressed by the Eastern Bloc has been diluted.[334] Based on a conceptualisation of the most effective and fundamental labour rights, the ILO Declaration on Principles and Rights at Work adopted in 1998 has enshrined freedom of association and the right to collective bargaining as one of the four 'core labour rights', which would ensure the freedom of individuals within the realm of the employment relationship.[335] A few years after the adoption of the ILO Declaration, the Inter-American Court of Human Rights, in a case concerning mass dismissals in reprisal of a strike organised by public sector unions in Panama, reached the conclusion that 'in trade union matters, freedom of association is of the utmost importance for the defence of the legitimate interests of the workers, and falls under the *corpus juris* of human rights'.[336]

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which already in 1981 included in the list of human rights traditional socio-economic rights such as the right to work, the right to health and the right to education. But it does not include collective labour rights, see Christian Jr. Kabange Nkongolo, "The Justiciability of Socio-economic Rights under the African Charter on Human and People's Rights: Appraisal and Perspectives Three Decades after its Adoption" (2014) 22 *African Journal of International and Comparative Law*, 492–511.

[333] Sarah Joseph, "UN Covenants and Labour Rights" in Novitz & Fenwick (2010) 331–58, 348–52; see the overview of the different human and social rights instruments on the right to collective bargaining in Patrick Macklem, "The Right to Bargain Collectively in International Law: Workers' Right, Human Right, International Right?" in Alston (2005) 61–84.

[334] Philip Alston, "'Core Labour Standards' and the Transformation of the International Labour Rights Regime" (2003) 15 *European Journal of International Law*, 457–521, 463.

[335] Brian A. Langille, "Core Labour Rights – The True Story (Reply to Alston)" (2005) 16 *European Journal of International Law*, 409–37, 429.

[336] I/A Court of H.R., *Case Baena Ricardo et al. v. Panama*, Judgement of February 2, 2001, Serie C No. 72, para 158.

In conjunction with the developments within the ILO, the trade union movement has also started a lobbying campaign at both global and local levels, which has favoured the progressive convergence between the human rights discourse and social rights discourse as regards the protection and exercise of collective labour rights.[337] Trade unions have started to base their claims for the protection against violation of trade union rights on human rights arguments, while at the same time adopting a litigation strategy that is traditionally more familiar to the human rights movements.[338] The 'paradox' of maintaining a strict separation between the two tracks has been overcome in favour of a merged approach in which labour rights are considered a fundamental tool for achieving democracy and social justice – as already stated in the ILO Constitution.[339]

The acme of the discourse on collective labour rights as human rights has been reached in more recent years. On the one side, the strategy of trade unions to litigate collective labour rights violations before human rights courts has allowed the European Court of Human Rights to adjudicate collective labour rights on the basis of the ECHR by undertaking an integrated approach taking into consideration social rights instruments, including the ILO Conventions and the ESC.[340] On the other side, the restrictive effects on the exercise of collective labour rights of the measures adopted by several governments as responses to the adverse effects of the economic crisis have been challenged on the basis of the global standards recognising collective labour rights as human rights.[341] In both cases, the result is the progressive emergence of the acknowledgement of collective labour rights as global rights. This achievement might constitute a first step towards the recognition of global collective labour rights as sources for a right to collective autonomy based on freedom of trade union association, the right to organise, the right to collective bargaining and the right to collective action.

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[337] See Lance Compa, "Labor's New Opening to International Human Rights Standards" (2008) 11 *Working USA: The Journal of Labor and Society*, 99–123; Judy Fudge, "Labour Rights as Human Rights: Turning Slogans into Legal Claims" (2014) 37 *The Dalhousie Law Journal*, 601–20.

[338] In critical terms, see Guy Mundlak, "Human Rights and Labor Rights: Why don't the two tracks meet?" (2012) 34 *Comparative Labor Law & Policy Journal*, 217–43, 226. For an even more critical account, see Jay Youngdahl, "Solidarity First. Labor Rights are not the Same as Human Rights" (2009) 18 *New Labor Forum*, 31–37.

[339] Virginia A. Leary, "The Paradox of Workers' Rights as Human Rights", in Lance Compa & Stephen S. Diamond (eds), *Human Rights, Labor Rights, and International Trade* (Pennsylvania University Press 1996) 22–47.

[340] See Klaus Lörcher, "The New Social Dimension in the Jurisprudence of the European Court of Human Rights (ECtHR): The *Demir and Baykara* Judgement, its Methodology and Follow-up" in Filip Dorssemont & Klaus Lörcher & Isabelle Schömann (eds), *The European Convention on Human Rights and the Employment Relation* (Hart 2013) 3–46.

[341] See Niklas Bruun, "Legal and Judicial International Avenues: The ILO" in Bruun & Lörcher & Schömann (2014) 243–64.

2.4.3. The ILO Conventions and its Committees

An analysis of the standards set within the ILO system for the exercise of collective labour rights is particularly relevant in order to define collective autonomy as a global right. The standards set by the ILO Conventions concern a wide and comprehensive conception of freedom of association and right to organise,[342] as well as a definition of the main features that a system of industrial relations should adopt in order to ensure an autonomous and free exercise of collective bargaining.[343]

The exercise of collective bargaining and collective action is considered an inherent aspect of the exercise of freedom of association and right to organise. Conversely, freedom of association is the pre-requisite needed in order to exercise collective labour rights.[344] However, a crucial distinction needs to be made: whereas freedom of association, the right to organise and collective bargaining are explicitly mentioned in the ILO Conventions, the right to strike is only protected on the basis of the interpretation offered by the ILO Committees.[345]

As said earlier, collective bargaining is included in the four core labour rights enshrined by the 1998 Declaration of Rights and Principles at Work, which binds the Member States of the ILO to its effective recognition and promotion regardless of the actual ratification of the dedicated conventions.[346] This acknowledgement followed the initial obligation of the ILO Member to promote the effective recognition of the right to collective bargaining among the 'nations of the world' as stated in the 1944 Declaration of Philadelphia.[347] More recently, an obligation to effectively recognise such a right has been included in the 2008 Declaration on Social Justice for a Fair Globalisation, which recognises the importance of promoting an effective right to collective bargaining in the context of globalisation and economic change.[348] The tripartite standard-setting mechanism of the ILO has generated specific instruments in respect of elements of collective autonomy and

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[342] Geraldo von Potobsky, "Freedom of Association: The Impact of Convention no. 87 and ILO Action" (1998) 137 *International Labour Review*, 195–222.

[343] Bernard Gernigon, Alberto Odero & Horacio Guido, "ILO Principles Concerning Collective Bargaining" (2000) 139 *International Labour Review*, 33–55, 40–41.

[344] ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (International Labour Office 2006) (CFA Digest) para 8; David A. Morse, "ILO Convention (No. 98) concerning the application of the principles of the right to organise and to bargain collectively" (1950) 3 *Industrial and Labor Relations Review*, 413–20, 414.

[345] The lack of an explicit reference in any ILO Conventions has led the employers' group to challenge the inclusion of the right to strike in the scope of the labour standards recognised by the ILO. The dispute seems to have been settled during the 2015 International Labour Conference with a tacit agreement between the employers and the workers' group, see Claudia Hofmann & Norbert Schuster, "It Ain't Over 'Til its Over: The Right to Strike and the Mandate of the ILO Committee of Experts Revised" (2016) Global Labour University, Working Paper no. 40.

[346] ILO Declaration of Rights and Principles at Work, Art. 2.

[347] ILO Declaration concerning aims and purposes of the ILO, Art. III

[348] ILO Declaration on Social Justice for a Fair Globalisation, Art. 1.A

collective bargaining. In addition to the Convention No. 87 on Freedom of Association and Right to Organise, there are: Convention No. 98 on the Right to Organise and Collective Bargaining (1949); Convention No. 154 on Collective Bargaining (1981); Recommendation No. 163 on Collective Bargaining (1981); and Recommendation No. 91 on Collective Agreements (1951).[349]

Convention No. 87 has the purpose of 'fencing' the exercise of freedom of association for both sides of the labour market against interferences from the public authorities. Workers and employers have therefore the right to establish and join organisations without previous authorisation.[350] They have the right to autonomously set the internal rules of such organisations,[351] which cannot be dissolved or suspended by the administrative authority.[352] The same rights apply to the federations and confederations that those organisations have the right to set up.[353] Finally, the Convention places the obligation on the State to 'take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise'.[354]

Whereas Convention No. 87 concerns the relationship between the exercise of freedom of association and right to organise with the exercise of force by the public authority, Convention No. 98 addresses more specifically the relationship between workers and employers. It sets out that workers cannot be discriminated against on the grounds of trade union membership, that to relinquish or not to take up union membership cannot be a condition of employment, and that participation in union activities cannot be a cause of dismissal.[355] Moreover, the Convention states that workers' and employers' organisations shall enjoy protection from interference on the part of the other, and it specifically outlaws so-called 'yellow unions' established or controlled by the employers.[356] Finally, it calls for setting measures 'appropriate to national conditions' facilitating the 'development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements', i.e. collective bargaining.[357]

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[349] The website of the ILO indicates other instruments that are relevant to collective bargaining: Convention n. 87 on the Freedom of Association and the Protection of the Right to Organise (1948); Convention n. 151 on Labour Relations (Public Service) (1978) and the equivalent Recommendation n. 159; Recommendation n. 92 on Voluntary Conciliation and Arbitration (19451); Recommendation n. 198 on the Employment Relationship (2006).

[350] ILO Convention No. 87, Art. 2.

[351] ILO Convention No. 87, Art. 3.

[352] ILO Convention No. 87, Art. 4.

[353] ILO Convention No. 87, Arts. 5 and 6.

[354] ILO Convention No. 87, Art. 11.

[355] ILO Convention No. 98, Art. 1.

[356] ILO Convention No. 98, Art. 2.

[357] ILO Convention No. 98, Art. 4.

The adoption of such measures is required by Convention No. 154, which has the purpose of extending free and voluntary collective bargaining machinery to all branches of economic activities in order to define working and employment conditions and to regulate the relationship between employers and employees, as well as that between employers and/or their organisation(s) with workers' organisation(s).[358] The Convention also states that the absence of such rules shall not hamper the exercise of collective bargaining and encourages the autonomous setting of such rules by the parties themselves.[359] Other aspects of the exercise of collective bargaining are then specified in the dedicated Recommendations.

Recommendation No. 163 recalls that collective bargaining parties shall be established and develop freely, independently and on a voluntary basis.[360] It requires the adoption of measures recognising such parties and ensuring that collective bargaining can be undertaken 'at any level whatsoever, including that of the establishment, the undertaking, the branch of activity, the industry, or the regional or national levels'.[361] Recommendation No. 91 states that collective bargaining machinery can be established through agreements, law or regulations with a view to achieving a collective agreement.[362] The collective agreement shall bind the individual parties, which cannot enter into contracts containing terms and clauses that conflict with those of the collective agreement, unless under the principle of more favourable conditions for the worker.[363] Recommendation No. 163 also covers the issue of collective agreement extension by encouraging the adoption of measures favouring the application of all or certain conditions set by the collective agreement to all the parties. In case of statutory extension, the collective agreement needs to be signed by representative organisations.[364] Finally, the Conventions and Recommendations deal with the issue of non-union employees' representative bodies. The general principle is that the presence of such bodies shall not hamper the possibilities for trade unions to enter into negotiations that culminate in a collective agreement. Rather, specific measures shall be taken in this regard, as well as in order to ensure co-operation between elected employees' company representative bodies and trade unions.[365]

Those standards have been interpreted by the two ILO Committees. The CEACR has affirmed that collective bargaining shall constitute the primary source of regulation for conditions of work and employment, and especially wages, which

[358] ILO Convention No. 154, Art. 5.
[359] ILO Convention No. 154, Arts. 5(c) and 5(d).
[360] ILO Recommendation No. 163, Art. 2.
[361] ILO Recommendation No. 163, Arts. 3 and 4.
[362] ILO Recommendation No. 91, Art. 1.1.
[363] ILO Recommendation No. 91, Art. 3.
[364] ILO Recommendation No. 163, Art. 5.
[365] ILO Recommendation No. 135 on Workers' Representatives (1971), Art. 5.

shall prevail over the individual contract. In this regard, the CEACR has set an obligation for the States to promote effective and autonomous machineries for collective bargaining and to recognise the trade unions for this purpose. The principle of voluntary, free and autonomous collective bargaining shall prevent the State – and the public authorities in general – from intervening directly in collective bargaining matters. Limitations and restrictions in the development of collective bargaining shall be the exception, especially as regards the decision of the level of bargaining, the extension of collective agreement and compulsory arbitration.[366] The CEACR reaffirmed these principles in its comments to the measures adopted in Greece between 2010 and 2012 for facing the effects of the economic crisis. Under the diktat of the 'Troika', the Greek government drastically intervened in the autonomous functioning of industrial relations by statutorily revoking national collective agreements, attributing a prevailing status to company collective agreements, and introducing the possibility of negotiating at company level with unspecified 'associations of persons'.[367] According to the CEACR, those measures violate the standards set out by the ILO Conventions, in particular nos. 87 and 98, and have 'a significant – and potentially devastating – impact on the industrial relations system', since they limit the autonomy of the trade unions.[368]

The interpretation of the standards for collective bargaining has extensively been defined by the CFA in the 'Digest on Principles and Decision on Freedom of Association' issued in 2006. In this document, the CFA firstly restates the principles of freedom, autonomy and voluntarism as regards the right to organise for workers and their associations, which the States cannot interfere in and which shall also be free to federate at an international level.[369] Secondly, as a general principle for the protection of the right to collective bargaining, the CFA affirms:

> The right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent. The public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof. Any such interference would appear to

[366] ILO, *Freedom of Association and Collective Bargaining: General Survey on the Reports on the Freedom of Association and Right to Organise Convention (No. 87), 1948, and the Right to Organise and Collective Bargaining Convention (No. 98), 1949* (1994) (CEACR Survey).

[367] Christos A. Ioannou, "Recasting Greek Industrial Relations: Internal Devaluation in the Light of the Economic Crisis and European Integration" (2012) 28 *The International Journal of Labour Law and Industrial Relations*, 199–222; Aristea Koukiadaki & Lefteris Kretsos, "Opening Pandora's Box: The Sovereign Debt Crisis and Labour Market Regulation in Greece" (2012) 41 *Industrial Law Journal*, 276–304.

[368] ILO, Report III (Part 1A) adopted at the International Labour Conference, 101st session (2012) ILC.101/III(1A), 159–64; ILO, Report III (Part 1A) adopted at the International Labour Conference, 102nd session (2013) ILC.102/III(1A) 106–10.

[369] CFA Digest (2006) paras 880–84.

> infringe the principle that workers' and employers' organizations should have the right to organize their activities and to formulate their programmes.[370]

Collective bargaining shall be characterised by autonomy and voluntarism.[371] Collective agreements shall be the prevalent form of employment regulation covering all sectors (with some restrictions for the public administration)[372] and setting both the conditions of work and the obligations between the parties.[373] The agreements shall be binding for the parties,[374] who shall ensure a mutual respect and recognition as the basis for solid labour relations.[375] The autonomy of the parties also concerns the determination of the level of bargaining, which cannot be imposed by law, by administrative decision or by case law.[376] However, no criteria are specified for determining the conditions that should govern the relationship between different levels of collective bargaining, which according to the Recommendation No. 163 lies in the autonomy of the parties.[377] In this regard, the CFA commented on the developments of industrial relations in Greece (see above) by emphasising that 'the elaboration of procedures systematically favouring decentralized bargaining of exclusionary provisions that are less favourable than the provisions at a higher level can lead to a global destabilization of the collective bargaining machinery'.[378] The statutory intervention of the public actor imposing a deregulated decentralisation violates the ILO standards for the exercise of collective autonomy.

The CFA also deals with the issues of representativeness and recognition of the counterpart. It recalls that 'direct negotiation between the undertaking and its employees, by-passing representative organizations where these exist, might in certain cases be detrimental to the principle that negotiation between employers and organizations of workers should be encouraged and promoted'.[379] The approach to representativeness and recognition is particularly wide and inclusive. It acknowledges the legitimacy of different and diverse practices of industrial relations, from the recognition of exclusive rights to the most representative workers' organisations to trade union pluralism and the protection of so-called minority organisations.[380] Yet the CFA emphasises the importance of a collective

[370] CFA Digest (2006) para 881.
[371] CFA Digest (2006) paras 925–26.
[372] CFA Digest (2006) paras 886–87.
[373] CFA Digest (2006) para 913.
[374] CFA Digest (2006) para 939.
[375] CFA Digest (2006) para 940.
[376] CFA Digest (2006) paras 988–89.
[377] ILO Recommendation No. 163, Art. 4. See Gernigon, Odero & Guido (2000) 32–43.
[378] ILO CFA, 365th Report of the Committee on Freedom of Association, 316th Session, (2012) point 997.
[379] CFA Digest (2006) para 945.
[380] CFA Digest (2006) paras 950–51 and 975–76.

bargaining system in which the competences of lower levels are defined by higher levels and in which company-level negotiations are pursued with the involvement of trade unions.[381]

The ILO Committees played a key role in the recognition of the right to strike and the definition of standards for its exercise.[382] In its Digest, the CFA recalls that the right to strike constitutes 'a fundamental right of workers and of their organizations'[383] and is 'one of the essential means through which workers and their organizations may promote and defend their economic and social interests'.[384] Therefore, 'the right to strike is an intrinsic corollary to the right to organize protected by Convention No. 87'.[385] Although the CFA's interpretation links the exercise of the right to strike to the aim of promoting and protecting the workers' interest, this has been widely defined so as to include opposition against socio-economic policies and demands for the adoption of socio-economic measures.[386] The CEACR also conceives of the right to strike as a fundamental feature of a system of industrial relations and as a means for exercising pressure from the workers' side, mainly in connection with a labour dispute emerging in phases of negotiations.[387]

The discourse about collective autonomy has strongly emerged in the observations and comments made by the ILO Committees in dealing with a few cases concerning limitations to the autonomous dynamics of collective bargaining. In replying to the complaint filed by the British Airlines Pilots Association (BALPA)[388] concerning the withdrawal of a call for a strike action as a consequence of the threat to refer to a court on the basis of the *Viking* and *Laval* case law (see Section 4.4.3), the CEACR has commented that 'when elaborating its position in relation to the permissible restrictions that may be placed upon the right to strike, it has never included the need to assess the proportionality of interests bearing in mind a notion of freedom of establishment or freedom to provide services'.[389] The Committee recalls that the resort to collective action is a fundamental tool in trade

[381] See the cases dealt with by the CFA in relation to the austerity measures introduced in several European countries in the aftermath of the economic crisis described in Bruun in Bruun & Lörcher & Schömann (2014) 247.

[382] See Bernard Gernigon, Alberto Odero & Horacio Guido, "ILO Principles Concerning the Right to Strike" (1998) 137 *International Labour Review*, 441–81.

[383] CFA Digest (2006) para 520.

[384] CFA Digest (2006) para 522.

[385] CFA Digest (2006) para 523.

[386] CFA Digest (2006) paras 526–31.

[387] CEACR Survey (1994) paras 136–38.

[388] ILO, Report III (Part 1A) adopted at the International Labour Conference, 99th session (2010) ILC 99 III(1A); the second one in ILO, Report III (Part 1A) adopted at the International Labour Conference, 100th session, (2011) ILC.100/III/1A.

[389] Alan Bogg, "*Viking* and *Laval*: The International Labour Law Perspective" in Freedland & Prassl (2014) 41–74, 54–60

disputes; and the fact that the limitations in the BALPA case stem from the interpretation of EU law does not change the position of the State in relation to the compliance with the ILO standards. The risk of bankruptcy as a consequence of being found liable of punitive damages for the exercise of collective action 'creates a situation where the rights under the Convention cannot be exercised'.[390] In rejecting the argument advanced by the UK government (concerning the limited impact of the restrictions due to the cross-border dimension of the dispute), the CEACR has further observed that 'in the current context of globalization, such cases are likely to be ever more common, particularly with respect to certain sectors of employment, like the airline sector, and thus the impact upon the possibility of the workers in these sectors of being able to meaningfully negotiate with their employers on matters affecting the terms and conditions of employment may indeed be devastating'.[391] The exercise of collective autonomy is anchored to and protected by the same international standards, irrespective of whether the dispute has a national or a cross-border dimension.

If the BALPA case allowed the CEACR to indirectly express serious concerns about the CJEU case law on the exercise of collective autonomy, the opportunity to comment directly on the effects of the case law came with the complaint filed by the Swedish unions against the so-called *Lex Laval*, adopted by the Swedish legislator in order to comply with the CJEU ruling in the Laval case (see Section 3.6.4). The Committee specified that the concerns expressed in its observations were not directed towards the interpretation of EU law given by the CJEU, but rather towards the legislative amendments introduced in the Swedish legislation on posted workers.[392] Yet the CEACR expressed its deep concern over the fact that a collective action that was lawful for the national law was found unlawful according to EU law. In this regard, the CEACR affirmed that, according to the ILO system, economic freedoms (and economic interests) cannot be seen as rights to be proportionally balanced with collective labour rights.[393] The refusal to deem an economic rationale as a possible ground for limiting the autonomy and independence of industrial relations also emerged in the previously mentioned Greek case in relation to the economic crisis.[394] The observations made by the ILO Committees in this regard reinforce the idea that the exercise of collective autonomy cannot be limited by measures inspired by economic reasons or interests.[395]

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[390] ILO (2010) 209.

[391] ILO (2010) 209.

[392] ILO (2013) 178.

[393] ILO (2013) 179.

[394] See for instance the CFA report on the case, ILO, 365th Report of the Committee on Freedom of Association, 316th Session, (2012) GB.316/INS/9/1, point 995.

[395] Niklas Bruun, "Economic Governance of the EU Crisis and its Social Policy Implications" in Bruun & Lörcher & Schömann (2012) 261–75, 267–71.

As for the so-called *Lex Laval*, the Committee noted that the limits that the Act placed on the possibility for unions to undertake a collective action against a foreign enterprise posting workers to the national territory consist in a restriction to the exercise of collective action violating ILO standards. In particular, the CEACR pointed to the possibility for posting companies not to be bound by any collective agreement and nevertheless be exempted from any collective action aiming at concluding a collective agreement. In this regard, the Committee concluded that 'foreign workers should have the right to be represented by the organization of their own choosing with a view to defending their occupational interests and that the organization of their choice should be able to defend its members' interests, including by means of industrial action'.[396] Once again, the ILO Committee does not look at the issue of borders. Thus, collective autonomy can be exercised regardless of national borders.

2.4.4. The European Social Charter and the European Committee of Social Rights

Adopted in 1966 as a supplementary instrument to the ECHR, the European Social Charter provides for a comprehensive protection of the exercise of collective labour rights. The right to organise, collective bargaining and collective action are enshrined respectively in Arts. 5 and 6 ESC. The right to organise is expressed as a freedom for workers and employers to form and join 'local, national, or international organisations' and the Parties to the ESC have the obligation not to adopt national law that could impair its exercise.[397] The recognition of a right to organise at different geographical scales entails that the exercise of collective labour relations expands beyond the borders of the States.

A certain complexity is entrenched in Art. 6 on the right to bargain collectively. It enshrines different modalities of interaction between labour market parties, and therefore it has been defined by Dorssemont as 'a matrix shaping a catalogue of procedures and/or practices that are crucial for a system of industrial relations'.[398] The provision states that the 'effective exercise' of collective bargaining shall be ensured by the Parties through promoting: a) 'joint consultations between the workers and employers'; b) 'machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements'; c) 'the establishment and use of appropriate machinery for conciliation

[396] ILO (2013) 179.

[397] Art. 5 ESC.

[398] Filip Dorssemont, "Article 6. The Right to Bargain Collectively. A Matrix for Industrial Relations" in Bruun & Lörcher & Schömann & Clauwaert (2017) 249–88, 250.

and voluntary arbitration for the settlement of labour disputes'.[399] Finally, the ESC requires the Parties to recognise 'the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into'.[400] The recognition of the right to collective action is included in the provision on the right to collective bargaining and linked to the effective exercise of such a right. In this sense, the ESC acknowledges the fundamental role of the right to collective action as a pillar of the process of collective bargaining. Moreover, the provision indicates that limitations to the exercise of collective action might derive from the autonomous self-regulation of the parties and included in clauses of collective agreements.

These provisions have been interpreted by the European Committee of Social Rights (ECSR), whose conclusions are collected in a digest issued in 2008 explaining the standards for the exercise and protection of collective labour rights under the ESC.[401] The two provisions are strictly connected.[402] The right to organise is protected in a number of ways: as freedom to form and to join a trade union; as freedom *not* to join a trade union; and as precondition for the exercise of trade union activities,[403] whose autonomy shall not be hampered, while individual participation in such activities shall be protected.[404]

In relation to collective bargaining, a thorny issue arises in the regulation of representativeness. The privileged rights (an in the Swedish case, see Section 3.2.7) to which a trade union can be entitled by virtue of its representativeness, might clash with the wide enjoyment of trade union rights ensured by the scope of Art. 5 ESC.[405] In this regard, the ECSR affirmed that practices of recognising exclusive rights to most representative organisations shall not hamper the exercise of key activities for other trade unions as well as their participation in collective bargaining.[406] Trade union pluralism is therefore protected under the ESC.

Freedom and autonomy are the key principles for the exercise of collective bargaining under the ESC.[407] As highlighted by Dorssemont, collective bargaining

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[399] Art. 6.1, 6.2, 6.3 ESC.

[400] Art. 6.4 ESC.

[401] Council of Europe: European Committee of Social Rights, *Digest of the Case Law of the European Committee of Social Rights* (2008) (ECSR Digest).

[402] Dorssemont notes that a violation of Art. 6 would certainly entail a violation of Art. 5 too, see Dorssemont in Bruun & Lörcher & Schömann & Clauwaert (2017) 253.

[403] Conclusions XII-2 Germany, p. 98, in ECSR Digest, 228.

[404] Antoine Jacobs, "Article 5. The Right to Organise" in Bruun & Lörcher & Schömann & Clauwaert (2017) 220–48, 223–33.

[405] Jacobs in Bruun & Lörcher & Schömann & Clauwaert (2017) 244.

[406] Conclusion XV-1 Belgium, p. 74, in ECSR Digest, 228; Conclusions 2006, Albania p. 41–42, in ECSR Digest, 232.

[407] Klaus Lörcher, "Legal and Judicial International Avenues: The (Revised) European Social Charter" in Bruun & Lörcher & Schömann (2014) 265–94, 283.

within the scope of the ESC is protected as joint consultations, collective negotiations, and conciliation and arbitration.[408] The right to take collective action is the pivot around which the 'matrix' for industrial relations turns, in order for collective bargaining not to become 'pointless'.[409] Although envisaged as an autonomous and voluntary outcome, the States are required to take measures in order to facilitate the achievement of collective agreements.[410] In line with the extensive scope of 'collective bargaining' recognised in Art. 6 ESC, the ECSR refers to 'any bargaining between one or more employers and a body of employees (whether "de jure" or "de facto") aimed at solving a problem of common interest, whatever its nature may be'.[411]

The recognition of a common concern in solving a conflict of interest is at the centre of the ESC's scope in protecting the right to take collective action. The ECSR delimits such a right to disputes on interests, thereby excluding conflicts based on rights;[412] but it does not restrict its entitlement to trade unions. The entitlement appears to be individual,[413] but its exercise collective, so that any groups of workers can call for a collective action.[414] The ESC allows for the right to collective action to be subjected to restrictions, which in the interpretation of the ECSR are in line with the laws and practices already in place in the Member States of the Council of Europe.[415] Peace obligation clauses restricting the right to collective action are in general considered in conformity with the ESC, in particular when stemming from consolidated traditions and practices of industrial relations.[416] The same applies to cooling-off practices, since they constitute a regulation of the exercise of collective action rather than a limitation.[417]

As for the ILO Committees, the ECSR also had the chance to elaborate on the ESC's standards for the exercise of the rights to collective bargaining and collective action in its assessment of the Swedish *Lex Laval* (see Section 3.6.4). In June 2012 the Swedish trade union (LO) submitted a collective complaint to the ECSR claiming that the changes in the Swedish legislation would restrict the exercise of

[408] Dorssemont in Bruun & Lörcher & Schömann & Clauwaert (2017) 254.

[409] Ibid., 265.

[410] Conclusions I, Statement of Interpretation on Article 6§2, p. 35, in ECSR Digest, 232.

[411] Conclusions IV, Germany, p. 50, in ECSR Digest 233.

[412] Conclusions I, Statement of Interpretation on Article 6§4, p. 38, in ECSR Digest, 233.

[413] Sten Evju, "The Right to Collective Action Under the European Social Charter" (2011) 2 *European Labour Law Journal*, 196–224, 213.

[414] Dorssemont in Bruun & Lörcher & Schömann & Clauwaert (2017) 270–71.

[415] See Andrzej Maian Świątowski, "Resocialising Europe through a European Right to Strike Modelled on the Social Charter?" in Countouris & Freedland (2013) 390–413, 399.

[416] Conclusions 2004, Norway, p. 404, in ECSR Digest, 236.

[417] Conclusions XIV-1, Cyprus, p. 156–57, in ECSR Digest, 236.

the rights to collective bargaining and collective action as protected by the ESC.[418] In particular, the unions complained about the limitations placed on the range of matters to be negotiated with the foreign companies posting workers to the Swedish territory, as well as on the limited possibility to request conditions beyond the minimum ones stated in national collective agreements. The unions also complained about the possibility given to the posting companies to demonstrate their compliance with the minimum standards set by national collective agreements, just by showing the clauses of the individual contracts of the posted workers, de facto undermining the role of collective bargaining as a regulatory mechanism of the labour market. In replying to the complaint, the Committee affirmed that the exercise of collective labour rights 'represents an essential basis for the fulfilment of other fundamental rights guaranteed by the Charter',[419] such as just conditions of work, safe and healthy working conditions, fair remuneration, dignity at work, and others. It also stressed that the autonomy of the parties of collective labour relations is a fundamental feature of the exercise of collective labour rights. In this sense, the Committee affirmed that the States 'should not interfere in the freedom of trade unions to decide themselves which industrial relationships they wish to regulate in collective agreements and which legitimate methods should be used in their effort to promote and defend the interest of the workers concerned'.[420] According to the ECSR, however, collective bargaining 'is a mutual process where not all conditions required by one party are likely to be accepted by the other, and that ensuring the effective exercise of the right to collective bargaining does not mean that employers can be obliged by the State or forced by trade unions to participate in a collective agreement or to accept all the conditions required by trade unions'.[421] Autonomy and voluntarism are thus the basic principles for the exercise of collective bargaining.

Furthermore, the Committee considers that national legislations preventing the exercise of collective action, or allowing it only to the extent of claiming minimum standards, is not in conformity with Art. 6.4 ESC, as it would limit the right of workers and trade unions to engage in collective action for the protection of economic and social interests of the workers. Further, it concludes by stating that

> within the system of values, principles and fundamental rights embodied in the Charter, the right to collective bargaining and collective action is essential in ensuring the autonomy of trade unions and protecting the employment conditions of workers:

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[418] Complaint No. 85/2012, Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, registered on 27 June 2012.

[419] See Council of Europe (Committee of Ministers) Resolution of February 5th 2014, CM/ResChS(2014)1 Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Complaint No. 85/2012 (2014).

[420] Ibid.

[421] Ibid.

> if the substance of this right is to be respected, trade unions must be allowed to strive for the improvement of existing living and working conditions of workers, and its scope should not be limited by legislation to the attainment of minimum conditions.

The system of values, principles and fundamental rights enshrined in the ESC is also recalled in relation to the possible limitation to the exercise of collective labour rights. In this regard, the ECSR states that the exercise of economic freedoms, as well as 'the facilitation of free cross-border movement of services and the promotion of the freedom of an employer or undertaking to provide services in the territory of other States', cannot impose disproportionate restrictions on collective labour rights. As such, the economic objectives cannot be treated 'as having a greater a priori value than core labour rights'. The autonomy of the Swedish trade unions has been violated by the adoption of the new legislation from the perspective of the ESC.[422]

2.4.5. The European Convention of Human Rights and its Court

In line with an individualist approach proper to human rights discourse, the ECHR identifies freedom of trade union association as a civil liberty for the individuals to form and join a collective organisation in order to pursue social and labour interests.[423] This approach does not necessarily match with a labour law perspective deeming freedom of trade union association as the workers' right to organise into trade unions as the precondition for the exercise of the rights to collective bargaining and to collective action. The mismatch is stressed by the evolution of the case law of the European Court of Human Rights (ECtHR), which has shown a progressive path towards the acknowledgement of freedom of association as the ground for the exercise of collective autonomy.

The Convention only mentions freedom of association. Art. 11 ECHR states

> Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

This recognition is accompanied by a further paragraph on permissible limits and restrictions to the exercise of freedom of association under the Convention. It states that

> No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of

[422] Dorssemont in Bruun & Lörcher & Schömann & Clauwaert (2017) 287.

[423] Hugh Collins, "The Protection of Civil Liberties in the Workplace" (2006) 69 *The Modern Law Review*, 619–31.

> health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

The first paragraph understands freedom of association as a freedom of the individual to join and form associations with others. It focuses on the individualistic aspect of the freedom of association.

The individualist approach was adopted by the ECtHR in its first encounters with trade union claims under the scope of Art. 11. In a trio of rulings issued between 1975 and 1976, the ECtHR repeated that, despite the recognition of a freedom to associate for trade union purposes, the Convention did not cover the collective rights of the unions to exercise their activities. In *National Union of Belgian Police*,[424] *Swedish Engine Drivers' Union*,[425] and *Schmidt and Dahlström*,[426] the Court stated that the rights to collective bargaining and the right to collective action would fall outside the scope of freedom of trade union association as defined by the ECHR. According to the Court, collective bargaining and collective action were not imperative means for the enjoyment of such a freedom.[427] The refusal to include collective labour rights in the scope of freedom of trade union association was also motivated by the presence of the ESC, as dedicated instrument in the context of the Council of Europe for the protection of such rights.[428]

The individual dimension of freedom of trade union association was later confirmed in several judgments in which the compliance with the Convention of common union practices, now in disuse – such as the closed shop agreements – were questioned in the light of the negative side of freedom of association.[429] In *Young, James and Webster*,[430] the Court, while not questioning the practice of closed shop agreements as such, recognised that compulsory union membership constituted a violation of a negative freedom of association if sanctioned with dismissal, as was the case for the three applicants who were British Rail employees. In this case, the Court recognised the applicability of the ECHR between private parties – the

[424] *National Union of Belgian Police v. Belgium (GC)* (App. no. 4464/70), Judgment of 27 October 1975.

[425] *Swedish Engine Drivers' Union v. Sweden* (App. no. 5614/72), Judgment of 6 February 1976.

[426] *Schmidt and Dahlström v Sweden* (App. no. 5589/72), Judgement of 6 February 1976.

[427] Filip Dorssemont, "The Right to Take Collective Action Under Article 11 ECHR" in Dorssemont & Lörcher & Schömann (2013), 333–65, 337.

[428] Keith Ewing & John Hendy, "The Dramatic Implications of *Demir and Baykara*" (2010) 39 *Industrial Law Journal*, 2–51, 5.

[429] See Virginia Manouvalou, "Is There a Human Right Not to be a Trade Union Member? Labour Rights Under the European Convention on Human Rights" in Novitz & Fenwick (2010) 439–62, 457.

[430] *Young, James and Webster v. UK* (App. nos. 7601/76 and 7806/77), Judgment of 13 August 1981.

employer and the employees – through the mediation of the State's law, which shall ensure the respect of human rights between them.[431]

The protection of the negative side of freedom of association against statutory compulsory union membership was then confirmed in *Sigurjónsson*.[432] Here, the Court affirmed that legally forcing an Icelandic taxi driver to join a professional association could be against the interest of the individual; moreover, it could be unnecessary as regards the union achieving the protection of the occupational interests of its members.[433] However, this case law introduced a novelty: the Court reached its conclusion by referring to other documents concerning freedom of association and the right to organise, although the Court excluded the claim that a compulsory union membership would fall within the scope of the protection ensured by the ILO Conventions, the ESC and the Community Charter.[434] The tension between the activity of the trade union and the individual freedom of the worker not to associate was also at stake in the *Sørensen and Rasmussen* case,[435] in which the Court stated that the obligation to join a specific trade union as a precondition for being employed violates the freedom of association of the individual and the State cannot sponsor exclusionary and compulsory union membership.[436]

However, the internal autonomy of the unions is not questioned.[437] In a few cases concerning the decisions to expel individual members, the Court asserted that the role of the State is to protect individuals against the dominant position of the unions, especially in case of compulsory union membership, but at the same time the decisions of expulsion can be challenged only in cases in which they do not respect the internal rules of the unions.[438] For instance, the decision of the British union ASLEF to expel one of its members because of their affiliation with the fascist

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[431] Olivier De Schutter, "Human Rights in Employment Relationships: Contracts as Power" in Dorssemont & Lörcher & Schömann (2013), 105–39, 108.

[432] *Sigurður A. Sigurjónsson v. Iceland* (App. no. 16130/90), Judgment of 30 June 1993.

[433] In the ruling the Court also attempts to provide a broader definition of the concept of a 'trade union'. The right to form and join a trade union is thus a wider specification of the freedom to associate, see Filip Dorssemont, "The Right to Form and to Join Trade Unions for the Protection of his Interests Under Article 11 ECHR. An Attempt 'to digest' the Case Law (1975–2009) of the European Court of Human Rights" (2010) 1 *European Labour Law Journal*, 185–235, 192.

[434] *Sigurjónsson*, para 35.

[435] *Sørensen and Rasmussen v. Denmark* (App. nos. 52562/99 and 52620/99), Judgment of 11 January 2006.

[436] Isabelle Van Hiel, "The Right to Form and Join Trade Unions Protected by Article 11 ECHR" in Dorssemont & Lörcher & Schömann (2013) 287–308, 295; on the protection of the negative side of freedom of trade union association, see also Dorssemont (2010) 195.

[437] On the issue of 'autonomy in foro interno', see Dorssemont (2010) 213–15.

[438] *Cheall v. UK* (App no 10550/83), Commission decision of 13 May 1985; *National and Local Government Officers Association (NALGO) v. UK* (App no 21386/93), Commission decision of 1 September 1993; see Van Hiel in Dorssemont & Lörcher & Schömann (2013) 300–02.

British National Party, was deemed legitimate by the Court in view of the internal rules of the union.[439]

The exposure to trade union matters contributed to making the Court more familiar with union activities. In *Gustafsson*,[440] a case concerning a blockade exercised by a Swedish union in order to force a restaurant owner to sign a collective agreement, the Court reiterated the protection of a negative freedom of association. However, it also accepted the protection of the occupational interests of the unions' members as a purpose of trade union association under the scope of the ECHR. Moreover, the collective agreement was acknowledged as one of the means at a union's disposal to ensure such interests, as well as collective bargaining, were recognised as a legitimate means in the light of the international documents enshrining them.[441] Thus, trade union activities started to appear on the radar of the Convention and the pace towards the actual recognition of collective labour rights accelerated. In *UNISON*,[442] the Court rejected the admissibility of a claim for a case concerning a strike against the privatisation of part of a public hospital in the UK, but at the same time it acknowledged both collective bargaining and collective action as two of the most important means at the disposal of the unions in protecting their members' interests. Further, in *Federation of Offshore Workers' Trade Unions*,[443] the right to strike was seen as a complementary means to collective bargaining, albeit one that exceeds the scope of Art. 11 ECHR.[444]

A break in the Court's narrow view on collective labour rights was marked by the *Wilson and Palmer* case,[445] in which the Court recognised a trade union right to represent its members in collective negotiations.[446] Against a practice that is lawful under British law – namely, to offer better conditions to employees in return for them not joining a union – the Court held that the employees have a right to be represented before the employer as part of their freedom of association. It is the role of the State to ensure that such a freedom would not be hampered by the employer counterpart.[447]

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[439] *Associated Society of Locomotive Engineers and Firemen (ASLEF) v. UK* (App. no. 11002/05), Judgment of 27 February 2007.

[440] *Gustafsson v. Sweden (GC)* (App no 15573/89), Judgment of 25 April 1996.

[441] *Gustafsson*, paras 45 and 55.

[442] *UNISON v. UK (admissibility)* (App. no. 53574/99), Decision of 10 January 2002.

[443] *Federation of Offshore Workers' Trade Unions and others v. Norway* (App no. 38190/97), Judgment of 27 June 2002.

[444] On the similarities between those cases as regards the procedural restrictions on collective action, see Dorssemont (2010) 357–60.

[445] *Wilson, National Union of Journalists and others v. UK* (App. nos. 30668/96, 30671/96 and 30678/96), Judgment of 2 October 2002.

[446] See Keith Ewing, "The Implications of Wilson and Palmer" (2003) 32 *Industrial Law Journal*, 1–22.

[447] De Schutter in Dorssemont & Lörcher & Schömann (2013) 112–13.

A crucial turning point is represented by the ruling on the *Demir and Baykara* case issued in 2008.[448] The facts of the case concerned the annulment of a collective agreement signed between the municipality of the Turkish city of Gaziantep and its employees because of the ban on trade union organising for civil servants imposed by Turkish law. The Court acknowledged this to be an unjustified restriction under the scope of Art. 11 ECHR, which would thus also cover the exercise of the right to collective bargaining. In this sense, the ruling states that collective bargaining, i.e. the right to engage in negotiations, is part and parcel of the objective to protect the interests of the union member. It overturns the previous case law, in which the Court did not distinguish between the right to participate in negotiations and the right to conclude a collective agreement, which was explicitly excluded from any protection under the ECHR.[449] The Court grounded the recognition of the right to collective bargaining on the need to interpret the Convention as a 'living instrument', which signalled its interpretation in the light of other European and international sources concerned with collective labour rights and with the case law of their monitoring bodies.[450] In this sense, the Court refers to the ILO Conventions and the ESC as tools for interpreting and actually widening the scope of the ECHR. The interpretation of the Convention – with regard to the protection of collective labour rights – seems thus to be aligned with the international and European standards for the exercise of collective labour rights.[451] In adopting this interpretative approach based on other international and European sources, the Court concludes that 'having regard to the developments in labour law, both international and national, and to the practice of Contracting States in such matters, the right to bargain collectively with the employer has, in principle, become one of the essential elements of the "right to form and to join trade unions for the protection of [one's] interests" set forth in Article 11 of the Convention'.[452]

Soon after the *Demir and Baykara* ruling, the Court also recognised the right to strike as falling under the scope of Art. 11 ECHR on freedom of trade union association – although not as an absolute right. In the *Enerji Yapi-Sol Sen* case,[453] the discipline of those Turkish civil servants who, despite being prohibited, participated in a strike action, was deemed by the Court as a violation of their right

[448] *Demir and Baykara v. Turkey* (App. no. 34503/97), Judgment of 12 November 2008.

[449] In the decision of inadmissibility in the case *Schettini and others v. Italy* (admissibility) App no 29529/95, Decision of 9 November 2000, the Court stated that the conclusion of a collective agreement is not the only activity that a trade union can undertake in order to pursue and protect the interest of its members, see also Dorssemont (2010) 220.

[450] See Ewing & Hendy in Bruun & Lörcher & Schömann (2014) 299.

[451] Virginia Mantouvalou, "Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation" (2013) 13 *Human Rights Law Review*, 529–55, 536–37.

[452] *Demir and Baykara*, para 154.

[453] *Enerji Yapi-Yol Sen v. Turkey* (App. no. 68959/01), Judgment of 21 April 2009.

to freedom of trade union association. Here, the Court recalled that on the ground of the ILO Convention no. 87, the ILO supervisory bodies have declared the right to strike as 'an indissociable corollary of freedom of trade union association', while the ESC recognises it as a 'means for ensuring the effective exercise of the right to collective bargaining'.[454] A similar conclusion has been reached in the *Danilenkov* case,[455] in which the Court introduced the protection against discrimination on the basis of union membership.[456] It found that the discrimination to which the Russian dockworkers had been subjected in relation to their membership with a union engaged in a collective action with the employer, was actually a violation of their freedom of trade union association ensured under the ECHR. The recognition of the right to collective action within the scope of Art. 11 ECHR has reached a new peak in *Hrvatski Liječnički Sindikat,*[457] in which the Court assessed the violation of the Convention by an injunction issued by a Croatian court preventing the union for medical practitioners from undertaking a strike action aimed at forcing the government to recognise an annex of the collective agreement for the healthcare sector that had been declared invalid because it was not negotiated with all the unions active in the sector. In condemning the ban over the strike (which lasted for three years and eight months) as not proportionate,[458] the Court also recognised that the injunction deprived the trade union of 'the most powerful instrument to protect the occupational interests of its members'.[459]

A discordant note is, however, represented by the *RMT* case,[460] in which the Court partially reconsidered the interpretative approach based on international and European sources other than the Convention. The facts of the case regarded a dispute between the British National Union of Rail, Maritime and Transport Workers (RMT) and the company provider of electricity in the London Underground, and it concerned the requirement of notice for a ballot deciding upon the call to strike. But the case also pertained to the issue of secondary action. In contrast with the

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[454] *Enerji Yapi-Yol Sen*, para 24. However, Dorssemont defines the achievement of the Court as 'timid recognition', see Dorssemont (2010) 364; on the standards for the protection of the right to strike outlined by the ECtHR, see also Vilija Velyvyte, "The Right to Strike in the European Union After Accession to the European Convention on Human Rights: Identifying Conflict and Achieving Coherence" (2015) 15 *Human Rights Law Review*, 73–100, 76.

[455] *Danilenkov and others v. Russia* (App. no. 67336/01), Judgment of 10 December 2009.

[456] Dorssemont (2010) 208.

[457] *Hrvatski Liječnički Sindikat v. Croatia* (App. no. 36701/09), Judgment of 27 November 2014.

[458] In a joint comment on the *Hrvatski Liječnički Sindikat* and on the *RMT* case, Jacobs asserts that the Court exercises 'an in-depth and case-by-case examination of the national strike laws of the Member States of the Council of Europe', which will not deprive the nation states of their prerogatives in regulating the exercise of collective action, see Antoine Jacobs, "Commentary: *National Union of Rail, Maritime and Transport Workers v. United Kingdom*, 8 April 2014, and *Hrvatski Liječnički Sindikat v. Croatia*, 27 November 2014" (2015) 1 *International Labor Rights Case Law*, 90–93.

[459] *Hrvatski Liječnički Sindikat*, para 59.

[460] *The National Union of Rail, Maritime and Transport Workers (RMT) v. UK* (App. no. 31045/10), Judgment of 8 April 2014.

argumentation advanced in *Demir and Baykara*, the Court upheld a narrow interpretation of the ILO and ESC standards, and instead relied upon the differences between the industrial relations systems of the European States. On this basis, the Court affirmed that the scope of Art. 11 ECHR would not include any right to a successful collective action, and it would not include any right to conclude a collective agreement.[461] Accordingly, the limits to the exercise of those collective labour rights might stem from national history and tradition. The Court admitted that the democratically elected, domestic legislators would know the system of their country better than the Court itself, and in this sense the national Parliaments would be the bodies legitimised to place restrictions on the exercise of the right to strike by legislation.[462] Therefore, even though in principle the Court recognised the secondary actions within the scope of Art. 11 ECHR, it also recognised a wide margin of appreciation for the national legal orders to place restrictions. The total ban set by British law was ruled to be in compliance with the limits set by Art. 11.2 ECHR. To some extent, the case 're-nationalises' the standards of the protection of the right to collective action by including elements of comparative law in the assessment; but, nevertheless, it shows that the right to strike also falls within the scope of freedom of association, and as such cases of alleged violation of its exercise can be subject to the scrutiny of the Court.[463] Yet the ruling highlights the potential contradictions between an integrated approach aiming at the harmonisation of the standards for the protection of the collective labour rights, and the national practices of industrial relations, which might derive from the social, economic and political contexts of particular countries.[464]

The interpretative approach adopted by the Court by referring to other sources for the interpretation of the meaning of Art. 11 ECHR has been defined as a 'dialogue between courts' in order to stress the path towards a stable communication between different judicial (or quasi-judicial) bodies belonging to different legal systems.[465] This approach has eventually recognised the right to collective bargaining and collective action as necessary in order to enjoy the benefits deriving from trade union association under the scope of the Convention. Thus, violations of or restrictions to the exercise of those collective labour rights according to the ILO and ESC standards might consist in violations of the ECHR. In this sense, the approach of the ECtHR, which envisions collective labour rights as human rights, may amount

[461] *RMT*, para 84–86.

[462] *RMT*, para 89. Bogg and Ewing define the approach of the Court as 'democratic deference', see Alan Bogg & Keith Ewing, "The Implications of the *RMT* Case" (2014) 43 *Industrial Law Journal*, 221–52, 244.

[463] See Ewing & Hendy in Bruun & Lörcher & Schömann (2014) 320.

[464] In this regard, but on the right to collective bargaining, see Antoine Jacobs, "Article 11: The Right to Bargain Collectively Under Article 11 ECHR" in Dorssemont & Lörcher & Schömann (2013) 309–32.

[465] Bücker & Dorssemont & Warneck in Bücker & Warneck (2011), 331.

to the definition of a global right to collective autonomy, which might clash with the process of constitutionalisation of collective labour rights within the EU context, in which instead they seem to be understood as socio-economic rights having economic limits to their exercise.[466]

2.4.6. The European Charter of Fundamental Rights and the Court of Justice

The discourse about collective labour rights as human rights assumes specific features in the EU context due to the dynamics of reciprocal influences between the constitutional traditions of the Member States and the process of constitutionalisation of rights occurring at the EU level.[467] Although initially excluded from its scope, in its case law in the 1970s the CJEU recognised the fundamental rights as general principles of EU law on the basis of their inclusion in the Member States' Constitutions and in the ECHR.[468]

In 2000, the adoption of the EU Charter of Fundamental Rights has advanced the recognition of fundamental rights in EU law. The Charter did not introduce any new rights and it was adopted as a merely declarative instrument. But it played a key role in grounding the EU project on the protection of fundamental rights.[469] A novelty concerned the elimination of a hierarchy between rights,[470] which are rather listed according to 'clusters' – such as dignity, freedoms, equality, solidarity, citizens' rights and justice.[471] In this order, the presence of socio-economic rights is

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[466] Judy Fudge, "Constitutionalizing Labour Rights in Europe" in Tom Campbell & Keith Ewing & Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press 2011) 245–68; Filip Dorssemont, "How the European Court of Human Rights gave us *Enerji* to cope with *Viking* and *Laval*" in Moreau (2011) 217–35, 232–33.

[467] Silvana Sciarra, "La costituzionalizzazione dell'Europa sociale. Diritti fondamentali e procedure di soft law" (2003) Working Paper C.S.D.L.E. Massimo D'Antona, INT-16/2003. On the potential effect of improving the legal protection at national level of the rights enshrined in the EU Charter, see also Brian Bercusson, "The Strategy of Fundamental Rights: The EU Charter of Nice 2000 and a 'Constitutional' Strategy" in Bercusson (2009d) 198–255.

[468] See Sonia Morano-Foadi & Stelios Andreadakis, "Reflections on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights" (2011) 17 *European Law Journal*, 595–610, 597–98.

[469] See Bob Hepple, "The EU Charter of Fundamental Rights" (2001) 30 *Industrial Law Journal*, 225–31. In this regard, Smismans critically observes that the inclusion of fundamental rights in the legal sources of EU law has functioned as a 'foundational myth' or 'narrative' for legitimising the project of EU integration, see Stijn Smismans, "The European Union's Fundamental Rights Myth" (2010) 48 *Journal of Common Market Studies*, 45–55.

[470] Placing, however, a hierarchy between rights and principles in which the latter seem not to have the 'same degree of enforceability' as the former, see Dorssemont in Bruun & Lörcher & Schömann (2012) 58.

[471] Ashiagbor underlines that the disposition of the rights in the EU Charter eliminates the classical divide between civil and political rights and social and economic rights, see Diamond Ashiagbor,

transversal, although it features primarily under the 'solidarity' cluster, which also includes collective labour rights.[472] The process of constitutionalisation of rights in the EU has reached a peak in the aftermath of the entry into force of the Treaty of Lisbon (2009), which states, firstly, that the CFREU has the same legal value as the Treaties,[473] secondly, that the rights and principles of the ECHR are part of EU law,[474] and thirdly, that the EU itself shall accede to the ECHR.[475] Yet opinion on the accession agreement formulated in 2014 by the CJEU has reaffirmed that the nature and scope of the protection of fundamental rights – be they civil, political, social or economic – are different within the EU framework, which remains concerned with the functioning of a common market.[476] The opinion of the CJEU actually reinforces the distinction between a human rights approach to the protection of individuals' rights and an approach based on their functionalisation to a primary economic objective. According to the CJEU, the EU fundamental rights need to be interpreted according to the EU's objectives. The CJEU thus denies that the EU institutions as well as the provisions of EU law would be subject to the scrutiny of the ECtHR, which would expose them to the need for complying with international labour law sources such as the ILO Convention and the ESC.[477]

In 1974 the CJEU had already recognised the possibility for employees of the EU institutions to organise in trade unions for the protection of their interests.[478] But the first step in the process of constitutionalisation of collective labour rights in the EU was the adoption of a merely declarative and non-binding document – such as the Community Charter of Fundamental Social Right of the Workers (Community Charter). The Community Charter was intended to complete the process of establishing a social dimension in the EU begun in 1974, complementing the economic side of integration.[479] It was adopted in 1989 as a political document counterbalancing the project of deepening the economic integration and legitimising the action of the EU Commission. At the same time it also represented 'a

"Economic and Social Rights in the European Charter of Fundamental Rights" (2004) 1 *European Human Rights Law Review*, 62–72, 65.

[472] See the contributions in Brian Bercusson (ed), *European Labour Law and the EU Charter of Fundamental Rights* (Nomos 2006).

[473] Art. 6.1 TEU.

[474] Art. 6.2 TEU.

[475] Art. 6.3 TEU.

[476] Opinion 2/13 of the Court (Full court) EU:C:2014:2454, para 170 and 172.

[477] For a positive account of this eventual evolution, see Nicole Busby & Rebecca Zahn, "The EU and the ECHR: Collective and Non-discrimination Rights at a Cross-road?" (2014) 30 *The International Journal of Comparative Labour Law and Industrial Relations*, 153–74, 161.

[478] Case 175/73 *Union Syndicale — Amalgamated European Public ServiceUnion — Brussels, Denise Massa and Roswitha Kortner v Council of the European Communities* EU:C:1974:95; Joined Cases C-193/87 and C-194/87 *Henri Maurissen and European Public Service Union v. Court of Auditors of the European Communities* EU:C:1990:18.

[479] Hepple (2005) 201–02. Giubboni (2006) 57–58.

commitment by the Member States of the European Union to a set of social policy and labour law objectives'.[480] As for collective labour rights, the Community Charter mentions freedom of association, the right to negotiate and conclude a collective agreement, and the right to resort to collective action, including strikes.[481] The Community Charter has been deemed a forerunner of the EU Charter as regards 'upgrading' the status of social and labour rights, and at a domestic level a tool for interpretation.[482] But it has also been seen as a 'defeat for European labour' because of the missed opportunity to constitute a step forward towards a European social dimension. The Charter simply restated the social and labour rights already enshrined in the laws of the Member States rather than introducing 'European-wide collective bargaining' by focusing on how to create a multilevel framework for collective bargaining linking company negotiations in multinational enterprises with social dialogue at the EU level.[483] Similarly, the Community Charter has also been considered weak especially in relation to an extant document protecting social and labour rights, such as the ESC.[484]

The CFREU includes freedom of association for trade union purposes, the right to negotiate and conclude collective agreements and the right to collective action. Art. 12, enshrining freedom of association, is included in the chapter of the Charter entitled 'freedoms'. It recognises for 'everyone' the right to freedom of association for trade union matters, 'which implies the right of everyone to form and to join trade unions for the protection of his or her interests'. As stressed in the Explanation of the Charter,[485] the provision traces the formula of Art. 11 ECHR by therefore linking the freedom of trade union association to an individual dimension of the right.[486] Bercusson identifies an additional limit in its failure to recognise a right to form trade unions at an international level.[487] However, Bercusson stresses that the provision recognises trade unions as social actors representing the interests of

[480] Brian Bercusson, "The Strategy of European Social Dialogue" in Bercusson (2009c) 126–67, 140.

[481] Art. 13 of the Community Charter. See Bercusson (1990) 638–40.

[482] Bercusson (2009d) in Bercusson (2009) 205–06.

[483] Stephen J. Silvia, "The Social Charter of the European Community: A Defeat for European labour" (1991) 44 *Industrial and Labour Relations Review*, 626–43.

[484] Lord Wedderburn, "European Community Law and Workers' Rights After 1992: Fact or Fake?" in Lord Wedderburn (ed), *Labour Law and Freedom. Further Essays in Labour Law* (Lawrence & Wishart 1995) 247–81, 251.

[485] Art. 12 in the Explanation relating to the Charter of Fundamental Rights [2007] OJ C 303/17.

[486] Dorssemont suggests that the drafters of the EU Charter have taken inspiration from the ECHR rather than other international instruments on socio-economic rights, and proposes a reading of the provision under the development of the interpretation of Art. 11 ECHR, see Filip Dorssemont, "Art. 12(1)" in Steve Peers & Tamara Hervey & Jeff Kenner & Angela Ward (eds), *The EU Charter of Fundamental Rights. A Commentary* (Hart 2014) 341–66, 364.

[487] Brian Bercusson, "Freedom of Assembly and of Association (Article 12)" in Bercusson (2006) 133–69, 162.

European workers.[488] Due to the variety of industrial relations systems of the EU Member States, he highlights that the provision has to operate a 'synthesis' between different understandings of collective labour rights, which can be innovative for some States – such as the UK where trade union rights are not extensively protected – and reductive for other States – such as Greece, where the Constitution also provides for an obligation of the State to promote and safeguard trade union rights.[489] The scope of the provision has been defined by the CJEU, which has included both the positive[490] and the negative[491] side of the freedom of trade union association.

In the CFREU, the rights to collective bargaining and collective action are enshrined in the chapter entitled 'solidarity'. Art. 28 CFREU states that

> workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

The provision indicates collective subjects or collectivities as the subjects entitled to such trade union rights.[492] The right to collective bargaining is described in terms of negotiating and concluding collective agreements 'at appropriate levels' – i.e. in its procedural perspective and by acknowledging the different levels at which collective bargaining may occur. The collective action is then intended as a tool for protecting the interest at stake in the process of collective bargaining and in particular in cases in which a labour dispute has arisen. Like the article on freedom of trade union association, Art. 28 is general and unspecific as regards, for instance, the form of collective agreement that can be achieved through collective bargaining and the levels of collective bargaining in order to encompass the features of the different systems of the Member States.[493] Although in the Explanation to the Charter it is indicated that Art. 28 traces the provisions of the ESC,[494] Veneziani notes that it is less demanding for the Member States than international sources such as the ILO Conventions and the ESC itself, which impose obligations on the States

[488] Bercusson in Bercusson (2006) 168.

[489] Bercusson in Bercusson (2006) 165–68.

[490] C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* EU:C:1995:463

[491] C-499/04 *Hans Werhof v Freeway Traffic Systems GmbH & Co. KG* EU:C:2006:168

[492] Bruno Veneziani, "Right of Collective Bargaining and Action (Art. 28)" in Bercusson (2006) 291–336, 296–97, 313–15.

[493] Veneziani in Bercusson (2006) 309–10.

[494] Art. 28 in the Explanation relating to the Charter of Fundamental Rights [2007] OJ C 303/17.

to promote collective bargaining and joint consultations by adopting appropriate measures.[495]

Those international labour law sources were referred to by the CJEU in *Viking* and *Laval* for the acknowledgement of the collective labour rights as fundamental rights of the EU. Yet the 'combination' of EU law and international law, which reinforced the recognition of the fundamental status to collective labour rights, produced the effect of strengthening the effectiveness of EU law in the national contexts and over the exercise of the collective labour rights themselves.[496] Unlike the provision on freedom of association, however, Art. 28 CFREU attributes collective labour rights to workers and employers, and their organisations, 'in accordance with Union law and national laws and practices'. The consequences are twofold and potentially conflictual: on the one side, the reference to 'national law and practices' functions as a safeguard of the national systems; on the other side, the reference to 'Union law' has been interpreted as implying that collective labour rights fall within the scope of EU law and their exercise shall comply with it. Indeed, in *Viking* and *Laval*, the CJEU indicated the reference to 'Union law' as entailing the need for collective labour rights to be exercised in accordance with the provisions of the Treaty, which in the two rulings concerned the exercise of economic freedoms of establishment and providing services.[497]

This clash might be mitigated by Arts. 52 and 53 CFREU, defining the scope, interpretation, and level of protection ensured to the rights of the Charter. Art 52 CFREU is a complex provision: *inter alia*, it states that any limitation on the exercise of the rights of the Charter shall respect their essence and be subjected to the principle of proportionality; it affirms that the rights of the Charter also included in the Treaties shall be exercised according to the Treaties' provisions;[498] it asserts that the protection ensured under the EU Charter corresponds to the protection ensured under the ECHR and in harmony with the constitutional traditions of the Member States. The Explanatory Note of the Charter specifies that those norms intend to set strict rules on the limits that can be placed on the exercise of fundamental rights, and aim at ensuring consistency with the ECHR, as well as avoiding a situation whereby the protection of rights at the national level is pursued according to a 'lowest common denominator' that curtails the scope of those rights within the national contexts. This interpretation seems to clash with the outcomes

[495] Veneziani in Bercusson (2006) 311.

[496] Sophie Robin-Olivier, "The Evolution of Direct Effect in the EU: Stocktaking, Problems, Projections" (2014) 12 *International Journal of Constitutional Law*, 165–88, 174.

[497] C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* EU:C:2007:772, para 44; C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* EU:C:2007:809, para 91.

[498] Lenaerts affirms that this provision ensures that the Charter would not affect the primacy of the Treaties' provision, see Koen Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights" (2012) 8 *European Constitutional Law Review*, 375–403, 394.

of the *Viking* and *Laval* rulings, in which the CJEU indicated that the recognition in international law of the collective labour rights does not entail that such rights cannot be subject to limitations. However, it must be stressed that no international conventions indicate economic freedoms as possible justifications for placing restrictions on the exercise of collective labour rights.

Art. 53 CFREU provides that the interpretation of the Charter shall not adversely affect or restrict the protection of human rights as ensured by international law, which is binding for the EU and for the Member States, including the ECHR. The Explanations of the Charter affirm that the provision is 'intended to maintain the level of protection currently afforded within their respective scope by Union law, national law and international law'. In this sense, Art. 53 can be interpreted as ensuring that the protection attributed under EU law follows the evolution of international law and aligns with the level of protection conferred by national law, de facto legitimising the primacy of EU law.[499] Although Art. 53 could function as a 'non-regression' clause guaranteeing the highest level of protection possible in accordance with international and/or national constitutional law, the CJEU has interpreted it strictly. In *Melloni*,[500] the Court affirmed that an interpretation of Art. 53 allowing the Member States to apply the level of protection ensured according to the national constitutional system, 'would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to dis-apply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution'.[501] Hence, EU law holds primacy over national law, and the exercise of fundamental rights shall comply with such a principle. According to this interpretation, the Charter does not set a minimum protection that can be raised at a national level.[502] A higher level of protection ensured by the constitutional order of a Member State cannot be applied or invoked as a means for avoiding the lowering of protective standards or for justifying a derogation from EU law.[503] In this sense, the reference to Art. 53 CFREU would not ensure that the exercise of collective labour rights could prevail over the exercise of economic freedoms in the light of a higher protection ensured either by international law or by national law.

Before their recognition as fundamental rights of the EU, the CJEU had already dealt with collective labour rights – yet without attributing such as status to them.

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[499] In this sense Lenaerts (2012) 397–98.

[500] C-399/11 *Stefano Melloni v Ministerio Fiscal* EU:C:2013:107

[501] C-399/11 *Melloni*, para 58.

[502] Aida Torret Pérez, "Melloni in Three Acts: From Dialogue to Monologue" (2014) 10 *European Constitutional Law Review*, 308–31, 316.

[503] In this sense, Art. 53 CFREU is seen as a 'symbolic' provision with no 'independent legal meaning', see Nik de Boer, "Addressing Rights Divergences Under the Charter: Melloni" (2013) 50 *Common Market Law Review*, 1083–104, 1103.

In *Albany*[504] – a case concerning the compliance of compulsory affiliation to a collective agreement on a supplementary pension scheme with the EU competition rules – the exemption from the scope of competition law of the collective agreement was motivated by the social function played by such an instrument in regulating the economy, which is in compliance with the social objectives of the EU (see also Section 4.2.4). No recognition of the status of the fundamental right for collective bargaining was made in the judgment. Rather, the opinion of the Advocate General stressed the absence of 'sufficient convergence of national legal orders and international legal instruments on the recognition of a specific fundamental right to bargain collectively'.[505] Despite recognising the protection ensured by the Community order to both freedom of association and the right to collective action,[506] the Advocate General observed that freedom of contract was sufficient to protect a process such as collective bargaining, which is 'negotiation between economic actors'.[507] The 'mutual recognition' basis of collective bargaining, excluding its acknowledgement as a fundamental right in the EU legal order, also emerged in the *UAPME* case,[508] in which the (then) Court of First Instance denied the existence – on the ground of EU law and in particular the provision on social dialogue – of a general right to participate or be engaged in collective negotiations.[509]

In the aftermath of the *Viking* and *Laval* case law, other rulings confirmed the status of the right to collective bargaining. In *Prigge*[510] and in *Hennings*,[511] the cases concerned the compliance of clauses of collective agreements concerning different treatment on the ground of age (compulsory retirement and pay level, respectively) with the EU Directive 2000/78 on equal treatment in employment and occupation (see Section 4.2.6). In both rulings, the CJEU has recalled that the right to collective bargaining is a fundamental right of the EU, which, however, shall comply with the prohibition of any discrimination, including age, set by EU law.[512] Similarly, the recognition of its fundamental status and of its social objectives in the *Commission v. Germany* case,[513] concerning local collective agreements for the municipal public

[504] C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* EU:C:1999:430

[505] Opinion of Advocate General Jacobs in Joined Cases C-67/96, C-115/97, C-116/97, C-117/97, C-219/97, EU:C:1999:28 para 160.

[506] Ibid., 158–59.

[507] Ibid., 161.

[508] T-135/96 *Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises (UEAPME) v. Council of the European Union* EU:T:1998:128.

[509] T-135/96 *UEAPME*, paras 77–80. See Dorssemont, in Moreau (2011) 229.

[510] C-447/09 *Reinhard Prigge and Others v Deutsche Lufthansa AG* EU:C:2011:573.

[511] Joined Cases C-297/10 and C-298/10 *Sabine Hennigs v Eisenbahn-Bundesamt and Land Berlin v Alexander Mai* EU:C:2011:560

[512] C-447/09 *Prigge*, para 47; Joined Cases C-297/10 and C-298/10 *Hennings*, para 78.

[513] C-271/08 *European Commission v Federal Republic of Germany (occupational pensions)* EU:C:2010:426.

employees allocating pension contributions to a fund indicated in the agreement, has not excluded the right to collective bargaining from compliance with EU law rules on public procurements in the context of the exercise of freedom of providing services (see Sections 4.3.5 and 4.5.4).[514] One can therefore share the conclusion of Barnard, who pointed to a paradoxical acknowledgement of the fundamental right status of collective labour rights that has *de facto* reduced the scope of Art. 28 and curtailed the expectations of trade unions to seek protection for their activities in EU law.[515]

2.4.7. Collective autonomy and the discourses on EU integration

In the famous Delpérée,[516] Ohlin[517] and Spaak[518] reports, considered as the ideological manifestos of the original European integration project, economic integration was indicated as the actual lever for achieving social improvements, without intervening in the sphere of social policies. According to the drafters of the reports, social benefits would be achieved by 'unchaining' the dynamics of a market built on a two-level structure with a plurality of legal and institutional frameworks.[519] For instance, by allowing labour to move from countries with high supply to countries with high demand, the wage rate would automatically tend to increase.[520] The original project of European integration was thus heavily influenced by the ordo-liberal economic doctrine, which considers the free market and the protection of its dynamism as the means to obtain social objectives.[521] The intervention of the public actor would be limited to the protection of the exercise of the economic freedoms, in the light of the key principle of the ordo-liberal doctrine considering EU integration as a process driven by legal integration leading towards the construction of a 'market without States'.[522] The legal and institutional

[514] C-271/08 *Commission v. Germany*, para 41.

[515] In this sense Catherine Barnard, "Article 28" in Peers & Hervey & Kenner & Ward (2014) 773–94, 794.

[516] Albert Delpérée, *Politique social et intégration européenne* (Librairie générale de droit et de jurisprudence 1956).

[517] International Labour Office, "Social Aspects of European Economic Co-operation. Report by a Group of Experts (summary)" (1956) 74 *International Labour Review*, 99–123.

[518] Paul-Henry Spaak, "Comité Intergouvernemental créé par la Conférence de Messine, Rapport des Chef de Délégation aux Ministres des Affaires Etrangéres" (1956)

[519] See Dukes (2014) 159.

[520] See Catherine Barnard, "EU 'Social' Policy: From Employment Law to Labour Market Reform" in Paul Craig & Gráinne De Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2011) 641–86, 642.

[521] Christian Joerges & Florian Rödl, "The 'Social Market Economy' as Europe's Social Model?" (2004) EUI Working Paper Law no. 2004/8, 5–6.

[522] Christian Joerges, "Law, Economics and Politics in the Constitutionalisation of Europe" (2002–2003) 5 *Cambridge Yearbook of European Legal Studies*, 123–49, 129.

framework tended to ensure the functioning of the market and the avoidance of unfair competition. In an economic space in which the products (good and services) and the production factors (labour and capital) could circulate freely, the social dimension was limited to the long-run objective of improving the living conditions of the European people, whereas the more immediate focus was on the creation of an integrated economy: the internal market.[523] The result has been highlighted by Ferrera as an 'encounter' between the welfare state created at the national level in the 19th and 20th centuries and EU integration. He describes this encounter as a clash, because of the different logics underpinning the two political projects: on the one side, the welfare state characterised by a logic of 'closure' presupposing 'the existence of a clearly demarcated and cohesive community, whose members feel that they belong to the same "whole" and that they are linked by reciprocity ties *vis-à-vis* common risks and similar needs'; and on the other side, the logic of 'opening' proper of EU integration 'aimed at fostering free movement (in the widest sense) and non-discrimination by weakening or tearing apart those spatial demarcations and closure practices that nation-states have historically built around (and often within) themselves'.[524]

The EU integration project has been progressively creating the conditions for free trade among the countries forming the internal market. On the one hand, this has meant the abolition of any restriction to the free circulation of the economic factors; on the other hand, it has also entailed a certain degree of harmonisation of national rules in certain fields in order to limit distortions to competition. The former operation refers to the notion of 'negative integration', while the latter refers to that of 'positive integration'. These notions represent the two poles leading the process of EU integration.[525] Yet, due to the distribution of competences set in the Treaty between the EU and its Member States, the harmonisation of rules has mainly focused on economic matters, leaving the social matters to be dealt with by the national institutions. This has had two main and intertwined consequences: on the one side, the process of EU integration has created a multi-level system in which the EU system coexists with the systems of the Member States; on the other side, the division of competences has favoured the process defined by Scharpf as 'decoupling', whereby economic regulation has been applied to the supranational organisation, whereas social regulation has been assigned to the States.[526] Not even the attribution of some (limited) competences in the social policy field upon the EU

[523] Giubboni (2006) 35–40.

[524] Maurizio Ferrera, "The JCMS Annual Lecture: National Welfare States and European Integration: In Search of a 'Virtuous Nesting'" (2009) 47 *Journal of Common Market Studies*, 219–33, quotations at 220.

[525] See Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999) 45.

[526] Fritz Scharpf, "The European Social Model: Coping with the Challenges of Diversity" (2002) 40 *Journal of Common Market Studies*, 645–70, 647.

has been able to bridge such a divide. In this regard, Streeck highlighted that the arrangement was designed in order to avoid any harmonisation in the social field, instead privileging the setting of coordination strategies that would have maintained the primacy of the national States over the making of social policy.[527] Despite a progressive 'constitutionalisation' of a social dimension within the EU legal system identified by Schiek,[528] the 'asymmetry' remains a central feature of the EU project, which, again according to Scharpf, prevents the effective achievement of a 'social market economy' in the internal market as indicated in Art. 3 TEU.[529] The EU system is characterised by 'multilevel politics' in which the national actor is chained within the boundaries of the supranational one.[530] The 'decoupling' dynamic has established a multilevel framework in which economic regulation is harmonised, whereas social regulation is not. This leads to differential gaps between the Member States, which in turn allows economic subjects (i.e. companies) to operate within a market on the basis of social dumping practices. This system has been portrayed as 'regulatory competition' by Deakin[531] and as 'law shopping' by Supiot.[532] The upshot of this situation is that collective autonomy in the EU is at the crossroads between the EU and the national frameworks.

However, labour relations have found their juridification at the EU level, despite them being inherently private relations.[533] From the perspective of collective autonomy, the EU framework is a space in which the process of juridification has concerned the setting of new *loci* for collective labour relations coexisting with the national machineries. In this sense, the concept of 'multi-level governance' has been used for defining the emerging coexistence of practices of social dialogue and collective negotiations at the EU level with the industrial relations systems at the national level, as 'intrinsically linked to the multi-level system of governance that

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[527] Wolfgang Streeck, "Neo-voluntarism: A New European Social Policy Regime?" (1995) 31 *European Law Journal*, 31–59, 41–42.

[528] According to Schiek, the process of constitutionalisation in EU law has brought about the 'embedding' of economic dynamics within social constraints, mainly related to social inclusion, human rights protection and equality, see Dagmar Schiek, *Economic and Social Integration. The Challenge for EU Constitutional Law* (Edward Eldgar 2012) 94.

[529] Rather, Scharpf points out that the economic regulation coming from the EU, grounded on the objective of market liberalisation, affects the autonomy of the social market economies proper of the Member States, see Fritz Scharpf, "The Asymmetry of European Integration, or Why the EU Cannot be a 'social market economy'" (2010) 8 *Socio-economic Review*, 211–50.

[530] Wolfgang Streeck, *Buying Time. The Delayed Crisis of Democratic Capitalism* (Verso 2013) 114–15.

[531] Simon Deakin, "Legal Diversity and Regulatory Competition: Which Model for Europe?" (2006) 12 *European Law Journal*, 440–54.

[532] Alain Supiot, "A Legal Perspective on the Economic Crisis of 2008" (2010) 149 *International Labour Review*, 151–62.

[533] See Mark Bell, "Constitutionalization and EU Employment Law" in Hans-W. Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014) 137–69.

the EU has produced'.[534] Within the continuous tension between an economic and a social dimension of integration, a dimension of collective labour relations has progressively emerged, eventually achieving a degree of institutionalisation within the EU framework and its legal system.

The collective dimension of labour relations within the EU evolved in relation to two dimensions: a vertical or supranational one, i.e. the dimension related to the establishment of a European social dialogue between collective subjects representing the national trade unions and employers' associations; and a horizontal or transnational one, i.e. a dimension related to the establishment of forms of collective labour relations within those multinational companies or groups operating transnationally. Despite having emerged autonomously, these two dimensions have been prompted by precise developments. In the case of European social dialogue, its practices have been institutionalised and included in the EU legislative process in respect of matters of social policy.[535] Instead, in the case of transnational negotiations within multinational companies or groups, the legislative intervention has provided the basis for further autonomous development pursued through the statutory bodies of employees' representation at company level entitled with the right of information and consultation.

Despite the relevance acquired by the European social dialogue in the legislative process on social policy,[536] the autonomy of such practices has been questioned. For instance, Davies stresses the lack of legitimacy for the actors involved in the practices of social dialogue due to a recognition of representativeness based on the role of the national affiliated members.[537] Furthermore, Smismans points out that often the effectiveness of the outcomes of the European social dialogue, i.e. the framework agreements, depends on public interventions, both at national and supranational level.[538] In this regard, it has also been highlighted that the tendency of the European social partners to negotiate and adopt framework agreements on so-called 'soft-issues'[539] that can be implemented autonomously in the national systems, reflects the will of the parties to limit the EU legislator's intervention (or

[534] Marginson & Sisson (2006) 290.

[535] Schiek notes that the European social partners are even entitled with prerogatives that are not placed upon the European Parliament, such as presenting a fully developed text to the Commission and Council in order to be approved, see Schiek (2012) 109.

[536] Brian Bercusson, "Threats and Challenges to and the Future of the European Social Dialogue" in Bercusson (2009g) 607–36.

[537] Anne C.L. Davies, "Should the EU have the Power to set Minimum Standards for Collective Labour Rights in the Member States?" in Alston (2005) 177–213, 179.

[538] See Smismans (2008). In this sense, also Davies in Alston (2005), 182.

[539] Such as non-discrimination and health and safety, in contrast to the traditional 'hard' issues, such as wages or working hours, see Keller & Webber (2011) 227–43.

interference).[540] Moreover, Hepple has underlined that social dialogue, as designed within the EU framework, is 'not supposed to be adversarial'[541] and cannot be a 'substitute of autonomous collective bargaining'.[542] This feature is also what distinguishes the European social dialogue from national collective bargaining. In this regard, Lo Faro stressed the fact that, unlike national collective bargaining, the social dialogue is not a spontaneously arising social phenomenon; rather, it is functionally built on and by EU law.[543] In this sense, he affirmed that the social dialogue represents a regulatory technique proper of the EU system, rather than a supranational transposition of national autonomous bargaining.[544] Concurring with Lo Faro's analysis, Hepple further stressed that the difference between social dialogue and autonomous collective bargaining lies in the recognition that collective bargaining is grounded on the rights to freedom of association and strike, whereas social dialogue is not.[545] By and large, real autonomy is mainly practised in the phases of implementation, which gives a 'procedural dimension' to the autonomy of the European social dialogue.[546] On this basis, Dukes concludes her analysis of the European social dialogue by affirming that, rather than a process of constitutionalisation of labour instances, it is in actual fact 'little more than a policy forum', which although part and parcel of a European system of industrial relations 'cannot rightly be thought of as a means of rendering the Union more democratic'.[547]

Unlike the European social dialogue, the transnational dimension of collective bargaining within the EU has no legal framework to rely upon.[548] The adoption of a directive for establishing transnational bodies of employees' representation – the European Works Councils (EWCs) – was not warmly welcomed by commentators. For instance, Lord Wedderburn criticised the evolution towards forms of corporate industrial relations that, again, differ from proper collective bargaining and do not match with the traditions of several Member States.[549] Scepticism towards the directive was also expressed by Streeck, who drew attention to the lack of real mandatory requirements for the establishment of EWCs on the managerial side.

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[540] Ann Branch, "The Evolution of the European Social Dialogue Towards Greater Autonomy: Challenges and Potential Benefits" (2005) 21 *The International Journal of Comparative Labour Law and Industrial Relations*, 321–46.

[541] Hepple (2005) 231.

[542] Hepple (2005) 249.

[543] Antonio Lo Faro, *Funzioni e finzioni della contrattazione collettiva comunitaria* (Giuffrè 1999) 84.

[544] Lo Faro (1999) 237.

[545] Hepple (2005) 231.

[546] Marco Peruzzi, "Autonomy in European Social Dialogue" (2011) 27 *The International Journal of Comparative Labour Law and Industrial Relations*, 3–21.

[547] Dukes (2014) 157.

[548] See André Sobczak, "Ensuring the Effective Implementation of Transnational Company Agreements" (2012) 18 *European Journal of Industrial Relations*, 139–51.

[549] Lord Wedderburn, "Consultation and Collective Bargaining in Europe: Success or Ideology?" (1997) 26 *Industrial Law Journal*, 1–34.

Streeck stressed how the voluntarist procedure set by the directive would not ensure adequate protection of the interest of the weaker party.[550] He also criticised the fact that the establishment of transnational forms of employees' representation would create a double system of workers' representation in Europe, with the national unions accompanied by the EWCs.[551]

Nevertheless, after a decade of functioning and one recast directive that has not modified their prerogatives, the EWCs function as a link for the definition of transnational trade union strategies, which allow different actors in different contexts and levels to interact.[552] Despite the lack of competences, the EWCs are the most common bodies representing the multinational's employees in negotiations, if often supported by European trade union federations and national unions.[553] The large diffusion of transnational collective agreements signed by EWCs raises questions about two main issues: the representativeness of such bodies, and the legal status of the collective agreements they sign. On the first aspect, it should be stressed that the EWCs can legitimately represent the employees of the multinational company, but the fact that these bodies can be entirely formed by non-union members might undermine the autonomy of the bargaining process.[554] On the second aspect, the unclear legal status of the transnational collective agreement challenges its legitimacy as a tool of transnational labour and employment regulation.[555]

Prospects and proposals of regulation have been advanced throughout the years. For instance, in 2006 a group of scholars and experts suggested the adoption of a directive providing for an optional framework for transnational collective agreement negotiated within Joint Negotiation Bodies to be activated through a joint request of the European social partners, or by a joint request of the management of the multinational company and its EWC.[556] The implementation of the collective agreement would then be achieved through the adoption of as many managerial decisions as the number of the establishments in which the agreement should be applied. Later, in 2012, a further study suggested a 'bottom-up' approach interpreting transnational collective bargaining as company bargaining, whose

[550] Streeck (1995) 49.

[551] Wolfgang Streeck, "Neither European nor Works Councils: A Reply to Paul Knutsen" (1997) 18 *Economic and Industrial Democracy*, 325–37.

[552] Anne Dufresne, "Trade Union Support and Political Blockage: The Actors' Viewpoint" (2012) 18 *European Journal of Industrial Relations*, 107–21.

[553] Marginson & Sisson (2006) 228.

[554] Jagodzinski (2012), 179.

[555] Antonio Lo Faro, "Bargaining in the Shadow of 'Optional Framework'? The Rise of Transnational Company Agreements and EU law" (2012) 18 *European Journal of Industrial Relations*, 153–65, 153–54.

[556] Edoardo Ales et al., *Transnational Collective Bargaining. Past, Present, Future,* (2006) Final report to the European Commission, Directorate General Employment, Social Affairs and Equal Opportunities, 36.

outcomes could be implemented either by attributing to them direct legal effects or as company collective agreements in the systems of the Member States.[557] In the abstention of the EU legislator, the debate is very lively. The proposals advanced are divided between those asserting that the adoption of a legal and institutional framework would deprive transnational collective bargaining of its autonomous force as a socio-economic dynamic, and those instead claiming that a legal intervention at the EU level would be needed in order to overcome the differences among the industrial relations systems of the Member States.[558] Among the first group, some propose a 'dynamic reading' of Art. 155.1 TFEU, encouraging management and labour to have a dialogue leading to stable contractual relations, as a legal basis for the conclusion of transnational collective agreements to be implemented via the autonomous route provided by the Treaty.[559] Others incentivise the participation of national social partners – also company management and employees' representative bodies – in the implementation process through practices of coordination.[560] Among the second group, the suggestions invoke the adoption of a 'transnational auxiliary legislation' that would preserve the autonomy of the parties by however creating a legal basis for the conclusion of transnational collective agreements,[561] for instance by providing for a 'functional equivalent' to the statutory legally binding value, such as an obligation for the employer to apply the terms of the agreement in the company.[562] Similarly, others suggest the adoption of a regulation imposing an obligation to implement the agreement upon the parties,[563] or the adoption of an optional directive giving legal effects to the transnational collective agreements in the sense of even prevailing over sectoral national agreements, but providing for a clause inspired by the principle of favour, so as to ensure the application of the conditions most favourable to the workers.[564]

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[557] Ricardo Rodríguez et al., *Study on the Characteristics and Legal Effects of Agreements between Companies and Workers' Representatives* (2012) Final report to the European Commission, Directorate General Employment, Social Affairs and Equal Opportunities

[558] Schömann (2012), 229.

[559] Dagmar Schiek, "Transnational Collective Labour Agreements in Europe and at European level – Further Readings of Article 139 EC" in Mia Rönnmar (2008) 83–100.

[560] André Sobczak, "Ensuring the Effective Implementation of Transnational Company Agreements" (2012) 18 *European Journal of Industrial Relations*, 139–51.

[561] Silvana Sciarra, "Collective Exit Strategies: New Ideas in Transnational Labour Law" in Davidov & Langille (2013) 405–19, 418.

[562] Lo Faro (2012) 162.

[563] Edoardo Ales & Giorgio Verrecchia, "Transnational: The Emerging Multifaceted Dimension of Industrial Relations" in Salvo Leonardi et al., *European Action on Transnational Company Agreements: A Stepping Stone Towards a Real Internationalisation of Industrial Relations?* (2012) IRES Final Report n. 02/2012, 35–45, 44.

[564] Teun Jaspers, "Effective Transnational Collective Bargaining. Binding Transnational Company Agreements: A Challenging Perspective" in Isabelle Schömann et al. (eds), *Transnational Collective Bargaining at Company Level. A New Component of European Industrial Relations?* (ETUI 2012) 233–65, 258. This proposal would also encounter the favour of the European trade union movement,

2.4.8. Concluding remarks: theoretical perspectives

This chapter has explored the conceptual and theoretical foundations of collective autonomy and collective bargaining in labour law theories, in industrial relations theories, and in the discourse on global labour rights. These three perspectives have highlighted the features of collective autonomy from different angles by stressing the elements that define it in legal terms and in understanding the role and the impact of the legal system in the functioning of collective bargaining. Allowing for some differences on account of the research focus of each field, the three perspectives nevertheless share an understanding of collective autonomy as being grounded on the emergence and establishment of collective bargaining as a socio-economic phenomenon primarily concerned with the normative definition of the conditions of work and employment. Furthermore, the three perspectives recognise collective bargaining as a bilateral process between employers and organised workers that should be pursued voluntarily and autonomously. The role of the legal system is to guarantee these features by protecting the foundations and the scope of collective autonomy.

The industrial relations theories identify collective bargaining as a process that emerged in conjunction with socio-economic changes. As observed by the Webbs, the collectivisation of production brought about by the Industrial Revolution has created the conditions for the emergence of the social collective subjects, such as the employer and the trade unions, collectively representing the instances of capital and labour. The industrial relations theorists highlight the social relationships that these subjects establish between one another. The union(s), the employer(s), and the State constitute three corners of a triangle in which the industrial relations system functions. Yet the State operates as a supreme regulatory force, whereas the other parties engage in collective bargaining and each of them bears a specific interest. The interplay between collective interests produces conflict and the conflict is, again, the spark of collective bargaining. The labour market is a space of interaction and conflict between collective interests. But the industrial relations theorists speak of collective bargaining not simply as a normative process. They also emphasise its political implications, since to pursue a collective interest means to exercise power and to establish power relationships between the subjects involved in collective bargaining. Collective bargaining is also a political process through which the parties attempt to exercise power over the individual subjects and over each other, as well as to 'conquer' more space within the larger society.

However, different conceptualisations can be identified in the field of industrial relations. Dunlop observes collective labour relations from a systemic perspective

whose main concern is exactly to avoid a situation in which transnational collective bargaining (which remains a form of company-level bargaining) could diminish the level of protection guaranteed by the national systems, see Marco Cilento, "Development of Transnational Negotiations within Multinational Companies in a Trade Union Perspective" in Leonardi et al. (2012) 119–26, 125.

by highlighting the elements that constitute the structure of an industrial relations system. Clegg and Flanders stress the pluralism of society and of the labour market by focusing on collective bargaining as a process of compromise between interests. In their comparative works, Hyman and Crouch emphasise the conflictual aspects of the industrial relations arena by pointing out the relevance of collective action in the process of collective bargaining. Nevertheless, all the authors share an understanding of collective bargaining as influenced by the rules that the parties shall follow, stemming from either the legal system or self-regulation. In the industrial relations perspective, the emphasis is on the need to avoid legal regulation taking over the autonomous exercise of collective bargaining. Even though their prescriptions differ, Dunlop and the pluralist school share a similar vision of the role of the legal system, namely, that it ought to be neutral in industrial relations and has to secure the autonomy and independence of the parties from the State and from each other. Dunlop emphasises the protection of collective labour rights and the adoption of supportive policy by the government. Flanders and Clegg promote the neutrality of the State in labour disputes and collective bargaining by highlighting its role as agent in charge of creating autonomous machinery for collective bargaining. In their view, the legal system should focus on general aspects of employment regulation – such as maximum working hours and health and safety – by leaving to collective bargaining the definition of more contingent rules – such as wages and overtime. In line with his radical approach to industrial relations, Hyman, instead, criticised the law as reproducing the exploitative scheme of employment. He advocates for the law to serve as a constraint on the power of the employer over the employees.

The labour law theories explored here were developed on the basis of insights drawn from the field of industrial relations. A labour law conceptualisation of collective bargaining highlights its normative power expressed through the conclusion of collective agreement and the exercise of collective action. From a labour law perspective, the basic assumption underpinning the definition of collective autonomy concerns the acknowledgement of the inherent normativity of collective bargaining as a process defining binding rules and conditions to be applied in the relationship between third parties, as well as between the collective subjects themselves. Like the industrial relations perspective, the legal study of collective labour relations also has its starting point in the recognition of the conflicting interests between the collective actors representing workers and employers. In this sense, the collective interest is the objective that the collective subjects pursue and the collective conflict is the real engine of the labour market's socio-legal dynamics. As part of these dynamics, the parties undertake collective actions, i.e. give material expression to the collective conflict. The agreement between the parties, i.e. the collective agreement, performs a social function as the regulatory instrument capable of compromising the collective interests and ending conflict.

In the labour law theories, the collective interest of social groups and the ensuing collective conflict are seen as social aspects worthy of the legal system's consideration. Therefore, the political assumption is that the legal system should recognise the existence of interests other than those of the State. Despite obvious differences, Sinzheimer, Kahn-Freund, Santoro Passarelli, and Giugni share the view that the State cannot be an overwhelming power denying the exercise of collective bargaining and collective action in the name of a supra-ordinated economic interest. The normative outcome of the dynamics of collective bargaining – namely, the collective agreement – ought to find recognition within the legal system, either as a private contract between private parties, or as a specific instrument of labour market regulation invested with exclusive prerogatives. However, the existence of collective labour relations does not depend upon the recognition of the State. The dynamics of collective labour relations exist as social phenomena, and the legal system of the State has to deal with them without repressing or encroaching on the autonomy of the parties. The role of State's law is therefore to set the conditions for an autonomous exercise of collective labour relations, which necessarily also includes both autonomy from the State and autonomy from other parties.

Autonomy, independence of the parties, free and voluntary negotiations, pluralism in forming and joining a trade union are also the key principles emerging in the discourse on global labour rights. Those principles inspire the provisions of the different legal systems enshrining collective labour rights. Yet different patterns can be discerned, depending upon the values that underpin the legal sources and the objectives that the systems intend to pursue. For instance, the ILO Conventions reflect the tripartite mechanism through which they are drafted, which means that they conceive of the issue of collective bargaining from a systemic perspective encompassing the views of the different subjects involved. A similar approach also emerges from the ESC. Both the ILO and the ESC, however, refer to the State's legislation, which shall ensure the adequate conditions for the evolution and functioning of a system of collective bargaining based on the principle of collective autonomy. The standards set by the ILO and by the ESC, and by their respective monitoring bodies, have also been included in the scope of Art. 11 ECHR through the integrated approach adopted by the Strasbourg Court in *Demir and Baykara.* In this sense, the scope of freedom of trade union association, originally envisioned in its individual entitlement and exercise, has been stretched by the Court to encompass a broad global right to collective autonomy.[565] None of these legal systems, however, conceives a proportionality test on the exercise of collective labour rights; rather they place limits on restricting the exercise of such rights.[566]

[565] Lörcher in Dorssemont & Lörcher & Schömann (2013), 3–46.

[566] Philip Syrpis, "The Treaty of Lisbon: Much ado…but about what?" (2008) 37 *Industrial Law Journal*, 219–35, 233–34.

In the EU context, by contrast, the exercise of collective labour rights seems to be under a conditionality clause that imposes rather than hampers the exercise of cross-border economic freedoms. Emerging alongside difficulties in a legal context that aimed at the creation of an integrated economic space, collective labour rights have nonetheless become part and parcel of the EU legal system through their recognition in the EU Charter. However, their exercise in the EU internal market has to deal with the economic objectives of the EU legal system, which has led to the limits imposed by the CJEU's rulings in the *Viking* and *Laval* cases. The legal sources on collective labour rights in the EU legal system diverge from the sources of the other system analysed here, since they entail limits that stem from economic interests. Any prospect of improving harmonisation in the exercise of collective labour rights has been curtailed by the opinion of the CJEU concerning the EU's access to the ECHR.[567]

For the purposes of this study, collective autonomy can be defined as the legal understanding of the scope of collective bargaining. The term identifies the degree of autonomy that the actors of collective bargaining enjoy within a legal system. In other words, the term 'collective autonomy' describes how a legal system conceives of and understands the dynamics of collective labour relations – broadly speaking, the freedom of organising, the processes of collective bargaining, and the exercise of collective action. In sum, collective bargaining is a bilateral process between collective subjects – the employer and the organised workers – who represent the social powers of capital and labour that emerged in conjunction with the capitalist system of production, which has led to the concentration of the workforce and to the collectivisation of employment relations. As with any other social phenomenon, collective bargaining has arisen autonomously from the changing dynamics of society and economy as a form of counter-power against the employer. Yet the more this phenomenon took place, the more it became institutionalised. Also, the more it was practised as an instrument of labour market regulation, the more it became a process of political dialogue, confrontation, and conflict between those social powers within society.

The globalisation of law, which downplays the centrality of State regulation, has ultimately added other layers to the regulation of such social phenomena. The dynamics of collective labour relations have found a legal translation in supranational legal systems too, which however view the social phenomena related to collective labour relations according to the values and objectives underpinning them. Unlike other legal orders, the EU context is a legal space that has the capability to conceive of the exercise of collective labour rights in a cross-border dimension. Yet the social elements of collective autonomy – its scope, normative power, autonomous and voluntary features – are challenged by the legal regulation of the EU internal market.

[567] See also Velyvyte (2015) 92.

3. Collective autonomy and collective bargaining in national contexts: A comparative analysis of Italy and Sweden

3.1. Introduction

The aim of this chapter is to analyse how collective autonomy and collective bargaining have found expression in the national context. This aim is pursued through a comparative analysis of the Italian and the Swedish contexts, focusing on the three foundations of collective autonomy: representation, the collective agreement, and the collective action. The comparison, conducted from the perspective of collective bargaining, intends to understand how, in two systems in which the regulation of the labour market is strongly based on collective autonomy, the legal system operates in order to preserve the autonomy of the parties. Therefore, the analysis mainly focuses on the modalities of legal recognition of the actors' representativity, of the normative effects of the collective agreement, and of the regulation of collective action in relation to collective bargaining. In line with the overall aim of this study, the analysis also aims at highlighting the current challenges that collective autonomy faces in the national context.

The comparison follows an analytical and thematic structure, which will not merely compare the two systems, but rather aims at understanding how collective autonomy can develop and function in a national context and how a national legal order is concerned with the regulation of collective labour relations. The differences and similarities of the two contexts ultimately highlight different manifestations of collective autonomy and offer complementary views on the development and evolution of collective bargaining at the national level.

The chapter is structured as follows: Section 2 outlines the main features of the two systems, including a description of the socio-economic and the legal contexts, the origin and evolution of the industrial relations systems, the structure of collective bargaining and of its parties, the influences deriving from EU law and the protection of collective labour rights and freedom to conduct business. Section 3 deals with the

regulation of access to collective bargaining, namely, the rules that the industrial relations parties are subject to in terms of recognition and representation. Section 4 is concerned with the outcome of the collective bargaining process, i.e. the collective agreement. This section analyses the status of the collective agreement, the legal recognition of its normative effects and the relationship between collective agreements at different levels. Section 5 addresses the issue of collective conflict by stressing the two systems' approaches to the entitlement of the right to collective action and the regulation of social peace. Section 6 deals with two of the challenges currently facing collective autonomy: the path towards the decentralisation of collective bargaining, and the phenomenon of cross-border economic freedoms and posting of workers. For each of these issues, one case from each country has been selected. For the issue of decentralisation, the attention is focused on the Fiat case in Italy from 2010 onwards; for the cross-border posting in the context of the EU's economic freedoms, the *Laval* case in Sweden is analysed. Finally, the last section concludes by summarising the comparative discussion and outlining the main features of collective autonomy and collective bargaining in these national contexts.

3.2. Foundations and features of the collective labour law and industrial relations systems

3.2.1. The socio-economic and legal contexts for industrial relations in a comparative perspective

The status of industrial relations systems in Europe is particularly diverse. The variety of European industrial relations systems ranges from the Scandinavian model of neo-corporatism, whose features include strong unions and centralised collective bargaining, to the pluralist and conflictual systems of Southern Europe, including France, passing from the co-determination systems of Germany and Austria and the newly established systems of the Eastern European countries, which are characterised by high degrees of deregulation and decentralisation.[1] Such variety is also reflected in the role of labour law. The relevance of the legal framework differs between systems in which collective bargaining is centralised, systems in which the works councils have a prominent role, and systems that are characterised

[1] Colin Crouch, "National Varieties of Labour Market Exposure" in Glenn Morgan & Richard Whitley (eds), *Capitalisms and Capitalism in the Twenty-first Century* (Oxford University Press 2012) 91–116; José A. Alemán, *Labor Relations in New Democracies. East Asia, Latin America, and Europe* (Palgrave Macmillian 2010) 15–16.

by a liberal voluntarism in collective bargaining.[2] Often, however, the variety of labour law systems derives from the historical and socio-economic contexts. As Deakin and Njoya emphasise, '[d]ivergence across labor law systems is in part the legacy of the common law/civil law divide, but it also reflects variations in the timing of industrialization, the forms of worker organization and the nature of industrial enterprise in different countries'.[3]

In a wide comparative perspective, Italy and Sweden differ profoundly. The classification operated by Esping-Andersen, as regards the different types of welfare states, places Italy and Sweden on opposite poles. According to his analysis, Italy belongs to the corporatist and conservative cluster-regime, characterised by an attribution of social rights based on class and passively received by the citizens. Sweden is instead included among the few countries having a welfare system inspired by the principles of universalism and de-commodification of social rights. Social-democratic parties are the social forces in this latter regime, whereas the former is led by conservative forces such as the Church.[4] In these contexts, industrial relations play different roles: in Sweden, the industrial relations actors collaborate to the establishment of an advanced welfare regime; whereas in Italy, industrial relations are a conflictual field, due to a conservative outlook that sees unions as subversive actors.[5]

In the work by Hall and Soskice, Sweden is included among those countries having a coordinated market economy, which implies that industrial relations are characterised by a high level of cooperation between companies and unions and by centralised organisations and wage-setting mechanisms. By contrast, Italy is placed among those countries having a mixed system between the liberal market economy and the coordinated market economy. This means that the functioning of the economy is not completely left to market forces, as in liberal economies, but the level of cooperation between the social and economic actors is not as high as in the coordinated market economies. Hall and Soskice note that the Italian system

[2] Simon Deakin & Wanjiru Njoya, "The Legal Framework of Employment Relations" in Paul Blyton & Nicolas Bacon & Jack Fiorito & Edmund Heery (eds), *The Sage Handbook of Industrial Relations* (Sage 2008) 284–304, 295.

[3] Deakin & Njoya in Blyton & Bacon & Fiorito & Heery (2008) 301.

[4] Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity Press 1990) 25. The other countries included in the corporatist welfare regime are Germany, France, and Austria. Sweden is instead associated with the other Scandinavian countries. The third type of welfare regime identified by Esping-Andersen is the liberal welfare regime, in which welfare is seen as an alternative to work and to receive social benefits is stigmatised in the name of a work ethic. In the liberal regime, the attribution of social rights is usually led by social insurance and associated with low income or unemployed categories of citizens.

[5] Esping-Anderson (1990) 30.

belongs to what they define as a 'Mediterranean model' characterised by the extensive intervention of the State in terms of economic aids to companies.[6]

The differentiation operated by Marginson and Sisson locates Italy and Sweden in different places and indicates why a comparison between the countries is appealing. In their comparative overview, Italy is included among the 'Latin' countries, but as an exception: the primary role of the State in those systems is mitigated in Italy by the relevance attributed to collective bargaining. Sweden is instead indicated as belonging to the Nordic model, where collective bargaining prevails over legal regulations. Other differences relate to the less extensive role played by information rights in the 'Latin' countries compared with the Nordic ones and on the peace obligation, which is more stringent in Nordic countries. However, Marginson and Sisson also stress that Italy and Sweden present some common features concerning multi-employer collective bargaining and workplace representation, which entails a strong role for trade unions.[7]

Statutory regulations in industrial relations have different weights in the two countries. In Italy there is no formal statutory regulation other than the constitutional provisions and the 1970 Workers' Statute, which protects the exercise of trade union activities at the workplace. By contrast, in Sweden several aspects of industrial relations are regulated by the 1976 Co-determination Act. The comparative overview on collective bargaining operated by Sciarra stresses that, despite being inspired by different approaches, the two systems are characterised by a wide principle of autonomy guiding the relationship between law and collective bargaining. Rules and conditions in industrial relations and employment are primarily set through collective bargaining, for which legal regulation offers a protective and supportive framework.[8] Sciarra emphasises that such a relationship leaves a crucial role to the judicial actors in terms of ensuring the actual enforcement of collective agreements.[9] In both systems the definition of rules on collective bargaining has occurred through the joint contribution of industrial relations, case law and statutory regulations.

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[6] Peter A. Hall & David Soskice, "An Introduction to Varieties of Capitalism" in Peter A Hall & David Soskice (eds), *Varieties of Capitalism. The Institutional Foundations of Comparative Advantage* (Oxford University Press 2001) 1–68, 20–21. The categorisation operated by Hall and Soskice also includes a liberal market economy type in which firms' activities are coordinated almost entirely through market relationships based on supply-demand dynamics (see Ibid., 8). The countries identified as liberal market economy are USA, UK, New Zealand, Canada and Ireland. The countries included among the coordinated market economy are, along with Sweden, Germany, Japan, Switzerland, Belgium, Denmark, Norway, Finland, the Netherlands and Austria. The 'mixed' or 'Mediterranean' type includes, along with Italy, Turkey, Portugal, Spain, France and Greece.

[7] Marginson & Sisson (2006) 42.

[8] Silvana Sciarra, "The Evolution of Collective Bargaining: Observations on a Comparison in the Countries of the European Union" (2007) 29 *Comparative Labor Law & Policy Journal*, 1–28.

[9] Ibid., 20.

The relationship between industrial relations and law in the two countries share some similarities but differ in terms of results. The historical-analytical framework on the relationship between trade union activism and the law outlined by Jacobs includes Italy by stressing how the Italian trade union movement went through the phases of repression, toleration, and recognition by law.[10] After their legal recognition, which took place at the end of the 19th and beginning of the 20th centuries,[11] the fascist corporatist system repressed the autonomous development of industrial relations. All industrial relations aspects were regulated within the public law sphere, so that the juridification was extreme and the weight of legal regulation unbearable.[12] The Republican State, instead, set the bases for a complete recognition of trade union activities on strong and supportive constitutional grounds.

Although not included in Jacobs's analysis, a similar path can be observed in Sweden, where trade union associations and strikes were initially banned. The main advancements were achieved in the so-called 'liberal era', during which collective labour relations were conceived as mechanisms for fixing labour prices and then tolerated – to use the same terminology used by Jacobs – as part of freedom of contract between workers and employers.[13] In the early 20th century the newly established practice of signing collective agreements, combined with the absence of formal recognition, necessitated the establishment of rules for settling labour disputes.[14] However, those formal rules were drafted by the labour market parties themselves, whereas the legislation reacted to the autonomous developments of industrial relations by codifying the achievements reached by the parties.[15] In this regard, Adlercreutz affirmed that in the legal construction of collective bargaining, the 'legal plane' was secondary.[16]

In his follow-up analysis of the legal evolution of collective labour relations in the post-WWII Europe, Jacobs observes that Italy belongs to those countries that

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[10] Antoine Jacobs, "Collective Self-regulation" in Bob Hepple (ed.) *The Making of Labour Law in Europe. A Comparative Study of Nine Countries up to 1945* (Hart 2006) 193–241. For the developments in Italian labour law, see Lorenzo Gaeta, *Il lavoro e il diritto: un percorso storico* (Cacucci 2013).

[11] See Paolo Marchetti, *L'essere collettivo. L'emersione della nozione di collettivo nella scienza giuridica italiana tra contratto di lavoro e Stato sindacale* (Giuffrè 2006) 13.

[12] Gino Giugni, "Juridification: Labor Relations in Italy" in Teubner (1987) 191–208, 193.

[13] See Axel Adlercreutz, *Kollektivavtalet. Studier över dess tillkomsthistoria* (Berlingska Boktryckeriet 1954) 97.

[14] See Christer Lundh, "Medlings- och skiljeförfarande i Sverige före 1906" in Anne-Marie Egerö & Birgitta Nyström (eds), *Hundra år av medling i Sverige. Historik, analys och framtidsvisioner* (Medlinginstitutet 2006) 8–31.

[15] An example is the 1928 Collective Agreement Act (1928 *Lag om kollektivavtal*), which incorporated the collective agreement into the legal system and established a labour court (*Arbetsdomstolen*) with the task of dealing with labour disputes concerning the application and interpretation of collective agreements and the regulation of non-strike clauses.

[16] Axel Adlercreutz, "The Rise and Development of the Collective Agreement" (1958) 2 *Scandinavian Studies in Law*, 9–53, 13.

exited from dictatorship and therefore needed a strong legal framework in order to secure the autonomy of labour market parties. By contrast, Sweden is included among the other Nordic countries in which such autonomy was already achieved and therefore had no need of a legislative intervention.[17] However, Jacobs also stresses that both Italy and Sweden have experienced a path of 'integration' of the collective bargaining system within the legal system.[18] Mückenberger also highlights similar paths in the two countries as regards workers' representation at the workplace. Although from different historical and trade union backgrounds, the outcomes of the 1970s legislation in both countries contributed to guaranteeing workplace activism by establishing a single-channel workers' representation system.[19]

Further common features emerge. For instance, Crouch's detailed historical overview of the formation and development of the industrial relations systems in the European countries highlights how Sweden and Italy share a common tendency towards centralisation. In Crouch's analysis Sweden is portrayed as a system of extreme neo-corporatism accompanied by strong unions at central and workplace levels. Crouch describes this model in terms of 'articulation' rather than proper centralisation, which he associates with authoritarian regimes. In Italy the strong union activism at the workplace level and the tendencies towards centralisation have not gone hand in hand, meaning that the industrial relations system has not been a central factor in stabilising the national economy.[20] However, the centralisation trends of the two systems have been overturned in the last two decades. Both systems have experienced a process of decentralisation, albeit via different paths and leading to different outcomes.

The aggregated data show a substantial – but not formal – similarity in terms of union membership and collective bargaining coverage. In line with the Nordic union tradition, Sweden has a very high union density rate: in 2015, the total rate of union density has been calculated around 69%,[21] divided between the 64% in the private sector and 81% in the public sector.[22] Nevertheless, the rate varies noticeably among sectors; it is much lower in the marginalised sectors of economy, such as restaurants,

[17] See Jacobs in Hepple & Veneziani (2009) 201–31.

[18] Jacobs also observes a further similarity concerning the late developments, which in both countries are consistent with a European trend in 'symptoms of containment' related to an increased dominance of the economic sphere over the social one enacted through legal intervention. Ibid., 229–31.

[19] Ulrich Mückenberger, "Workers' Representation at the Plant and Enterprise Level", in Hepple & Veneziani (2009) 232–62.

[20] Crouch (1993) 284.

[21] Medlingsinstitutet, *Avtalsrörelsen och lönebildningen* (2016), 220. The OECD indicates a union density rate of 67.3% for 2014, see OECD StatExtracts, available at https://stats.oecd.org/index.aspx?queryid=350, accessed 29 June 2017.

[22] Medlingsinstitutet (2016) 220.

hotels and bars, as well as among younger workers and migrant workers.[23] In Italy the total trade union density rate is calculated around 37% of the workforce, which remains the highest among the countries of Southern Europe.[24] However, the rate is lower among younger workers, who, along with the high rate of unemployment, also experience a progressive disaffection towards the trade union, which is seen as incapable of adequately representing those employed in flexible and atypical (i.e. precarious) jobs.[25]

The membership rate on the employers' side is also high in both countries: in Sweden 82% of employees in the private sector are employed by a unionised employer;[26] whereas in Italy the rate of employers' organisations density is around 58%.[27] In both countries, and particularly in Sweden, the membership rate on the employers' side is higher than the membership rate on the employees' side: these data demonstrate a certain interest for the employers to be members of an association. The relevance of union affiliation is also mirrored in the collective agreement coverage rate. In Italy it has been estimated that around 80% of employees are covered by a collective agreement (85% of employees, however, receive the wage set in collective agreements).[28] In 2015 the percentage of employees covered by a collective agreement in Sweden is around 90%.[29]

Both systems, although on different bases, succeed in ensuring a high coverage of collective bargaining, despite the shared lack of *erga omnes* efficacy for the collective agreements. The legal systems do not formally include the collective agreement in the hierarchy of legal sources, which is deemed as a private contract. In Italy Art. 1 of the introductory section of the civil code lists the acts that constitute sources of law: statutory acts (*leggi*), administrative acts (*regolamenti*), and customs (*usi*), which are subordinated to the Constitution.[30] Originally the provision also

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[23] Niklas Selberg, "The Laws of 'Illegal' Migrants and Dilemmas in Interest Representation on Segmented Labor Market: À propos 'Irregular' Migrants in Sweden" (2014) 35 *Comparative Labor Law & Policy Journal*, 247–88; Nedžad Mešić & Charles Woolfson, "Roma Berry Pickers: Sweden: Economic Crisis and New Contingent of the Austeritat" (2015) 21 *Transfer*, 37–50.

[24] Jelle Visser, "ICTWSS Data base. Version 5.0" (Amsterdam Institute for Advanced Labour Studies, 2015). See also OECD StatExtracts, available at https://stats.oecd.org/index.aspx?queryid=350, accessed 29 June 2017.

[25] Cesare Minghini & Federico Chicchi, *Quali alleanze? Giovani e sindacato di fronte alla frantumazione del lavoro* (Ediesse 2011).

[26] Medlingsinstitutet (2016) 220.

[27] See Visser (2015).

[28] See Visser (2015); also Eurofound, Italy: industrial relations profile, available at http://www.eurofound.europa.eu/ observatories/eurwork/comparative-information/nationalcontributions/italy/italy-industrial-relations-profileand

[29] In the private sector the coverage is around 85%, whereas in the public sector it is 100%, see Medlingsinstitutet (2016) 217.

[30] The primacy of the Constitution as legal source is recognised both by the doctrine (see Federico Sorrentino, *Le fonti del diritto* (ECIG 2002) 35–37) and by the constitutional case law (see Corte Cost., 5 giugno 1956, n.1). The primacy of the Constitution is also implicitly stated in the constitutional text

included the corporatist norms that have been removed after the dismantlement of the corporatist system.[31] The so-called *fonte collettiva* (collective source), i.e. the source springing from collective bargaining, is not included, despite the strong role it plays in regulating the employment relationship.[32] Being a private contract, the rules on contract law generally apply to the collective agreements.[33] Unlike Italy, the Swedish legal system does not have a provision listing the legal sources. The hierarchy has been formulated by the doctrine and case law: the Constitution (*grundlagar*) takes primacy as fundamental law,[34] followed by statutory law, including legislation (*lagstiftning* or *lagar*), ordinances (*förordningar*) and agency regulations (*föreskrifter*). Legal sources are also the legislative preparatory works (*förarbeten* or *travaux préparatoires*), case law (*rättpraxis*),[35] and the general principles of law (*allmänna rättsprinciper*), which are subsidiary sources of law. The list is closed by custom and usage, and the doctrine itself.[36]

3.2.2. Origin and evolution of industrial relations

The economies of both Italy and Sweden industrialised relatively late in comparison to other European countries – mainly in the late 19th century. This aspect has delayed

itself, in the provisions concerning the role and the function of the Constitutional Court in terms of judgement of constitutional legitimacy of legislative acts (Arts 134 and 136 Const.).

[31] The legislation establishing the corporatist system was abrogated already in 1943 by R.D.L. 721/1943, which however explicitly maintained the norms of the civil code in order to preserve the corporatist collective agreements in force.

[32] See Luigi Mariucci, "Le fonti del diritto del lavoro" (2008) 3 *Rivista giuridica del lavoro e della previdenza sociale*, 323–61. In addition, the employment relationship is also directly regulated by the individual contract and also, to a very limited extent, by customs, see Luigi Montuschi, "Il sistema generale delle fonti giuslavoristiche" in Mattia Persiani (ed), *Le fonti del diritto del lavoro* (Cedam 2010) 395–415, 413. This complexity has been portrayed as 'normative polycentrism', see Paolo Tosi & Fiorella Lunardon, *Introduzione al diritto del lavoro. 1. L'ordinamento italiano* (Laterza 2004) 39.

[33] Cass., 1 luglio 1998, n.6427.

[34] The *grundlagar* (literally, fundamental laws) consist of four acts: the 1974 Instruments of Government (*Regeringsformen*), which sets the general principles and the fundamental rights of the citizens; the 1810 Act of Succession (*Successionordiningen*); the 1949 Act on Freedom of the Press (*Tryckfrihetsförordningen*); the 1991 Fundamental Law on Freedom of Expression (*Yttrandefrihetsgrundlagen*).

[35] A key role in the system of labour law source is assigned to the case law of the Labour Court (*Arbetsdomstolen*), whose composition and functioning of the Court are defined by the 1974 Labour Disputes Act (SFS 1974:371 *Lag om rättegången i arbetstvister*). The Court has a broad jurisdiction, which includes both individual and collective labour disputes on the interpretation and application of collective agreements. It has a tripartite composition in which labour market parties' representatives (which hold the majority of seats), legally trained judges, and independent labour market experts sit together. The Labour Court is the first and only instance in cases filed by labour market organisations. Usually no appeal is available. The Court functions as an appeal court in cases of individual complaints not supported by a trade union, which are dealt with in the first instance by District Courts.

[36] See Aleksander Peczenik, *On Law and Reason* (Springer 2009) 266.

the emergence of a collective dimension of labour relations,[37] whose originating factors have been industrial warfare and conflicts in workplaces.[38] In accordance with the autonomous emergence of labour organising, in both countries the relations between organised employees and employer(s) have been considered as private relations geared towards finding a compromise between the parties' economic interests. Given also the shared absence of a statutory minimum wage, the principle of collective autonomy has strongly influenced the development of collective labour law and industrial relations, which has evolved with little State involvement.

In Italy, the understanding of industrial relations as private relations has been strengthened by two intertwined factors: firstly, by the pioneering theorisation of trade unions as bodies raised outside the State's sphere and actually competing with it in relation to the regulation of employment;[39] secondly, by the reaction to the corporatist experience of the fascist regime. The corporatist system imposed the recognition of labour market parties as public law bodies and statutorily regulated all aspects of industrial relations.[40] The repression of trade union activities and the criminalisation of strikes were central aspects of corporatism,[41] which did not conceive trade union pluralism or autonomous collective bargaining.[42] On the contrary, trade union pluralism, freedom of association, and the strike form the

[37] For the Italian context, see Carlo Vallauri, *Storia dei sindacati nella società italiana*, (Ediesse 2008); for the Swedish one, see Axel Adlercreutz, "Some Features of Swedish Collective Labour Law" (1947) 10 *The Modern Law Review*, 137–58; Niklas Bruun, "The Nordic Model for Trade Union Activity" in Niklas Bruun et al. (eds), *The Nordic Labour Relations Model* (Aldershot 1992) 1–45, 10.

[38] See Lorenzo Zoppoli, "Contrattazione collettiva e unità d'Italia" Working Paper CSDLE Massimo D'Antona, IT – 130/2011. In Italy, the phenomenon of labour organising essentially developed in industrialised areas and the collective organising of labour was a response to the organised action of capital, see Vallauri (2008) 43; in Sweden, the system of corporative guilds based on self-regulation of trades was replaced in the late 19th century by a system of free trade in which the strikes were, however, illegal, see Adlercreutz (1958) 22. On the labour conflicts that occurred in Sweden between the end of the 19th and the beginning of the 20th centuries, see Svante Nycander, *Makten över arbetsmarknaden. Ett perspektiv på Sveriges 1900-tal*, (SNS Förlag 2002) 17.

[39] The organising of economic interests that motivated the formation of new collective bodies was seen to undermine the supremacy of the State in terms of legal production and sovereignty over private relationships. See Romano (1969).

[40] The 1926 Charter of Labour, the ideological manifesto of the corporatist regime, stated that trade unions and employers' associations should jointly contribute to the welfare and growth of the national economy, see Francesco Carnelutti, *Sindacalismo* (Diritto del Lavoro 1927).

[41] The corporatist regime was enacted through Act 563/1926, which recognised only the fascist unions as legally representative of the workers. The act followed the so-called *Patto di Palazzo Vidoni*, an agreement signed between the leaders of the fascist unions and Confindustria, which eliminated free trade unionism and introduced the mandatory judicial intervention in collective labour disputes. The institutionalisation of trade unions and employers' associations as State's bodies reached the acme with Act 129/1939 establishing *the Camera dei fasci e delle corporazioni*, replacing the elected Chambers of Deputies, in which appointed and non-elected members of the fascist trade unions and employers' association jointly participated in the legislative activity of the State.

[42] See Giuseppe Pera, "Relazione per l'Italia" in Lauralba Bellardi (ed), *Dallo stato corporativo alla libertà sindacale. Esperienze comparate* (Franco Angeli 1985) 13–24.

bedrock of the industrial relations system envisioned by the Republican Constitution adopted in 1948.[43] Art. 39.1 and Art. 40 of the Italian Constitution recognise freedom of trade union association and the right to strike, respectively: these provisions have been interpreted by the Constitutional Court as 'logically connected' on account of the 'unitary expression of the new system'.[44] The autonomy of labour relations is thus grounded on constitutional provisions which 'shield' the field of activities of labour market parties from interference on the part of the public authority.

The other core aspects of collective bargaining are defined in a constitutional provision – Art. 39 – which requires the trade unions to register in public in order to be able to accede to the negotiations and sign an *erga omnes* collective agreement. Due to an evident corporatist legacy and resistance on the part of the trade union movement,[45] the provision has never been put into practice.[46] Nevertheless, it functions as a 'touchstone': it impedes the adoption of legislation on trade union matters conflicting with the norm.[47] On the basis of Art. 39 Const., the Constitutional Court has operated a crucial distinction about the collective agreement, which has reaffirmed the private nature of collective labour relations. Given the non-applied constitutional procedure set in order to achieve the *erga omnes* collective agreement, the Court specified that collective agreements are private-law contracts (*contratti collettivi di diritto civile*).[48] Being a private contract, the parties shall rely upon the provision of the civil code concerning the contractual freedom of the parties;[49] consequently, they enjoy a wide autonomy in defining its scope.[50] Hence collective autonomy is an expression of private autonomy, and industrial relations are private relations.

Nevertheless, the State, through the action of the government, has played an important role in the industrial relations arena, particularly in periods of crisis. The intervention of the government has usually tried to foster and promote labour market

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[43] Gian Guido Balandi, "From Corporatism to Freedom of Association: A Note About Italy" (2011) 32 *Comparative Labour Law and Policy Journal*, 925–32.

[44] Corte Cost., 5 aprile 1960, n.26.

[45] CISL and UIL refused to enact the norm on account of their small number of members, which would have relegated them to a minor role in the phases of negotiations, since the procedure sets out that the negotations should be conduted on a unitary basis by a trade union representing proportionally the different industry federations. See Gino Giugni, "Art 39" in Giuseppe Branca (ed), *Commentario della Costituzione. Rapporti Economici* (Zanichelli 1979) 257–88, 258–59.

[46] Inter alia, Maria Vittoria Ballestrero, *Diritto sindacale, 4th edizione* (Giappichelli 2012) 49–52.

[47] Giugni in Branca (1979) 288.

[48] Nevertheless, the Court recognises that the conclusion of *erga omnes* collective agreements remains a possibility, albeit an abstract one. See Corte Cost., 18 gennaio 1957, n.10.

[49] Art 1322 civil code. According to the provision, the parties can conclude contracts which are not specifically defined as long as they address the realisation of interest worthy of being protected by the legal order. The collective agreements are usually considered to be this kind of 'unspecified contract'. See also Francesco Santoro Passarelli, *Contratto collettivo e norma collettiva* (Il foro Italiano 1949).

[50] See Corte Cost., 19 giugno 1969, n.105; Corte Cost., 8 maggio 1963, n.70.

policies by seeking the support of social partners.[51] The involvement of the government has contributed to increasing the level of centralisation and the degree of institutionalisation of the system, albeit informally.[52] It also set the basis for the adoption of a model of tripartite negotiations called *concertazione sociale* (social concertation), through which government and social partners jointly define labour market policies.[53] A tripartite character is also present in the definition of labour market regulation through the so-called *leggi concertate* (concertated acts) adopted by the Parliament under the form of law decrees[54] on the basis of consultation with the national union confederations and employers' associations. These aspects, although strongly opposed by sectors of the trade union movement as encroaching on the autonomy of industrial relations,[55] became common practice and a specific feature of the Italian industrial relations system[56] – also in conjunction with the consent expressed by the Constitutional Court that rejected any claims of unconstitutionality.[57]

The peak of social concertation was reached in the early 1990s, when in conjunction with the collapse of the political system due to a series of corruption scandals, the social partners acquired a prominent role in defining the economic policies that Italy needed in order to join the upcoming European common currency.[58] In this context, in 1993 the parties adopted a tripartite Joint Protocol that

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[51] Lauralba Bellardi, *Concertazione e contrattazione. Soggetti, poteri e dinamiche regolative* (Cacucci 1999) 19.

[52] Gian Primo Cella & Tiziano Treu, "La contrattazione collettiva" in Gian Primo Cella & Tiziano Treu (eds), *Relazioni industriali. Manuale per l'analisi dell'esperienza italiana* (Il Mulino 1984) 157–214, 165; Maurizio Ricciardi, *La parabola. Ascesa e declino della contrattazione collettiva in Italia* (Clueb 2010) 18; Gian Primo Cella & Tiziano Treu, *Relazioni industriali e contrattazione collettiva* (Il Mulino 2009) 81.

[53] The income policies introduced through social concertation mainly concerned the definition of the adjustment index of salaries to inflation and the cost of living. For an historical and political overview, see Gino Giugni, *La lunga marcia della concertazione sociale* (Il Mulino 2003); see also Edoardo Ghera, "La pratica della concertazione in Italia" (1999) 3 *Quaderni Costituzionali*, 501–21.

[54] The government can issue these provisional acts on the basis of urgency and emergency, which must be converted into ordinary legislation by the Parliament within 60 days, otherwise they lose *ex tunc* their efficacy (Art 77 Const.).

[55] The CGIL opposed this practice as introducing elements of neo-corporatism, see Salvo Leonardi, "Autonomia e unità nel sindacalismo italiano: un *excursus* storico" (2003) 17 *Lavoro e Diritto*, 633–72, 654–55.

[56] The Italian way to the establishment of this model caught the attention of international onlookers, see for instance, Gian Primo Cella, "Between Conflict and Institutionalization: Italian Industrial Relations in the 1980s and Early 1990s" (1995) 1 *European Journal of Industrial Relations*, 385–404; Serafino Negrelli & Valeria Pulignano, "Change in Contemporary Italy's Social Concertation" (2008) 39 *Industrial Relations Journal*, 63–77.

[57] Corte Cost., 6 febbraio 1985, n.34. The case concerned the adoption of an act eliminating the so-called scala mobile, which was the automatic adjustment of salaries to inflation. See Bellardi (1999) 40.

[58] See also Marino Regini, "Between Deregulation and Social Pacts: The Responses of European Economies to Globalization" (2000) 28 *Politics & Society*, 5–33.

aimed at introducing elements of institutionalisation in order to increase the efficiency and rationality of the system.[59] The fate of social concertation, however, has depended on the colour of the government. Whereas the centre-left coalitions that won the elections in 1996 and 2006 tried to involve social partners in drafting reforms concerning labour market regulation, the right-wing governments formed after the 1994, 2001 and 2008 elections have been much more reluctant to use such a practice. In the period between 2001 and 2006, the formula '*concertazione sociale*' was replaced with the more EU-friendly term of '*dialogo sociale*' (social dialogue); however, this seldom entailed truly inclusive dialogues.[60] Rather, the right-wing governments challenged the unity of the union movement by favouring the conclusions of separate agreements in 2009 excluding the most representative – and conflictual – confederations from national negotiations in several sectors.[61]

Recent developments show trade union actors struggling against the atrophy of collective autonomy. The interventions of the legislator have destabilised the collective bargaining system, by introducing the possibility for company collective agreements to derogate both from statutory provisions and from higher level collective agreements (Art. 8 of Decree 138/2011 – transformed into Act 148/2011) and the substantial equivalence between sectoral and company collective agreements (Art. 51 of Act 81/2015). The destabilising effect has been partially remedied by the social partners themselves through the adoption of a trio of cross-sectoral agreements mainly dealing with the prerogatives of the company level of collective bargaining and the calculation of representativeness. The 2011 Interconfederal Agreement (*Accordo Interconfederale*), the 2013 Joint Protocol (*Protocollo d'Intesa*) and the 2014 Single Text on Representativeness (*Testo Unico sulla Rappresentanza*), signed unitarily on the trade union side, have nevertheless introduced elements of decentralisation (see Section 3.6.1).

If in the Italian context the private nature of industrial relations was a reaction to the fascist ideology, in Sweden that nature is derived from the socio-economic developments that have contributed to the affirmation of an industrial relations system. The rise of the labour movement was gradual and mainly led by highly skilled workers and craftsmen with the aim of setting a price list for work performances.[62] The freedom of trade in the labour market characterising this early

[59] Giugni (2003) 72, who defined the 1993 Protocol as the 'Constitutional Charter' of Italian industrial relations.

[60] Valeria Pulignano, "Union Struggle and the Crisis of Industrial Relations in Italy" (2003) 27 *Capital & Class*, 1–7; for a comprehensive overview of the effects of the political events in the 2000s on the industrial relations system, see Ricciardi (2010) 68.

[61] Generally speaking, the right-wing government adopted neo-liberal economic policies, see Ricciardi (2010) 72. Its action was mainly unilateral and authoritative without consulting the social partners, see Lauralba Bellardi, "Dalla concertazione al dialogo sociale: scelte politiche e nuove regole" (2004) 18 *Lavoro e Diritto*, 183–229; Cella & Treu (2009) 66.

[62] Especially within those trades in which high and specialised qualifications were needed and gave the workers considerable bargaining power, such as typographical, painting, and construction sectors,

period allowed workers to organise and struggle in the absence of specific legislation on association and labour market regulation.[63] From the employers' side, the collective agreement was seen as guaranteeing the social peace and a 'fixed price' for labour. From the employees' side, its adoption ensured the application of minimum working standards and prevented downward competition from non-unionised workers.[64] In this sense, the collective agreement in Sweden had an economic origin as a private contract between private parties wishing to fix the conditions of an economic exchange.[65] As such, the system of industrial relations was progressively and autonomously established by the parties themselves. The basic foundations were set through the signing of the 1906 December Compromise (*Decemberkompromissen*), reached in the wake of the developments occurring in the other Nordic countries.[66] A first statutory recognition of the autonomous prerogatives of the parties was already achieved in 1928, through the adoption of a legislative act establishing a Labour Court having jurisdiction on the disputes over the application and interpretation of collective agreements and social peace obligations.[67] Yet the contractual origins of the industrial relations system were later reaffirmed by the conclusion of the so-called Basic Agreement or Saltsjöbaden Agreement (*Huvudavtalet* or *Saltsjöbadensavtalet*), so named after the town in which it was signed in 1938, which recognised the right to strike and the right to negotiate as pillars of an autonomous system.[68] The adoption of the Co-determination Act in 1976 (*Lag om medbestämmande i arbetslivet*, SFS 1976:580)[69]

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see Adlercreutz (1958) 37. On the endurance of the main features of the guild system in the Swedish context, see also Hasselbach (2002), 19.

[63] Moreover, the previous adoption of quite extensive social welfare legislation has been indicated as a factor preventing an overly repressive attitude of the legislative actor towards the emerging organisations of workers, see Bruun in Bruun at al. (1992) 10 and 24.

[64] Adlercreutz (1954) 299.

[65] The definition stated in the 1928 Act on Collective Agreement partially reflected that view: the act defined the collective agreement as 'a contract about conditions which should be observed for the employment of workers, or about the relationship in other respect between the employer and the employee', see Folke Schmidt, *Law and Industrial Relations in Sweden* (Almikvist & Wiksell 1977) 123.

[66] The Swedish organisations followed the example of the Danish context, in which the labour market parties achieved a mutual agreement already in 1899 with the so-called September Compromise (*Semptemberfolig*). A similar development was also experienced in Norway, where, however, the employers were much less hostile to the idea of a social pact with the labour side. A different pattern took shape in Finland, which until 1919 was subject to Russian colonial domination and the evolution of collective labour relations was characterised by a stronger influence of statutory law and by the presence of a powerful Communist trade union. See Hasselbach (2002) 16.

[67] Schmidt (1977) 39.

[68] For an historical overview, see Nycander (2002) 74.

[69] Its adoption came after public discussions on the necessity of having a legal framework for regulating collective negotiations and workplace relations. Both parties were interested: the trade unions for introducing elements of industrial democracy at the workplace; the employers for the ensuing

has ultimately codified the achievements of the industrial relations arena. Thus, industrial relations are private relations, whose autonomous functioning has been recognised and promoted by the legal system.

The early compromise achieved between labour and capital made the direct intervention of the State superfluous.[70] Although the State has refrained from intervening in the regulation of industrial relations, an indirect influence comes from the regulation of social security, which in Sweden is often left to the management of the trade unions.[71] Labour market and industrial relations policies were dealt with autonomously through the Labour Market Council (*Arbetsmarknadsnämnden*), set up by the Basic Agreement.[72] The neutrality of the State contributed in strengthening the social position of labour market parties as keepers of the social peace, protectors of the general interest and policy-makers in the field of employment.[73] In this context, the role of the State was central as regards the maintenance of high standards of social services, such as education, healthcare and housing.[74]

The Swedish system has been defined as 'the archetypal case of corporatism, marked by centralized and coordinated bargaining between the peak organizations of labour and capital'.[75] The cooperation between labour market parties has been particularly tight in times of crisis, as for instance in the early 1980s, when an economic crisis required the social partners to coordinate labour market policies in order to provide for a more efficient framework for pursuing collective negotiations at company level.[76] The outcome was the so-called Development Agreement (*Utvecklingsavtalet*, whose full name is Agreement on Efficiency and Participation)

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cooperation at company level. See Örjan Edström, *MBL och Utvecklingsavtalet: Samverkansförhandlingar i företag* (Fritze 1994) 108–09.

[70] Anders Kjellberg, "The Swedish Model of Industrial Relations: Self-regulation and Combined Centralisation-Decentralisation" in Craig Phelan (ed), *Trade Unionism Since 1945: Towards a Global History* (Peter Lang 2009) 155–98, 157.

[71] In Sweden, unemployment funds are run by the trade unions and the fees to be paid in order to gain access to the funds are usually included in the union membership fees (the so-called Ghent system). Anders Kjellberg, "Il sistema Ghent in Svezia e i sindacati sotto pressione" (2008) 3 *Economia & Lavoro*, 129–54; also Anders Kjellgerg, "Trade Unions and Collective Agreements in a Changing World" in Annette Thörnquist & Åsa-Karin Engstrand (eds), *Precarious Employment in Perspective: Old and New Challenges to Working Conditions in Sweden* (Peter Lang 2011) 47–100, 49.

[72] 1938 Basic Agreement, Chapter I, Arts 1 and 2. The Council functioned as an arbitration body since the parties did not recognise the jurisdiction of the Labour Court, see Axel Adlercreutz & Birgitta Nyström, *Labour Law in Sweden* (Kluwer 2010) 44–45.

[73] See Stig Gustafsson, "The Swedish Industrial Relations System" (1974) 37 *The Modern Law Review*, 627–42, 629.

[74] See Fredrik Movitz & Åke Sandberg, "Contested Models: Productive Welfare and Solidaristic Individualism" in Åke Sandberg (ed), *Nordic Lights: Work, Management and Welfare in Scandinavia* (SNS Förlag 2013) 31–90, 44–46.

[75] Lucio Baccaro & Chris Howell, "A Common Neoliberal Trajectory: The Transformation of Industrial Relations in Advanced Capitalism" (2011) 39 *Politics & Society*, 521–63, 543.

[76] These adjustments were needed in order for Sweden to join the EU, see Olle Djerf, "Lönebildning i ny ekonomisk-politisk regim" in Egerö & Nyström (2006) 97–112.

signed in 1982, which set rules for company negotiations on managerial decisions.[77] Through this agreement, the trade unions accepted aspects of business flexibility and the employers agreed on promoting training and formation so that the employees could match the technological changes.[78] Further cooperation, encouraged by the Social-Democratic government, was at the basis of the so-called 1997 Industrial Agreement (*Industriavtal*, or *Samarbetabvtal om Industriell Utveckling och Lönebildning*, Agreement on Industrial Development and Wage Formation), which introduced elements of decentralisation in the centralised wage-setting mechanism by attributing a central role to the sectoral level of bargaining.[79]

In both systems, the autonomy of industrial relations has been supported and secured by the adoption of 'auxiliary legislation'. In Italy, the 1970 Workers' Statute (L. 300/1970 *Statuto dei Lavoratori*) favoured the stabilisation of workplaces by reinforcing the 'institutional presence' of trade unions in workplaces.[80] Its impact on the evolution of the system of industrial relations has been extremely significant as a link between the self-regulated system of industrial relations and the legal order of the State.[81] In Sweden, the aforementioned 1976 Co-determination Act covers almost all aspects of industrial relations. Both its scope and relevance are vast[82] as it enshrines collective labour rights and defines procedures, functions, and purposes of collective bargaining at different levels.

[77] Edström (1994) 182. The joint regulation at workplace level is referred to in the agreement as a form of employees' participation, see 1992 Agreement on Efficiency and Participation, Section 8, Item 1.

[78] See Edström (1994) 174. The agreement restored the cooperation between labour market parties by ending a phase of conflict, see Klas Levinson, "Codetermination in Sweden: From Separation to Integration" (1996) 17 *Economic and Industrial Democracy*, 131–42, 133.

[79] Nils Elvander, "The Labour Market Regimes in the Nordic Countries: A Comparative Analysis" (2002a) 25 *Scandinavian Political Studies*, 117–37, 129–30; Nils Elvander, "The New Swedish Regime for Collective Bargaining and Conflict Resolution" (2002b) 8 *European Journal of Industrial Relations*, 197–216.

[80] Bruno Veneziani, "Industrial Democracy in Italy" (1987) 17 *International Studies of Management & Organisation*, 69–77, 70–73.

[81] The absence of a structured collective bargaining framework favoured the emergence of 'uncontrolled' company negotiations, which the Workers' Statute helped to regulate by providing a legal framework that encompassed company collective bargaining, see Mario Rusciano, *Contratto collettivo e autonomia collettiva* (Utet 2003) 115.

[82] The ratio is to include every kind of subordinate employment in the realm of collective negotiations. The Act applies to 'the relationship between employer and employee', where the employee is defined as a person who performs a work for another person – the employer – who benefits from that work. SFS 1976:580, Section 1.

3.2.3. The collective bargaining system and the labour market parties

Although similar in both countries, the structures of collective bargaining systems differ as to the relevance attributed to the levels of negotiations and the degree and dynamics of decentralisation. In Italy, the prevalence of collective bargaining at sectoral level favoured the progressive establishment of a two-level structure in which the company level of bargaining (*contrattazione di secondo livello*, second-level bargaining) complements the sectoral level bargaining (*contrattazione di primo livello*, first-level bargaining). Emerging from years of practice in sectoral collective bargaining, this two-level framework has been formalised in the 1993 Joint Protocol, which recognised the pivotal role of sectoral bargaining and attributed a supplementary role to decentralised bargaining at company level or alternatively at local level.[83] The intersectoral level of negotiations has played a fundamental role in defining labour market and income policies, but its relevance in defining the 'rules of the game' in the industrial relations field was delayed and mainly provided for the codification of practices already affirmed in sectoral bargaining.[84] The sectoral level has been central to the definition of wages and employment conditions, although its centrality is nowadays downplayed in favour of the company level.

The centralised structure of the Swedish system has instead meant a more prominent role for the intersectoral level. The relevance of intersectoral negotiations, with regard to defining the 'rules of the game', dates back to the 1938 Basic Agreement. This level of bargaining has also been the primary mechanism of minimum wage-setting until the mid-1990s, when the abandonment of the Labour Market Council by the employers' association shifted this function to the sectoral level.[85] However, the company level has played a central role since the 1938 Basic

[83] Bellardi (1999) 108. In those sectors characterised by the presence of small-sized companies, such as the agricultural sector, the parties choose to pursue decentralised bargaining at the local level in the geographical area within, however, the boundaries set by the sectoral collective agreement, see Bellardi (1999) 183.

[84] As for instance the practice of complementary company collective bargaining, see Gino Giugni, "Articulated Bargaining in Italy" in Allan Flanders (ed), *Collective Bargaining: Selected Readings* (Penguin 1971) 267–85.

[85] On the framework for wage bargaining, see Schmidt (1977) 27. See also Klas Levinson, "Codetermination in Sweden: Myth and Reality" (2000) 21 *Economic and Industrial Democracy*, 457–73; and Sofia Murhem, *Turning to Europe: A New Swedish Industrial Relations Regime in the 1990s* (Acta Universitatis Upsaliensis 2003), 23. Also Kerstin Ahlberg & Niklas Bruun, "Sweden: Transition Through Collective Bargaining" in Thomas Blanke & Edgar Rose (eds), *Collective Bargaining and Wages in Comparative Perspective: Germany, France, the Netherlands, Sweden and the United Kingdom* (Kluwer 2005) 117–43, 124. The decision also had the consequence of modifying the core activity of SN, which assumed a lobbying attitude to replace the traditional role of the bargaining party, see Kjellberg in Phelan (2009) 183.

Agreement as an instrument of employee participation.[86] The model established in the early stages provided for a close coordination between the central level and the workplace level, which has been upheld by the Co-determination Act.[87] In the last two decades, however, the Swedish system has experienced a process of decentralisation and individualisation which has increased the relevance of the company level of bargaining and modified the function of the sectoral collective agreement as a framework agreement setting minimum standards to be supplemented by the company level.[88]

In both systems, the minimum working and employment conditions are set by the sectoral agreement and complemented by company agreements. However, the Swedish system appears more inclined to 'metabolise' a process of decentralisation, on account of its historically centralised operation and the trade union structure based on the hierarchy between the industry and the local branches.

A profound difference concerns the degree of trade union pluralism. In Italy, the unitary trade union confederation established after the collapse of the corporatist system – CGIL (*Confederazione Generale Italiana del Lavoro*) – encompassing the three souls of the movement – the communist, the social-Catholic and the social democrat – was shortlived.[89] Already in 1948 and in 1949 the Catholics and the social democrats sorted out and established their own unions, respectively the CISL (*Confederazione Italiana Sindacati dei Lavoratori*) and the UIL (*Unione Italiana del Lavoro*).[90] The main point of division concerned the views on the role of the trade union: the majoritarian Marxist view of the CGIL, which saw the trade union as representing the entirety of the working class and functioning as a 'transmission belt' between the workers and the Party, could not stand alongside the Catholic view, which emphasised instead the associative moment and the function of trade unions as stabilising political and economic actors.[91] This division persists to this day, but in addition several radical 'rank and file' unions (Cobas, CUB and USB) emerged in open and radical opposition to the main confederations and are now an

[86] Walter Korpi, "Workplace Bargaining, the Law and Unofficial Strikes: The Case of Sweden" (1978) 16 *British Journal of Industrial Relations*, 355–68.

[87] Anders Bruhn & Anders Kjellberg & Åke Sandberg, "A New World of Work Challenging Swedish Unions" in Sandberg (2013) 126–86, 130–31.

[88] Ahlberg & Bruun in Blanke & Rose (2005) 130.

[89] Walter Tobagi, "L'unità operaia dal patto di Roma alla scissione sindacale" in Alceo Riosa (ed), *Lezioni di storia del movimento operaio* (De Donato 1974) 177–95.

[90] See Valeria Pulignano, "An Historical Analysis of Trade Unionism in Italy: Between Pluralism of Ideas and Unity of Action" in Phelan (2009) 97–120, 102–07. See also Hyman (2001) 144–46.

[91] See Leonardi (2003) 637–38. The split occurred when also the unity front of anti-fascist political parties split, in conjunction with the start of the Cold War. The trade unions have always had a corresponding political party. CGIL had the Communist Party, CSIL the Christian-democrats and UIL the Socialist party.

established part of the Italian trade union movement, mainly active in marginalised sectors and among public sector employees.[92]

CGIL, CISL and UIL are the main unions, identified with the term 'confederations'. In terms of affiliated federations, CGIL has 12 members, CISL 19, and UIL 16. In terms of membership, CGIL is the largest one with its 2,600,516 members, followed by CISL with 2,267,046 members, and Uil with 1,361,868. These numbers respectively correspond to 15%, 13%, and 8% of the total employed workforce.[93] The Italian confederations are organised according to sectors and geographical area. In each branch of industry, they have an affiliated federation, which is then organised at national, regional, local and company level. But the confederations also have representative bodies at national level as well as at local or regional levels, which work in cooperation with the industry federations but outside the plants. For instance, CGIL has its own metallurgic affiliated union federation, Fiom, which is organised at national level, at regional or local level, and at plant level. At the same time, CGIL has a confederal office at national level and offices at local or regional level, which are active throughout the territory.[94] Both confederations and federations allow individual membership.

Workplace employees' representation is ensured through a system combining elements of a double-channel, such as workplace elections for the workplace representative bodies, with elements of a single-channel, such as the exclusion from the elections of those unions that are not parties of collective agreement applied in the company. The Italian system is thus a 'hybrid', in which the union component is particularly relevant,[95] and in which a statutory mechanism of workplace representation ensures to 'underdog' unions the possibility to accede to workplace representation rights.

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[92] They are called 'sindacati di base' ('rank and file' unions or grassroots unions) and were established during the peak of the concertation period in opposition to the main confederations. See Gregor Gall, "Conflict, Militancy and Crisis in Italian Industrial Relations: A Response to Terry" (1994) 25 *Industrial Relations Journal*, 155–57; Richard M. Locke & Lucio Baccaro, "Learning from Past Mistakes? Recent Reforms in Italian Industrial Relations" (1996) 27 *Industrial Relations Journal*, 289–303, 293; Elanor Colleoni & Stefania Marino & Manuela Galetto, "Radical Unionism in Italy – Back to the Future: Fiom and Chainworkers" in Heather Conolly & Lefteris Krestos & Craig Phelan (eds), *Radical Unions in Europe and the Future of Collective Interest Representation* (Peter Lang 2014) 137–55.

[93] The numbers of members for each confederation are reported on their websites (accessed 29 June 2017). I have calculated the density on the basis of the total number of employees reported for 2015 by the National Institute of Statistics (Istat) in its Annual Report. Obviously, the actual data might be slightly different due to mismatches between the years considered for the available data on union membership and the data on the total number of employees.

[94] See Richard M. Locke, "The Resurgence of the Local Union: Industrial Restructuring and Industrial Relations in Italy" (1990) 18 *Politics & Society*, 347–79, 354–55.

[95] Anna Alaimo, "La riforma della rappresentanza aziendale dei lavoratori. Dal sistema duale al doppio canale: itinerari possibili", WP CSDLE Massimo D'Antona, IT – 287/2016.

The main employers' association in the private sector is *Confindustria*, established in 1910 and active at national and regional level as well as under the respective industry associations.[96] In this sense, the organisational structure is similar to trade union confederations.[97] An employer can be a member of both the regional association and the national one, but they may also choose to be a member of just one of them as well as the industry employers' federation and not of the confederation, and vice versa.[98] *Confindustria* is a confederation counting 221 affiliated associations (including territorial associations, sectoral associations and others) and 150,447 companies of different sizes.[99] It mainly represents the affiliated associations in intersectoral negotiations and lobbying activities.[100] Sectoral negotiations are pursued by industry associations with the corresponding union federations. Further associations exist in other sectors, such as *Confartigianato*, *Confagricoltura* or *Confcommercio*,[101] in the artisan, agricultural and retail sectors respectively, mainly unifying the interests of small-scale companies.[102] However, a scattering trend in employers' (but also workers') representation has emerged, which reflects the low institutionalisation of the Italian system and parallels the proliferation of collective agreements in the same sector that hinder the uniform application of employment standards.[103] Finally, in the public sector the employer counterpart is represented by a specialised agency ARAN (*Agenzia per la rappresentanza negoziale delle pubbliche amministrazioni*).[104]

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[96] See Lucio Baccaro & Valeria Pulignano, "Employment Relations in Italy" in Greg J. Bamber & Russell D. Landsbury & Nick Wailes (eds), *International and Comparative Employment Relations: Globalisation and Change* (Sage 2011) 138–68, 148.

[97] Gian Primo Cella, *Il sindacato* (Laterza 1999) 96.

[98] See Paolo Feltrin, "Rappresentatività e rappresentanza delle associazioni datoriali: dati, sfide, problemi" (2011) 4 *Quaderni di Rassegna Sindacale*, 67–89.

[99] Data collected on Confindustria's website, at www.confindustria.it (accessed 29 June 2017). See also Liborio Mattina, "Sfide e prospettive per le organizzazioni imprenditoriali in Italia" (2011) 4 *Quaderni di Rassegna Sindacale*, 91–115, 94.

[100] In recent years, a number of small- and medium-sized enterprises have abandoned Confindustria because of its policy of privileging larger companies, see Lauralba Bellardi, "Il sistema di rappresentanza imprenditoriale e la struttura della contrattazione collettiva" in Mimmo Carrieri & Tiziano Treu (eds), *Verso nuove relazioni industriali* (Il Mulino 2013) 241–75; Stefano Zan, "Segnali di novità nel sistema di rappresentanza degli interessi datoriali in Italia" (2011) 4 *Quaderni di Rassegna Sindacale*, 47–66.

[101] According to their respective websites, Confartigianato has 12 affiliated industry federations; Confagricoltura has 23; and Confcommercio 90; see also Mattina (2011) 94.

[102] Mattina (2011) 94. For the developments of employers' associations, see Bellardi in Carrieri & Treu (2013).

[103] Donata Gottardi, "La contrattazione collettiva tra destrutturazione e ri-regolazione" (2016) 4 *Lavoro e Diritto*, 877–926, 886–87.

[104] The reform that also led to the establishment of a bargaining system for the public sector was introduced with Act 29/1993 entitled 'the rationalisation and revision of public administration organisation and public employment'. See Baccaro & Pulignano in Bamber & Landsbury & Wailes (2011) 158–59.

In Sweden, the central union organisation is LO (*Landsorganisationen i Sverige*) – established in 1898. It organises blue-collar workers and coordinates the activities of sectoral industry federations. The other organisations on the employees' side are: the Swedish Confederation of Professional Employees or TCO (*Tjänstemännens Centralorganisation*), which was founded in 1944 and represents salaried employees in both the private and public sectors,[105] and SACO (*Sveriges Akademikens Centralorganisation*), founded in 1947, which represents academics and graduate professionals. The division of the workforce in terms of blue-collar, white-collar, and professional workers has been described as a 'socially segregated trade union movement'[106] or 'unified unionism',[107] according to an overall or sectoral perspective respectively. This aspect entails a very limited degree of competition among trade unions.[108]

In terms of political affiliations, LO is historically very close to the Social-Democratic Party,[109] whereas the other two tend not to have any political affiliation.[110] In terms of members, LO is the biggest confederation with around 1.3 million members and 14 industry federations affiliated. TCO has around 1 million members and 14 affiliated federations; whereas SACO has around 500,000 members and 22 affiliated federations.[111] The confederations do not have individual membership but affiliate only the sectoral federations, which are organised at both national and local (workplace) levels. Therefore, the individual employee can only be a member of the sectoral federation. For instance, a worker in the construction sector can only be a member of the local branch of the sectoral trade union *Byggnadsarbetareförbundet*, which is affiliated to LO.

Unlike the uncertainty of the Italian system, Sweden has a strict regime of single-channel workers' representation, pivoting around the 'established trade union'

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[105] The current confederation TCO was officially established in 1944, but unions that organised salaried employees already existed. DACO (De anställdas centralorganisation) was founded in 1931 and in 1944 merged with TCO, which was previously established in 1937. See Murhem (2003) 21.

[106] Kjellberg in Thörnquist & Engstrand (2011) 53.

[107] Fahlbeck & Mulder (2009) 18.

[108] Bruhn & Kjellberg & Sandberg in Sandberg (2013) 133.

[109] During the 1930s, the social-democratic stream within LO started a victorious internal ideological campaign against the communist stream, which was particularly strong in some sectoral unions, see Christer Lundh, "Lönekostnader och lönebildningens transaktionskostnader. Kollektivavatlssystemets utveckling i Sverige 1906–1956" in Christer Lundh (ed), *Nya perspektiv på Saltsjöbadsavtalet* (SNS Förlag 2009) 15–41, 35. Until 1991 the membership of the industry federations affiliated to LO provided automatic and mandatory accession to the Social-Democratic Party.

[110] This aspect is seen as a strength of the Swedish trade union movement since it improves the unity of the movement across the divisions between blue- and white-collar workers, see Bruhn & Kjellberg & Sandberg in Sandberg (2013) 138–39.

[111] Medlingsinstitutet (2016) 210.

(*etablerade fackliga organisationen*),[112] i.e. the union that is bound by a collective agreement with the employer. Therefore, the main confederations are, in a certain sense, favoured in terms of workplace representation, since they are also the trade unions that are usually parties of collective agreements applied in the enterprise.[113] In light of this, the privileged position acquired by the established trade unions tends to marginalise employees not affiliated with such unions or non-unionised employees.[114]

The industry federations may, however, decide to set up specific transversal coalitions in order to improve their bargaining power before the employers' representatives on issues concerning different categories of employees, such as working environment, pensions and insurances.[115] Examples include PTK (*Privattjänstemannakartellen*), created by some private sector federations affiliated with TCO and SACO,[116] or OFR (*Offentliganställdas Förhandlingsråd*), formed instead by public sector federations.[117] Minor organisations can also exist, such as the union of managers, called *Ledarna* (formerly known as SALF, *Sveriges Arbetsledareförbund*), which represents managers, foremen, and supervisors in public and private sectors but remains independent and not affiliated with TCO.[118]

The largest minority union historically active in the labour market is SAC (*Sveriges Arbetares Centralorganisation*), which was founded in 1910 and is inspired by a syndicalist ideology and radical strategy of labour conflict.[119] SAC is mostly active in the public sectors, especially in transport and education, but also in the less regulated segments of the labour market, such as the construction and restaurant industries, and among migrant workers.[120] Although it rarely engaged in

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[112] See Anna Christensen, "Den etablerade fackföreningen och minoritetsorganisationen" in Reinhold Fahlbeck & Carl Martin Roos (eds), *Perspektiv på arbetsrätten. Vänbok till Axel Adlercreutz* (Juridiska Föreningen 1983) 9–35.

[113] See Mia Rönnmar, "Workers' Representation and Social Dialogue at Workplace Level – Sweden" (2009) National report to the XIX World Congress of the International Society for Labour Law and Social Security Law, 7.

[114] On the discriminations on the grounds of membership potentially deriving from the privileged position acquired by the established trade unions, see Christensen in Fahlbeck & Roos (1983) 12.

[115] Adlercreutz & Nyström (2010) 173.

[116] The PTK cartel counts 25 industry federations and represents ca. 800,000 employees, see Medlingsinstitutet (2016) 211.

[117] The OFR cartel organises 14 industry federations and represents ca. 550,000 individual members, Medlingsinstitutet (2016) 211.

[118] Adlercreutz & Nyström (2010) 165. Other small independent unions are *Svensk Pilotförening* (the Swedish Pilot Association), *Svensk Lokförarförening* (the Swedish Engine-drivers Association), and *Hamnarbetarförbundet* (the Stevedore Workers Association); see Anders Kjellberg, "Union Density and Special/Professional Unions in Sweden, Studies in Social Policy, Industrial Relations, Working Life and Mobility" (2013) Research reports 2/2013.

[119] Reinhold Fahlbeck, *Nothing Succeeds Like Success: Trade Unionism in Sweden* (Juristförlaget 1999) 20.

[120] Selberg (2014) 265–66.

collective negotiations, and as such never seriously threatened the predominance of LO, the presence of such a rival and more radical union helped shape the attitude and policy of the main confederation.[121]

On the employers' side, the organisation of federations was a reaction to that of the trade unions.[122] Under the initiative of the federation of employers in the metal industry in 1902 the Swedish Employers' Federation, SAF (*Svenska Arbetsgivareföreningen*) was created as the organising association of private sector employers.[123] Now the employers' association is named SN (*Svenskt Näringsliv*) after a merger with another employers' association *Sveriges Industriförbund* occurred in 2001.[124] SN represents 50 industry and employers' associations, which in total comprise 59,666 companies of all sizes.[125] In the public sector, collective negotiations on the employer's side are conducted by *Sveriges Kommuner och Landsting* (Swedish Association of Local Authorities and Regions), which represents 290 municipalities and 20 regions, and by *Arbetsgivarverket* (the Swedish Agency for Government Employers), which includes 250 different agencies and offices in areas related to the public sector.[126]

3.2.4. EU influences on collective labour law and industrial relations

Italy was among the founding countries of the European Economic Community in 1957, whereas Sweden joined the EU only in 1995, without adopting the single currency as Italy had done in 1992. EU membership has obliged legal systems to implement several directives in the field of collective labour law, such as those on collective redundancies, employee information and consultation, and transfer of

[121] In contraposition to the decentralised model of labour activism that privileges independent actions at workplaces supported by SAC, LO pushed for a centralised system of union representation and this policy has been reflected in the legislative developments concerning freedom of association, collective bargaining, and workplace representation, see Bruun in Bruun at al. (1994) 13–14.

[122] The close tie between the Social-Democratic Party and the trade union movement convinced – almost forced – the employers to organise according to a central structure for pursuing a similar strategy of central coordination. See Klas Åmark, "Social Democracy and the Trade Union Movement: Solidarity and the Politics of Self-interests" in Klaus Misgeld & Karl Molin & Klas Åmark (eds), *Creating Social Democracy: A Century of the Social Democratic Labour Party in Sweden* (Pennsylvania State University Press 1992) 67–96.

[123] See Kjellberg in Phelan (2009) 160–61.

[124] The progressive merging of employers' associations is a common trait among the Nordic countries, see Reinhold Fahlbeck, "Industrial Relations and Collective Labour Law: Characteristics, Principles and Basic Features" (2002) 43 *Scandinavian Studies in Law*, 87–133, 112.

[125] Medlingsinstitutet (2016) 207.

[126] Medlingsinstitutet (2016) 208.

undertakings. These elements have influenced the national systems of industrial relations.[127]

Furthermore, the EU legal framework provides for the establishment of a European level of social dialogue on the basis of the provisions of the FEU Treaty. The mechanism of European social dialogue attributes a role to the national social partners, namely, to implement through collective agreement the European framework agreements concluded via an autonomous route. The implementation of the European framework agreement becomes a matter of 'internal discipline' for the affiliated organisations.[128] The chapter on social policy of the TFEU also allows the States to entrust national social partners with the implementation of EU directives. In this case, the State is under obligation to guarantee implementation within a certain time limit.[129]

From a national perspective, the legal obligations deriving from EU legal systems create tensions in the field of industrial relations and collective labour law, especially in countries lacking a mechanism for the *erga omnes* efficacy to collective agreement – as is the case in the Italian and Swedish systems. As for Italy, the mismatch has been highlighted in two cases in which the CJEU condemned Italy for failing to fulfil the obligation of implementation deriving from the directives on collective redundancies.[130] In those cases the Italian legislator refused to intervene in order to attribute some formal requirements to the instrument of collective agreement, as requested by the EU Commission, in order to safeguard the principle of collective autonomy and to comply with the constitutional limits for the conclusion of an *erga omnes* collective agreement.[131] In this sense, the social partners and the government agreed in using the practice of social concertation for the implementation of EU directives in the social policy field.[132]

In general, the low degree of institutionalisation of collective autonomy within the Italian context has limited the influence of the EU. But the trend of decentralisation, which has been supported by the government, the employers' association and part of the trade union movement, received incentives from the supranational actors. The influences on the system of collective bargaining have come from outside the institutional framework of the EU. In 2011 – in the midst of the economic crisis – the European Central Bank wrote to the Italian government that they 'further reform the collective wage bargaining system allowing firm-level agreements to tailor wages and working conditions to firms' specific needs and

[127] For Sweden, see Erik Sjödin, *Ett europeiserat arbetstagarinflytande. En rättslig studie av inflytandedirektivens genomförande i Sverige* (Iustus 2015).

[128] Massimo Roccella & Tiziano Treu, *Diritto del lavoro della Comunità europea* (Cedam 2007) 424.

[129] Art 153.3 TFEU.

[130] Case 91/81 *Commission of the European Communities v Italian Republic* EU:C:1982:212; Case 131/84 *Commission of the European Communities v Italian Republic* EU:C:1985:447.

[131] See Lo Faro (1999) 231.

[132] Patto sociale per lo sviluppo e l'occupazione, 22 Dicembre 1998, p. 5, see Ballestrero (2012) 332.

increasing their relevance with respect to other layers of negotiations'.[133] Accordingly, the ECB welcomed the 2011 Interconfederal Agreement that introduced elements of decentralisation.[134]

In the Swedish context, influences from EU law have had the effect of fostering a debate about the 'internationalisation' or Europeanisation of collective labour law in relation to the so-called *acquis communautaire*.[135] The implementation of EU labour law rules in the Swedish system has given rise to a conflict between a collectivistic system based on collective bargaining and the EU's liberal vision that places individuals – not the collective organisations – at the centre of labour market regulation.[136] A further aspect has concerned the introduction of certain rights of information and consultation for those unions that are not part of a collective agreement.[137] With regard to the issue of implementation of EU directives through national collective bargaining, the Swedish and Italian systems share a lack of *erga omnes* collective agreement.[138] This aspect has been highlighted by the controversial interpretation of the Swedish system of autonomous collective bargaining given by the CJEU in the *Laval* case (see Section 3.6.4). However, in Sweden the problems are mitigated by the extremely high rate of collective bargaining coverage ensured primarily by the high rate of organising density on the employers' side. The principle of collective autonomy, which entails the non-intervention of the State in the regulation of the labour market, is safeguarded by the industrial relations system itself.[139]

3.2.5. The protection of collective labour rights

Freedom of trade union association, the right to collective bargaining and the right to take collective action are the legal pillars of a system of industrial relations. The

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[133] See Mario Napoli, "Osservazioni sul sostegno legislative alla contrattazione aziendale" (2012) 135 *Giornale di diritto del lavoro e di relazioni industriali,* 467–75.

[134] See "Trichet e Draghi: un'azione pressante per ristabilire la fiducia degli investitori", Corriere della Sera, 29 September 2011, at http://www.corriere.it/economia/11_settembre_29/trichet_draghi_inglese_304a5f1e-ea59-11e0-ae06-4da8 66778017.shtml?refresh_ce-cp. See Aristea Koukiadaki & Isabel Távora & Lucio Miguel Martínez, "Joint Regulation and Labour Market Policy in Europe During the Crisis: A Seven-country Comparison" in Aristea Koukiadaki & Isabel Távora & Lucio Martínez Lucio (eds), *Joint Regulation and Labour Market Policy in Europe During the Crisis*, (ETUI 2016) 7–134, 52.

[135] See Birgitta Nyström, "Europeiseringen av den svenska arbetsrätten" in Birgitta Nyström & Örjan Edström & Jonas Malmberg (eds), *Nedslag i den nya arbetsrätten* (Liber 2012) 9–31.

[136] Rönnmar (2009) 5.

[137] Mia Rönnmar, "Information, Consultation and Workers Participation – An Aspect of the EU Industrial Relations from the Swedish Point of View" in Rönnmar (2008) 15–39, 36; Sjödin (2015).

[138] Ruth Nielsen, "Europeanization of Nordic Labour Law" (2002) 43 *Scandinavian Studies in Law*, 37–75, 51–52.

[139] Mikael Hansson, *Kollektivavtalsrätten. En rättsvetenskaplig berättelse* (Iustus 2010) 88–89.

protection and recognition of such collective labour rights ensure that the system can function autonomously and freely. In both Italy and Sweden, these rights are guaranteed and protected as fundamental. In Italy, their protection is set out in the Constitution; in Sweden, their recognition has been achieved in the industrial relations arena through the December Compromise and the Basic Agreement and only afterwards included in the Constitution and in the Co-Determination Act.

Within the Italian constitutional framework, which attributes great relevance to labour and social issues,[140] freedom of trade union association, the right to collective bargaining and the right to strike are all provided in the section of the Constitution dedicated to economic relations. This section contains several employment rights[141] having a direct effect on and therefore applicable in the relationships between private parties.[142] However, the achievement of constitutional recognition for collective labour rights has come after a long history of workers' struggles often outside or even in conflict with the law in force.[143] The Italian Constitution is straightforward in this regard. Along with the freedom of association for lawful purposes,[144] the constitutional framework sets a very broad protection for collective labour rights. Art. 39.1 enshrines the freedom of trade union association, also including its negative side,[145] and constitutes the basis for a wide trade union

[140] The first article states that labour constitutes the foundation of the Republic (Art 1), see Luca Nogler, "Cosa significa che l'Italia è una Repubblica "fondata sul lavoro"?" (2009) 23 *Lavoro e Diritto*, 427–40; Cesare Pinelli, "'Lavoro' e 'progresso' nella Costituzione" (2009) 123 *Giornale di Diritto del Lavoro e di Relazioni Industriali*, 401–21.

[141] The Constitution is divided into three sections: an introductory part on the fundamental principles; a part on rights and duties of citizens; and a part on the order of the Republic. The Title III of Part I on 'rights and duties of citizens' includes the right to a fair and just remuneration adequate for guarateeing to the worker and her/his family a life in freedom and dignity (Art 36.1 Const.); the rights to weekly rest and paid annual leave and to a maximum number of working hours per day (Arts 36.2 and 36.3 Const.); the principle of equality between men and women in employment and the protection of under-age work (Art 37 Const.).

[142] See Corte Cost., 5 giugno 1956, n.1; Edoardo Ghera, *Diritto del lavoro* (Cacucci 2011) 16. The constitutional regulation of the employment relationship has also allowed the 'by-passing' of the corporatist regulation of the civil code, which was not immediately revised after the end of the system. In the years after the Constitution – and especially between 1948 and 1956, when the very first constitutional ruling clarified the competences of the Constitutional Court in relations with the previous legislation – the tendency of the Supreme Court (Corte di Cassazione) was to consider the constitutional employment rights only in their vertical dimension. This interpretation entailed that the employment relationship should be regulated prima facie by the norms of the civil code. However, that conflict has been composed already in the late 1970s at the end of a process of 'constitutional adjustment' of the ordinary legislation issued before the adoption of the Constitution. See Maurizio Ricci, *Autonomia collettiva e giustizia costituzionale* (Cacucci 1999) 81.

[143] For a brief but comprehensive overview of the legislation on trade unions and strike, and the progressive emergence of organised labour against such a legal framework in post-unity and pre-fascist Italy (the so-called 'liberal period'), see Gaeta (2013) 10–30. See also the historical reconstruction in Umberto Romagnoli, "Art 40" in Branca (1979) 289–325, 289–91.

[144] Art 18 Const.

[145] See Giugni in Branca (1979) 278.

pluralism.[146] The right to collective bargaining is instead implicitly deduced from the constitutional recognition of the collective agreement as an instrument for the definition of terms and conditions of employment, although the norm would not include a right to conclude collective agreements – but only a right to negotiate.[147]

The Workers' Statute has helped to strengthen the constitutional protection by reaffirming those rights in the workplace.[148] The Act states the freedom of trade union pluralism and the right to organise: in the workplace, workers are entitled to create or join trade unions as well as to participate in their activities.[149] The participation in union activities is also protected against discriminatory treatments due to union membership,[150] and the Act sanctions anti-union conduct by an employer, defined as any behaviour of the employer aimed at impeding or limiting the exercise of trade union freedom and trade union activity.[151]

The right to strike is protected in Art. 40 of the Constitution. It has a 'lean' formulation simply stating that such a right shall be exercised according to the statutory provisions regulating it. Implicitly it means that only an act of a democratically elected body, such as the Parliament, can limit the exercise of the right to strike, but it has also meant that limits and constraints to the exercise of the right to strike have been left to be decided by political forces, and as such subject to electoral variations.[152] No statutory act was adopted until 1990 though, when a regulation of the strike in essential public services was introduced. Therefore, the limits to the exercise of the right to strike have been mainly defined by the judiciary.[153] The abstention of the legislator was compensated by the activity of the Constitutional Court, which cleansed the fascist criminal code by making the limits

[146] Giugni in Branca (1979) 275.

[147] Art 39.2–39.4 Const. See Giugni in Branca (1979) 280.

[148] The Statute opposed a paternalistic conception of the employment relationship by guaranteeing, in the section entitled 'freedom and dignity of the worker': freedom of speech (Art 1); protection from the control of the employer (Arts 2–3–4); a regulation of disciplinary sanctions (Art 7); the protection of health and physical integrity of the workers (Art 9); the right to study for employees (Art 10); the possibility to organise cultural activities in workplaces (Art 11); the prohibition of being assigned to job tasks lower than those stated in the employment contract at the moment of hiring (Art 13); see Franco Liso, "Lo Statuto tra *amarcord* e prospettive per il futuro" (2010) 24 *Lavoro e Diritto*, 75–83, 77.

[149] Art 14 L. 300/70.

[150] Arts 15 and 16 L. 300/70.

[151] Art 28 L. 300/70. The provision gives the judge the option of issuing an injunction ordering the employer to cease the anti-union conduct.

[152] These concerns were already expressed by members of the Communist Party during the sessions of the Constituent Assembly drafting the constitutional text, see Romagnoli in Branca (1979) 291.

[153] However, the judiciary has often been subordinated to pressures coming from the political arena, see Romagnoli in Branca (1979) 292–94.

and sanctions of the corporatist regime inapplicable.[154] Since the outset of the democratic order, the Court has recognised strikes and lock-outs as lawful means within and outside labour disputes, so as to also include political strikes.[155]

A key characteristic of the Swedish system, by contrast, is that the protection of collective labour rights has been achieved firstly through industrial relations practices and has been codified into the legislation afterwards. The first recognition of the freedom of trade union association occurred with the 1906 December Compromise, which provided for the definition of a standard clause mutually recognising freedom of trade union association and the managerial prerogative in running the business. The consequent exclusion of the employees not covered by such an agreement, i.e. employed by a non-organised employer, was remedied by the 1936 Act on Freedom of Association and Right to Collective Bargaining, which extended the protection of freedom of association to all workers.[156] The 1938 Basic Agreement also introduced the right to take industrial action as an inherent part of a system of industrial relations based on collective bargaining.[157]

Those rights have been codified in the 1974 Swedish Constitution.[158] The Instruments of Government (*Regeringsformen*) provide for the protection of the freedom to associate and the right to industrial action: Art. 2:15 of the Instrument of Government (the Act of the Swedish Constitution regulating the functioning of the State and enshrining the rights and freedoms of the citizens) recognises the freedom of association for private and public purposes that also covers trade union purposes; Art. 2:14 states that trade unions, an employer or an employers'

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[154] The criminal code issued by the fascist regime sanctioned strikes in the private sector as offences against public economy (Art 502–508 c.c.) and in the public sector as offences against public administration (Arts 330–333 c.c.). Those provisions are not still officially abrogated.

[155] In Corte Cost., 28 aprile 1960, n.29, the Constitutional Court has declared unconstitutional Art 502 p.c. on unlawfulness of strikes and lock-outs in labour disputes. On the political strike, see Corte Cost., 19 dicembre 1974, n.290. Progressively, the Constitutional Court revised the other norms of the penal code banning different forms of strike and collective action, such as Art 504 p.c. which punished with detention the collective actions taken for pressuring public authority (strikes pursuing the subversion of constitutional order are still unlawful, see Corte Cost., 2 giugno 1983, n.165); or Art 507 p.c. sanctioning boycott (Corte Cost., 2 aprile 1969, n.84), which is now unconstitutional only in cases of violence and use of force. See Franco Carinci, "Il diritto di sciopero: la *nouvelle vague* all'assalto della titolarità individuale" (2009) 123 *Giornale di diritto del lavoro e delle relazioni industriali*, 423–69, 447.

[156] *Lag om förenings och förhandlingsrätt*, SFS 1936:506. Adlercreutz stressed though that the act was actually adopted in order to protect salaried employees, see Adlercreutz (1947) 150–52.

[157] Chapters IV and V of the Agreement. The recognition of these trade union rights occurred implicitly by regulating their exercise: the right to negotiate was recognised within the procedures laid down for pursuing negotiations (Chapter II of the Agreement). See Edström (1994) 94–95.

[158] Adlercreutz & Nyström (2010) 57. For instance, the second chapter of the Instrument of Government, entitled 'Fundamental rights and freedoms', includes a series of collective freedoms, such as freedom of assembly, freedom to demonstrate, and freedom of association, which constitute the preconditions for the democratic functioning of a system of industrial relations, IG Chapter 2, Art 1

association are entitled to take industrial action (*fackliga stridsåtgärder*), unless otherwise provided by law or collective agreement. Courts and public authorities cannot thereby limit the call for industrial actions,[159] nor are any constitutional limits set, which means that all industrial actions that are not specifically prohibited are lawful.[160]

The definitive statutory recognition of collective labour rights occurred in 1976 with the adoption of the Co-determination Act. Section 7 enshrines the right of association (*föreningsrätt*) in terms of the right to form and to join a trade union, the right to exercise the membership (namely, the right to enjoy the conditions set by the collective agreements signed by the union) and the right to participate in union activity.[161] These rights are recognised to employers and employees on an equal footing, even though in practice the provision aims at protecting the employee's right of association as the more exposed party within the employment relationship.[162] The mutual recognition of the right to organise is expressed by the obligation of the labour market parties to seek to prevent their members from taking any action that infringes the right of association of the other party and, if such cases occur, to persuade their members to cease.[163] Although considered as an individual right,[164] the right of association is secured through the action of the collective subjects.[165]

Historically, the freedom of association in the Swedish context was not conceived as encompassing the protection of its negative side, as it was considered against the standard clauses included in the collective agreements.[166] Such a development has come from the case law of the European Court of Human Rights in the *Gustafsson* case.[167] The dispute concerned a restaurant owner who was not a member of the employers' association nor bound by any collective agreement, who refused to sign

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[159] See Folke Schmidt, *Facklig arbetsrätt* (Juristförlaget 1997) 222.

[160] Niklas Bruun & Jonas Malmberg, "*Lex Laval*: Collective Actions and Posted Work in Sweden" in Roger Blanplain & Frank Hendrickx (eds), *Labour Law between Change and Tradition – Liber Amicorum Antoine Jacobs* (Kluwer 2011) 21–34; Fahlbeck & Mulder (2009) 37.

[161] See Dan Holke & Erland Olauson, *Medbestämmandelagen med kommentar, 4th edition* (Norsted 2012) 74.

[162] Schmidt (1997) 109. See also Bruun in Bruun et al. (1992) 27.

[163] SFS 1976:580, Section 9.

[164] Adlercreutz & Nyström (2010) 159.

[165] The Labour Court has recognised the termination of employment as a possible cause of infringement of the right to associate. In a case concerning the end of a probation period of employment before the end of the contract, the Court found a company liable for breaching the employee's right of association because the dismissal was related to her union activity. In that case, the union was also awarded compensation by the Court, see AD 2004:49.

[166] Petra Herzfeld Olsson, *Facklig föreningsfrihet som mänsklig rättighet* (Iustus 2003) 542; Tore Sigeman, "Gustafssondomens konsekvenser för svensk arbetsrätt" in Anders Agell (ed), *Föreningsfrihet och stridsåtgärder på arbetsmaknaden. Gustafssonmålet i perspektiv* (Iustus 1999) 36–76, 50.

[167] Case 15573/89, *Gustafsson v. Sweden (GC)* (App. n.15573/89), Judgment of 25 April 1996.

an accession agreement (*hängavtal*) with the union of the hotel and restaurant sector. As a consequence, he became the target of a collective action under the form of a blockade, which was joined by sympathy strikes by other unions and resulted in the stoppage of supplies to the restaurant. Although lawful within the national legal system, the employer brought the case before the Strasbourg Court claiming that the actions constituted a violation of his negative freedom of association covered by Art. 11 ECHR because of the request either to become a member of an employers' association or to sign a collective agreement applying working conditions that he did not negotiate.[168] In the end, the Court rejected these claims, since the employer was not forced to comply with compulsory membership in an employers' association. The alternative to signing a collective agreement with the union would have not consisted in a violation of negative association. The court recognised the employer's claim to be a purely political objection to the Swedish system of collective bargaining – an element not falling within the scope of freedom of association as set forth by the Convention that would not cover a right not to enter into a collective agreement.[169] However, in expressing the general principles related to the protection of freedom of association, the Court asserted a positive obligation for the State to also protect the negative side of the freedom of trade union association.[170] This decision had a fundamental impact on the Swedish context, since it challenged its tradition of unionism and the practice of becoming a union member.[171]

Along with the right to organise, the Co-determination Act recognises a general right to negotiate (*allmän förhandlingsrätt*).[172] The provision has a twofold

[168] Herzfeld Olsson (2003) 349.

[169] Case 15573/89, *Gustafsson v. Sweden (GC)* (App. n.15573/89), Judgment of 25 April 1996, para 52.

[170] Case 15573/89, *Gustafsson v. Sweden (GC)* (App. n.15573/89), Judgment of 25 April 1996, para 45. See also Tonia Novitz, "Negative Freedom of Association" (1997) 26 *Industrial Law Journal*, 79–87.

[171] For instance, AD 1998:17 (*Kellerman*). The case concerned a textile company that was not a member of the employers' association, nor was it bound by a collective agreement, which was subject to a collective action in order to enter into a collective agreement. On the basis of the ECHR *Gustafsson* case, the Labour Court rejected the claim of the company concerning the violation of its negative freedom of association because the action did not demand that the employer join an organisation nor was it less favourable for the employer to meet the union's demand by signing an agreement than join the employers' organisation, see Mikael Hansson, "Industrial Action and the Proportionality Principle in Swedish Law" in Laura Carlsson & Örjan Edström & Birgitta Nyström (eds.), *Globalisation, fragmentation, labour and employment law. A Swedish perspective* (Iustus 2016) 53–72, 68. See also Eklund & Sigeman & Carlsson (2008) 72. The authors stress that the Labour Court seemed to apply a proportionality test between the infringement of the negative right of association to which the company was exposed by entering into the agreement, and the need of regulation through the collective agreement, which constitutes a legitimate interest of the union protected under Art 11 ECHR.

[172] SFS 1976:580, Section 10, subsections 1 and 2. See Holke & Olauson (2012) 89. The lack of individual entitlement of the right to negotiate was set by the regulation in the 1936 Act on Collective Bargaining and mirrored a practice of the industrial relations sphere, where the individual employer has to be considered as a collective actor due to the possibility of negotiating with the collectivity of

perspective: for the trade unions, it concerns the right to negotiate with an employer on any matter relating to the relationship concerning any member of the organisation employed by that employer; from the perspective of the employer, the right to negotiate actually corresponds to a duty to negotiate with the unions.[173] The Labour Court has clarified that the right/duty to negotiate does not imply the right/duty to reach a collective agreement.[174] Nor does it state a duty to bargaining in good faith, which means that negotiations are primarily guided by power relationships and a willingness to resort to industrial action.[175] Indeed, the right to negotiate is supported by a widely protected right to take industrial action, whose exercise is not subject to a review on its proportionality and is regulated by the Act in relation with the negotiations and the entry into force of collective agreements.[176] The basic principle of the Swedish system is therefore the lawfulness of any collective action that does not pursue an unlawful aim.[177] The statute also covers secondary or sympathy actions, whose lawfulness depends on the lawfulness of the primary action and constitutes a strong support to collective bargaining negotiations and disputes, as well as a specific feature of the collective solidarity on which the Swedish system has been built.[178]

3.2.6. Freedom to conduct business and its limits

The regulation and the functioning of the labour market entail a relational interaction of two sides – the employer and the employees' organisation. If the collective labour rights represent the legal expression of the activities of the trade unions as the countervailing power to the employer, the freedom to conduct business represents

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the company's workforce. See also the travaux préparatories of the 1976 Co-Determination Act, Prop. 1975/76: 105, Bil. 1, 348–49.

[173] See inter alia the decisions of the Labour Court AD 1978:60 and AD 1984:98.

[174] See AD 1972:15. In this case the Court dismissed the complaint of a railway workers' union not affiliated with the main confederations claiming that the public employer's refusal to reach an agreement stated at the beginning of the negotiations violated the right to negotiate (the provisions at stake were prior to the Co-Determination Act). See Eklund & Sigeman & Carlsson (2008) 123.

[175] Fahlbeck & Mulder (2009) 33.

[176] SFS 1976:580, Section 41. On the absence of a principle of proportionality in the legal regulation of collective action, see Hansson in Carlsson & Edström & Nyström (2016) 56–57. Hansson reports on parliamentary discussions concerning the opportunities to introduce such a principle in the review of legality of collective actions, see Ibid., 58.

[177] See, inter alia, AD 1977:38, where the Labour Court dismissed a claim for damages submitted by a company against a blockade operated by the construction sector union aiming at signing a collective agreement including closed-shop clauses. The Labour Court rejected the claim on the basis that no collective action is unlawful unless the aim is unlawful and contravenes the law.

[178] Hansson notes that secondary actions, due to the link to primary actions, are 'unlimited with respect to scope', see Hansson in Carlsson & Edström & Nyström (2016) 58. On the relevance of secondary actions in the Swedish system, see Kerstin Ahlberg & Niklas Bruun & Jonas Malmberg, "The *Vaxholm* Case from a Swedish Perspective" (2006) 12 *Transfer*, 155–66, 159.

the legal expression of the employers' managerial prerogative. In general, the legal systems do not disregard the exercise of the freedom to conduct business. The activity of the employer is recognised and protected as an individual freedom. As with collective labour rights, Italy and Sweden differ in this regard. While it is enshrined in the Italian constitutional text, in the Swedish context, the freedom to conduct business – expressed as the managerial prerogative in running the business – has been recognised through the mutual agreement reached between the parties.[179]

Art. 41 of the Italian Constitution recognises freedom to conduct business as freedom of undertaking an economic enterprise (*libertà di impresa economica*) in the context of the principles and rights governing the economic relations of the democratic system – like collective labour rights. The constitutional status of the freedom to conduct business is not absolute and inviolable, but it can be subject to certain limits placed by the legislator deriving from the social objectives to which the Constitution attributes higher value.[180] However, the company is recognised by the Constitution as a bearer of specific interests in need of protection, which are not confined to the enjoyment of private property or contractual freedom but go beyond this so as to include the freedom to engage in economic activities and industrial production.[181] The potential clash between a protection of an individual interest and the social objectives of the Italian Constitution is highlighted in the second part of the provision, where it is stated that freedom to conduct business cannot be exercised in contrast with the social benefit and in ways that harm security, freedom and human dignity. According to the Constitutional Court, this provision would allow statutory limits to the freedom of enterprise justified by the social interests.[182]

The doctrine is, however, divided: some authors see the 'social finality' clause as a general clause to be interpreted by the judge according to the historical circumstances.[183] Others consider Art. 41 Cost. as the constitutional recognition of the social benefit that the freedom of enterprise fosters and achieves, for instance by ensuring employment.[184] Others still stress the need to consider the two paragraphs together, so that the exercise of the economic freedom of enterprise cannot be separated from the necessity to pursue social finalities. In this sense, the freedom to conduct business would only be acknowledged if it were exercised in a manner that

[179] Freedom to conduct business in not mentioned in the Swedish Constitution.

[180] Roberto Nania, "Libertà economiche: impresa e proprietà" in Roberto Nania & Paolo Ridola (eds), *I diritti costituzionali, vol. 1* (Giappichelli 2006) 195–227, 200–01.

[181] Or even the freedom of competition, i.e. the protection from forms of unfair competition and monopoly, see Francesco Galgano, "Art 41" in Branca (1979) 1–68, 6.

[182] Corte Cost., 28 gennaio 1991, n.63 and Corte Cost., 23 giugno 2010, n.270, see Vincenzo Bavaro, *Azienda, contratto e sindacato* (Cacucci 2012) 67.

[183] Giancarlo Rolla, *La tutela costituzionale dei diritti* (Carocci 2010) 179.

[184] See Alessandro Pace, *Problematica delle libertà costituzionali* (Cedam 1993) 460. This assumption is claimed by the 'law and economics' stream of Italian labour law scholarship, see Pietro Ichino, "Il dialogo tra economia e diritto del lavoro" (2001) 1 *Rivista Italiana di Diritto del Lavoro*, 165–201.

does not hamper social benefit.[185] This constitutionally guaranteed economic freedom has also been indicated by the judiciary as a limit to the exercise of the right to strike.[186] Yet this constraint would only concern the possibility of the company to maintain its productivity, i.e. 'to remain on the market', which shall not be hampered by the collective action.[187]

In Swedish labour law, the freedom to conduct business is expressed in terms of the employers' managerial prerogatives to decide on business and to run the company. As with collective labour rights, this freedom has its contractual origins in the 1906 December Compromise.[188] The recognition of the prerogative of the employer in running the business constituted the 'price' to be paid by the Swedish trade unions in order to have the freedom of trade union association recognised by the counterpart. However, the employers' prerogatives are limited by restrictions related to the exercise of employees' right of information and consultation. The Co-determination Act imposes a set of obligations for the employer to consult the trade union representatives at company level, who can intervene in the employers' decisions on specific matters concerning the allocation of work. Although the final decision is up to the employer, the provisions are designed to allow the union to express its views on the matter concerned as early as possible in the process, so as to ensure effective participation on the part of the employees' representatives.[189] Such rights are accompanied by a right to veto, which the trade union can exercise in order to stop specific personnel policies of the employer, such as the use of temporary agency work and outsourcing to external contractors.[190] However, the Labour Court has specified that the union shall provide for reasonable justifications for the use of the veto right due to the strong restriction it places on the employer's freedom to conduct business.[191] Co-determination agreements represent a further form of restriction on the managerial prerogative. The Act establishes that once an employer has entered into a collective agreement, the union counterpart has the right

[185] For instance in cases of environmental damages or when the organisation of the company harms the health and safety of the employees, see Bavaro (2012) 75. See also the interpretation of the Constitutional Court affirming that Art 41 Cost. restricts the unilateral managerial power of the employer, Corte Cost., 22 febbraio 1989, n.103.

[186] Cass., 30 gennaio 1980, n.711.

[187] The distinction is between the 'dynamic dimension' and the 'static dimension' of the company. According to the Supreme Court, only the latter constitutes a limit to the exercise of collective action. See Giovanni Orlandini, "*Viking*, *Laval* e *Rüffert*: I riflessi sul diritto di sciopero e sull'autonomia collettiva bell'ordinamento italiano" in Vimercati (2009) 55–74, 59–60.

[188] See Mia Rönnmar, "The Managerial Prerogative and the Employee's Obligation to Work: Comparative Perspectives on Functional Flexibility" (2006) 35 *Industrial Law Journal*, 56–74, 61.

[189] Jenny Julén Votinius, "Employee Representation at the Enterprises: Sweden" in Roger Blanplain (ed), *Systems of Employee Representation at the Enterprise* (Kluwer 2012) 131–55, 137.

[190] SFS 1976:580, Sections 38–40. See Julén Votinius in Blanplain (2012) 138.

[191] AD 1979:31 in Eklund & Sigeman & Carlsson (2008) 242. In this case the union was awarded damages because the company did not take into consideration the veto exercised.

to ask for a co-determination agreement to be signed with the company employees' representative, regarding the conclusion and termination of contracts of employment, the management and distribution of work and the business operation in general.[192]

3.2.7. The rights of employees' information and consultation

The different traditions and approaches of trade unions in Italy and Sweden are reflected in the different relevance of employees' rights of information and consultation within the two systems. Such rights are indeed much more rooted in the Swedish system, in which they represent the counterbalance to the managerial prerogative. By contrast, the practice of information and consultation is not particularly relevant in the Italian tradition of industrial relations.

Although the workers' participation in the management of the company is recognised by the Italian Constitution,[193] the parties have historically privileged collective bargaining, in line with a tradition of trade unionism refusing to undertake practices of collaboration with company management.[194] The understanding of labour-capital relations in terms of interest-sharing has always been rejected by large sectors of the trade union movement.[195] Nevertheless, the practices of certain forms of information and consultation are related to company collective bargaining, as, for instance, in the case of managing crises within a company.[196] One example is the regulation of collective redundancies,[197] whose procedure entails an obligation to both inform the plant union representatives, or, if they are not present, the industry

[192] SFS 1976:580, Section 32, subsection 1 and 2, see Julén Votinius in Blanplain (2012) 139.

[193] Art 46 Const. The provision has been indicated as a limit to the exercise of freedom of enterprise by virtue of the social finalities it implies, see Constantino Mortati, "Il lavoro nella Costituzione" (first published in 1954) in Lorenzo Gaeta (ed), *Costantino Mortati e "Il lavoro nella Costituzione": una rilettura* (Giuffrè 2005) 7–102, 52.

[194] The establishment of forms of workers' participation, such as cooperatives, has instead had partial success. The most common forms, such as profit-sharing or shareholding, never took hold in the Italian industrial relations. See Tiziano Treu, *Labour Law and Industrial Relations in Italy* (Kluwer 2010) 200.

[195] Those practices have been opposed by the largest union confederation CGIL, whereas the other confederations gradually accepted forms of company participation and collaboration. The Italian situation is different from other countries, which privilege a system of industrial relations based on a pure 'dual-channel' of representation where company union representatives are not related to the national trade unions. See Roccella & Treu (2007) 457–58.

[196] Usually the procedures start with information and consultation of the employees' representatives at the company with a view to a future collective agreement that would achieve a participatory solution to the crisis. This function has also been introduced in order to ensure that the employees' collective interests are taken into account and refers to the so-called 'proceduralisation' of the employer's power. See Gino Giugni, *Diritto sindacale. Aggiornato da Bellardi, Curzio, Leccese* (Cacucci 2014) 156.

[197] The issue of collective redundancies is regulated by Act. 223/1991 and Leg. Decree 151/1997, respectively, implementing EU directives 129/75 and 92/56.

federations, and to undertake consultations in order to find alternative solutions to the redundancies which are then ratified through so-called 'solidarity agreements' (*contratti di solidarietà*) concerned with working-time and wage flexibility.[198] The strength of workplace union representatives has even been improved by the implementation of both the EWCs directive and the employees' information and consultation rights directive.[199] The implementing acts have indeed attributed the prerogatives stated by the EU Acts to workplace union officers: one third of the members of a EWC can, for instance, be appointed by the trade unions who signed the sectoral collective agreement applied in the company, and the remaining two thirds by the workplace bodies of employees' representative, which also have a mainly union-based composition.[200] These bodies have received the entitlement of the employees' information and consultation provided by the EU directive.[201] The transnational outreach of the Italian trade unions has been improved thanks to the anchorage of the information and consultation rights stemming from EU law to the national tradition of single-channel workplace representation.[202]

In Sweden, the rights of information and consultation have an important share in the frame of co-determination.[203] The legal framework attributes those rights mostly to the established trade union. This union enjoys a so-called 'primary' right of negotiation (*primär förahandlingsskyldighet*), concerning the obligation for the employer to negotiate before taking decisions on significant changes in the activity or in the working and employment conditions of the union's members,[204] and a so-called 'enhanced' right to negotiate (*förstärkt förhandlingsrätt*), referring to the prerogative to ask the employer to negotiate in other circumstances that concern one of its members.[205] Both the established trade union and in some cases also the non-

[198] Art 4.5 of Act 223/1991. The institute of solidarity collective agreement has been created by the Law decree 726/1984 converted into Act 863/1984. The decree was adopted as an urgent measure to sustain employment and in order to provide a joint instrument to company management and trade unions so as to manage situations of company crisis. Information about the procedure must be communicated within seven days (Art 4.3), whereas the time limit for reaching a solidarity agreement is fixed at 45 days (Art 4.6). If no agreement is reached within that time, the local labour office intervenes in order to formulate proposals for the agreement (Art 4.7).

[199] Leg. Decree 25/2007 implementing EU directive 2002/14.

[200] Art 9.6 L. 113/2012 implementing EU directive 2009/38.

[201] Art 2. See Luciana Guaglianone, "L'accesso ai diritti di informazione e consultazione nel d.lgs. n.25/2007. Verifica della legittimità delle disposizioni alla luce della tutela multilivello" in Marzia Barbera & Adalberto Perulli (eds), *Consenso, dissenso e rappresentanza: le nuove relazioni sindacali* (Cedam 2014) 67–75.

[202] CESOS, Le relazioni sindacali in Italia e in Europa. Rapporto 2008-2009 (CNEL 2010).

[203] Rönnmar (2009) 9.

[204] SFS 1976:580, Section 11, subsection 1.

[205] SFS 1976:580, Section 12.

established ones have the right to be kept informed by the employer as regards any decision concerning the activity of the company.[206]

A right of information is attributed to non-established unions in case of changes in the employment and working conditions of their members.[207] However, the Labour Court has clarified that such a right cannot be exercised in case of organisational changes involving several employees at the same time when some are members of the established trade union and others are not. Rather, it can be exercised only in cases that concern a single employee who is not a member of the established trade union.[208] When the employer is not bound by any collective agreement, the Act obliges them to negotiate with every single union having at least one member within the workforce of the company with regard to changes on working and employment conditions affecting the individual employee, collective redundancies and transfer of undertaking.[209] The employer is thus encouraged to reach and sign a collective agreement in order to limit the number of unions having access to such broad information and consultation rights.[210] The practice of the established trade union has favoured the establishment of strong, single-channel employees' representation, which has not been modified by the implementation of the already mentioned EU directives.[211] The provisions of the implementing act are semi-compelling, so that collective agreements signed or approved by the central trade unions can derogate from the legislative provisions.[212]

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[206] SFS 1976:580 Sections 19–21. The information concerns the production, the economic situation of the company, the personnel policy and access to business records, but it is restricted on private matters of the employer and with regard to issues related to industrial conflict. See Örjan Edström, "Involvement of Employees in Private Enterprises in Four Nordic Countries" (2002) 43 *Scandinavian Studies in Law*, 159–88, 179.

[207] SFS 1976:580, Section 13, subsection 1.

[208] AD 1984 :98, see Holke & Olauson (2012) 130.

[209] SFS 1976:580, Section 13, subsection 2.

[210] SFS 1976:580 Section 19a.

[211] The first EU directive on the EWCs (EU directive 94/45) was implemented by SFS 1996:359 Act on European Works Council (*Lag om europeiska företagsråd*). The new directive (EU directive 2009/38) is implemented by SFS 2011:427 Act on European Works Councils. The acts have been issued due to the failure of the directives' implementation through collective bargaining instruments, see Herman Knudsen & Niklas Bruun, "European Works Councils in the Nordic Countries: An Opportunity and a Challenge for Trade Unionism" (1998) 4 *European Journal of Industrial Relations*, 131–55, 136.

[212] But it cannot state less favourable conditions than those set by the EU directive. Section 12, SFS 2011:427. See Birgitta Nyström, "Sweden Report" in Roger Blanplain (ed), *European Works Councils* (Kluwer 2013) 21.

3.3. The actors and their access to collective bargaining

3.3.1. Representation and representativeness: the autonomous recognition between the parties

The capability of the actors to represent their members is a core aspect of collective autonomy. The aim of each party in the collective bargaining process is to pursue and satisfy the collective interests of the collectivity of subjects they represent. Hence, representation is the concept through which a collective subject is entitled to undertake the negotiations with the counterpart. In both systems the main and historically rooted trade unions have a privileged position in conducting negotiations. However, the different degree of trade union pluralism entails a different regulation of access to negotiations.

Both in Italy and in Sweden, the autonomous establishment of industrial relations favoured the autonomous setting of rules on representation. Nevertheless, the plurality of trade unions that characterises the Italian context made the establishment of certain rules necessary, so as to exclude non-representing subjects. In the Swedish context, the exclusionary and contractual basis on which the system was established has naturally provided for a practice of representation centred round the established trade unions. In the Italian context, the trade union representation would – in principle – be regulated by the constitutional provision on the registration of trade unions. However, the non-application of such a rule (see Section 3.2.2) has entailed the recourse to an access to negotiations regulated on the basis of the concept of representativeness. This concept derives from a socio-political rather than legal understanding of industrial relations and emphasises the fact that trade unions are social bodies constantly in need of legitimacy among their members and before the rest of the workers. It has been defined as the capacity of the organisation to unify the behaviours of the workers so that each of them would operate not according to individual choices but rather as a group.[213] Representativeness is hence the social institution that ensures that an agreement signed by a union is respected and accepted by its members.

The access to negotiation at the intersectoral and sectoral level is historically based on the mutual recognition between the parties.[214] The Italian trade union confederations privileged a strategy based on unanimity rather than on majoritarian principles, so as to negotiate and conclude sectoral collective agreements jointly

[213] Giugni (2014) 65.

[214] See the historical reconstruction of collective bargaining evolution by Cella & Treu in Cella & Treu (1984) 77.

with a common and therefore stronger position.[215] This praxis was interrupted by the separate sectoral agreements concluded in 2009 without the signature of the industry federations affiliated with CGIL. In this scenario the introduction of rules regulating access to sectoral bargaining on the basis of a calculation of representativeness (meaning the actual degree of representation of a union) became necessary. The intersectoral agreements concluded between 2011 and 2014 deal with, among other things, the definition of criteria for the calculation of representativeness on the basis of the average between membership data and electoral data at the company-level elections.[216] From a socio-political concept, representativeness has become a selective criterion that aims to identify those unions allowed to have access to negotiations. Although the Italian industrial relations system might benefit from the introduction of rules on the calculation of representativeness in terms of rationality and efficiency, the definition of such rules by an agreement between the main parties *de facto* excludes from the system the rank and file unions, which are not affiliated with the major confederations.[217]

In the Swedish context, the very limited trade union pluralism and the definition of trade union given by the Co-determination Act make the question of formal representativeness almost irrelevant.[218] The access to negotiations follows the well-established practice of mutual recognition between the parties already achieved through the Basic Agreement. The parties of that agreement are the party representing the two sides of the labour market and the space for other subjects is very narrow and mainly confined to specific sectors or categories of workers. Despite the general right to negotiate set by the Co-Determination Act, which would permit access to negotiations to all unions, the recognition from the employers' side and the attitude of the unions operate as a *de facto* criterion of selection. It is rather rare that an employers' association would decide to sit and negotiate with the radical and conflictual union SAC, which in turn would find it rather problematic to legitimise the decision to negotiate before its members.

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[215] Salvo Leonardi, "Gli accordi separati: un *vulnus* letale per le relazioni industriali" (2010) 3 *Quaderni di rassegna sindacale*, 355–69, 355.

[216] The calculation is limited to companies with more than 15 employees in which a sectoral agreement is applied.

[217] Vincenzo Bavaro, "Il principio maggioritario nelle relazioni industriali" (2014) 1 *Lavoro e Diritto*, 3–22, 18. For an analysis supporting the position of the rank and file unions, see ClashCityWorkers, "'Guerra preventiva' al conflitto. Un'analisi dell'accordo sulla rappresentanza del 31 Maggio", available at http://www.clashcityworkers.org/documen ti/analisi/1050-analisi-accordo-rappresentanza-31-maggio-guerra-preventiva-al-conflitto.html.

[218] See Rönnmar (2009) 5, footnote 20.

3.3.2. Acknowledgement by the legal system: the legal regulation of representation and representativeness

In both systems the trade unions are considered private associations. This status is formally recognised in the Swedish Co-determination Act, whereas it is based on the status of non-recognised associations defined by the civil code in Italy.[219] However, in Italy the non-applied constitutional provision (Art. 39 Cost.) sets down rules for trade union recognition and access to negotiations. It states that in order to acquire legal personality and to participate in negotiations, trade unions should be registered in public registers and should have a democratic internal organisation. The acquisition of legal personality would allow the union to represent unitary the sectoral workforce, proportionally to their members, in order to sign *erga omnes* collective agreements.[220] Although not applied, the presence of this provision prevents the statutory regulation of such issues.[221] This obstacle has been circumvented by resorting to the aforementioned concept of representativeness, which is recognised and upheld by statutory provisions. For instance, Art. 8 of Decree 138/2011 empowers the company collective agreements signed by the 'comparatively most representative union associations at national level', or by their workplace representative bodies, to derogate from legislation and sectoral collective agreement on a series of matters, such as working time and the use of atypical employment in the company.[222] Similarly, Act 81/2015 (and in particular its Art. 51) attributes to the sectoral and company collective agreements signed by the 'comparatively most representative unions at national level' and by their RSAs or by the RSUs, the possibility to define rules and standards (also derogating from statutory legislation) for the use of atypical employment contracts within the company. Hence, the statutory recognition of representativeness as the criterion empowering the unions with regulatory competences contains the pitfall of decentralisation, as both the mentioned norms place sectoral collective agreements and company collective agreements on an equal footing.[223] Accordingly, the norm seems to also place on an equal footing the union subjects: the norm is ambiguous as to the subject who is entitled to sign a collective agreement – be it the national union or a company representative body – as well as in relation to whether the

[219] Art 36 civil code, which states that the internal order and functioning of such associations is regulated by the associative agreements signed by the members.

[220] Art 39 Const.

[221] An exception is constituted by the regulation of representativeness in the public sector. Here, the accession to national bargaining is regulated by Art 43 of Leg. Decree 165/2001. The legislative regulation of representativeness in the public sector derives from the fact that public sector collective agreements have *erga omnes* efficacy deriving from law. See Rusciano (2003) 234.

[222] Bavaro (2012) 184.

[223] Recchia in Ghera & Garofalo (2015) 125.

collective agreement should be signed jointly by the sectoral and company union subject, or whether it can also be signed by just one of them.[224]

Workplace representation in based on a single-channel in both contexts. This means that the trade unions play a central role. However, in Sweden, workplace representation is almost entirely carried out by the established trade union by virtue of the privileged position it acquires as a consequence of the signature of a collective agreement, whereas in Italy, due to the system's trade union pluralism, the situation is different. Workplace representation in the Italian system has received both a statutory and an autonomous regulation. The statutory regulation is based on Art. 19 of the Workers' Statute, which attributes the right to set a 'plant union representative' (*rappresentanze sindacali aziendali*, or RSA) to each union that has signed a collective agreement – of any level – applied in the workplace. However, this formulation requires a brief historical excursus. It is the result of a referendum held in 1995 that modified the previous version of the provision by abrogating both the possibility to form a RSA for the main confederations on the basis of their 'historical or presumed representativeness' and the criterion of being part of a national or regional collective agreement applied in the workplace. The original norm was meant to preserve the historical representativeness of the main unions, [225] and at the same time allow for the participation of other unions, who, albeit not affiliated with the main federations, demonstrated their representativeness by participating in national (sectoral) collective bargaining.[226] In the current formulation, the representativeness of a union – and therefore access to workplace representation rights – is demonstrated by the signature of whatever collective agreement applied in the company.[227] De facto, the norm unbinds the sectoral and company union representativeness, creating the preconditions for defusing the conflict – if not for the emergence of 'yellow unions'.

The autonomous regulation of workplace representation and representativeness was instead introduced in 1993 by the Joint Protocol concluded between the national trade union confederations and Confindustria. It introduced the rules for creating unitary bodies – 'unitary union representatives' (*rappresentanze sindacali unitarie*, or RSUs) – unifying all the unions active in the workplace affiliated with the national confederations. The parties of the 1993 Protocol committed themselves to adopting this form of workplace representation instead of RSAs (on the unions'

[224] Stefania Scarponi, "Quale autonomia per il sistema sindacale italiano?" (2016) 4 *Lavoro e Diritto*, 963–73, 967.

[225] The Constitutional Court deemed such a criterion as guaranteeing that the collective interest be also represented on the basis of conflict. See Corte Cost., 11 marzo 1988, n.344. See Federico Martelloni, "I tornanti della dialettica tra rappresentanza e conflitto collettivo" in Barbera & Perulli (2014) 245–55, 248.

[226] See Corte Cost., 22 febbraio 1974, n.54; Corte Cost., 11 marzo 1988, n.334; Cort Cost., 18 gennaio 1990, n.30.

[227] This effect had been envisioned by the Constitutional Court in the ruling concerning the admissibility of the referendum (Corte Cost., 11 gennaio 1994, n.1).

side) and to recognising RSUs as a counterpart in company industrial relations (on the employers' side). Originally, one third of these bodies were formed by shop floor stewards appointed by the confederations, while the rest were formed through workplace elections. The 2011 Interconfederal Agreement and the 2014 Single Text eliminated the appointed third, so that now members of RSUs are entirely elected by the employees. However, only the shop stewards of those unions that are part of the intersectoral agreements can run in elections. In sum, workplace representation in Italy is a particularly complicated issue. In a workplace there can be as many RSAs as signatory parties of an applied collective agreement, but only one RSU, which is intended to be the unitary body representing the different unions jointly. The bodies can even coexist, but the main confederations are committed to only a set RSU. Both bodies enjoy the set of rights for workplace representatives provided by the Workers' Statute.[228]

In Sweden, trade unions and employers' associations are considered legal entities.[229] They are entitled to rights and assume obligations, sign contracts binding themselves (and their members), as well as sue and being sued.[230] One characteristic of the Swedish system concerns the fact that labour market organisations are entitled to the *locus standi* in cases relating to the misapplication or violation of clauses of collective agreements, also as regards the individual contracts of its members.[231] However, there is no statutory provision or practice concerning trade union recognition or registration, or any other regulation concerning their internal functioning;[232] but the labour market parties can be subject to certain obligations as regards the relationship with the individual members. For instance, as a consequence of the centrality of the unions in the Swedish system, the Labour Court recognised

[228] The 1993 Joint Protocol provided that the plant union representatives already constituted by the signatory parties were to be substituted by the new unitary union representative. In this sense, the new bodies acquired the set of rights disposed by the Workers' Statute for the plant union representatives. See Point 4 of the 23 December 1993 interconfederal agreement. These rights are included in the section concerning 'trade union activity' and concern the trade union assembly (Art 20), referendum (Art 21), right to use company's space (Art 27), right to billposting (Art 25), right to collect contribution (Art 26); the individual ones concern the protection of shop stewards who are entitled to take paid leave (Art 23) and unpaid leave (Art 24) in order to be able to perform the tasks required to a trade union officer. The shop stewards are also protected against unilateral transfer of unit by the employers (Art 22). See Maria Vittoria Ballestrero, "Quarant'anni e li dimostra tutti" (2010) 24 *Lavoro e Diritto*, 19–30, 21.

[229] Schmidt dates the acknowledgement of legal personality to labour market parties approximately to 1910, see Schmidt (1977) 48.

[230] Adlercreutz & Nyström (2010) 166.

[231] On the issue, see Jonas Malmberg (ed), *Effective Enforcement of EU Labour Law* (Iustus 2003) 153–54.

[232] Birgitta Nyström, "The Evolving Structure of Collective Bargaining in Sweden 1990–2003" (2003) Report to the EU Commission, 12.

an obligation not to expel individual members who would be otherwise excluded from employment.[233]

The Co-determination Act specifies that an employees' organisation (*arbetstagarorganisation*) or an employers' association (*arbetsgivarorganisation*) are associations of employees or employers that have the task of safeguarding the interests of the employees in relation to the employer, and vice versa.[234] The concept of collective interest is thus crucial in identifying a labour market organisation and therefore acknowledging it as a party in collective negotiations.[235] The Act marks a distinction between local and central employees' organisation. Only the local employees' organisation (*lokal arbetstagarorganisation*) is defined as an association (*sammanslutining*) of employees that is a party of collective negotiations at local – workplace – level; whereas a central employees' organisation (*centrala arbetstagarorganisation*) is a national union (*förbund*).[236]

3.4. The collective agreement as the outcome of collective autonomy

3.4.1. The collective agreement as the autonomous source of labour regulation

A system of collective bargaining has the aim of achieving a compromise between the collective interests at stake that the parties seek to pursue. The compromise is represented by the collective agreement, which is therefore the instrument best suited to de-escalate the conflict and to match the divergent expectations that the

[233] The cases dealt with by the Supreme Court mainly concerned situations in which a single worker was expelled by a trade union for his or her political opinions, see Schmidt (1977) 52; A famous case concerned the refusal to admit a Norwegian bricklayer who had moved to Sweden by the Stockholm branch of the Swedish Bricklayers' Union, despite the statute of the union providing for the admission of foreign bricklayers as members of LO-cooperative union. In setting the obligation for the union to accept the worker as a member, the Court reasoned by considering the union membership necessary for the worker to accede to employment due to the union's activity and extent, see NJA 1948:513; Adlercreutz & Nyström (2010) 177.

[234] SFS 1976:580, Section 6. Schmidt notes that the act does not adopt the terms of common use, such as *förening* (the equivalent of association or union), *fackförening* (trade union), or *förbund* (national union). By contrast, he stresses that the same act defines the right of association as föreningsrätt, which means literally right of association. See Schmidt (1977) 46.

[235] It is again Schmidt who stresses the difference between an association having an economic activity, which means oriented towards making profit, and an association, such the labour market ones, which is not-for-profit but nevertheless has an economic aim. He defines trade unions as *ideel* (friendly) organisations. See Schmidt (1977) 47–48.

[236] SFS 1976:580, Section 6, subsection 2

parties have of the negotiations. As said, both the Italian and the Swedish systems view the collective agreement as a private contract, which, although not formally included among the sources of law, holds primacy in regulating the spheres of industrial relations and employment.

In Italy, the collective agreement is defined as an *extra ordinem* source. Although it is not listed among the legal sources of the system, it produces normative effects in the individual relationship.[237] The case law deems the collective agreement as an external source (*fonte eteronoma* – heteronomous source) for the individual contract[238] – also by virtue of the prerogatives attributed by the civil code, such as the non-negotiable nature of the rights it creates for the employees.[239] In addition, the doctrine identifies in the collective agreement some key features of legal sources, such as the abstract and general norms regulating a large number of concrete situations, i.e. employment relationships.[240] As such the status of the collective agreement is located between a private contract and a legal source.[241] In the case of strikes in essential services, the legislation empowers collective agreements with general regulatory prerogatives. Thus, the private nature of collective autonomy is disregarded, due to the need for a uniform regulation of strike procedures based, however, on the autonomy of the parties.[242]

Despite the private law understanding, the high degree of union density and the codification of the industrial relations system have to some extent modified the nature of the collective agreement in the Swedish context, where it enjoys 'a *de facto* public statutory character'.[243] The extensive regulation introduced by the Co-

[237] This definition stresses the acknowledgement in the legal system of a normative function to collective agreement, although it is not achieved according to the constitutional procedure; see Luigi Mengoni, "Legge e autonomia collettiva" (1980) *Massimario di Giurisprudenza del Lavoro*, 692–98, 698.

[238] Cass., 24 agosto 2004, n.16691; Cass., 10 ottobre 2007, n.21234.

[239] Art 2113 civil code. Originally, the provisions regarded the corporatist collective agreement, but a few of them have been reformed in order to attribute to the 'civil law collective agreement' the same prerogatives, especially in terms of the relationship between the individual contract of employment and the collective agreement. See Rusciano (2003) 87. Further, the misinterpretation of clauses of the collective agreement can be invoked as grounds for appealing to the Supreme Court (Art 360.3 civil procedural code).

[240] See Mattia Persiani, "Il contratto collettivo di diritto comune nel sistema delle fonti" (2004) 1 *Argomenti di Diritto del Lavoro*, 1–29. See also Giugni (2014) 140; Rusciano (2003) 254.

[241] This interpretation may conflict with the private nature of the collective agreement, but it relies on the observation of the evolution of law as also including the rules produced by private subjects. Modugno F., Le fonti normative nel diritto del lavoro, 2011, Atti del convegno nazionale Nuovi assetti delle fonti nel diritto del lavoro, 2011, avalaible at http://caspur-ciberpublishing.it/index.php/atticsdn/article /view/725. The inclusion appears problematic due to the absence of a clear rule setting out the relationship with the constitutional provision on *erga omnes* collective agreements, see Ghera (2011) 301.

[242] Act 146/1990. See Corte Cost., 14 ottobre 1996, n.344.

[243] Reinhold Fahlbeck, "Collective Agreements: A Crossroad between Public Law and Private Law" (1987) 8 *Comparative Labour Law & Policy Journal*, 268–95, 287.

determination Act has created a legal framework in which the collective agreement is considered a private contract with specific features.[244] Therefore, although formally the collective agreement remains a private law contract, it should be seen as a source of regulation within the realm of labour law and industrial relations.[245] Furthermore, the legislation gives priority to the collective agreement in regulating certain aspects of work and employment.[246] In these cases the legislation is considered semi-compelling law (*semidispositiv lagstiftning*), meaning that a collective agreement can deviate from its provisions.[247]

Whereas in Italian law a definition of collective agreement is absent, in Sweden the collective agreement has to fulfil some basic – and minimal – requirements. The Act defines the collective agreement (*kollektivavtalet*) as an agreement in writing between an employers' organisation or an employer and an employees' organisation concerning the conditions of employment or the relationship between employers and employees.[248] Despite the difference in the formal definition, the instrument of the collective agreement performs the same substantial functions in both Italy and Sweden. In Italy, the collective agreement contains a so-called 'obligatory part' (*parte obbligatoria*), concerning the reciprocal obligations that bind only the signatory parties, and a so-called 'normative part' (*parte normativa*), which sets the working and employment conditions to be applied in the employment relationship.[249] On the one hand, the collective agreement is called to regulate the relationship between trade unions and employer or employers' association(s), so as to function as a regulatory instrument of industrial relations (*funzione obbligatoria*). On the other hand, the collective agreement fixes the conditions of employment, functioning as the normative source for the individual employment relationship (*funzione normativa*).[250] Identical functions are performed by the collective

[244] Schmidt (1977) 126.

[245] Hansson points out that the prominent self-regulative dynamics of labour law place it at a crossroads between private and public law, see Hansson (2012) 40.

[246] See for instance SFS 1976:580, Section 4, which lists a series of provisions, also concerning fundamental aspects such as the right to negotiate, the procedures of negotiations, the transfer of undertaking, the interpretation of collective agreement and others, which can be derogated through a collective agreement.

[247] Schmidt (1997) 37; Kent Källström & Jonas Malmberg, *Anställningsförhållandet* (Iustus 2013) 165; Hansson (2012) 63.

[248] 1976 Co-Determination Act, Section 23. Subsection 2 states that an agreement is also to be considered in writing if it is under the form of minutes or where the proposal for the agreement and the acceptance of it are in separate documents. The requirement of the written form has been grounded on the need for clarity required by an instrument such as the collective agreement, which applies to parties not signing the agreement, application and subjects who are bound by it. See Prop. 1975/76:105, 372, also Schmidt (1997) 180.

[249] Bortone (1992) 48.

[250] A further function can be the 'managerial function' (*funzione gestionale*), which refers to cases in which the collective agreement is adopted in order to 'manage' the employment relations within a company as well as in case of the management of company crisis and collective redundancies. Minor functions also depend on the different clauses that the collective agreement may contain: for instance,

agreement in the Swedish system.[251] The collective agreement thus has a part with obligatory effects (*obligatorisk verkan*), which refers to the obligations arising from the signature of the agreement binding the parties, and a part with normative effects (*normativ verkan*), which refers to the conditions to be applied in the employment relationship.[252] A further and fundamental function, even codified in the Co-determination Act,[253] of the collective agreement in the Swedish system is to establish the obligation of social peace between the signatory parties as well as between their members (see Section 3.5.2).[254]

3.4.2. The legal recognition of the normative effects of the collective agreement

Generally speaking, the collective agreement produces normative effects for the contracts of employment between the individual parties falling within its scope, i.e. covered by union membership. This also means that the individual contract cannot, in principle, derogate from the conditions stated by the collective agreement. The analysis of the normative effects of the collective agreement hence concerns the extent to which individual autonomy may deviate from collective autonomy and the mechanisms through which a legal system may 'ratify' the achievement reached by collective autonomy, so as to legitimise the collective agreement as autonomous source.

In Italy, the nature of the obligations stemming from the obligatory clauses is socio-political rather than legal. The equilibrium of the system of industrial relations lies and relies on the obligation of the affiliated members to respect the agreement, which offsets the organisations' commitment to pursue the collective interests of their members. As to the individual scope, the Supreme Court has clarified that the collective agreement and the individual contract are two different sources linked by a hierarchical relation in which the 'individual' source refers to the 'collective' one for the rules to apply to the employment relationship. In this way, later collective

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a clause establishing a specific fund or bilateral body performs a so-called 'institutional function' (*funzione istituzionale*); moreover, social peace clauses are identified as performing a 'settling function' (*funzione compositiva*). See Giugni (2014) 151–53.

[251] An agreement not fulfilling those criteria is not to be deemed a collective agreement, SFS 1976:580, Section 25.

[252] Hansson (2010) 145 and 187; Folke Schmidt has defined the collective agreement as having 'combined effects' ('[k]ollektivavtalet kan således sägas ha en kombinerad effekt'), Schmidt (1997) 195. Fahlbeck and Mulder define the statutory definition as the widest possible one, see Fahlbeck & Mulder (2009) 34.

[253] SFS 1976:580, Section 41.

[254] Fahlbeck defines such a function as the most important function of collective agreements, which he defines as instruments of labour peace, see Reinhold Fahlbeck, *Strikes, Lockouts and Other Industrial Actions* (Iustus 1993) 73.

agreements are entitled to modify the terms of an employment relationship concluded under a previous collective agreement.[255] However, the case law has acknowledged the inderogability of the normative part of collective agreement by the individual contract: the Supreme Court has stated that employers and employees affiliated to signatory associations are bound by the clauses of the collective agreement.[256] Accordingly, the presence of pejorative clauses in the individual contract is envisioned as an eventuality that ought to be remedied through the so-called mechanism of 'real efficacy' (*efficacia reale*) of the collective agreement, which is based on individual resort. Conceptually, this mechanism serves the purpose of safeguarding the individual autonomy of the parties since it sanctions only clauses of the employment contracts setting lower conditions than those stated by the collective agreement.[257] The autonomy of the individual parties to set higher conditions for the employee, although deviating from those set in the collective agreement, is instead protected. In this regard, the Italian legal system upholds the principle of '*favor*', which entails the application to the workers of the most favourable conditions, either stated in legislation, or in a collective agreement, or in the individual contract.[258] The ratio is to favour the protection of the weaker party in the employment relationship – without encroaching on individual autonomy.

No principle of *favor* is present in Swedish labour law, where the legal effects and the functions of the collective agreement are, unlike Italy, statutorily codified. Section 26 of the Co-determination Act states that a collective agreement signed by an employers' or employees' organisation binds their members within its scope.[259] In concrete terms, the provision means, on the one side, that the organisations affiliated with the contracting parties of a collective agreement are bound by its obligatory clauses as regards their reciprocal relations (*obligatoriska avtalsvillkor*);

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[255] Cass., 24 agosto 2004, n.16691; Cass., 10 ottobre 2007, n.21234.

[256] See inter alia, Cass., 26 giugno 2004, n.11939.

[257] This mechanism developed in contrast to the mechanism of 'obligatory efficacy' (*efficacia obligatoria*), which would instead assume the conclusion of the collective agreement by the union under the collective mandate of the workers. This would mean that the employers and the workers, by their adhesion to the respective associations, renounce their private individual autonomy. See Santoro-Passarelli (1991) 48–49, and inter alia, Cass., 22 febbraio 1992, n.2205).

[258] The principle of favour also applies in case of conflict between collective agreements: for instance, in case of transfer of undertakings, the more favourable collective agreement of either the transferee or the transferor shall apply to the employees, see Cass., 8 settembre 1999, n.9545.

[259] SFS 1976:580, Section 26, subsection 1. The mandatory nature of the normative clauses applies regardless of whether the member has joined the organisation before or after the conclusion of the agreement or whether she resigns from union membership before the expiration of the agreement itself. See SFS 1976:580, Section 26, subsection 2, see Jonas Malmberg, "The Collective Agreement as an Instrument for the Regulation of Wages and Employment Conditions" (2002) 43 *Scandinavian Studies in Law*, 189–213, 199. The rules on prolongation make the agreement still applicable to the individual subjects in case of membership to a different organisation. In this case the new organisation should sign a new collective agreement in order to end the application of the previous one on the individual members, see Holke & Olauson (2012) 226.

on the other side, the employer affiliated to a signatory employers' organisation is obliged to apply the terms and conditions of employment (*normativa bestämmelser*) set by the agreement to all employees.[260] Accordingly, the principle of inderogability is codified in Section 27 of the Co-determination Act. It entails that the employers and the employees who are bound by a collective agreement cannot enter into any contract that does not comply with such an agreement without rendering such a contract null and void.[261] The Labour Court has specified that the inderogability principle also applies in relation to the terms of the individual contracts stating more favourable conditions to the employees, except for the minimum terms and conditions. According to the Court, the ratio of such a principle concerns the protection of the collective agreement and collective autonomy, which would be undermined by a divergent individual agreement between the employer and the employee.[262]

The centrality of the collective agreement within the Swedish system is further illustrated by the recognition of legal effects produced by certain implicit terms.[263] Any Swedish collective agreement is seen to contain silent or hidden clauses (*tysta* or *dolda klausuler*) – defined as 'those employment terms which cannot be found in the express text of the agreement'.[264] Hidden clauses may derive from customary rules concerning contract law, such as the obligation to be compensated for the work performed, and from the *travaux préparatories* of the statutory acts adopted by the legislator; or they may also stem from the intentions of the parties during the negotiation process.[265] Hidden clauses may also regard the legal effects regulating the relationship between the employer(s) and the employees' organisation(s), such as freedom of association, managerial prerogatives and social peace obligations.[266]

Although the mandatory nature of the collective agreement would require the legal system to provide adequate mechanisms of sanctions and remedies in case of

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[260] See Holke & Olauson (2012) 224.

[261] SFS 1976:580, Section 27. Holke & Olauson (2012) 232. See also Tore Sigeman, "The Structure of Swedish Collective Labour Law: An Introduction" in Alan C. Neal (ed), *Law and the Weaker Party. An Anglo-Swedish Comparative Study* (Professional Books 1981) 131–43, 138.

[262] The case concerned an oral agreement between an employer and an employee about the payment of overnight reimbursement to which the employee was not entitled according to the collective agreement, see AD 1989: 12.

[263] In this regard Hansson stresses the fact that to be bound by clauses that are not explicitly mentioned in the agreement might be considered an anomaly, see Hansson (2012) 317.

[264] Antti Suviranta, "Invisible Clauses in Collective Agreements" (1965) 9 *Scandinavian Studies in Law*, 177–215, 182.

[265] Suviranta also mentions the clauses and implied terms of the employment contracts as an 'invisible clause', thus as terms arising out of the employment relationship which might have a mandatory legal effect for the collective agreement; see Suviranta (1965) 183–84.

[266] As well as the banning of certain forms of strike. For a reconstruction of the issue of invisible clauses concerning collective action, see Håkan Göransson, "Hidden Clauses in Collective Agreements: The Case Law of the Swedish Labour Court" (1990) 34 *Scandinavian Studies in Law*, 93–113.

breaches of the agreement, the Italian system has not set out any special mechanisms in this regard. In accordance with the private law status of the agreement, the rules on contract law should apply,[267] but the practice of damage compensation is non-existent in the Italian experience because of the potential for trade union liability to hamper trade union freedom.[268] Parties usually prefer internal mechanisms of sanctioning, such as collective action.[269] In the Swedish system, by contrast, the violation of the obligations arising out of the collective agreement is sanctioned with the so-called punitive or general damages (*allmänt skadestånd*), which might exceed the economic loss suffered by one party or can even be awarded if no economic loss has occurred at all.[270] The liability and the remedies in case of breach can be sanctioned to all parties bound by the collective agreement, i.e. employers, employees and respective organisations,[271] including the co-determination agreement.[272] The calculation of the due amount of damages is usually undertaken by the court on a case-by-case basis.[273] In general, the employer bound by a collective agreement is also liable to pay damages in case of non-application of the conditions of the agreement to outside employees.[274] However, the Labour Court has recognised that the employer can terminate the situation of violation by extending the conditions of the agreement to outside employees.[275]

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[267] Art 1362 civil code and ff. See Treu (2010) 198.

[268] Historically, trade unions have been rather unwilling to subject themselves to legal liability, preferring to remain within the field of political liability intended as the responsibility assumed to the members, also in case of unlawful strike, see Antonio Lo Faro, "Responsabilità e sanzioni per sciopero illegittimo: cambia qualcosa in Italia dopo *Laval*?" (2011) 131 *Giornale di Diritto del Lavoro e delle Relazioni Industriali*, 419–32, 423.

[269] Treu points out that the missed resort to contractual liability in case of breach of obligatory clauses is a 'further sign of the low degree of institutionalization of Italian industrial relations and of the lack of faith among the parties as to the possibility of increasing it by legal sanctions'. See Treu (2010) 195.

[270] SFS 1976:580, Section 55. Sigeman in Neal (1981) 141. Sigeman notes that the legal rules on damages for breach of a collective agreement are placed in between the civil and the penal law realms. He attributes this aspect to political choices made when the 1928 Act on Collective Agreement was adopted, to downplay penal liability for the breach of a collective agreement, see Tore Sigeman, "Damages and Bot. Remedies for Breach of Collective Agreements in Nordic Law" (1985) 29 *Scandinavian Studies in Law*, 185–212, 193.

[271] SFS 1976:580, Section 54. Adlercreutz & Nyström (2010) 201; Malmberg (2002) 201.

[272] SFS 1976:580, Section 57, subsection 1.

[273] For instance, the Labour Court has stated that in assessing the calculation of damages due by an employer who had violated a clause of a collective agreement, the actual economic profit earned by the employer through the misapplication of the agreement should be considered, see AD 2014:31, where the Court refers to the travaux préparatories of the CO-Determination Act, see Prop. 1975/76:105, part. 1, 302.

[274] See AD 2013:92, where the Labour Court specifies that a collective agreement is also applicable to a workforce that is temporarily employed by the company if the employer is bound by it.

[275] The Labour Court has rejected the claim of compensation for damages of a union for the non-application of the agreement's conditions to an outside employee because the employer had ensured the application of the agreement as soon as the company management realised it was under such an

The corollary of the private nature of the collective agreement would concern the fact that it does not produce effects on other subjects who are not bound by membership. Given that both systems lack statutory *erga omnes* mechanisms that would make the collective agreement universally applicable, the question becomes how to limit possible segmentations of the labour market by ensuring the widest possible application of the terms of the collective agreement. In other words, the legal system should be concerned with the definition of mechanisms that extend the collective agreement beyond its legal force, i.e. its *ultra vires* extension.[276] In both systems, the employer not affiliated with an association entered into a collective agreement is not legally obliged to apply the terms of the collective agreement to the company workforce. Moreover, in Italy, the employer bound by a collective agreement is not obliged to apply those conditions to the employees who are not members of the union counterpart. Nevertheless, the terms of the collective agreement are usually applied in practice: their missed application would indeed either be sanctioned as anti-union conduct and discrimination for trade union membership in case of application of higher terms and conditions for non-organised employees.[277] A common practice consists of including in the individual contract an explicit reference to the collective agreement. A collective agreement is also considered applicable to non-unionised employees pursuant to the concrete, albeit implicit, application of its terms in the individual employment relationship.[278]

A judicial practice (which thus can only take place pursuant to an individual complaint) in the Italian system is to extend to non-unionised employees the wage clauses of a collective agreement if the wage set in the individual contract is lower than the one set by the collective agreement. The mechanism is based on a joint reference to the constitutional provision on fair and just remuneration and the provision of the civil code attributing to the judge the prerogative to indicate the wage if such a clause is missing in the individual contract.[279] Due to the recognition of the direct effect of the constitutional provision,[280] the judge can indicate the wage set in collective agreements as the one fulfilling the constitutional requirements and

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obligation. Therefore, the Court did not find grounds for awarding the union with compensation, see AD 2014:31.

[276] The *ultra vires* extension of the collective agreement differs from the *erga omnes* extension because it does not automatically produce the universal application of the agreement.

[277] Art 15 L. 300/70.

[278] Inter alia Cass., 4 marzo 1996, n.1672. The Supreme Court, however, specifies that in these cases the employer is bound only by the collective agreement implicitly or explicitly referred to, but not automatically by the successive ones, see Cass., 23 aprile 1999, n.4070.

[279] Art 36 Const. and Art 2099 civil code.

[280] The Constitutional Court identifies in Art 36 Const. a sufficiently clear norm as to give the judges the prerogative to define the meaning and the scope of the principle of just remuneration, see Corte Cost., 28 giugno 1971, n.156. The direct effect of Art 36 Const. has also been stated in other rulings, see, inter alia, Corte Cost., 4 luglio 1963, n.129; Corte Cost., 14 giugno 1984, n.177; Corte Cost., 10 dicembre 1987, n.559.

replacing the wage clause stated in the individual contract.[281] In this sense, the legal system recognises the collectively negotiated wage as the legitimate wage and collective autonomy as the legitimate principle of wage-setting.

The extension of the terms of a collective agreement is also ensured through the procedures set for public procurements. For instance, Art. 36 of the Workers' Statute states that the calls for public tender shall include a clause concerning the obligation for the assignee to apply employment conditions no lower than those set in the sectoral or local collective agreements.[282] Similarly, Art. 118.6 of Act 123/2006 on public tenders obliges the company awarded with a public tender to apply working and employment conditions no lower than those stated by the collective agreements applied in the sector and in the geographical area concerned by also stating the liability as regards eventual subcontractors.[283] This mechanism does not intervene into the collective agreement, i.e. it does not alter the agreement's status within the legal system, but rather demonstrates the recognition by the legal system of the collective agreement – and collective autonomy – as a regulating source in employment.

In Sweden too, different treatments can derive from the condition of being (non-)unionised. Non-unionised employees (*utanförstående arbetstagare*) or members of non-established trade unions might be exposed to less favourable treatments than members of an established trade union.[284] Similarly, employees of a non-unionised employer (*utanförstående arbetsgivare)* might be subject to lower conditions than those stated in a collective agreement.[285] However, the high union density among the employers ensures a high coverage of the collective agreement due to the statutory obligation for the employer bound by a collective agreement not to enter into deviating contracts.[286] Although in general the relationship between a unionised employer and the outside employee would be regulated by the principle of freedom of contract, the collective agreement is invested with a role of performing a 'filling

[281] See Giugni (2014) 148. In this regard, this mechanism has been pointed out as the maximum failure of the establishment of a relationship between the legal system and the inter-organisations system, because the collective agreement shows a very wide power and efficacy within the inter-organisations system, but a very limited power and efficacy within the legal system. See Rusciano (2003) 70.

[282] The social finalities of such provisions have been indicated as justifying their constitutionality, see Corte Cost., 1 giugno 1998, n.226 and Cass., 21 dicembre 1991, n.13834.

[283] Giugni (2014) 150.

[284] See Reinhold Fahlbeck, "Om diskriminering av utanförstående arbetstagare" in Fahlbeck & Roos (1983) 67–101, 77. The Employment Protection Act states that an employer who is bound by a collective agreement shall also apply its conditions on the matters listed in the act to employees who are not members of the signatory union performing the same work. The 1977 Annual Leave Act (SFS 1977:480 *Semesterlag*) states a similar rule as regards leave.

[285] See for instance Alan C. Neal, "The Employment Protection Act and Individual Employment in Sweden" in Neal (1981) 175–92, 191; Malmberg (2002) 207.

[286] Tore Sigeman, "Insiders and Outsiders in the Labour Market. Experiences of a Nordic Welfare State in Labour Law Perspective" (1999) 38 *Scandinavian Studies in Law*, 265–78, 267.

effect' (*utfyllande verkan*) in relation to the individual employment contract.[287] The Labour Court has considered the employer bound by a collective agreement to be under the obligation to apply the conditions of the agreement also to outside employees, by virtue of the filling effect that the agreement has in the company as customary source (*sedvänja*).[288] In this sense the collective agreement entitles the individual employee to certain rights to be protected in the employment relationship, which also holds for the outside employee.[289] Yet not all the conditions stated in the collective agreement shall be applied to the outside employee. The Labour Court upholds a distinction between general conditions, which must be applied to a company's entire workforce, and individual conditions, whose application may be subject to union membership.[290] Only the minimum conditions are to be considered terms of a collective agreement to be applied to outside employees too in order to ensure the uniform application of employment standards in the labour market.[291] According to the Labour Court, the principle of competition between trade unions might allow a different application of wage levels, since the wage has to be deemed as an individual condition of employment.[292] The application of wage clauses solely to members of the signatory unions hence aims at protecting the established trade union from the phenomenon of 'free riding'.[293]

In case of a non-unionised employer, the sectoral collective agreement in force cannot automatically apply. In this situation, however, the legal framework provides the trade unions with a very effective tool: the possibility to ask the employer to sign an 'accession agreement' (*hängavtal*) that reproduces the terms of the sectoral agreement. The unions are also allowed to take industrial action in order to force the

[287] Källström & Malmberg (2013) 182.

[288] See Malmberg (2002) 205; also Källström & Malmberg (2013) 185.

[289] AD 2014:31. The case concerned a bakery where the employer was a member of the employers' association of the sector and was therefore bound by the sectoral collective agreement. The employee was not a member of the union. In this regard, the Court recalls the general principle of the Swedish labour market concerning the application of the collective agreement the employer is bound by to all employees. In the case, the employee had received lower conditions as regards salary and no compensation for overtime, leave payment, and insurance benefits.

[290] See Källström & Malmberg (2013) 183.

[291] AD 1977:49, see Eklund & Sigeman & Carlsson (2008) 156; the authors stress that the Court aimed at reaching social peace on the labour market: the missed application of the agreement to non-unionised employees would have exposed the employer to collective action.

[292] AD 1982:69. See Christensen in Fahlbeck & Roos (1983) 26–27.

[293] See AD 1984:79. In the ruling, the Court reaffirms the normative nature of the collective agreement, but it states that the conditions that should also be applicable to outside employees are limited. Specifically, the case related to the application of wage levels to an outside employee. The Court affirmed that the employee was entitled to the minimum level stated by the collective agreement and not to the same level of their co-workers affiliated with the established trade union, even though they were performing the same tasks and job.

employer to enter into an accession agreement.[294] The importance of this instrument cannot be underestimated because it ensures the uniform application of employment terms and conditions in the labour market, although the conclusion of an accession agreement does not necessarily end the negotiations, since the unions would then be allowed to negotiate other terms, in particular wage levels, in co-determination agreements.[295]

3.4.3. The relationship between collective agreements at different levels: between autonomy and legal regulation

Generally speaking, both the Italian and the Swedish systems of collective bargaining rely on a hierarchical structure in which negotiations at lower levels occur within the framework and the limits set by the higher level. This aspect is particularly important in relations with company collective bargaining, which usually occurs within the boundaries set by joint protocols or intersectoral agreements. In setting the rules for industrial relations practices or defining labour market policies, this type of agreement does not have a specific duration. Its adoption is totally up to the parties, who can decide to modify them or to negotiate new ones when required. In both Italy and Sweden, the government has played a significant role in stimulating the process of intersectoral negotiations in specific periods.

Sectoral bargaining is then bound by the rules set by the intersectoral agreements. In Italy, however, in light of the trade union pluralism, sectoral collective agreements can be signed by industry federations not affiliated with the major confederations – and for which the intersectoral agreement is not binding. However, the rules on representativeness introduced by the social partners between 2011 and 2014 aim at excluding from sectoral bargaining those unions that do not subscribe to the intersectoral agreement.[296] In Sweden the basic procedures for sectoral bargaining are established in the Co-determination Act, albeit on the basis of common practices in industrial relations. As a general rule, both the central agreements and the legislation provide that the first step in starting out the negotiations should be taken by local organisations, unless the circumstances are such that they require the direct intervention of national industry organisations. In

[294] This provision is contained in Section 42a of the Co-Determination Act which suspends the ban over collective action against employers who are not bound by a collective agreement included within the scope of the Act itself.

[295] Ahlberg & Bruun & Malmberg (2006) 158.

[296] The mechanism has been critically referred to as a 'dictatorship of the majority' because it tends to exclude from the conclusion of the sectoral agreement both autonomous unions not affiliated with the main confederations and the dissent union organisations affiliated with the main confederations. See Umberto Romagnoli, "Libertà sindacale sequestrate" in www.eguaglianzaeliberta.it, accessed 29 June 2017.

this way, negotiations concerning conditions to be applied within certain sectors are necessarily conducted by national industry federations,[297] who are also allowed to refer to third bodies in order to seek solutions to a dispute.[298] Interestingly, the intersectoral agreements are not considered as proper collective agreements in the Swedish system: this means that sectoral federations shall explicitly include the clauses negotiated at a higher level in sectoral collective agreements.

The sectoral collective agreement constitutes the bedrock of labour market regulation in both countries. Its function is to ensure the normative and retributive standards to all workers employed in the sector concerned and to define the boundaries for the lower levels of bargaining. In Italy, the sectoral collective agreements last two years for the retributive clauses and four years for other clauses. The case law has stated that in the absence of an expiration date, each party can decide to terminate the agreement, in accordance with the regulations of contracts.[299] In Sweden, the sectoral collective agreements on wages and working conditions last for 1, 2, or 3 years, according to the will of the parties, and they are usually automatically extended for 1 year if no termination notice has been given.[300]

Company collective bargaining plays a fundamental role in both systems. In the less centralised Italian system, the complementary function of company collective bargaining, always central to the functioning of the system, was formalised in the 1993 Protocol as the most suitable level of bargaining in response to the need for enterprises' 'flexibility'.[301] In general, the company collective agreement applies to the entire company workforce,[302] unless providing worse conditions than the

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[297] Art 3 of the 1938 Basic Agreement. This rule is also upheld in SFS 1976:580, Section 14, subsections 1 and 2; see Rönnmar (2009) 11.

[298] These bodies can be those established by the parties themselves as well as those set up through legislation. For instance, the 1997 Industrial Agreement states the appointment of an impartial third person one month before the expiry date for assisting the parties in the negotiations. Similarly, the 1982 Development Agreement provides for the possibility to refer to the Efficiency and Participation Development Board in order to demand possible proposals for a solution to the dispute. On the legislative side, in 2000 an amendment to the Co-Determination Act has established the National Mediation Office for the purpose of mediating in industrial disputes at the request of the parties or on its own initiative in case of an industrial action. See SFS 1976:580, Sections 46–48.

[299] Cass., 25 febbraio 1997, n.1694, the Supreme Court stresses the need to avoid never-ending obligations, with the exception of rights maturated by the employees.

[300] Other collective agreements concerning more durable issues, such as working environment, equal opportunity, or insurance pay, might last longer, see Fahlbeck & Mulder (2009) 36; Adlercreutz & Nyström (2010) 191.

[301] Bavaro (2012) 107. In this sense, the 1993 Protocol achieved the twofold goal of centralising the dynamics of controlling labour costs through income policies at national level, and decentralising to the productivity goals connected to specific situations of the companies, see Bellardi (1999) 115; on the relevance of a collective bargaining at local level as a tool for balancing company needs for constraining salary increases and workers' need to adjust the wages to the living costs, see Lauralba Bellardi, "La struttura della contrattazione collettiva: ragionando della sua revisione" (2007) 21 *Lavoro e Diritto*, 235–49.

[302] See for instance Cass., 26 giugno 2004, n.11939.

sectoral one. In this situation, the case law has excluded its application to employees who are not affiliated with the signatory unions.[303] Until the entry into force of Art. 8 of Act 148/2011, derogations by means of company collective agreements were deemed to be exceptions authorised by virtue of collective autonomy.[304] The Act has, however, overturned this logic by substantially placing the second-level collective agreement (the company collective agreement) and the first-level collective agreement (the sectoral one) on an equal footing.[305] The definitive acknowledgement of the 'interchangeability' between sector- and company-level collective agreements has come with the labour market reform introduced by Act 81/2015, which places them on equal footing within the scope of the acts without defining the respective competences.[306] In identifying the source regulating the use of temporary and atypical employment in the company, Art. 51 of the Act does not distinguish between national, local or company collective agreement – *de facto* ratifying a decentralisation of collective bargaining in which the company-level is no longer connected to a higher (i.e. national and sectoral) level and in which, therefore, the company is the privileged space for collective negotiations.[307] This act has curtailed the prerogatives of collective bargaining in setting the employment standards as if such a mechanism for the regulation of the labour market had lost the trust previously attributed by the legal system in favour of the legislative process, which at present appears to be strongly directed by the government.[308]

In the more centralised Swedish system of collective bargaining, the company negotiations occur within the strict framework set out by sectoral collective agreements. Collective negotiations at company level usually aim at achieving a 'local' collective agreement, which means a collective agreement signed between the company and the local branch of the sectoral federation, in order to implement the guidelines set by the sectoral agreement as regards wages and benefits.[309] The company collective agreement, which shall contain the provisions stated by the

[303] For instance, in case of providing part-time employment instead of full-time as stated in the sectoral agreement, see Cass., 24 febbraio 1990, n.1403. Yet, in case of collective redundancies, the legislation attributes to the collective agreement the *erga omnes* efficacy within the workplace also in case of pejorative conditions on the basis of the function of the agreements as restricting procedure for the exercise of the employer's power of unilateral definition of the criteria for collective dismissals rather than from an expression of collective autonomy, see Corte Cost., 22 giugno 1994, n.268.

[304] Bavaro (2012) 127.

[305] In this sense Vito Leccese, "Il diritto sindacale in al tempo della crisi. Intervento eteronomo e profili di legittimità costituzionale" (2012) 136 *Giornale di diritto del lavoro e delle relazioni industriali*, 479–525, 491.

[306] See Recchia in Ghera & Garofalo (2015) 124.

[307] See Umberto Gargiulo, "L'azienda come luogo "preferenziale" delle relazioni sindacali?" (2016) 3 *Lavoro e Diritto*, 391–416, 400.

[308] Giuseppe Antonio Recchia, "Il ruolo dell'autonomia collettiva" in Edoardo Ghera & Domenico Garofalo (eds), *Contratti di lavoro, mansioni e misure di conciliazione vita-lavoro nel Jobs Act 2* (Cacucci 2015) 117–30, 129.

[309] Ahlberg & Bruun in Blanke & Rose (2005) 119.

collective agreement of higher level, has universal application within the space of the company by virtue of the principle of inderogability.[310] Further types of collective bargaining at company level concern negotiations over the application and interpretation of collective agreements – i.e. disputes on rights – and co-determination agreements. Both cases are linked with sectoral bargaining. In the case of a dispute on a company collective agreement, if the negotiations fail, the dispute is referred to higher levels of collective bargaining and finally to the Labour Court. In the case of co-determination agreements, the negotiations can be pursued only by the established trade union. Despite the decentralisation that occurred in the 1990s, the Swedish system is still based on a hierarchy that views the company collective agreement as being subordinated to the sectoral one.

3.5. Collective autonomy, collective bargaining, and collective conflict

3.5.1. Collective bargaining and the entitlement of the right to collective action

The exercise of conflict is a central aspect in the discourse on collective autonomy. The process of collective bargaining aims at suspending the conflict between the parties and finding a compromise between the collective interests at stake. The possibility to exercise collective conflict is central in the negotiation phase as a tool for forcing a stalemate, but it is also a very effective sanction in case of violation of the conditions set in a collective agreement.

In the national contexts the issue of conflict relates to the effect that the collective withdrawal from work might have on the productive capabilities of a single company and on the economy as a whole. Collective action is thus of fundamental importance in trying to better understand the degree of parties' autonomy within the system of collective bargaining. Because of the potential effects deriving from the exercise of collective conflict, the issue of its entitlement is crucial in analysing a national context because it indicates to what extent the legal framework entrusts the collective subjects with the exercise of collective power.[311] In Sweden the constitutional provision and the Co-determination Act confer such a right to the collective subjects, including the individual employer. On the contrary, the provision of the Italian Constitution does not indicate the subjects entitled to strike.

[310] Holke & Olauson (2012) 234.

[311] See also Leader (1992) 255–57.

In the Italian context the right to strike has traditionally been recognised as an 'individual right having a collective exercise'.[312] Thus, the definition of strike is not restricted to the situations in which a trade union calls the action or when the individual participation of the workers depends on union membership.[313] However, the issue of the entitlement of the right to strike is debated periodically. Interestingly enough, the thesis of collective entitlement is sustained by 'conservative' scholars in opposition to supporters of individual entitlement. In this sense, the collective entitlement is mostly seen as an instrument of control over the resort to strike in industrial conflict.[314] The supporters of the thesis of collective entitlement base their claims on the prerogative of the labour market parties to regulate and limit collective action through collective agreements.[315] But this thesis does not find any specific ground in the legal system and for it to be applied it would need to be revised. By contrast, individual entitlement is endorsed by the case law of the Constitutional Court, which has recognised the right to strike as an individual right,[316] as well as by the act on the strike in essential public services, which refers to 'subjects promoting the strike' or 'organisations of workers proclaiming the strike'. The absence of references to trade union subjects means that the subjects calling for the strike action shall be not necessarily organised in a trade union.[317] In accordance with the principle of individual entitlement, trade unions cannot be liable for unlawful strike, so that sanctions, including damages, can only be assigned to the individual workers.[318]

In Sweden, the constitutional provision on the right to collective action explicitly suggests the collective entitlement of the right to strike on both parties by referring

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[312] Giugni (2014) 263.

[313] See also the decision of the Supreme Court stating that the exercise of the strike cannot be limited by the approval of trade unions in a pluralist system, Cass., 21 luglio 1984, n.4288.

[314] See Carinci (2009) 425.

[315] Roberto Romei, "Ripensare il diritto di sciopero?" (2012) 134 *Giornale di diritto del lavoro e delle relazioni industriali*, 331–37.

[316] Inter alia, Corte Cost., 9 gennaio 1974, n.1; Corte Cost., 5 aprile 1960, n.26. This ruling belongs to the cluster of sentences aiming at cleansing the penal code from the corporatist rules. However, the Court stated that the self-employed worker should not have any employees directly dependent on them in order for the action to be considered a strike rather than a lock-out. See Corte Cost., 8 luglio 1975, n.222; Corte Cost., 13 dicembre 1962, n.123. On this point, also Luca Nogler, "La titolarità congiunta del diritto di sciopero" (2013) Working Paper C.S.D.L.E. Massimo D'Antona, IT – 183/2013, 6. Nogler argues that the criterion of the presence of an organisation should be added to the criteria of the collective abstention from work of a plurality of workers and of the pursuing of a collective interest.

[317] In this sense Giugni (2014) 263. According to the commentators, the adoption of the act on strike in essential public services enhanced the establishment of a 'neo-institutional model'. See Mario Rusciano, "Legge sullo sciopero e modello neo-istituzionale" (2009) 121 *Giornale di diritto del lavoro e delle relazioni industriali*, 121–38.

[318] Orlandini in Vimercati (2009) 73.

to collective (or industrial) actions undertaken by labour market parties.[319] Collective entitlement has its roots in the contractual origin of the right to strike, which in the Swedish system was introduced through the 1938 Basic Agreement, and it is supported by the self-regulation pursued through the intersectoral agreements signed at national level. Therefore, the framework of rules – set by law as well as by collective agreements – attributes a great power to collective actors, so as to reflect the centralised structure of the system.[320] The system is designed in order to give full power to the unions over the use of collective actions, to the extent that an action organised by individual workers without the union involvement would be deemed an unlawful wildcat strike.[321] In accordance with the collective entitlement, the labour market parties can be sanctioned in case of unlawful collective action to economic and punitive damages.[322] Furthermore, the act assigns to the organisations the responsibility over their members in order to prevent them from taking or participating in any unlawful collective action.[323] The principle of collective entitlement is also reinforced by the limitation of the individual employees' liability for participating in an unlawful collective action to cases of 'wildcat strikes', when the trade unions are not involved and in general are not taken into account if the organisation has already been condemned to pay the damages.[324] The right to take collective action thus appears as a purely collective right, whilst its individual dimension, as the right of the single worker to retrieve his or her work, seems downplayed.

3.5.2. Collective autonomy and social peace: statutory and contractual limits to collective conflict

Besides being a tool in the process of collective bargaining, the conflict also constitutes an anomaly in the system, as it establishes a situation of discontent on both sides of the labour market. In the light of a conceptual understanding that conceives of collective bargaining as a process geared towards achieving a compromise, the situation of 'peace' set by the collective agreement allows both

[319] Hansson in Carlsson & Edström & Nyström (2016) 67; Niklas Bruun & Claes-Mikael Jonsson & Erland Olauson, "Consequences and Policy Perspectives in the Nordic Countries as a Result of Certain Important Decisions of the Court of Justice of the EU" in Bücker & Warneck (2011) 19–43, 23.

[320] Sigeman in Neal (1981) 140.

[321] Fahlbeck & Mulder (2009) 39.

[322] SFS 1976:580, Sections 54–55.

[323] SFS 1976:580, Section 42, subsection 2.

[324] See Niklas Bruun & Caroline Johansson, "Sanction for Unlawful Collective Actions in Nordic Countries and Germany" (2014) 30 *The International Journal of Comparative Labour Law and Industrial Relations*, 253–71, 267. However, the individual employee participating in a strike action without the support of the union may incur penalties for the breach of the individual employment contract, see Schmidt (1997) 230.

parties to enjoy the benefits gained through the negotiations. Yet social peace entails limitations to the exercise of collective conflict. Its regulation is a central aspect in the context of collective autonomy, which reflects the attribution of the entitlement of the right to take collective action. But social peace also relates to the relationship between collective agreement and the individual contract: social peace clauses are obviously obligatory clauses, which should bind only the collective subjects signing the agreement; yet social peace regulation affects the possibility of single workers to go on strike.

The individual entitlement characteristic of the Italian system would exclude the claim that single workers should be bound by social peace clauses.[325] Yet the disrespect of such clauses would certainly spoil the entire system, since it would question the representativeness of the trade unions.[326] Although not statutorily regulated,[327] social peace clauses are a common practice within Italian industrial relations, whose regulation has, however, been a prerogative of collective autonomy.[328] In the Italian system, social peace is not seen as an inherent obligation stemming from the conclusion of a collective agreement. This is mainly due to the fact that social peace clauses emerged out of the practice of industrial relations in a specific moment in the evolution of collective bargaining. In this sense, the actors of industrial relations, but also the doctrine itself, have refused to give universal value to a contingent practice.[329] Nevertheless, in 1993 the labour market parties institutionalised social peace clauses in the Joint Protocol and anchored them in the

[325] For this classical understading, see Giorgio Ghezzi, "Autonomia collettiva, diritto di sciopero e clausole di tregua (variazioni citriche e metodologiche)" (1967) 149 *Rivista Trimestrale di Diritto e Procedure Civile*, 149–89, 173.

[326] In this sense, Franco Liso & Luisa Corazza, "Le clausole di pace: variazioni sul tema" (2015) Working Paper C.S.D.L. Massimo D'Antona n.247/2015.

[327] The only statutory limitations to the exercise of strike concern the essential services, which are regulated by Act 146/1990 that provides for a series of procedural requirements (notice period, conciliation and notification of duration) for balancing the right to strike with other constitutionally protected rights (defined by Art 1 of the Act) related to life, health, freedom and security, freedom of movement, social security and welfare, education, and freedom of communication, see Corte Cost., 14 ottobre 1996, n.344. The act also establishes the 'Commission of Guarantee', a body engaged with the task of inflicting individual sanctions in case of violations and of intervening in the setting of minimum services when collective negotiations fail. See Edoardo Ales, "Sciopero ultima ratio e principio di libertà sindacale" (2003) 17 *Lavoro e Diritto*, 599–613; Enrico Maria Mastinu, "La regolamentazione contrattuale del conflitto sindacale. Vecchi problemi e nuove tendenze" (2013) 2 *Rivista Giuridica del Lavoro e della Previdenza Sociale*, 371–405.

[328] Already in 1962, social peace clauses were included in the collective agreements of the major industrial companies.

[328] Giorgio Ghezzi, *La responsabilità contrattuale delle associazioni sindacali* (Giuffrè 1963); Ghezzi (1967); Luisa Corazza, Clausole di tregua [dir. lav.] Diritto on line (2014), Treccani, available at http://www.treccani.it/enciclopedia/clausol e-di-tregua-dir-lav_(Diritto-on-line). For an historical overview of the use of social peace clauses in Italian industrial relations and labour law, see Maurizio Falsone, "Dalle clausole di tregua alla esigilibilità: di nuovo l'obbligo implicito di pace sindacale?" (2015) 1 *Lavoro e Diritto*, 121–48.

[329] Romagnoli in Branca (1979) 299.

negotiation phases. The agreement provided for pecuniary sanctions, related to the 'contractual vacancy contribution' (*indennità di vacanza contrattuale*), i.e. a raise in the wage due to the workers in cases of missed renewal,[330] and in cases of collective actions undertaken in the five months straddling the expiration of the collective agreement.[331] In 2009, these mechanisms were eliminated by the parties who preferred a mechanism based on individual discipline within the organisations.[332]

The 2014 Single Text has, however, placed social peace clauses at the centre of the industrial relations system.[333] Although the agreement restates that individual workers would not be bound by social peace clauses, it also introduces the so-called 'esigibility clause' (*clausole di esigibilità*), which intends to regulate the exercise of conflict by coercively securing a collective agreement in force. In the light of these clauses, the signatory parties and their affiliate members are not entitled to undertake collective action questioning a collective agreement in force.[334] According to Section 4 of the Single Text, social peace clauses included by company collective agreements bind not only the parties but also the non-signatory ones that are anyway affiliated to the confederations subscribing to the 2014 Single Text. Therefore, an affiliated union refusing to sign a collective agreement at sectoral or company level would be nevertheless bound by the clauses of such an agreement.[335] The juridification of union affiliation is alien to the Italian system by virtue of the principle of collective autonomy, but also on the grounds of the concept of representativeness and of the private law status of the collective agreement that would exclude any legal obligation for third parties.[336]

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[330] See Edoardo Ales, "Italy" in Freedland & Prassl (2014) 187–209, 208.

[331] Eodardo Ales & Lorenzo Gaeta & Giovanni Orlandini & Michele Faioli, "Collective Action in Italy: Conceptualising the Right to Strike" in Bücker & Warneck (2011) 119–58, 130.

[332] See Mastinu (2013) 390. The separate agreements expanded the 'cooling-off' period to six months before the expiration, see Point 2.4 of the Interconfederal agreement of 15 April 2009. However, the general framework introduced in 1993 is maintained, see Franco Carinci, "Una dichiarazione d'intenti: l'Accordo quadro 22 gennaio 2009 sulla riforma degli assetti contrattuali" (2009) Working Paper C.S.D.L.E. Massimo d'Antona, IT – 86/2009, 16.

[333] Point 6 of the 2011 agreement, see Mastinu (2013) 381.

[334] See Part III of the 2014 Single Text. However, this obligatory clause is limited to the trade unions and the RSU, so as to not encroach the individual exercise of the fundamental right to collective action. 'These company collective agreements, defining no-strike clauses and sanctions, designed to ensure the enforceability of commitments made through collective bargaining, have binding effect, as well as for the employer, for all union representatives as well as trade unions expressions of signatory confederations to the framework agreements, or for organizations that have formally acceded to them, and not for individual workers'. See Part IV of the 2014 Single Text.

[335] Arturo Maresca, "L'esigibilità del contratto collettivo nazionale: enigma od opportunità praticabile?" (2014) 143 *Giornale di diritto del lavoro e di relazioni industriali*, 563–75, 569–70.

[336] Marco Barbieri, "Il testo unico alla prova delle norme giuridiche" (2014) 143 *Giornale di diritto del lavoro e di relazioni industriali*, 577–90, 578.

In the Swedish system, social peace is statutorily regulated in the section of the Co-determination Act entitled *fredsplikt* (peace obligation). Again, the statutory regulation on social peace derives from the self-regulation set out in the 1938 Basic Agreement,[337] which empowered the trade unions to regulate the resort to strike from a privileged position.[338] The regulation of social peace is one the most distinctive features of the Swedish system, according to which the entry into force of a collective agreement brings about social peace obligations. The primary purpose is to avoid industrial conflict where an agreement is in force, but an additional purpose is to provide for a peaceful climate in the sector in order to permit company collective bargaining and co-determination negotiations, which occur between the parties who are bound by a collective agreement.[339] The resort to collective action is indeed banned if its aim is to impose a certain interpretation of a collective agreement, to demand an amendment to a collective agreement in force, or to implement a clause of the collective agreement after its expiration.[340] Collective actions are banned on disputes on rights; instead they would always be lawful where a dispute on interests arises between the parties.[341] The Labour Court has clarified that peace obligations exist only between parties who are bound by a collective agreement, so that the resort to conflictual actions between subjects not bound by a collective agreement, i.e. a dispute over interests, is preserved and protected under the constitutional provision.[342] In this sense, an employer can also be subject to a collective action in cases where they have agreed a collective agreement with a 'yellow union'.

The social peace obligation does not, however, apply to sympathy or secondary collective action.[343] The party taking the secondary action is allowed to strike – usually under the form of a blockade or boycott – against a third party, to which it is not bound by a collective agreement. The Act allows sympathy action *a contrario*: a secondary collective action is not lawful when it is undertaken in support of a primary unlawful collective action. In the reverse sense, a sympathy action is always lawful when the primary action is lawful.[344] Furthermore, the negotiations on co-

[337] Holke & Olauson (2012) 305. The 1938 Basic Agreement establishes that collective action cannot be taken by a party that has not fulfilled its duty to negotiate (1938 Basic Agreement, Chapter II, Art 8). For an analysis of the rules set in the Basic Agreement, see Schmidt (1977) 187.

[338] Steven Anderman, "Labour Law in Sweden: A Comment" in Neal (1981) 195–207, 203.

[339] SFS 1976:580, Section 32.

[340] SFS 1976:580, Section 41, points 1, 2, and 3.

[341] Schmidt (1977) 255; Nyström (2013) 6. Negotiations should take place in the first instance, but in case they fail, the parties ought to refer to the Labour Court or to an arbitrator.

[342] AD 2006:58.

[343] The temporariness of the secondary action constitutes a substantive requisite for the action to be lawful. See Holke & Olauson (2012) 321.

[344] SFS 1976:580, Section 41, point 4. Adlercreutz & Nyström (2010) 211; see also Schmidt (1977) 171.

determination agreements can always be supported through collective action, even though the parties are bound by a sectoral collective agreement.[345]

3.6. Current challenges to collective autonomy in the national contexts: the decentralisation of collective bargaining and the cross-border economic freedoms

3.6.1. The trajectories towards decentralisation

Both Italian and Swedish industrial relations have undertaken the trajectory towards decentralisation shared by many European countries in the last decade.[346] The 2008 crisis has accelerated these trajectories. The reforms adopted in Europe exerted great pressure on the collective bargaining system due to a narrative in which industrial relations should contribute to the economic recovery by fostering competitiveness through decentralisation and deregulation.[347] In Italy, a certain degree of decentralisation has always been part of the system. However, in the acute phases of the economic crisis, this aspect has been sharpened by the technocratic government that replaced the right-wing government in late 2011 as one of the conditions to exit the stalemate of the national economy. In Sweden, the trends towards decentralisation to the company level had already started in the 1990s, and they have been driven by the labour market parties through a logic of organised decentralisation.

In Italy, the effects of the crisis have been dealt with by legislative interventions of deregulation,[348] which have affected industrial relations by *de facto* de-structuring the collective bargaining system. The government has adopted rules providing for a

[345] SFS 1976:580, Section 44.

[346] Baccaro & Howell (2011).

[347] Antoine Jacobs, "Decentralisation of Labour Law Standards Setting and the Financial Crisis" in Bruun & Lörcher & Schömann (2014) 171–92. For an overview of the reforms introduced in the EU countries most seriously affected by the crisis and their effects on labour market regulation and collective bargaining, see Koukiadaki & Távora & Martínez Lucio (2016).

[348] The reforms have also concerned a deregulation of employment protection, see Alessandro Riccobono, "Il dibattito su flessibilità e rimodulazione delle tutele. La modernizzazione del diritto del lavoro tra crisi economica e possibili percorsi di riforma" in Gianni Loy (ed), *Diritto del lavoro e crisi economica. Misure contro l'emergenza ed evoluzione legislativa in Italia, Spagna e Francia* (Ediesse 2011) 169–93; Maria Teresa Carinci, "Il rapporto di lavoro al tempo della crisi: modelli europei e *flexicurity* 'all'italiana' a confronto" (2012) 136 *Giornale di Diritto del Lavoro e delle Relazioni Industriali*, 527–72.

substantial equality between collective agreement at different levels and for the possibility of company collective agreements to deviate from sectoral agreements and statutory provisions. As a response, the social partners have negotiated new inter-sectoral agreements that attempt to restate the primacy of the sectoral negotiations, despite large concessions to the prerogatives of company collective bargaining, in a model inspired by the formula of 'organised decentralisation'.[349] Yet the hierarchy between collective agreements is somehow overturned: sectoral and company collective agreements are placed on an equal footing and company industrial relations are primarily regulated at decentralised level.[350]

In 2009, deregulatory elements were introduced into the system of industrial relations by an agreement signed between CISL, Uil and Confindustria – without the participation of CGIL. The agreement identified the potential for company agreements to derogate from sectoral agreements as a way of overcoming company crisis and fostering development.[351] The following session of renewing sectoral collective agreements was pursued without CGIL, which opposed the process of deregulatory decentralisation.[352] Already in 2010, however, the trade union front recomposed itself and sectoral negotiations were again pursued unitarily. The renovated unity led to the adoption, in June, of the 2011 Interconfederal Agreement that, albeit repairing the cleavage in the trade union movement and retrieving the uniformity of industrial relations, ratified the possibility for company agreements to derogate *in peius* from sectoral agreements. The parties agreed on the possibility to derogate from first-level bargaining 'in order to ensure the capacity to support the need of specific productive contexts', i.e. the enterprise.[353] Moreover, the agreement stated that company collective bargaining could be empowered with primary regulative competences by legislation or first-level agreements also on issues already regulated by other levels of bargaining.[354] In practice, a statutory provision can refer to company collective bargaining in order to delegate the regulation of specific issues, even though already regulated by the sectoral collective agreements.

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[349] See Giugni (2014) 180–91.

[350] In this sense, Vincenzo Bavaro, "L'aziendalizzazione nell'ordine politico-giuridico del lavoro" (2013a) 27 *Lavoro e Diritto*, 213–42, 217.

[351] Section 5.1 of Accordo Interconfederale 15 aprile 2009 per l'attuazione dell'accordo-quadro sulla riforma degli assetti contrattuali del 22 gennaio 2009. The 2009 Interconfederal Agreement was achieved in order to implement a previous separate Framework Agreement signed on 22 January 2009 concerning a re-definition of the collective bargaining structure in a decentralised sense. See Lauralba Bellardi, "Concertazione e contrattazione dal Protocollo Giugni agli accordi separati del 2009" (2009) 3 *Rivista Giuridica del Lavoro e della Previdenza Sociale*, 447–81, 474.

[352] Sabrina Colombo & Ida Regalia, "The Reform and Impact of Joint Regulation and Labour Market Policy During the Current Crisis: Italy" in Koukiadaki & Távora & Martínez Lucio (2016) 257–319, 270–71.

[353] Section 7 of the 2011 Interconfederal Agreement. See Riccardo Dal Punta, "Cronache da una transizione confusa (su art. 8, l. n.148/2011, e dintorni)" (2012) 26 *Lavoro e Diritto*, 31–53, 44.

[354] Section 3 of the 2011 Interconfederal Agreement.

However, the most controversial achievements of the 2011 Interconfederal Agreement are the attribution of *erga omnes* efficacy to the company collective agreements signed by the majority of the members of the workplace representing bodies,[355] and the introduction of a social peace obligation that excludes actions against a company agreement in force.[356] Thus, the company collective agreement is secured through a mechanism that has the effect of marginalising dissent – both collective, because a dissenting union would be silenced by the majority, and individual, because an employee who is not member of the signatory unions would not be able to question the applicability of the clauses of the agreement to the individual contract.[357]

In September 2011, a legislative intervention by the government codified the deregulatory prerogatives of company collective agreements. Art. 8 of Decree 138/2011 (now Act 138/2011) introduced the formula of 'proximity collective bargaining', expressing the need for lowering the regulation of employment standards to the company level in order to promote the role of company collective bargaining as the best practice for sustaining the economic conditions and recovery of single enterprises.[358] The legislative provision provides company collective agreements, signed by the workplace bodies or regional branch associations affiliated with the 'comparatively most representative' trade union organisations at national or regional level, the possibility of derogating from statutory provisions, without prejudice of EU law and international obligations, and from the clauses of national collective agreements concluded at sectoral level.[359] The norm does not clarify which actor has to sign the company agreement and whether the workplace unions and the regional branches should agree and jointly sign it.[360] Otherwise, in case of conflict between the workplace bodies and the regional branch, it seems that the former should prevail, so that the company collective agreement has primacy in regulating the conditions of work and employment in the company.[361] The provision undermines collective autonomy mainly for two reasons. First, it has been adopted

[355] In case of RSU. If a RSU is not present, the agreement shall be signed by the majority of RSAs and ratified through a referendum among the employees. Section 4 and 5 of the 2011 Interconfederal Agreement.

[356] Section 6 of the 2011 Interconfederal Agreement.

[357] Bavaro (2014) 16. Vincenzo Pietrogiovanni & Andrea Iossa, "Workers' Representation and Labour Conflict at Company Level: The Italian Binary Star in the Prism of the Swedish Ternary System" (2017) 8 *European Labour Law Journal*, 45–66, 64.

[358] The reform seems to have been inspired by a letter issued by the European Central Bank calling for a decentralisation of the system, see Napoli (2012).

[359] Art 8.2-bis of law 148/2011.

[360] In this sense, Bavaro (2012) 195–96.

[361] Franco Carinci, "Al capezzale del sistema contrattuale: il giudice, il sindacato, il legislatore" (2011) Working Paper C.S.D.L.E. Massimo D'Antona, IT – 133/2011, 26.

without any involvement on the part of social partners.[362] Second, the norm attributes *erga omnes* effects to company collective agreements signed by the parties of the 2011 Intersectoral agreement. This would prompt questions of constitutional compliance, but it has been imposed in order to avoid conflict at company level in times of economic crisis.[363]

The trajectory of decentralisation has been marked by the industrial relations parties through additional steps: a (separate) intersectoral agreement, signed in November 2012 (with the exclusion of CGIL), which set out guidelines for aligning company negotiations on wages with companies' need to foster productivity,[364] and the already mentioned 2014 Single Text on Representativeness, which established the rules for acceding to company collective bargaining and for the efficacy of company collective agreements. Through this agreement, the industrial relations parties have ratified the deregulatory competences (defined as 'adjusting modificatory agreement' in the text) of the company collective agreement in the light of the companies' needs due to their specific production contexts. Ultimately, the reform of the labour market adopted by the government in 2015 has contributed to the process of decentralisation by substantially equalising the status of company and sectoral collective agreements as regards recourse to atypical employment in the company (see Section 3.4.3). Furthermore, the legislator has encouraged company-level collective bargaining by introducing in the 2015 Budget Act the possibility to benefit from tax relief on wages determined by decentralised (mainly company-level) collective agreements concluded according to the definition given by the mentioned 2015 reform.[365] Again, the statutory pressures towards decentralisation have conditioned the replies of the industrial relations parties. In January 2016, the major union confederations issued a joint protocol that emphasised the role of company collective bargaining and the obsolescence of a rigid hierarchical system of collective bargaining.[366] Subsequently, in July 2016, the major confederations and Confindustria signed a further intersectoral agreement

[362] Although a clause in the 2011 Agreement commits the parties not to resort to the 'proximity collective bargaining', this has become praxis, because, as noted by Barbieri, the clause would only bind Confindustria and not even the affiliated employers, see Marco Barbieri, "Il rapporto tra l'Art 8 e l'accordo interconfederale del 28 giugno 2011" (2011) 3 *Rivista Giuridica del Lavoro*, 461–70, 465.

[363] Edoardo Ales, "Dal 'caso FIAT' al 'caso Italia'. Il diritto del lavoro 'di prossimità', le sue scaturigini e i suoi limiti costituzionali" (2011) WP CSDLE Massimo D'Antona IT – 134/2011; Stefania Scarponi, "I rinvii della legge alla contrattazione collettiva nel prisma del pluralismo sindacale" in Barbera & Perulli (2014) 3–11, 6–7.

[364] Accordo Interconfederale fra Confindustria e Cisl, Uil e Ugl, Linee programmatiche per la crescita della produttività e della competitività in Italia, 21 Novembre 2012.

[365] Art 1.186 of Act 208/2015.

[366] CGIL-CISL-UIL, "Un moderno sistema di relazioni industriali – Per un modello di sviluppo fondato sull'innovazione e la qualità del lavoro" (14 Gennaio 2016).

through which they embrace the economic incentives towards decentralisation proposed by the legislator with the 2015 Budget Act.[367]

Despite such developments, company collective bargaining has not increased since 2011.[368] Its relevance has been limited to cases of company crisis and restructuring, in which the resort to company collective agreements – defined as 'defensive agreements' – pursued the purposes of saving employment through a trade-off between internal flexibility (in terms of working shifts and wages) and the requalification of personnel.[369] By looking at the most representative (in the private sector) sectoral collective agreements (such as metalworkers and chemical and pharmaceutical workers), company collective bargaining receives competences mainly as regards the definition of working time and shifts within the general rules set at sectoral level.[370] The rounds of renewal that took place in 2015 (chemical and pharmaceutical sector) and 2016 (metallurgic sector) have not attributed more regulatory competences to company collective bargaining. It is framed within the competences attributed by the sectoral agreement, whose principal role is preserved.[371] But the relevance of company collective bargaining is emphasised in both new sectoral collective agreements in relation to the coordination between wage-setting and companies' competitiveness and with a supplementary role of setting a bonus for the employees related to productivity. In this regard, it has been stressed how the company collective agreement has become an instrument adopted by single companies to compete on the market – *de facto* denying the historical role of the collective agreement itself, namely, to regulate and limit the competition between workers (and thus between companies).[372] Overall, the Italian path towards the decentralisation of collective bargaining has been marked by the tension between the intervention – or interference – of the government, which collides with the tradition of collective autonomy, and the attempts of the social partners to preserve their autonomy. In comparison with other European countries, the decentralisation of collective bargaining has not represented an inverse trend in the Italian system. Unlike in other countries hit by the crisis, the sectoral collective agreement has not been deprived of its central relevance, while the social partners

[367] Accordo Interconfederale sulla detassazione del salario di produttività (14 July 2016).

[368] Colombo & Regalia in Koukiadaki & Távora & Martínez Lucio (2016) 290.

[369] Colombo & Regalia in Koukiadaki & Távora & Martínez Lucio (2016) 304–05.

[370] However, a closer look at the provisions of these collective agreements revails that in the metallurgic sector several aspects of the regulation of working time are attributed to the unilateral definition by the company management – subject to a consulation with the employees' representative bodies. See for instance the difference between Art 5 of Part III of the metallurgic sectoral collective agreements and Art 8 of the chemical and pharmaceutical sectoral collective agreement.

[371] See also Andrea Lassandari, "Il sistema di contrattazione collettiva oggi: processi disgregativi e sussulti di resistenza" (2016) 4 *Lavoro e Diritto*, 975–83, 979.

[372] Lauralbe Bellardi, "Relazioni industriail e contrattazione collettiva: criticità e prospettive" (2016) 4 *Lavoro e Diritto*, 939–51, 943.

have endorsed the trajectory of decentralisation.[373] Yet problematic aspects emerge in relation to the large numbers of companies outside the coverage of sectoral collective agreements – mostly small-sized companies in which often no union bodies are present. In these contexts, the legislative framework, by pushing towards decentralisation, *de facto* empowers the employers with strengthened managerial prerogatives.[374] A remedy to these situations is identified in the possibility, envisioned in particular by the Intersectoral Agreements, to develop a territorial level of collective bargaining, pursued by the local branches of sectoral industry federations, in order to establish uniform rules for particular geographical areas in light of their specificities.[375]

Pursued in a context of continuity and with the active endorsement of the social partners, in Sweden the process of decentralisation started in the 1980s with the progressive dismantling of the centralised system grounded on intersectoral negotiations.[376] From the 1990s onwards, the competences of the company-level of collective bargaining have increased. Yet the industrial relations system has maintained a structure in which the higher levels manage the lower level: even though the cross-sectoral rule-setting mechanism – for which Sweden was celebrated – has lost its centrality, the cross-sectoral parties have jointly agreed on driving the process of decentralisation by concluding the 1997 Industrial Agreement that entrusted most competences to sectoral collective bargaining.[377] Thus, the trajectory towards decentralisation has not affected the relevance of the national sectoral collective agreement, which has become a framework agreement setting minimum standards on conditions of employment and wage levels.[378]

Taking into consideration the collective agreements in the metallurgic (2013–15) and chemical sectors (2013–16), the texts show how, without prejudice of the principle of inderogability stated in Section 27 of the Co-determination Act, the local parties, which on the unions' side are the local branches of the industry federations, agreed in attributing to company negotiations the competences in deviating from the clauses stated at sectoral level (but also from statutory

[373] Italy differs from other countries hit by the crisis, whose decentralisation path has been defined in terms of 'collapse' or 'corrosion', see Koukiadaki & Távora & Miguel Martínez in Koukiadaki & Távora & Martínez Lucio (2016) 69.

[374] Lassandari (2016) 980.

[375] See Ida Regalia, "Oltre la contrattazione di secondo livello. Note sulla concertazione a livello locale" (2015) 1 *Rivista Giuridica del Lavoro e della Previdenza Sociale*, 97–111; Lorenzo Zoppoli, "Istituzioni e negoziazioni territoriali: un'analisi della strumentazione giuridica" (2015) 1 *Rivista Giuridica del Lavoro e della Previdenza Sociale*, 29–48.

[376] Scott Lash, "The End of Neo-corporatism? The Breakdown of Centralised Bargaining in Sweden" (1985) 23 *British Journal of Industrial Relations*, 215–39; Peter Sheldon & Louise Thornwhaite, "Swedish Engineering Employers: The Search for Industrial Peace in the Absence of Centralised Collective Bargaining" (1999) 30 *Industrial Relations Journal*, 514–32, 521.

[377] Elvander (2002b) 198.

[378] Malmberg (2002) 193; Ahlberg & Bruun in Blanke & Rose (2005) 130.

provisions) in order to adjust the employment and working conditions to the circumstances and situation of the company concerned.[379] The competences of company collective bargaining mainly concern the regulation of matters such as working time, the definition of company-based wage levels and accessory wage benefits. However, from an overall perpscetive, the role of company collective bargaining seems to be very advanced in the Swedish context. Besides those competences, the two sectoral collective agreements also attribute to company collective bargaining the competences in regulating the redistribution of job tasks and redeployment of workers within the company.[380]

The main features of the Swedish system have certainly favoured this process. The powerful position of the established trade union, as regards the possibility to influence the decisions of the employer at company level through the rules set by the Co-determination Act, has certainly made the unions more eager to participate in the system's decentralisation. The dynamics of decentralisation have also been favoured by both sides of the labour market, in line with the Swedish tradition of cooperation and mutual recognition of each other's interest.[381] The transformation of the national sectoral collective agreement into a framework agreement to be supplemented or even derogated by the company collective agreements has been seen as anticipating a changing role for the trade union confederations from bargaining actors to actors monitoring the implementation and application of local agreements.[382]

The Swedish path to the decentralisation of collective bargaining proved to function well in the face of periods of crisis. During the 2008 economic crisis, in the light of the spirit of decentralised cooperation, the labour market parties were able to undertake company restructuring plans that achieved a certain degree of equilibrium between the safeguarding of employment and the economic competitiveness of the companies. The practices and structure of the Swedish system allowed the parties to establish dynamics of 'micro-corporatism', through which the unions and the managements of companies in crisis cooperated in order to find a compromise to maximise their respective interests – although in some cases to the detriment of non-unionised employees.[383] The cooperative attitude between labour market parties has been a tool for reaching collective agreements that aim at balancing working time and income in times of company crisis in exchange for

[379] Item 3 of Section 1 of the metallurigic sectoral collective agreement and Introduction of chemical sectoral collective agreement.

[380] See Section 8 of the metallurgic sectoral collective agreement and Item 7 of Section 14 of the chemical sectoral collective agreement.

[381] Ahlberg & Bruun in Blanke & Rose (2005) 137–38.

[382] See Baccaro & Howell (2011) 545.

[383] See Jørgen Svalund et al., "Stress Testing the Nordic Models: Manufacturing Labour Adjustments During Crisis" (2013) 19 *European Journal of Industrial Relations*, 183–200, 193.

ceding acquired rights.[384] For instance, an example is given by the so-called 'short-time agreements' (*korttidsavtal*) or 'crisis agreements' (*krisavtal*) concluded at company level in the metallurgic sector within the frame of the sectoral agreement signed by IF Metall in 2009 with the emoloyers' counterpart *Teknikföretagen*, which aimed at avoiding massive collective redundancies by reducing working hours and cutting pay for the employees for a limited period of time (the sectoral agreement lasted for about a year).[385] In this case, company collective agreements were signed within a frame negotiated and concluded at sectoral level; this meant that the decision to cut hours and wages for the companies' employees were not negotiated at company level itself, where power relationships are simply unbalanced. Rather the higher-level intervention of the sectoral parties ensured that negotiations could be conducted on a more equal plane.

3.6.2. An extreme case of decentralisation: Italy and the Fiat case

Through the conclusion of several intersectoral collective agreements, the Italian social partners have managed to preserve the basic features of the Italian system and to avoid a drift towards 'micro-corporatist' industrial relations.[386] In the Italian context such an evolution would be particularly disruptive for the entire system of industrial relations, due to the low degree of institutionalisation that would not help in maintaining uniform conditions of employment in the labour market. An illustrative example can be seen in the events that have occurred in the Fiat company since 2010. Although it remains an isolated case, the Fiat case has marked recent years of Italian industrial relations and it has been defined as 'a textbook example of disorganised decentralisation'.[387]

Fiat is the most important Italian company in the automotive sector and has several plants throughout the territory, but also abroad – inside and outside the EU. It has always been a central player in the political and industrial relations fields, on the frontline on the employers' side in influencing policy choices made by the governments, and it also became a worldwide actor pursuant a transnationalisation of the management and the acquisition of US automotive brand Chrysler. Pursuant to this acquisition, the management intended to 'import' the US model of human resource management into the Fiat establishments in Italy, so as to reduce the labour

[384] Svalund et al. (2013) 196.

[385] Svalund et al. (2013) 189. See also Ulf Ericsson, Sören Augustinsson & Pär Pettersson, "A Jigsaw Puzzle with no Given Solution: The Financial Crisis, Trust, Loyalty and Fair-play" (2015) 39 *Labor Studies Journal*, 278–96.

[386] See Silvana Sciarra, "'Neocorporativismo' si declina al plurale: i neocorporativismi di impresa" in Gaetano Vardaro (ed), *Diritto del lavoro e corporativismi in Europa: ieri e oggi* (Franco Angeli 1988) 565–74.

[387] Giungi Giugni (2014) 181.

costs of production by increasing the flexibility of shifts and working time.[388] By taking advantage of the 'decentralisation wave' introduced in 2009, the management at Fiat initiated negotiations with the company union representatives in order to reach company agreements derogating from the collective agreement of the metallurgic sector.[389] The pressures of the management for a wider use of the so-called 'opt-out clauses', allowing a substantial derogation of the sectoral agreement at company level, were not ended by a later sectoral agreement signed in 2010.[390] Further, during the negotiations at company level, the management several times used the threat of delocalising production in other plants in foreign countries (mainly Serbia and Poland) to create the conditions for collective redundancies in the Italian plants.[391] The possibility of relocating production to another country ensuring lower labour costs has formed the backdrop to company negotiations within the Fiat company aimed at concluding company agreements for increasing the productivity of each plant.[392]

In this context, a first plant agreement was signed in the Fiat establishment in Pomigliano d'Arco (south of Italy, near Naples) in June 2010. The terms of the agreement concerned a reorganisation of shifts and working hours through an increase in the job performances required of the employees in order to align the plant's productivity with the plant in Poland. Although the agreement contained terms derogating *in peius* the clauses of the sectoral collective agreement, it was not questioned by the national employers' industry association, which feared the possible consequences of Fiat's exit from the association.[393] A similar agreement was later signed for the establishment in Mirafiori (north of Italy, near Turin) in December 2010. As in Pomigliano, the terms of the agreement increased the workload of the employees and reduced the daily time-breaks. Both the Pomigliano and the Mirafiori agreements were confirmed through a referendum among the employees, including blue- and white-collars, in which support for the agreements

[388] See Iacopo Senatori, "Multinationals and National Industrial Relations in Times of Crisis: The Case of FIAT" (2012) 28 *The International Journal of Comparative Labour Law and Industrial Relations*, 471–72. For a comparison between the company-level industrial relations in an Italian factory and a US factory that are both involved in the Fiat productive process, see Andrea Signoretti, *Fabbriche globali. Un confronto fra Torino e Detroit* (Il Mulino 2014).

[389] For a detalied account, see Franco Carinci, "La cronaca si fa storia: da Pomigliano a Mirafiori" in Franco Carinci (ed), *Da Pomigliano a Mirafiori: la cronaca si fa storia* (IPSOA 2011).

[390] The agreement was reached to prevent Fiat's exit from the employers' industry association Federmeccanica affiliated with Confindustria, see Andrea Lassandari, "La contrattazione collettiva: prove di de-costruzione di un sistema" (2011) 25 *Lavoro e Diritto*, 321–41, 323.

[391] Adalberto Perulli, "Delocalizzazione produttiva e relazioni industriali nella globalizzazione. Note a margine del caso Fiat" (2011) 25 *Lavoro e Diritto*, 343–61, 348.

[392] See, inter alia, Aris Accornero, "Pomigliano, ovvero la parabola del contratto" in Carinci (2011) 3–6. Social dumping threats are often in the background of negotiations within multinational companies, see Leonardi (2010).

[393] See Franco Carinci, "Se quarant'anni vi sembran pochi: dallo Statuto dei lavoratori all'Accordo di Pomigliano" (2010) Working Paper C.S.D.L.E. Massimo D'Antona, IT – 108/2010, 25.

won by a very small margin.[394] In between the two agreements, Fiat exited the employers' association, so as to no longer be bound by the sectoral agreement. Actually, Fiat created a new company, denominated Joint Venture, not affiliated with Confindustria, which negotiated outside the boundaries of the sectoral collective agreement. As also stated in the company agreement itself, Fiat's exit from Confindustria made the company agreement a first-level agreement in the light of the structure of the Italian system of collective bargaining, which meant it was equally valid as a sectoral collective agreement.[395]

The agreement signed in December 2011 in the Fiat plant in Pomigliano continued the evolution towards a 'micro-corporatist' system of company industrial relations. In the first section of the agreement, the parties recognise each other as 'stable interlocutors of a correct system of industrial relations aiming at valorising human resources, widening the moments of dialogue and reducing those of conflict'. In general, the parties have introduced new rules concerning a company system of industrial relations based on the participation of employees and the prevention of conflict.[396] The agreement was reached without the consent of the major union industry federation FIOM-CGIL – the most conflictual union and the largest in number both at company and at national level. Fiat's exit from the employers' association entailed the discarding of the rules on unitary workplace union representation established by the 1993 Protocol and the consequent return to the statutory regime based on the RSA, according to which the right to workplace representation can only be enjoyed and exercised by those union subjects who have signed a collective agreement applied in the company (see Section 3.3.1). As FIOM-CGIL refused to sign the company agreement and the sectoral collective agreement did not apply in Fiat, the union was not entitled to the rights of workplace representation set out by the Workers' Statute.[397]

This case is an example of the risk related to the phenomenon of micro-corporatism: the management excluded the dissenting union, which was no longer deemed a legitimate counterpart because of its refusal to sign the company agreement. This situation was (partially) remedied by a ruling of the Constitutional Court, which stated that workplace representation rights cannot be limited to the trade unions that have signed a company agreement.[398] According to the Court, it is not the conclusion of a collective agreement that constitutes the 'gate' for the access to the representation rights at the workplace level. Rather, it is the participation of a union in the negotiations. In other words, a union is legitimised to exercise the

[394] See Carinci (2011) 7–8.

[395] See, inter alia, Lassandari (2011) 329–30.

[396] See Luigi Mariucci, "Contratto e contrattazione collettiva oggi" (2013) 27 *Lavoro e Diritto*, 23–36; Mariucci stresses the fact that the company collective agreement was actually univocally drafted by the management, see Ibid., 27–28.

[397] Pietrogiovanni & Iossa (2017) 54.

[398] Corte Cost., 3 luglio 2013, n.231; Pietrogiovanni & Iossa (2017) 54.

workplace representation rights if it has participated – and therefore represented its members – in the phases of bargaining, without necessarily signing the final agreement. Otherwise, the Court explains, access to workplace representation rights would be anchored to a compliant attitude towards the management, rather than to the task of representing the collective interests of the employees. If the concrete consequence of the ruling has been the reintegration of Fiom shop stewards in the workplace bodies,[399] the Court's ruling has also restored the historical role of the unions as collective counter-power,[400] by legally grounding the system on the 'notion of sociological representativeness' in the constitutional guarantee of trade union pluralism and the right to organise.[401]

Besides these problematic aspects, the Fiat agreements contain other destabilising and controversial elements. In brief, the terms of the agreements redesign the relationship between the collective agreement and the individual contract, as well as question the traditional notion of the individual entitlement of the right to strike. On the first issue, the agreements contain a clause – the so-called 'integrative clause' (*clausola integrativa*) – that intends to secure the application of the terms of the agreements into the individual contracts. According to this clause, all the clauses of the agreements are binding for the individual contracts. On the second issue, the parties have secured the agreements themselves by including a so-called 'responsibility clause' (*clausola di responsabilità*) which binds the signatory unions to ensure the respect of the agreement also by the behaviour of individual workers, and makes them liable for any collective and individual behaviours undermining the application of the agreements.[402] Although the 'integrative clause' would be superfluous in the Italian context, where the company collective agreement is actually binding on the entire workforce employed in the company, such a clause assumes a different connotation if read in conjunction with the 'responsibility clause'. In combination, a strike against the agreement would cause both the

[399] The ruling has been welcomed by trade unionists and by scholars as restoring 'the industrial citizenship' to FIOM and as rebalancing the power relationships within the company, Vincenzo Bavaro, "La razionalità pratica dell'Art 19 St. Lav. e la democrazia industriale" (2013b) Working Paper C.S.D.L.E. Massimo D'Antona, IT – 184/2013, 11. See also Azzurra De Salvia, "Le nuove RSA nel gruppo Fiat" in Barbera & Perulli (2014) 309–17. The author emphasises that the combination between the company collective agreements signed in the different plants of the group, the ruling of the Constitutional Court, and the new legislation on the derogation of legislative provisions by means of company agreements have created a very peculiar system of workplace representation in Fiat, see Ibid., 312.

[400] Bavaro (2013b) 15. Similarly, Antonio Baylos, "Rappresentanza/rappresentatività sindacale: basta che funzioni" in Barbera & Perulli (2014) 159–70, 165.

[401] Antonello Zoppoli, "Art 19 dello Statuto dei lavoratori, democrazia sindacale e realismo della Consulta nella sentenza n.231/2013" (2014) Working Paper C.S.D.L.E. Massimo D'Antona, IT – 201/2014, 13. The author refers to the ruling in critical and sceptical terms as not solving the chronic instability of the Italian system.

[402] This clause is set in Point 14 of the agreement signed in the Fiat plant in Pomigliano (Napoli) and in Point 1 of the agreement signed in the Fiat plant in Mirafiori (Torino).

sanction of the individual workers and the sanction of the signatory unions. The signatory unions have thus restricted the right to go on strike for the individual workers. This means that a violation of the agreement by an individual worker entails the violation of the individual contract and the consequent infringement that allows the employer to use its disciplinary power.[403] Those clauses attribute to the unions a repressive role towards the individual behaviour of employees and redefine the scope and the obligatory character of no-strike clauses.

Under the threat of company delocalisation, a parallel company system of industrial relations has been created within Fiat, which deviates from the tradition of Italian industrial relations based on multi-employer bargaining. The events in Fiat attain instead a system of single-employer, reproducing the model of US industrial relations.[404] The definitive foundations of the new system have been set with the collective agreement concluded in July 2015 by the new company FCA (Fiat-Chrysler Automobiles) and the industry union federations of the metalworkers sector (except FIOM-CGIL).[405] The agreement sets forth the establishment of a closed system of industrial relations, totally disconnected from the national-industry sector – in fact the parties even reaffirmed the basic features of an industrial relations system, such as trade union rights (for which the parties refer to the Constitution and to the Workers' Statute) and the features of the collective agreement. In this regard, it should be stressed that the new system is a company-based system of industrial relations, in which the rules are set only through company-based collective bargaining and in which the collective agreement is secured through strong social peace clauses. The parties have agreed to consider all the clauses of the agreement binding on the individual and collective parties alike – so that any (individual or collective) form of actions violating any clause of the agreement make both the workers and the unions answerable to the management, who would be relieved of certain contractual obligations such as union-duties leaves and the application of the principle of favour.[406] In conclusion, the right to strike is restricted and placed under the sword of Damocles of individual and collective liability.[407] In such a system, dissent has been eliminated, power relationships are completely unbalanced and collective autonomy is transformed into 'managerial autonomy'.

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[403] In this sense Vincenzo Bavaro, "Contrattazione collettiva e relazioni industriali nell' "archetipo" Fiat di Pomigliano d'Arco" (2010) 3 *Quaderni di Rassegna Sindacale*, 337–54, who highlights the unconstitutional outcome of binding social peace clauses on individual contracts. Similarly, Pasquale Chieco, "Accordi FIAT, clausola di pace sindacale e limiti al diritto di sciopero" (2011) Working Paper C.S.D.L.E Massimo D'Antona, IT – 117/2011.

[404] Ales (2011) 6; Senatori (2012) 483–84.

[405] Contratto collettivo specifico di lavoro tra FCA N.V. e CNH Industrial N.V. e FIM-CISL, UILM-UIL, FISMIC, UGL Metalmeccanici e l'Associazione Quadri e Capi FIAT, 7 July 2015.

[406] Arts 9 and 11 of the collective agreement.

[407] However, it must be said that the agreement does not hinder the possibility for unions to participate in collective actions, also against FCA, which are organised a sectoral or national level.

3.6.3. Provision of services and cross-border posting of workers in Italy and Sweden

In both Italy and Sweden, matters of labour law concerning the conflict of laws in the context of cross-border provision of services are governed by the Rome I Convention and the EU Regulation 593/2008, according to which the choice of the applicable law in employment is up to the parties, but in the absence of such a choice the employment relationship is governed by the law of the country in which the worker is employed. The cross-border posting of workers, however, represents an exception regulated by the directive 96/71 on posting.

In the Italian system, the EU directive on posting of workers has been implemented by the Legislative Decree 72/2000.[408] The act, which has the same scope of the EU directive (see Section 4.5.1), provides for the application to cross-border posted workers of working and employment conditions stated in legislation, regulation or administrative provisions, and in collective agreements signed by the comparatively most representative trade unions and employers' associations applicable to workers performing the same job tasks in the areas where the posted workers operate.[409] The same rule also applies in cases of cross-border sub-contracting to foreign companies.[410] Yet in Italian law the posting is defined as the situation in which an employer places temporarily one or more employees at the disposal of another employer, to the satisfaction of her own interest.[411] In this sense, the posting would be possible only in those cases in which it benefits the posting employer, who would hover over rather than maintaining control over the posted employee.[412] The norm would most likely also be applicable to foreign enterprises established in Italy in case of cross-border posting.[413]

As a general rule, the posted worker enjoys the same conditions as the domestic worker. The national legislation is extended to the posted workers, although this could amount to a violation of EU law in the view of the case law of the CJEU on posting.[414] However, the lack of *erga omnes* efficacy for the collective agreements

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[408] Decreto Legislativo 72/2000, Attuazione della direttiva 96/71/CE in materia di distacco dei lavoratori nell'ambito di una prestazione di servizi. The act also applies to companies established outside the EU, Art 1.3 D.L. 72/2000.

[409] Art 3.1 D.L. 72/2000.

[410] Art 3.3 D.L. 72/2000.

[411] Art 30 of Act 276/2003 on the implementation of labour market and employment policies.

[412] Carabelli deems this criterion as a further safeguard for the employee, who cannot indiscriminately be 'landed' by the employer to other companies, see Umberto Carabelli, *Europa dei mercati e conflitto sociale* (Cacucci 2009) 30–33.

[413] Carabelli (2009) 34.

[414] C-319/06 *Commission of the European Communities v Grand Duchy of Luxembourg* EU:C:2008:350; see Massimo Pallini, "Posted Workers: Italian Regulation and Dilemmas" (2006) 12 *Transfer*, 272–76. Similarly, Bano higlights the almost unavoidable conflict between the application of the Italian principle of favour and the EU rules on cross-border posting set by the CJEU case law,

means that foreign companies temporarily operating in the domestic territory would be obliged to apply only the minimum standards, including the minimum wage.[415] The Italian legislation on posting even states that posted workers can claim rights deriving from Italian collective agreements before courts in the home country,[416] even though this has been deemed potentially in conflict with the scope of the collective agreement set out by the constitutional provision.[417] The Italian *Consiglio di Stato* (the Supreme Administrative Court) found this legislation to contravene the EU rules on posting in a case concerning a social security contribution imposed by a local authority to an Austrian construction company posting workers to Italy in the frame of a tender. Here, the Italian Court ruled that the extension of the entire Italian labour law provisions – contained in legislation and collective agreements – would constitute an obstacle to the cross-border provision of services because of the effects of discouraging foreign companies from the exercise of cross-border economic freedom.[418] The Court also stresses the fact that compliance with the domestic legislation can be achieved by the application of the home country conditions which are 'identical or at least substantially comparable' to the domestic ones.[419] In this sense, the Italian court allows the cross-border circulation of employment and working conditions in the context of the posting of workers by marginalising the application of collectively negotiated standards.

A further problematic aspect in the relationship between EU law, national law and collective autonomy concerns the application of collective agreements to foreign posted workers in the context of the current process of decentralisation of collective bargaining. The new rules, set both statutorily and collectively, on the relationship between sectoral collective agreements and company collective agreements grant to the latter the possibility to derogate from the clauses of the former. In the context of cross-border posting, an Italian company might be in a comparatively more advantageous position than a foreign service provider, because it could profit from the deregulatory clauses of the sectoral collective agreement. A foreign company would instead be bound by the national minimum standards according to the EU rules on cross-border posting.[420] Therefore, the decentralisation of collective bargaining places the application of national collective agreement to

see Fabrizio Bano, *Diritto del lavoro e libera prestazione di servizi nell'Unione Europea* (Il Mulino 2008a) 199–200.

[415] Orlandini in Vimercati (2009) 65.

[416] Art 6 D.L. 72/2000.

[417] Giovanni Orlandini, "Il recepimento della direttiva sul distacco transnazionale in Italia: l'impatto del caso *Laval*" (2011) 131 *Giornale di Diritto del Lavoro e delle Relazioni Industriali*, 405–18, 407.

[418] Cons. Stato, 1 marzo 2006, n.928. See Ales & Gaeta & Orlandini & Faioli in Bücker & Warneck (2011) 149–50. The authors stress that a right to collective bargaining as a 'procedural right' for the setting of labour standards is denied in a 'genuine transnational' setting, Ibid., 152.

[419] Cons. Stato, 1 marzo 2006, n.928, 18.

[420] Bavaro (2012) 154–56.

posting companies at risk. This is also due in part to the social partners' endorsement of decentralisation.[421]

As for Sweden, the system has been particularly affected by the pressures coming from the increasingly globalised dynamics of the economy, which, through social dumping and fragmentation of the labour market, have challenged the key principle (and practice) of the Swedish model of labour market regulation, i.e. the uniformity of working and employment conditions among the employees performing their tasks within the Swedish territory.[422] The access of Sweden to the EU in 1995 also contributed to hastening such processes by introducing elements of deregulation and liberalisation of certain sectors that constitute heavy challenges to the Swedish model of welfare, which is now exposed to marketisation and privatisation – dynamics totally alien to its history.[423] For instance, the abolition of the ban on temporary agency work ensuing the need for Swedish labour law to comply with EU rules, as well as the exercise of cross-border EU economic freedoms, favouring the employment of intra-EU migrant workers, have brought about further fragmentation of labour conditions, even in the same workplace.[424] Further elements of debate following the country's membership of the EU have concerned the risk of social dumping due to the facilitated possibility for foreign workers to be temporarily employed in Sweden.[425]

Sweden has implemented the EU directive through the Act on posting of workers (SFS 1999:678 *Lag om utstationering av arbetstagare*), which applies to all employers who are not established in countries other than Sweden (thus also non-EU countries) and who post workers to Sweden within the framework of cross-border provision of services.[426] The risks of undermining the Swedish system of autonomous collective bargaining, based on collective agreement coverage and union membership, were at the heart of the debate on implementation.[427] The

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[421] Giovanni Orlandini, *Mercato unico dei servizi e tutela del lavoro* (Franco Angeli 2013) 73.

[422] Andreas Bieler & Ingemar Lindberg, "Swedish Unions and Globalization: Labour Strategies in a Changing Global Order" in Andreas Bieler & Ingemar Lindberg & Devan Pillay (eds), *Labour and the Challenge of Globalization: What Prospects for Transnational Solidarity?* (Pluto Press 2008) 199–216.

[423] Movitz & Sandberg in Sandberg (2013) 49.

[424] Petra Herzfeld Olsson & Erik Sjödin, "The Fissured Workplace: Some Responses to Contemporary Challenges in Sweden" (2015) 37 *Comparative Labor Law & Policy Journal*, 143–62, 145.

[425] For a discussion on social dumping in the context of the accession of Sweden to the EU, see Kerstin Ahlberg & Niklas Bruun, *Kollektivavtal i EU. Om allmängiltiga avtal och social dumping* (Juristförlaget 1996) 136.

[426] Section 1 SFS 1999:678. The act provides for an exception for merchant navy as regards seagoing workers, Section 2 SFS 1999:678.

[427] The safeguard of the autonomous regulation of the labour market through collective bargaining of countries such as Sweden and Denmark was part of the negotiations for the adoption of the EU directive on posting, which resulted in the provision contained in Art 3.8 including collective agreements that are not universally applicable. The safeguard of such a model was also one of the key issues discussed in the political debate concerning the Sweden's accession to the EU and the assurances

implementation of the directive on posting centred on the application to the posted workers of the statutorily set employment conditions.[428] Section 5 of the Act refers to several statutory acts that define the core conditions of work and employment that the foreign service providers must apply to the posted workers in order to ensure that domestic and posted workers enjoy the same terms of employment. The provision deals with issues such as annual leave, parental leave, non-discrimination between permanent and temporary employees, working environment, health and safety, and working time, and it refers to the dedicated acts in that regard.[429] The Act reproduces the issues listed in the EU directive, with the only and most evident exception of the minimum rate of pay. The lack of a statutory minimum wage as well as the lack of a mechanism for declaring the collective agreement universally applicable have indeed meant that such an issue cannot be included among those matters that the foreign employer should apply to posted workers.[430]

In light of the principle of collective autonomy, the implementation of the directive on posting had also attributed to the union the possibility of demanding that a foreign employer sign an 'accession agreement' – with the possibility to resort to collective action – reproducing the conditions of the domestic one in order to ensure the uniformity of working and employment conditions in the Swedish labour market.[431] In the wake of the EU rules and of the CJEU case law, however, the Swedish system of autonomous regulation of the labour market through industrial relations instruments (collective agreement and collective action) has been shown to function in internal situations, but its application becomes problematic in cross-border situations.[432] Indeed, it entails that a company not bound by a collective agreement, including economic clauses on pay, could not know in advance the level of wages to be corresponded to its employees. In a cross-border situation, this implies that a foreign service provider cannot know the wage to be applied to the posted workers.[433] This aspect and the related use of collective action finalised at the conclusion of the agreement with foreign enterprises comprise the core of the *Laval* dispute.

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made about it were one of the reasons why social partners adhered to the accession project, see Kerstin Ahlberg, "The Age of Innocence – and Beyond" in Stein Evju (ed), *Cross-border Services, Posting of Workers, and Multi-level Governance* (Institutt for privatrett 2013) 293–321, 294.

[428] In this sense, Ahlberg in Evju (2013) 302.

[429] Section 5 SFS 1999:678.

[430] Mia Rönnmar, "Sweden" in Freedland & Prassl (2014) 241–60, 244.

[431] Örjan Edström, "The Free Movement of Services and the Right to Industrial Action in Swedish Law – in the Light of the *Laval* Case" in Rönnmar (2008) 167–91, 186.

[432] Miriam Kullmann, *Enforcement of Labour Law in Cross-border Situations* (Kluwer 2015) 304–05.

[433] Jonas Malmberg & Tore Sigeman, "Industrial Actions and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice" (2008) 45 *Common Market Law Review*, 1115–46, 1141.

3.6.4. A scenario of cross-border posting of workers: Sweden and the *Laval* case

The dispute in *Laval* arose from the attempt of the Swedish union *Byggnadsförbundet* (construction sector) to sign an accession agreement, also through the use of collective action, with the Latvian company temporarily operating in Sweden by posting its employees. These aspects of the Swedish system originated from a similar cross-border situation – the so-called *Britannia* case. The case, which occurred before Sweden had joined the EU, concerned a boycott action taken in 1989 by the Swedish Seafarers' Union (*Sjöfolksförbundet*) against the ship Britannia, registered under the Cyprus flag and employing mainly Filipino crew, by applying the conditions stated in a collective agreement signed with the Filipino trade union. The action, backed-up by the International Transport Federation and joined by a sympathy strike of the Swedish Transport Workers' Union (*Svenska Transportarbetareförbundet*), tried to force the company to sign an accession agreement in order to apply the national working and employment standards to the crew.[434] The Labour Court found that the action violated the social peace obligation stemming from the Co-Determination Act, even though the parties of the dispute were not bound to each other by a collective agreement. According to the Court, the action was to be considered unlawful since it was attempting to replace a collective agreement in force, albeit concluded under foreign law.[435] This principle – called the *Britannia principle* – was challenged by the Swedish legislator, who amended the Co-determination Act in order to include a paragraph stating the lawfulness of collective actions in disputes arising from employment relationships outside the scope of the Act itself (in other words, disputes with foreign employers). The so-called *Lex Britannia*[436] had the aim of equipping the unions with a tool for combating social dumping through the potential to extend the effects of a collective agreement.[437]

As in the Britannia case, in the Laval dispute the Swedish union *Byggnadsförbundet* undertook a collective action against the Latvian company Laval that posted workers in Sweden in the context of a cross-border provision of services (building a school in a suburb of Stockholm). However, unlike the Britannia case, the Laval dispute occurred after Sweden had joined the EU, which meant that EU rules on cross-border provision of services and posting of workers were applied. The union's action, under the form of a blockade of the worksite, took place after the negotiations for the conclusion of an accession agreement failed, after which point the company signed a collective agreement in Latvia with the local unions.

[434] See Malmberg & Sigeman (2008) 1124–25.

[435] AD 1989:120. See also Mats Glavå, Arbetsrätt (Studentliteratur 2001) 163–65.

[436] Lag 1993:1498. See Hansson in Carlsson & Edström & Nyström (2016) 67.

[437] Malmberg & Sigeman (2008) 1125; Alhberg in Evju (2013) 294.

The main point of dispute concerned the hourly rate of pay to be paid to the posted workers. The company complained that the lack of a universally applicable collective agreement made the determination of the due salary difficult to assess in advance. Moreover, the company argued that the conclusion of a collective agreement in Latvia would have meant that the collective action, which was joined by a sympathy action undertaken by the Electricians' union (*Svenska Elektrikerförbundet*), violated the social peace obligation. According to Laval, the fact that the social peace obligation would not apply to collective agreements signed abroad constituted a violation of the EU-law principle of non-discrimination in the context of the cross-border provision of services.

In a preliminary decision, the Labour Court dismissed the company's request to issue an interim injunction to stop the action. According to the Labour Court, the action was lawful under Swedish law because it falls within the scope of *Lex Britannia*.[438] However, the Labour Court decided to seek a preliminary ruling from the CJEU in order to assess the possible compliance of the collective action with the EU provisions on non-discrimination on the grounds of nationality (Art. 18 TFEU) and on freedom to provide services (Art. 56 TFEU), and with the rules on cross-border posting set by the Directive 96/71. In particular, the Labour Court sought clarification with regard to the possible discrimination deriving from the exclusion of collective agreements outside the scope of the Co-determination Act, i.e. signed abroad, from the social peace obligation set by the Co-determination Act itself.[439]

As is widely known, the ruling of the CJEU found the collective action to infringe the EU rules on freedom to provide services and on cross-border posting (see also Section 4.5.3). The collective action undertaken by the Swedish trade union was found to constitute an illegitimate obstacle to the freedom to provide services, since, while justifiable in its aim, it was not undertaken in compliance with the principle of proportionality. The collective action did not comply with the rules on restrictions to cross-border economic freedoms developed by the case law of the CJEU (see Section 4.3.6). A collective action that was lawful according to Swedish law was thus declared unlawful under EU law. When the case 'returned' to Sweden, the Labour Court had to rule on the claim of the company to be compensated by financial and punitive damages imposed on the unions for unlawful collective action.[440] In this regard, the Labour Court assessed the claim on two grounds: for violation of EU law, and for violation of the Swedish Co-determination Act. As Rönnmar explains, the Labour Court reasoned that the compensation for violation of EU law was due because of the horizontal direct effect attributed by the CJEU to the provision on the economic freedom to provide services, which granted the

[438] AD Beslut nr. 111/04.

[439] AD Beslut nr. 49/05.

[440] AD 2009:89.

company a right that was directly applicable before national courts.[441] On the basis of the principle of national procedural autonomy, the Labour Court applied by analogy the rules on damages for unlawful collective action set out in the Co-determination Act.[442] As for the violation of Swedish law, the Labour Court applied the rules of damages provided for in the Co-determination Act, since *Lex Britannia* was found by the CJEU to infringe EU law on non-discrimination and therefore could not be applied in the case.[443] Bernitz and Reich observe that the application by analogy of Swedish law on compensation for unlawful collective action followed the rule *ubi ius – ibi remedium*. In this sense, the Labour Court used national law to ensure an effective protection of a EU-law-based right, which lacks a rule for remedy.[444] On the other hand, they also observe how the Labour Court has followed the concept of a 'hybridisation of remedies', which in their view explains the combination of national procedural law with EU law in order to ensure an effective remedy and compensation to violations of rights stemming from EU law.[445]

From an overall perspective, the impact of the Laval case on the Swedish system of industrial relations and labour market regulation includes all the issues related to globalisation, Europeanisation, migration, and decentralisation of collective bargaining.[446] From the perspective of collective autonomy, the challenge consists in the implicit preference for a statutory definition of the employment standards as opposed to collective bargaining. The risk of the *Laval* case is hence a juridification of industrial relations and the intervention of the State in the 'inviolable area' of wage-setting.[447] In the industrial relations arena, the dispute and its judicial outcome have, to a certain extent, upset the relationship between labour market parties. The trade unions have pointed out that the case has been steered by the employers' association in order to limit the wide possibility to resort to collective action in the Swedish system, especially for secondary actions. This belief has partially been confirmed by the approval expressed by the Swedish employers' association and the financial support it gave to Laval for the dispute.[448] On the union's side, the *Laval* case was an opportunity to increase and improve transnational cooperation with unions from other countries and within the European trade union movement, with

[441] Mia Rönnmar, "*Laval* Returns to Sweden. The Final Judgment of the Swedish Labour Court and Swedish Legislative Reforms" (2010) 39 *Industrial Law Journal*, 280–87, 281.

[442] Rönnmar (2010) 282.

[443] Ibid.

[444] Ulf Bernitz & Norbert Reich, "Case No. A 268/04, The Labour Court, Sweden (*Arbetsdomstolen*) Judgment No. 89/09 of 2 December 2009, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet et al.*" (2011) 48 *Common Market Law Review*, 603–23, 614.

[445] Bernitz & Reich (2011) 616.

[446] Bruhn & Kjellberg & Sandberg in Sandberg (2013) 145.

[447] Hansson (2012) 88–89.

[448] Charles Woolfson & Christer Thörnqvist & Jeffrey Sommers, "The Swedish Model and the Future of the Labour Standards after *Laval*" (2010) 41 *Industrial Relations Journal*, 333–50, 341–42.

the aim of raising mobilisation and developing strategies for combating social dumping.[449]

The fear of a restrictive outcome to the dispute was reflected in the changes that the legislator adopted in order to adjust the domestic legislation to the interpretation given by the CJEU. The reform of the Act on Posting of Workers[450] and of the Co-determination Act[451] – called *Lex Laval* – had the intent of limiting the resort to collective action against foreign companies temporarily posting workers to Sweden.[452] The reform limited the possibility to resort to collective action against a foreign employer posting workers in Sweden, only for demanding the application of minimum conditions of work and employment, including the minimum rate of pay, as stated in national collective agreements applied throughout the territory in the sector concerned, and only if the posted workers do not already enjoy the same conditions. The provision explicitly stated that a collective action would be unlawful if the posting employer is able to demonstrate that the posted employees enjoy conditions at least as favourable as the minimum conditions stated in the national collective agreement.[453] Accordingly, the foreign company would not be obliged to be bound by a collective agreement – not even in its country of origin. It could indeed also demonstrate respect for Swedish minimum conditions, including pay, through the individual contract of the posted workers.[454] In this regard, LO rightly highlighted the difficulties for the trade unions to actually prove that the terms stated in the employment contract signed by the posted worker correspond to the actual terms granted by the employer.[455]

Although the Posting of Workers Act extends the right to organise and to negotiate to the posted workers,[456] the preparatory works of *Lex Laval* specify that the restrictions on the right to strike would have also applied in cases where the posted workers were members of a Swedish trade union.[457] Transnational trade

[449]Kristina Lovén Seldén, "Laval and Trade Union Cooperation: Views on the Mobilizing Potential of the Case" (2014) 1 *The International Journal of Comparative Labour Law and Industrial Relations*, 87–104. On the involvement of Swedish unions within the wider European trade union movement, see Sofia Murhem, "Swedish Trade Unions and European Sector-level Industrial Relations – Goals and Strategies" in Rönnmar (2008) 105–17.

[450] SFS 2010:228 Lag om ändring i lagen (1999:678) om utstationering av arbetstagare. The Act on posting of workers has been further modified by a successive law, Lag 2012:857 that introduced the obligation to notify the posting of workers to the Office for Working Environment (Arbetsmiljöverket), see Medlingsinstitutet (Swedish national mediation office), Avtalrörelsen (2013) 236–37.

[451] SFS 2010:229 Lag om ändring i lagen (1976:580) om medbestämmande i arbetslivet.

[452] Bruun & Malmberg in Blanplain & Hendrickx (2011)

[453] Section 5a SFS 1998:678. Section 5b extends the same restrictions for the posted workers hired through temporary work agencies.

[454] Rönnmar in Freedland & Prassl (2014).

[455] Woolfson & Thörnqvist & Sommers (2010) 344.

[456] Section 7 SFS 1998:678.

[457] Prop. 2009/10:48 Åtgärder med anledning av Lavaldomen, 40–41. See Jonas Malmberg & Erik Sjödin, "Lex Laval" in Nyström & Edström & Malmberg (2012) 47–60, 55.

union membership would thus not have been a solution to bypass the strike ban in its cross-border dimension. The outcome of such a reform constituted an interference in collective autonomy, as unions could no longer act as enforcing and monitoring actors of the labour standards negotiated with the national employer's counterpart, unless the foreign employer were willing to sign a collective agreement.[458] As noted by Kullman, 'the problem, from the perspective of the EU, lies in the Swedish system of labour market regulation'.[459]

The outcomes of the Laval case have been criticised by the ILO Committees in relation to a British case – the BALPA case – in which the *Laval* (and *Viking*) case law was referred to in order to prevent a collective action being taken by the British Airline Pilot Association (see Section 4.4.3). Both Committees (the CEACR and the CFA) have, on several occasions, expressed 'serious concerns' as regards the legislative changes introduced in Sweden in the aftermath of the *Laval* case. The Committees pointed out that the changes would limit the resort to collective action and would therefore not be in compliance with the ILO standards. In this regard, the CEACR affirmed that 'foreign workers should have the right to be represented by the organization of their own choosing with a view to defending their occupational interests and that the organization of their choice should be able to defend its members' interests, including by means of industrial action'.[460] Furthermore, LO, TCO and SACO together filed a collective complaint before the European Committee of Social Rights claiming the violation of Arts. 4, 6 and 19.4 of the ESC concerning, respectively, the right to a fair remuneration, the obligation of the State to promote collective bargaining, the right to take collective action, and the right of migrant workers to a no less favourable treatment than domestic workers (see Section 2.4.4).[461] In the complaint, the unions outline the effects of the reform and prefigure the upcoming scenario. They point to the dramatic decline in collective agreements signed with foreign companies in the construction sector – the most exposed to cross-border posting – in the aftermath of the decision of the CJEU: the annual report of the Mediation Office showed that the number decreased from 100 agreements in 2007 to 27 in 2010.[462] According to the unions, the fact that a similar decrease has not been registered for Swedish companies demonstrates the risk of

[458] Kerstin Ahlberg, Caroline Johansson & Jonas Malmberg, "Monitoring Compliance with Labour Standards. Restrictions of Economic Freedoms or Effective Protection of Rights?" in Stein Evju (ed), *Regulating Transnational Labour in Europe: The Quandaries of Multilevel Governance* (Institutt for privatrett 2014) 187–216, 204.

[459] Kullmann (2015) 109.

[460] See ILO Committee of Experts, General Report on the Application of Conventions and Recommendations, adopted at the International Labour Conference, 102nd session (2013) 179.

[461] Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Sweden, Complaint no. 85/2012.

[462] Ibid., point 82.

social dumping to which domestic workers and companies are exposed.[463] The unions also highlighted that the 2010 reform would allow the emergence in the domestic labour market of 'collective agreement free zones', since the conclusion of a collective agreement would have been left to the willingness of the employer.[464] The ECSR eventually declared the measures to be not in conformity with the standards of protection set by the ESC with regard to the exercise of collective action and the equality of treatment for migrant workers. In particular, the Committee emphasised that 'any restrictions that are imposed on the enjoyment of this right should not prevent trade unions from engaging in collective action to improve the employment conditions, including wage levels, of workers irrespective of their nationality'. Therefore, the provisions constituted 'a disproportionate restriction on the free enjoyment of the right of trade unions to engage in collective action, insofar as it prevents trade unions taking action to improve the employment conditions of posted workers'.[465]

In April 2017, the controversial *Lex Laval* was amended.[466] According to the Government's proposition issued in February 2017, the reform, entered into force in June 2017 and also concerning the implementation of the 2014 EU Enforcement Directive,[467] intends to situate collective agreement and collective action against social dumping, which were marginalised by *Lex Laval*, once again at the centre of the Swedish system of labour market regulation. The proposal explains that the new legislation allows the unions to reach the conclusion of a collective agreement with the posting company, alongside the possible resort to a collective action, in order to apply to the posted workers the minimum conditions set out in the national collective agreement.[468] To this end, it restores the possibility of undertaking collective action against posting companies in order to seek a collective agreement for regulating the conditions of the posted workers. The posting company will no longer be able to avoid signing a collective agreement with a Swedish union or be object of a collective action, by demonstrating that the posted workers already enjoy conditions comparable to the minimum Swedish conditions by means the individual contract – the so-called *bevisreglen* (evidence rule) is thus repealed.[469]

The new legislation goes further than the suggestions advanced in a previous proposition issued in 2014, which proposed to introduce the possibility for trade unions to ask the foreign posting companies to sign a 'confirmation agreement' (*bekräftelseavtal*) in order to 'subscribe' to the employment and working conditions

[463] Ibid., point 83.

[464] Ibid., point 71.

[465] Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Sweden, Complaint no. 85/2012, Decision on admissibility and merits, points 122 and 123.

[466] SFS 2017:320 Lag om ändring i lagen (1999:678) om utstationering av arbetstagare.

[467] Prop. 2016/17:107 Nya utstationeringsregler.

[468] Prop. 2016/17:107, 25.

[469] Prop. 2016/17:107, 29.

to be applied to the posted employees.[470] It seems to restate the link between collective agreement as the source of employment regulation, and collective action as the tool for implementing it. The government's proposal explains that the Swedish model is based on voluntarily entered collective agreement (and also favours this outcome in situations of cross-border posting); but it also states that if negotiations fail, there should be the possibility to resort to strike actions.[471] According to the reform, the posted worker is entitled to receive the conditions stated in a collective agreement signed between an employer and a Swedish union concerning the regulation of posting and an individual contract limiting or cancelling the rights (i.e. the conditions) to which the posted workers are entitled, has to be considered invalid.[472] *De facto*, the posted worker is put on an equal footing with the national worker by the formalisation of the principle expressed in the case law of the Labour Court according to which the employer who is bound by a collective agreement is obliged to extend its conditions to non-unionised employees.[473]

However, the new legislation still has to deal with the limits imposed by the EU regulation on cross-border posting of workers. This means that the only conditions that can be demanded to apply to posting companies are those stated in the sectoral collective agreement applied at national level.[474] De facto, there is a real, albeit limited, possibility that the application of working and employment standards will be inconsistent. The organised decentralisation of the Swedish system refers to company collective bargaining for the setting of relevant conditions such as wages and working time. By applying a sectoral collective agreement, the posting company would be allowed to deviate from the conditions actually applied in the geographical area in which the work is performed – and even in the same worksite. From another perspective, this also means that the scope of collective action in cross-border situations is limited. Section 5a of the Act on posting of workers limits the resort to collective action to the aim of signing a collective agreement setting the minimum condition and minimum wages as set out by nationally applied collective agreement in the relevant sector.[475] Although restoring the anti-dumping features of the Swedish system, this norm highlights the challenges placed on collective autonomy by the dynamics in cross-border situations – namely, to combine the uniform application of labour standards on the labour market with the safeguard of the autonomy of collective bargaining.

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[470] See Dir. 2014:149 *Tilläggsdirektiv till Utstationeringskommittén* (A 2012:03). The previous government had excluded such a possibility as being in breach of EU law, see Prop. 2009/10:48 *Åtgärder med anledning av Lavaldomen*, 34–35.

[471] Prop. 2016/17:107, 46.

[472] Section 5c of SFS 1999:678 as modified by SFS 2017:320.

[473] Prop. 2016/17:107, 131–32.

[474] Prop. 2016/17:107, 47. See Section 5a SFS 1999:678.

[475] Section 5a of SFS 1999:678 as modified by SFS 2017:320.

Regarding the potential repercussions of the CJEU rulings in *Laval* (and *Viking*) in the Italian context, it has been noted that some of the limits that that ruling imposes on the exercise of the right to strike already exist in the Italian system.[476] For instance, the constitutionally recognised economic freedom to conduct business is acknowledged by the Supreme Court as a limit to the exercise of the strike.[477] Unlike the decision of the CJEU, the Italian judiciary privileges the protection of the company's possibility to remain on the market – the 'static dimension' – and not the exercise of its economic freedom – the 'dynamic dimension'. Such a distinction is made because the 'static dimension' of the company is also seen as safeguarding employment; whereas the 'dynamic dimension', whose protection seems to be privileged by EU rules, concerns the concrete possibility of the companies to operate on the market, despite resistance coming from the labour side under the form of collective action.[478] The obligation to use the collective action as a last resort, in the light of the proportionality test applied by the CJEU in the *Laval* and *Viking* rulings, is alien to the Italian system, in which a similar limitation only applies in essential public services but not in the private sector.[479] In this sense, the 'transplant' of the CJEU's conclusions to the Italian context would have overturned the principle of collective autonomy in terms of the use of collective action by the trade unions. In the aftermath of the *Laval* ruling, the Italian trade union confederations issued a joint declaration in which they claimed the need for a monitoring activity of the unions to ensure the application to posted workers of the conditions stated in national collective agreements.[480] The unions also addressed the EU institutions with a request for modifying the terms of the directive and providing for a mechanism of collective complaints to the EU.[481] Nevertheless, it has also been observed that a situation like that which occurred in the *Laval* dispute would unlikely occur in the Italian context, since the unions do not share the same powers as labour market inspectors as they do in the Swedish system, and they also lack the degree of coordination and strategy shown by the Swedish unions in organising a collective action against a foreign company.[482]

[476] See Ales in Freedland & Prassl (2014) 206.

[477] Cass., 30 gennaio 1980, n.711.

[478] Cass., 30 gennaio 1980, n.711, in which the court sets the limit of a strike in the constitutionally guaranteed freedom of economic enterprises. See Orlandini in Vimercati (2009) 59–60.

[479] Stefano Guadagno, "The Right to Strike in Europe in the Aftermath of *Viking* and *Laval*" (2012) 4 *European Journal of Social Law*, 241–77, 253.

[480] CESOS (2010) 57.

[481] Ibid., 58.

[482] Orlandini also observes that it is very uncommon for the Italian trade unions to undertake collective action against foreign service providers, see Orlandini (2013) 90–92.

3.7. Concluding remarks: comparative perspectives

The integrated and analytical comparison of collective autonomy in the Italian and Swedish systems of collective labour law and industrial relations has highlighted how collective bargaining is regulated in the national contexts and the challenges it currently faces in the national dimension. Although both systems are based on the principle of collective autonomy, the analysis has focused on different features, developments and functions. From an overall perspective, Italy has a system characterised by low institutionalisation and high conflictuality. On the contrary, Sweden has a statutorily codified system based on autonomy, cooperation, and partnership.

The systems share a high degree of trade union membership – although much higher in Sweden – and an understanding of industrial relations as private relations, which entails the use of private law for defining collective autonomy. In this regard, history has played a major role and has led to diverse outcomes. In Italy, the repression of trade union freedoms, and the juridification of industrial relations experienced during the corporatist regime, expressed the need to lay the foundation of a post-corporatist system on the constitutional protection of trade union rights. In Sweden, the compromise achieved by the parties in the early years entailed a bilateral and mutual recognition grounded on a contractual basis.

Both systems of collective bargaining strongly rely upon collective labour rights. The right to associate and organise for trade union purposes, the right to negotiate and the right to take collective action are considered fundamental labour rights in both countries and are protected against abuses. However, the Italian constitutional framework differs from the Swedish industrial relations and statutory framework. The protection 'from above' ensured in the Italian system has its roots in the need to avoid any possible authoritarian drift limiting the autonomy of industrial relations. By contrast, the protection 'from below' that characterised the Swedish system has its roots in the compromise concluded by the labour market parties. This recognition has been reached through negotiations and therefore has implied some concessions, such as the recognition of the authority of the employer and her prerogatives in managing the company. However, the statutory regulation secured the respective positions of the parties, especially that of the trade union as the counter-power to the power of the employer.[483] The 'auxiliary legislation' adopted in Italy has rather served the task of reaffirming the protection of constitutional labour rights in the workplace and ensuring employees' representation through workplace bodies. In both cases, the statutory intervention has not encroached on

[483] Bruun considers the adoption of a law in the field of industrial relations as an instrument of consolidation of trade unions' power, but also as an instrument of State control over the external activity of the trade unions, see Bruun in Bruun et al. (1992) 24.

the autonomy of the parties; rather it has promoted and favoured the recognition of the autonomous features of the two systems.

The freedom to conduct business is also enshrined differently in the two systems: it is recognised at constitutional level in the Italian system, albeit not as an absolute right; whereas it has a contractual origin in the Swedish one, where it has become an implicit term of collective agreements. In the case of Italy, the freedom to conduct business can be limited by issues related to social finalities, whereas in Sweden, where it is defined in terms of managerial prerogative, it is limited by a series of information and consultation rights attributed mostly to the established trade union, i.e. the union with which the employer is bound by collective agreement.

On the union side, the fundamental difference is constituted by the degree of trade union pluralism that is reflected in the regulation of access to collective bargaining. In Sweden, the contractual origin of industrial relations has produced a situation in which the representation of workers is a *de facto* exclusive prerogative of the main federations, whose position is expressed by the notion of an 'established trade union'. In Italy, the presence of a plurality of trade unions has made it necessary to define the concept of 'representativeness' in order to determine which subjects are entitled to negotiate. The limited pluralism of the Swedish system excludes competition between trade unions; hence the identification of the trade union counterpart in each sector does not constitute a problem. In this context, the concept of representativeness is marginal and expressed through the conclusion of a collective agreement, which activates a series of workplace representation and co-determination rights, creating a practice of industrial democracy. The marked trade union pluralism of the Italian system requires a complex mechanism in order to ensure a proportional representation of the unions that are active at company level. As a consequence, company negotiations are more complex, since they require a certain degree of accord among the unions represented in the workplace bodies. The dramatic events in Fiat have proved the disruptive effects that can derive from disagreement among the unions. However, the Italian system's procedures of workplace representation are designed to ensure an equal representation to the several unions active in the sector, whereas the mechanism of the Swedish system reflects the very limited pluralism on the trade union side. The exclusionary basis on which the Swedish system is grounded have favoured the establishment of a system in which a single union (the established trade union) holds a series of rights that can be exercised at workplace level in order to limit the managerial prerogatives, i.e. the power, of the employer. The presence of such limits to the employer's freedom to conduct business, and its contractual origin, has necessarily entailed a limitation of the subjects entitled to such rights. If, on the one hand, this aspect does not favour trade union pluralism and can be deemed a conservative element, then, on the other hand, it contributes to strengthening the unity of the labour movement front. The centralised and vertical organisation of trade unions means that union strategies at company level shall be decided in accordance with

the central federations. From another perspective, it also means that every single conflict in any workplace is framed within a wider scenario of labour conflict.

In accordance with the shared understanding of industrial relations as autonomous private relations, the collective agreement is considered a private contract in both systems. However, although not formally recognised as a legal source, the collective agreement constitutes the main source of labour and employment regulation, which means that, despite being a private contract, it has legal effects on the sphere of third parties. The codification of its specific features in the Swedish system ensures a clearer status as a source of labour regulation. In the Italian context, the collective agreement instead holds a hybrid status, which does not undermine its centrality in the areas of labour law and industrial relations. The legal systems of the two countries provide for legal mechanisms that recognise the role of the collective agreement as a major source of employment regulation. Again, the analysis of this aspect highlights the different degrees of institutionalisation and juridification: whereas in Sweden these elements, having emerged as industrial relations practices, are codified in the Co-determination Act, in Italy the centrality of the collective agreement and collective autonomy has been set by the judiciary on the basis of the constitutional framework, even though the legislative references to the collective agreement as a source of regulation adopted by the legislator recognise and support the collective autonomy of the industrial relations parties.

A further fundamental difference consists in the issue of social peace. The centrality of social peace obligations in the Swedish system reflects its high level of institutionalisation. By contrast, this is historically absent from the Italian system. A peaceful environment is needed in order to pursue negotiations that limit managerial decisions. Social peace stemming from the conclusion of a collective agreement thus becomes essential for perpetuating the rationale of a system based on partnership and cooperation. The self-regulation of social peace reached in Italy in the aftermath of the last wave of intersectoral agreement and the Fiat case seems instead to signal a trend toward securing the company collective agreement, which would result in a limitation of dissent rather than an inclusion of the trade unions in company decisions.[484]

In sum, the comparative analysis highlights different methods of regulating collective autonomy and collective bargaining, which are mirrored in different exercises. The overarching statutory regulation characteristic of the Swedish context preserves the functioning of a system based on collective autonomy. The low degree of statutory regulation within the Italian context produces, instead, uncertainty and leaves the strength of collective autonomy to contingent socio-political and economic elements, and, ultimately, to the mercy of power relationships in the labour market. In Sweden, the legal framework and the industrial relations

[484] Pietrogiovanni & Iossa (2017) 56.

framework are consistent. In other words, the legal framework intervenes in order to fix the prerogatives of collective autonomy as self-defined by the industrial relations parties. The industrial relations and the legal frameworks work in harmony in order to ensure the continuity of the system. In Italy, the legal and industrial relations frameworks do not match each other. The legal system acknowledges the prerogatives of collective autonomy but does not provide for a juridical link between the two frameworks, whose evolution is divergent and inconsistent. Therefore, in a national context, collective autonomy expresses itself in conjunction with influences from the legal framework. The link between the legal and the industrial relations frameworks and their reciprocal recognition are needed in order to ensure the functioning of collective autonomy and collective bargaining.

The analysis of the two national contexts has also highlighted two major challenges faced by collective autonomy and collective bargaining: namely, decentralisation and cross-border posting of workers. As to the scenario of decentralisation, the different reactions of the two systems reflect their different features. The trade union pluralism, on which the Italian system is grounded, seems to constitute a problem rather than a resource in this regard. Along with the illustrative Fiat case, the low degree of institutionalisation of industrial relations has led to the fragmentation of the labour market and of the trade union movement, which is also characterised by several conflicts – even within the same organisation – between sectoral federation and workplace representatives.[485] In Sweden, the cooperative attitude of labour market parties and the hierarchical structure of trade union representation have safeguarded the system from 'shocks' deriving from decentralisation. In the Swedish context, the unions, due to the power they had acquired throughout the years supported by institutionalisation and statutory regulation, have been able to 'control' and 'guide' the process of decentralisation. As pointed out by Giugni and Romagnoli – two outstanding Italian labour law scholars – already in the 1970s, a deregulated decentralisation is detrimental to trade unions and to their counter-power role.[486] In this sense, a process of decentralisation led by the trade unions themselves, by virtue of the structure of the collective bargaining system and in light of a non-interventionist attitude of the legislator, ensures that the collective interests of the workers are protected. In the Italian context, conversely, interferences by the legislator (expressing the attitude of the

[485] See, for instance, the interesting case of the agreement signed in a metallurgic company between the management of the industry federation of CISL (FOIM-CISL), which was reached without the approval of the RSU. In contrast to the usual practice, the company agreement also set out that the terms should be applied only to the members of the signatory union, so as to affect the traditional understanding of workplace representativeness, see Donata Gottardi, "Nota a contratto: l'accordo Pometon S.p.a. nello specchio rotto delle relazioni sindacali nel settore metalmeccanico" (2013) 27 *Lavoro e Diritto*, 269–81, 276.

[486] Umberto Romagnoli, *Lavoratori e sindacati tra vecchio e nuovo diritto* (Il Mulino 1974); Gino Giugni, *Il sindacato fra contratti e riforme. 1969–1973* (BRI 1973). More recently, see also Ricciardi (2010) 103.

government) have led to a situation in which the collective bargaining system has been de-structured. The substantial equality between the levels of collective bargaining, expressed by the statutory recognition of the company collective agreement as being equivalent to the sectoral collective agreement, opens up room for a disorganised decentralisation in which the definition of working and employment standards occurs within the company. This context intensifies the negative aspects of trade union pluralism by setting the conditions for the proliferation of non-representative collective subjects – both unions and employers' associations.[487] It also favours a revival of the phenomenon of so-called '*contratti collettivi pirata*' (pirate collective agreements), namely, collective agreements signed by non-representative unions – which in many cases can even be 'yellow unions' – which set into motion downward competition and a lowering of working and employment standards.[488]

The scenario of cross-border posting of workers constitutes a further challenge to collective autonomy and collective bargaining because of the possibility for foreign companies, supported by EU law, to accede to the internal labour market by 'importing' working and employment conditions negotiated in a different system, and to be protected against collective actions aimed at applying national employment conditions. The disruptive effect on collective autonomy at a national level is constituted by the risk of a 'race to the bottom' in collective bargaining and by the ultimate decline of collective agreement in a context such as the EU internal market in which the economic borders blur. Furthermore, the cross-border posting scenario also highlights an incompatibility between collective autonomy and a market in which the competition is played on the basis of labour law and employment standard differentials. This conflict is expressed in the *Laval* case by the legislative developments following the decision of the CJEU. The immediate intervention of the legislator, which had to comply with the CJEU ruling by reducing the space of collective bargaining and collective action in cross-border situations, went in the direction of confining collective autonomy to the national dimension. In cross-border situations in which profit is ensured by social dumping, the statutory regulation of employment conditions seems more appealing. The amendments introduced in 2017 remedy this situation by retrieving an anti-dumping force for collective action. Yet the minimum limit set for the scope of collective action in cross-border situations is a further constraint to collective autonomy. Overall, it also stresses a contradiction that pertains to the main challenges to collective autonomy: on the one hand, the role of collective autonomy and collective bargaining in cross-border situations is confined to the definition of minimum conditions and wages at

[487] Andrea Lassandari, "Sulla verifica di rappresentatività delle organisazzioni sindacali datoriali" (2017) 153 *Giornale di Diritto del Lavoro e delle Relazioni Industriali*, 1–19.

[488] Gottardi (2016) 889; Pietrogiovanni & Iossa (2017) 53. In general, Giuseppe Pera, "Note sui contratti collettivi "pirata"" (1997) 1 *Rrivista Italiana di Diritto del Lavoro*, 381–89.

a national sectoral level; on the other hand, the national systems of collective bargaining are subject to pressures towards a decentralisation that favours and privileges a company-level of employment regulation through collective bargaining.

Finally, it is worth mentioning a further aspect that emerged in the Fiat case, namely, the freedom of relocation that the companies can exercise in a globalised market, which represents one of the cross-border scenarios for collective autonomy in the EU internal market. This aspect constitutes a challenge to collective autonomy and collective bargaining, and serves as a disruptive element within national industrial relations. The freedom of the company to delocalise comprises a strong bargaining component, since the eventual closure of plants would mean the loss of jobs. The combination of facilitations in delocalising and outsourcing and the negative effects on employment created by the economic crisis has put pressures on the national systems of industrial relations leading towards increased decentralisation and deregulation of collective bargaining.[489] The companies with sufficient resources to relocate acquire a stronger bargaining power to be exercised during collective negotiations, which results in a limitation of the free and autonomous functioning of collective autonomy and collective bargaining.

[489] Fausta Guarriello, "I diritti di contrattazione collettiva in un'economia globalizzata" (2012) 135 *Giornale di diritto del lavoro e di relazioni industriali*, 341–59, 352.

4. Collective autonomy and collective bargaining in the cross-border dimension of the EU internal market

4.1. Introduction

The analysis conducted in the previous chapters has stressed that the concept of collective autonomy implies the autonomous exercise of collective bargaining. Both conceptually and legally, collective autonomy receives its legitimation as a principle according to which collective bargaining, and more broadly industrial relations, is pursued autonomously and voluntarily by the labour market parties in the frame of the rules set by the legal system. Hence, the legal system shall guarantee the *autonomy* of collective autonomy. In its expression within the national contexts, collective autonomy is recognised by the legal system, which provides legal bases to its functioning through the protection of collective labour rights and the recognition of the normative power of collective bargaining. In this chapter, the issues related to collective autonomy and collective bargaining are explored in the context of the cross-border dimension of the EU internal market.

Cross-border situations occur when the national collective labour law and industrial relations frameworks interact with the EU framework for the exercise of those economic freedoms. The focus of the analysis is on the exercise of economic freedoms of establishment and providing services. The possibility for enterprises to cross the borders of the States in order to re-establish themselves, or to temporarily perform an economic activity, is a key feature of the creation and functioning of the internal market. However, the economic dynamics bring about social dynamics. In the case of the cross-border exercise of economic activities, the social dynamics concern the possibility for the national trade union actors to deal with foreign enterprises in order to ensure that the exercise of the EU economic freedoms does not give rise to the phenomenon of social dumping.

The structure of the chapter is as follows. Section 2 explores the legal foundations of collective autonomy in the EU legal system. It includes a discussion of the

primary law of the EU, a discussion of the reference to practices of collective autonomy and collective bargaining within EU secondary law, and an analysis of the case law of the CJEU. Section 3 examines the freedoms of establishment and of providing services. It addresses the fundamentals of their exercise as set out in the TFEU and interpreted by the CJEU. It also includes a discussion of the freedom to conduct business in the EU legal system, as well as the potential limits to the exercise of the economic freedoms stemming from the protection of fundamental rights. The following sections consider the interplay between the cross-border economic freedoms and collective autonomy. Section 4 deals with collective autonomy in the context of the freedom of establishment and its effect on the exercise of collective labour rights at a national level. Section 5 deals with issues related to the cross-border posting of workers, including a discussion of the application of collective agreements to posted workers and the possible exercise of collective bargaining and collective action. Finally, Section 6 discusses the implications of the exercise of economic freedoms in the cross-border dimension of the EU internal market for collective autonomy. It intends to offer possible insights into how collective autonomy develops and evolves in the EU internal market. Ultimately, dealing with cross-border situations constitutes one of the main challenges facing collective autonomy today amid the ongoing process of EU integration. Section 7 concludes the chapter.

4.2. The expressions of collective autonomy in EU law

4.2.1. The legal foundations of collective autonomy in EU law

An investigation of collective autonomy in EU law should reflect its multi-dimensional features. Collective autonomy can be a means to implement EU law at the national level, just as it can contribute to the formation of EU law as such. Although a statutory regulation of collective autonomy at EU level is excluded on the basis of Art 153.5 TFEU, legal grounds for the recognition of collective autonomy at both national and EU level, can, however, be found in the EU Treaties.

According to Art 3 TEU, one of the objectives of the EU is to 'establish an internal market' grounded on 'a highly competitive social market economy, aiming at full employment and social progress'.[1] Dorssemont has interpreted the provision as the expression of the attempt to balance the economic and the social values of the EU itself.[2] Deakin also stresses the conception of the 'internal market' as a means to

[1] Art 3 TEU.

[2] Dorssemont in Bruun & Lörcher & Schömann (2012) 49.

achieve an end. He rejects the association of the 'social market economy' formula with the ordo-liberal origin of the European integration project due to the progressive shift of the intellectual basis of that economic ideology, which is now related to neo-liberal economic thinking.[3] Rather, Deakin considers Art 3 TEU as a possible legal basis for a more active involvement of labour law and social policy in the regulation of the EU internal market.[4] Art 4 TFEU includes social policy within the shared competences of the EU, which are regulated according to the principles set out in Arts 3–6 TEU.[5] This means that the principles of sincere cooperation (Art 4.3 TEU), of subsidiarity (Art 5.3 TEU) and of proportionality (Art 5.4) apply. The two latter principles entail that the EU shall take action only 'in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level' (subsidiarity) and that 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties' (proportionality). They constitute limits to the EU's actions in the areas of shared competence, which Weiss has described as preventing 'an excessively intrusive Community legislation' and as entailing that in labour law and social policy matters, 'the EU is entitled to legislate only on minimum standards, giving the Member States the opportunity to develop rules above that level for the benefit of the workers'.[6]

The other side of the principle of sincere cooperation is constituted by the respect for the national legal systems of the Member States. Art 4.2 TEU sets the obligation for the EU to respect the EU Member States' 'national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'.[7] In this sense, it might be argued that the EU's actions cannot disregard collective autonomy as a basic feature of the constitutional system in countries such as Italy, in which the principle of collective autonomy is recognised in the provisions of the Constitution protecting collective labour rights. A similar discourse can be used for collective autonomy in countries like Sweden, in which it constitutes a feature of national identity that has contributed – and still contributes – to the country's socio-economic development. In both cases, collective autonomy is implicitly recognised as an element of the national systems, which the EU cannot

[3] Along similar lines is the analysis of Joerges that considers the achievement of 'social market economy' in the original ordo-liberal meaning impossible within the context of the EU internal market, see Christian Joerges, "*Rechtsstaat* and Social Europe: How a Classical Tension Resurfaces in the European Integration Process" (2010) 9 *Comparative Sociology*, 65–85, 73.

[4] Simon Deakin, "The Lisbon Treaty, the *Viking* and *Laval* Judgments and the Financial Crisis: In Search of New Foundations for Europe's 'Social Market Economy'" in Bruun & Lörcher & Schömann (2012) 19–43, 39.

[5] Art 4 TFEU.

[6] Manfred Weiss, "Labour Law and the Future of Social Europe" (2008) 14 *Canadian Labor & Employment Law Journal*, 159–86, 164.

[7] Art 4.2 TEU.

disrespect in its actions.[8] The reference to Art 4.2 TEU has even been advanced by Weatherill as a possible ground for awarding a wide margin of discretion to the trade unions in undertaking collective action against economic delocalisation.[9]

A further legal ground for the acknowledgement of collective autonomy in EU law is constituted by the provisions on fundamental rights. The reference to the rights and freedoms set out in the EU Charter of Fundamental Rights, which through the Treaty of Lisbon has been attributed with 'the same legal value as the Treaties',[10] entails that Art 28 on collective labour rights constitutes a legitimate legal ground for the recognition of collective autonomy in EU law.[11] Already before the 'upgrading' of the Charter, Orlandini identified a few problematic aspects of Art 28 related to both the diversity of industrial relations systems in Europe and the wording of the provision, which would exclude a cross-border collective action.[12] Nevertheless, Weiss indicates that the 'solidarity' rights of the Charter, including Art 28 are 'incompatible with mere de-regulation, de-collectivization and de-institutionalization'.[13] In this sense, Art 28 includes collective autonomy as a feature of the European social model and, as stressed by Bercusson, it provides 'the starting point for the future of coherent and systematic evolution of collective labour law of the EU'.[14]

In the framework of a fundamental rights argument, one should also mention Art 6.3 TEU, which states that the rights and freedoms set by the ECHR 'shall constitute general principles of the Union's law'.[15] On this basis, a judicial recognition of collective labour rights as protected under Art 11 ECHR might find its application in the EU legal system. However, after the Opinion 2/13 delivered by the CJEU that has denied access to the ECHR because of the consequent limitation of the autonomy of EU law on the adjudication of fundamental rights, there is no guarantee of a consistent interpretation under the scrutiny of the CJEU, in particular as regards the right to strike.[16]

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[8] On this point also Norbert Reich, "Free Movement v Social Rights in an Enlarged Union – the *Laval* and *Viking* Cases before the ECJ" (2008) 9 *German Law Journal*, 125–61, 132.

[9] Steve Weatherill, "*Viking* and *Laval*: The EU Internal Market Perspective" in Freedland & Prassl (2014) 23–39, 38.

[10] Art 6.1 TEU.

[11] In this sense also Manfred Weiss, "The Potential of the Treaty has to be Used to its Full Extent" (2013) 4 *European Labour Law Journal*, 24–27, 27.

[12] Giovanni Orlandini, "Diritto di sciopero, azioni collettive transnazionali e mercato interno dei servizi: nuovi dilemmi e nuovi scenari per il diritto sociale europeo" (2006) Working Paper C.S.D.L.E. Massimo d'Antona, INT-45/2006, 34–35.

[13] Manfred Weiss, "Industrial Relations and EU Enlargement" in John D.R. Craig & S. Michael Lynk (eds), *Globalization and the Future of Labour Law* (Cambridge University Press 2006) 169–90, 174.

[14] Bercusson (2009f) in Bercusson (2009) 318.

[15] Art 6.3 TEU.

[16] Velyvyte (2015) 91.

The chapter of the TFEU concerning social policy (Chapter X) also contains references to fundamental social rights conventions. Art 151 TFEU mentions the ESC and the 1989 Community Charter as a 'benchmark' for the Member States in the achievement of social objectives,[17] which include the 'dialogue between management and labour'.[18] The same provision indicates 'the diverse forms of national practices, in particular, in the field of contractual relations' as an aspect that the Member States should take into account in implementing measures that aim to achieve the social objectives set out in the Chapter. The reference can be read as a recognition of collective autonomy in the national contexts, which can constitute a limit to the implementation of EU legislation.

Along with Art 28 of the Charter, collective autonomy has found its recognition in EU primary law in Art 152 TFEU, which states that

> The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy.

The provision has been introduced by the Lisbon Treaty and, according to Veneziani, 'it expresses the idea that the 'collective autonomy' of social partners is a protagonist of a reshaped legal system as a whole, in which collective rights and actions (collective bargaining and action, freedom of association, participation) have acquired full legal status'.[19] The provision has four features: first, it achieves the inclusion of the social partners in the EU system by indicating that the EU recognises and promotes their activities; second, it demonstrates the awareness of the EU legislator of the vast heterogeneity of the national industrial relations systems of the Member States; third, it seems to place a positive obligation on the EU by indicating that it has to facilitate the dialogue between European social partners; fourth, it stresses that the *autonomy* of the parties cannot be disrespected by the EU.

Therefore, Art 152 TFEU includes collective autonomy in EU primary law in terms of both its protection and its functioning at EU level.[20] According to Barnard, Art 152 TFEU recognises 'the constitutional position of the social partners'.[21] Again, Veneziani conceives Art 152 TFEU as a legal basis for the establishment of

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[17] De Schutter has deemed the reference to the ESC as 'insufficient, however, to ensure that EU law shall always be consistent with the requirements of the Charter', see Olivier De Schutter, "The European Social Charter as the Social Constitution of Europe" in Bruun & Lörcher & Schömann & Clauwaert (2017), 11–51, 25.

[18] Art 151 TFEU.

[19] Bruno Veneziani, "The Role of the Social Partners in the Lisbon Treaty" in Bruun & Lörcher & Schömann (2012) 123–61, 127.

[20] Marco Peruzzi, "Autonomy in European Social Dialogue" (2011) 27 *The International Journal of Comparative Labour Law and Industrial Relations*, 3–21, 11.

[21] Catherine Barnard, *EU Employment Law* (4th edn, Oxford University Press 2012a) 713.

'a truly democratic system of industrial relations'.[22] He also stresses that 'Article 152 must be interpreted as a device for anchoring the role of the European social partners as co-regulators and their involvement in EU-related decision-making procedures'.[23] Veneziani concludes by considering Art 152 TFEU as the expression of the 'democratic principles' of the EU and as the peak of the 'normative *crescendo*' of social policy in the context of the EU in which eventually 'the social partners have achieved an institutional status within the dialogue between the EU bodies'.[24]

Art 152 TFEU has also been referred to as an 'upgraded' legal basis for the autonomous development of social dialogue at EU level.[25] Along with Art 155.1 TFEU, stating that

> Should management and labour so desire, the dialogue between them at Union level may lead to contractual relations, including agreements

they can be read as implying a certain degree of autonomy for the European social partners in pursuing their relations in order to achieve a stable apparatus for negotiating and concluding collective agreements. In this sense, Art 155 TFEU has been interpreted as a possible legal basis for the development of transnational collective bargaining,[26] and as the legal foundation on which the social partners can potentially ground the autonomous regulation of the exercise of collective labour rights at national level.[27]

The Chapter on Social Policy further contains a recognition of the regulatory prerogatives of collective autonomy at national level. It gives the States the possibility to 'entrust management and labour, at their joint request, with the implementation of directives' adopted in the social policy field and of the European framework agreements reached in the context of European social dialogue.[28] In the latter case, however, the autonomy of the social partners is downsized by the obligation placed upon the States to ensure the implementation of the directive. The State is entitled to take appropriate measures to enable the social partners to achieve the transposition of the directive through national industrial relations mechanisms. Hence, EU law attributes to the State the possibility to step in and participate in industrial relations.

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[22] Bruno Veneziani, "Austerity Measures, Democracy and Social Policy in the EU" in Bruun & Lörcher & Schömann (2014) 109–51, 124.

[23] Ibid., 125.

[24] Ibid., 149 (Italics in the original).

[25] Manfred Weiss, "The European Social Dialogue" (2011) 2 *European Labour Law Journal*, 155–65, 156.

[26] Schiek in Rönnmar (2008) 83–100.

[27] Davies in Alston (2005) 206.

[28] Art 153.3 TFEU.

Furthermore, Art 153 TFEU indicates that 'representation and collective defence of the interests of workers and employers' constitutes one of the fields in which the EU 'shall support and complement the activities of the Member States'.[29] Ryan has already pointed out the mismatch – if not the conflict – between such a legal basis for EU action and the exclusion of collective labour rights from the EU competences.[30] In this regard, Davies claims that this provision could constitute an exception to Art 153.5 TFEU and therefore a legal basis for the promotion of collective bargaining at national level, which is not explicitly mentioned among the exempted fields and which definitely concerns representation and defence of collective interests.[31] However, the provision refers to Art 153.5 TFEU as a condition for its application: its scope is thus limited. Yet it can constitute a legal ground for recognising the task of the State in setting a mechanism for collective negotiations.

Moreover, Art 156 TFEU includes the 'right of association and collective bargaining between employers and worker' in the list of matters on which the Commission 'shall encourage cooperation between the Member States'.[32] The wording of the provision does not imply any legislative or regulatory competence for the EU; but it does constitute a further recognition of the relevance of collective autonomy in the field of social policy. Finally, collective autonomy is also mentioned in Art 146 TFEU within Chapter IX on Employment. Here, the exercise of collective autonomy, expressed as 'national practices related to the responsibilities of management and labour',[33] constitutes an aspect of concern for the Member States in the context of promoting and coordinating their employment policies as required by the EU employment strategy introduced with the 1996 Treaty of Amsterdam.[34]

The EU-law legal bases for collective autonomy have been mentioned in the measures adopted at EU level for confronting the effects of the 2008 economic crisis. Regulation 1176/2011 on the prevention and correction of macroeconomic imbalances indicates that social partners at national level shall be involved in the economic policy measures to be taken by the States; in addition, it states that the application of the regulation shall respect their role of the social partners in the wage

[29] Art 153.1(f).

[30] Ryan suggested that the now Art 153.1(f) 'contains a distinct legislative power', which, however, clashes with Art 153.5, see Bernard Ryan, "Pay, Trade Union Rights and European Community Law" (1997) 13 *The International Journal of Comparative Labour Law and Industrial Relations*, 305–25, 311.

[31] Davies in Alston (2005) 194–95.

[32] Art 156 TFEU.

[33] Art 146 TFEU.

[34] Barnard (2012a) 92. In general on the European employment strategy, see Diamond Ashiagbor, *The European Employment Strategy: Labour Market Regulation and New Governance* (Oxford University Press 2005).

setting mechanisms.[35] The Regulation refers to Art 152 TFEU and Art 28 CFREU, which shall be fully respected by the EU institutions in its application finalised at requiring the States to introduce measures for remedying budgetary imbalances.[36] In this regard, however, Schubert points out that the Regulation does not specify the modalities for the social partners' involvement in the decision-making process of measures that would certainly affect the systems of collective bargaining.[37] In her view, the margin of discretion left to the Member States in adopting austerity measures does not ensure the actual respect of the prerogatives of collective autonomy – and of the right to collective bargaining – at national level.[38]

4.2.2. Practices of collective autonomy in EU law

Unlike the national dimension, the legal expressions of collective autonomy in EU law consist in the evolution of certain practices of industrial relations into collective bargaining. Even though the rights to information and consultation rights have been excluded from a conceptual understanding of collective autonomy and collective bargaining, it is interesting to note how these are the forms in which collective autonomy finds expression in EU law. Already at the outset of a EU social dimension, these rights obtained recognition for the management of an employment crisis at the company level. The first 'social directives' adopted on the basis of the 1974 Social Action Programme, concerned collective redundancies,[39] transfer of undertakings,[40] and insolvent employers.[41] The tools provided for this aim by those directives concerned the rights of information and consultation of employees' representatives.[42] Now these rights are enshrined in Art 27 CFREU, which attributes information and consultation rights to the workers and their representatives 'in good time' and under the conditions set by EU law and national law and practices.

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[35] Recitals 19, 20, and 25 Regulation (EU) 1176/2011 on the prevention and correction of macroeconomic imbalances [2011] OJ L306/25.

[36] Art 1.3 and Art 6.3 Regulation 1176/2011.

[37] Claudia Schubert, "Collective Agreements within the Limits of Europe. Collective Autonomy as Part of the European Economic System" (2013) 4 *European Labour Law Journal*, 146–79, 168.

[38] Ibid., 169.

[39] Directive 75/129/EEC on the approximation of the laws of the Member States relating to collective redundancies [1975] OJ L 48/29, now replaced by Directive 98/59/EC [1998] OJ L 225/16.

[40] Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses [1977] OJ L 61/26, now replaced by Directive 2001/23/EC OJ L 82/16.

[41] Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer [1980] OJ L 283/23, now replaced by Directive 2008/94/EC [2008] OJ L 283/36.

[42] Mückenberger in Hepple & Veneziani (2009) 259.

The cornerstones in this field are Directive 2009/38 on the EWCs[43] and Directive 2002/14 'establishing a general framework for informing and consulting employees in the European Community'.[44] Although they both aim at implementing forms of employees' information and consultation, the scopes of the directives are different. The EWCs directive is meant to be applied in Community-scale undertakings and in Community-scale groups of undertakings,[45] and its scope is transnational.[46] The information and consultation directive instead applies to undertakings employing at least 50 employees or to establishments employing at least 20 employees in any Member State;[47] its scope is thus national.[48]

Although no legal bases for collective bargaining are set down in those directives, they both provide for negotiations aimed at establishing bodies and procedures leading to the exercise of information and consultation rights. The EWCs directive, for instance, provides for the establishment of Special Negotiating Bodies, whose members 'shall be elected or appointed in proportion to the number of employees employed in each Member State' by the transnational company concerned.[49] This body pursues negotiations with the management in order to conclude an agreement in writing indicating 'the scope, composition, functions, and term of office of the European Works Council(s) or the arrangements for implementing a procedure for the information and consultation of employees'.[50] The EWC, instead, lacks

[43] Directive 2009/38/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast) [2009] OJ L 122/28. The Recast Directive has replaced Directive 94/45 without altering the original structure but with an improved definition of certain aspects, such as the contents to be expected in the agreements setting up the EWCs and the representation of the employees, see Sylvaine Laulom, "The Flawed Revision of the European Works Council Directive" (2010) 39 *Industrial Law Journal*, 202–08, 205–06.

[44] Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community – Joint declaration of the European Parliament, the Council and the Commission on employee representation [2002] OJ L 80/29.

[45] Art 1 Directive 2009/38/EC. Art 2 Directive 2009/38 defines 'Community-scale undertakings' as 'any undertaking with at least 1 000 employees within the Member States and at least 150 employees in each of at least two Member States' and 'Community-scale groups of undertakings' as 'a group of undertakings with the following characteristics: — at least 1 000 employees within the Member States, — at least two group undertakings in different Member States, and — at least one group undertaking with at least 150 employees in one Member State and at least one other group undertaking with at least 150 employees in another Member State'.

[46] Roger Blanpain, *European Works Councils. The European Directive 2009/38/EC of May 2009* (Kluwer 2009) 31.

[47] Art 2 Directive 2002/14/EC.

[48] Gold observes that the adoption of the information and consultation directive was needed in order to remedy 'an anomaly in the practice of worker participation in a minority of EU member states notable Ireland and the UK', which lacked at formal system for those rights, see Michael Gold, "Employee Participation in the EU: The Long and Winding Road to Legislation" (2010) 31 *Economic and Industrial Democracy*, 9–23, 18–19.

[49] Art 5 Directive 2009/38/EC.

[50] Art 5.3 Directive 2009/38/EC.

negotiating competences going beyond the involvement in information and consultation procedures.[51]

The relationship with the national frameworks of industrial relations is not extensively dealt with by the EWCs directive. The Preamble contains a reference to the principle of autonomy of the parties in setting up the EWCs and a reference to the principle of subsidiarity, which would entitle the States to determine the subjects that have to be deemed employees' representatives for the scope of the directive.[52] A provision safeguarding the national systems of industrial relations might be found in Art 10 stating that the exercise of information and consultation rights by the EWC shall occur 'without prejudice to the competence of other bodies or organisations in this respect'.[53] In this sense, the prerogatives of trade unions, in relation to information and consultation rights as ensured by the national systems, can be protected.

The national-level scope of the Information and Consultation directive instead entails a more extensive clarification of the interaction with the national systems of industrial relations. Already the Preamble sets out that within the frame of the objective to establish a general framework for the exercise of information and consultation rights, the States shall ensure 'that management and labour have a leading role by allowing them to define freely, by agreement, the arrangements for informing and consulting employees which they consider to be best suited to their needs and wishes'.[54] Thus, the labour market parties are entitled to define the procedures for such rights by means of negotiations that pursue the collective interests of their members. The possibility for labour market parties to implement the objectives of the directive is also set in Art 1.2, which includes the national practices of industrial relations as a means for defining and implementing the 'practical arrangements for information and consultation'.[55] This principle is further expressed in Art 5 of the directive, which states that the management and labour can be entrusted by the States to set down 'the practical arrangements for informing and consulting employees' through collective agreements concluded at the appropriate level, including the company level.[56] The involvement of unions is not explicitly mentioned in the provisions of the directive; yet the reference to national practices of industrial relations, as well as the express possibility to conclude agreements on information and consultation rights at other levels than the company one, seems to indicate that national trade unions, depending on the national system of industrial relations, can also play a relevant role according to the directive.

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[51] Anna Alaimo, "The New Directive on European Works Councils: Innovations and Omissions" (2010) 26 *The International Journal of Comparative Labour Law and Industrial Relations*, 217–30.

[52] Whereas 19 and 20 of the Preamble of the Directive 2009/38/EC.

[53] Art 10 Directive 2009/38/EC.

[54] Recital 23 Directive 2002/14/EC.

[55] Art 1.2 Directive 2002/14/EC.

[56] Art 5 of Directive 2002/14/EC.

Information and consultation rights are also included in the directives concerning the management of situations of company crisis. In the case, for instance, of Directive 98/59 on collective redundancies and Directive 2001/23 concerning the transfer of undertakings, the procedures of information and consultation shall be undertaken 'with a view to reaching an agreement'.[57] The CJEU has further specified that the provision on information and consultation procedures set by the directive on collective redundancies 'imposes an obligation to negotiate'.[58] In this regard, Barnard has commented that the reference to consultation with a view to achieving an agreement 'blurs the distinction between consultation and collective bargaining'.[59] Therefore, EU law seems to conceive information and consultation rights and procedures as part of collective autonomy.

A further expression of collective autonomy in EU law pertains to the limitative effect it can have on the application of EU law, especially in cross-border scenarios. A first example is the so-called Monti I Regulation entitled to 'the functioning of the internal market in relation to the free movement of goods among the Member States'.[60] However, the recognition of collective autonomy is here limited to the exercise of collective action. Art 2 of the Regulation states that

> This Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike. These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States.

The Regulation was adopted in the aftermath of *Commission v France (strawberry case),*[61] which had raised several criticisms from the labour movement with regard to the restrictions to the exercise of collective action deriving from the application of EU rules on free movement of goods.[62] In this case, the Court recognised the collective action taken by French farmers against the import of Spanish strawberries (produced with cheaper costs and sold at cheaper prices) being an obstacle to the free movement of goods, and as such it introduced the principle of 'horizontal indirect effect' by acknowledging the liability of the State in not preventing or stopping a private action restricting the exercise of an EU freedom.[63]

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[57] Art 2.1 Directive 98/59/EC and Art 7.1 Directive 2001/23/EC.

[58] Case C-188/03 Junk, para 43.

[59] Barnard (2012a) 639.

[60] Council Regulation (EC) 2679/98 on the functioning of the internal market in relation to the free movement of goods among the Member States [1998] OJ L 337/8.

[61] C-265/95 *Commission of the European Communities v French Republic (strawberries case)* EU:C:1997:595.

[62] Brian Bercusson, "European Labour Law and the Social Dimension of the European Union" in Bercusson (2009a) 5–41, 18.

[63] Harm Schepel, "Freedom of Contract in Free Movement Law: Balancing Rights and Principles in European Public and Private Law (2013) 21 *European Review of Private Law*, 1211–29, 1225.

The Monti I Regulation can be interpreted in two divergent ways. Giubboni pessimistically deemed it as imposing the free movement of goods as a supranational limit on collective action;[64] whereas Eklund as well as Orlandini acknowledged it as explicitly protecting the right to strike as a fundamental right of the EU, by however reaffirming the national competences on its regulation.[65] The Monti clause aims at safeguarding the exercise of the right to collective action according to national rules: indeed, through an interpretation of the clause in conjunction with Art 4 of the Regulation ('when an obstacle occurs, and subject to Article 2…'), the lawfulness of a collective action or a strike is determined by national laws, even in a cross-border situation. It therefore preserves the autonomy of trade unions in undertaking a strike action in the context of the free movement of goods.

In the wake of the criticism raised by the *Viking* and *Laval* case law, the Monti I Regulation was adopted as a blueprint for the draft of a proposal for a further regulation – the so-called Monti II Regulation, or 'Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services'.[66] It would have aimed, in the intention of the EU legislator, to match the concerns expressed by the former Commissioner Mario Monti as regards the negative impact of the Laval-quartet rulings in relation to the perception of EU integration by large sectors of European society, including workers and unions.[67] However, the proposal has been discarded by the national Parliaments in the first-time use of the so-called 'yellow card' procedure.[68] The key point was the clause, stating that the

> exercise of the freedom of establishment and the freedom to provide services enshrined in the Treaty shall respect the fundamental right to take collective action, including the right or freedom to strike, and conversely, the exercise of the fundamental right to take collective action, including the right or freedom to strike, shall respect these economic freedoms.[69]

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[64] Giubboni (2006) 64.

[65] Ronnie Eklund, "The *Laval* Case" (2006) 35 *Industrial Law Journal*, 202–08, 207; Giovanni Orlandini, "The Free Movement of Goods as a Possible 'Community' Limitation on Industrial Conflict" (2000) 6 *European Law Journal*, 341–62.

[66] Proposal for a Council Regulation COM(2012) 130 final.

[67] Mario Monti, "A New Strategy for the Single Market – at the service of Europe's Economy and Society" (2010) Report to the President of the European Commission, José Manuel Barroso.

[68] Art 7.2 of the Protocol on the Application of Principles of Subsidiarity and Proportionality attached to the Treaty. This procedure allows one third of the national Parliaments to demand the revision of a legislative proposal in case of breach of the principle of subsidiarity. For an overview on the positions of the national Parliaments towards the proposal for the Monti II Regulation, see Dorte Sindbjerg Martinsen, *An Ever More Powerful Court? The Political Constraints of Legal Integration in the European Union* (Oxford University Press 2015) 202.

[69] Art 2.

This provision – a sort of 'mutual respect clause' – lacked the merit of solving the conflict generated by the Laval-quartet rulings. It merely echoed that case law by putting economic freedoms and collective labour rights on an equal footing, so as to leave any future conflict at the mercy of a judicial decision grounded on the principle of proportionality.[70] Against this reading, other commentators have pointed out that the proportionality principle set in the Regulation would have been a better outcome than the indeterminacy of leaving the regulation of collective action in the context of the exercise of economic freedoms to the case law.[71] However, the 'mutual respect clause' would have not solved any conflict; rather, it would have had the effect of defusing the original 'Monti clause' by ratifying the application of free movement rules to collective action through the application of the principle of proportionality.

A wider recognition of collective autonomy as a limit to the implementation and enforcement of EU law is mentioned in the Directive 123/2006 on services in the internal market (service directive),[72] which combines freedom of establishment and of providing services in view of the fact that they are complementary aspects of the cross-border integration of domestic markets. Already in the Preamble, the relations between social partners, as well as the exercise of the right to negotiate and conclude collective agreements and to take collective action, shall not be affected by the directive.[73] This statement is further specified in Arts 1.6 and 1.7, which can be interpreted as placing the exercise of collective autonomy – intended both as contractual relations between employers and workers, and as the exercise of collective labour rights – from the scope of the directive itself.[74]

4.2.3. The collective agreement as source of employment regulation in EU law

A further expression of collective autonomy recognised by EU secondary law regards the function of the collective agreement as a source of regulation of the employment relationship. In the first instance, the collective agreement has been recognised as a source of employment in Directive 91/533 on the employer's obligation to inform the employees of the terms and conditions applicable to the

[70] See Niklas Bruun, Andreas Bücker & Filip Dorssemont, "Balancing Fundamental Social Rights and Economic Freedoms: Can the Monti II Initiative Solve the EU Dilemma?" (2012) 28 *The International Journal of Comparative Labour Law and Industrial Relations*, 279–306, 288–89.

[71] The Adoptive Parents, "The Life of a Death Foretold: The Proposal for a Monti II Regulation" in Freedland & Prassl (2014) 95–110, 107–08.

[72] Directive 123/2006/EC on services in the internal market [2006] OJ L 376/36.

[73] Recitals 14 and 15 Directive 123/2006/EC.

[74] Arts 1.6 and 1.7 Directive 123/2006/EC.

contract or employment relationship, also known as the 'Cinderella directive'.[75] Lo Faro stresses that the directive 'represents a worthy attempt to apply uniformly to the employment relationships of all citizens of the European Union a canon of legal civilisation regarding the employment relationship, consisting in informing Community employees of the legal terms governing their employment'.[76] The canon also includes the collective agreements, which are listed in Art 2.2 of the directive, among the sources regulating the employment contract that the employer needs to be aware of and communicate to the employees.[77]

The collective agreement is further indicated as a source of terms of employment by the already mentioned Directive 2001/23 on transfer of undertakings. Its Art 3.3 obliges the transferee to 'continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor'.[78] The obligation shall continue 'until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement'. However, the States have the chance to introduce a one-year time limit for the validity of the application of the agreement. The case law of the CJEU has confirmed that after the expiration of the time limit, the employees might lose their rights maturated under the previous collective agreement.[79] This 'static interpretation'[80] of the collective agreement has been confirmed by the case law of the CJEU. In *Werhof* as well as in *Alemo-Herron*, the Court supported the claim of the defendants – the transferees – who refused to apply the changes of the collective agreement by which they would have been bound, since they occurred after the transfer itself. In *Werhof*, the 'static interpretation' safeguarded the negative freedom of association of the transferee, which would otherwise have been bound by agreement signed by an association of which it is not a member.[81] Whereas in *Alemo-Herron*, the Court privileged the freedom to conduct business of the transferee, which would have been otherwise infringed by the obligation to apply a collective agreement entered into force after the date of the transfer (see Section 4.3.1). In both cases, the Court saw the transfer as establishing a new contractual relationship between the new employer and the employees – redeemed from the one in force at the time of the transfer.

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[75] Jon Clark & Mark Hall, "The Cinderella Directive? Employee Rights to Information about Conditions Applicable to their Contract or Employment Relationship" (1992) 21 *Industrial Law Journal*, 106–18.

[76] Antonio Lo Faro, *Regulating Social Europe: Reality and Myth of Collective Bargaining in the EC Legal Order* (Hart 2000) 81.

[77] Art 2.2 Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship [1991] OJ L 288/32.

[78] Art 3.3 Directive 2001/23/EC.

[79] C-4/01 *Serene Martin, Rohit Daby and Brian Willis v South Bank University* EU:C:2003:594.

[80] Barnard (2012a) 609.

[81] C-499/04 *Hans Werhof v Freeway Traffic Systems GmbH & Co. KG* EU:C:2006:168, para 35.

A further piece of EU secondary law dealing with the collective agreement as a source of regulation is Directive 2003/88 concerning certain aspects of the organisation of working time.[82] For instance, according to Art 4, collective agreements are entitled to set the number of breaks during a working day that exceeds six hours.[83] Furthermore, Art 8 indicates collective agreements as a source for defining the conditions of night work,[84] while Art 15 indicates that collective agreements can set more favourable conditions for the employees as regards health and safety.[85] In particular, the Working Time Directive gives the collective agreement the possibility to derogate from statutory employment standards. Art 18 attributes to collective agreements, i.e. to collective autonomy, the possibility to introduce derogations to the standards set by the directive itself as for daily rest (Art 2), breaks (Art 4), weekly rest period (Art 5), and night work (Art 8). In this regard, the directive refers to those collective agreements 'concluded between the two sides of industry at national or regional level or, in conformity with the rules laid down by them, by means of collective agreements or agreements concluded between the two sides of industry at a lower level'.[86] Collective autonomy is recognised and it receives derogatory prerogatives. The EU-law norms do not question the modalities through which the collective agreement is achieved. Its normative power is recognised in EU law.

An important recognition of the collective agreement as a source of employment regulation is contained in Directive 96/71 on the posting of workers.[87] Here, the collective agreement in force in the State in which the service is provided (the host State) is in principle considered the source of the employment conditions that are temporarily applied to the posted workers. These aspects are dealt with in more detail in Section 4.5 in relation to the cross-border dimension of the EU internal market.

4.2.4. Collective autonomy before the Court of Justice

The inclusion of collective labour rights in the EU Charter of Fundamental Rights and its interpretation given by the CJEU has already been discussed in relation to their recognition as fundamental rights of the EU. This section, by contrast, discusses the cases in which the CJEU has dealt with collective autonomy and

[82] Directive 2003/88/EC concerning certain aspects of the organisation of working time [2003] OJ L 299/9.

[83] Art 4 Directive 2003/88/EC.

[84] Art 8 Directive 2003/88/EC.

[85] Art 15 Directive 2003/88/EC.

[86] Art 18 Directive 2003/88/EC.

[87] Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [1997] OJ L 18/1.

collective bargaining as a mechanism of labour market regulation in its relationship with EU law. The case law of the CJEU is discussed in three streams: the first concerns the regulatory intervention of collective bargaining on the market and the relation between the collective agreement and competition law; the second concerns the application to collective bargaining of EU anti-discrimination law; and the third concerns the view on collective bargaining and collective agreements as obstacles to the cross-border exercise of the economic freedoms.

The landmark case in the first stream is certainly *Albany*.[88] The facts concerned a company operating in the Dutch textile sector that complained against the obligation, set by the sectoral collective agreement, to join a specific pension fund. The company claimed that the compulsory affiliation to the pension fund violated the EU rules on competition in the internal market, also because it was made mandatory by a decision of the Minister of Social Affairs and Employment. Nevertheless, the CJEU, on the basis of the provisions of the Treaty referring to social dialogue and collective bargaining, indicated that 'it is beyond question that certain restrictions of competition are inherent in collective agreement between organisations representing employers and workers'.[89] The regulatory force of the collective agreement is thus recognised by the CJEU, which, further, declared the collective agreement as falling outside the scope of the EU competition rules. Such a statement is grounded on the social objectives set by the EU Treaty, which, according to the Court, would be undermined if competition rules were applied to collective bargaining. Accordingly, the Court recognised the social objectives inherently pursued by collective bargaining, also in the case at stake, concerning the improvement of working conditions and remuneration.[90] In this sense, the CJEU followed up the arguments of the Advocate General who considered the collective agreement at stake as not affecting third parties because of its aim to improve wages and other working conditions and therefore being limited to the parties of the agreement itself.[91]

The *Albany* ruling has prompted an intense debate. In this regard, Barnard notes the CJEU's 'labour relations approach which offered a greater respect to the autonomy of the Social Partners'.[92] Yet Ashiagbor critically observes that 'the Court's judgment states that collective agreements are only immune from antitrust scrutiny if they are in the context of collective bargaining, and if they relate to the traditional subject-matter of collective bargaining, i.e. wages and working

[88] C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* EU:C:1999:430.

[89] C-67/96 *Albany*, para 59.

[90] C-67/96 *Albany*, para 63.

[91] Opinion Advocate General Jacobs, para 198. See Stein Evju, "Collective Agreements and Competition Law. The *Albany* Puzzle, and *van der Woude*" (2001) 17 *The International Journal of Comparative Labour Law and Industrial Relations*, 165–84, 170.

[92] Barnard (2012a) 195.

conditions'.[93] However, Evju has stressed that the achievement of the ruling concerns the sharp line that the CJEU drew between the concept of trade union (built on the functional definition of the collective agreement and of the social objectives it pursues) and that of 'undertaking', which is instead a subject falling within the scope of competition law.[94] Furthermore, Sciarra underlined how the decision of the CJEU highlighted the different perspectives on collective agreements depending on the legal system in which they are conceived. She observed that 'in the national context it would be hard to imagine that a request put by management and labour to make compulsory the affiliation to a sectoral pension fund could be attacked as an agreement between undertakings. And yet the language of European competition law illustrates the reasoning of cross-frontier business against the national rules enforceable in one economic sector'.[95] The *autonomy* of industrial relations is challenged by the rules of competition law underpinning the construction and functioning of the EU internal market. However, the Court dismissed the claim of Albany by referring to such autonomy, proper to national legal systems.[96]

The ruling in *Albany* paved the way for a further ruling of the CJEU in the *van der Woude* case,[97] which again concerned a Dutch collective agreement in the hospital sector and its clause on voluntary supplementary health insurance. As in *Albany*, the collective agreement was declared to be mandatory by the Minister of Social Affairs and Employment. In reiterating the decision taken in *Albany* to exempt collective agreement from the scope of competition law, the Court specified that to decide otherwise 'would constitute an unwarranted restriction on the freedom of both sides of industry […] when they enter into an agreement concerning a particular aspect of working conditions'.[98] In this sense, on the one hand, Evju, although critically observing that the CJEU seemed to consider the functional purpose of collective agreements and therefore limited the autonomy of the party, commented that '*van der Woude* deals directly and specifically with the narrower concept of collective agreement'.[99] On the other hand, Sciarra emphasised how the Court expanded the range of 'core subjects' that can be the object of collective bargaining.[100]

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[93] Diamond Ashiagbor, "Economic and Social Rights in the European Charter of Fundamental Rights" (2004) 9 *European Human Rights Law Review*, 62–72, 67.

[94] Evju (2001) 174–76.

[95] Silvana Sciarra, "Market Freedoms and Fundamental Social Rights" in Bob Hepple (ed), *Social and Labour Rights in a Global Context: International and Comparative Perspectives* (Cambridge University Press 2002) 95–121, 108.

[96] C-67/96 *Albany*, para 66.

[97] C-222/98 *Hendrik van der Woude v Stichting Beatrixoord* EU:C:2000:475.

[98] C-222/98 *van der Woude*, para 26.

[99] Evju (2001) 181.

[100] Sciarra in Hepple (2002) 112.

The Court has again specified the terms of this exclusion in the *FNV Kunsten Informatie en Media* case, in which it was called to adjudicate a dispute on the applicability of EU competition rules to a collective agreement setting conditions of employment of self-employed persons.[101] The facts of the case concerned a collective agreement signed between the Dutch artist and media workers' union and the union for musicians on the one side (*FNV Kunsten Informatie en Media* and *Nederlandse toonkunstenaarsbond*) and the Association of Foundations for Substitutes in Dutch Orchestras on the other side (*Vereniging van Stichtingen Remplaçanten Nederlandse Orkesten*) regarding the fees to be applied to substitute musicians, including those performing under the form of independent (self-employed) service providers. When asked to decide over the application of competition rules on this type of collective agreement that did not cover subordinated workers nor the self-employed, the Court affirmed that in principle self-employed persons are to be deemed as 'undertakings' and that therefore a collective agreement stating the conditions for the provisions of service would not be excluded from the scope of EU competition rules. In this case, however, the CJEU acknowledges that 'the term "employee" for the purpose of EU law must itself be defined according to objective criteria that characterise the employment relationship, taking into consideration the rights and responsibilities of the persons concerned',[102] and that therefore 'the status of "worker" within the meaning of EU law is not affected by the fact that a person has been hired as a self-employed person under national law'.[103] The purpose of improving conditions of employment and work sought by the employers' and employees' representing organisations in negotiating and concluding a collective agreement excludes such an instrument of labour market policy from the application of competition rules.[104] The protection of 'labour' in its substance, rather than in its notion,[105] constitutes the reason for excluding collective agreements from the scope of EU competition rules, due to the social objectives it pursues.[106]

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[101] C-413/13 *FNV Kunsten Informatie en Media contro Staat der Nederlanden* EU:C:2014:2411.

[102] C-413/13 *FNV Kunsten Informatie en Media*, para 34.

[103] C-413/13 *FNV Kunsten Informatie en Media*, para 36.

[104] Inter alia, Joined Cases C-115/97, C-116/97 and C-117/97 *Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* EU:C:1999:434, para 57.

[105] In the *FNV* ruling, the Court affirms that 'the classification of a "self-employed person" under national law does not prevent that person being classified as an employee within the meaning of EU law if his independence is merely notional, thereby disguising an employment relationship', see Case C-413/13 *FNV Kunsten Informatie en Media*, para 35.

[106] See also Daniela Comandè, "The Right to Collective Bargaining in Action: The Ongoing Short-circuit between the Economic and Social Dimensions" (2012) 2 *European Journal of Social Law*, 99–112, 102.

In the second stream, represented by the *Rosenbladt*,[107] *Prigge*[108] and *Hennings*[109] cases, the CJEU has stated that the autonomy of collective bargaining falls within the scope of the EU regulation of anti-discrimination. The dispute in *Rosenbladt* concerned a woman employed by a cleaning firm, whose employment contract had been automatically terminated when she reached the age of 65 due to a clause of the applicable collective agreement. Her request to be further employed beyond that age limit was rejected by her employer on the basis of that clause. Similarly, in *Prigge*, three pilots employed by Lufthansa complained against the automatic termination of their contracts at the age of 60. The age limit for mandatory retirement was set in the collective agreements regulating the conditions of Lufthansa pilots. Finally, the *Hennings* case concerned two joint applications in which two public employees – one employed by the Land of Berlin as manager of a care home, and another working as an engineer for the federal authority for railways – claimed to be discriminated against on the grounds of age because of the age classification about pay set in the collective agreement applicable to their contracts.

In those cases, the applicants considered the provisions of the collective agreements to violate the principle of non-discrimination on the basis of age set by the Directive 2000/78 on equal treatment in employment and occupation. Therefore, the CJEU was asked to interpret the provisions of the collective agreements at hand in light of the principle of non-discrimination, set by the EU Charter and by the Directive, and in light of the justification grounds for age discrimination set by the Directive. Different treatments on the grounds of age are indeed allowed by the Directive if justified by specific labour market or employment policies, and if applied proportionally to the aim. Along with the common recognition of the right to collective bargaining as a fundamental right in the EU legal system on the basis of Art 28 CFREU,[110] the rulings shared a further interesting feature. The CJEU, in including the collective agreements within the scope of EU anti-discrimination law, also acknowledged the autonomy of the social partners in defining and implementing labour market and employment policies through collective agreements.[111] The instrument of collective bargaining seemed to be appreciated by the CJEU because of its flexibility, which ensures that different interests are taken into consideration and balanced in the collective agreement.[112] However, the Court concluded that the scope of collective bargaining can be subject to 'a strict judicial

[107] C-45/09 *Gisela Rosenbladt v Oellerking Gebäudereinigungsges. mbH* EU:C:2010:601.

[108] C-447/09 *Reinhard Prigge and Others v Deutsche Lufthansa AG* EU:C:2011:573.

[109] Joined Cases C-297/10 and C-298/10 *Sabine Hennigs (C-297/10) v Eisenbahn-Bundesamt and Land Berlin (C-298/10) v Alexander Mai* EU:C:2011:560.

[110] C-45/09 *Rosenbladt*, para 67; C-447/09 *Prigge*, para 47; C-297/10 and C-298/10 *Hennigs*, para 67.

[111] C-45/09 *Rosenbladt*, para 41; C-447/09 *Prigge*, para 61; C-297/10 and C-298/10 *Hennigs*, para 65.

[112] C-45/09 *Rosenbladt*, paras 67 and 68; C-297/10 and C-298/10 *Hennigs*, para 92.

control',[113] since it is defined by the (higher) legislative source, which in turn is subject to EU law. For instance, in *Rosenbladt*, the fact that the discriminatory measure was contained in a collective agreement did not lead the Court to consider it automatically exempted from compliance with EU law.[114] The scope of collective autonomy cannot go beyond the boundaries set by EU law. For instance, in both *Prigge* and *Hennings*, the Court stated that the age limit set by the collective agreement was lower than the one set by national and international legislation. Such a derogation could not be justified by the aim it intended to achieve, i.e. protecting air traffic safety, which, according to the Court, would fall outside the justifications set by the Directive concerning labour market policies and the protection of employees' interests.[115] Thus, the judicial control of the CJEU concerns the protection of the individual employee, whose limitation, however, as stressed by Schiek, can enjoy a wide margin of discretion if justified by falling within the competences of the social partners in defining labour market policies.[116] As Schubert notes, the Court considered that 'regulations protecting legitimate interests of the general public can only be included in a collective agreement under the condition that these interests are simultaneously employees' interests', otherwise they are the subject of a State's regulation rather than of collective autonomy.[117]

The third stream of case law concerns cases in which the autonomy of collective bargaining clashed with the exercise of the freedoms of establishment and providing services. The core of this stream is certainly represented by the *Viking Line*[118] and *Laval*[119] cases. As is widely known, in these cases, whose facts have already been described in Section 1.3.4, collective autonomy has not been exempted from the scope of EU law. Although the CJEU recognised the function of collective bargaining as a regulatory mechanism of the labour market and for pursuing social objectives, collective autonomy itself – expressed by the exercise of collective labour rights – is deemed an obstacle to the cross-border exercise of economic freedoms in need of justification.[120]

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[113] Monika Schlater, "Mandatory Retirement and Age Discrimination Under EU Law" (2011) 27 *The International Journal of Comparative Labour Law and Industrial Relations*, 287–99, 296.

[114] C-45/09 *Rosenbladt*, para 52 and 53. See Schlater (2011) 297.

[115] C-447/09 *Prigge*, paras 81–82; C-297/10 and C-298/10 *Hennigs*, paras 76–78.

[116] C-45/09 *Rosenbladt*, para 68. See Dagmar Schiek, "Age Discrimination before the ECJ – Conceptual and Theoretical Issues" (2011) 48 *Common Market Law Review*, 777–99, 792.

[117] Schubert (2013) 159.

[118] C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* EU:C:2007:772.

[119] C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* EU:C:2007:809.

[120] See, inter alia, Catherine Barnard, "*Viking* and *Laval*: An Introduction" (2008a) 10 *Cambridge Yearbook of European Legal Studies*, 461–92, 470.

According to the arguments advanced by the trade unions and supported by the Danish and Swedish governments, the exercise of collective labour rights would have been excluded from compliance with EU law by virtue of the exclusion from the regulatory competences of the EU *ex* Art 153.5 TFEU. Instead, the CJEU referred to its previous case law in other areas, such as, *inter alia*, social security in order to affirm that, despite the lack of harmonisation in the field, the Member States shall nevertheless comply with the fundamental principles of EU law. In this regard, for instance, the CJEU referred to *Decker*[121] and *Kohll*,[122] two cases concerning the application of free movement rules on national social security schemes. In both decisions, the CJEU upheld the opinion of the Advocate General Tesauro (jointly issued for both cases), in which he concluded that the national competences on social security schemes do not 'mean that Member States may contravene with impunity a fundamental principle established by the Treaty'.[123] Therefore, by analogy, the exclusion from the regulatory competences of the EU of the collective labour rights does not exempt the exercise of collective labour rights from the scope of EU law, nor preclude that national legislation on collective labour rights has to comply with EU rules. In both *Viking* and *Laval*, the CJEU concludes by stating that 'the fact that Article [153.5 TFEU] does not apply to the right to strike or to the right to impose lock-outs is not such as to exclude collective action' from the domain of, respectively, freedom of establishment and freedom to provide services.[124]

In *Viking* the Court dismissed the argument of the Finnish union based on the *Albany* case law, by simply affirming that 'it cannot be considered that it is inherent in the very exercise of trade union rights and the right to take collective action that those fundamental freedoms will be prejudiced to a certain degree'.[125] In *Laval*, the Court rejected the claims, advanced by the Swedish government, that the constitutional protection of the right to collective action would exclude it from falling within the scope of EU law. Rather, the CJEU affirmed that 'compliance with Article [56 TFEU] is also required in the case of rules which are not public in nature but which are designed to regulate, collectively, the provision of services'.[126] Although constitutionally protected in the Member State's legal system, the right to collective action is not absolute and can be subject to restrictions deriving from EU

[121] C-120/95 *Nicolas Decker v Caisse de maladie des employés privés* EU:C:1998:167.

[122] C-158/96 *Raymond Kohll v Union des caisses de maladie* EU:C:1998:171.

[123] Joined Opinion of Advocate Geneal Tesauro in Cases C-120/95 *Decker* and C-158/96 *Kohll* EU:C:1997:399, referred to by the CJEU in C-120/95 *Decker*, para 23, and in C-158/96 *Kohll*, para 19.

[124] C-438/05 *Viking Line*, para 41; C-341/05 *Laval un Partneri*, para 88. On the common tendencies in the two rulings as regards the issue of horizontal direct effects and the application of the principle of proportionality, see Reich (2008) 154.

[125] C-438/05 *Viking Line*, para 52.

[126] C-341/05 *Laval un Partneri*, para 98.

law, in particular on the basis of Art 28 CFREU, which sets out the compliance with EU law for the exercise of collective actions.[127]

However, the arguments of the Court do not take into account the nature of the collective agreement as an instrument limiting the competition also in cross-border situations;[128] rather, the Court looks at the collective agreement from the perspective of EU law and its all-encompassing nature.[129] In this sense, the Court states that the fact that collective agreements 'are excluded from the scope of the provisions of the Treaty on competition does not mean that that agreement or activity also falls outside the scope of the Treaty provisions on the free movement of persons or services'.[130]

Although with different outcomes, in the three streams the CJEU has upheld collective bargaining as a regulatory mechanism of the labour market that has to deal with the potential restrictions deriving from EU law. In this first stream of case law, the CJEU has recognised collective bargaining as a regulatory mechanism of the market by actually exempting the collective agreement from the scope of competition law. Thus, the rulings acknowledged the restrictive extent of collective autonomy on competition; yet this is justified, also in EU law, by virtue of the social objectives it pursues, i.e. the improvement of working and employment conditions, which are compatible with the social objectives of the EU. In the second stream, collective bargaining receives legitimation as a means for adopting and implementing labour market policies, which, however, need to comply with EU rules on anti-discrimination law. Finally, in the third stream, the acknowledgement of the autonomy of collective bargaining in setting collective rules on employment regulation is interpreted by the Court as ground for the exercise of collective autonomy as a restriction to the cross-border pursuit of the economic freedoms.

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[127] C-341/05 *Laval un Partneri*, paras 91–93. See Barnard (2008a) 467.

[128] In this sense Phil Syrpis & Tonia Novitz, "Economic and Social Rights in Conflict: Political and Judicial Approaches to their Reconciliation" (2008) 33 *European Law Review*, 411–26, 420.

[129] Niamh Nic Shuibhne, "Settling Dust? Reflections on the Judgments in *Viking* and *Laval*" (2010a) 21 *European Business Law Review*, 681–703, 697.

[130] C-341/05 *Laval un Partneri*, para 94, and C-438/05 *Viking Line*, para 53. In *Viking*, the Court supports this argument by referring to previous case law concerning the effects of the application of clauses of a collective agreement to transfontalier (cross-border) workers, in which collective agreements have been acknowledged as falling within the scope of the rules on free movement of workers, C-15/96 *Kalliope Schöning-Kougebetopoulou v Freie und Hansestadt Hamburg* EU:C:1998:3; C-35/97 *Commission of the European Communities v French Republic* EU:C:1998:431; C-400/02 *Gerard Merida v Bundesrepublik Deutschland* EU:C:2004:537; see C-438/05 *Viking Line*, para 54.

4.3. The economic freedoms of establishment and to provide services and the EU internal market

4.3.1. The freedom to conduct business as fundamental right

The economic freedoms of establishment and providing services are complementarily related to the freedom to conduct business. On the one side, the freedom of establishment is the freedom to locate or relocate an economic activity in the territory of a Member State. On the other side, the freedom to provide services is the freedom to economically operate in the EU market at large, intended as the totality of the markets of the Member States. The two freedoms have to be considered in the wider context of the exercise of the freedom to conduct business, which is enshrined in Art 16 CFREU.[131]

In both cases the company is the subject entitled to such rights. The entitlement of subjective rights and freedoms to legal persons, such as companies, is a basic feature of the EU legal order.[132] Already in the landmark *Van Gend en Loos* ruling, the CJEU had affirmed that the nature of a legal system such as the EU (EEC at the time) is such to confer rights to individuals, including companies, to be claimed before national court and having direct effect in the national legal systems.[133] Furthermore, the legal standing attributed to private individuals in order to ask the review of legality of EU acts confirms that companies are subjects of rights and freedoms, and that they can seek protection of their interests in the EU legal system.[134] In this regard, the General Court has indicated Art 16 CFREU as a successful ground for asking the review of legality of EU acts that have the effect of limiting the freedom to conduct business.[135] In the EU legal order the company is entitled to business rights, such as the rights to participate in the market in free

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[131] Marco Zinzani & Giuseppe Santarelli, "Libertà di impresa e protezione dei consumatori" in Pasquale Gianniti (ed), *I diritti fondamentali nell'Unione Europea. La Carta di Nizza dopo il Trattato di Lisbona* (Zanichelli 2013) 1199–235, 1204.

[132] The free movement rights can be seen as public subject rights as originating from public law but exercised for the pursuit of general as well as private interests, in this regard see Pedro Caro de Sousa, *The European Fundamental Freedoms: A Contextual Approach* (Oxford University Press 2015) 56–58.

[133] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* EU:C:1963:1, para 12. See also Scharpf, 221. This statement is also the basis for the decision in the Francovich case (C-6/90), which states the liability of the States towards the individuals in case of missed or delayed implementation of a directive.

[134] See Art 263 TFEU. The case law on the legal standing of companies is wide, see recently T-262/10 *Microban International Ltd and Microban (Europe) Ltd v European Commission* EU:T:2011:623.

[135] See T-52/09 *Nycomed Danmark ApS v European Medicines Agency (EMA)* EU:T:2011:738, paras 88 and 89.

competition, the right to property and the right to free movement in the pursuit of economic activities, which have acquired fundamental status in EU law.[136]

A freedom to conduct business is the subjective right to engage in economic activity in a regime of free competition.[137] Such a freedom is intrinsic to the concept – and practice – of the free market that the EU project intends to pursue.[138] Already in *Nold*[139] and *Eridania,*[140] the Court recognised this freedom under the form of freedom to 'choose and practice a trade or a profession'. In these rulings, the Court embraced the protection of the freedom to conduct business as a fundamental right stemming from the constitutional traditions of the Member States.[141] Later, the Court recognised the contractual freedom of companies as part and parcel of their economic autonomy, which shall be defended against interferences from the States.[142] Furthermore, the freedom to conduct business has been a constant reference in the case law of the Court as regards the definition of the rules on the exercise of the freedom of establishment, whose main features derive from the freedom of companies to conduct business in another Member State.[143] In the list of rights enshrined by the Charter of Fundamental Rights, the right to conduct business appears in between the right to engage in work (Art 15) and the right to property (Art 17), forming a tryptic of provisions protecting economic activities in the EU legal system.[144]

As a socio-economic right, the freedom to conduct business can be subjected to limitations and restrictions relating to objectives of general interests and applied

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[136] See Danny Nicol, "Business Rights as Human Rights" in Campbell, Ewing & Tomkins (2011) 229–43. See also C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk* EU:C:2013:28, para 42.

[137] Michele Everson & Rui Correa Gonçalves, "Art 16: Freedom to Conduct Business" in Steve Peers, Tamara Hervey, Jeff Kenner & Angela Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 437–63, 447.

[138] Usai refers to the freedom to conduct business as fostering the social benefits deriving from the functioning of the free market and eventually as a factor for deepening the political integration of the EU, see Andrea Usai, "The Freedom to Conduct Business in the EU, its Limitations and its Role in the European Legal Order: A New Engine for Deeper and Stronger Economic, Social, and Political Integration" (2013) 14 *German Law Journal*, 1867–88, 1881.

[139] Case 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Ruhrkohle Aktiengesellschaft* EU:C:1975:114.

[140] C-230/78 *SpA Eridania-Zuccherifici nazionali and SpA Società Italiana per l'Industria degli Zuccheri v Minister of Agriculture and Forestry, Minister for Industry, Trade and Craft Trades, and SpA Zuccherifici Meridionali* EU:C:1979:216.

[141] Everson & Gonçalves in Peers & Hervey & Kenner & Ward (2014) 440.

[142] In the Sukkerfabriken case (C-151/78 *Sukkerfabriken Nykøbing Limiteret v Ministry of Agriculture* EU:C:1979:4), the Court dismissed the claim of the appellant, but nonetheless recognised the imposition of quotas to trade of sugar beets as infringement of the freedom to contract of companies.

[143] Luca Perilli, "Art 16 – Libertà d'impresa" in Giacinto Bisogni, Giuseppe Bronzini & Valeria Piccone (eds), *La Carta dei diritti dell'Unione Europea. Casi e materiali* (Chimienti 2009) 197–204, 199. See also the Opinions of the Advocate General La Pergola in Centros and Advocate General Tizzano in Sevic.

[144] See also Everson & Gonçalves in Peers & Hervey & Kenner & Ward (2014) 442–45.

proportionally.[145] In this regard, the CJEU affirmed that the freedom to pursue an economic activity – i.e. the freedom to conduct business – can be restricted, for instance, by the need for the State to regulate a specific sector for reasons related to a general interest.[146] In a case concerning working time limitations to self-employed drivers in the context of the harmonisation of rules on road transport, the Court affirmed that '[the] freedom to conduct a business, which coincides with freedom to pursue an occupation […] are not absolute rights, however, but must be considered in relation to their social function'.[147] Also, the Court affirmed that 'the freedom to conduct a business may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest'.[148]

The scope of the freedom to conduct business includes private relationships.[149] However, in the context of employment and labour relations, the reference to freedom to conduct business acquires a connotation that privileges the protection of the economic activity (and of the employer's side) over the protection of the worker. For instance, the CJEU referred to Art 16 CFREU and the freedom to conduct business as legal grounds for the recognition of an employer's right 'to project an image of neutrality towards customers' in a case in which an employee of the security company G4S who wore a veil for religious reasons, claimed to be discriminated against since the company adopted an internal rule forbidding its employees from wearing any visible signs of political, philosophical or religious belief.[150] Similarly, in cases in which the freedom to conduct business has encountered industrial relations, the CJEU has interpreted it as freedom of contract, de facto (and de iure) denying the peculiarity of collective labour law.

In *Alemo-Herron*[151] the Court reviewed a case concerning the privatisation of the leisure service department of a London borough council, which thus transferred part of its activities to a private company. The core of the dispute concerned the application of certain so-called 'dynamic clauses'[152] of the collective agreement in force at the time of transfer, which was negotiated with the public authority

[145] For an overview on case law of the CJEU concerning the limitations to the freedom to conduct business and freedom to pursue a trade or an economic activity, see Usai (2013) 1872.

[146] See, inter alia, Case 44/79 *Liselotte Hauer v Land Rheinland-Pfalz* EU:C:1979:290.

[147] Joined cases C-184/02 and 223/02 *Kingdom of Spain and Republic of Finland v European Parliament and Council of the European Union* EU:C:2004:497, paras 51–52.

[148] C-283/11 *Sky Österreich*, para 46.

[149] C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* EU:C:2011:771 and C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* EU:C:2012:85.

[150] C-157/15 *Samira Achbita e Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* EU:C:2017:203, para 38.

[151] C-426/11 *Mark Alemo-Herron and Others v Parkwood Leisure Ltd* EU:C:2013:521.

[152] The 'dynamic clauses' of a collective agreement have the effect of binding the transferee to conditions negotiated prior the transfer.

representing the councils (the National Joint Council) and that the transferee claimed not to be bound by, because it did not participate in the process of negotiation. Although similar to the dispute of the *Werhof* case, in *Alemo-Herron*, the Court focused its ruling on the protection of the freedom to conduct business as freedom of contract, rather than on the negative freedom of association of the transferee. This led the Court to reverse the conclusion in *Werhof* by affirming that the 'dynamic clauses' of a collective agreement cannot be applied in the transfer of undertaking without harming the transferee's freedom of contract.[153] In *Werhof*, the Court affirmed that an 'unconditional application' of the principle of freedom of contract in a labour dispute on the application of dynamic clauses of a collective agreement, 'could result in erosion of the rights' to which the employees are entitled, which is the primary objective in the context of the transfer of undertaking.[154] In *Alemo-Herron*, instead, the fact that the company did not take part in the negotiations that led to the collective agreement meant for the CJEU that 'the transferee can neither assert its interests effectively in a contractual process nor negotiate the aspects determining changes in working conditions for its employees with a view to its future economic activity'.[155] Eventually, the impossibility of pursuing its own interest in a negotiation conducted by another subject was deemed by the Court as affecting 'the transferee's contractual freedom […] to the point that such a limitation is liable to adversely affect the very essence of its freedom to conduct a business'.[156] Surprisingly enough, in *Alemo-Herron*, the Court does not refer to or take into consideration the right to conclude collective agreements set in Art 28 CFREU, as to annul the alleged equality between fundamental rights achieved with the Charter.

The upgrading of freedom of contract to the status of fundamental right and even principle of EU law is a novelty.[157] Its application in the context of industrial relations leads to alarming outcomes. The Court placed the interests of the company and the interest of the employees on an equal footing, but privileged the protection of the company's right to conduct business as if the protection of the employees' rights constituted an illegitimate restriction on such a right – or 'as if it is the employer that is the vulnerable party'.[158] In this sense, Weatherill suggests that the

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[153] Jeremias Prassl, "Freedom of Contract as General Principle of EU Law? Transfer of Undertaking and the Protection of Employer Rights in EU Labour Law. Case C-426/11 *Alemo-Herron and others v Parkwood Leisure Ltd*" (2013) 43 *Industrial Law Journal*, 434–46, 440.

[154] C-499/04 *Hans Werhof v Freeway Traffic Systems GmbH & Co. KG* EU:C:2006:168, paras 23–25.

[155] C-426/11 *Alemo-Herron*, para 34.

[156] C-426/11 *Alemo-Herron*, para 35.

[157] In this regard, Prassl (2013) 442–43.

[158] Stephen Weatherill, "Use and Abuse of the EU's Charter of Fundamental Rights: On the Improper Veneration of 'Freedom of Contract'. Judgment of the Court of 18 July 2013: Case C-426/11, *Mark Alemo-Herron and Others v Parkwood Leisure Ltd*" (2014) 10 *European Review of Contract Law*, 167–82, 172.

blind application of the logic of freedom of contract in the conflict of interests between the parties to the labour dispute led to 'a distinctively pro-employer interpretation'.[159] From another perspective, the reference to Art 16 CFREU allowed the Court to conduct an operation of deregulation. National measures protecting the employees' rights can be lowered by the need to ensure a uniform (minimum) interpretation of the freedom to conduct business.[160]

In a further case, *AGET Iraklis*,[161] concerning collective redundancies in a cement factory in Greece, the Court applied the same logic as in *Alemo-Herron* and interpreted the freedom to conduct business as freedom of contract. Here, the Court dealt with the interpretation of the freedom of establishment (the owner of the Greek company was a French multinational) in the light of Art 16 CFREU and within an industrial relations scenario. In this case, the Court affirmed that a national-law provision imposing on the employer a framework for collective redundancies that entails the obligation to notify the public authority, and the possibility of receiving a negative response, constitutes a violation of the company's freedom of contract. In particular, the Court found that imposing such a framework would interfere with the employer's freedom of contract in respect of the workers employed, especially if the collective redundancies plan could be rejected by the public authority.[162] In other words, the decision to lay employees off is part of the freedom of contract of the employer and therefore the protection of employees is a restriction. The starting point of the Court is the economic freedom of the companies and its interest, which the Court allows to prevail over an inherent element of labour law, namely, the protection of employees in case of redundancies. However, this aspect of the ruling is mitigated by the reference made by the Court to Art 3.3 TFEU, on the basis of which it affirmed that the aim of the EU 'is not only to establish an internal market but is also to work for the sustainable development of Europe, which is based, in particular, on a highly competitive social market economy aiming at full employment and social progress, and […] social protection'.[163] In doing this, the Court refuted the corollary advanced by the Advocate General, who postulated that the EU 'is based on a free market economy, which implies that undertakings must have the freedom to conduct their business as they see fit'.[164] Instead, the CJEU

[159] Ibid., 174.

[160] Weatherill (2014) 179; Marija Bartl & Candida Leone, "Minimum Harmonisation after *Alemo-Herron*: The Janus Face of EU Fundamental Rights Review" (2015) 11 *European Constitutional Law Review*, 140–54, 149. Bartl & Leone also point to the overturning of the 'telos' of the directive on transfer of undertaking from the aim to protect the employees to the goal of striking a fair balance between the parties involved, Ibid., 153.

[161] C-201/15 *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis* EU:C:2016:972.

[162] C-201/15 *AGET Iraklis*, para 69.

[163] C-201/15 *AGET Iraklis*, para 76.

[164] Opinion of Advocate General Wahl in C-201/15 *AGET Iraklis* EU:C:2016:429, para 1.

acknowledged that the freedom to conduct business can be limited by the public authorities for reasons of public interest.[165] However, the criteria for justifying public intervention into the company's decision on collective redundancies advanced by the Greek government were rejected as not justifiable on the basis of the aim to protect the workers. According to Court, to justify a limitation to operate collective redundancies for the 'interest of the national economy' is a purely economic ground intended to protect an economic sector from 'adverse effects'.[166] Also, the Court deemed that the criteria of considering the 'situation of the undertaking' and the 'conditions in the labour market' were not formulated clearly enough to define the scope of public authority in intervening to limit the economic activity of the company,[167] i.e. its freedom to conduct business, which includes the freedom to effect collective redundancies.

4.3.2. The exercise of economic freedoms in the EU internal market

The EU integration project, directed at creating an internal market, relies in the first instance upon the free circulation of economic factors. Its corollary is their free access to the national domestic markets, which implies the abolition of barriers to the movement of goods, persons (workers, self-employed, and companies), capital, and services.[168] These four freedoms are enshrined in the TFEU and are the pillars of economic integration, which aims, as the CJEU recalled, at eliminating 'all obstacles to intra-Community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market'.[169] The original provisions on the freedom of establishment and of providing services included in the 1957 Treaty of Rome already mentioned the necessity to abolish restrictions to their exercise. The emphasis of the 1960s and 1970s case law of the CJEU privileged an approach focusing on the abolition of any discrimination on the ground of nationality in light of Art 18 TFEU,[170] which constitutes the cornerstone of the exercise of the economic freedoms.[171] It would

[165] C-201/15 *AGET Iraklis*, para 86.

[166] C-201/15 *AGET Iraklis*, para 97.

[167] C-201/15 *AGET Iraklis*, paras 99–100.

[168] On the 'constitutional' relevance of the four freedoms for the economic integration project, see Schiek (2012) 82.

[169] C-15/81 *Gaston Schul Douane Expediteur BV v Inspecteur der Invoerrechten en Accijnzen, Roosendaal* EU:C:1982:135, para 33.

[170] Arts 52 and 59 of the Treaty establishing the European Economic Community.

[171] See Case 48/75 *Jean Noël Royer* EU:C:1976:57, para 12, in which the Court states that the exercise of the freedom of movement, which concerns the entry and residence in the territory of a Member State, is subject to common principles including the principle of non-discrimination on the grounds of nationality.

also respect and not interfere with the national regulatory autonomy based on the mutual recognition of the Member States' respective national legislations.[172]

The 'non-discrimination' approach does not question the restrictive effect that a national rule would have on the access to the domestic market, as long as the rule is applied equally to national and foreign operators. In the evolution of the case law of the CJEU, it is possible to notice a progressive switch from the non-discrimination approach to a test of 'market access', which entails the evaluation of the effect of a national measure on the effective exercise of the economic freedoms.[173] In 1978, in the *Rewe* case (also known as *Cassis de Dijon*, which, however, concerned free movement of goods),[174] the Court only stated the obligation for Germany to set aside the rule banning the import of the French liquor on the basis of the requirement of a minimum percentage of alcohol.

The approach in the 1990s cases *Kraus*,[175] *Gebhard*[176] and *Säger,*[177] was different. In these cases, the Court specified that the exercise of economic freedoms entails the abolition not only of rules discriminating on the basis of nationality, but also of any other measure that prohibits, hinders or 'makes less attractive the exercise of fundamental freedoms guaranteed by the Treaty'.[178] National measures shall thus pass through the test of 'market access' in order not to be considered in breach of EU law. However, whereas the 'non-discrimination' approach has, as its corollary, that 'rules which do not discriminate do not breach the Treaty',[179] the 'market access' test requires that the measures allegedly restricting the exercise of economic freedoms be justified, which is also the case if they are applied in a non-discriminatory manner.[180]

Generally speaking, freedom of establishment and freedom to provide services are subject to similar regulation as for their exercise within the single market. The

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[172] Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford University Press 2013) 17.

[173] Catherine Barnard & Simon Deakin, "Market Access and Regulatory Competition" in Catherine Barnard & Joanne Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Hart 2002) 197–224.

[174] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* EU:C:1979:42.

[175] C-19/92 *Dieter Kraus v Land Baden-Württemberg* EU:C:1993:125.

[176] C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* EU:C:1995:411.

[177] C-76/90 *Manfred Säger v Dennemeyer & Co. Ltd* EU:C:1991:331.

[178] C-55/94 *Gebhard*, para 37. See also Case C-602/10 *SC Volksbank România SA v Autoritatea Naţională pentru Protecţia Consumatorilor — Comisariatul Judeţean pentru Protecţia Consumatorilor Călăraşi (CJPC)* EU:C:2012:443, para 73. See Barnard (2013) 263–64. Nic Shuibhne underlines that the CJEU meant to ensure coherence and convergence to free movement law by drawing a general definition of restrictions, see Niamh Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (Oxford University Press 2013) 32.

[179] Barnard & Snell in Barnard & Peers (2014) 414.

[180] See also C-384/93 *Alpine Investments BV v Minister van Financiën* EU:C:1995:126, para 38.

case law of the CJEU has also affirmed that these freedoms enjoy direct effect, i.e. they do not need any implementation measure adopted by the Member States.[181] The direct effect can also be claimed in its horizontal application, i.e. being directly applicable in disputes between private parties.[182] However, the substance of their exercise differs. The freedom of establishment is associated with the free movement of persons and it is distinguished from the free movement of workers as to the nature of the economic activity pursued, which in the case of establishment concerns an autonomous activity, i.e. a company or a self-employed person.[183] The freedom to provide services differs from freedom of establishment as regards the seat of the economic operator and the temporary nature of the economic activity. The provision of services entails, on the one hand, that the service is provided in a country other than the one in which the operator is established,[184] and, on the other hand, that the economic activity is pursued for a limited period of time.[185] Freedom of establishment instead implies a certain degree of economic and social integration into the economy of the country of destination.[186] Their exercise is not exclusive. One person can be established in a Member State and at the same time operating as service providers in another Member State.[187] Even though at the origin of the single market, freedom of establishment and freedom of providing services were considered two separate realms, nowadays, due to the increased degree of economic integration and technological factors, 'the borderline between establishment and services has become more difficult to draw'.[188]

The tension between the national frameworks of collective labour law and industrial relations and the EU framework for the exercise of the economic freedoms of establishment and providing services ultimately erupted in the cluster of rulings usually referred to as the 'Laval-quartet', which in chronological order are *Viking*

[181] Case 2/74 *Jean Reyners v Belgian State* EU:C:1974:68, para 32 Case 33/74 *Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* EU:C:1974:131, para 27.

[182] Case 36/74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* EU:C:1974:140; C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* EU:C:1995:463; C-438/05, C-438/05 *Viking Line*.

[183] Massimo Condinanzi & Alessandra Lang & Bruno Nascimbene, *Citizenship of the Union and Free Movement of Persons* (Brill 2008) 109.

[184] Inter alia, C-154/89 *Commission of the European Communities v French Republic* EU:C:1991:76, paras 10–12.

[185] Case 196/87 *Udo Steymann v Staatssecretaris van Justitie* EU:C:1988:475, para 16.

[186] Case 2/74 *Reynes*, para 21.

[187] C-143/87 *Christopher Stanton and SA belge d'assurances "L'Étoile 1905" v Institut national d'assurances sociales pour travailleurs indépendants (Inasti)* EU:C:1988:378, para 12.

[188] Anthony Arnull, *The European Union and its Court of Justice* (Oxford University Press 2006) 466.

Line, *Laval*, *Rüffert*,[189] and *Commission v Luxembourg*.[190] In these cases, the Court was called to rule on the restrictive effect of the exercise of collective bargaining and collective action, i.e. the essence of collective autonomy, on the exercise of cross-border economic freedoms. The facts and the outcomes of the cases highlight the core of the problems related to the interplay between collective autonomy and the exercise of the economic freedoms, which reproduces the tension between the territorial application of labour rules – i.e. 'the principle of territoriality' – and the abolition of restriction to the free circulation of economic factors.

4.3.3. The freedom of establishment and cross-border relocations

In EU law, the freedom of a company to establish its seat in one of the Member States primarily concerns the possibility for EU nationals, i.e. nationals of EU Member States, to move and reside in the territory of another Member State. Art 49 TFEU – which talks about a 'right to establishment' – prohibits restrictions to the exercise of this possibility. Within the scope of freedom of establishment, legal persons and natural persons are treated alike, as also stated in Art 54 TFEU.[191] In the case of legal persons, the link with the legal system, i.e. the definition of the applicable law, derives from the place in which the company has its registered office, being the main seat or just a subsidiary.[192]

The economic scope of Art 49 TFEU is clarified in the second part of the provision, which firstly specifies that the prohibition of restrictions also applies to the 'setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State', and secondly defines freedom of establishment as including 'the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms under the same conditions as for the nationals'. In *Factortame*[193] and *Gebhard,* the CJEU had defined the notion of freedom of establishment as 'the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period',[194] which enables companies 'to participate,

[189] C-346/06 *Dirk Rüffert v Land Niedersachsen* EU:C:2008:189.

[190] C-319/06 *Commission of the European Communities v Grand Duchy of Luxemburg* EU:C:2008:350.

[191] Art 54.1 TFEU states that 'Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States'.

[192] C-270/83 *Commission of the European Communities v French Republic* EU:C:1986:37, para 18.

[193] C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* EU:C:1990:257.

[194] C-213/89 *Factortame*, para 20.

on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom'.[195]

The regulation of freedom of establishment is complex. First, its exercise includes the possibility to operate through a primary and/or a secondary establishment. Second, it implies a cross-state element, consisting in the company crossing a border, and consequently it attributes to the company a right to exit a country and the right to enter another country. Third, it requires the States not to discriminate against companies on the grounds of nationality and not to place restrictions on companies that intend to establish themselves in the territory of the State concerned.[196] By and large, the issue of freedom of establishment concerns the freedom of a company to decide, without restrictions, which law it shall be subject to and, once decided and realised, to be treated by national law in the same way as national companies.

The CJEU has affirmed that the freedom of establishment can be performed directly under the form of primary establishment, as well as through subsidiaries of the main company, established in one of the EU Member States, under the form of secondary establishment.[197] The case law has, however, specified that the economic activity performed through a primary or a secondary establishment must be 'genuine' in order not to constitute an abuse through a 'wholly artificial arrangement'.[198] This condition is also valid for companies primarily registered in third countries, which should, however, have a well-established economic link with one of the Member States, for instance having a branch performing a relevant, permanent and effective economic activity in the territory of a Member State.[199] In *Segers*,[200] for instance, the CJEU has affirmed that the exercise of EU freedom of establishment 'requires only that the companies be formed in accordance with the law of a Member State and have their registered office, central administration or principal place of business within the Community', regardless of 'the fact that the company conducts its business through an agency, branch or subsidiary solely in another Member State'.[201] Thus, the link with the country of primary establishment can even be only formal and consist in the fulfilment of the domestic requirements

[195] C-55/94 *Gebhard*, para 25.

[196] Barnard (2013).

[197] Case 33/78 *Somafer SA v Saar-Ferngas AG* EU:C:1978:205.

[198] C-196/04 *Cadbury Schweppes plc och Cadbury Schweppes Overseas Ltd mot Commissioners of Inland Revenue* EU:C:2006:544, paras 58 and 64.

[199] General programme for the removal of restrictions on freedom of establishment adopted by the Council on 18 December 1961 (OJ L 2/36) 7.

[200] Case 79/85 *D. H. M. Segers v Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen* EU:C:1986:308. The ruling stated that the national social security scheme shall also be applied to directors of companies operating in the country through a secondary establishment.

[201] Case 79/85 *Segers*, para 16.

to set up a company, which can then operate in the territory of other Member States through secondary establishment.

This principle was confirmed in *Centros*,[202] in which the Court ruled that the registration of a company under a Member State's company law in order to enjoy a lower share capital requirement cannot constitute an abuse of right or fraud even though the company does not perform any activity in the country of registration but rather operates in another Member State through a subsidiary. According to the Court, 'the right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty'.[203] Although a State can legitimately seek to prevent the abuse of free movement rights, it cannot refuse to recognise a branch of a company lawfully established under the law of another Member State.[204] The genuine economic activity needed in order for a company to legitimately enjoy the rights attached to free movement law can thus also be pursued in a State other than the one of establishment.[205] In *Centros*, the refusal of Danish authorities to register the branch office of the company set up by two Danish nationals under British law as a subsidiary according to the freedom of establishment was considered by the Court to be in breach of EU law.

Nevertheless, a Member State enjoys a margin of appreciation in determining the conditions that a company must fulfil in order to be registered under national law. In *Daily Mail*[206] the Court rejected the claim of the company, established under British law, which intended to transfer its central management to another country without losing the nationality of the country of origin. The obligation to receive the consent of the national authority was found by the CJEU not to violate EU law. The States are thus allowed to set their internal rules in relation to the creation of companies insofar as the freedom of the company to move to another Member State is not hampered. By analogy, this regulation can be assimilated to the regulation of EU citizenship, which, albeit being the legal status to be recognised as a citizen of a Member State, does not alter the national competences in terms of the recognition and attribution of the national citizenship.[207]

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[202] C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* EU:C:1999:126.

[203] C-212/97 *Centros*, para 27. See Nic Shuibhne (2013) 90.

[204] C-212/97 *Centros*, paras 24 and 38.

[205] Anne Looijestijn-Clearie, "*Centros Ltd*: A Complete U-Turn in the Right of Establishment for Companies? (2000) 49 *The International and Comparative Law Quarterly*, 621–42, 641.

[206] Case 81/87 *The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc* EU:C:1988:456.

[207] The CJEU itself has related the movement freedoms, both of establishment and providing services, to the issue of European citizenship through the parallel application of the non-discrimination principle, see C-193/94 *Criminal proceedings against Sofia Skanavi and Konstantin Chryssanthakopoulos*, EU:C:1996:70, para 22; and C-92/01 *Georgios Stylianakis v Elliniko Dimosio* EU:C:2003:72, para 18. See Caro de Sousa (2015) 77–78. See also, Niamh Nic Shuibhne, "The Resilience of EU Market Citizenship" (2010b) 47 *Common Market Law Review*, 1597–628.

Daily Mail and *Centros* are the points of reference addressed in the following case law as regards the freedom of establishment in relation to the issue of the applicable law and recognition of branches of foreign companies.[208] For instance, in *Überseering*[209] the Court ruled that Germany had to recognise the legal capacity to bring an action before a national court to a company incorporated in the Netherlands and operating in Germany with a secondary establishment. In this case the owner of all the shares of the company was a German national and resident and, in light of this, the German court intended to oblige the company to be incorporated under German law in order to receive the legal standing before a national court. However, the CJEU ruled that such a requirement would infringe the freedom of establishment of the company as restricting its exercise. Thus, the legal capacity of a company in the country of secondary establishment does not depend on the primary establishment, i.e. a Member State cannot impose the registration in its own system for the recognition of the company. Similarly, in *Inspire Art*[210] the Court outlawed a Dutch legislation imposing certain additional burdens on so-called 'formally foreign companies', i.e. those companies incorporated in another State but carrying on their business mainly in the Netherlands without having any real connection to the country of incorporation. The obligation for the Member States to recognise companies incorporated in foreign legal systems also includes the equality of treatment: in *Sevic*,[211] for instance, the CJEU affirmed that the provisions of company law concerning mergers within the domestic territory shall also be made available for cross-border mergers as in the case that concerned a German company merging with a company established in Luxembourg.

In the mentioned cases, however, the CJEU reaffirmed the validity of the *Daily Mail* argument, according to which the conditions that a Member State can require a company to fulfil in order to retain the legal personality in the outbound exercise of freedom of establishment, i.e. in relocating to another Member State, are still a matter of national competence.[212] This principle was later confirmed in the landmark case *Cartesio*,[213] which concerned a Hungarian company that intended to relocate

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[208] See Nadja Kubat Erk, "The Cross-Border Transfer of Seat in European Company Law: A Deliberation about the Status Quo and the Fate of the Real Seat Doctrine" (2010) 21 *European Business Law Review*, 413–50, 426.

[209] C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* EU:C:2002:632.

[210] C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd* EU:C:2003:512.

[211] C-411/03 *SEVIC Systems AG* EU:C:2005:762.

[212] C-208/00 *Überseering*, paras 61 and 62; Inspire Art, para 103; in *Sevic*, the Court did not explicitly mention or refer to *Daily Mail*, however, Paschalidis notes that its rationale was preserved because the case concerned the different treatment of companies created under foreign law, see Paschalis Paschalidis, *Freedom of Establishment and Private International Law for Corporations* (Oxford University Press 2012) 61–62.

[213] C-210/06 *CARTESIO Oktató és Szolgáltató bt.* EU:C:2008:723.

to Italy without losing the Hungarian nationality. Here, the CJEU recognises to the Member States

> the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State and, as such, capable of enjoying the right of establishment, and that required if the company is to be able subsequently to maintain that status. That power includes the possibility for that Member State not to permit a company governed by its law to retain that status if the company intends to reorganise itself in another Member State by moving its seat to the territory of the latter, thereby breaking the connecting factor required under the national law of the Member State of incorporation.[214]

This decision was criticised as attributing to the States the right to impose certain rules for the companies that intend to relocate.[215] Yet the case law of the CJEU on freedom of establishment for companies appears consistent with the rules of other areas of freedom of movement for persons: it treats legal and natural persons equally; it generally prohibits unjustified and disproportionate restrictions to out-bound and in-bound movements; it leaves the issue of 'citizenship' (broadly intended) as a matter of national competences, so as not to encroach on national competences. But at the same time, the regulation of freedom of establishment obliges the Member States to recognise foreign companies operating in their territory through secondary establishment, just as it imposes on them the obligation to allow any 'migrant company' to incorporate itself into the national system, i.e. the primary establishment, according to the rules of company law and then enjoying the same conditions as national companies.[216] Hence, the CJEU seems to balance the freedom of companies to relocate and to operate through secondary establishment, i.e. in-bound freedom of establishment, with the power of the States to attribute legal nationality to the economic subject exercising outbound freedom of establishment, to place certain limited conditions on relocations ultimately applying the law of the country of origin. Relocations are hence legitimate economic operations within the EU market, but the company is not automatically entitled to retain the nationality of the country of origin.

Daily Mail and *Centros* represent two sides of the coin. On the one side, a Member State cannot prevent the establishment of a company in another Member State and cannot refuse to register a subsidiary or branch of a company duly

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[214] C-210/06 *Cartesio*, para 110.

[215] The choice between the 'incorporation' theory and the 'real seat' theory is left to the national States, rather than made uniform by the CJEU, see Carsten Gerner-Beuerle & Michael Schilling, "The Mysteries of Freedom of Establishment after *Cartesio*" (2010) 59 *The International and Comparative Law Quarterly*, 303–23.

[216] See also *Vale*, in which the refusal of Hungary to incorporate an Italian company relocating there was considered by the CJEU as an infringement of freedom of establishment because it did not ensure the same conditions for cross-border reconversions of companies as for national ones, see Case C-378/10 *VALE Építési kft* EU:C:2012:440.

established in another Member State. On the other, however, a Member State can set its own rules as to the recognition of nationality to a company, which means that it can decide whether or not the company can 'export' national rules to another Member State. From a labour law perspective, this may mean that the State of origin can impose certain conditions on the company that, albeit delocalising, intends to maintain the nationality of origin, such as the application of the national collective agreement. However, such a rule would be deemed a restriction to the freedom of establishment and would undergo the proportionality test. In general, nothing can prevent a company from relocating its activity to a country with lower employment standards. It would be subject to the labour law regime of the country of new establishment, which means that it could employ workers with lower employment conditions. As pointed out by Cremers, the freedom of establishment in practice has been used extensively by companies established in high-standards countries to employ cheaper labour either by delocalising in low-standards countries and then operating through subsidiaries without conducting any business in the country of primary establishment, or by outsourcing the 'labour factor' in the production process to companies established in low-standards countries that are nothing more than cross-border employment recruitment agencies.[217] These operations allow the companies to circumvent the application of labour law and collective agreement in high-standards countries by instead applying the employment conditions of the country of establishment. In the words of Cremers, 'the right to free establishment and the deregulation of company law, in particular the easy registration and the lowering of other statutory obligations, have opened the doors for such fraudulent intermediaries'.[218] From the perspective of collective autonomy, the consequences are twofold: on the one hand, collective bargaining becomes an ineffective instrument of labour market regulation; on the other hand, collective negotiations are under pressure in terms of downward competition between labour and employment regimes. In this sense, workers and trade unions might be obliged to lower their claims in order not to experience the closing of companies and factories that would affect employment levels. In other words, the freedom of establishment paves the way to an eventual 'race to the bottom' of employment conditions and to social dumping in the EU internal market.

[217] Jan Cremers, "EU Economic Freedoms and Social Dumping" in Magdalena Bernaciak (ed), *Market Expansion and Social Dumping in Europe* (Routledge 2016) 173–89, 180–81.

[218] Cremers in Bernaciak (2016) 183.

4.3.4. The freedom to provide services and the 'country of origin' principle

As with the freedom of establishment, the TFEU prohibits restrictions to the provision of services by 'a national of a Member State established in a Member State other than that of the persons for whom the services are intended' (Art 56 TFEU). The Treaty defines such a freedom in a residual way by affirming that 'services' are those economic activities not 'governed by the provisions relating to freedom of movement for goods, capital and persons' (Art 57 TFEU). The provision has been indicated by the CJEU as ensuring that all economic activities fall within the scope of EU economic freedoms.[219] The residual – or subsidiary – definition entails a broad understanding of the category of 'services', so that 'it is hard to think of areas of (economic) activity excluded from the protection of the Treaty'.[220] However, the nature of the service must be remunerated and temporary.[221] No unpaid services fall within the scope of service provision,[222] nor does economic activity pursued on permanent basis, which would instead fall within the scope of freedom of establishment.[223] Moreover, the salaried employees are excluded from the scope of provision of services, as they can rely on the freedom of movement for workers.[224]

The definition of 'service' is not a closed one. The case law has not defined how long a temporary period shall be in order for the company to be considered a cross-border service provider, rather than a company established in the host country. The CJEU has stated that it is the nature of the service rather than its duration that qualifies a company as falling within the scope of provision of services. In *Schnitzer*,[225] the Court has clarified that, since 'no provision of the Treaty affords a means of determining, in an abstract manner, the duration or frequency beyond which the supply of a service […] can no longer be regarded as the provision of

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[219] C-452/04 *Fidium Finanz AG v Bundesanstalt für Finanzdienstleistungsaufsicht* EU:C:2006:631, para 32; see Barnard (2013) 366.

[220] Barnard (2013) 371.

[221] Art 57.1 and 57.2 TFEU.

[222] C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* EU:C:1991:378, see Barnard (2013) 373–76.

[223] C-55/94 *Gebhard*, para 22.

[224] Bano (2008a) 59; Marc De Vos, "Free Movement of Workers, Free Movement of Services and the Posted Workers Directive: A Bermuda Triangle for National Labour Standards?" (2006) 7 *ERA Forum*, 2006, 356–70, 359. The inclusion of public services, such as education and healthcare, which are provided for free by the State to its citizens, is controversial since the non-economic nature of the service would not exclude the application of EU provisions on services, see Gareth Davies, "The Law on the Free Movement of Services: Powerful, but not Always Persuasive" in Anthony Arnull & Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 562–85, 568–69.

[225] C-215/01 *Bruno Schnitzer* EU:C:2003:662.

services within the meaning of the Treaty',[226] it follows that '"services" within the meaning of the Treaty may cover services varying widely in nature, including services which are provided over an extended period, even over several years' as well as 'services which a business established in a Member State supplies with a greater or lesser degree of frequency or regularity, even over an extended period, to persons established in one or more other Member States'.[227] The residual nature of the definition of provision of services is downplayed in favour of widening its scope by including 'all services that are not offered on a stable and continuous basis from an established professional base in the Member State of destination'.[228] Although the provision of services shall be '"episodic" and "irregular"',[229] the service provider can even have some infrastructure in the territory of the country in which the service is provided (such as chambers and offices) without being considered an established company insofar as the facilities are necessary for performing the service.[230]

In order to enjoy the rights attached to the free movement of services, the service provider must fulfil the geographical requirements set out by the Treaty. It must *both* hold the nationality of a Member State *and* be established in a Member State (not necessarily the same State[231]) and shall provide a service to a person established in another Member State. Therefore, the cross-border element is fundamental; yet it is not limited to the movement of the service provider. The cross-border element can also emerge in cases in which the service is provided by a company established in a country to a recipient established in another country, such as the case of financial services,[232] as well as in cases in which the recipient moves across borders in order to receive a service in another Member State, as in the case of tourism or healthcare.[233]

The service provider is thus a company (or a self-employed person) that performs a remunerated and not subordinated economic activity for a (undefined) limited

[226] C-215/01 *Schnitzer*, para 31.

[227] C-215/01 *Schnitzer* para 30.

[228] C-171/02 *Commission of the European Communities v Portuguese Republic* EU:C:2004:270, para 25. See Vassilis Hatzopoulos & Thien Uyen Do, "The Case Law of the ECJ Concerning the Free Provision of Services: 2000–2005" (2006) 43 *Common Market Law Review*, 923–91, 930.

[229] Vassilis Hatzopoulos, "Recent Developments of the Case Law of the ECJ in the Field of Services" (2000) 37 *Common Market Law Review*, 43–82, 45.

[230] C-94/55 *Gebhard*, para 27.

[231] But both conditions must be fulfilled: a non-Member State national cannot enjoy the rights stemming from the free provision of services even though established in a Member State, see Case C-290/04 FKP Scorpio, para 68.

[232] C-384/93 *Alpine Investments*.

[233] Joined cases C-286/82 and 26/83 *Graziana Luisi and Giuseppe Carbone v Ministero del Tesoro* EU:C:1984:35. For an overview of the different cross-border possibilities, see Barnard & Snell in Barnard & Peers (2014) 410–11. In general, Nic Shuibhne has highlighted a progressively more open approach of the CJEU in recognising a cross-border element in cases related to free movement, see Nic Shuibhne (2013) 127.

period of time in the territory of a Member State other than the one in which it is established. This subject enjoys the rights of departure, entry and residence as regards the provision of the service at stake, and the right not be discriminated against on the basis of nationality as regards the exercise of the economic activity.[234]

Unlike in the case of establishment, the service provider remains primarily subject to the law of the country in which it is established, i.e. the country of origin, although it performs for a limited period an economic activity in another country, i.e. the country of destination. Although the country of destination can ask the cross-border service provider to comply with some requirements as long as they are not discriminatory, the CJEU has specified that one of the core distinctions between establishment and cross-border provision of services lies in the fact that the service provider shall not be subjected to all the requirements needed for the establishment.[235] However, the basic and background principle governing the cross-border provision of services is – as with the other economic freedoms – the prohibition of domestic rules discriminating against foreign companies economically operating in the national market. This basic rule has then been stretched by the case law of the CJEU as to reach an overall ban on any domestic rule preventing or 'making less attractive' the cross-border provision of services, which in the end result in hindering the intra-EU trade of services.[236]

Over the years, such a ban has been translated into a principle according to which the cross-border service provider is allowed to operate in the country of destination according to the rules of its country of origin. Although the Treaty states that a service provider shall pursue its temporary economic activity in the country of destination under the same conditions imposed by that State to its own nationals,[237] the CJEU has progressively adjusted this principle. The original so-called 'mutual recognition' formula defined and applied by the Court in order to prevent a double burden on cross-border service providers, has been considered by commentators – and by the Court itself – as a sort of recognition of the principle of the country of origin providing that the cross-border service provider is only subject to rules of its country of establishment.[238] In this sense, the country of origin principle entails that

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[234] Barnard (2013) 378.

[235] Besides blurring the line between the two freedoms, such an obligation would also 'deprive of all practical effectiveness the provisions of the Treaty whose object is, precisely, to guarantee the freedom to provide services'. C-76/90 *Säger*, para 13.

[236] C-76/90 *Säger*, para 12; C-384/93 *Alpine Investments*, para 38.

[237] Art 57 TFEU. The principle of the country of origin is, however, applied in certain directives regulating, for instance, financial and bank services, see Stephen Weatherill, "Promoting the Consumer Interest in an Integrated Services Market" (2007) Europa Institute, Mitchell Working Paper Series, 1/2007.

[238] Graham observes a certain overlapping between the principles of mutual recognition and country of origin in the case law of the CJEU, see Ronnie Graham, "Mutual Recognition and Country of Origin in the Case Law of the European Court of Justice" in Roger Blanpain (ed), *Freedom of Services in the European Union: Labour and Social Security Law: The Bolkestein Initiative* (Kluwer 2006) 37–49.

if the rules of the State of establishment can satisfy the requirements demanded by the country of destination, the cross-border service provider would be subject only to the home country rules.[239] Thus, the rules of the country of establishment are assessed in order to evaluate whether they can be deemed equivalent to those of the country of destination, or for instance by assessing whether the objective that the host country rules intend to achieve can be achieved equally by the home country rules.[240] The rationale of the interplay of these two principles relies on 'the idea that a business should be able to do business abroad as if it were at home'.[241]

But other commentators have noted that the equivalence of the 'mutual recognition' formula with the 'country of origin' principle is misleading, since in the latter case the application of the rules of the home country would not require the operation of comparison; rather, they would be applied directly.[242] In this sense, the company can temporarily 'export' the rules of its country of origin to the territory of the country of destination, which, however, maintains the role of monitoring the compliance of the cross-border service provider with the requirements set by both legal systems.[243]

The country of origin principle is central to the Service Directive. As is widely known, the directive did not have an easy and straightforward path of approval. Its original version, also known as the Bolkestein directive, had been criticised for upholding the principle of country of origin, which would have excluded any regulatory competence for the host state by stating that service providers would have been subject only to the national provisions of their country of origin.[244] In addition, the Bolkestein draft also attributed to the country of origin monitoring tasks, de facto completely excluding the host State from the regulation of the cross-border services market. This would potentially give rise to a 'race to the bottom' of labour and employment standards led by the practices of social dumping.[245] The application of the country of origin would have been particularly complicated and controversial in the field of labour law, allowing the service provider to operate in a social dumping

[239] See C-358/98 *Commission of the European Communities v Italian Republic (sanitation services)* EU:C:2000:114, para 13.

[240] Hatzopoulos & Do (2006) 980.

[241] Davies in Arnull & Chalmers (2015) 576.

[242] Bano (2008a) 86.

[243] See Hatzopoulos & Do (2006) 979.

[244] See Wouter Gekiere, "The Proposal of the European Commission for a Directive on Services in the Internal Market: An Overview of its Main Features and Critical Reflections" in Blanpain (2006) 3–18, 13.

[245] Nikolai Fichtner, *The Rise and Fall of the Country of Origin Principle in the EU's Services Directive – Uncovering the Principle's Premises and Potential Implications* (Institut für Wirtschaftsrecht 2006) 8–10.

regime[246] and threatening the exercise of collective labour rights[247] – something that, with the benefit of hindsight, can be seen to have occurred in the *Laval* judgement.[248]

The final version of the directive eliminated the principle of the country of origin and reduced the interaction between the directive and national labour legislations.[249] In this regard, the core provision of the directive is Art 16, which is entitled the 'freedom to provide services' and it calls on the States to 'respect the right of providers to provide services in a Member State other than that in which they are established'. Along with a list of requirements that would be considered restrictions to the free provision of services, Art 16.3, however, excludes the application of labour legislation from such restrictions. The directive indeed does not prevent the States where the services are provided 'from applying, in accordance with Community law, its rules on employment conditions, including those laid down in collective agreements'.[250] The provision seems to aim at avoiding the phenomenon of regulatory competition by enforcing the territorial application of the labour rules.[251] But the reference to EU law entails that the rules of the country of destination shall comply with the general rules on the restrictions to cross-border provision of services that make the cross-border provision of services less attractive or advantageous.

In conclusion, it can be affirmed that 'the logic of the internal market is that as far as possible each economic actor should be subject to the law of their home State, and mutual recognition should ensure that other States recognise the adequacy of this law and permit that actor to do business on their national market without further ado'.[252] The application of labour rules to a foreign service provider is, however, a specific case. Labour rules might include both administrative requirements that can be legitimately considered additional burdens on the cross-border service provider,[253] and employment and labour conditions, whose dis-application can instead give rise to social dumping.

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[246] Even though Neal underlines that the real threat of social dumping would come from the exercise of cross-border provision of services by self-employed or 'false self-employed', since the posted employees would fall within the scope of the Posting of Workers Directive, which entails – at least until the 'Laval-quartet' – the host State regime in relation to some labour and employment conditions, see Alan C. Neal, "The Country of Origin Principle and Labour Law in the Framework of the European Social Model" in Blanpain (2006) 51–72, 70.

[247] See the analysis of the country of origin principle as proposed in the Bolkestein proposal in Niklas Bruun, "The Proposed Directive on Services and Labour Law" in Blanpain (2006) 19–35.

[248] Supiot in Moreau (2011).

[249] Catherine Barnard, "Unravelling the Services Directive" (2008b) 45 *Common Market Law Review*, 323–94, 330.

[250] Art 16.3 and Recital 86 Directive 2006/123/EC.

[251] Bano (2008a) 91.

[252] Damian Chalmers & Gareth Davies & Giorgio Monti, *European Union Law* (Cambridge University Press 2014) 804.

[253] C-279/00 *Commission of the European Communities v Italian Republic (Temporary labour agencies)* EU:C:2002:89. In this case, Italy attempted to justify such an obligation as a measure

The temporary work of a foreign worker in a country other than the one in which she is employed is generally regulated according to Regulation 593/2008 on the law applicable to contractual obligations (also known as Rome I). This regulation states that the foreign employees can either be subject to a free choice of the parties or, in the absence of such a choice, she would be subject to the law regime of the country in which the worker habitually carries out her work, i.e. the home country.[254] The law of the country where the employer is situated shall apply only if the law of the worker's country of origin cannot be determined.[255] If both cannot be determined, then the applicable law is the one of the country to which the worker is most closely connected.[256]

The cross-border posting of workers in the context of the provision of services within the EU internal market is, however, regulated differently and constitutes a 'derogation' of the principles set out in the Rome I Regulation. The regulation of cross-border posting in the EU internal market is set down by Directive 96/71, whose rules aim not at standardising the national legislation, but rather at coordinating them in light of settling possible conflicts of rules concerning the actors operating in another country than the one of origin. The Directive focuses on the regime to be applied to the company posting the workers rather than on its employees. They deal with the access of foreign service providers to the domestic markets of the Member States in view of establishing an internal market. Due to the different employment conditions and labour law regimes among the Member States, the question as to which labour standards shall apply raises the spectre of social dumping.

4.3.5. Aspects of public procurement law and the territorial application of labour rules

An aspect of the tension between the territorial application of labour standards and economic freedoms is played out in the area of public procurement in the context of free movement of services. In the EU context, the regulation of public procurement has been developed as a further instrument to ensure the achievement of a liberalised internal market by preventing discrimination between national and non-national tenderers and by outlawing protectionist measures in the attribution of contracts for

protecting the employees of the company by facilitating eventual legal proceedings. The Court, however, found that a substantially equivalent protection was already ensured through the German rules.

[254] Art 8.2 Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6.

[255] Art 8.3 Rome I Regulation.

[256] Art 8.4 Rome I Regulation. See also Hepple (2005) 152–53.

public works.[257] Within the cross-border dimension, 'the core question is whether tenderers from other Member States, which will post workers as part of execution of their tender, have to comply with generally applicable host State legislation or whether such compliance would unjustifiably restrict their freedom to provide services'.[258]

At EU level, the field of public procurement is regulated by Directive 2014/24 on public procurement,[259] which has replaced the former Directive 2004/18.[260] The scope of the directive regards public contracts exceeding a certain threshold.[261] Although a field in its own right, the public procurement regime is regulated at EU level in compliance with the provisions on free movement and with the principles of non-discrimination and equal treatment as well as transparency, proportionality and mutual recognition.[262] The application of these principles to the public procurement regime aims at avoiding 'both the risk of preference being given to national tenderers or applicants and the possibility that a body financed or controlled by the State or other public authorities might choose to be guided by considerations other than economic ones'.[263]

The previous EU regime on public procurement granted little space to social matters. The 2004 Directive contained a general provision on the compliance with labour obligations and a reference in the Preamble to the directive on cross-border posting, which, however, would have been mandatory only as regards the minimum conditions indicated by Art 3.1.[264] The new regime governed by Directive 2014/24 introduces a more defined clause of compliance with labour and social standards stating that the Member States shall take measures to ensure that the suppliers comply with the applicable obligations stemming from labour law rules set by

[257] See Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement, and Legal Change* (Oxford University Press) 2007, 105–09.

[258] Claire Kilpatrick, "Internal Market Architecture and the Accommodation of Labour Rights. As Good as it Gets?" (2012) 1 *European Journal of Social Law*, 4–29, 11.

[259] Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65. This directive is accompanied by Directive 2014/23/EU on the award of concession contracts [2014] OJ L 94/1, and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L 94/243.

[260] Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L 134/114.

[261] Art 4 Directive 2014/24/EU.

[262] Art 18 Directive 2014/24/EU. See Kerstin Ahlberg & Niklas Bruun, "Public Procurement and Labour Law – Friends or Foes?" in Mia Rönnmar (eds), *Labour Law, Fundamental Rights and Social Europe* (Hart 2011) 89–114, 91.

[263] Andrea Usai, "Caught between the Public Procurement Principles and the 'Public Procurement Function' of Directive 2006/123/EC" (2014) 9 *European Procurement & Public Private Partnership Law Review*, 228–39, 236.

[264] Arts 26 and 27 and Recital 34 of the 2004/18 Directive. See Kilpatrick (2012) 11–12.

national legislation, collective agreements, and international law.[265] Yet Recital 98 of the Preamble states that the rules on the award criteria and the performance of work by the supplier are set in accordance with the provisions of the directive on cross-border posting 'as interpreted by the Court of Justice'.[266] Thus, as pointed out by Ahlberg and Bruun, the provision 'does not expand the scope for applying labour rights', but rather reaffirms the obligation for the public authorities to comply with the *Laval* case law.[267] This would correspond to a codification of the country of origin principle in the cross-border provision of services.[268]

The awarding of public contracts follows a procedure divided into several stages, which mainly regard the specification of the terms of the tender, the identification of the supplier, the contract award and the performance of the work by the supplier.[269] Considerations about social aspects might intervene in the awarding stages, in which the public authorities might specify certain social and labour clauses that the supplier has to respect, just as they might exclude certain suppliers for non-compliance with social and labour standards. Furthermore, in the performance stage, the supplier has to be monitored with respect to the actual application of those clauses.[270] In the definition of the tender, the public authority has limited scope for including labour obligations; yet the call might include the compliance of labour standards such as health and safety in the workplace as technical specifications of the work to be supplied.[271] In the selection of the supplier, then, the public authority is entitled to exclude those operators who do not fulfil the requirements specified in the call on the basis of the list contained in the directive. Nevertheless, the case law has specified that other conditions can be added insofar as they comply with the principles of non-discrimination and proportionality.[272] The employment of long-term unemployed persons, for instance, has been considered a legitimate criterion of selection by the CJEU on the condition that its compliance would not, directly or indirectly, favour national suppliers.[273]

The general rule as to the awarding of public procurement is the cost/efficiency balance, which, in other words, means that the public contract shall be awarded to

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[265] Art 18.2 Directive 2014/24/EU. The Directive refers to the core ILO Conventions on freedom of association and right to organise, abolition of child labour and forced labour, and non-discrimination, see Annex X Directive 2014/24/EU.

[266] Recital 98 Directive 2014/24/EU.

[267] Kerstin Ahlberg & Niklas Bruun, "Public Procurement and Labour Rights: Governance by Scaremongering?" in Evju (2014) 239–61, 259.

[268] Nicola Countouris & Samuel Engblom, "'Protection or Protectionism?' A Legal Deconstruction of the False Dilemma in European Integration" (2015) 6 *European Labour Law Journal*, 20–47, 38.

[269] Catherine Barnard, "Using Procurement Law to Enforce Labour Standards" in Davidov & Langille (2013) 256–72, 259.

[270] Kilpatrick (2012) 11.

[271] Ahlberg & Bruun in Evju (2014) 243.

[272] Barnard in Davidov & Langille (2013) 260.

[273] Case 31/87 *Gebroeders Beentjes BV v State of the Netherlands* EU:C:1988:422, para 30.

the bidder that ensures either the lowest price or the 'most economically advantageous tender'.[274] This aspect of the public procurement regime raises questions concerning the promotion and the application of labour standards, including in particular wages, which might increase the costs of a bid and therefore make certain suppliers non-competitive. On the contrary, the application of lower employment conditions and wages, ensured by the labour law regime to which the company belongs, augments the competitive advantage. Such situations might generate dynamics of social dumping.[275] In case of a selection made on the 'lowest price' criterion, the room for the contracting authority to consider other factors, i.e. social ones, in the awarding appears limited.[276] The directive provides, however, for the possibility to further investigate, and eventually reject, 'abnormally low' tenders. This clause includes the missed compliance to labour obligations *ex* Art 18.2 of the directive,[277] which does not seem as strong as the rule in the 2004 Directive. It explicitly mentioned 'compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed', which might imply compliance not only with the minimum conditions, but also with the actual conditions in force in the workplace.[278] In the case of the 'most economically advantageous tender' criterion, social and labour factors could be taken into account, as confirmed by the CJEU in a case concerning the inclusion of a condition relating to a campaign against local unemployment in a tender for a public work concerning the construction of a school in the French region of Nord-Pas-de-Calais.[279]

This aspect of the public procurement regime has been reaffirmed in the case *Commission v Germany (occupational pensions)*[280] concerning the relationship between public contracts and collective bargaining. The case concerned a collective agreement signed between a number of local authorities and public-sector trade unions providing for the allocation of part of the salaries of public employees to pension funds managed by the unions themselves. According to the Commission, the procedure followed by the German authorities was in breach of the EU rules on public procurement, since no public tender was called on an EU-scale for awarding a public contract concerning pensions. The judgement can be associated with the *Laval*-quartet since it again deals with the clash between the social objectives of collective bargaining and the economic perspective of the internal market, as well

[274] Art 67 Directive 2014/24/EU.

[275] Ahlberg & Bruun in Evju (2014) 242.

[276] Barnard in Davidov & Langille (2013) 261.

[277] Art 69 Directive 2014/24/EU.

[278] Barnard in Davidov & Langille (2013) 263.

[279] C-225/98 *Commission of the European Communities v French Republic* EU:C:2000:494, para 50. See Barnard in Davidov & Langille (2013) 263.

[280] C-271/08 *European Commission v Federal Republic of Germany (occupational pensions)* EU:C:2010:426.

as with the conflict between the autonomy of labour market parties (in this case the employer being represented by a public subject) and the rules on market competition.[281]

Although the ruling from the perspective of public procurement law seems to offer greater scope for public authorities to include social and labour clauses on the protection of workers,[282] it also questions the autonomy of collective autonomy. The CJEU refers to the *Viking* and *Laval* case law as to the recognition of a right to collective bargaining, which, albeit a fundamental right of the EU legal system,[283] cannot be absolute and must be exercised in accordance with EU law. In this sense, and by analogy with the rulings on cross-border economic freedoms, the collective labour rights fall within the scope of the EU rules on public procurement.[284] In the specific case, the Court affirmed the need to assess whether 'a fair balance was struck in the account taken of the respective interests involved, namely enhancement of the level of the retirement pensions of the workers concerned, on the one hand, and attainment of freedom of establishment and of the freedom to provide services, and opening-up to competition at European Union level, on the other'.[285] Yet the assessment is conducted asymmetrically by only considering whether the German pension scheme was in compliance with the EU rules on public procurement and not also the other way around, i.e. an evaluation of the EU rules on public procurement in the light of the social objectives pursued by the parties of the collective agreement.[286] According to the Court, collective autonomy and free competition rules (in this case embodied by the rules on public procurement rather than by the cross-border economic freedoms) represent two poles that can be reconciled. However, in *Commission v Germany*, the Court rejected the argument set forth by the German government regarding the principle of solidarity as underpinning the collective agreement signed between the public authorities and the unions, or better it affirms that such a principle 'is not inherently irreconcilable with the application of a procurement procedure'.[287] Therefore, the Court failed to take into account that collective bargaining is a solidaristic means at the workers' disposal for limiting the competition on the labour market. As Barnard stresses, this outcome is not surprising from the perspective of the internal market, given that 'the

[281] In this respect, see Phil Syrpis, "Reconciling Economic Freedoms and Social Rights – The Potential of *Commission v Germany* (Case C-271/08, Judgment of 15 July 2010)" (2011) 40 *Industrial Law Journal*, 222–29.

[282] C-271/08 *Commission v Germany (occupational pensions)*, paras 55–56, see Barnard in Davidov & Langille (2013) 264–65.

[283] The Court even refers to Art 152 TFEU introduced by the Lisbon Treaty recognising the autonomy of the social partners and the diversity of the national industrial relations systems, para 39.

[284] C-271/08 *Commission v Germany (occupational pensions)*, paras 36–50. See Syrpis (2011) 223.

[285] C-271/08 *Commission v Germany (occupational pensions)*, para 52.

[286] See Syrpis, "Reconciling Economic Freedoms", 227.

[287] C-271/08 *Commission v Germany (occupational pensions)*, para 58.

problem with the market access approach is that it inevitably prioritizes the economic freedom over the social interest'.[288]

The extreme consequence of cross-border competition in the context of provision of services and public procurement is represented by the *Bundesdruckerei* case.[289] The facts concerned a call for tender issued by the municipality of Dortmund for the digitalisation of documents related to the urban-planning service of the city. The tender referred to the regional law as for the application of a minimum hourly wage. The company Bundesdruckerei asked to be relieved from this obligation because in case of being awarded the tender, the company would have subcontracted the service to a Polish company, established in Poland, where such a wage would have been 'not usual in that State in the light of the general standard of living there'.[290] It also argued that the obligation was not set in a collective agreement or a national law, and therefore not in compliance with the EU regime on public procurement. Since the Dortmund municipality rejected the request, Bundesdruckerei brought an action before the regional Public Procurement Board for the violation of the freedom to provide services caused by the obligation on minimum wage set by the tender, which, according to the company, was liable to prevent or make less attractive the cross-border provision of services. Referred to by the national court, the CJEU upheld the claim of the company by affirming that 'the imposition, under national legislation, of a minimum wage on subcontractors of a tenderer which are established in a Member State other than that to which the contracting authority belongs and in which minimum rates of pay are lower constitutes an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State'.[291] Further, the CJEU notes that the minimum wage clause only concerned public contracts. This, according to the Court, would exclude the workers of the private sector from the protection ensured by the minimum wage level insofar as it is not proved that 'employees working in the private sector are not in need of the same wage protection as those working in the context of public contracts'.[292] The ensuing paradox is that the principle of non-discrimination is invoked in order to lower the level of protection for public employees, as to subsume the legitimisation of a practice of social dumping.[293] In *Bundesdruckerei*, the obligation to apply a higher minimum wage than the one

[288] Barnard in Davidov & Langille (2013) 265.

[289] C-549/13 *Bundesdruckerei GmbH v Stadt Dortmund* EU:C:2014:2235.

[290] C-549/13 *Bundesdruckerei*, para 10.

[291] C-549/13 *Bundesdruckerei*, para 30.

[292] C-549/13 *Bundesdruckerei*, para 32.

[293] Eva Katharina Sarter, "The Legal Framework of Contracting: Gender Equality, the Provision of Services and European Public Procurement Law" (2015) 14 *Wagadu: A Journal of Transnational Women's and Gender Studies*, 55–83, 70.

applicable where the service would be outsourced was deemed disproportionate in relation to the aim of combating social dumping.[294]

A different outcome is achieved in a similar case, *Regiopost,*[295] which seems to have somehow revisited the decision in *Bundesdruckerei* and therefore enhanced the role of public procurements as an instrument of social promotion and protection.[296] Whereas in *Bundesdruckerei* the provision of service (the digitalisation of archive documents) did not entail the actual posting of workers, in *Regiopost* the services would have been provided *in loco*. In *Regiopost*, the Court concluded that the inclusion of a minimum wage clause in a public call for tender for postal services issued by the municipality of the German town of Landau, in the Rhineland-Palatinate Land, referring to the regional statutory minimum wage, referring in turn to the minimum wage set in a regional collective agreement, was not in violation of the EU rules on public procurement as well as the rules on posting of workers. Although a restriction to provision of services in the context of public procurement, the measure included in the call aimed at protecting the workers and did not constitute discrimination because of its limitation to public calls for tenders. According to the Court, the clause of the public call referred to a minimum wage level that 'is laid down in a legislative provision, which, as a mandatory rule for minimum protection, in principle applies generally to the award of any public contract in the *Land* of Rhineland-Palatinate, irrespective of the sector concerned'.[297] Further, the regional law at hand did not provide for a higher wage level than other statutory provisions at national level. Thus, the level of social protection was deemed to be the minimum one.[298] Although the ruling offers a new perspective on the protection of employment conditions through public procurement, it presents certain problematic aspects with regard to the application of the collective agreement and its relationship with statutory regulation. These aspects are addressed in Section 4.5 in relation to the application of collective agreements in the context of the cross-border posting of workers.

4.3.6. Restrictions and justifications

The regulation of the freedoms of establishment and of providing services entails the abolition of any national measure able to hinder or make less attractive their exercise. If the basic principle set out by the Treaty concerns the abolition of any

[294] C-549/13 *Bundesdruckerei*, para 33.

[295] C-115/14 *RegioPost GmbH & Co. KG v Stadt Landau in der Pfalz* EU:C:2015:760.

[296] Clemens Kaupa, "Public Procurement, Social Policy and Minimum Wage Regulation for Posted Workers: Towards a More Balanced Socio-economic Integration Process?" (2016) 1 *European Papers – A Journal on Law and Integration*, 127–38, 138.

[297] C-115/14 *RegioPost*, para 75.

[298] C-115/14 *RegioPost*, para 76.

discrimination on the basis of nationality,[299] the case law of the CJEU has gone further by including any limitative measures, no matter if they are directly discriminatory, indirectly discriminatory or applied in a non-discriminatory manner.[300]

In *Van Binsbergen* the Court specified that, beside nationality and residence requirements, the measures limiting the exercise of the cross-border economic freedom also include those requirements 'which may prevent or otherwise obstruct the activities of the person providing the service'.[301] In *Säger*, it went even further by affirming that 'the Treaty requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services'.[302] The 'market access' approach adopted by the Court has thus aimed at banning national measures impeding the free movement of economic factors, such as the companies and the services they provide. But the case law has developed so as to include any national measure that makes the business of cross-border service provision less advantageous on the basis that it already provides similar services in the home country.[303] For instance, in *Alpine Investments* the Court considered the ban on cold-calls set by Dutch legislation as a restriction to cross-border provision of services, which was challenged by a Dutch company claiming this would hamper its freedom to provide services in other countries where cold-calls were not banned. In this view, the possibilities of challenging national measures that limit cross-border competitive advantages are almost boundless. As Spaventa noted, the 'market access' approach developed by the CJEU 'is so broadly construed as to fail to provide us with any demarcation line in relation to the scope of the free movement provisions'.[304] In her view, the '"free movement" right is not construed anymore as a mere right to move, but rather as a right to pursue an economic activity in another country or even […]

[299] Art 18 TFEU.

[300] However, Nic Shuibhne notes that already the Treaty provisions refer to the non-discriminatory restrictions as part of the regulation of the economic freedoms. In this sense, she stresses the fact that, although relevant, the discriminatory element is not necessarily required in order to consider a national measure as restricting the exercise of economic freedoms, see Nic Shuibhne (2013) 190.

[301] Case 33/74 *van Binsbergen*, para 10.

[302] C-76/90 *Säger*, para 12.

[303] Joined Cases C-369/96 and C-376/96 *Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL and Bernard Leloup, Serge Leloup and Sofrage SARL* EU:C:1999:575, para 33.

[304] Eleanor Spaventa, "From *Gebhard* to *Carpenter*: Towards a (Non)-Economic European Constitution" (2004) 41 *Common Market Law Review*, 743–73, 764.

in one's own country'.[305] Any limitative measures can be called before the Court[306] – even measures that are not necessarily protectionist.[307]

Nevertheless, the Treaty law and the case law of the CJEU provide for a few exceptions in which a State can legitimately limit the exercise of the economic freedoms. Also in this case freedom of establishment and freedom of providing services share the same regulation. Indeed, Art 62 TFEU included in the chapter on freedom to provide services refers to Art 52.1 TFEU as to possible different treatments of foreign nationals which are based on reasons of public policy, public security or public health.[308] This means that a national measure restricting the exercise of the two economic freedoms can be justified on such grounds, which are equally valid for both freedoms.[309] On such grounds the Member States can justify primarily discriminatory measures, whereas in the case of indirect discrimination or non-discriminatory measures, the State shall – and can – rely on different grounds, which are not defined in the Treaty.[310]

However, the 'public policy' ground has been interpreted restrictively by the Court, which has recognised that 'the concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty'.[311] Being a 'justification for a derogation from the fundamental principle of the freedom to provide services, [it] must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the European Community institutions'.[312] The public policy-

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[305] Spaventa (2004) 765. Spaventa refers to cases in which the freedom of establishment and of providing services were invoked against national measures banning certain economic activities, such as the *Gourmet* case (C-405/98 *Konsumentombudsmannen v Gourmet International Products AB* EU:C:2001:135) concerning the scrutiny of a total ban on the advertisement of alcoholic beverages or the *Schindler* case (C-275/92 *Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler* EU:C:1994:119) concerning the scrutiny of the ban on provision of lotteries.

[306] Weatherill in Freedland & Prassl (2014) 23–39, 24.

[307] Caro de Sousa (2015) 115.

[308] Barnard has highlighted that in the case law of the CJEU, the public security ground has been 'largely subsumed' under the heading of public policy, Barnard (2013) 498.

[309] See C-243/01 *Criminal proceedings against Piergiorgio Gambelli and Others* EU:C:2003:597, Hatzopoulos & Do (2006) 963. Also in Payroll (C-79/01 *Payroll Data Services Srl, ADP Europe SA and ADP* GSI SA EU:C:2002:592), the Court indicates that the same principles concerning the abolition of restrictions apply to both establishment and provision of services.

[310] Nic Shuibhne (2013) 24–25. The public policy derogation is the most used by the States in the frame of the free movement of companies, whereas the public health justification mainly regards individual cases concerning the free movement of natural persons or cases concerning welfare policies, see Barnard (2013) 510–13. The public health-based justifications are also invoked by States in cases concerning restrictions to the import of certain goods, in most cases medical products, see Takis Tridimas, *The General Principles of EU Law* (Oxford University Press 2007) 221–25.

[311] Case 41/74 *Yvonne van Duyn v Home Office* EU:C:1974:133, para 18. The case concerned free movement of workers though.

[312] C-319/06 *Commssion v Luxembourg*, para 50.

based derogations are thus attentively scrutinised by the Court, which, in particular in cases concerning the freedom of movement of companies, has allowed such derogations only when a fundamental principle of the Constitutional framework of the State concerned was at stake.[313]

Furthermore, the Member States are entitled to place and justify restrictions on the economic freedoms on the ground of overriding reasons related to public or general interest, also known as 'imperative' or 'mandatory requirements'.[314] These requirements apply when the measure at stake is not directly discriminatory and cannot find justification on the grounds of the exceptions set by the Treaty.[315] In order to be lawful for EU Law, the measure at hand, which has been found by the CJEU to restrict the cross-border exercise of the economic freedoms, shall be assessed in the light of a test whose features have been outlined by the CJEU in the *Gebhard* case. Here the Court listed the four conditions that the national measure shall fulfil, which are namely:

- To be applied in a non-discriminatory manner;
- To be justified by reasons of public or general interest;
- To be suitable for attaining the objective pursued;
- Not to go beyond what is necessary to attain such an objective.

Thus, once a measure has been declared to be non-discriminatory, it must pass through the next step of the test, which concerns the justification by reasons of public or general interest. The range of public or general interest reasons identified by the Court throughout the years is quite wide and includes the protection of workers and the safeguarding of good relations in the labour market.[316] However, the Court has made clear that if the protection of the interest concerned can be already satisfied by the conditions imposed in the country of origin, then the national measure cannot be considered justified.[317]

Due to the wide extent of the concept of 'public or general interest',[318] the real test consists of the third and fourth limbs, which together form the so-called proportionality test aimed at evaluating the restrictive extent of the national measure concerned in the light of the objective of public or general interest it intends to attain. Proportionality is a general principle of EU law,[319] whose overall function concerns

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[313] As, for instance, in the Omega case, which will also be discussed later. See Barnard (2013) 509–10.

[314] Barnard (2013) 528; Davies in Arnull & Chalmers (2015) 578.

[315] Tor-Inge Harbo, *The Function of Proportionality Analysis in European Law* (Brill 2015) 22.

[316] Case 279/80 *Criminal proceedings against Alfred John Webb* EU:C:1981:314, paras 18–19.

[317] C-288/89 *Stichting Collectieve Antennevoorziening Gouda and others v Commissariaat voor de Media* EU:C:1991:323, para 13.

[318] An extensive list of these reasons is outlined by the Court in Gouda, see C-288/89 *Gouda*, para 14.

[319] The origins of the principle of proportionality have been traced back to Aristotle and his concept of justice. In this sense, the principle of proportionality is related to a balancing operation, which, however, as Engle notes, shall concern primarily inalienable rights rather than alienable economic

the 'management' of conflicts 'between two rights claims, or between a rights provision or private interest and a state/public interest'.[320] Its application entails a balancing operation by the CJEU regarding a conflict that can arise from either two conflicting rights or norms within the EU legal system (horizontal dimension) or a national measure limiting the exercise of a right or freedom stemming from EU law (vertical dimension).[321] In the latter case, the specific function of the proportionality principle is to promote and guarantee the integration of the markets by avoiding national measures that could hamper the free circulation of goods, services, and persons (natural and legal persons).[322]

The application of the proportionality test concerns an evaluation of the national measure within a scheme assessing whether the means is suitable to the end and does not go beyond what is necessary to achieve it. It is a test of suitability and necessity. However, it also takes into consideration the 'general political approach taken by the relevant national authorities concerning the issue',[323] since the identification of possibly less restrictive measures is often included. For instance, in the already mentioned case *Alpine Investments*, the Court applied the proportionality test to the ban on cold-calls by concluding that despite constituting a restriction to the freedom of providing services abroad, the Dutch rule was suitable to attain its objective, i.e. the protection of consumers, and it did not go beyond the necessary restrictive extent, since it still allowed the company to reach the customers through other means, without hindering the relationship with actual clients.[324] Once the Court recognises the restrictive extent of a national measure, it can either conduct the test autonomously or refer to the national court by outlining some guidelines for the assessment of proportionality.[325]

4.3.7. Economic freedoms and fundamental rights

The relationship between the protection of fundamental rights and the exercise of economic freedoms is a complex one in the EU legal system for several reasons. Firstly, all EU Member States' constitutional orders ensure the protection of fundamental rights; secondly, all the EU Member States, as well as the EU institutions, are bound by the ECHR; thirdly, the EU legal order itself is equipped

interests, see Eric Engle, "The History of the General Principle of Proportionality: An Overview" (2012) 1 *The Dartmouth Law Journal*, 1–11.

[320] Tor-Inge Harbo, "The Function of the Proportionality Principle in EU law" (2010) 16 *European Law Journal*, 158–85, 164.

[321] Harbo (2010) 172.

[322] Tridimas (2007) 193.

[323] Harbo (2010) 161.

[324] See Barnard (2013) 534–35.

[325] Tridimas (2007) 238–39.

with a legally binding document, such as the CFREU, enshrining the protection of fundamental rights. In this regard, the point is to recognise that potential restrictions to the economic freedoms may come from different angles: from the constitutional provisions of a Member State; from the obligation to comply with the ECHR; or from the respect of fundamental rights ensured by the Charter.[326] The legal complexity of the EU system and its market dynamics might thus generate conflict between rights and economic norms, which the Court of Justice is called on to solve on the basis of EU law.[327]

Initially, the CJEU indicated the protection of fundamental rights ensured by the constitutional traditions of the Member States and by the ECHR as embedded in the legal system established by the European Community.[328] Later, in *Wachauf*,[329] the Court further indicated the observance of fundamental rights as an obligation for both the EU institutions and the Member States in applying and implementing EU law.[330] On this basis, the protection of fundamental rights was finally recognised as a legitimate interest that can justify national measures restricting the exercise of economic freedoms. This principle was stated in the *ERT* case,[331] in which the Court left to the national (Greek) court the task of evaluating whether a monopolistic concession of television broadcasting was in breach of freedom of expression within the scope of Art 10 ECHR.[332] Instead, in *Carpenter*,[333] the Court recognised the protection of family life as a right-based justification for impeding the deportation of a third country national from the UK on the grounds that such a deportation would have hindered the freedom of providing service of the husband of the person concerned.[334]

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[326] On these aspects, see José Narciso Cunha Rodrigues, "The Incorporation of Fundamental Rights in the Community Legal Order"; Takis Tridimas, "Primacy, Fundamental Rights and the Search for Legitimacy", and Brun O' Bryde, "The ECJ's Fundamental Rights Jurisprudence – A Milestone in Transnational Constitutionalism" in Miguel Poiares Maduro & Loïc Azoulai (eds), *The Past and Future of EU Law* (Hart 2010) 89–97 and 119–29.

[327] Nic Shuibhne notes that 'the complexity of transnational life, not the Court of Justice, is what causes sensitive conflicts between uncommon constitutional traditions', see Niamh Nic Shuibhne, "Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law" (2009) 34 *European Law Review*, 230–56, 240.

[328] See Case 4/73 *Nold*, para 13. See Robin C.A. White, "Reshaping the Human Rights Landscape of the European Union" in Niam Nic Shuibhne & Laurence W. Gormley (eds), *From Single Market to Economic Union: Essays in Memory of John A. Usher* (Oxford University Press 2012) 341–58, 343.

[329] C-5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* EU:C:1989:321.

[330] Francis G. Jacobs, "*Wachauf* and the Protection of Fundamental Rights in EC Law" in Poiares Maduro & Azoulai, (2010) 133–39.

[331] C-260/89 *Elliniki Radiophonia Tiléorassi AE v Dimotiki Etairia Pliroforissis e Sotirios Kouvelas* EU:C:1991:254.

[332] C-260/89 *ERT*, paras 41–43. The court, however, affirmed that it was beyond its competences to review the compliance of national measures with the provisions of the ECHR.

[333] C-60/00 *Mary Carpenter v Secretary of State for the Home Department* EU:C:2002:434.

[334] C-60/00 *Carpenter*, para 46.

The economic freedoms in EU law are fundamental rights on their own, either as 'subjective public rights' entitled upon individuals,[335] or as encompassed in the freedom to conduct business.[336] Their fundamental status gives rise to questions concerning their relationship with the other fundamental rights and the inevitable exercise of balance between them. In light of the Treaty's objective to establish a 'social market economy', it is legitimate to wonder whether the economic freedoms should prevail over the exercise of fundamental rights,[337] the protection of which should then be deemed a restriction and in compliance with the proportionality principle applied to justify the limitative measures.[338] The *Omega*[339] and the *Schmidberger*[340] cases represent the key rulings in this regard.[341] In both cases, the CJEU has stated that the economic freedoms can be limited by the exercise of a fundamental right, in particular when it concerns a fundamental right that is both protected by the Constitution of a Member State and enshrined in the ECHR. In *Schmidberger*, the facts concerned the blocking of the Brenner motorway by an environmentalist association in the context of a demonstration, which stopped the circulation of vehicles including the lorries of the Schmidberger company transporting goods between Germany and Italy. The claim of the company aimed at seeking compensation for the economic loss due to the missed use of the motorway during the blockade and was based on the infringement of the EU provisions on free movement of goods. The failure of the State to ban the demonstration was deemed to be an infringement of the free movement of goods (therefore stating the liability of the State for an action undertaken by a private subject). Yet the Court stated that 'the national authorities relied on the need to respect fundamental rights guaranteed by both the ECHR and the Constitution of the Member State concerned in deciding

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[335] Thorsten Kingreen, "Fundamental Freedoms" in Armin von Bogdandy & Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart 2010) 515–49, 549.

[336] C-280/93 *Federal Republic of Germany v Council of the European Union* EU:C:1994:367. A critical approach would distinguish between the economic freedoms related to the exercise of the rights attached to EU citizenship, such as the free movement of persons and services, and those economic freedoms, such as the free movement of goods and capitals, which instead are instrumental to the functioning of the single market, see Francesco de Cecco, "Fundamental Freedoms, Fundamental Rights, and the Scope of Free Movement Law" (2014) 15 *German Law Journal*, 383–406.

[337] Nic Shuibhne (2013) 46.

[338] Peter Oliver & Wulf-Henning Roth, "The Internal Market and the Four Freedoms" (2004) 41 *Common Market Law Review*, 407–41, 437–39.

[339] C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* EU:C:2004:614.

[340] C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* EU:C:2003:333.

[341] See John Morijn, "Balancing Fundamental Rights and Common Market Freedoms in Union Law: *Schmidberger* and *Omega* in the Light of the European Constitution" (2006) 12 *European Law Journal*, 15–40.

to allow a restriction to be imposed on one of the fundamental freedoms enshrined in the Treaty'.[342]

In *Omega*, instead, at stake was the freedom to provide services (albeit the free movement of goods was also invoked by the company concerned) in a case regarding the ban imposed by the German authority on the commercialisation of a laser-drome installation to be used in a game in which the targets were constituted by human beings. The ban was justified by the need to protect human dignity – a principle enshrined in the German Constitution. The claim of the company was instead based on the fact that the same product was allowed in Great Britain, where the company had its main site and could commercialise the product. The questions thus concerned whether such a ban had to be considered as a restriction to a cross-border economic activity. In recalling that the protection of fundamental rights as ensured both by the constitutional traditions of the Member States and by the ECHR, the Court concluded that 'there can therefore be no doubt that the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right'.[343]

Nevertheless, in both cases a further passage in the argumentation of the Court of Justice cannot be overlooked. In *Schmidberger*, the Court acknowledged that both the free movement of goods and the freedom of assembly and of expression are not absolute rights and can therefore be subject to restrictions.[344] This leads the Court to affirm that 'the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests'.[345] Although the Court attributed in the case a wide margin of appreciation to the national court, it also affirmed that 'nevertheless it is necessary to determine whether the restrictions placed upon intra-Community trade are proportionate in the light of the legitimate objective pursued, namely, in the present case, the protection of fundamental rights'.[346] Similarly, in *Omega*, the Court affirmed that 'measures which restrict the freedom to provide services may be justified on public policy grounds only if they are necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures'.[347] The national measure motivated on the grounds of a constitutional principle such as the protection of human dignity, had hence to pass the proportionality test.[348] The CJEU thus assumes a market

[342] C-112/00 *Schmidberger*, para 76.

[343] C-36/02 *Omega*, para 34.

[344] C-112/00 *Schmidberger*, paras 78–80.

[345] C-112/00 *Schmidberger*, para 81.

[346] C-112/00 *Schmidberger*, para 82.

[347] C-36/02 *Omega*, para 36.

[348] See also Morijn (2006) 37–39.

perspective, which seems to prioritise the relevance attributed to the restrictions to the free movement stemming from the exercise of fundamental rights.[349] The two cases have constituted the grounds for the discussion on the restrictive effect on the economic freedoms of the exercise of collective labour rights made by the CJEU in the *Viking* and *Laval* rulings. In these cases, which are dealt with in more detail in subsequent sections, the CJEU has stated that the exercise of the right to collective action shall find an adequate justification on the grounds of the test applied to the restrictions to the economic freedoms of movement. Or, in the words of the Court, the exercise of collective action 'must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality'.[350] This, of course, requires the collective action to be justified. Yet the Court did not grant the same margin of appreciation to the Member States as it did in *Schmidberger* and *Omega*. In this regard van Pejpe advances the hypothesis that 'perhaps the Court attributes a lower status to fundamental social rights than to human rights like the freedom of expression';[351] whereas Malmberg and Sigeman wonder why the Court did not take into account the differences and traditions as to the exercise of fundamental rights (as it did in *Omega*), according to which the function of collective action in the Swedish system would have been recognised and thus protected.[352] However, in his early analysis of the *Viking* dispute, Bercusson highlighted a fundamental difference with the *Schmidberger* case law: no margin of appreciation can ever be granted to a private party (an employer in this case) who is attempting to restrict the exercise of a fundamental right (the collective action) in the name of an economic interest.[353] Hence, if, on the one side, it is true that 'by integrating the protection of fundamental rights as general principles of law into the European legal order itself, the Court liberates the proportionality test from the burden of the doctrine of supremacy of Union law over the law of Member States',[354] it is also true, on the other side, that a hierarchy seems to emerge in the EU legal order, according to which the proportionality test is applied to the

[349] See also Stephen J. Curzon, "Internal Market Derogations in Light of the Newly Binding Character of the EU Charter of Fundamental Rights" in Giacomo Di Federico (ed), *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument* (Springer 2011) 145–59, 150.

[350] C-438/05 *Viking Line*, para 46; C-341/05 *Laval un Partneri*, para 94. In this regard, Nikolett Hös, "The Principle of Proportionality in *Viking* and *Laval*: An Appropriate Standard of Judicial Review?" (2010) 1 *European Labour Law Journal*, 236–53, 245–47.

[351] Taco van Pejpe, "Collective Labour Law after *Viking*, *Laval*, *Rüffert*, and *Commission v Luxembourg* (2009) 25 *The International Journal of Comparative Labour Law and Industrial Relations*, 81–107, 95.

[352] Malmberg & Sigeman (2008) 1130.

[353] Brian Bercusson, "The Trade Union Movement and the European Union: Judgement Day" (2007) 13 *European Law Journal*, 279–308, 304.

[354] Schepel (2013) 1222.

restrictions to economic freedoms stemming from the exercise of social fundamental rights, rather than vice versa.[355]

4.4. The freedom of establishment and collective autonomy

4.4.1. Collective autonomy as private governance in employment

According to the EU freedom of establishment, a company has the freedom to decide in which Member State to set up its seat. This freedom implies that the Member State of establishment shall not restrict the cross-border movement and shall treat the 'migrant company' on an equal footing with the domestic companies. It also implies that the Member State of origin shall not place restrictions on the 'departure' of the company. The case law of the CJEU in the *Viking Line* case has shown how, in certain circumstances, even the exercise of collective labour rights by trade unions – which are not part of the State's apparatus – can be deemed to be a restriction to the freedom of the company to relocate.

In *Viking Line*, the ferry company that intended to reflag one of its vessels in Estonia, i.e. a case of relocation to a country with lower labour costs, had to face the collective action of the Finnish crew that aimed at protecting the conditions of work and employment ensured by the application of the Finnish collective agreement. The labour costs differential between Finland and Estonia was the spark for Viking Line to exercise its freedom of (re-)establishment.[356] The collective action was considered by the CJEU to be a restriction to the company's freedom of establishment. The interesting (almost paradoxical) aspect of the case is that the Court reached this conclusion on the basis of a genuine recognition of the functioning of collective autonomy. The Court's view relies on an understanding of the exercise of collective autonomy as private governance.

Being a dispute between private parties, the Court discussed the horizontal application of the Treaty's provision on freedom of establishment in order to understand whether the prohibition of restriction to the freedom of establishment could be claimed by the company against the trade union. The discussion of the Court revolved around its previous case law concerning the rule-setting by private associations, mainly in relation to the requirement of nationality in the sport field

[355] Bogg in Freedland & Prassl (2014) 55.

[356] See Bercusson (2007) 281.

(*Walrave and Koch*,[357] *Donà*,[358] *Deliège*,[359] *Bosman*[360]), but also in relation to other requirements in other fields, such as access to activities as self-employed (*Wouters*[361]), and the procedure for the recruitment of employees (*Angonese*[362]). In those rulings, the Court had recognised that restrictions to the economic freedoms of movement could also come from the rules set by private associations by virtue of their prerogatives in regulating the conditions to access and exercise in certain sectors. In the Court's words, 'the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down'.[363] In those rulings, the Court did ban the limitations related to the athletes' nationality set by international, European and national federations, as well as the prohibition on multi-partnership for the lawyer practice in *Wouters*, and the requirement of a language certificate for the access to employment in *Angonese*. The Court's rationale is expressed in a further case, not referred in the *Viking* and *Laval* decisions: in *Ferlini*, indeed, the challenge to the scale of fees applied by the Luxembourg Hospital Group to a person (an officer of the EU institutions) not affiliated with the national social security scheme brought the Court to state, once again on the grounds of that cluster of cases, that the Treaty's rules on free movement also apply in cases in which an organisation 'exercises a certain power over individuals and is in a position to impose on them conditions which adversely affect the exercise of the fundamental freedoms guaranteed under the Treaty'.[364]

The prohibition of setting restrictions to the cross-border economic freedom, including the freedom of establishment, shall apply to public authorities as well as to private associations. In this sense, the Court stated that 'the abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services would be compromised if the abolition of State barriers could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations not governed by public law'.[365] The rules on free

[357] Case 36/74 *Walrave and Koch.*

[358] Case 13/76 *Gaetano Donà v Mario Mantero* EU:C:1976:115.

[359] Joined cases C-51/96 and C-191/97 *Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo and François Pacquée* EU:C:2000:199.

[360] C-415/93 *Bosman.*

[361] C-309/99 *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten* EU:C:2002:98.

[362] C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* EU:C:2000:296.

[363] C-438/05 *Viking Line*, para 58.

[364] C-411/98 *Angelo Ferlini v Centre hospitalier de Luxembourg* EU:C:2000:530, para 50. See Gareth Davies, "Freedom of Movement, Horizontal Effect, and Freedom of Contract" (2012) 20 *European Review of Private Law*, 805–28, 814.

[365] C-415/93 *Bosman*, para 83.

movement therefore enjoy horizontal application between private parties, including the case of the contract of employment, or, as the Court put it, to 'all agreements intended to regulate paid labour collectively'.[366] The *Viking* case law is thus an evolution of the doctrine of direct effect.

Collective autonomy exercises its power by setting employment rules that are valid for the collectivity of employment contracts falling within its scope. According to the Court, it is to be considered on an equal footing as the regulation set up by public bodies and also to share the same liability in case of infringement of EU law.[367] However, the 'extended vertical direct effect', as defined by Apps, recognised in the form of the unions by virtue of their regulatory activity, does not 'fit entirely easily into the company of such quasi public agencies as sports regulatory bodies and self-regulating professional organisations', because trade unions usually do not impose conditions from above, but rather negotiate those conditions via a bilateral process such as collective bargaining.[368] This scepticism is also shared by Davies, who stresses that 'professional bodies are given exclusive control over a particular area of economic activity, whereas unions are (in general) given the right to take collective action to support their negotiating activities'.[369] Unilateral regulation and bilateral processes cannot be treated alike.

The exercise of collective autonomy, which consists of the interaction between two private parties, is instead indicated by the CJEU as an obstacle to the cross-border economic freedoms. In this regard, Dashwood emphasises how the CJEU has overturned the 'orthodox approach' to the vertical application of the Treaty's provisions on free movement rules to public power, by extending it to the trade unions, which are not part of the State's apparatus.[370] According to the logic in the *Viking* ruling, collective autonomy has to be seen as State's law in the context of the freedom of establishment – and trade unions should be seen as part of the State's apparatus. Yet no authoritative process of regulation, like that of the State, is put in place through collective autonomy, which constitutes a negotiating process between conflicting collective interests that, however, aims at finding a compromise. Barnard critically highlights that such an understanding denies the recognition of the inherent task of the trade unions to act in order to protect the interests of the members, whereas the States act with the aim of balancing the interests of the different

[366] C-438/05 *Viking Line*, para 58. 422–23.

[367] Nic Shuibhne (2013) 105.

[368] Katherine Apps, "Damages Claims Against Trade Unions After *Viking* and *Laval*" (2009) 34 *European Law Review*, 141–54, 147.

[369] Davies (2008) 136.

[370] Alan Dashwood, "*Viking* and *Laval*: Issues of Horizontal Direct Effect" (2008) 10 *Cambridge Yearbook of European Legal Studies*, 525–40, 526. The issue of horizontal direct effect was also raised in the *Laval* case in relation to the directive on posting of workers, but disregarded by the Court, see Ibid., 537.

categories of citizens.[371] In this regard, Syrpis and Novitz observe that the application of the EU provisions on free movement to private associations, including trade unions, could occur in those cases in which the States delegate a regulatory task to private parties. The authors offer the example of wages: whereas the setting of a national minimum wage through collective agreement, i.e. by collective autonomy, can be considered as a delegated act because the State could instead set a statutory wage, the setting of wages at company level cannot. The wage level is, in this case, the result of a compromise between the employer and the employees that takes into consideration the contingent situations of the company, and therefore it is not a 'form of delegated state regulation'.[372]

For the CJEU, collective autonomy has a legal autonomy by means of the collective agreement. Its exercise and its extent, however, differ from country to country. Therefore, collective autonomy shall fall within the scope of EU law on economic freedoms, so as not to create 'inequality in its application'.[373] The exercise of collective action is also recognised as part of such legal autonomy, and thus as falling within the scope of EU law. The two aspects (the collective action and the collective agreement) are seen by the CJEU as 'inextricably linked' in the case at stake, due to the attempt of the Finnish union to stop the delocalisation and the consequent dis-application of the Finnish collective agreement. The Court therefore concludes that 'in exercising their autonomous power, pursuant to their trade union rights, to negotiate with employers or professional organisations the conditions of employment and pay of workers, trade unions participate in the drawing up of agreements seeking to regulate paid work collectively'.[374] This means that the rules set by collective bargaining and enforced through collective action have the potential impact of restricting the freedom of companies to relocate their production to another Member State.

The cross-border mobility of companies, and their freedom to decide under which rules the economic activity shall be pursued, clashes with the exercise of collective autonomy, i.e. with the rules set through collective agreement and with their enforcement through collective action. Adams and Deakin observe that '*Viking* is the labour law equivalent to *Centros,* in the sense that it validates the right of exit in the specific sense of a right to seek out an alternative, low-cost jurisdiction'.[375] The so-called *law shopping* regime, according to which a company is free to choose the legal framework that better matches its economic needs, is expanded to the labour rules concerning the exercise of collective autonomy to the extent that practices of

[371] Barnard (2008a) 473.

[372] Syrpis & Novitz (2008) 421.

[373] C-438/05 *Viking Line*, para 34 and 35.

[374] C-438/05 *Viking Line*, para 65.

[375] Zoe Adams & Simon Deakin, "Freedom of Establishment and Regulatory Competition" in Arnull & Chalmers (2015) 537–61, 555.

social dumping become legitimised.[376] This regime might be appealing for countries in need of foreign investment, discarding the quality of working and employment conditions. In this regard, Bercusson highlights the divide between the Member States in the *Viking Line* dispute: the 'newcomers' (i.e. the countries that joined in the 2000s) favoured the Court's interpretation against the old Member States.[377] Thus, higher labour and employment standards, supported by a strong exercise of collective autonomy, collide with the interests of other countries to attract foreign investments by maintaining lower standards. At the same time, high labour and employment standards collide with the interests of multinational companies to relocate in order to profit from labour cost differentials, i.e. social dumping.[378]

At first sight, the exercise of the freedom of establishment does not raise controversies as regards employment issues, nor does it in relation to collective autonomy, due to the application of the country of establishment rules to the company, including those related to employment and labour.[379] Yet, from the perspective of collective autonomy, that statement is true insofar as the exercise of collective autonomy itself is not deemed to be a 'restriction' for its effect of making it 'more difficult for the employers concerned to access jurisdictions with lower regulatory requirements and, relatedly, lower direct wage costs'.[380] In the cross-border dimension of the EU internal market, freedom of establishment and collective autonomy thus meet in the interplay between the exercise of collective labour rights and social dumping practices of relocation.

4.4.2. Collective autonomy as a limit to the freedom of establishment: justification and proportionality

Once the exercise of collective autonomy has been recognised as potentially hindering the exercise of the cross-border freedom of establishment, the CJEU has followed up by recognising the collective action in *Viking* to be an actual restriction to the freedom of the ferry company to reflag the vessel in Estonia. According to the Court, 'it cannot be disputed that collective action such as that envisaged by FSU has the effect of making less attractive, or even pointless […] Viking's exercise of its right to freedom of establishment, inasmuch as such action prevents both Viking

[376] Massimo Pallini, "*Law shopping* e autotutela sindacale nell'Unione Europea (2008) 1 *Rivista Giuridica del Lavoro e della Previdenza Sociale*, 3–26, 9–11.

[377] Bercusson (2007) 288.

[378] For a positive account of the wage differentials in the EU as a driving force for economic development, see Dorota Leczykiewicz, "Conceptualising Conflict between the Economic and the Social in EU Law After *Viking* and *Laval*" in Freedland & Prassl (2014) 307–22, 316–21.

[379] Karl Riesenhuer, *European Employment Law: A Systematic Exposition* (Intersentia 2012) 126.

[380] Adams & Deakin in Arnull & Chalmers (2015) 554.

and its subsidiary, Viking Eesti, from enjoying the same treatment in the host Member State as other economic operators established in that State'.[381]

On this point, Adams and Deakin correctly note that the freedom that the Court protects is the freedom to make use of the labour standards (and labour law) differentials between Finland and Estonia rather than the freedom to exit a domestic market in order to access another one (i.e. the freedom of establishment).[382] They refer to a previous ruling of the CJEU – *Graf*[383] – in which a worker claimed that the missed compensation as a consequence of the voluntary termination of employment had to be considered as an obstacle to his freedom to cross-border mobility.[384] In rejecting the claim, the Court noted that the rules applied regardless of the worker's nationality and regardless of whether the new employer is established in Austria itself or in a different Member State. Therefore, it concluded that 'there is nothing on the file to indicate that such legislation operates to the disadvantage of a particular group of workers wishing to take up new employment in another Member State'.[385] The same logic of rejecting a claim for the application of higher standards should have been applied in Viking too. Adams and Deakin affirm that the claim in *Graf* is 'the precise converse of the claim […] that enterprises are entitled to have the labour laws of high-costs states disapplied in their favour if cross-state mobility is not to be inhibited'.[386] Consistently, thus, the Court could have interpreted the collective action against Viking as non-discriminatory and as not impeding as such the cross-border relocation of the vessel.

Instead, the Court ruled the collective action undertaken by the Finnish union to violate EU law because of the restriction it placed on the cross-border freedom of establishment of the company Viking. In line with the stream of case law concerning restrictions to free movement rules,[387] the Court went further by assessing the possible and legitimate grounds on which the action could be justified as well as its proportionality. The Court found the aim of protecting the workers to be compatible with EU law due to the social objectives of the EU set out by the Treaty in relation to social policy.[388] It also referred to earlier case law in which the protection of the

[381] C-438/05 *Viking Line*, para 72.

[382] Adams & Deakin in Arnull & Chalmers (2015) 555.

[383] C-190/98 *Volker Graf v Filzmoser Maschinenbau GmbH* EU:C:2000:49.

[384] The worker (an Austrian national employed in Austria) resigned from his employment in order to take up a job in Germany. On the ground of *Bosman* case law, he claimed that the Austrian legislation preventing the payment of the compensation for voluntary termination of the employment restricted his cross-border mobility as worker.

[385] C-190/98 *Graf*, para 17. See Denis Martin, "Comments on *Angonese* (Case C-281/98 of 6 June 2000), *Graf* (Case C-190/98 of 27 January 2000), *Delège and Lehtonen* (Cases C-51/96 and 176/96 of 11 and 13 April 2000), *Nazli* (Case C-340/97 of 10 February 2000) and *Kaba* (Case C-356/98 of 11 April 2000)" (2000) 2 *European Journal of Migration and Law*, 431–44, 434–35.

[386] Adams & Deakin in Arnull & Chalmers (2015) 555–56.

[387] Reich (2008) 125–61, 137.

[388] C-438/05 *Viking Line*, para 78.

workers had been seen as an overriding reason of public interest, which could legitimately limit the economic freedoms.[389] In assessing the *Viking* case, however, the Court questioned the actual threat to working and employment conditions placed by the attempt to relocate in another Member State. The action would be legitimate only 'if it were established that the jobs or conditions of employment at issue were not jeopardised or under serious threat'.[390] In principle, the CJEU recognised the collective action as a suitable means for the aim of protecting the workers.[391]

From the perspective of collective autonomy, the interpretation of the CJEU constitutes an intrusion in the prerogative of the parties to determine the scope and the aim of their actions – or its social function of protecting collective interests.[392] The 'social autonomy'[393] of the parties expressed through the voluntary exercise of collective labour rights is curtailed by the interpretation of the Court. As Joerges and Rödl point out, 'the right to collective action does not imply the power to regulate market affairs unilaterally', but rather 'collective action is intended to compensate the absence of such a unilateral regulatory autonomy'.[394] They also stress the contradictory outcome of considering a breach to EU law as a collective action, whose revindications would instead have not infringed the company's freedom of establishment if accepted by Viking and codified in a collective agreement.[395] In this view, the autonomy and voluntarism in engaging in the dynamics of collective autonomy seem to be acknowledged only on the company's side, which would be free to decide whether to accept the conditions of employment by concluding a collective agreement, but it should be dispensed to be forced to do so by means of collective action.

On the trade union's side, the exercise of collective action could only be justified if the aim falls within the scope of EU law. As Davies notes, the exercise of a right to collective action cannot constitute a legitimate ground in itself, but is subordinate to its aim.[396] The task to assess the compliance with the principle of proportionality in the case at hand was, however, assigned to the national court, which the CJEU

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[389] The Court referred, inter alia, to *Schmidberger*, *Arblade*, and *Mazzoleni*. See C-438/05 *Viking Line*, para 77.

[390] C-438/05 *Viking Line*, para 81.

[391] C-438/05 *Viking Line*, para 86, here the CJEU also refers to the ECtHR's cases *Syndicat national de la police belge* and *Wilson, National Union of Journalists and Others*; C-341/05 *Laval un Partneri*, para 107. Yet in the outcome the CJEU upheld the individualist approach of the ECHR, see Silvana Sciarra, "*Viking* and *Laval*: Collective Labour Rights and Market Freedoms in the Enlarged EU" (2008) 10 *Cambridge Yearbook of European Legal Studies*, 563–80, 571.

[392] Sciarra (2008) 572.

[393] Christian Joerges & Florian Rödl, "Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections After the Judgments of the ECJ in *Viking* and *Laval*" (2009) 15 *European Law Journal*, 1–19, 12.

[394] Ibid, 14.

[395] Ibid.

[396] Davies (2008) 142.

pointed out as the court having the jurisdiction for evaluating whether the reflagging of the vessel had seriously affected the jobs or the conditions of employment of the crew.[397] The Court instructed the national court to consider whether the Finnish union would have had other and less restrictive means to achieve the same objective of protecting the employment conditions of the vessel's crew.[398] Hence, the CJEU demanded that the national court adjudicate on the aim of the collective action, de facto subordinating the exercise of collective autonomy as counter-power protecting the weaker party in labour relations *vis-à-vis* the economic power of the company, to the discretion of the judge.[399] The inherent purpose of a collective action is therefore completely missed (or misunderstood) by the CJEU. Rather than a countervailing power, the CJEU deems collective action to be a distortive factor of the market.[400] In this regard, Reich underlines that a strict application of the proportionality test to collective action would undermine the 'very substance of the right to strike', because the 'labour unions would not have an efficient instrument to fight for their legitimate aims, such as social protection of workers'.[401] At the national level, for instance, the application of a proportionality test on collective action is a very sensible issue, which is mostly avoided by courts because of the essential aspect of State neutrality in industrial relations dynamics.[402]

The autonomous definition of a trade union's aims and strategy is thus at stake. In *Viking*, the CJEU also expressed its view on the policy of the International Transport Federation for combating the practice of flags of convenience.[403] According to the Court, such a policy limited the freedom of establishment because of its aim to prevent the ship-owners from reflagging in another country.[404] The transnational solidarity actions in the maritime sector are questioned by the CJEU because it calls the unions to undertake actions whenever a reflagging is operated without taking into consideration the actual harm caused to the employment conditions.[405] Novitz, however, stresses how the CJEU completely overlooked the dynamics proper of a truly cross-border sector such as the maritime one. She highlights how 'flags of convenience are a means by which ship owners have

[397] C-438/05 *Viking Line*, paras 83 and 85.

[398] C-438/05 *Viking Line*, para 87.

[399] In this sense, Leczykiewicz in Freedland & Prassl (2014) 312–13.

[400] Robert Rebhahn, "Broader Lessons for European and Domestic Labour Law" in Freedland & Prassl (2014) 295–306, 298.

[401] Reich (2008) 149 and 150.

[402] Bercusson (2007) 304. For instance, on the Swedish case, see Hansson in Carlsson & Edström & Nyström (2016).

[403] On the practice of flag of convenience and the ITF's campaign, see Daniel Fitzpatrick, "Transnational Collective Action: The FOC Campaign Case Study" in Dorssemont & Jaspers & van Hoek (2007), 85–92.

[404] C-438/05 *Viking Line*, para 88.

[405] C-438/05 *Viking Line*, para 89.

progressively eroded seafarers' terms and conditions of employment', as well as the difficulties – if not hindrances – in certain jurisdictions in claiming and proving a breach of workers' rights by the employer.[406] The assessment of collective autonomy from the perspective of the freedom of establishment has led the CJEU to express its take on union policies and cross-border strategies, and to restrict the scope of collective autonomy itself by subordinating it to judicial assessment. The outcome is a constraint on the exercise of collective autonomy. For instance, Novitz and Syrpis foresaw the risk that the interpretation given by the CJEU had spread in the EU, so as to make the exercise of collective action discretionary according to the will of national courts and to make the trade union less apt to undertake a collective action due to the risk of being found legally liable.[407]

4.4.3. The trail of *Viking*: freedom of establishment and collective autonomy in conflict

The decision of the CJEU in *Viking* has de facto paved the way for the judicial recourse by companies to the protection ensured by EU law to freedom of establishment in order to challenge the unions undertaking collective actions in labour disputes. The courts have therefore assumed a more prominent role in labour disputes, although it could be argued that the courts are not 'the most appropriate *loci* for protecting the interests of workers or their organisations', and instead are 'more comfortable with the protection of individual freedoms, usually in the form of civil, political and economic rights claimed by employers, than the constraints placed on such freedoms by collective trade union action'.[408]

The best-known follow-up dispute of the *Viking* (and *Laval*) case law concerns the airline company British Airways and the pilots' union, the British Airline Pilots Association (BALPA), whose dispute arose in 2008 and represents the most immediate and evident effect of the CJEU's case law on cross-border economic freedoms and collective labour rights. The dispute concerned a collective action undertaken by the British Airline Pilots Association (BALPA) against an operation of delocalisation made by British Airways. The latter intended to set up a low-cost subsidiary in France that would have operated on European and US routes. Concerned with the application of lower conditions of employment, the union BALPA intended to start negotiating with British Airways after having received a legitimation through a ballot of the members (86% of whom agreed with the claim

[406] Tonia Novitz, "A Human Rights Analysis of the *Viking* and *Laval* Judgements" (2008) 10 *Cambridge Yearbook of European Legal Studies*, 541–61, 557.

[407] Syrpis & Novitz (2008) 425.

[408] Novitz (2008) 545.

of the union).[409] The company refused to negotiate; therefore, the union called an industrial action by notifying it seven days in advance as required by the procedural rules set by English law. In response, the company claimed the action to be in violation of its freedom to establishment as protected by EU law and referred to the *Viking* (and *Laval*) case law of the CJEU. Accordingly, the company threatened to sue the union in case of strike by asking for £100 million for each day of strike. After an attempt to seek a confirmation of the lawfulness of the action by the High Court, the union withdrew the action, because of the risk of bankruptcy in case of negative response.[410] As Ewing and Hendy explain, the concerns of the union regarded the most likely issuing by the Court of an interim injunction against the industrial action requested by British Airways. According to the features of English law, an interim injunction against an industrial action is to be issued either because the procedural requirements have not been followed, or in cases in which 'the claimant can demonstrate a serious issue to be tried and that the status quo should be maintained unless the balance of convenience disfavours it'.[411] BALPA was thus discouraged from continuing the action, also because of the risk of a long judicial dispute that could have reached the CJEU and the further risk of paying unlimited damages because of the new ground for a tort for which no statutory immunity was granted.[412] The action was stopped three days after it had started; consequently, the judicial dispute stopped too.[413] Although lawful for domestic law (because it followed the procedural requirements demanded by English law), the action risked being found in breach of EU law.[414] The BALPA case, therefore, gave rise to what has been termed the 'chilling effect' of the CJEU case law that inhibits the functioning of industrial relations, since 'the twin threats of interim injunctions and unlimited damages have deterred unions from calling action in disputes involving a cross-border dispute'.[415]

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[409] Geraint Harvey & Peter Turnbull, "Power in the Skies: Pilot Commitment and Trade Union Power in the Civil Aviation Industry" in David Lewin & Paul J. Gollan (eds) *Advances in Industrial and Labor Relations (Vol.20)* (Emerald Group Publishing Limited 2012) 51–74, 55.

[410] Lydia Hayes & Tonia Novitz & Hannah Reed, "Applying the Laval Quartet in a UK context: Chilling, Ripple and Disruptive Effects on Industrial Relations" in Bücker & Warneck (2011) 201–58, 239–40.

[411] Keith D. Ewing & John Hendy, "The Dramatic Implications of *Demir and Baykara*" (2010) 39 *Industrial Law Journal*, 2–51, 44.

[412] Hayes & Novitz & Reed in Bücker & Warneck (2011) 240. Ewing reports the words of John Hendy QC, who was counsel for BALPA, saying that the company was seeking 'unlimited damages, including damages in respect of damage alleged to have been sustained by it by the mere fact that BALPA had served notice to ballot for strike action', see Keith D. Ewing, *The Draft Monti II Regulation: An Inadequate Response to Viking and Laval* (Institute of Employment Rights 2011) 4.

[413] See Ewing & Hendy (2010) 44–45.

[414] Ewing (2011) 5.

[415] Hayes & Novitz & Reed in Bücker & Warneck (2011) 258.

The union BALPA filed a complaint to the ILO Committee of Experts on the Application of Conventions and Recommendations because of the possible restrictions on the exercise of collective labour rights as enshrined by the ILO Convention n. 87 on Freedom of Association and the right to organise. In 2010, at the 99th session of the International Labour Conference, the Committee commented on the case by observing 'with serious concern the practical limitations on the effective exercise of the right to strike of the BALPA workers in this case'.[416] Without, however, directly criticising the CJEU's case law, the Committee expressed its view that 'the omnipresent threat of an action for damages that could bankrupt the union, possible now in light of the *Viking* and *Laval* judgements, creates a situation where the rights under the Convention cannot be exercised'.[417] Further, the Committee also questioned a unilateral application of the proportionality test in the case, which did not take into consideration the limitations on the exercise of collective labour rights stemming from the cross-border economic freedoms. The Committee stressed that in the context of economic globalisation, the distinction between a domestic dispute and a cross-border one is likely to become increasingly blurred, especially in certain sectors such as transport.[418]

The ILO Committee has reiterated the concerns about the BALPA case in its 2011 and 2013 Reports. In both cases, it has raised the issue of immunities for strike actions. In the words of the Committee, 'the need to ensure fuller protection of the right of workers to exercise legitimate industrial action in practice and considers that adequate safeguards and immunities from civil liability are necessary to ensure respect for this fundamental right, which is an intrinsic corollary of the right to organize'. On this basis, Bogg suggests that, in view of the CJEU's case law, the ILO standards on the exercise of collective labour rights can be matched only by granting immunities for their exercise in relation with the exercise of cross-border economic freedom.[419]

A further step in the *Viking*'s trail comes from Germany. In 2010, the airline company Lufthansa was subject to a collective action organised by the pilots' association *Vereinigung Cockpit*, which represents almost the totality of the pilots employed by Lufthansa, undertaken in order to demand the application of the company collective agreement negotiated in Germany also to the controlled company Lufthansa-Italia established in Italy.[420] The dispute did not follow a

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[416] ILO, "Report of the Committee of Experts on the Application of Conventions and Recommendations" (2010) International Labour Conference, 99th Session, 209.

[417] Ibid.

[418] Ibid. See Vasiliki Kosta, *Fundamental Rights in EU Internal Market Legislation* (Oxford University Press 2015) 226.

[419] Bogg in Freedland & Prassl (2014) 71.

[420] See Andreas Bücker & Matti Hauer & Torsten Walter, "Workers' Rights and Economic Freedoms: Symphony or Cacophony? A Critical Analysis from a German Perspective" in Bücker & Warneck (2011), 35–95, 57–58.

judicial route, since the parties agreed on arbitration a few months later; the cross-border aspects of the dispute are evident though: a strike was undertaken in Germany in order to enforce a company collective agreement negotiated in Germany to a controlled subsidiary established in Italy. From the perspective of domestic law, the commentators highlight that the legitimacy of such an action would depend on the determination of a (disputed) legal obligation for the main company to apply the company collective agreement in its subsidiary.[421] From the perspective of EU law, in contrast, the focus is shifted to the threat to working and employment conditions caused by the missed application of the collective agreement to the subsidiary in Italy. If the delocalisation was a first step in order to undermine the conditions of the workers and to limit the coverage of the collective agreement, then the action, albeit affecting the freedom of establishment of Lufthansa, would have been deemed legitimate, even though the target is not the company in which the collective agreement is claimed to be applied.[422]

However, the English context appears as a flourishing 'battleground' (even though it often concerns airline companies) between the exercise of collective labour rights and the exercise of freedom of establishment. The *Viking* (and *Laval*) case law was again brought into play in a dispute that arose in 2013 concerning the setting up of a low-cost subsidiary of the Spanish airline company Iberia, which is controlled, along with British Airways, by the UK-based company International Consolidated Airline Group SA. Despite the guarantee made by the company that the operation would have not created job losses in the group, the Spanish trade union of pilots, *Sindicato Español de Pilotos de Líneas Aéreas* (SEPLA), entered into strike assisted by the International Federation of Airline Pilots Associations (IFALPA), which at that time was domiciled in the UK, before moving to Montreal, Canada.[423] As in the *Viking* case, a request for an interim injunction against the collective action was filed in an English court on the grounds of an alleged violation of the freedoms of establishment and providing services.[424] The ruling mainly revolved around a twofold matter of jurisdiction: on the one hand, the companies claimed that the dispute was a commercial or civil dispute on the basis of the Brussel I Regulation;[425] on the other hand, the injunction was requested before an English court, although the collective action occurred in Spain and the claimant companies held that it breached Spanish law, which includes the economic freedoms protected

[421] Ibid., 61–62.

[422] Ibid., 64.

[423] Tonia Novitz & Phil Syrpis, "The United Kingdom" in Freedland & Prassl (2014) 261–76, 273.

[424] *British Airways and International Consolidated Airlines Group SA v Sindicato Espanol de Pilotos de Lineas Aereas and the International Federation of Airline Pilots Association* (SEPLA) [2013] EWHC 1657 (Comm) [2013] 2 CLC 65.

[425] The ground for the claim on the jurisdiction of the English court was based on Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001[OJ L 12/1.

under EU law.[426] The claims strongly relied on the *Viking Line* case law, which, however, was referred to by the English court so as to deny the commercial or civil nature of the dispute. The *Viking* case law was instead mentioned for attributing a 'quasi-public law' status to the conduct of the trade union, which the English court defined as 'emanations of the State' in the context of the restrictions that their activities could place on the EU economic freedoms. Further, the English court affirmed that the dispute required a balance between a constitutionally guaranteed right – such as the right to collective action – and the EU economic freedoms, which, in its opinion, 'will involve a resort to notions of public law rather than to private law'.[427] Novitz and Syrpis highlight that the decision of the judge is 'not an accurate representation of the rather generous basis on which trade unions were found to be liable' in the *Viking* case, 'where more attention was paid to their "regulatory" role'.[428] From the perspective of collective autonomy, this ruling has a twofold effect: on the one hand, it recognises the constitutional relevance of collective autonomy, as grounded in the exercise of fundamental rights; on the other hand, however, it seems to shift collective autonomy away from its original private law realm and toward a public law sphere. This operation risks undermining collective autonomy as a bilateral process of negotiations stemming from a conflict of collective interests.

The case shows that to refer to the freedom of establishment to prevent a collective action is not always successful. A further example in this regard is given by the dispute of 2016 between the Govia Thameslink Railway (GTR), a train-operating company that operates in the area of London and in particular on the route to the Gatwick airport, and the *Associated Society of Locomotive Engineers and Firemen* (ASLEF), representing train drivers that organises some 90% of the drivers employed by GTR. The dispute arose as consequence of the decision of the company to increase the use of Driver-Only Operating passenger trains, on which the doors can be closed through an electronic system activated by the drivers themselves rather than manually by a conductor, who would therefore be absent from these trains. The union opposed this decision, since, in its view, it would have increased the workload of the drivers, as to jeopardise the safety of the train journey, as well as to modify their job tasks as indicated in the employment contracts. After a lengthy dispute, the union called for a collective action that was supported by the ballot and by the participation of the majority of the workers active in the service. In the attempt to stop the action, the company alleged that the strike infringed its freedom of establishment protected by EU law, due to the fact that the French company Keolis owns 35% of GTR. The claim relied on the argument that the collective action would discourage the company from extending its activity in the UK and

[426] *SEPLA*, para 12.

[427] *SEPLA*, para 37.

[428] Novitz & Syrpis in Freedland & Prassl (2014) 274.

would eventually bring it to completely withdraw from the country. After a first request by the company to issue an injunction to stop the action was rejected by the High Court, the dispute was referred to the Court of Appeal, which described the case as 'atypical for labour injunction cases'.[429] Indeed, the court affirmed that the strike action had been declared by complying with the required procedures and that the legal claim of the company was entirely based on EU law as incorporated into English law. Already in the preliminary section of the ruling, the judges highlighted that 'the logic of [the company's] argument is that a UK company which has the necessary cross border element would have a claim in respect of industrial action in circumstances where a company wholly owned by UK shareholders would not'.[430] Therefore, the court seemed to frame the claim of the company as attempting to circumvent the national law on strikes by referring to EU law. Since the appeal of the company relied on the *Viking* case law of the CJEU, the court gave its interpretation of the ruling, by however clarifying that in the dispute at hand between GTR and ASLEF, the company was already established in the UK and thus the question could not concern whether it was being prevented or deterred from establishing itself. In analysing the CJEU's ruling, the English court affirmed that '*Viking* would not be protected from the bargaining strength of the Estonian trade unions; it would have to make its accommodations with them in the same way as Estonian based companies have to do'.[431] In the court's view, the EU provision on freedom of establishment 'does not protect companies from having to deal with strong or even bloody minded trade unions',[432] as well as it 'is to allow companies to have access to an open and free market, not to give them a more favourable protection than locally based enterprises'.[433] The English court went further: it stated that 'every strike by workers in a particular EU state may be said at some level to make it less attractive for a company in another EU state to continue to operate in that state, and certainly it might discourage it from expanding its operations'.[434] Unlike the CJEU hence, the English Court seems to understand the core meaning and purpose of a collective action, i.e. to cause a loss to the counterpart in order to force negotiations. Thus, freedom of establishment cannot always be a licence to avoid being exposed to a collective action.

The transport sector seems to be the most affected by the EU rules on freedom of establishment. The specific features of such a sector entail the possibility for a company to set its main seat in any country and keep operating throughout the EU internal market. The common thread is the recourse to freedom of establishment by

[429] *Govia GTR Railway Ltd v Associated Society of Locomotive Engineers and Firemen* [2016] EWCA Civ 1309, para 10.
[430] *Govia,* para 12.
[431] *Govia,* para 42.
[432] *Govia,* para 41
[433] *Govia,* para 42.
[434] *Govia,* para 43.

the company concerned as a legal loophole for preventing or stopping a collective action. The threat of being found liable for damages, in those countries in which the legal regulation of collective action includes them, constitutes a 'sword of Damocles' for the unions, which might become very careful in undertaking collective action, namely, a keystone of collective autonomy, when a cross-border element could be found.

4.5. Cross-border posting of workers and collective autonomy

4.5.1. The regulation of cross-border posting in the EU internal market

In the context of freedom of providing services, the interplay with the dynamics of collective autonomy mainly occur as a consequence of cross-border posting of workers. The cross-border posting of workers is regulated by Directive 96/71 (directive on posting) and by Directive 2014/67 (enforcement directive),[435] which has been adopted with a view to remedying the deficiencies of the directive on posting that emerged from the *Laval* case law.

The directive on posting defines the 'posted worker' as 'a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works'.[436] The scope of the directive includes three specific situations of posting in the framework of cross-border provision of services: (a) when a worker is posted by a company that has concluded a contract for the provision of a service in a country other than the one in which it is established; (b) when a worker is posted to an establishment located in a country other than the one in which she usually works, which is owned by the same company by which she is employed; (c) when a worker is posted to a foreign country by a temporary work agency by which she is employed.[437]

The cross-border posting is thus a situation in which 'a worker, employed by an employer established in a Member State of the Community (hereafter the "home State") and under a contract which is most probably regulated by the law of that home State, is seconded for temporary work to another Member State of the

[435] Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2014] OJ L 159/11.

[436] Art 2 Directive 96/71/EC.

[437] Art 1.3 Directive 96/71/EC.

Community (the "host State")'.[438] The key features of the posting of workers in the EU internal market are: first, the cross-border element represented by the movement of a worker from the country in which she usually works, to a country in which the service has to be performed; second, the temporary nature of the posting, according to which the worker is supposed to return to the country of usual employment. Consequently, the key implications of cross-border posting concern: on the one hand, the temporary access to the domestic market of the host State by the posting company; on the other hand, the ensuing competition between companies of different countries but operating, temporarily or permanently, in the same country. Hence, cross-border posting, which entails the circulation of both workers and services, raises questions as to the application to posted workers of the host country's working and employment conditions – in a legal context such as the provision of services that is based on the abolition of restrictions between national markets.

The context of EU integration offers an example of the tension between the abolition of restrictions to the free circulation of persons and services and the protection of domestic markets from unfair competition and social dumping. In the first decades of EU integration, the homogeneity of the social and labour conditions in the Founding States of the EU (or EEC) did not raise questions of social dumping.[439] The progressive enlargement to countries with different (lower) standards made such gaps in labour standards an evident feature of the EU internal market. If the conditions applied to posted workers are those of the home country, as would be the case according to private international law,[440] then the host country would be exposed to social dumping. But the application of the host State conditions to the foreign service provider would be considered protectionist, according to the ordo-liberal economic doctrine.[441] The challenge for the EU law-makers was thus to find a compromise between the free circulation of the workforce in the context of the provision of services and the safeguarding of national markets from social dumping.

Before the adoption of the directive on posting, the specific features of temporary posting led the CJEU to define a legal framework that was distinct from the free movement of workers.[442] Those rules were set in three rulings that the CJEU issued

[438] Paul Davies, "Posted Workers: Single Market or Protection of National Labour Law Systems?" (1997) 34 *Common Market Law Review*, 571–602, 571.

[439] An exception is represented by Art 119 EC (now 157.1 TFEU) of the 1957 Treaty of Rome in which the principle of equality between men and women was stated in order to avoid a distortion of competition for France that was the only country at that time explicitly having such a norm, see Giubboni (2006) 52.

[440] See Deakin (2008) 593–94.

[441] De Vos (2006) 357.

[442] In this sense, Rocca (2015) 145.

in the *Webb*,[443] *Seco*,[444] and *Rush Portuguesa*[445] cases. The starting point was the recognition of 'provision of manpower' as service made in *Webb*.[446] However, the Court recognised manpower provision as a 'particularly sensitive matter from the occupational and social point of view' because the 'pursuit of such a business directly affects both relations on the labour market and the lawful interests of the workforce concerned'.[447] Thus, restrictions to such an activity would fall within the legitimate choices of public policy adopted by the Member States, whose diversity in labour market conditions, the fear of harming good labour relations and the safeguarding of the workforce affected may justify making the cross-border provision of power conditional on the issuing of licence in the country of destination, even if the service provider has already received a licence in the country of establishment.[448]

The core of the regulation of situations of cross-border posting was defined by the CJEU in *Seco* and *Rush Portuguesa*. In both cases, the Court, albeit not asked in this regard, recognised the possibility for the host country to extend its labour legislation, including collective agreements, to the posting companies in order to protect the domestic market from social dumping.[449] This principle has been stated in the two rulings, but the *Rush Portuguesa* case has attracted much more attention due to the specific context of posting, involving companies established in a country such as Portugal, that had recently (in 1990) joined the EU, and sending workers to a country with strong social and labour regulation, such as France.[450] In *Seco*, the issue at stake concerned the payment of social contributions to the host country Luxembourg by a company established in France, where it already paid similar

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[443] Case 279/80 *Webb*.

[444] Joined Cases 62 and 63/81 *Société anonyme de droit français Seco and Société anonyme de droit français Desquenne & Giral v Etablissement d'assurance contre la vieillesse et l'invalidité* EU:C:1982:34.

[445] C-l 13/89 *Rush Portuguesa Ldª v Office national d'immigration* EU:C:1990:142.

[446] In brief, the *Webb* case concerned the claim of a company sending technical staff for short periods from the UK to businesses located in the Netherlands. For this operation, the company had to receive a licence in order to provide manpower to other companies, i.e. supplying workers who are not in an employment contract with the receiver. The Dutch authorities refused to issue the licence to the company on the basis of the protection of good labour relations in the labour market and of the safeguarding of the interests of the labour force affected by the operation of manpower supply. The CJEU, however, recognised manpower provision as a service and therefore applied the rules on cross-border provision of services, which sees the abolition of all measures that restrict the possibility for companies established in another Member State to provide services under the same conditions of national companies.

[447] Case 279/80 *Webb*, para 18.

[448] Case 279/80 *Webb*, paras 19–20.

[449] Davies speculates that the Court had felt the need to state such a principle in order to offer some comfort to the States, whose domestic law as regards work permits had to be abolished, see Davies (1997) 589.

[450] In this sense, also Rocca (2015) 150.

contributions. In *Rush Portuguesa*, the Court was instead addressed with a question concerning the obligation for a Portuguese company to receive from the French Migration Office the work permits for its workforce temporarily operating in France. In both cases, the Court recognised that the measures under scrutiny aimed at regulating – and limiting – the cross-border operation of the companies, de facto constituting a measure safeguarding and protecting neither the national nor the posted workers. The Court, however, accompanied the decisions with a further and final statement in both rulings. In *Seco*, it stated that 'it is well-established that Community law does not preclude Member States from applying their legislation, or collective labour agreements entered into by both sides of industry relating to minimum wages, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established, just as Community law does not prohibit Member States from enforcing those rules by appropriate means'.[451] In *Rush Portuguesa*, a similar statement[452] was made without the reference to the minimum wage, which has been interpreted as giving a broader scope to this principle, so as to include other matters than the minimum wage and also higher conditions than the minimum ones.[453]

According to the *Rush Portuguesa* case law, a country would therefore be entitled to extend to foreign service providers all the labour legislation including national collective agreements.[454] The *Rush Portuguesa* case law has been deemed both as a 'blank cheque' giving an unconditional authorisation to the States to impose national law to posting companies,[455] and as a firewall against the adverse effects of social dumping, to ensure that all workers employed in the domestic labour market and in the same worksite enjoy the same conditions.[456] However, the early case law on posting stated that the temporary nature of the posting would exclude access to the labour market of the host country.[457] Therefore, the regulation of posting would fall within the scope of the provision of services and depend on the activity of the company rather than on the mobility of the workers.[458]

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[451] Joined Cases 62 and 63/81 *Seco*, para 14.

[452] C-l 13/89 *Rush Portuguesa*, para 18.

[453] Rocca (2015) 153.

[454] This led several EU countries, especially those importing cheap labour, to equip their labour law systems with mechanisms for extending the non-*erga omnes* collective agreement, see Stein Evju & Tonia Novitz, "The Evolving Regulation: Dynamics and Consequences" in Evju (2014) 27–93, 42–46.

[455] De Vos (2006) 370.

[456] Countouris & Engblom (2015) 36.

[457] C-l13/89 *Rush Portuguesa*, para 15. Cremers considers this aspect 'ambiguous', see Cremers in Bernaciak (2016) 178.

[458] C-43/93 *Raymond Vander Elst contro Office des migrations internationales (OMI)* EU:C:1994:310. The case concerned the application of the work permit regime to Moroccan nationals employed by a Belgium company that posted them in France. Evju & Novitz in Evju (2014) 40. See also Rocca (2015) 156–59, who stresses that, unlike *Rush Portuguesa*, in *Vander Elst* the Court referred to the national

The adoption in December 1996 of the Directive 96/71 on the posting of workers in the framework of the provision of services has, in Davies' view, to a certain extent codified the *Rush Portuguesa* case law and 'its pro-domestic regulation stance' culminating in safeguarding the conditions of work in the country of destination of the service.[459] The legal bases of the directive are in the chapter on provision of services rather than the one on social policy,[460] but its purpose is twofold. On the one hand, it aims to complete the internal market by removing obstacles to the free provision of services; on the other hand, it aims to identify the working conditions applicable to temporary cross-border posted workers in order to prevent social dumping.[461] In the context of the cross-border provision of services, the directive gives the States the possibility to extend their national legislation including collective agreement.[462] Its original aim was to reinforce 'the significance of Member States' national labour legislation within the Community law by securing the application and enforcement of national law in situations involving posting of workers'.[463] In this regard, Davies identifies the 'paradox' of a directive that is 'highly protective of domestic labour regulation' whose legal basis is instead in the promotion of cross-border provision of services.[464] In light of the objective of abolishing the national measures restricting or making less attractive the cross-border provision of services, the directive on posting represents an exception because it places several conditions upon the service provider.[465] The application of the host country's labour standards would indeed limit the competitive advantage based on labour-cost differentials in its home country, i.e. social dumping.

The far-reaching goal of the directive on posting was downsized by a set of CJEU rulings (*Arblade*,[466] *Mazzoleni*,[467] *Finalarte*,[468] and *Portugaia Construções*[469])

measure at stake as restricting the market access of the posting company rather than deeming it to be discriminatory.

[459] Davies (1997) 586.

[460] Arts 57.2 and 66 TFEU.

[461] See Recitals 5 and 6 Directive 96/71/EC; see also the proposal for the adoption of the directive, European Commission, "Proposal for a Council Directive concerning the posting of workers in the framework of the provision of services" COM(91) 230 – SYN 346, 1991, 13.

[462] Recital 12 Directive 96/71/EC. See Sindbjerg Martinsen (2015) 193–94.

[463] Eeva Kolehmainen, "The Directive Concerning Posting of Workers: Synchronization of the Functions of National Legal Systems" (1998) 20 *Comparative Labor Law & Policy Journal*, 71–104, 101.

[464] Davies (1997) 591.

[465] Paul Davies, "The Posted Workers Directive and the EC Treaty" (2002) 31 *Industrial Law Journal*, 298–306, 300.

[466] Joined Cases C-369/96 and C-376/96 *Arblade and Leloup*.

[467] C-165/98 *Criminal proceedings against André Mazzoleni and Inter Surveillance Assistance* EU:C:2001:162.

[468] Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte Sociedade de Construção Civil Ld.ª and others* EU:C:2001:564.

[469] C-164/99 *Portugaia Construções Ldª* EU:C:2002:40.

issued in the transitional period after the adoption of the directive.[470] The Court developed a scheme that brought the rules on posting back into the frame of the cross-border provision of services by making the application of host State measures subject to the test assessing their proportionality and suitability as regards the pursued objective.[471] In accordance with the discipline on cross-border provision of services, the national measures shall be justified by an overriding reason related to public interest, which in the cases at hand concerned the social protection of (national and posted) workers.[472] Yet the CJEU stated that, according to the general principles of cross-border provision of services, a national rule could apply only insofar as the interest it pursues is not already safeguarded by the rules to which the service provider is subject in its country of establishment. The application of host State employment conditions (including wages) has to be limited to rules that are 'sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice […] to determine the obligations with which [the service provider] is required to comply'.[473] Although not applicable due to the transitional period, those rulings, according to Davies, mitigated the application of the host country principle in cross-border posting by realigning the directive with the regulation of cross-border provision of services.[474]

The directive on posting has been ultimately embedded within the scope of the cross-border provision of services with those rulings belonging to the so-called 'Laval-quartet' that dealt with cross-border situations of posting – *Laval* and *Rüffert*. In *Laval*, the Court retraced the elements of the directive on posting by affirming that its adoption gave application to the principles of free provision of services expressed in Art 56 TFEU, which in turn has implemented the principle of non-discrimination on the grounds of nationality (Art 18 TFEU) in the context of cross-border provision of services.[475] The adoption of the directive on posting came, in the CJEU's interpretation, in order to regulate the conditions of cross-border posting 'in the interest of the employers and their personnel'.[476] According to the Court, it did not aim at harmonising the national legislations, but it set that 'the laws of the Member States must be coordinated in order to lay down a nucleus of mandatory

[470] See also De Vos (2006) 363–64.

[471] C-369/96 *Arblade and Leloup*, paras 34–35. See Jari Hellsten, *On the Social Dimension in Posting of Workers: Reasoning on Posting of Workers Directive, Wage Liability, Minimum Wage and Right to Industrial Action* (Helsinki University Print 2007) 14.

[472] Joined Cases C-369/96 and C-376/96 *Arblade and Leloup*, para 36; C-165/98 *Mazzoleni*, para 27; C-49/98 *Finalarte*, para 41; C-164/99 *Portugaia Construções*, paras 28–29. Davies criticises such a statement because of the total lack of relevance of a social policy argument within the context of a directive regulating the economic freedom of cross-border provision of services, see Davies (2002) 302.

[473] C-369/96 *Arblade and Leloup*, para 43. In this regard, see also Malmberg & Sigeman (2008) 1137.

[474] Davies (2002) 301.

[475] C-341/05 *Laval un Partneri*, paras 54–58.

[476] C-341/05 *Laval un Partneri*, para 58.

rules for minimum protection to be observed in the host country by employers who post workers there'.[477] The Court concluded that the *Laval* dispute had to be examined on the basis of the directive on posting interpreted in light of the Treaty's provision.[478] In *Rüffert*, the reference for preliminary ruling made by the German court for ascertaining whether the regional law on public procurement of the Land of Lower Saxony contravened the Treaty's norm on provision of services, did not mention the directive on posting. It has been the Court that, in light of the facts of the dispute that concerned the construction of a prison carried out by the employees of a subcontractor established in Poland, framed the case in the context of the directive on posting.[479]

Therefore, in those rulings the CJEU gave priority to the interpretation of the disputes in light of the directive on posting rather than of the Treaty. According to Deakin, the reasons are unclear. He affirms that Art 56 TFEU would have already given the Court the legal grounds for examining the cases, also in consideration of the fact that a directive cannot, in principle, be applied to a dispute between private parties – as in *Laval*.[480] Yet, Deakin observes, the reference to the directive on posting as an expression of Art 56 TFEU served the purpose of tracing the exception of cross-border posting, which allows Member States to extend their national legislation to posting service providers, back into the discipline of provision of services, which instead entails the abolition of restrictions in national law. In this sense, the entire system of the directive on posting is an exception in need of justification, as well as any State's law that departs from its provision.[481] Similarly, van Pejpe affirms that the operation of the CJEU had the effect of incorporating into the directive on posting the limitations that the Treaty's provision imposes on national law. Though van Pejpe concludes that the Court seemed to interpret Art 56 TFEU in light of the directive, since the limitations to cross-border service provision are already expressed in the provisions of the directive.[482]

The controversies that emerged from the case law, and the ensuing political and academic debate,[483] prompted the EU Commission to adopt Directive 2014/67 (the enforcement directive), which aims at clarifying certain aspects of the cross-border

[477] C-341/05 *Laval un Partneri*, para 59, referring to Recital 13 of the directive on posting.

[478] C-341/05 *Laval un Partneri*, para 61.

[479] C-346/06 *Rüffert*, para 18.

[480] Deakin (2008) 595.

[481] Deakin (2008) 597.

[482] Van Pejpe (2009) 100.

[483] See Wiebke Warneck, "EU Level – What are the Reactions to the Jurisdiction at European level?" in Andreas Bücker & Wiebke Warneck (eds), *Viking – Laval – Rüffert: Consequences and Perspectives* (ETUI 2010) 121–27; Andrea Iossa, "Protecting the Right to Collective Action and to Collective Bargaining: Developments and New Perspectives at European and International Level" in Bücker & Warneck (2011), 245–314, 304.

posting.[484] The enforcement directive has the same legal basis as the directive on posting, which means that it also aims at promoting free movement of services and ensuring a certain level of protection for the posted workers. One of the main elements concerns the clarification of situations of genuine posting, in order to prevent abusive situations such as letter-box companies. In this regard, the enforcement directive sets out several criteria for the identification of genuine posting with a view to preventing abuses by companies that do not perform other economic activities in the country of establishment but only administrative activities or purely internal management. The directive attributes to Member States the faculty to designate a competent authority in charge of determining whether a company would abuse the rules on cross-border posting, by assessing elements such as the places where the posted workers are recruited and where the posting takes place; the place where the company has its registered office and where it performs its substantial activities; the time of posting and the nature of such an activity.[485] In their overall analysis of the enforcement directive, Countouris and Engblom sceptically emphasise that it applies 'some paper over the cracks opened by the Court of Justice' because it endorses (almost codifies) its case law.[486]

Despite the adoption of the enforcement directive, the 'ordeals' of the statutory regulation of cross-border posting do not see an end. In March 2016, the Commission presented a further proposal designed to revise the 1996 directive on posting in order to clarify some of the most problematic aspects of the phenomenon of cross-border posting, which comprise issues related to the applicable wages to posted workers.[487] However, the twofold aim of the directive on posting is re-stated – as affirmed in the Preamble of the proposal.[488]

4.5.2. Employment conditions in the cross-border posting

In the three situations identified by the directive on posting, the posted workers are entitled to enjoy the host country conditions of employment and work. The definition of 'worker' also falls within the scope of host State law,[489] since a EU-

[484] On the debate that has led to the adoption of the directive, see Sindbjerg Martinsen (2015) 209.

[485] Art 4.2 Directive 2014/67/EU.

[486] Countouris & Engblom (2015) 37. The authors point to Paragraph 23 of the Preamble in which it is stated that the Member States can only apply certain requirements and measures to the posting companies insofar as they are justified by overriding reasons of public interest and respect the principle of proportionality.

[487] COM(2016) 128 final 2016/0070 (COD), Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, Strasbourg, 8.3.2016.

[488] Recital 4 of the proposal amending Directive 96/71/EC.

[489] Art 2.2 Directive 96/71/EC.

wide definition is lacking. However, the directive delimits the conditions that can be extended to posted workers. According to the list set down in Art 3.1, the posted workers shall receive equal treatment with the host country workers as regards maximum working hours, minimum rest periods, paid holidays, minimum rates of pay, overtime, health and safety, non-discrimination, protection of pregnant women, children, and young people.[490] The directive also delimits the sources for those conditions to: (a) law, regulations and administrative provisions, and/or (b) collective agreements that have been declared universally applicable.[491]

The key conditions of employment to be applied to posted workers are defined by the legislation and collective agreements of the host State. Moreover, the Directive contains two provisions that may function as further safeguards against social dumping. On the one hand, Art 3.10 states that 'terms and conditions of employment on matters other than referred to' in Art 3.1 can be extended to posted workers in case of public policy provisions, which, however, shall be applied in accordance with the principle of non-discrimination.[492] In this regard, Kolehamainen observes that the provision contributes in further protecting the host country labour market by transforming a closed list into an open one.[493] On the other hand, Art 3.7 of the directive states that 'the application of terms and conditions of employment which are more favourable to workers' cannot be prevented.[494] Although the 'hard-core' protection provided by Art 3.1 refers to the minimum conditions, the directive does not preclude the application of the home State conditions, when higher.[495] In this sense, the directive seems inspired by a principle of '*favor*' for the posted workers, which are entitled to enjoy the highest conditions possible. Thus, the directive has been conceived as a 'minimum directive' that would leave room for the improvement of the conditions of the posted workers.[496] The 'minimum protection' ensured by the directive can be transformed into 'full protection' by extending the labour standards of the host State beyond the minimum level provided by Art 3.1.[497]

One of the most controversial aspects of the Laval-quartet rulings concerned the interpretation of Arts 3.1, 3.7, and 3.10. In *Laval*, the dispute between the Swedish

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[490] The list also includes other provisions of non-discrimination, see Art 3.1 Directive 96/71/EC. Davies notes that the directive aims at extending to posted workers those conditions of their immediate interest, leaving aside, for instance, the rules on dismissal and those on representation, which are linked to the home country, where the contract of employment of the posted worker belongs, see Davies (1997) 579.

[491] Art 3.1 Directive 96/71/EC.

[492] Art 3.10 Directive 96/71/EC.

[493] Kolehmainen (1998) 86.

[494] Art 3.7 Directive 96/71/EC.

[495] Mijke Houwerzijl, "Towards a More Effective Posting Directive" in Blanpain (2006) 179–97, 190.

[496] Evju & Novitz in Evju (2014) 60.

[497] Roberto Pedersini & Massimo Pallini, *Posted Workers in the European Union* (Eurofund 2010) 15.

union and Laval pertained to the application to the posted workers of the conditions laid down in the Swedish collective agreement for the construction sector in the area of Stockholm, which were higher than the minimum ones set at sectoral level. Whereas, in *Rüffert*, the wages set by the regional collective agreement and included as a mandatory criterion for the assignment of the public tender, were higher than the minimum level set by the national collective agreement. In this regard, the Court affirmed that Art 3.1 would aim at ensuring mandatory rules for the minimum protection of the posted worker. The application of the host State conditions of employment would avoid social dumping by precluding the posting company from applying the potentially lower home State conditions of employment.[498] Yet the Court also affirmed that 'Article 3(7) of Directive 96/71 cannot be interpreted as allowing the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection'.[499] A different interpretation would, in the Court's view, 'amount to depriving the directive of its effectiveness'.[500] Ultimately, the Court has interpreted the entire regulatory system of cross-border posting as a 'minimal' system, aimed at guaranteeing a minimum level of protection for the posted workers. It is difficult to discern a protective rationale for the rights of the posted workers, who are denied from enjoying higher conditions than the minimum ones. Unless, as ironically affirmed by Deakin, the Court did not mean that it is easier to find a job in the cross-border dimension by offering lower conditions of employment.[501] The directive on posting becomes a 'ceiling directive' that imposes minimum protection as the maximum protection allowed, 'unless, pursuant to the law or collective agreements in the Member State of origin, those workers already enjoy more favourable terms and conditions of employment'.[502]

Similarly, the public policy justification indicated by Art 3.10 as grounds for the application of other conditions than those referred to in Art 3.1 was narrowly interpreted in *Commission v Luxembourg*. The Grand Duchy invoked the preservation of good relations on the labour market and the protection of the posted workers' rights as matters of public policy in the meaning of the directive as grounds justifying the extension of most of its labour legislation, including collective agreements, to foreign service providers. The Court rejected this claim; instead it upheld the opinion of the Commission and considered that the extension of the entire labour law regime to foreign companies would go beyond the mandatory requirements of the directive and expand the list of terms and conditions set in Art

[498] C-341/05 *Laval un Partneri*, paras 74–77.

[499] C-341/05 *Laval un Partneri*, para 80; C-346/06 *Rüffert*, para 33.

[500] C-341/05 *Laval un Partneri*, para 80.

[501] Deakin (2008) 598.

[502] C-341/05 *Laval un Partneri*, para 81.

3.1. In particular, the Court affirms that the notion of public policy 'when it is cited as justification for a derogation from the fundamental principle of the freedom to provide services, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the European Community institutions'.[503] The Court thus restates the primacy of EU law and substantially limits the autonomy of the Member States in defining the notion of public policy, in a manner that Barnard describes as 'interpreting Article 3(10) PWD almost out of existence'.[504] In this sense, the regulation of the domestic labour market, including the role of the State in the arena of industrial relations, is subject to the authority of EU law.

The interpretation of the directive on posting given by the CJEU transforms the minimum conditions of Art 3.1 into a 'mandatory minimum', so as to prevent the employment terms being raised by the host State in view of protecting the national market from social dumping.[505] In this sense, Deakin affirms that the Court gives 'an interpretation which rules out Member State legislation setting standards above those provided for in the Directive'.[506] Along the same lines, Malmberg observes that the Court 'interprets the Posting of Workers Directive as an almost exhaustive coordination of the national measures for protecting workers in posting situations'.[507] Therefore, the directive becomes a ceiling for the application of host State conditions, which shall comply with the scope of the provisions on the free movement of services as set out in the Treaty. In sum, as put by Kilpatrick, 'the Court's new approach makes the Posted Workers' Directive an exhaustive and restrictively interpreted statement of justification for which host-state labour standards can apply under' Art 56 TFEU.[508] The origin of a possible 'race to the bottom' of labour and employment standards in the EU internal market lies in this interpretation. In order to compete with the workers posted by low-standard countries, the workers and trade unions of high-standard countries might conclude collective agreements that push employment conditions downwards.

The definition of the conditions to be applied to the posted workers has not been modified by the Enforcement Directive, which rather sets rules for facilitating access to this information. The employment conditions of 'hard-core' protection shall be 'generally available free of charge in a clear, transparent, comprehensive

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[503] C-319/06 *Commssion v Luxembourg*, para 50.

[504] Catherine Barnard, "The UK and Posted Workers: The Effect of *Commission v Luxembourg* on the Territorial Application of British Labour Law" (2009a) 38 *Industrial Law Journal*, 122–32, 129.

[505] Evju & Novitz in Evju (2014) 81.

[506] Deakin (2008) 596.

[507] Jonas Malmberg, "Regulating Posted Workers – Before and After the *Laval* Quartet" in Rönnmar (2011) 77–90, 79.

[508] Claire Kilpatrick, "*Laval's* Regulatory Conundrum: Collective Standard-setting and the Court's New Approach to Posted Workers" (2009) 34 *European Law Review*, 844–65, 847.

and easily accessible way at a distance and by electronic means'.[509] In case of collective agreement, the 'Member States shall ensure that those terms and conditions are made available in an accessible and transparent way to service providers from other Member States and to posted workers, and shall seek the involvement of the social partners in that respect'.[510] The Enforcement Directive also extends the monitoring competences of the host State by allowing them to set administrative requirements, insofar as they are applied proportionally and are justified in accordance with EU law, and to conduct inspections that might help to uncover abuses.[511] In this regard, the directive emphasises that the social partners (or 'management and labour') may undertake inspection tasks in order to monitor the application to the posted workers of the conditions set in collective agreements concluded at a different level.[512]

The guarantee that posted workers receive the conditions to which they are entitled is the main objective of the Enforcement Directive. To this aim, the directive gives the posted workers the right to judicial and administrative protection. The Member States shall ensure that, in case of mistreatment, the posted workers could enjoy effective mechanisms for lodging complaints in order to seek remedy.[513] In this context, the directive safeguards 'other competences and collective rights of social partners' as set down by national law and practices.[514] Hence, the measures taken by the States for ensuring effective judicial or administrative protection to posted workers shall not encroach on the competences of collective autonomy. In this sense, the provision might constitute a basis for national trade unions to develop strategies of cross-border workers' representation (see Section 4.6.2).

Finally, the directive also states the liability of subcontractors in case of the misapplication of the rules on posting and of the national working and employment conditions that the posted workers are entitled to.[515] It also introduces the possibility to set fines and sanctions for those service providers that fail to comply with the rules on posting.[516] However, it has been pointed out that the enforcement directive only sets the liability for subcontractors in the first link. The scenario of 'letter-box companies' would still constitute a threat to collective autonomy through the extension of the supply chain.[517]

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[509] Art 5.1 Directive 2014/67/EU.

[510] Art 5.4 Directive 2014/67/EU.

[511] Arts 9 and 10 Directive 2014/67/EU.

[512] Art 10 Directive 2014/67/EU.

[513] Art 11.1 Directive 2014/67/EU.

[514] Art 11.4(b) Directive 2014/67/EU.

[515] Art 12 Directive 2014/67/EU. Sindbjerg Martisen points out that this measure is likely to protect against future CJEU cases, see Sindbjerg Martinsen (2015) 217.

[516] Art 13 Directive 2014/67/EU.

[517] Sørensen (2015) 100.

The 2016 proposal for amending the directive on posting aims at a better regulation of specific situations of posting on the basis of the application of the principle 'equal pay for equal work in the same place'.[518] Accordingly, the application of host State rules is empowered. The proposal states that host State labour legislation shall be extended to those situations of posting exceeding 24 months, either if such a duration is stipulated in advance, or if it is instead reached afterwards.[519] The text further clarifies that the calculation of the duration would include cases in which a posted worker is replaced by another worker, but only in case of posting lasting more than 6 months. These rules are conceived as a possible remedy to the phenomenon of 'letter-box' companies, as well as the resort to temporary work agencies.

4.5.3. The collective agreement as source in the cross-border posting of workers

The tension between the territorial application of labour rules and the cross-border provision of services is sharpened in relation to collective bargaining and the application of the host country collective agreements to the posted workers and the posting companies. The territorial applicability of collective agreements collides with the aim of guaranteeing the competitive advantage in the cross-border provision of services. The twofold aim of the directive on posting, i.e. tempering the erosion of national labour standards and ensuring the cross-border exercise of provision of services, is Janus-faced. On the one hand, it may be seen as protective, as it would ensure the uniform application of a certain level of labour standards to national and posted workers, as well as their collective bargaining coverage. On the other hand, it may be seen as protectionist, because of its protection of the domestic market from competition.

The preliminary drafts of the directive, issued in the aftermath of *Rush Portuguesa*, limited the applicable collective agreements to those having *erga omnes* effect, i.e. those legally applied without distinctions throughout the labour market of the host country.[520] In the final version, the application of collective agreements that 'have been declared universally applicable', namely, *erga omnes* collective agreements that must be observed by all undertakings in the geographical area and sector concerned (whose application is, however, mandatory only for the building sector, whereas is at the discretion of the States in other sectors[521]), is accompanied by a provision that deals with the diversity of industrial relations

[518] COM(2016) 128 final 2016/0070 (COD), 2.

[519] Art 1 of the Proposal amending Art 2 Directive 96/71/EC.

[520] Stein Evju, "Posting Past and Present" (2008) Formula Working Paper, no. 4, 7.

[521] Davies (1997) 582.

systems in the EU countries, which in some cases (as, for instance, in Italy and Sweden) lack universally applicable collective agreements. In this sense, the directive states that in the absence of universally applicable collective agreements, the conditions of employment and work to be extended to posted workers can also be found in collective agreements 'which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or collective agreements which have been concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory'.[522]

The EU legislator privileged the territorial application of labour rules by protecting the domestic labour markets and industrial relations systems, even though it partially contradicted the *Rush Portuguesa* case law, according to which the posted workers do not gain access to the national labour market because of the temporary nature of their job.[523] Further, although the statutory regulation of cross-border posting seems sensible towards the diversity of industrial relations and collective bargaining systems of the Member States, it aims to ensure that only the collective agreements that bind the domestic companies would be applicable to foreign service providers, in order to avoid a protectionist effect.[524] In this regard, Davies notes that the provision entails a focus on the representativeness of the signatory parties, which becomes the relevant criterion for assessing the applicability of the collective agreement.[525]

According to the general rule, the Member States would have the option of extending the minimum wages set by collective agreements entered into by both sides of industry and generally applied throughout the territory, to foreign companies temporarily operating in their territory.[526] Yet already in *Mazzoleni* the CJEU affirmed that the application of national rules on minimum wage to cross-border service providers may consist in an additional and disproportionate burden in view of the discipline of provision of services.[527] Nevertheless, it acknowledged that the differential in collectively set wages and employment conditions might 'result in tension between employees and even threaten the cohesion of the collective labour agreements that are applicable in the Member State of establishment'.[528] The tension between the cross-border competitive advantage and the application of the collective agreement also emerged in *Portugaia Construções*.

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[522] Art 3.8 Directive 96/71/EC.

[523] Wolfgang Däubler, "Posted Workers and Freedom to Supply Services. Directive 96/71/EC and the German Courts" (1998) 27 *Industrial Law Journal*, 264–68, 267.

[524] Davies (1997) 581.

[525] Ibid., 580.

[526] See also C-272/94, *Criminal proceedings against Michel Guiot and Climatec SA* EU:C:1996:147, para 12.

[527] C-165/98 *Mazzoleni*, para 36.

[528] C-165/98 *Mazzoleni*, para 36.

In this case, the Court recognised that the host countries can demand the foreign posting company to apply the wage level set by the sectoral collective agreement insofar as it is applied to all undertakings operating in the territory of the host country. However, the Court indicated that the possibility to derogate from the sectoral collective agreement by means of a company collective agreement should be available to foreign service providers too on equal conditions with the domestic employers.[529]

The issue of the applicability of the collective agreement in relation to the wage was at the core of the *Laval* dispute and of the CJEU's ruling. In accordance with the rules of the Swedish system, the Swedish union requested the posting company to conclude a collective agreement stating the applicable wages to the posted workers. The findings of the Court referred to the absence of collective agreements universally applicable in the meaning of Art 3.8 of the directive on posting in the Swedish system and that workplace-level negotiations are part of the Swedish collective bargaining system.[530] The Court judged the Swedish system of voluntary collective bargaining not to be in compliance with the EU rules on cross-border provisions of services. According to this interpretation, a State in which the employment conditions, including wages, are not set in accordance with the criteria set by the directive on posting, 'is not entitled […] to impose on undertakings established in other Member States […] negotiation at the place of work, on a case-by-case basis, having regard to the qualifications and tasks of the employees, so that the undertakings concerned may ascertain the wages which they are to pay their posted workers'.[531] Furthermore, since the union attempted to regulate the cross-border situation of posting by means of a collective agreement, it could not rely upon the exception ensured by Art 3.10. Being a private body, the union cannot make use of that clause, which would allow the extension to posted workers of host country conditions on matters other than those listed in the directive itself.[532] While the trade unions' regulatory power is recognised, it cannot constitute the grounds for claiming the public policy justification in situations of cross-border posting.[533]

As a consequence of the failure of collective negotiations, the Swedish union, again in compliance with Swedish law, undertook a collective action that aimed at forcing the cross-border service provider to sign a collective agreement. One of the questions that the CJEU had to answer thus concerned the legitimacy of such an action in the context of cross-border posting. Despite the sharp recognition of

[529] C-164/99 *Portugaia Construções*, paras 34–35.

[530] C-341/05 *Laval un Partneri*, para 69.

[531] C-341/05 *Laval un Partneri*, para 70.

[532] C-341/05 *Laval un Partneri*, para 84.

[533] Reich, however, underlines that the Court has discarded the public policy justification because Art 3.10 of the directive on posting refers to matters other than those listed in Art 3.1, whereas in the dispute, the Swedish union tried to impose a wage level on Laval, which is among the matters listed in the provision. See Reich (2008) 147.

collective action as a fundamental right in the EU legal system law, the Court also affirmed that such a status does not exclude collective action from the scope of EU law, as it does not exempt collective action from complying with EU law obligations. Consequently, the collective action undertaken by the Swedish union had to pass the 'market access' test.[534]

The first step was to identify whether it constituted an obstacle to the free provision of services; in other words, whether the collective action would fall within the scope of the EU regulation of cross-border service provision. The Court followed the same line of arguments as in *Viking*: the collective action is indicated as an expression of the private legal autonomy of the trade unions, which cannot be excluded from compliance with Treaty provisions without compromising the objective of abolishing trade barriers between Member States.[535] For the Court, to be exposed to a collective action for the determination of working and employment conditions constitutes an obstacle that is 'liable to make it less attractive, or more difficult, for such undertakings to carry out construction work in Sweden, and therefore constitutes a restriction on the freedom to provide services'.[536] Once recognised as an obstacle, the second step concerned the assessment of the objective of the collective action in order to ascertain whether it could constitute an 'overriding reason of public interest' in the sense of the case law on restrictions to the cross-border provision of services.[537] In this regard, the Court recognised that the collective action aimed at protecting the workers against social dumping, which would, in principle, constitute a justification for a restriction in light of the social objectives of the EU.[538] Yet the collective action, expressed under the form of a blockade of the worksite, was found to be disproportionate in relation to its aim. Although in principle the blockade is a legitimate action for the protection of workers,[539] the blockade undertaken by the Swedish unions could not be justified, since it was asking for conditions that went beyond the scope of the directive on posting and was undertaken in a 'national context characterised by a lack of provisions, of any kind, which are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum pay'.[540] Therefore, the unlawfulness of the collective action, from the perspective of EU law, depended on the feature of the national system of collective bargaining, which did not provide for a mechanism extending the collective agreement.

[534] Barnard (2008a) 474.
[535] C-341/05 *Laval un Partneri*, para 98.
[536] C-341/05 *Laval un Partneri*, para 99.
[537] De Vos (2006) 363.
[538] C-341/05 *Laval un Partneri*, para 103.
[539] C-341/05 *Laval un Partneri*, para 107.
[540] C-341/05 *Laval un Partneri*, para 110.

A further aspect of the dispute that the CJEU was called to interpret consisted in the assessment from the perspective of EU law of the Swedish *Lex Britannia*, according to which the social peace obligation, automatically stemming from the conclusion of a collective agreement, would not apply in case of a collective agreement outside the scope of the Co-determination Act – i.e. mainly collective agreements concluded abroad by companies operating in Sweden. In this regard, the Court concluded that such a rule would be discriminatory, since it would not take into consideration the fact that the cross-border service provider could be bound by a collective agreement in its country of establishment.[541] According to the Court, the cross-border dimension of the provision of services would oblige the State of destination to treat companies bound by a collective agreement alike, without distinction on the locus in which the collective agreement has been concluded. This interpretation introduces the possibility to 'export' collective agreements to the host country. The borders are kept for collective bargaining – a company cannot be forced to negotiate the conditions for the posted workers with the host country unions – but not for the collective agreement, which can be applicable anywhere in the EU internal market. Yet the Court maintains the freedom of the cross-border service provider to voluntarily enter into a collective agreement with the host country unions. However, as stressed by van Pejpe, 'the Court has overlooked the fact that the employer does not have any reason to conclude a more favourable collective agreement if the unions are not allowed to exert pressure on it by resorting to collective action'.[542] Thus, the Court overlooks collective action as a re-balancing tool of the bargaining power of the subjects involved in collective bargaining.[543]

The inconsistency between a domestic system of collective bargaining based on decentralised collective bargaining and the EU provisions on cross-border posting also emerged in the *Rüffert* case.[544] Here, the German labour inspectors found that the subcontractor Polish company corresponded to its posted employees less than half of the wage that it was supposed to pay according to the regional collective agreement indicated by the call for public tender as mandatory for the contractor.[545] In the light of EU law, the CJEU ruled out the provision of German public procurement law because the collective agreement indicated as the source for the terms and conditions of employment for the contractor's employees would not respect the criteria set by the directive on posting. The regional collective agreement is not, by definition, a collective agreement universally or generally applicable to all of the industry in the same sector. Further, the Court also considered it

[541] C-341/05 *Laval un Partneri*, para 113.

[542] Van Pejpe (2009) 98.

[543] Novitz (2008) 553.

[544] Kilpatrick (2012) 20.

[545] See Martin Franzen & Cornelia Richter, "Case C-346/06, *Rechtsanwalt Dr. Dirk Ruffert, in his capacity as liquidator of Objekt und Bauregie GmbH & Co. KG v Land Niedersachsen*, [2008] ECR I-1989" (2010) 47 *Common Market Law Review*, 537–54, 538.

discriminatory that such a rule would only be mandatorily applicable in the public sector, thereby excluding workers in the private sector from the level of protection so ensured.[546] The ruling in *Rüffert* demonstrates the scarce sensibility of the Court towards the characteristics of an industrial relations system.[547] Or in other words, it is the evidence that 'principles of subsidiarity, collective autonomy for the social partners and the fundamental right of trade unions to bargain collectively are given very little weight in situations of posting'.[548] From the perspective of the domestic system of collective bargaining, the interpretation given by the Court constitutes an interference into its functioning that undermines the role of local collective bargaining and defuses the possible benefits deriving from a decentralised system as to adjusting the terms and conditions set at the national level to the actual reality of regional areas. Further, the ruling would also create a competitive disadvantage for the national companies, which would be placed in a regime of cross-border competition with foreign service providers not obliged to follow the rules on public procurement.[549]

Although the *Regio Post* ruling has to a certain extent revised the interpretation of the interplay between public procurement law and the EU regulation of cross-border posting (see Section 4.3.5), it is important to underline that from the perspective of collective autonomy and collective bargaining, the Court has delivered a further blow. In interpreting the obligation for the posting company to correspond to the posted workers the wage levels set in a regional collective agreement, the Court compared the elements of *Regio Post* with the *Rüffert* case, in which the conclusion derived from the non-universal coverage of the collective agreement at hand. In *Regio Post*, instead, the Court found that the regional collective agreement for postal services, indicated by the public call as mandatory for the contractor, did not impose a higher level than the wage set by statutory law or by the national collective agreement.[550] Thus, the Court operated a clear-cut distinction between a statutorily set minimum wage and a collectively set minimum wage. In the latter case, the lack of *erga omnes* collective agreement or sectoral or geographically limited coverage would not ensure the universal coverage needed in order for the minimum wage level to comply with EU law on cross-border posting.[551]

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[546] The arguments of the Court are well outlined in Christopher McCrudden, "The *Rüffert* Case and Public Procurement" in Marise Cremona (ed), *Market Integration and Public Services in the European Union* (Oxford University Press 2011) 117–48, 127–28.

[547] Ahlberg & Bruun in Evju (2014) 251.

[548] Niklas Bruun, Antoine Jacobs & Marlene Schmidt, "ILO Convention No. 94 in the Aftermath of the *Rüffert* Case" (2010) 16 *Transfer*, 473–88, 485.

[549] Kilpatrick (2012) 21.

[550] C-115/14 *RegioPost*, para 75.

[551] C-115/14 *RegioPost*, para 73.

The application of collective agreement is a central element of the proposal for amending the directive on posting. It sets forth to eliminate the distinction between economic sectors as regards the application of collective agreements as defined by Art 3.8 of the directive on posting, which would become mandatory in all sectors.[552] This would contrast the case law of the CJEU with regard to the application of home country conditions when equivalent to the minimum conditions set in the host country sectoral collective agreement. Accordingly, a sectoral collective agreement would be automatically applicable to posting companies – within the scope of the directive on posting though, i.e. as to the minimum conditions in the matters set in Art 3.1. Further, the application of collective agreements in subcontracting in the context of cross-border posting is a key aspect. The Impact Assessment accompanying the proposal identifies subcontracting as a practice that exposes posted workers to situations of vulnerability and as a driver of downward wage pressure.[553] In this regard, the EU legislator proposes to give the States the faculty (but not the obligation) to impose, on the basis of the respect of the principles of proportionality and non-discrimination, that the subcontractors shall respect the employment conditions also stated in non-universally applicable collective agreements.[554] This would mean that subcontractors would be bound by company collective agreements that bind the main contractor.

In waiting for the adoption of that amendment, the *Laval* and *Rüffert* case law gives rise to ambiguity in relation to the exercise of collective bargaining and the application of collective agreements. In the words of Sciarra, the outcome of those rulings is that 'wage dumping follows as a direct consequence and is the paradoxical effect of a *de facto* bargaining system, the force of which can be maintained only in the national system of industrial relations'.[555] As for the functioning of an industrial relations system, Davies notes the 'poor understanding' demonstrated by the Court, which discards 'workplace-level collective bargaining as a possible means of setting a minimum wage' in favour of an employer-friendly attitude that, however, does not consider collective bargaining as a bilateral process of compromising.[556] In this regard, Kilpatrick stresses that the approach of the Court to the interpretation of the applicable conditions to posted workers, 'combines a lack of respect for collective standards with a lack of clarity on what counts as a host-state standard'.[557] The 'minimalist' but rigid interpretation of the criteria for collective agreement set by the directive on posting denies the function of collective bargaining as a complementary tool to statutory regulation; it also rejects any role for company

[552] COM(2016) 128 final 2016/0070 (COD), 7.

[553] SWD(2016) 52 final, 14.

[554] Art 1.2(b) of the proposal amending Art 3 Directive 96/71/EC.

[555] Sciarra (2008) 576.

[556] Davies (2008) 144.

[557] Kilpatrick (2009) 857.

collective bargaining in situations of cross-border posting. In sum, the Court does not acknowledge the flexibility of the labour law realm, in which legislative sources coexist with collective sources defined by collective autonomy. Furthermore, as also observed by Lo Faro, the ruling of the Court places foreign service providers in a better competitive position than the national companies. Cross-border service providers receive 'total immunity' against the entry into negotiations with national unions as well as for the application of the same working and employment conditions stated in the collective agreement that the national companies are bound by.[558] A possible remedy can be found in the Enforcement Directive, which, among the administrative requirements that the Member States have the faculty to demand of posting companies, includes the conditions 'to designate a contact person, if necessary, acting as a representative through whom the relevant social partners may seek to engage the service provider to enter into collective bargaining within the host Member State'.[559] The wording would not suggest any obligation for the posting company to enter into negotiations though. The conclusion of a collective agreement between a national trade union and a posting company would depend on the willingness of the latter. No reference is made to the most powerful means for the trade unions to force an employer to negotiate, i.e. the collective action. In this sense, the directive (thus the EU legislator) seems to conceive collective bargaining and collective action as two separate elements, whereas they are inherently connected in order to guarantee collective autonomy.

As for the exercise of collective action, a further paradox appears. A collective action undertaken in order to back-up collective negotiations, which would be lawful in internal situations, becomes potentially unlawful in a situation of cross-border posting. The private autonomy of the trade unions, expressed through the exercise of collective action, is liable to making the cross-border provision of services less attractive for foreign companies. On this point, Deakin – in sceptically asking 'more difficult or less attractive than what?' – observes that the interpretation given by the Court might refer to the difficulties generated by a law that ensures the exercise of collective action, as well as to the economic difficulties of applying Swedish employment conditions to workers posted from Latvia.[560] The exercise of collective action as part of the collective autonomy of the trade unions is therefore limited and placed under the condition that its aim would not concern the application of employment conditions higher than the minimum ones and only insofar as those minimum conditions are not already ensured by the home-country standards. Even though the protection against social dumping is indicated as a legitimate aim for undertaking a collective action, the focus of the Court seems to deal with the

[558] Antonio Lo Faro, "Towards a De-fundamentalisation of Collective Labour Rights in European Social Law?" in Moreau (2011) 203–16, 205–06.

[559] Art 9(f) Directive 2014/67/EU.

[560] Deakin (2008) 584.

protection of social dumping against collective action. As pointed out by Kosta, 'protecting national workers from "social dumping" will always lead to some degree of protectionism'.[561] For the Court, the collective action aimed at levelling-out the differentials between Swedish and Latvian labour standards, de facto eliminating the competitive advantage of Laval. Similarly, the exclusion from the social peace obligation of collective agreements signed abroad, which in the Swedish system functions as a safeguard against cross-border social dumping,[562] was found to violate the principle of non-discrimination.[563] In all cases, it would constitute an overturning of the nature of collective action, whose exercise constitutes an economic cost for the employer as a means for the workers to set employment conditions.[564] As Sciarra puts it, 'the Court ignores the fact that collective autonomy is vested with an original power of self-determination and production of rules. This implies recourse to industrial action as a sanction internal to the autonomous system of collective labour relations'.[565]

The issue of collective action in the context of cross-border posting is not dealt with in the directive on posting, which 'does not give any indication of the latitude which can and should be given to workers collectively to protect their own interests where the state does not act directly to do so'.[566] The only reference is in the Preamble, in which it is stated that the directive does not prejudice the laws of the Member States as far as collective action is concerned. The Laval dispute, however, brought it into the picture. The attempt to codify the proportionality principle set in the *Viking* and *Laval* case law in the Monti II Regulation failed; whereas the enforcement directive contains references to the issue of collective action. Recital 14 recalls that 'respect for the diversity of national industrial relations systems as well as the autonomy of social partners is explicitly recognised by the TFEU' and Recital 48 affirms that the Directive 'respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union, notably protection of […] the freedom to conduct a business (Article 16), the right to collective bargaining and action (Article 28), fair and just working conditions (Article 31)'. The enforcement directive also contains a provision (Art 1.2) that addresses the exercise of collective action in the context of situations of cross-border posting. It states:

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[561] Kosta (2015) 223.

[562] Malmberg & Sigeman (2008) 1125.

[563] Reich (2008) 140.

[564] Kilpatrick (2009) 855.

[565] Sciarra (2008) 577.

[566] Tonia Novitz, "Labour Rights as Human Rights: Implications for Employers' Free Movement in an Enlarged European Union" (2007) 9 *The Cambridge Yearbook of European Legal Studies*, 357–86, 371.

> This Directive shall not affect in any way the exercise of fundamental rights as recognised in Member States and at Union level, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States, in accordance with national law and/or practice. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take collective action in accordance with national law and/or practice.

Despite some similarities with the Monti clause, Kosta notes that this provision is more similar to Recital 14 of the service directive, which starkly differs from the Monti clause since it suggests that the only collective action safeguarded by the clause are those that are exercised in compliance with EU law.[567] Moreover, Kosta stresses that it seems that the exercise of collective action would be subjected to two standards in order to be 'saved' by the application of the directive, due to the double reference to national law and EU law, which is instead missing as regards the right to conclude collective agreements.[568] Despite the good intention, the provision of the enforcement directive does not clarify whether it would be possible to undertake a collective action against a posting company in a cross-border situation. A further doubt emerges: the provision mentions that it is 'this directive' that shall not affect the exercise of collective labour rights. A natural question springs up in this regard: will the safeguarding clause of the enforcement directive also be valid for the original directive on posting? No answer comes from the 2016 proposal.

Overall, the directive on posting does not explicitly mention collective autonomy. This flaw is partially remedied by the Enforcement Directive. Recital 14 refers to the acknowledgement made by the TFEU in relation to the diversity of national industrial relations systems and the autonomy of the social partners.[569] The Preamble calls the State to ensure that the terms of the collective agreement signed in accordance with Art 3.8 of the directive of posting are made available to cross-border service providers, without prejudice of the autonomy of the social partners.[570] Collective autonomy, under the form of 'autonomy of the parties', is also recognised as a mechanism for the conclusion of collective agreements that can set terms and conditions to be applied to posted workers.[571] Finally, the respect of collective autonomy is demanded for the actions that the EU Commission and the Member States may undertake in order to support the 'relevant initiatives of the social partners at the Union and national level that aim to inform undertakings and workers on the applicable terms and conditions of employment'.[572] Eventually, the Enforcement Directive seems to acknowledge the controversies generated by the

[567] Kosta (2015) 236. On the clause included in the Service Directive, see Novitz (2007) 374.
[568] Kosta (2015) 236.
[569] Recital 14 Directive 2014/67/EU.
[570] Recital 19 Directive 2014/67/EU.
[571] Art 5.4 Directive 2014/67/EU.
[572] Art 8.3 Directive 2014/67/EU.

Laval case law in terms of the disregarding of collective autonomy in the context of cross-border posting and seems to begin from its recognition as a principle of labour market regulation.

4.5.4. Wage and social dumping in the cross-border posting

The major element of social dumping is the wage differential between countries.[573] A cross-country report about posting of workers in the EU commissioned by the European Federation of Building and Woodworkers, has highlighted that typical situations of abuse concern the non-compliance with wage provisions as well as the practice of paying the posted workers the lowest official minimum wage rate level.[574] From the perspective of collective autonomy, this aspect constitutes a threat to the functioning of collective bargaining, whose lower levels (i.e. the company level) usually perform a complementary role in particular about pay. The directive on posting does not specify the meaning of the 'minimum rate of pay' employment condition listed in Art 3.1. Its definition is left to the national law and practices, in accordance with the territorial application of labour rules. In this regard, the Court has stated that the directive on posting 'does not itself provide any substantive definition of the minimum wage', whose constituent elements come 'within the scope of the law of the Member State concerned, but only in so far as that definition, deriving from the legislation or relevant national collective agreements, or as interpreted by the national courts, does not have the effect of impeding the free movement of services between Member States'.[575]

The *Sähköalojen ammattiliitto ry* case,[576] which involved workers posted from Poland and the Finnish trade union in the electricity sector *Sähköalojen ammattiliitto ry*, constitutes an attempt by the CJEU to clarify the scope of 'minimum wage' in the context of Art 3.1 of the directive on posting. In 2011 a company established in Poland, *Elektrobudowa Spółka Akcyjna* (ESA), hired 186 workers under Polish employment law and posted them to its branch established in Finland in order to carry out electrical installation work at a construction site of a nuclear plant. The dispute arose because the Finnish trade union claimed ESA to be in breach of the EU regulation on posting as the wages given to the posted workers

[573] Magdalena Bernaciack, "Social Dumping and the EU Integration Process" (2014) ETUI Working Paper 2014.06, 12.

[574] Jan Cremers, *In Search for Cheap Labour in Europe – Working and Living Conditions of Posted Workers* (CLR-Studies 2010).

[575] C-522/12 *Tevfik Isbir v DB Services GmbH* EU:C:2013:711, para 37.

[576] C-396/13 *Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna* EU:C:2015:86.

were lower than those set in the national sectoral collective agreement.[577] The Finnish union informed the posted workers about the violation of their wage rights and demanded that they join the union, in order to be allowed to file individual cases for pay claims before a national court. In the proceeding, the Finnish union affirmed that ESA did not accord to the workers a series of accessory elements of the basic pay, which were stated in the national collective agreement, such as basic hourly pay according to the pay groups set in the agreement, guaranteed piecework, holiday allowances, daily allowances, and compensation for travelling time (the worksite was distant at approximately 15km from the workers' accommodation). The request of the company to dismiss the action was based on the claim that the employment contracts were regulated by Polish law, which would not have allowed the trade unions to bring individual claims before a court. The CJEU, however, discarded the argument by instead affirming that Polish law is irrelevant with 'regard to the *locus standi* of the *Sähköalojen ammattiliitto* before the referring court'.[578] The application of the relevant national law as the regulation of cross-border posting is further reaffirmed by the CJEU, which states that the rules of the directive on posting 'makes absolutely clear that questions concerning "minimum rates of pay" within the meaning of the directive are governed, whatever the law applicable to the employment relationship, by the law of the Member State to whose territory the workers are posted in order to carry out their work',[579] i.e. the host State, which shall definitely also apply because the workers had been posted to a Finnish branch of the company established in Poland.[580]

Consequently, the Court interpreted Art 3.1 of the directive on posting in order to ascertain whether the accessory elements of pay claimed by the Finnish union were to be deemed as minimum rate of pay in the meaning of the directive of posting. The CJEU grounded its interpretation on the aims of the directive itself, which consist in ensuring a nucleus of mandatory rules for the minimum protection of the workers posted in the framework of cross-border provision of services as well as a climate of fair competition between national undertakings and undertakings that provide cross-border services.[581] However, the Court pointed out that the directive on posting 'has not harmonised the material content of those mandatory rules for

[577] According to Finnish law, the national collective agreement is universally applicable in the meaning of the directive on posting and therefore to be applied to posted workers, as also stated in the national legislation implementing the directive on posting.

[578] C-396/13 *Sähköalojen ammattiliitto ry*, para 21.

[579] C-396/13 *Sähköalojen ammattiliitto ry*, para 23.

[580] C-396/13 *Sähköalojen ammattiliitto ry*, para 24.

[581] C-396/13 *Sähköalojen ammattiliitto ry*, paras 29–30. However, the Court did not agree with the opinion of the Advocate General about 'a paradigm shift' from the *Laval* case law emphasising the protection of the domestic market and of the posted workers rather than the freedom to provide services, see Niklas Bruun, "Commentary to European Court of Justice – 12/2/2015 – *Sähköalojen ammattiliitto ry v Elektrobudowa Spółka Akcyjna*, C-396/13" (2015) 2 *International Labor Rights Case Law*, 159–75, 173.

minimum protection, even though it provides certain information concerning that content'.[582] In this sense, it affirmed that the definition of the elements composing the minimum wage is to be determined according to the rules of the host State, provided that those rules are set according to the criteria laid down in the directive on posting and 'in so far as that definition, as it results from the relevant national law or collective agreements or from the interpretation thereof by the national courts, does not have the effect of impeding the freedom to provide services between Member States'.[583] On this basis, the Court could even state that 'the minimum wage calculated by reference to the relevant collective agreements cannot be a matter of choice for an employer who posts employees with the sole aim of offering lower labour costs than those of local workers'.[584] In the case at stake, therefore, the court recognised all the accessory elements of the minimum pay to fall within the definition set by the directive on posting as long as they could be found in the relevant collective agreement.[585] In sum, the decision of the Court reaffirms the principle of territoriality as it strengthens the application of the national collective agreement to posted workers.

The determination of the applicable wage in a cross-border situation is a crucial knot of the European labour market policies and regime. The entire institute of cross-border provision of services and of cross-border posting of workers seems to rely on the possibility to apply lower wages than those actually applied in the place where the service is provided or where the workers are posted. However, the protection against a competition based on social dumping is among the reasons of public interest justifying restrictions to the exercise of free movement.[586] In the domestic systems of industrial relations, the application of the collective agreement is closely related to the application of wage levels, which is often set through collective bargaining. Also in those countries having a statutory minimum wage, this is usually accompanied by collectively-set levels of wages, which might also vary depending on the features of the collective bargaining systems.[587]

The determination of the applicable wage to the posted workers was at the core of the Laval dispute. The wage setting mechanism in the framework of the Swedish system is based on case-by-case negotiations between the company and the trade union. According to the CJEU, such a system would not be in compliance with the provisions of the directive on posting, since it requires the posting company to

[582] C-396/13 *Sähköalojen ammattiliitto ry*, para 31.

[583] C-396/13 *Sähköalojen ammattiliitto ry*, para 34.

[584] C-396/13 *Sähköalojen ammattiliitto ry*, para 41.

[585] The Court did not include meal vouchers and costs of accommodation in the definition of minimum rate of pay as not stated in law, regulation, nor in relevant collective agreements, see C-396/13 *Sähköalojen ammattiliitto ry*, para 70.

[586] C-315/13 *Edgard Jan De Clercq and Others* EU:C:2014:2408, para 65. Also, C-341/05 *Laval un Partneri*, para 103.

[587] Kilpatrick (2009) 855.

apply, after collective negotiations, wages that are higher than the minimum ones.[588] One of the functions of collective autonomy – the wage setting – is therefore challenged by the application of free movement rules, which would allow a foreign company to circumvent the territorial application of labour rules by 'importing' home-country wages in the labour market of the host country, as long as the wage level in the home country is comparatively equal to the minimum level in the host country set in law or by a national collective agreement.[589]

A more elaborated notion of the wage emerges in the Enforcement Directive, which for instance mentions 'the different minimum rates of pay and their constitutive elements' as one of the relevant pieces of information whose access should be improved by the States.[590] In the wake of this, the Impact Assessment study accompanying the 2016 proposal for amending the directive on posting identifies both the structural wage differential among the EU countries and the lack of clarity as to the definition of the elements composing the minimum wage as problematic aspects of the regulation of posting. According to the study, both aspects lead to social dumping and unfair competition.[591] In this regard, the document suggests a set of policy options with a view to implementing the principle of the 'same wage for the same job in the same place'. The proposed options include a re-definition of the elements composing the minimum wage on the basis of the *Sähköalojen ammattiliitto ry* case law and suggests extending all the mandatory rules on remuneration to posted workers including those stated in *erga omnes* collective agreements.[592] Accordingly, the final proposal suggests introducing a change in Art 3.1 by replacing the formula 'minimum rate of pay' with the formula 'remuneration' and to extend to posted workers all the elements composing the remuneration for local workers set in the applicable collective agreement.[593]

[588] C-341/05 *Laval un Partneri*, para 70.

[589] Herwig Verschueren, "The European Internal Market and the Competition between Workers" (2015) 6 *European Labour Law Journal*, 128–51, 140.

[590] Art 5.4 Directive 2014/67/EU.

[591] SWD(2016) 52 final, Commission staff working document, Strasbourg, 8.3.2016, 10.

[592] SWD(2016) 52 final, 23–24.

[593] Point 2(a) of the proposal amending Art 3 Directive 96/71/EC.

4.6. The challenges to collective autonomy in the cross-border scenarios of the EU internal market

4.6.1. Cross-border situations as company-level industrial relations

One of the effects of the *Viking* and *Laval* case law consists in the limitations of the freedom of trade unions to take collective action in the cross-border dimension. From the perspective of collective autonomy, this amounts to a limitation in the trade unions' activities for pursuing the collective interest of their members. In other words, the rulings of the CJEU 'deny trade unions in the EU the role they have developed for themselves in national industrial relations systems over the past century'.[594] In a borderless market, those rulings place restrictions on trade unions' room for manoeuvre in counteracting economic activities of outsourcing and delocalisation put in place by the 'migrant company'.[595]

The cross-border dimension consists of the movement of a company across national borders under the EU law regime in order to perform an economic activity. The exercise of the economic freedoms leads the 'migrant company' to deal with the national frameworks of collective labour law and industrial relations by triggering dynamics of industrial relations transcending the national borders and the domestic systems.[596] Such freedoms are fostered by and pursued through the EU integration project and its legal framework. Their cross-border exercise is the pivot of the economic integration and, as a socio-economic phenomenon, it also brings about dynamics of change in the field of industrial relations. Unlike the European social dialogue and the transnational collective bargaining in multinational companies, the cross-border dimension mainly concerns relations established between national subjects, although on the employer's side the subject could also be a multinational company having several branches in different EU countries that, however, did not interact with a transnational employee representative body.

Cross-border industrial relations should be interpreted as private relationships between a private, albeit collective, organisation – such as a trade union – and a private company. In this sense, the relationship established between a company exercising the economic freedoms and a national trade union ought to be considered as company labour relations relating to the private nature of those actors. Therefore,

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[594] Nathan Lillie, "European Integration and Transnational Labour Markets" in Joan DeBardeleben & Achim Hurrelmann (eds), *Transnational Europe: Promise, Paradox, Limits* (Palgrave Macmillan 2011) 113–29, 120.

[595] Nicole Lindstrom, "Service Liberalisation in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?" (2010) 48 *Journal of Common Market Studies*, 1307–27.

[596] In this sense also Fudge & Mundlak in Dahan & Lerner & Milman-Sivan (2016).

the industrial relations dynamics fostered by the exercise of economic freedoms are aligned with the tendency of the last decade in terms of a shift of labour and employment regulation from the macro-level of State regulation to 'decentralised' regulation at the micro-level.[597]

The scenario of cross-border posting of workers in the context of the freedom to provide services entails the access of foreign subjects (both the company and its employees) to the domestic market of the country of destination of the service – the host country. As also emphasised by the Preamble of the directive on posting, 'the transnationalization of the employment relationship raises problems with regard to the legislation applicable to the employment relationship'.[598] From the domestic market perspective, this means that, on the one hand, the foreign companies enter into competition with the national companies, and, on the other, the foreign employees enter into competition with workers in the host country.[599] Although the Court has, on several occasions, observed that 'workers employed by a business established in one Member State who are temporarily sent to another Member State to provide services do not, in any way, seek access to the labour market in that second State if they return to their country of origin or residence after completion of their work',[600] the EU framework for economic freedoms aims at facilitating the movement of companies and workers, which results in widening the competition on an EU scale. Contractors and subcontractors from low-wage countries can, indeed, compete with similar companies in high-wage countries by offering services in which they only apply the minimum wages of the host country rather than the collectively negotiated conditions.[601]

In those cases in which the migrant company applies the minimum conditions stated in national collective agreements, further challenges arise. Being subject to the host country regulation would mean for the foreign subjects to comply with conditions of employment that have not been negotiated by the collective actors who represent them. These negotiations do not take into account the individual needs of the 'migrant company' – or they might even adopt a protectionist stance. The cross-

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[597] See Miguel Martínez Lucio & Robert MacKenzie, "'Unstable Boundaries?' Evaluating the 'New Regulation' within the Employment Relationship" (2004) 33 *Economy and Society*, 77–97; Vincenzo Pietrogiovanni, "The System of Sources of a Globalised Labour Law" in Carlsson & Edström & Nyström (2016) 241–61.

[598] Recital 6 Directive 96/71/EC.

[599] In this sense, Hepple (2005) 165.

[600] Inter alia, C-49/98 Finalarte, para 22. Verschueren deemed this argument, also brought up in *Rush Portuguesa* and *Vander Elste*, 'to be designed to diminish the importance of the host states' immigration laws and make them inapplicable in these cases', see Herwig Verschueren, "Cross-border Workers in the European Internal Market: Trojan Horses for Member States' Labour and Social Security Law?" (2008) 24 *The International Journal of Comparative Labour Law and Industrial Relations*, 167–99, 175.

[601] Ines Wagner, "The Political Economy of Borders in a 'Borderless' European Labour Market" (2015) 53 *Journal of Common Market Studies*, 1370–85, 1378.

border industrial relations should therefore be viewed as company labour relations because at least one of the subjects involved, i.e. the employer, is not included in a structured and coordinated industrial relations system. The regulatory role of collective autonomy as regards the labour market is thus challenged in the cross-border dimension, in which its scope is formed around the dimensions of the company.[602]

When the company moves from its home State to the host State, there are different actors with different and conflicting interests involved. On the one hand is the company itself, which aims at gaining competitiveness by applying working and employment conditions to their employees which are lower than those applied by national companies. On the other hand are the local workers and trade unions, which aim instead at ensuring that such a company applies the same conditions as those for the local workers, in order not to experience the risk of a race to the bottom of social and labour standards – i.e. social dumping, which has been defined as 'the strategy geared towards the lowering of wage or social standards for the sake of enhanced competitiveness, prompted by companies and indirectly involving their employees and/or home or host country governments'.[603] In the midst of that relationship, there are the migrant company's employees, who can paradoxically benefit from the unequal treatment of receiving lower conditions than the ones of the host country workers.[604] A multifaceted definition of social dumping has been given by Hendrickx, who divides it into three different types: *dismantlement*, intended as the lowering of domestic employment and labour standards, including anti-union policies, in order to attract foreign investments; *replacement*, i.e. the replacement of high-cost workers with low-cost workers coming from countries with lower labour and employment standards; *delocalisation*, meant as the relocation of the economic activity where the production would have lower labour costs – a weapon that can also be used as a tool for leverage during collective bargaining.[605]

In light of the conceptualisation of the cross-border dimension as company-level industrial relations, the pages that follow will define the challenges that face collective autonomy in the cross-border dimension of the EU internal market. The responses to these challenges often concern unilateral initiatives from the unions' side. Historically, the organising of the employer's side has been a response to workers' organising. The dynamics of the cross-border dimension of the EU internal market make no exception in this regard.

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[602] Van Pejpe (2009) 97.

[603] Magdalena Bernaciak, "Social Dumping: Political Catchphrase or Threat to Labour Standards?" (2012) ETUI Working Papers 2012.06, 25.

[604] Countouris & Engblom (2015) 44.

[605] Hendrickx (2011) 1065.

4.6.2. Cross-border workers' representation

A first aspect regards the basic task of a trade union, namely, the representation of its members and, in general, of the workforce. Unlike the transnational context, in which the transnational interest of the multinationals' employees can be pursued by statutory bodies of employee representation, such as the EWC,[606] workers' representation is a thorny issue in the cross-border dimension. Trade unions are member-based organisations whose primary aim is to pursue the collective interest of the members by representing them before the employer's counterpart and before the political authority.[607] In the scenario of cross-border posting, the relationship between the trade union and its members is affected by the presence of a further social group – the posted workers – that might have a different collective interest. In Hepple's words:

> When workers from State A (the home state) are posted to work abroad in State B (the host state), State A may want to ensure that its laws and the collective or works agreement made by its firms are applied to those workers. On the other hand, State B will be anxious to avoid the import of lower labour standards from State A which have the effects of undermining established laws and agreements in State B. Workers in host states want to make foreign parent companies of local subsidiaries legally responsible for failing to observe the labour standards that they are obliged to follow in their home countries.[608]

The union is therefore at a crossroads between adopting a protectionist or a protective attitude towards the posted workers.[609]

In the first case, the union would act to protect the domestic national labour market against foreign elements that could destabilise it, such as workers coming from another country and performing jobs for lower conditions than those usually applied to local workers. A few examples of this dynamic are provided by a series of protests that occurred in the UK from 2006 onwards in the context of the posting of foreign workers.[610] The most famous of these is certainly the Lindsey Oil dispute of 2009. The dispute concerned the employment of Italian and Portuguese workers posted to an oil refinery in north-east Lincolnshire owned by Total, a French

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[606] Valeria Pulignano, Isabel da Costa, Ugo Rehfeldt & Volker Telljohann, "Local Actors and Transnational Structures. Explaining Trends in Multinational Company-level Negotiations in Europe" in Peter Fairbrother, Marc-Antonin Hennebrt & Christian Lévesque (eds), *Transnational Trade Unionism: Building Union Power* (Routledge 2013) 141–60.

[607] Mundlak (2012) 226–27.

[608] Hepple (2005) 153.

[609] See Stefania Marino, Rinus Penninx & Judith Roosbland, "Trade Unions, Immigration and Immigrants in Europe Revisited: Unions' Attitudes and Actions Under New Conditions" (2015) 3 *Comparative Migration Studies*, 1–16.

[610] Gregor Gall, "The Engineering Construction Strike in Britain, 2009" (2012) 36 *Capital & Class*, 411–31, 415.

multinational. Through a tender, Total had outsourced part of the construction project of part of the plant, to IREM, an Italian company that was awarded the contract on the basis that it undertook to supply its own skilled workforce, and pay them equivalent wages to the local workforce.[611] Despite the impossibility of proving that the company paid the posted workers less than expected, a series of protests, under the form of wildcat strikes and walk-outs, were spontaneously organised by local workers against the presence of the posted workers, who in their view had brought social dumping and a 'race to the bottom' in the local pricing of labour.[612] The official unions remained in background, without directly taking part in the dispute,[613] although several shop stewards sympathised with the actions.[614] Later the most important unions in the construction sectors (GMB and Unite) stood in favour of those workers who were dismissed because of partaking in the actions. The unions also advanced claims as regards the need to recruit local (i.e. British) workers for other construction works financed through public money, and supported the British workers in similar disputes claiming that the missed recruitment of local labour was a matter of discrimination on the grounds of nationality.[615]

The dispute quickly took on a 'racialised' profile, due to the protesters' use of the controversial slogan 'British jobs for British workers'.[616] The dynamics of the scenario of cross-border posting of workers and of provisions of services thus triggered social dynamics of racism and scapegoating, in which foreign workers were stigmatised for the cost of their labour, despite social dumping being to the detriment of both local and foreign workers who are both discriminated against by these employment policies.[617] Local workers (and unions), rather than organising along the classic workers/employers divide, might put in place 'responses which are exclusionary and rooted in nation-centric discourses of job protection against "external" threats'.[618] The Lindsey Oil dispute is also a result of the chilling effect of the *Laval* case law on industrial relations: the union was, indeed, reluctant to take control of the dispute under the threat of possible liability for damages.[619] As Countouris and Engblom stress, 'what labour law could no longer recompose into a

[611] Catherine Barnard, "'British Jobs for British Workers': The Lindsey Oil Refinery Dispute and the Future of Local Labour Clauses in an Integrated EU Market" (2009b) 38 *Industrial Law Journal*, 245–77, 247.

[612] Novitz & Syrpis in Freedland & Prassl (2014) 271.

[613] Gall (2012) 422.

[614] Barnard (2009b) 248.

[615] Barnard (2009b) 253–54.

[616] Gall (2012) 422.

[617] See Ryan Bernard, "Transnationalism and Labour Law: The 'British Jobs' Protest in 2009" in Moreau (2011) 72–88, 79–85.

[618] Anthony Ince et al., "British Jobs for British Workers? Negotiating Work, Nation, and Globalisation through the Lindsey Oil Refinery Dispute" (2015) 47 *Antipode*, 139–57, 143.

[619] Novitz & Syrpis in Freedland & Prassl (2014) 270.

civilised and effective struggle for the betterment of the living and working conditions of both local and foreign workers soon turned into a bitter struggle between the most vulnerable interest holders in the overall dispute'.[620]

On the contrary, the trade unions might instead decide to uphold a protective attitude towards the posted workers, which would mean protecting them in case of mistreatment or misapplication of the rules on cross-border posting. In this way, the union is in the position of both protecting the rights of the posted workers and fighting social dumping. An example is the aforementioned *Sähköalojen ammattiliitto ry* case, in which the Finnish union undertook the representation of posted workers in a national litigation over the wages to which those workers were entitled. Although mentioned in the reference for preliminary ruling, the freedom to trade union association enshrined in Art 12 CFREU is not taken into account by the CJEU, which instead based its decision on Art 47 on the right to effective remedy and fair trial. In this sense, as stressed by Bruun, a representing role of the interests of the posted workers can also be disanchored by the presence of a trade union and be performed for instance by NGOs concerned with social justice and the rights of migrant workers.[621] However, the adoption of specific national legislation attributing a stronger role to the trade unions over the monitoring of the enforcement of the national collective agreement on cross-border service providers could be a way of remedying the deficiencies of the EU regulation of cross-border posting. The union could receive, for instance, legal standing in cases in which an employer also temporarily operating in the territory of the State does not respect the collective agreement in force.[622] This would open spaces for a mechanism of cross-border trade union representation ensuring that the posted workers could find in the domestic unions the subject to refer to in order to see their rights defended.[623] However, such a scenario only envisions a post-breach participation with a view to receiving remedies after the actual violation. Moreover, it would constrain the solutions within national borders.

The protective stance of the unions might not prevent social dumping practices though. A union could be engaged in representing the posted workers and pursuing their collective interests; but at the same time, this situation cannot guarantee that the foreign company does not, for instance, apply the minimum conditions stated in national legislation and/or collective agreements, which could not be the actual

[620] Countouris & Engblom in Freedland & Prassl (2014) 285.

[621] Bruun (2015) 173.

[622] With regard to the contrast between *Laval* and *Sähköalojen ammattiliitto ry* on the instruments that the unions would have to combat illegal and abusive cross-border posting, see Nathan Lillie & Ines Wagner, "Subcontracting, Insecurity and Posted Work: Evidence from Construction, Meat Processing and Ship Building" in Jan Drahokoupil (ed), *The Outsourcing Challenge: Organised Workers across Fragmented Production Networks* (ETUI 2015) 157–74, 160.

[623] For a further experience in the Finnish context, see Nathan Lillie & Markku Sippola, "National Unions and Transnational Workers: The Case of Olkiluoto 3, Finland" (2011) 25 *Work, Employment & Society*, 292–308.

conditions applied in the workplace according to company collective agreements. The paradoxical result is that unions with a protective attitude might also find themselves in the position of claiming the recruitment of local workers.[624] A union could perform a monitoring role as regards the application of the due conditions to the posted workers, which, however, would require a cooperative attitude of both the employer and the posted workers. The provision of the Enforcement Directive safeguarding the competences of the social partners set by national law and practice in ensuring the application of the due conditions to posted workers (Art 11.4(b)) can be framed within the context of cross-border workers' representation. It can be interpreted as a safeguard of the trade unions' rights to collective bargaining and collective action – but also rights to co-determination, information and consultation – in the scenario of cross-border posting as a possible means for the national unions to protect the posted workers before their employer – and correspondingly to combat social dumping. Nevertheless, it leaves the definition of these aspects to the national legal and industrial relations frameworks.

The relationship between posted workers and national unions appears as a problematic one. For instance, a study conducted in a sector particularly exposed to cross-border posting such as the construction industry in Germany, has shown that often the posted workers unofficially agree to receive a lower wage than the one they would be entitled to according to EU rules.[625] Similarly, a study in the Finnish construction industry conducted through interviews with union officers has shown that the attitude of the posted workers towards the local union is also fundamental as the protection of the posted workers can be ensured only if they refer to the union in case of misapplication or violation of the agreed conditions of work.[626] Despite the intention of ensuring the application of (at least) a floor of host country employment standards to the posted workers, the EU rules on cross-border posting 'instead of blurring the inside/outside divide between hypermobile and native citizens in certain sectors, the firms' borders separate workers from the host country's institutional industrial relations systems and strengthen the divide between mobile posted workers with less pay and rights on the one hand, and native workers in a standard employment relationship on the other'.[627]

Dealing with temporary cross-border labour mobility is a major challenge for trade unions, and in particular in the scenario of posting. The posted worker will return to her home country after the job is complete, which means that she does not become part of the domestic labour market, despite taking part in it. In the context of the EU internal market, a domestic dimension, especially in certain sectors such

[624] See Nathan Lillie, "Subcontracting, Posted Workers and Labour Market Segmentation in Finland" (2012) 50 *British Journal of Industrial Relations*, 148–67, 161.

[625] Wagner (2015) 1379.

[626] Again this example concerns the case of the Olkiluoto 3 nuclear power plant, see Lillie & Sippola (2011) 301–02.

[627] Wagner (2015) 1381.

as construction, no longer exists. The cross-border competition ensured through the exercise of the EU economic freedoms allows companies to move across the borders with their employees. But this movement challenges the unity of collective interest on the workers' side, often placing workers against workers. The most widespread approach in dealing with the organising of posted workers seems to concern initiatives at workplace level taken by shop stewards of national unions' local branches.[628] An attempt to unify the representation of posted and seasonal workers has been put in place by an initiative of the German construction sector union IG-BAU (*Industriegewerkschaft Bauen-Agrar-Umwelt*), which in 2004 established the European Migrant Workers Union with the intention to set a cross-border workers' representation body. The union is intended to exercise representation mainly through legal counsel and advices on conflict at work for the workers posted in countries other than the one in which they usually work, especially in the agriculture and construction sectors. The initiative has faced several problems, linked to both its cross-border nature, which has meant that the members are scattered around Europe, and the mistrust of other national unions as to the jurisdiction on union matters.[629] However, the European Migrant Workers Union carries out projects on cross-border labour mobility and workers' training in Central and Eastern Europe with a focus on the German context.[630]

Cross-border workers' representation cannot find regulation at the EU level due to the exclusion of freedom of association from the EU competences. Furthermore, the European social dialogue mechanisms do not seem to offer a proper basis for such an issue due to the absence of individual membership and to the institutionalisation that undermines the capacity of mobilising workers across Europe.[631] The issue is thus confined within the national borders as regards a possible regulation, so as to reflect the logic of 'de-coupling' proper to EU integration, or left to the initiatives of national trade unions, which, however, reflect the differences in trade union culture and industrial relations models.

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[628] For an overview on several cases concerning posted workers in countries such as Denmark, Finland, Norway, the UK and the United States, see Sonila Danaj & Markku Sippola, "Organizing Posted Workers in the Construction Sector" in Drahokoupil, (2015) 217–35.

[629] On the EMWU see Ian Greer, Zinovijus Ciupijus & Nathan Lillie, "The European Migrant Workers Union and the Barriers to Transnational Industrial Citizenship" (2013) 19 *European Journal of Industrial Relations*, 5–20.

[630] See the current activities at http://www.emwu.org/

[631] In this sense Richard Hyman, "European Trade Unions and the Long March Through the Institutions. From Integration to Contention?" in Fairbrother & Hennebrt & Lévesque (2013) 161–79.

4.6.3. Cross-border collective bargaining

Although the evolution of cross-country collective bargaining might sound utopian due to the differences between national systems, the cross-border dimension, meant as company-level industrial relations, offers interesting sparks of hope in this regard. In the cross-border dimension, the 'migrant company' acts on its own terms. It is disconnected from any coordinated system of collective bargaining and it should apply the conditions of employment negotiated by subjects that do not represent it. At the same time, however, the 'migrant company' could undertake negotiations with local trade unions in order to set employment and working conditions, including wages, for the posted workers. Yet the CJEU seems to have excluded the fact that wages can be set through collective bargaining in cross-border situations.

In *Laval*, the Court discarded the mechanism provided for by the Swedish system to negotiate a collective agreement on a case-by-case basis with the 'migrant company'. In the Court's view, collective bargaining on case-by-case basis would lack the criteria of transparency capable of making such a definition 'sufficiently precise and accessible'.[632] The dynamics of collective bargaining are thus an economic cost constituting a burden for the companies that intend to provide services in the cross-border dimension.[633] In this regard, Davies has commented that the ban on collective action aimed at forcing the employer to engage in negotiations is 'a fundamental misunderstanding of the way in which collective bargaining works: it cannot be isolated from collective action in the way that the Court appears to envisage'.[634]

The application of the terms and conditions of a collective agreement to subjects crossing national borders is a particularly complex affair. It entails the knowledge on the part of the subjects concerned of the terms and conditions it has to apply (in the case of a company) or is entitled to (in the case of a worker). It also implies that the interests of those subjects are not necessarily taken into consideration by the subjects that negotiate the conditions to apply. Moreover, the complexity of the issue of cross-border collective wage setting is increased by the heterogeneity among the EU countries, in which the minimum level can be either statutorily fixed or not. In any case, company collective bargaining intervenes as a complementary mechanism in wage setting, the relevance of which might vary depending on the flexibility attributed to the company level of collective bargaining.[635] It is, indeed, common practice to delegate the definition of the applicable wage to company level bargaining, especially in the present time when the interest of the company is

[632] C-341/05 *Laval un Partneri*, para 110.

[633] In this sense also, as regards the application of the principle of proportionality to the exercise of collective labour rights, Hös (2010) 246.

[634] Davies (2008) 129.

[635] Kilpatrick (2009) 856–57.

upgraded and the industrial relations and labour market policies pivot on the company level in order to adjust the level of wages to the competitive and economic needs of the company itself. Yet the application of collective agreements to a foreign company could result in a discriminatory manner in those systems lacking *erga omnes* collective agreements.[636] The discipline of cross-border situations as emerged from the case law of the CJEU seems to favour a statutory setting of working and employment conditions, including wages, which marginalises collective bargaining. In contrast with this evolution, the Enforcement Directive introduces the faculty for the host State to request the posting company to appoint a representative for engaging in collective negotiations with national social partners. This provision might pave the way for the establishment of a cross-border scope for collective autonomy grounded on collective negotiations between the posting company and the national trade unions. However, the regulation of cross-border posting would probably prevent the definition of working and employment conditions higher than the minimum ones set by the national collective agreement and the resort to collective action would be excluded. Nevertheless, its application would empower the negotiation and conclusion of the collective agreement as an autonomous and bilateral instrument of employment regulation in the cross-border dimension.

So far, industrial relations responses to the growth of social dumping have mainly consisted in cross-border unilateral initiatives taken by the trade unions to combat the increase in cross-border movements of capital and workers, the exclusion of pay from the regulatory competences of the EU, and the establishment of a common economic and monetary policy among EU Member States.[637] Such initiatives began in the early 1990s as a response to the effects of the EU economic policy on the wage levels across the countries, and had 'the short-term goal of fighting wage dumping, and the longer-term goal of building up sufficiently robust coordination between the unions to negotiate European collective agreements'.[638]

These unilateral initiatives – aimed at coordinating, in a cross-border dimension, the wage setting mechanisms and wage levels through collective bargaining – have had a 'top-down' or centralised approach or a 'bottom-up' or decentralised approach, depending on the actors who took the initiative and the process of coordination, either the European Industry Federations (EIFs) or the national trade unions respectively.[639] The 'top-down' approach consists in the common bargaining policies and training programmes developed by EIFs in order to coordinate the actions and the bargaining strategies of the affiliated national unions in the sectors

[636] Hepple (2005) 167.

[637] See Niklas Bruun & Bob Hepple, "Economic Policy and Labour Law" in Hepple & Veneziani (2009), 31–58, 50.

[638] Anne Dufresne, "The Trade Union Response to the European Economic Governance Regime. Transnational Mobilization and Wage Coordination" (2015) 21 *Transfer*, 141–56, 146.

[639] Glassner & Pochet (2011) 14; Marginson & Sisson (2006) 106.

concerned. Although cross-border coordination of national strategies for collective bargaining is a policy that is widely adopted in several sectors,[640] the EIFs mainly involved in this process are the European Metallurgic Federation (EMF) and the European Federation of Building and Woodworkers (EFBWW), organising the metallurgic and the construction sectors respectively. The relevance of the initiatives undertaken in these two sectors by the EIFs is given by the practices they intend to counter-balance through cross-border strategies. Through its initiative, the EMF has intended to set common standards among the national unions and to benchmark the national sectoral negotiations, so as to reduce the margin of profit of multinationals in relocation and delocalisation; whereas the EFBWW's initiative has tried to better regulate the phenomenon of posting of workers by setting common standards among those countries (mostly Germany and its neighbouring countries) in order to avoid social dumping.[641]

In a sector such as the metallurgic one, the historical strength of the national unions, which has favoured the institutionalisation of cross-border networks,[642] the presence of transnational bodies, such as the EWCs, has further contributed to improving the cross-border trade union strategies, by sharing information and developing common strategies for influencing the management.[643] In the construction sector, by contrast, the EFBWW has had to deal with specific problems, chiefly related to the different union membership rates among the countries, the high mobility of single workers, and the liberalisation fostered by the EU. Therefore, the EFBWW, alongside taking initiatives to coordinate local unions, has also taken a leading role in advocating for the adoption of the directive of posting of workers.[644]

The strength and the tradition of national trade unions in certain sectors, such as the metallurgic ones, has also been the primary factor behind the emergence of 'decentralised' or 'bottom-up' cross-border initiatives of collective bargaining coordination.[645] The creation of fora for the exchange of information and results in national negotiations among the unions, in the metallurgic sector, dates back to the 1970s, although the definition of common and coordinated bargaining strategies came later in the mid-1990s as a response to the influence of the common monetary policies on wage levels.[646] These initiatives have been undertaken especially in

[640] See the tables in Marginson & Sisson (2006) 107–08.

[641] See Roland Erne, *European Unions: Labor's Quest for a Transnational Democracy* (Cornell University Press 2008) 86–94.

[642] Glassner & Pochet (2011) 15–16.

[643] See Pulignano & da Costa & Rehfeldt & Telljohann in Fairbrother & Hennebrt & Lévesque (2013).

[644] See Hans Baumann, Ernst-Ludwig Laux & Myriam Schnepf, "Collective Bargaining in the European Building Industry – European Collective Bargaining?" (1996) 2 *Transfer*, 321–33.

[645] Glassner & Pochet (2011) 15.

[646] Jochen Gollbach & Torsten Schulten, "Cross-border Collective Bargaining Networks in Europe" (2000) 6 *European Journal of Industrial Relations*, 161–79.

those contexts with the highest rates of cross-border labour mobility. For instance, the German, Austrian and Swiss trade unions in the metallurgic sectors established cross-border union networks, such as the DACH group, already prior to the 1970s with the aim of sharing strategies and practices of bargaining, but also so as to coordinate national negotiations.[647] A similar initiative was undertaken by the Nordic unions of the metal sector with the establishment already in 1972 of a cross-border network called *Nordiska Metall* including the unions of Sweden, Norway, Denmark, Iceland, Finland, and the northern regions of Germany, which in this way coordinated national demands, strategies and outcomes of collective bargaining.[648]

An interesting initiative, because of its cross-sectoral nature, is the one established by the German, the French, the Belgian, the Luxembourg and the Dutch unions in 1998, denominated the Doorn group. The network was initiated by the Belgian unions as a response to the adoption in 1996 of a Belgian law obliging them to compare the wage rises in the neighbouring countries as a basis for wage claims in national collective bargaining. The group served the purpose of coordinating the wage rises in collective agreements in order to permit a parallel improvement in the countries concerned and avoid wage competition in a region characterised by high cross-border workforce mobility. However, the coordination in the Doorn group has also gone further in respect of qualitative aspects such as working time and training.[649] Other experiences similar to the Doorn group have been established under the form of Interregional Trade Union Councils (IRTUCs), mainly operating in frontier regions and mostly involving German unions in the attempts to avoid social dumping, especially from the Eastern borders. The councils' function is 'to protect minimum wages and social standards in cross-border regions marked by considerable disparities'.[650] In this sense, since their creation, the ETUC looked very attentively to both the IRTUCs experience and the Doorn group,[651] because of the innovative nature of such initiatives as a tool for grassroots responses to supranational economic policies, as well as fora for spreading trade union cultures and favouring the organising of workers in countries or regions with weak local unions.[652]

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[647] Franz Traxler et al., "Can Cross-border Bargaining Coordination Work? Analytical Reflections and Evidence from the Metal Industry in Germany and Austria" (2008) 14 *European Journal of Industrial Relations*, 217–37.

[648] Søren Kaj Anderson, "Nordic Metal Trade Unions on the Move: Responses to Globalization and Europeanization" (2006) 12 *European Journal of Industrial Relations*, 29–47, 37–38.

[649] Anne Dufresne & Emmanuel Mermet, "Trends in Coordination of Collective Bargaining in Europe" (2002) ETUI Working Paper 2002.01.02 (E), 6–9.

[650] Nikolaus Hammer, "Cross-border Cooperation Under Asymmetry: The Case of an Interregional Trade Union Council" (2010) 16 *European Journal of Industrial Relations*, 351–67, 364.

[651] Marginson & Sisson (2006) 111.

[652] See ETUC, "Development of the Role of the IRTUCs in Strengthening Cross-border Cooperation in the Field of Collective Bargaining" (2011), available at: https://www.etuc.org/IMG/pdf/Rapport_CSIR_EN.pdf

The unilateral nature of those initiatives has been highlighted as one of the causes of their relative impact on the creation of a cross-border system of collective bargaining aiming at wage setting.[653] However, 'collective bargaining is the most consolidated and powerful institution contributing to bringing some equilibrium to unbalanced economic relations'.[654] To find a pathway for the development of cross-border collective bargaining remains the biggest challenge for collective autonomy. Unlike the sectors in which cross-border initiatives have been put in place by national unions, cross-border scenarios such as posting of workers or 'letter-box' companies, mainly occur in the service sector, in which the workforce is scattered and, consequently, union activity is more difficult. In those scenarios, the establishment of a mechanism favouring negotiations between the national union and the 'migrant company' would be a solution worth exploring. It would create a platform for collective bargaining that could accommodate the interests of both parties and therefore be in line with the foundations of collective autonomy.

4.6.4. Cross-border collective action

The issue of cross-border collective action entails an interplay between local dynamics in a global context and global dynamics in a local context. In the global context, the workplace dynamics transcend the borders of the companies and local practices interact with global actors and transnational networks in conjunction with the emergence of collective conflict.[655]

The economic dynamics of globalisation, in which multinational companies are leading actors, already brought about the emergence of cross-border workers' mobilisation and cross-border union campaigns with a view to protesting against massive layoffs due to relocation, as well as receiving better working conditions.[656] Cross-border union and workers' mobilisation has also occurred in protest against decisions taken by the EU legislator. The most famous example in this regard is perhaps the European mobilisation against the Service Directive in its 'Bolkestein version', which has led to mass demonstrations in Brussels (but also at a national level) organised by the ETUC with the participation of workers and unionists from

[653] Susanne Pernicka & Vera Glassner, "Transnational Trade Union Strategies Towards European Wage Policy: A Neo-institutional Framework" (2014) 20 *European Journal of Industrial Relations*, 317–34, 330.

[654] Sciarra in Hepple (2002) 103.

[655] Christian Lévesque et al., "Trade Union Strategies in Cross-border Actions. Articulating Institutional Specificities with Local Power Dynamics" in Fairbrother & Hennebrt & Lévesque (2013) 57–80, 65.

[656] See the overview of some international cases in Wiebke Warneck, "Transnational Collective Action – Already a Reality?" in Dorssemont & Jaspers & van Hoek (2007), 75–84.

different EU countries.[657] Other examples can be given, such as the protests of dockworkers against the attempts of the EU legislator to introduce a directive on the liberalisation of port services.[658] However, the shipping and maritime sectors have an inherently borderless character, which has contributed to making the unions in these sectors pioneers in processes of transnational and cross-border unionisation and in campaigns against social dumping practices; but it also differentiates them from the cross-border dimension considered here.[659]

The features of the cross-border dimension of the EU internal market present specific characteristics that imply a different expression of collective action dynamics. The cross-border scenarios and their regulation in EU law entail an uneven distribution of power between the social actors, an uneven pace between social and economic integration, and a competition played out over labour differentials in different geographical loci.[660] These features create a situation of conflict in relation to scenarios of delocalisation and outsourcing. The cross-border dimension appears as a flourishing context with regard to the exercise of cross-border collective action, but at the same time seems very poor in terms of concrete opportunities. On the one side, the integration of the national markets into a common market creates the conditions for the establishment of a European labour market without borders. The operations of cross-border delocalisation, outsourcing and subcontracting made through the exercise of EU-law-based economics create scenarios of potential conflict. On the other side, however, a legal protection of the cross-border exercise of collective action is underdeveloped, since, as expressed in Art 28 CFREU, it is 'squeezed' between the national legal frameworks and the EU legal system. The protection ensured under the national legal framework has to comply with the EU rules on cross-border economic freedoms. In the EU legal system, instead, its regulation is excluded from the competences of the EU; in addition, as the Monti II case has demonstrated, the national legislators seem to be jealous of their competences in this regard, so as to keep it within the boundaries of subsidiarity and therefore national competences. Although the rejection of the Monti II Regulation has probably saved the right to collective action from an excessive deference to the principle of proportionality that could have undermined its exercise, no other legal bases recognise the clash between collective action and economic freedom, i.e. no legal bases exist for the exercise of cross-border collective action. Rather, from the *Commission v France (strawberries case)* onwards, the cross-

[657] See Katarzyna Gajewska, "The Emergence of a European Labour Protest Movement?" (2008) 14 *European Journal of Industrial Relations*, 104–21, 110.

[658] Peter Turnbull, "Dockers versus the Directives. Battling Port Policy on the European Waterfront" in Kate Bronfenbrenner (ed), *Global Unions: Challenging Transnational Capital through Cross-border Campaigns* (Cornell University Press 2007) 117–36.

[659] Nathan Lillie, "Union Networks and Global Unionism in Maritime Shipping" (2005) 60 *Relations Industrielles / Industrial Relations*, 88–111; Fitzpatrick in Dorssemont & Jaspers & van Hoek (2007).

[660] Bercusson in Papadakis (2008) 139.

border exercise of collective action has been questioned in light of the exercise of cross-border economic freedoms.[661]

No other international and European sources conceive a cross-border dimension for collective action. The ILO standards, the provisions of the European Social Charter, as well as the right to collective autonomy eventually included within the scope of Art 11 ECHR, refer to national contexts and make no mention of cross-border situations.[662] A possible way forward could be the one indicated by the ILO Committees, which have strongly criticised the outcomes of the *Laval* and *Viking* disputes. Or one can stress the interpretation of the ECHR as a 'living instrument' given by the Strasbourg Court, according to which the ECHR has to be interpreted in accordance with the evolution of the socio-economic context. However, collective action still remains a very nation-based issue, confined within the legal systems of the countries, despite the cross-border reality of conflictual collective interests.

Nevertheless, the *Laval* case law implies several challenges to the national regulation of collective action. Novitz stressed the significance of these challenges, which range from the assumption that trade unions always play an organic role in collective actions (which is not the case in systems where the right to strike is primarily an individual right), to a narrow construction of the aims of collective actions (only linked to an immediate threat in order to protect the immediate workers' economic interest), to the image of collective action as a last resort to be undertaken after negotiations have failed (thus placing procedural requirements that might not be conceived in certain national systems), to the recognition of the court as a suitable locus for the application of proportionality test.[663]

The dynamics of the cross-border scenarios have the potential to infringe some of the basic and traditional features of collective action. For instance, as already highlighted, the exercise of economic freedoms in the cross-border dimension fosters practices of social dumping and regulatory competition, which have the effects of spoiling the historical ground in terms of an effective exercise of collective action, i.e. the collective solidarity between workers.[664] The potential 'race to the bottom' brought about by social dumping, indeed, set the workers of different countries against each other, as happened in the British protests against posted workers. The collective interest of the host country workers, i.e. to avoid the

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[661] Teun Jaspers, "The Right to Collective Action in European Law" in Dorssemont, Jaspers & van Hoek (2007) 23–74, 59.

[662] Hepple (2005) 191. Even though Hepple also notes that the ILO standards for the exercise of collective action as defined by the CEACR and CFA might also be applied in cross-border situations, Ibid., 189.

[663] Tonia Novitz, "The Impact of *Viking* and *Laval*. Contesting the Social Function and Legal Regulation of the Right to Strike" in Ales & Novitz (2010) 251–73, 259–68.

[664] Bob Hepple, "Enforcement: The Law and Politics of Cooperation and Compliance" in Hepple (2002) 238–57, 253.

deterioration of working and employment conditions due to social dumping, would be in conflict with the collective interest of the employees of the 'migrant company', i.e. to receive employment and therefore a salary. Similarly, also in case of cross-border exercise of freedom of establishment, the collective interest of the employee of the company delocalising in another country might conflict with the collective interest of the workers of the country in which the activity is delocalised, since the latter would benefit from the delocalisation in terms of employment opportunities.

Further, the cross-border situations establish asymmetrical industrial relations in which the classical exercise of strike loses its significance. If the classical understanding of strike action concerns the collective withdrawal from work by the employees for the protection of their economic and social interests with a view to hampering the production of the company,[665] such a situation would be impossible in cases of cross-border provision of services in which the host State workers would undertake conflictual actions against a company that does not employ them. These forms of collective action are, indeed, common in systems such as the Swedish one, in which the primary aim historically has been to avoid social dumping and downward competition between workers – also within the national borders.

A strike action would still be possible in cases of freedom of establishment entailing a delocalisation of the economic activity. The employees of the 'migrant company' would withdraw from work to impede the delocalisation, but again the effectiveness of such an action might be curtailed by the decision of the management to actually reduce production in the worksite and move abroad. In this sense, a collective action in the cross-border dimension would be most likely undertaken in the form of a boycott, also in the more aggressive form of a blockade of the worksite, and secondary or sympathy actions.[666] These were, indeed, the forms of collective action undertaken by the Swedish unions in the Laval dispute.[667] However, the legitimacy of these types of collective action is not universally recognised because of the different rules at the national level, but also at the supranational level, as demonstrated by the *RMT* case dealt with by the Strasbourg Court.

The boycotts can be defined as actions 'deliberately aimed at damaging a person who is not the employer of the worker engaged in the boycott action' and are characterised 'as actions undertaken by economic actors (workers and/or trade unions) not having a (direct) contractual relation with the enterprise and which are detrimental to the proper functioning of the enterprise'.[668] Thus, the boycott is undertaken between subjects who are not bound by contractual relationships, either individual or collective. It can therefore be an effective tool in cross-border

[665] See also Antoine T.J.M. Jacobs, "The Law of Strikes and Lockouts" in Blanpain (2010) 659–720, 664.

[666] In this sense also Antonio Ojeda-Avilés, *Transnational Labour Law* (Kluwer 2014) 261.

[667] See Ahlberg & Bruun & Malmberg (2006) 159.

[668] Filip Dorssemont, "Labour Law Issue of Transnational Collective Action – Comparative Report" in Dorssemont, Jaspers & van Hoek (2007) 245–73, 264.

situations concerning provision of services because of the intent to hamper the economic links of the targeted company.[669] The effectiveness of boycotts can also derive from the potential to extend the actions beyond the boundaries of the labour dispute by involving larger communities and by bringing about political implications.[670]

As with the boycott, the secondary or sympathy action concerns subjects who are not bound by any contractual relationship. This type of action can be defined as 'industrial action which may not be in the immediate or direct interests of the workers concerned, and which is taken to demonstrate support for other workers engaged in a dispute with another employer or with another subsidiary of the same employer'.[671] The ILO CEACR already in 1994 recognised the relevance of these types of actions in relation to 'the move towards the concentration of enterprises, the globalization of the economy and the delocalization of work centres', so as to conclude that 'a general prohibition on sympathy strikes could lead to abuse and that workers should be able to take such action, provided the initial strike they are supporting is itself lawful'.[672] Further, the ECSR has recently reiterated that excessive limitations to the right to undertake secondary actions cannot be in compliance with the ESC due to the new forms of employment relationships and the scattering of the workforce brought about by the dynamics of the global economy.[673] Yet the regulation of sympathy actions is subject to very different rules depending on the national contexts and models of industrial relations systems.[674] In the cross-border dimension, however, the issue of sympathy actions might come up against some problems due to the fact that, by their inception, these actions are linked to a lawful primary action undertaken by workers against their direct employer.[675] Sympathy actions would thus be possible in cases, for instance, of cross-border delocalisation and outsourcing, but not in cases in which a 'migrant company' providing services should be forced to apply or sign a collective agreement. In this latter case, as mentioned above, the collective action would not regard the direct employer of the host State workers, and further the workers might not have a primary economic interest in undertaking the collective action, so that the legitimacy and lawfulness of a secondary action might be questionable under

669 Dorssemont in Dorssemont & Jaspers & van Hoek (2007) 265.

670 See the cases concerning Latin America in Ojeda-Avilés (2014) 270–72.

671 Paul Germanotta & Tonia Novitz, "Globalisation and the Right to Strike: The Case for European-level Protection of Secondary Action" (2002) 18 *The International Journal of Comparative Labour Law and Industrial Relations*, 67–82, 68.

672 ILO Freedom of association and collective bargaining. Report presented at 81st session of International Labour Conference, Geneva, 1994, 74.

673 ECSR, Conclusion XX-3 (UK), 2014.

674 Jacobs in Blanpain (2010) 676–77.

675 See Jaspers in Dorssemont & Jaspers & van Hoek (2007) 44–45.

national law.[676] Yet sympathy actions can be a very effective tool in cross-border situations: the employers suffering a strike by their employees who are in a sympathy strike might exert pressures on the targeted company in order to accommodate the dispute. It has also been argued that the introduction of a right to secondary action in the EU legal system would contribute to completing the construction of an internal market and achieving proper dynamics of industrial relations, including in the mechanisms of social dialogue.[677] However, for these forms of collective action to be effective in the cross-border dimension, there is the need for a certain degree of solidarity between the workers and for an advanced degree of protection from the legal system, whereas the EU framework seems to go in the opposite direction.[678]

Finally, the dynamics of cross-border situations also break the traditional distinction between 'disputes of rights' and 'disputes of interests', i.e. disputes 'concerning the interpretation and application of existing contractual rights' and disputes that 'relate to changes in the establishment of collective rules and require conflicting economic interests to be reconciled'.[679] The entitlement to certain employment conditions (a right) of the posted workers corresponds to the interest of the workers of the country of destination to impede social dumping situations. A dispute between a 'migrant company' and the national trade union is primarily a dispute of interests between two subjects that are not bound by a contractual relationship. Yet the case law of the CJEU has excluded that the determination of the conditions to apply to cross-border posted workers can be negotiated through collective bargaining on a case-by-case basis, unless so decided by the 'migrant company'. In this sense, the classical method to solve a dispute of interests, i.e. collective bargaining, is denied. This also implies that the collective interest of the workers cannot be formed around the process of negotiations and therefore be satisfied through collective bargaining and the conclusion of a collective agreement. Yet a definition of conflict of interest intended as arising in 'areas where no valid collective agreement applies',[680] cannot apply to the cross-border dimension either,

[676] Dorssemont in Dorssemont & Jaspers & van Hoek (2007) 260–61.

[677] Germanotta & Novitz (2002) 78–80.

[678] As Germanotta reminds us: 'Strikes, boycotts and blockades sought or carried out for purposes of worker solidarity need to be accorded strict and unconditional protection. Workers should not, as they often do now, have to embark upon necessary but legally unprotected or prohibited solidarity action, and then to negotiate their way out trouble as part of a settlement agreement, or otherwise to rely upon the existence of chance circumstances that would permit them lawfully to engage in sympathy strikes or boycotts for other, independent reasons. Solidarity action should be freed from the constraints of legal rules that draw artificial boundaries, defined, for example, by the involvement of a common or "non-neutral" employer or a common trade union organisation or trade union affiliation, or by a direct or immediate connection or interest in the matter that gives rise to the primary dispute', see Paul Germanotta, "Solidarity Action and International Law" (2002) 9 *International Union Rights*, 22–23, 23.

[679] Jacobs in Blanpain (2010) 672.

[680] Ruth Nielsen, *EU Labour Law* (Djøf 2013) 163.

because the issue at stake is precisely the application of a collective agreement by the 'migrant company'. However, a dispute between a 'migrant company' and a host State union cannot be a dispute of rights either, because there are no contractual obligations binding the two parties. Nor does the directive on posting of workers entitle the union to a right to see the host State conditions applied to the posted worker, or to conclude a collective agreement with the 'migrant company'. It only entitles the posted workers to receive equal (or equivalent, in case of home country conditions) minimum conditions, no matter how and where they are stipulated. The collective interest of a host State union would therefore regard the application of an already existing collective agreement by the 'migrant company' in order to expose the domestic labour market to social dumping. In the cross-border dimension, the line between interests and rights hence becomes blurred.

4.6.5. Decentralisation of collective bargaining and the cross-border dimension

The decentralisation of collective bargaining empowering the company level of negotiations is a long-lasting trend in the European countries. It has, however, accelerated in the aftermath of the crisis by means of the measures adopted to face its effects supported by an ideological economic doctrine pushing towards the flexibilisation of the wage setting mechanism and the decline in collective bargaining coverage.[681] On the one side, the decentralisation of collective bargaining was set among the priorities by the instruments adopted at EU level to deal with the crisis and the economic imbalance of the Member States.[682] On the other side, it formed a part of deals for the countries at risk of default in order to receive a bail-out loan.[683] The consequent effect has been a decentralisation trend in almost all EU countries. Nevertheless, the differences between systems of industrial relations persist and different paths toward decentralisation have been taken in the different countries.[684]

The decentralisation of collective bargaining represents a major challenge to the territorial application of labour standards. To empower the company level of negotiations to adopt collective agreements derogating from the terms set in the

[681] These issues are listed among the policy recommendations issued by the DG ECOFIN addressing the Member States as needed for facing the crisis, in particular the flexibilisation of wage setting, deemed as the way forward to restore the competitiveness of labour market, see European Commission – DG for Economic and Financial Affairs, "Labour Market Developments in Europe 2012" (2012) 52.

[682] See Rocca (2015) 312.

[683] See the contributions in Koukiadaki & Távora & Martínez Lucio (2016); Simon Deakin & Aristea Koukiadaki, "The Sovereign Debt Crisis and the Evolution of Labour Law in Europe" in Countouris & Freedland (2013) 163–88.

[684] Antoine Jacobs, "Decentralisation of Labour Law Standard Setting and the Financial Crisis" in Bruun & Lörcher & Schömann (2014) 171–92, 186–87.

national ones (and in some cases also from statutory provisions) contributes toward differentiating the labour conditions within the same sectors in the same labour market. The contemporary economic processes of outsourcing and subcontracting, however, intensify the fragmentation of labour standards and even bring it into the workplace. To resort to subcontracting in certain industries is not a new issue, which means that the presence in the same workplace of workers having different employers is not necessarily a consequence of globalisation and borderless markets. Yet, if in the past this practice was mainly the result of the need for specialised and high-skilled workers to perform certain tasks in particular industries,[685] in the present economy both subcontracting and outsourcing are mainly led by the need for companies to reduce production costs, including the cost of labour, and they are common practice in all sectors.[686]

The practice of cross-border posting, however, brings the fragmentation of labour standards within the same workplace to its peak.[687] The Laval-quartet case law sharpens this effect by overturning the aim of the directive on posting from an instrument intended to avoid the differentiation in employment conditions between home country and host country workers, to one that protects the differential gaps in the internal market and the fragmentation of employment standards. A local worker can perform her job alongside a posted worker, and they can have different employment and working conditions due to the fact that the former is under the national law regime, which entails being subject to both the statutory and collective bargaining regimes, whereas the posted worker is, in principle, subject to the minimum standards regime of the host country, and if the home country conditions match the minimum regime, then the posted worker would be under the home country regime.[688]

By adding the element of collective bargaining decentralisation to the picture, the fragmentation of employment standards may even arrive at a paradox. According to the rules on cross-border posting, the posted workers should receive the minimum conditions set either in legislation or in the collective agreement universally or generally applicable in the sector concerned. Yet the dynamics of decentralisation have established mechanisms according to which company collective agreements can derogate to sectoral collective agreements and to the statutory provisions. The inherent status of company collective agreement entails that its terms are applied

[685] Weil highlights how subcontracting was a widespread practice already in late 1800s especially in the construction and mine sectors, see David Weil, *The Fissured Workplace: Why Work Became so Bad for so Many and What can be Done to Improve it* (Harvard University Press 2014) 99.

[686] See Stefan Kirchner, "Who Performs Outsourcing? A Cross-national Comparison of Companies in the EU-28" and Luca Giustiniano et al., "Business Outcomes of Outsourcing: Lessons from Management Research" in Drahokoupil (2015) 25–45, and 47–65.

[687] Lillie (2012).

[688] Rocca underlines how the interpretation given by the CJEU on the directive on posting contributes in fostering the competition between workers and in putting pressure on wages and working conditions, see Rocca (2015) 327.

only to the workforce of the company, which automatically would exclude it from the definition of a collective agreement set in the directive on posting in terms of being deemed a source of employment conditions for cross-border posted workers. The EU regulation of cross-border posting highlights the contradiction between empowering the role and scope of national collective bargaining at sectoral level as the main source of employment regulations in cross-border situations, and the trajectories of decentralisation undertaken by (and imposed on) the systems of collective bargaining in the EU Member States. If company collective bargaining is praised for its ability to adjust working and employment conditions to the contingent needs of the companies, in cross-border situations of posting its role is denied and centralised collective bargaining is privileged. In this sense, a posted worker would be excluded from the application of the terms of the company collective agreement, which would instead be applied to the local workers. Therefore, paradoxically, a posted worker might receive higher working and employment conditions than a local worker employed in the same worksite who is instead subject to a company collective agreement deviating *in peius* from the sectoral one.

This is one of the aspects of the regulation of cross-border posting that the 2016 proposal intends to remedy – albeit only within the context of subcontracting. The proposed amendment introduces the faculty for the States to oblige possible cross-border subcontractors to apply the same employment conditions as in cases of national subcontracting also set in non-universally applicable collective agreement insofar as the obligation complies with the principles of non-discrimination and proportionality.[689] Such a provision would require subcontractors to comply with the terms set by company collective agreements which the contractor is bound by. In this sense, the company collective agreement would receive a further legitimisation as the lynchpin of the collective bargaining system, but its evolution would be harmonised with the regulation of cross-border posting, so as to contrast with the 'fissurisation' of the workplace stemming from EU law.[690] However, the option to make this provision mandatory in light of the principle of equal pay for equal work also at company level, according to which posted workers employed by a subcontractor shall enjoy the same wage as if they were employed by the main contractor established in the host State, is discarded in the Impact Assessment Study because 'it risks failing the test of proportionality and compatibility with the Internal Market, as it would create more obligation on companies posting workers from other Member States than on local companies in the host Member State'.[691]

The cross-border posting and the decentralisation of collective bargaining are both processes leading towards a fragmentation of labour and the dismantling of uniform labour relations within the workplace because of the different regimes the

[689] COM(2016) 128 final, 7.

[690] The reference is again to Weil (2014).

[691] See SWD(2016) 52 final, 27.

workers employed in the same worksite might be subject to.[692] Moreover, these practices push forward the erosion of multi-employer collective bargaining by confining labour relations within the space of a single company.[693] From the perspective of collective autonomy, the combination of these practices undermines the uniformity of a collective interest on the workers' side. For instance, in the German metal sector, company collective bargaining that aims to avoid the closure of establishments (so-called concession bargaining) has made the interests of the management and of the long-term employees converge and has been used as a way to secure the employment of long-term employees to the detriment of the so-called 'contingent workers',[694] which the cross-border posted worker can be seen to be part of, mainly employed through work agencies.[695] However, the interplay between the deregulatory collective bargaining decentralisation, which allows the employer to negotiate specific wage levels with the company employees' representatives,[696] and the practice of cross-border posting might lead to a rethinking of the classical distinction *insiders/outsiders* in collective bargaining.[697] It would be possible to speculate whether an employer might find it more convenient to negotiate a company collective agreement, perhaps even with a non-unionised employees' representative body, derogating from statutory provisions and higher-level collective agreement as regards the levels of wages and other working conditions.

4.7. Concluding remarks: cross-border perspectives

The analysis of this chapter has explored the evolution of collective autonomy and collective bargaining in the cross-border dimension of the EU internal market. It has highlighted the legal foundations of collective autonomy in EU law, the implications deriving from the exercise of the economic freedoms of establishment and providing

[692] In this regard, Lillie & Wagner in Drahokoupil (2015) 171–72.

[693] Paul Marginson, "Coordinated Bargaining in Europe: From Incremental Corrosion to Frontal Assault?" (2015) 21 *European Journal of Industrial Relations*, 97–114.

[694] Edmund Heery, "Trade Unions and Contingent Labour: Scale and Method" (2009) 2 *Cambridge Journal of Regions, Economy and Society*, 429–42.

[695] However, the case study refers not strictly to cross-border posted workers, but only to temporary agency workers in general, see Chiara Benassi & Lisa Dorigatti, "Straight to the Core – Explaining Union Responses to the Causalization of Work: The IG Metall Campaign for Agency Workers" (2015) 53 *British Journal of Industrial Relations*, 533–55, 548.

[696] See Maarten Keune, "Decentralizing Wage Setting in Time of Crisis? The Regulation and Use of Wage-related Derogation Clauses in Seven European Countries" (2011) 2 *European Labour Law Journal*, 86–95.

[697] On the issue, Colin Crouch, "Labour Market Governance and the Creation of Outsiders" (2015) 53 *British Journal of Industrial Relations*, 27–48, 28–30.

services as protected by EU law, and the transformation of the basic features of collective autonomy in the cross-border scenarios.

In the EU legal system, the economic freedoms of establishment and providing services are the cornerstone of the integration of the national markets into the internal market. These freedoms are both the pillars that underpin the construction of the internal market and subjective rights to which the companies are entitled. Accordingly, the CJEU's case law 'evinces a tendency towards interpreting the fundamental freedoms not merely as exponents of free trade but as the normative expressions of a European economic constitution'.[698] The economic freedoms constitute the foundations of the 'genuine internal market' envisioned by the CJEU in its case law, whose construction requires the abolition of any restriction to the cross-border movement of economic factors. The application of restrictions in cross-border situations shall be justified according to the aim pursued and proportional to their effect. The understanding of restrictions, however, has gone so far as to include collective labour rights and the national systems of industrial relations. Yet, in light of the EU framework for the exercise of economic freedoms, the 'ultra-liberal turn of the Court of Justice'[699] in the Laval-quartet cases cannot be seen as a surprise, but rather as a natural outcome of the EU's legal dynamics.

The EU internal market is characterised by different social and labour law regimes among the countries.[700] As a matter of fact, the 2004 and 2007 enlargement of the EU has involved countries having lower social and labour standards.[701] In such a context, the exercise of the cross-border economic freedoms brings about industrial relations dynamics that challenge the foundations of collective autonomy from different angles by sharpening the fragmentation of social and labour standards in the EU internal market and producing an ensuing effect of social dumping. From the perspective of collective autonomy, these dynamics set the basis for the emergence of a new dimension.

In the case of the freedom of establishment, the 'migrant company' moving from one country to another in order to establish itself in the host State and pursue there an economic activity would be considered as being assimilated to the host State's legal system, which would include the collective labour law and industrial relations systems. But the freedom of establishment entails the abolition on restrictions to the 'departure' of the migrant company in order to relocate its activities to another country. In this sense, the EU regulation of establishment aims at eliminating and prohibiting restrictions deriving from national law that might obstruct or hinder the relocation. On this ground, a collective action that aims to impede relocation (or

[698] Tridimas (2007) 213–14.

[699] Supiot in Moreau (2011) 296.

[700] Stéphane Lalanne, "Posting of Workers, EU Enlargement and the Globalization of Trade in Services" (2011) 150 *International Labour Review*, 211–34, 218.

[701] See Maarten Keune, "EU Enlargement and Social Standards: Exporting the European Social Model?" (2008) ETUI Working Paper 2008.01.

delocalisation) might be viewed as hindering the company's freedom to decide where to locate its economic activity. A similar effect could be attributed to the obligation to comply with collectively regulated working and employment conditions.[702] At the same time, the exercise of freedom of establishment could be used by companies, usually those with a multinational or transnational outreach,[703] as a threat in the phases of negotiations with the union counterpart.[704] Similarly, companies could use the exercise of the freedom of establishment to escape certain home State regulation concerning, for instance, co-determination or collective bargaining rules.[705] In general, the *Viking* ruling pertains to the attribution of horizontal direct effect to the provisions of freedom of establishment, as well as the recognition of collective autonomy as private governance hindering the exercise of such cross-border economic freedom. In this regard, Schepel talks about 'constitutionalized private law', whose recognition 'in no way "solves" the conflict between "liberal" and "social" values in the EU's "highly competitive social market economy": it merely moves that debate to higher levels of complexity and leaves the value judgment necessary to weigh and balance values in specific cases of conflict to courts'.[706]

In the case of freedom to provide services, the case law of the CJEU has evolved from the acknowledgement of the possibility for Member States to extend the national collective agreements to the posted workers (*Rush Portuguesa*) to the recognition that the posting company can apply the working and employment conditions set in the home country if they respect the minimum conditions of the host country (*Laval*). This conclusion brings about consequences for the domestic system of industrial relations. If the EU regulation of these economic activities allows the service providers and the posting companies to 'export' the home State conditions of employment, the effect is to legitimise practices of social dumping by gaining competitive advantages on the basis of lower labour costs to the detriment of the national social and industrial relations systems.[707]

According to the *Viking* and *Laval* case law, the compliance with host State labour standards and conditions of employment constitutes a limitation to the principle of free competition in the European internal market. This paradigm entails that the two

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[702] Adams and Deaking point out that the *Laval* case could have been treated as concerning freedom of establishment rather than of providing services as the workers were posted from Latvia to a subsidiary of Laval established in Sweden, see Adams & Deakin in Arnull & Chalmers (2015) 554, note 76.

[703] See Béla Galgóczi, Maarten Keune & Andrew Watt, "Relocation: Challenges of European Trade Unions" (2007) ETUI working Paper 2007.03.

[704] This practice is stigmatised by the 1977 (2006) ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.

[705] Adams & Deakin in Arnull & Chalmers (2015) 547.

[706] Schepel (2013) 1224.

[707] Countouris & Engblom in Freedland & Prassl (2014), 286.

pillars of collective autonomy – collective bargaining and collective action – challenges the exercise of economic freedoms in the internal market because of the restrictive extent that both dynamics have. On the one hand, the application of the national collective agreement entails that the foreign company loses its competitive advantage on labour costs. On the other hand, being subject to a collective action that aims to prevent, impede or even negotiate with a union the conditions for the exercise of cross-border economic freedoms constitutes an economic cost for the company. Collective bargaining (as well as collective action) is, by definition and from its inception, an instrument for the regulation of competition.[708] Its functioning cannot be justified simply because it pursues social objectives. It appears difficult to detach the labour market from the market in general, as if collective bargaining would not be part and parcel of an efficient functioning of the market itself preventing unfair competition.[709] A 'genuine internal market' would require the uniformity of social and labour standards, in order to ensure that all economic actors participate in the market under the same conditions, rather than receiving competitive advantages from differential gaps.[710] The regulation of the cross-border exercise of the economic freedoms, instead, seems to exacerbate the fragmentation by offering opportunities of competitive advantage stemming from the gaps in labour and employment standards, i.e. from social dumping.

The cross-border scenarios involve a plurality of actors having different interests and expectations – including companies, workers, and the States. These subjects are all 'national' rather than 'supranational' or 'transnational'. They belong and are subject to different labour law and industrial relations regimes. The interactions between these actors bring about the almost inevitable rise of conflicts, which the Court indicates to be solved in favour of the exercise of economic freedoms. The CJEU's case law points to collective autonomy as hampering the core of economic freedoms because it constitutes a restriction to the enjoyment of differentials in labour and employment conditions between EU countries. However, the inverse reasoning is also valid: the exercise of cross-border economic freedoms challenges the two pillars of collective autonomy because it marginalises national collective bargaining and because it reduces collective action to a protective and protectionist instrument.

The interplay between the EU framework and the national frameworks leads one to question the basic features of the dynamics of collective bargaining as they have been understood and developed in the national contexts. By restricting the exercise

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[708] On the economic nature of collective labour rights, see Vincenzo Bavaro & Vincenzo Pietrogiovanni, "Questioning the Balance between Economic Freedoms and Social Rights: The Collective Labour Freedoms" (forthcoming 2018).

[709] Bercusson (2007) 290–94.

[710] Simon Deakin, "Two Types of Regulatory Competition: Competitive Federalism versus Reflexive Harmonisation. A Law and Economic Perspective on *Centros*" (1999) 2 *Cambridge Yearbook of European Legal Studies*, 231–60, 236.

of collective labour rights, collective autonomy is restricted and therefore confined to national boundaries. The company-level of collective labour relations is the key level in the cross-border dimension because the dynamics relate to the 'migrant company', which is the main actor. The developments in EU law embrace this view. On the one side, the Enforcement Directive introduces the faculty to demand that the posting company appoint a representative for engaging in negotiations with national trade unions – but also with employers' associations. This provision set the basis for an attempt to reintroduce the 'migrant company' into an industrial relations framework by, however, legitimising collective bargaining in the cross-border dimension. On the other side, the 2016 proposal sets forth to extend company collective agreements to subcontractors in the context of cross-border posting so as to ensure a principle of 'equal pay for equal work in the same place' and align cross-border dynamics with decentralisation trends.

Yet cross-border labour mobility challenges the original principles of trade unionism: solidarity and concentration of workforce, so that the union is at the crossroads between protectionist and protective attitudes. Moreover, the relevance of collective bargaining is questioned in the cross-border dimension, so that their dynamics are relegated within the borders of the national frameworks and the attempts to overcome them are unilateral from the unions' side. In the context of widespread decentralisation of collective bargaining, then, the issue of the cross-border exercise of economic freedoms adds a further aspect of fragmentation of labour standards and employment conditions. Finally, the legal regulation of collective action in cross-border situations re-shapes its exercise and brings about the necessity to conceive of new forms of conflict that go beyond traditional strike actions.

These aspects lead to the marginalisation of collective autonomy in the regulation of the EU internal market and to the abdication of trade unions from their historical role. Already in the 1970s Lord Wedderburn, in analysing the effect of multinational companies on the dynamics of collective labour law and industrial relations, warned that 'the international function of the trade union movement as a countervailing power to management in the multi-national enterprise demands recognition by *national* systems of labour law of a right to take collective action in support of industrial action in other countries against companies which are, in an economic sense, part of the same unit of internationalised capital'.[711] The increasingly intertwined economic dynamics within the EU internal market probably require that this warning be transposed to the EU level, so as to give full recognition, in the EU legal system, to the exercise of collective labour rights, i.e. to collective autonomy, in cross-border situations, which would not be subordinated to compliance with the economic needs of companies.

[711] K.W. Wedderburn, "Multi-national Enterprise and National Labour Law" (1972) 12 *Industrial Law Journal*, 12–19, 19 (emphasis in the original).

5.Concluding analysis

5.1. A three-fold perspective

From the analysis of theoretical, comparative and cross-border perspectives, collective autonomy stands as a bilateral normative system grounded on collective bargaining supported by collective action. These are the instruments that the workers have at their disposal to collectively correct the inherently asymmetrical and unbalanced relationship between the employee and the employer. But the three-fold perspective offered herein has also shown that the functioning of collective autonomy and collective bargaining appears to be challenged by the changing landscape of industrial relations in Europe.

In the previous chapters, collective autonomy and collective bargaining have been analysed with regard to their relationship with the legal system within a single perspective. In this concluding chapter, the intention is to conduct a multifaceted and integrated analysis of the notion, function and exercise of collective autonomy and collective bargaining, and of the challenges they present both at a national level and in the cross-border dimension of the European Union. In contemporary Europe, collective autonomy and collective bargaining appear to be in trouble. In the context of EU integration, collective autonomy is cast aside in favour of economic objectives; in the national contexts, the systems of collective bargaining are subject to decentralisation trends that alter the historical role of collective bargaining itself and remodel its core features.[1]

The conclusive analysis builds on the discussions and findings that have emerged from each of the perspectives explored thus far. A comprehensive legal study on collective autonomy and collective bargaining cannot overlook the fact that the conceptual and theoretical understanding defined by leading scholars in the field of labour law and industrial relations has to be integrated with the rules set by international and supranational labour law sources. Furthermore, it cannot disregard the national contexts, which constitute the primary loci in which collective bargaining has been established and industrial relations have found a legal

[1] See Isabelle Schömann, "Reforms of Collective Labour Law in Time of Crisis: Towards a New Landscape for Industrial Relations in the European Union?" in Nicole Busby, Douglas Brodie & Rebecca Zahn (eds), *The Future Regulation of Work: New Concepts, New Paradigms* (Palgrave 2016) 145–63, 148–49.

translation. Moreover, it ought to take into account that the project and process of European integration have established an internal market in which socio-economic dynamics of collective bargaining interact with the legal regulation in a cross-border dimension. Therefore, the theoretical, comparative, and cross-border perspectives provide the researcher with the analytical instruments needed in order to understand and evaluate the challenges that collective autonomy and collective bargaining are facing in contemporary Europe.

This closing chapter is structured as follows: Section 5.2 defines the foundations of collective autonomy and collective bargaining as multifaceted phenomena; Section 5.3 highlights the challenges that collective autonomy and collective bargaining deal with; and finally, Section 5.4 explores the prospects for collective autonomy in contemporary Europe and illustrates the relevance of discussing collective autonomy in a cross-border dimension.

5.2. Collective autonomy as a multifaceted phenomenon

5.2.1. The notion and function of collective autonomy and collective bargaining

Collective bargaining is primarily a socio-economic phenomenon. It arose in the aftermath of the Industrial Revolution as a dynamic of interaction between trade unions, representing the workers, and the employer. These dynamics progressively developed into industrial relations systems, in which the employers (and the employers' associations), the trade unions and the State interact to regulate the labour market. In this context, collective bargaining constituted the process of jointly regulating the conditions of work and employment. This 'operational' or 'functional' definition of collective bargaining represents the common feature of the different industrial relations theories considered in this work. The so-called 'pluralist school' of industrial relations represented by Flanders and Clegg emphasises this task of collective bargaining, but it also situates it within the wider social context by highlighting that collective bargaining is also the process through which the collective actors 'raise the voice' of their members in the political debate by pursuing their collective interests.

But collective bargaining is also a dynamic of power in itself. It is the process through which the collective subjects attempt to exercise power over each other. From the employer's side, the aim is to reaffirm the power on the workforce; from the employees' side, the purpose of bargaining collectively with the employer is to compress and limit the power stemming from the social structure of the employment

relationship. The power relationship is central to the industrial relations analysis. In Dunlop's view, collective bargaining reflects the distribution of power within society. The outcomes of collective bargaining will tend to reflect societal power structures. Hyman and Crouch base their analysis on conflict and power. These two aspects are intertwined with collective bargaining: conflict is its engine, whereas power is its external but constitutive elements. In both understandings, collective bargaining is a power-related process of interaction between employers and employees. The function of collective bargaining is therefore to allocate power between the subjects participating in the negotiations.

In labour law theories, the common denominator between the theories developed by Sinzheimer, Kahn-Freund, Santoro Passarelli and Giugni concerns the recognition of the normative power of industrial relations expressed through collective bargaining. This power results in the collective agreement, which states the norms that regulate both the individual and the collective relationships between the employer(s), the workers and the union(s). In this sense, collective bargaining is conceived as the process through which the organisations representing the social powers of labour and capital set the norms to be applied in their reciprocal relationships and in the individual employment relationships between the subjects they represent.

The discourse on global labour rights reflects these elements. The international labour law sources promote the autonomy and independence of industrial relations and of their actors from the law. Yet the law, i.e. the legal systems of the States, have to protect the exercise of collective autonomy under the form of the labour rights of trade union association, collective bargaining, and collective action. The recognition of the socio-economic nature of collective autonomy passes through the recognition of the establishment of trade unions as a right of the workers to protect their collective interests, as well as the recognition of the collective agreement as the autonomous and bilateral instrument of regulation, and of collective action as a legitimate form of action for the protection of the collective interest. Thus, the discourse of global labour rights contributes to the definition of the notion and function of collective autonomy and collective bargaining by highlighting their scope as part of the individual and collective rights of the workers.

In the conceptual terms that emerged from the discussion of the theoretical perspectives, collective autonomy is the legal understanding of the scope of collective bargaining, which constitutes the primary socio-economic expression of the activity of social groups interacting in the labour market. The establishment of collective bargaining and of industrial relations dynamics are not dependent on the existence of a legal framework. But the conceptual understanding of collective autonomy does depend on the relationship between industrial relations and the law. The need for the State to recognise collective bargaining as the regulatory process of the labour market, constitutes the cornerstone of the definition of collective autonomy. Its notion refers to the autonomous development of the dynamics related

to industrial relations within the labour market; it also indicates the need for the State to refrain from interfering in the industrial relations sphere. The function of collective autonomy consists in ensuring that the interaction between the organised workers and the employer(s) occurs on an equitable basis and without reciprocal interferences as well as from the State. To this end, the role of the State is to set a legal framework that protects the possibility to exercise collective labour rights of association and organisation, of collective bargaining and of collective action.

5.2.2. The exercise of collective autonomy and collective bargaining

Autonomy and independence represent the main elements of the exercise of collective autonomy and collective bargaining. The features of the legal framework are of central relevance in this regard, since they can determine certain paths or patterns of collective autonomy and collective bargaining. The autonomy of collective bargaining is ensured by the legal framework that shall guarantee its function.

In order to abide by the notion and function of collective autonomy, the legal system has to ensure an exercise of collective bargaining that safeguards its nature as an instrument for defending and promoting an autonomous and collective socio-economic interest. In other words, the autonomy of collective bargaining is preserved if the legal system recognises it as a socio-economic phenomenon that emerged from the labour market and evolved in relation with socio-economic changes. Overall, the exercise of collective autonomy has to be secure in respect of the deployment of the conflict(s) of interests within the labour market. A juridification of industrial relations that annuls or denies the existence and the exercise of such a conflict – as occurs, for instance, in corporatist regimes – would contravene the foundational notion and function of collective autonomy. If the collective interests are nullified in the name of a distorted view of a supreme socio-economic interest, the autonomy of industrial relations is suppressed, along with the free and voluntary exercise of collective labour rights.

In relation to the definition of its conceptual foundations, collective autonomy should function as a mechanism underpinned by legal regulation that preserves the right for collective conflict to be pursued. Once the legal system has recognised the normative power of collective bargaining, it must ensure that such a regulatory mechanism is performed without interferences and on conditions of reciprocity. The equality of the collective bargaining parties is the result of a re-balancing process aimed at defusing the unilateral power of the employer over the individual workers. In this sense, Simitis's wide analysis of the processes of juridification of labour relations pinpoints that 'statutory regulations guarantee the necessary uniformity' in

relation to the interaction between social actors in the labour market.[2] The ultimate recognition of collective autonomy by the legal system comes by way of the provision of mechanisms for ensuring its effectiveness without impairing its autonomy.

The safeguarding of the collective interests of workers and employers and the socio-economic nature of collective bargaining are reflected in the European and international labour law sources. From this perspective, collective bargaining constitutes a labour right that can be exercised both by the individual worker and by the trade union. As for the individual worker, the right to collective bargaining is the right to be represented by a trade union in collective negotiations with the employer, as well as the right to enjoy the conditions set in a collective agreement. As for the trade union, the right to collective bargaining is the right to participate in the definition of the rules governing the labour market, in addition to the right to represent its members and to stand before an employer.

The features of collective autonomy and collective bargaining outlined in the analysis of labour law and industrial relations theories are reflected in the national contexts. In other words, the national contexts – specifically, the Italian and the Swedish contexts – apply, comply with, and reflect the conceptual elements developed in the theories on collective autonomy and collective bargaining. This is, of course, due to the fact that those theories have been outlined on the basis of the observation of the national contexts. Nevertheless, it is also true that the national developments have been influenced by the theoretical discourses on collective autonomy and collective bargaining. For instance, in Italy, the evolution of collective bargaining has been influenced by the theory of *autonomia privata collettiva* developed by Santoro Passarelli. His conceptual understanding of collective autonomy as private autonomy influenced the judiciary in applying private law institutions to collective bargaining. Giugni's theory of *ordinamento intersindacale* has instead influenced the attitude of the political actors and of the State towards industrial relations.[3] In Sweden, the pragmatic approach to industrial relations adopted by the labour market parties has influenced the State's attitude towards collective bargaining. The State has ensured and protected the voluntarism of the parties in engaging in collective bargaining and it has refrained from intervening in the composition of conflicts of interests arising in the labour market, as theorised by labour law and industrial relations scholars.

The comparative perspectives of this study demonstrate how the exercise of collective autonomy and collective bargaining in the national contexts is a multifaceted process. At national level, collective bargaining constitutes both a right

[2] Spiros Simitis, "Juridification of Labor Relations" in Teubner (1987) 113–61, 121–22, quotation at 121.

[3] A similar discourse can be applied to the British system, which has been enormously influenced by Kahn-Freund's analysis, which in its turn was originally stimulated by the observation of Kahn-Freund himself of the British dynamics of collective bargaining.

and a regulatory process. Its function is twofold and intertwined. On the one hand, collective bargaining constitutes the right of individual workers to 'collectivise' their individual interests within a collective subject that operates as a counterpower to the employers. On the other hand, collective bargaining is the bilateral process of labour market regulation through which the collective subjects, i.e. the labour market parties, set common and shared rules for the functioning of the labour market itself and for industrial relations.[4] Furthermore, the analysis of the Italian and Swedish contexts stresses that the free exercise of conflict is an essential part of collective autonomy. The exercise of conflict is substantiated in the national context in the possibility to exercise the right to collective action. In this regard, the Italian and the Swedish systems highlight two ways of protecting the exercise of collective action. In Italy, the constitutional provision has functioned as a 'fence' protecting the right to collective action, whose limits have been set by the judiciary and by the parties themselves through social peace clauses included in the collective agreements. In Sweden, the right to collective action has developed as a clause of collective agreements based on the general agreement reached by the labour market parties in the early stages of the definition of an industrial relations system. Later, the right to collective action has achieved a constitutional status and has been included in ordinary legislation as an exception to the social peace obligations stemming from the conclusion of a collective agreement. Both national contexts understand the socio-economic element of collective bargaining and reaffirm the maxim that 'collective bargaining without the right to strike is collective begging'.[5]

5.2.3. The legal grounds for collective autonomy

From both the theoretical and the comparative perspectives, collective autonomy arises as a socio-economic phenomenon whose legal regulation is grounded (and should be grounded) within the sphere of private law. This feature derives from a view of collective autonomy as the mechanism through which private but collective interests (distinguished from the interest of the State) are represented in society (more specifically in the labour market) and find a compromise that benefits both parties. Consequently, the co-optation of collective autonomy into the public-law sphere would deny its nature as a conflictual mechanism of regulation. In this sense, trade unions are private associations and collective agreements are private contracts.

[4] Alan Bogg & Keith D. Ewing, "Freedom of Association" in Matthew W. Finkin & Guy Mundlak (eds), *Comparative Labor Law* (Edward Elgar 2015) 296–329.

[5] The origins of this slogan are undetermined, but it is quite widespread both among union activists and labour law scholars. See Erik Tucker, "Can Worker Voice Strike Back? Law and the Decline and Uncertain Future of Strikes", in Alan Bogg & Tonia Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (Oxford University Press 2014) 455–74, 456, footnote n. 6.

Private law is thus the 'gateway' through which collective autonomy finds recognition in the legal system of the State.

The functioning of collective autonomy is grounded on two legal elements, namely, the protection of collective labour rights and the recognition of the normative effects of collective bargaining. As a constitutive element of collective autonomy, the protection of collective labour rights ensures that collective bargaining (and, more generally, industrial relations) occurs on an equal footing, despite the imbalance of power inherently related to the employment relationship. Through the protection of collective labour rights, the legal system recognises workers and trade unions as bearers of rights – as it does with the employer (and the company) through the recognition of a freedom to conduct business. Through the translation of the normative effects of collective bargaining into legal rights and entitlement, the legal system accomplishes collective autonomy by giving 'legal substance' to its functioning. This occurs by incorporating the collective agreement within the legal system. Depending on the labour law tradition of the State, the recognition can occur as private contracts having legal effects only for the members of the signatory parties or as *erga omnes* collective agreement, which entails a broader recognition of the normative effects of the collective agreement on the entire labour market.

International, European and national labour law protects collective labour rights, and in particular a right to collective bargaining, and recognises the collective agreement as the legal outcome of collective bargaining. Each legal system, however, has its own legal sources in this regard, which are informed by the values and objectives of the system itself. According to the standards set by the ILO, the right to collective bargaining is a fundamental labour right of the workers, who are entitled to enjoy the conditions set through the collective agreement; but it is also the right of the trade unions and employers to voluntarily, freely and autonomously negotiate the reciprocal obligations and the conditions of work and employment. In both cases, the collective agreement is recognised as the instrument through which such rights are substantiated. The perspective of the ESC focuses on the States as legislative actors. Collective labour rights are protected by means of the obligations placed upon the States to promote and adopt measures for their exercise and for the recognition of the collective agreement as the regulative instrument of industrial relations. The ESC, thus, conceives collective bargaining within a 'matrix' for industrial relations (borrowing a pertinent expression conied by Dorssemont) supported by the State's legal framework. An individual dimension of freedom of trade union association is instead favoured by ECHR. The scope of Art 11 ECHR, however, has been extended by the case law of the ECtHR as to include a right to collective bargaining and to collective action. Within the scope of Art 11 ECHR the right to collective bargaining is characterised as the right of the individual worker to benefit from the union's activity of bargaining and to be represented in collective negotiations. The collective agreement is the primary instrument in this regard.

The EU system presents a complexity that reflects its multi-dimensional character as a polity. First and foremost, the EU system has to deal with the diversity of the constitutional systems and industrial relations systems of the Member States, which implies the coexistence of different conceptions of the right to collective bargaining. This aspect is reflected in Art 28 CFREU, which identifies it as the right of the parties to negotiate and conclude collective agreements (and also to engage in conflictual actions in case of conflicts of interest). However, Art 28 CFREU states that the exercise of collective bargaining shall ultimately comply with EU law – as also reaffirmed by the CJEU's case law. In this sense, the EU fundamental rights status of collective bargaining is downplayed by the need to comply with the objectives of the EU itself, which, despite comprising social aspects, still prioritises the economic side of integration in terms of removing obstacles to the free movement of services and companies. Nevertheless, collective autonomy finds an explicit and comprehensive recognition in the EU system in Art 152 TFEU. The reference to the diversity of national systems and to the autonomy of social partners creates a fundamental legal ground, which comprehends the foundations of collective autonomy, namely, the socio-economic origins that differ depending on the historical and political contexts. Furthermore, collective bargaining in the EU system is also associated with social dialogue as defined by the Treaty. In this form, however, collective bargaining profoundly differs from the definition that emerged from the theoretical and comparative perspectives. In this regard, already in 1996, Sciarra commented on the Agreement of Social Policy attached to the Maastricht Treaty by affirming that 'no theoretical framework appears suitable to include and describe European collective bargaining as it emerges from the Social Chapter'.[6] Despite its increasing relevance as a mechanism of policy- and law-making, the European social dialogue constitutes a system *per se*, whose outcomes cannot be compared to collective agreements in the classical sense – nor can its features be related to the theoretical definition of the notion and functions of collective autonomy.[7] However, the EU system recognises collective bargaining as an essential element of the autonomy of the social partners (see, for instance, Art 155.1 TFEU) and as a valid instrument for implementing EU law at national level (Art 153.3 TFEU). In this regard, the EU system also acknowledges the normative effects of the collective agreement in several pieces of secondary law, which confer upon it the regulation of certain aspects of the employment relationship.

[6] Silvana Sciarra, "Collective Agreements in the Hierarchy of European Community Sources" in Paul Davies, Antoine Lyon-Caen, Silvana Sciarra & Spiros Simitis (eds), *European Community Labour Law: Principles and Perspectives. Liber Amicorum Lord Wedderburn of Charlton* (Clarendon Press 1996) 189–212, 201.

[7] This is a widely recognised point, see, inter alia, Marco Peruzzi, *L'autonomia nel dialogo sociale europeo* (Il Mulino 2011) 59; Lo Faro (2000); Hepple (2005).

In the national contexts, the right to collective bargaining is universally recognised as a fundamental labour right.[8] The comparative analysis between Italy and Sweden demonstrates, however, that a legal system can choose different routes to protect a right for trade unions and workers to engage in collective bargaining. In the Italian system, collective bargaining is a fundamental socio-economic right based on constitutional grounds; whereas in the Swedish system, it has received a statutory recognition pursuant to the industrial relations practices. In the Italian case, the constitutional recognition of a right to collective bargaining derives from the provision (albeit one that is not applied, see Section 3.2.2) indicating the collective agreement as the primary instrument of labour market regulation. This feature of the collective agreement is instead codified in the Swedish Co-determination Act – but, again, its roots are in the praxis of industrial relations and in the mutual recognition and cooperative partnership agreed between the trade unions and the employers' association. Yet the 'codification' of industrial relations has not altered their autonomous foundations and exercise; rather, it has provided for enhanced legal grounds for collective autonomy and for stabilising a balance of power between trade unions and employers favouring the collective subjects.

In both the Italian and the Swedish systems, the collective agreement is formally a private law contract. Nevertheless, it is meant to regulate several individual employment relationships. The normative power of the collective agreement in both Italy and Sweden is grounded on a 'legal fiction', according to which the collective agreement, although a private contract, is judicially interpreted as the 'code of the industrial sector' – in line with the conceptual understanding advanced by Kahn-Freund. Accordingly, the collective agreement receives a legally binding character. In Italy, the inderogability of the collective agreement is based on a conceptual understanding of the relationship of membership between the individual subject (worker and employer) and the respective organisations. On this aspect, the theories developed by Santoro Passarelli and Giugni differ: whereas Santoro-Passarelli supported the legal institution of the mandate as legal basis for the inderogability of the collective agreement, Giugni grounded the inderogability of the collective agreement on the rationale of the *ordinamento intersindacale*. The collective agreement is the 'fundamental norm' of the system, and therefore the individual contract shall not deviate from it. In Sweden, by contrast, the inderogability of the collective agreement is stated in the Co-determination Act, which forbids the individual parties who are members of a collective organisation from entering into agreements that deviate from the collectively set terms and conditions of employment. The centrality of the collective agreement, i.e. of collective autonomy, in the Swedish industrial relations system is also attested by the absence of principle of *favour* in the light of the more prominent role attributed to the collective subjects. The cooperative partnership and collective autonomy are protected as the rationale

[8] Sciarra (2007).

of the entire system of labour market regulation. In contrast to this, the Italian system allows certain derogations (excluding those recently introduced as regards the company collective agreement) by the individual contract when it is aimed at providing better conditions for the workers, i.e. for the weaker party, who enjoys a higher degree of protection by the legal system.

5.3. The challenges to collective autonomy and collective bargaining

5.3.1. The paradigm of collective autonomy and the EU internal market

From the collectivisation of the workforce identified by the Webbs as the spark of collective bargaining, to the removal of economic borders between national markets in the EU, the socio-economic nature of collective bargaining remains unchanged. Rather, its expression has merely taken different forms. The main argument of this thesis is that the operations of delocalisation and outsourcing made under the scope of the EU cross-border economic freedoms, i.e. the EU internal market law, herald a transformation of the basic features of collective autonomy.

The paradigm of collective autonomy entails that the parties pursue collective bargaining autonomously, freely, and voluntarily, on the grounds of the recognition of collective labour rights. The autonomy of the parties can only be ensured if they are excluded from the public law spheres, which means that the legal regulation on collective bargaining shall be limited to its framework, i.e. the collective labour rights, and to the recognition of the normative effects of the collective agreements. These aspects conflict with the aspirations of the State to regulate the economy and to define the economic constitution of a political community. On this point, the analysis of Kahn-Freund differs from that of Sinzheimer, whose understanding of the relationship between law and political economy envisioned a central role for the State as a regulatory power. Further, Giugni's theory deviates from Santoro Passarelli's theory on a matter related to juridification. Whereas Santoro Passarelli conceived of collective autonomy as still to be subordinated to the State's power, Giugni saw a limited role for the State in acknowledging the normative effect of collective bargaining.

The collective autonomy of the parties aims at regulating the labour market in order to reach a compromise between the collective interests in conflict. Thus, it has an economic aim. The rationale of collective autonomy is evident in its nature as a non-authoritarian, socio-economic regulative mechanism based on equal participation and reciprocal recognition. It opposes the State's control over the

economy. This aspect emerges in the national comparison. Neither Italy nor Sweden provide for a statutory regulation of wages, which means greater autonomy for the parties to regulate the labour market through collective bargaining.

It is perhaps on this point that the EU legal system and the paradigm of collective autonomy are at variance with one another. An economic and political project, supported by the creation of a legal system, such as the internal market of the EU, cannot leave room to the autonomous regulation of the socio-economic sphere and of the labour market by means of socio-economic dynamics such as collective bargaining. The EU internal market cannot function without an 'interventionist' public actor, which, despite the ideological underpinnings of the free market, intervenes to ensure the integration of the national markets. In this context, the space for self-regulation by means of collective autonomy is limited. The EU system demonstrates a 'minimal' understanding of collective autonomy, which is conceived as social dialogue entrenched within supranational legislative procedures, or constrained within the boundaries of information and consultation rights, or, finally, confined within the national borders. In the first case, collective autonomy is obfuscated by the 'shadow of the law', as famously pointed out by Bercusson.[9] In the second case, collective autonomy takes place as an '*extra legem*' industrial relations dynamic. In the third case, its autonomous normative power in cross-border situations is undermined due to the supremacy of the internal market's interest.

Yet the emergence of a cross-border dimension related to the exercise of economic freedoms by companies is a socio-economic change that fosters socio-economic dynamics, including collective bargaining. The analysis of collective autonomy in the light of EU internal market law addresses the long-standing question about the unbalanced development between the economic and the social sides of those dynamics. The *Viking* and *Laval* case law acknowledges the primary nature of collective autonomy as private governance. However, the CJEU interprets the normative power of collective autonomy as a monopoly in the regulation of employment.[10] The Court failed to recognise a fundamental difference between the unilateral power of private associations in regulating the access and the exercise of economic activities and the collective bargaining process. Collective bargaining is not a unilateral and authoritative exercise of power by trade unions to rule on employment conditions; but it is the negotiated process of joint regulation between the two sides of industry. The Court therefore ignored the fact that 'the balance of bargaining power between unions and employers obviously varies considerably from case to case'.[11]

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[9] See Brian Bercusson, "Democratic Legitimacy and European Labour Law" (1999) 28 *Industrial Law Journal*, 153–70, 159.

[10] Schubert (2013) 161–63.

[11] Davies (2008) 137.

The Court acknowledges the trade unions as autonomous bodies invested with the prerogative of regulating the labour market. In this regard, it is interesting to highlight a potentially contradictory interpretation of the nature and function of a trade union from the perspective of the CJEU. If, according to the Court, the trade union can enjoy a wide power in regulating the labour market through collective bargaining in light of the autonomy that the union receives from the legal system, the same autonomy cannot be invoked to claim that the provision of a collective agreement be made part of public policy – as shown in ruling on the *Rüffert* case. The interplay between these two principles – the private-governance nature of collective autonomy and its inherently private-law origin – would disadvantage the exercise of collective bargaining in cross-border situations in those countries in which the regulation of the labour market is grounded on collective autonomy. The outcomes of the rulings lead towards an increased role and relevance of statutory regulation to the detriment of collective autonomy.

Making collective autonomy subject to the EU rules on free movement brings about a metamorphosis of the foundations of the collective autonomy paradigm that constitutes a challenge for the domestic systems of autonomous collective bargaining. For instance, in Sweden the possibility for the unions to undertake a collective action against a company outside collective agreement coverage is a pillar of the industrial relations system for enforcing the working and employment conditions to a subject – such as a foreign company – outside the system. The signature of a collective agreement activates a further stage of negotiations concerning working conditions at the workplace (co-determination) and defining the actual levels of wages to be paid to the workforce of a company.[12] By limiting the influence of collective autonomy in situations of cross-border posting to the application of the minimum standards set in the national collective agreement, would leave the risk of social dumping practices unaltered. No co-determination rights would be activated in this case. In this sense, the structure and function of collective bargaining in the Swedish context are hindered. The paradox is that a national company would have been subject to the same collective action as Laval without having the option to challenge such an action on the grounds of EU rules on cross-border provision of services.[13]

The transformation of collective autonomy is further fostered by the 'portability regime'[14] according to which the 'migrant company' can 'export' the collective agreement signed in its home country if it reproduces the minimum conditions set by the national sectoral collective agreement of the country of destination. This rule derives from the interpretation of collective labour law in the light of the EU rules on free movement, according to which a 'migrant company' shall not be subject to

[12] Ahlberg & Bruun & Malmberg (2006) 158.

[13] See also Sciarra (2008) 576.

[14] Deakin (2008) 587.

a discriminatory treatment or to a double burden. If the company is already bound by a rule – a collective agreement in this case – in the home State having a comparable effect to the one imposed by the country of destination, then the company shall only be subjected to the home State rule or collective agreement. Ultimately, this interpretation nullifies the principle of labour law territoriality.

5.3.2. The dynamics of the cross-border scenarios

The three cross-border scenarios explored here disclose dynamics of industrial relations that create challenges to collective autonomy and collective bargaining. In the scenario of *relocation of an economic activity*, the 'migrant company' exercises its freedom to establishment in order to set up a new subsidiary or to relocate its activity in another Member State. In both cases, the movement activates dynamics of industrial relations that concern the interaction between the 'migrant company' and the domestic trade unions of both countries involved. As shown in the *Viking* dispute and in the following cases, a collective action against the delocalisation might be deemed an obstacle to the freedom of establishment of the company. At the same time, the delocalisation can be used as a threat in order to obtain a more powerful position in the phases of collective bargaining. Or, a union might be tempted to lower the employment standards in order to attract and facilitate the delocalisation, which would bring new jobs to the country.

In the scenario of *cross-border posting of workers*, the 'migrant company' exercises its economic freedom to provide services in the territory of another Member State by posting its employees for a limited period of time. Even though these workers are supposed to return to their country of origin at the end of the service, the possibility for the company to compete with national companies on the basis of lower labour costs entails dynamics of industrial relations that pertain to the application of the domestic collective agreement. The potential for the 'migrant company' to apply the minimum standards of employment stated in the national sectoral collective agreement de facto divests company-level collective bargaining from its complementary role. The principle of 'equal conditions for equal job in the same place', contained in the new proposal for amending the directive on cross-border posting advanced in March 2016, would be hard to apply in systems in which the monitoring role is not attributed to the unions, which have a direct interest in ensuring the principle of territoriality of labour law. Furthermore, the impact of the dynamics of this scenario concerns the domestic dimension of collective bargaining. Again, the workers and the unions are captured in the intensification of a 'race to the bottom' that leads them to negotiate downwards, thus overturning the basic function of collective bargaining as a mechanism for the improvement of employment conditions.

In the scenario related to the phenomenon of *letter-box companies*, these dynamics are combined. In addition, collective autonomy and collective bargaining are under pressure because of the difficulty to coordinate actions towards these companies that have as their core business the exploitation of cross-border labour standards differentials in the EU internal market.

In the view of the CJEU, the cross-border dimension seems to be a space outside the competences of collective autonomy. The need for companies to know in advance the economic advantages given by the cross-border activity entails the denial of cross-border industrial relations dynamics, i.e. the interaction between the 'migrant companies' and the national trade unions and workers. It would eventually reaffirm the 'de-coupling' dynamics of EU integration, according to which social and labour competences are confined within the State's borders and competences.

The *Viking* and *Laval* case law signals the emergence of two regimes of labour market regulations: a national regime applicable to the domestic companies, and a cross-border regime pertaining to the 'migrant companies'. This hinders the autonomous evolution of industrial relations in the cross-border dimension. The emergence of the cross-border dimension is a socio-economic evolution of the national dimension; the dynamics of industrial relations shall evolve accordingly. Instead, the EU legal system, on the one hand, fosters the emergence of the cross-border dimension by setting the legal basis for the companies to operate cross-border, while, on the other hand, it prevents the establishment of cross-border industrial relations by limiting the exercise of collective labour rights.

In addition, the collective interests undergo a transformation. On the employers' side, the cross-border dimension entails the decay of the collective interest, which is fractionised or decomposed to the individual interests of the single companies.[15] In this sense, the dynamics of the cross-border dimension amplify the conceptual understanding of the theory of private collective autonomy about the collective interest of the employer as mainly related to the individual interest of the company. Yet in the cross-border dimension the collective interests on the workers' side appear as scattered, because the collective interests of the domestic workers not to be exposed to social dumping are played against the collective interests of the workers of the 'countries of origin' to be employed. Therefore, there is no need on the employers' side for organising collectively.

According to EU law, the exercise of collective conflict can be pursued only if it can be justified and exercised proportionally to its aims. This aspect corresponds to a restriction of the scope of collective autonomy. The contours and the extent of the collective conflict are designed by EU law rather than by autonomous industrial

[15] The individualisation of economic interest is a consequence of the trajectory towards decentralisation and individualisation of the employment regulation, see Michael Barry, "Concerted Capital: Understanding Employer Interests and the Role of Employer Coordination in Contemporary Employment Relations" in Keith Townsend & Adrian Wilkinson (eds), *Research Handbook on the Future of Work and Employment Relations* (Edward Elgar 2011) 111–29, 117.

relations dynamics. Further, the recognition of collective labour rights in the EU legal system is anchored to the provision of the EU Charter in its Art 28. The exercise of those rights is acknowledged 'in accordance with Union law and national laws and practices'. The ultimate criterion for evaluating the exercise of collective labour rights is thus the compliance with EU law, in light of the principles of supremacy and direct effect.[16] In this sense, the national law and practices for the exercise of collective labour rights shall conform themselves with the EU rules on cross-border economic freedoms. In sum, EU law prevails over national law; and EU-based rights – such as the economic freedoms of establishment and providing services – can be claimed in national courts against collective labour rights that limit their exercise. The cornerstones of any legal system that intends to rebalance the relationship between employees and employers are unsteady in the cross-border dimension of the EU internal market.

Finally, the issue of the legal recognition of the collective agreement has to be considered in its cross-border dimension. In the EU legal system, the collective agreement seems to be recognised as a mechanism of labour market regulation insofar as its effects are confined 'in-borders'. In this case, the collective agreement is even exempted from being seen as a restrictive instrument of competition.[17]

The collective agreement in the EU legal system can be conjugated as a labour right, with the limits imposed by the compliance with EU rules on economic freedoms, or as a regulatory source implementing a framework agreement adopted within the procedures of the European social dialogue.[18] In both situations, it is possible to affirm that in the EU legal system 'the limitations of the right of collective bargaining imply that unions and employers' organizations have no monopoly with regard to their legislative power'.[19] The relevance of the collective agreement is relegated to the status of 'static' source, as for instance in case of the cross-border posting of workers. There is no legal acknowledgement of the dynamic role and potentiality of the collective agreement as an instrument of company-level labour market regulation in the cross-border dimension.

The economic changes brought about by the establishment of a borderless internal market were already described by Lecher and Platzer in terms of the 'internationalisation of capital', 'transnational cooperation between companies and

[16] The recent evolution in the CJEU case law seems to disavow what Mancini wrote in 1989, i.e. that '[t]he Treaty does not empower the Court to review Member State laws apart from the obvious exception of review under Article 169 which does not provide for the annulment of such laws', see Federico G. Mancini, "The Making of a Constitution for Europe" (1989) 26 *Common Market Law Review*, 595–614, 604.

[17] The reference is to the aforementioned *Albany* case, see Section 2.4.6.

[18] See Bruno Caruso & Anna Alaimo, "Il contratto collettivo nell'ordinamento dell'Unione Europea" (2011) Working Paper C.S.D.L.E. Massimo D'Antona, INT-87/2011, 15.

[19] Schubert (2013) 161.

groups of companies', and 'cross-border mergers and acquisitions'.[20] The corresponding social changes have concerned the process of adaptation of the labour market parties to these patterns. Trade union representation now deals with a cross-border dimension that regards the necessity for the national trade union to take into consideration the possibility to organise the workers that move temporarily in the host country labour market as part of a cross-border posting. Further, collective bargaining dynamics have to confront the need to find ways to combat social dumping and the ensuing 'race to the bottom' of social and labour standards. Moreover, collective action has been marginalised as a merely defensive instrument, whose undertaking is directed toward protecting employment against delocalisation or forcing the 'migrant companies' to apply the terms and conditions of the host country collective agreement so as to not, again, experience social dumping. The three cornerstones of a collective labour law and industrial relations system – collective organising, collective bargaining, and collective action – face the challenges that stem from the economic and legal dynamics of the internal market.

The employers also experience social changes. The companies that delocalise or relocate industrial production, or those that temporarily post workers for providing services in a country different from the one in which they are established, offer new perspectives on the analysis of the employers' position. The cross-border dynamics of the EU internal market increase the possibility to resort to outsourcing. The supply chain therefore expands and the workplaces become more fragmented. In the same workplace, it would be possible to have different employers, which makes it difficult to identify the bargaining counterpart. The cross-border dimension constitutes a space in which small-scale companies operate, but it is also a space in which bigger companies or groups of companies can organise the production of services on a wider geographical scale. These developments are consistent with the evolution of firms' organisational restructuring, which includes practices of downsizing, de-layering and changing the boundaries of the firm.[21]

The exercise of cross-border economic freedoms is a useful tool for redefining the entire process of production. The scenario of 'letter-box companies' is instructive in this regard. A single company could establish its main seat in a country with certain labour and employment standards and post workers to a country with higher standards in the frame of the cross-border provision of services. Otherwise, a large-scale company could outsource part of its production (or certain services related to production, for instance cleaning) to a smaller company operating cross-border. The result is social dumping. The freedom of establishment can also be used

[20] Wolfgang E. Lecher & Hans-Wolfgang Platzer, "Global Trends and the European Context" in Lecher & Platzer (1998) 1–17, 11–12.

[21] John Hassard, Leo McCann & Jonathan Morris, "Employment Relations and Managerial Work: An International Perspective" in Townsend & Wilkinson (2011) 150–66, 153–54. See also Niklas Selberg, *Arbetsgivarbegreppet och arbetsrättsligt ansvar i komplexa arbetsorganisationer: En studie av anställningsskydd, diskriminering och arbetsmiljö* (Media-tryck 2017).

(and has been used) as a threat in the process of collective negotiations, despite the ILO condemning this in the Tripartite Declaration of Principles concerning Multinational Enterprises. This game offers a win-win option to the employer, who could obtain a favourable collective agreement under the threat of closing the establishment, or else can relocate production to where labour and employment costs are cheaper. The comparative and the cross-border perspectives stress how national systems of collective bargaining are affected by the dynamics fostered by EU internal market law, which seem to dilute the social powers of both sides of the labour market. These dynamics expand the boundaries of the labour market and at the same time fragment the collective representation. However, this seems to offer a most favourable position to the already more powerful party.

5.3.3. The challenges of decentralisation and de-nationalisation

Collective autonomy and collective bargaining in contemporary Europe have to face two major and related challenges. On the one side, the systems of collective bargaining are moving along a path towards decentralisation that undermines the role of collective autonomy for the regulation of the labour market and industrial relations. On the other side, the dynamics of collective bargaining no longer pertain exclusively to the national dimension, but rather are influenced by processes of globalisation and Europeanisation that affect collective autonomy. Collective bargaining and collective autonomy can no longer be considered simply national features. Both of them emerge from the analysis of the cross-border dimension.

The processes of decentralisation and de-nationalisation are features of contemporary legal developments. The 'centripetal and centrifugal forces' that push the legal production far from a centre located within the structure of the State are characteristic of the dynamics of globalisation of law.[22] Unlike State law, collective bargaining has arisen as a flexible instrument of norms production, as demonstrated, for instance, by the resorting to company collective bargaining in order to adapt the centrally negotiated working conditions. Yet, in the national contexts, the paths toward decentralisation lead to an upturning of the traditional hierarchy between levels of collective bargaining. The ensuing effect is to destabilise a system based on collective autonomy.

This is particularly evident in the case of Italy. Here, the reforms of the labour market introduced in 2011 and 2015 have legitimised the prerogatives of company collective agreement to deviate both from sectoral collective agreement and from statutory legislation. In this sense, the company level becomes the primary level of employment standards production. In Sweden, this process is also present, but it is

[22] Pietrogiovanni in Carlsson & Edström & Nyström (2016) 241. Pietrogiovanni describes these processes in terms of a 'balkanisation of labour law' so as to stress the conflictual falling apart of the sources, see Ibid., 260.

mediated by the influential role of the trade union federations as actors in the labour market. Here, the vertical organisation of trade unions mitigates the effects of a process of decentralisation that is deemed necessary at the present time in which neo-liberal economic doctrine requires employment to be flexible in order to match the economic needs of companies.

The decentralisation trends, however, lead industrial relations towards a 'micro-corporatist' dimension, exemplified by the Fiat case in Italy, in which the space to regulate narrows from the national labour market to that of the companies or of the factories. The actors of this type of industrial relations are still the employers and the organised employees, but the collective bargaining dynamics are consequently influenced. In the company space, the power imbalances of the employment relationship are indeed amplified and the employer's bargaining position is enhanced. The dynamics of the cross-border dimension also tend towards the trend of 'micro-corporatism' stressed in the national dimension. The industrial relations in the cross-border dimension concern a single company – the 'migrant company' – that crosses the borders within the EU internal market to perform an economic activity. In so doing, it takes part in the labour market of the country of destination, but as an actor alien to its industrial relations system. Yet the EU rules on economic freedoms prevent assimilation and protect the 'migrant company' from such exposure. No mechanism for forcing the interaction between the 'migrant company' and the national trade unions exists, whose relationship can be undertaken only on a voluntary basis, i.e. via a company's decision.

That is why the cross-border dynamics of labour relations have to be considered as company labour relations. They concern the relationship of a single company with its employees on the one side, and with the national trade unions on the other. The national workers and the migrant company's workforce might even have different and conflictual collective interests. Moreover, the employees of the 'migrant companies' are often migrant workers too, but who move to another country temporarily, meaning that the degree of integration in society is limited and often the interest towards union activism less urgent.[23] This would add a further barrier to the possibility for them to unionise and would reinforce the 'micro-corporatist' effect by binding the employment opportunities of the workers to the effectiveness of the company to take up calls for tenders, which can usually be guaranteed by lower costs.

If, on the one hand, the dynamics of 'micro-corporatism' are fostered by the decentralisation trends, both in the national and in the cross-border dimension, then

[23] Adrien Thomas, "Degrees of Inclusion: Free Movement of Labour and the Unionization of Migrant Workers in the European Union" (2015) 54 *Journal of Common Market Studies*, 408–25. However, this case is different from the situations in which the migrant workers move in order to seek jobs in another laobur market. In this case, they indeed fully become members of the labour market, although with the obvious distinction of being subjected to the migration law regime. On this issue, see Adrian A. Smith, "Racism and the Regulation of Migrant Labour", in Blackett & Trebilcock (2015) 138–49.

collective autonomy and collective bargaining within contemporary Europe, on the other hand, experience a process of 'de-nationalisation' that impairs their function as instruments and mechanisms of labour market regulation. In the wake of economic globalisation, the 'de-nationalisation' of collective autonomy and collective bargaining is already a well-established trend that is also consistent with the dynamics of 'micro-corporatism' described above.[24] This trend seems to be reproduced in the cross-border dimension of the EU internal market, in which the foundations of a national system of collective bargaining – consisting in the shared interests of both sides of the labour market to establish a mechanism for the composition of conflicts of interests through collective negotiations – are undermined. As indicated above, the collective interests on the employers' side are fragmented into the individual interests of the companies, just as the collective interests on the workers' side are split between two categories of workers – the employees of the 'migrant company' and the workers employed in the national labour market. Consequently, there is no interest on the employers' side to coordinate a strategy for collective negotiations in the cross-border dimension. In fact, the cross-border coordination of a bargaining strategy is a prerogative of trade unions that seek to prevent social dumping in areas with a high level of cross-border worker and company mobility.

As highlighted by the analysis of the comparative and cross-border perspectives, the decentralisation challenge leading to 'micro-corporatism' seems to clash with the regulative dynamics of cross-border posting of workers, in which, instead, the sectoral collective agreement is enhanced in the name of economic efficiency and rationality. In this context, the trend is to privilege sectoral collective bargaining, as company collective bargaining is deemed to conflict with the economic rationale of predictability required in order to benefit from the economic advantages ensured by labour cost differentials among EU countries. Therefore, collective autonomy is in the paradoxical situation of being subjected to decentralisation within the national borders and centralisation in the cross-border dimension. In the first case, collective bargaining is lowered to the company level, where the mismatch of power is greater. In the second case, it is subjected to downward pressure for lowering labour costs and employment standards. Overall, these trends marginalise collective autonomy and favour the in-border and cross-border interests of companies.

As Platzer already stressed in 1998, 'the interest of the actors in forms of regulation is primarily a function of their respective power on the labour market, but is also influenced by the competitive environment of product markets. The material advantages and superior resources of employers, the possibilities for substituting

[24] See Andrea Iossa, "Collective Bargaining in a Globalised World: A Multi-dimensional Picture" in Laura Carlsson & Örjan Edström & Birgitta Nyström (eds), *Globalisation, Fragmentation, Labour and Employment Law: A Swedish Perspective* (Iustus 2016) 25–51, 50–51. Already in 2001 Hyman envisioned a 'de-nationalisation' effect on industrial relations as a result of the dynamics of globalisation and Europeanisation, see Hyman (2001) 288.

capital for labour and the greater mobility of capital all combine to create an asymmetry of power in the labour market'.[25] The EU legal system does not intervene to rebalance such an asymmetry, but rather imposes conditions for the exercise of collective labour rights that prevent the possibility for the unions to act. The issue of the collective action in the cross-border dimension is an element that further intensifies the process of 'de-nationalisation' of collective autonomy and collective bargaining. Even though the legal regulation of collective action is still primarily a matter of national law, as also reaffirmed in the *RMT* case by the European Court of Human Rights, the plurality of legal sources setting standards for its exercise, including the EU sources, de facto eradicates the collective action from the socio-economic and industrial relations contexts by transforming it into an 'abstract principle'. Yet the collective action is far from becoming a cross-border matter. The clash is, indeed, between a borderless internal market and a still nationalised framework for collective action, which shall be exercised 'according to national laws and practices'.

In accordance with Mezzadra and Neilson's analysis of the relations between labour, capital, and borders in the current economic regime, the path of decentralisation and the process of 'de-nationalisation', which produce the 'micro-corporatist' trend in industrial relations and annul the potentiality of collective bargaining and collective autonomy as regulatory instruments of the labour market, reshape the 'map of the world' (in the terms of this study, the internal market of the EU) by shifting rather than eliminating the borders for the exercise of collective autonomy. The legal regulation of the cross-border dimension, hence, does not eliminate the gap between employer and employees in the labour market, which instead 'continues to exist but is articulated within shifting assemblages of territory and power, which operate according to a logic that is much more fragmented and elusive than it was in the classical age of the nation-state'.[26]

5.4. Prospects and retrospect

5.4.1. Collective autonomy as a legal principle of market regulation

From the investigation conducted in this study, collective autonomy emerges as a system for the production of those norms that regulate the labour market. It operates through collective bargaining between the collective subjects representing socio-economic interests and powers, and it relies on the exercise of collective labour

[25] Hans-Wolfgang Platzer, "Industrial Relations and European Integration: Patterns, Dynamics and Limits of Transnationalization" in Lecher & Platzer (1998) 81–117, 95.

[26] Mezzadra & Nielson (2013) 85.

rights. Even though collective autonomy is an autonomous system of normative production, it needs the support of the legal system. If collective labour rights are denied, or if the collective agreement is not recognised as a normative instrument of employment regulation, collective autonomy cannot function. Collective autonomy has been defined on the basis of the recognition of collective bargaining by the legal system in terms of a right to collective bargaining and in terms of a right to be entitled to the outcomes of collective bargaining. In both cases, collective bargaining – and therefore collective autonomy – is not a unilateral or static system. It is rather a dynamic and bilateral system that involves two parties. Each of them has a primarily economic interest in engaging in collective negotiations.[27]

As a mechanism of labour market regulation, collective bargaining is part and parcel of the market – its socio-economic origin places it *within* the market. It is not something alien to market dynamics, but rather something embedded in the capitalist economy as a pluralist, democratic, and therefore conflictual method for the satisfaction of socio-economic interests. The recognition enacted by the national legal systems is functional to the performance of the market. Even a close reading of the 'liberal-individualist understanding of industrial relations', based on Hayek's work, would consider collective autonomy as a functional element in market development and efficiency.[28] Collective autonomy is established when the legal system recognises its relevance for the functioning of the market and accepts, on democratic bases, that conditions of employment and work are set through the free, voluntary, and autonomous interaction between the collective parties. Collective autonomy is therefore recognised as a legal principle of market regulation. In the national legal systems, the socio-economic aspects of collective autonomy are evident. The Italian Constitution frames collective autonomy as *rapporti economici* (economic relations); in the Swedish system, collective autonomy has emerged from the labour market itself and its socio-economic nature is not questioned. The socio-economic essence of collective autonomy also emerges from the analysis of the discourse on global labour rights. The international labour law sources protect collective labour rights to individuals and unions for the protection of their economic interest.

The establishment of a EU-wide internal market ought to reflect such an essence. The core foundations of collective autonomy are unaltered, but its manifestation is necessarily modified by the socio-economic and legal novelties introduced through the abolition of economic borders between national markets by means of EU law.

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[27] See Jacobs in Dorssemont & Lörcher & Schömann (2013) 312. Bavaro & Pietrogiovanni (forthcoming 2018).

[28] Marc T. Moore, "Reconstituting Labour Market Freedom: Corporate Governance and Collective Worker Counterbalance" (2014) 43 *Industrial Law Journal*, 398–428. The argument advanced by Moore sees the exercise of collective labour rights as a mechanism for making the employer accountable to the company's employees, who in return would be committed to 'the management's internal objectives and values', Ibid., 427.

Within the internal market, collective autonomy is no longer framed within a coordinated industrial relations system. The European dynamics of industrial relations are scattered and collective autonomy, accordingly, is re-scaled. If, at the national level, the challenge of decentralisation can be processed through the presence of a system of industrial relations, in the cross-border dimension collective autonomy has to deal with the extreme individualisation of the EU legal system, which sees the company as a primary subject of economic rights and competition as a primary value.

Collective autonomy cannot receive full recognition in the EU system if the autonomous socio-economic dynamics of the cross-border dimension are not understood as inherent dynamics of the EU internal market itself – rather than national-level dynamics. Historically and conceptually, collective autonomy has been defined in opposition to attempts to impose a mechanism of labour market regulation 'from above', e.g. corporatism or the Weimar collectivist system. The core of collective autonomy as legal principle is the recognition by the legal system of the socio-economic dynamics emerging 'from below', i.e. from the market realm itself. This is why the European social dialogue has a hard time in being recognised as collective autonomy.[29] The legal dimension precedes the socio-economic one, rather than supporting it. The constitutionalisation of the autonomy of the parties achieved in EU law, through Art 152 TFEU *in primis*, ought to be interpreted as including collective autonomy 'from below' as part of the internal market. If collective autonomy is a legal principle of market regulation, in a social market economy, such as the one established by the EU, collective autonomy shall hold a fundamental status. The basis for such recognition can be found in Art 28 CFREU, which, as observed by Busby and Zahn, would have the advantage of functioning as a lynchpin in the EU internal market for converging and synthesising the different interpretations of collective labour rights in the international and European sources.[30] However, a recognition of this kind, i.e. grounded on a fundamental rights instrument, would be partial. It would only recognise an aspect of collective autonomy – but it would overlook the fact that collective autonomy is an autonomous system of normative production of socio-economic rules.

But what are the elements of collective autonomy that emerge in the cross-border dimension and that the EU legal system shall protect as legal principles of market regulation? Considering that, in EU law (with all the limits and restrictions highlighted so far), the autonomy of labour market parties is recognised, the protection of collective labour rights is recognised, and the collective agreement as an instrument of employment regulation is recognised, what still needs to be

[29] See Dukes (2014) 145.

[30] Nicole Busby & Rebecca Zahn, "Collective Labour Rights in EU and International Law: Consolidation, Reconciliation and Beyond?" in Brodie & Busby & Zahn (2016) 125–44.

recognised is the existence of collective interests in conflict.[31] This is perhaps one of the constitutive elements of collective autonomy that still lacks recognition in EU law. Collective autonomy cannot find recognition if the existence of a conflict between collective interests is not acknowledged in the law. Although Art 28 CFREU mentions conflict of interest as the grounds for undertaking collective actions, the case law of the CJEU sets out that a collective action in a dispute over the exercise of a cross-border economic freedom must be justified by 'overriding reasons of public interest'. But the analyses of the labour law and industrial relations theories, of international labour law, and of the national contexts have shown that the public interest differs substantially from the collective interest. If the collective interest is subordinated to the public interest, it is simply denied. The national systems preserve the rationale of collective autonomy by identifying the collective interest of the parties as a legal principle to protect by allowing, for instance, the deployment of collective conflict. The collective interest needs to be identified as the interest of one collective subject, which can conflict with the interest of other collective subjects. The collective interest is symmetrical to the individual interest of the migrant company in profiting from labour regime differentials. The collective interest is defined in the abstract but, then, it is determined by and situated within a specific dispute. The exercise of cross-border economic freedoms gives rise to disputes in which collective interests are evidently in conflict. The constitutionalisation of collective autonomy in EU law shall be grounded on the recognition of this conflict as a conflict between interests of collective subjects operating with the market.

5.4.2. An auxiliary law at EU level?

A further constitutive element of collective autonomy is the auxiliary support exercised by the law. This aspect is reflected both in the national legal systems, as exemplified in the Italian and Swedish contexts, and in the international and European legal sources on collective labour rights. In the national contexts, the law operates as a framework setting the foundations of collective autonomy; whereas, the international and European sources set the conditions that the national legal systems shall ensure for allowing the labour market parties to pursue autonomous, voluntary and free collective negotiations. These conditions might privilege an individual or a collective dimension of the collective labour rights, but in general they place obligations on the States to ensure that collective bargaining can be exercised autonomously through the protection of collective labour rights.

[31] In this sense, also Dukes (2014) 209.

If Davies, on the basis of the social policy provisions set by the EU Treaty, considered the EU as a promoter of collective labour rights,[32] the *Viking* and *Laval* case law has already downplayed such a role. In Art 115 TFEU on the approximation of laws, regulations or administrative provisions directly affecting the establishment of the internal market, Davies further identified a possible legal basis for the adoption of measures promoting the protection and exercise of collective labour rights within the EU Member States.[33] However, Davies herself, in underlining the importance of collective labour rights as an instrument of labour market regulation insofar as it 'empower[s] workers in their dealing with employers', warned that 'they are not tied to any particular agenda set by a distant legislator with a limited understanding of the specific needs of their workplace'.[34] Collective labour rights serve the purpose of augmenting the power of the organised workers, but their exercise is a delicate matter for the legislator. In this regard, Davies also observed that 'collective labour rights are vital if the floor of minimum rights is not to become a ceiling of maximum protection'.[35] In light of the interpretation of the directive on posting made by the CJEU, it is therefore doubtful hat a legal basis for an effective exercise of collective labour rights in the cross-border dimension, i.e. counteracting the power of the employers, could be found in the current EU law system.

Art 28 CFREU cannot bring any benefit in this regard because of the explicit reference both to national laws and practices, which confines collective labour rights within the national legal frameworks, and to EU law, which has resulted in the subordination of collective labour rights to the rules on economic freedoms. The international and European legal source might constitute proper loopholes. Yet the ILO Conventions refer to State law and they are not binding upon the EU – even though the ILO Committees have found the evolution of collective autonomy in the cross-border dimension as deviating from the standards set by the relevant Conventions. The ESC, instead, conceives collective bargaining as a mechanism for defining working and employment conditions. This image of collective bargaining is hardly applicable to decentralised contexts of the company level, which defines the cross-border dimension of industrial relations.

Art 11 of the ECHR could perhaps offer an effective basis for arguing for the protection of collective labour rights in the cross-border dimension. The case law of the ECtHR considers the limitations to their exercise as potential violations to be justified 'as necessary in a democratic society', whereas the case law of the CJEU considers collective labour rights to be restrictions to economic freedoms to be

[32] Davies in Alston (2005) 193–96.

[33] According to Davies, the resort to Art 115 (Art 95 TCE at the time of Davies' writing) could overcome the exclusion of the right and interests of employed persons from the matters that could be regulated on the basis of Art 114 TFEU (former Art 94 TCE), Davies in Alston (2005) 197.

[34] Davies in Alston (2005) 209.

[35] Ibid.

justified. However, the prospects of seeing an EU-level dispute between cross-border economic freedoms and collective labour rights before the European Court of Human Rights have been curtailed by the Opinion of the CJEU as regards the accession to the ECHR. One can speculate as to what might happen though. In light of the ECHR case law, an outcome such as that of the *Viking* and *Laval* disputes could only have been possible if the economic arguments underpinning the cases were proved to be necessary in a democratic society – which is hard to prove from a human rights perspective. In fact, the resort to the ECHR has become an increasingly common litigation strategy for national trade unions.[36] Yet Hendy warns of the risks involved in such a strategy. He stresses that 'the only justification for taking a trade union case to the ECtHR can be that it has a reasonable prospect of achieving a result which will improve or defend the ability of trade unions to protect the interests of the working class'.[37]

Rather than seeking support in the human rights realm, it might be beneficial for collective autonomy to keep any potentially auxiliary support from the law within the spheres of collective labour law. The labour market and industrial relations are the realms in which the collective interests are recognised and the conflicts of interests are played out. In the national dimensions, the protection of collective labour rights is set by the legal system in tandem with the activities of the labour market parties – and in particular of trade unions and organised labour. Collective labour rights are to be protected as rights of the labour market. In Italy as in Sweden, collective autonomy is grounded on the legal support to collective bargaining as a regulatory mechanism of the labour market, which in turn is supported by a strong protection of the exercise of collective action in relation to the conflict of interests expressed in collective negotiations. In the cross-border dimension of the EU internal market, this statement implies that collective labour rights are to be protected with regard to the exercise of economic freedoms. The attempt to provide a regulation of the clash between economic freedoms and collective labour rights proposed under the form of the Monti II Regulation would not have set the conditions for ensuring the exercise of collective labour rights within the cross-border dimension. Instead, it would have certified the *sub judice* conditions of collective autonomy in the cross-border dimension.

The auxiliary role of the law envisaged by the theories on collective autonomy and applied in the national contexts relates to the 'indirect' support offered by the protection of collective labour rights and the recognition of the normative effects of collective bargaining. But if a direct intervention on the part of the State in the

[36] The interest of unions towards litigation procedures is proved, for instance, by the recent publication of guides describing the possible judicial routes that a union could take, see Andrea Allamprese & Lorenzo Fassina, *Vademecum for Europe: A Practical Guide for Union Legal Bureau Officers* (Ediesse 2015).

[37] John Hendy QC, "Procedure in the European Court of Human Rights (with a particular focus on cases concerning trade union rights)" in Dorssemont & Lörcher & Schömann (2013) 61–91, 91.

dynamics of industrial relations might clash with a collective autonomy principle, then the opposite is also true. The abstention of the legislator might constitute an infringement of the collective autonomy principle in terms of abstaining from operating in order to rebalance the power relationship between the parties – and therefore their autonomy. In the EU-law setting, the EU legislator is prevented from regulating the exercise of collective action and a revision of the EU Treaty in order to remove the exclusion of competences on collective labour rights would probably not be desirable (or possible) at the present time, due to the political majority in the EU institutions. However, the legal recognition and protection of the collective interests and their conflict in labour disputes could constitute the grounds for a further route. By linking the lawful exercise of collective action to the defence of the collective interest in the context of the exercise of cross-border economic freedoms, the power imbalance currently provided by the EU legal system would be remedied. This operation might not even require amending the exclusion of competences set in Art 155.5 TFEU. To allow collective actions in cross-border situations on the basis of recognising a collective interest to protect is different from regulating their exercise. It is only providing a legal basis for exercising a labour market right in a dimension in which it is denied. According to the scheme outlined by Kahn-Freund as to the phases of the relations between law and trade union activities,[38] the European labour law would therefore shift from repression (the *Viking* and *Laval* case law), which has replaced abstention, to the stage of recognition,[39] which would define a new element for aligning the paradigm of collective autonomy with EU law, namely, the recognition that collective action can no longer be a primarily national matter. This, in itself, could constitute the grounds for a new paradigm to emerge.

5.4.3. Collective autonomy and the cross-border dimension

The primary achievement of a study on the evolution of collective autonomy and collective bargaining concerns the recognition that developments in the field of collective labour law and industrial relations are inextricably connected to the evolution of socio-economic dynamics of economic production that bring about changes in the labour market. As happened in the wake of the socio-economic dynamics that accompanied the establishment of industrial modes of production,

[38] Kahn-Freund (1944).

[39] The scheme outlined by Kahn-Freund is reprised by Jacobs in his comparative analysis of the developments of collective labour law in Western Europe, see Jacobs in Hepple (2006). Hepple applied the same scheme in a wider comparative analysis of the historical phases of collective labour law, which also includes non-European countries, see Bob Hepple, "The Historical Developments of Collective Labour Law: Comparative Reflections" in Marcel van der Linden & Richard Price (eds), *The Rise and Development of Collective Labour Law* (Peter Lang 2000) 415–36.

today the globalisation of the economy, often associated with a de-industrialisation of production that privileges the service sectors and the free circulation of capital,[40] has a major impact on collective labour law and industrial relations, prompting new paradigms to emerge. Stone defines 'globalisation' as 'the increase in cross-border transactions in the production and marketing of goods and services that facilitates firm relocation to low labor cost countries'.[41] The cross-border dimension is thus central in analysing and understanding the modalities in which globalisation affects the evolution of collective labour law and industrial relations. A proper analysis of this dimension cannot disregard an analysis of the evolution of the legal regulation of collective bargaining within the national contexts; what is more, it cannot overlook the conceptual and theoretical elements of collective autonomy in terms of the relationship between collective bargaining (and industrial relations) and the law.

The paradigm of collective autonomy was established within a certain socio-economic model of production and in relation with the authority of the State as the ultimate power of legal production. It entailed the functioning of a mechanism for the definition of labour and employment standards set on the autonomy of collective bargaining, supported by the right to organise and the right to exercise collective action. These foundations have fallen through in the context of the EU internal market. The State is no longer the ultimate source of legal production, but its law is subjected to the law of the EU. The geographical scale has also changed. The actors of collective bargaining interact within a context in which the borders for the movements of capital and companies are eliminated. Yet national borders are less porous when it comes to the regulation of collective labour rights; in addition, new borders have emerged, which are the borders of the companies. The de-nationalisation of industrial relations dynamics and the decentralisation of collective bargaining move towards the disentanglement of company labour relations and away from nation-based schemes.

As a consequence of socio-economic changes, industrial relations take new routes. Within the globalised context of multinational companies, collective bargaining has taken the form of the International Framework Agreements, whose development, as noted previously, reaffirm the 'micro-corporatist' effects of globalisation on industrial relations. Such texts are negotiated in a legal void; the negotiating parties refer to the standards and principles set by the ILO Conventions as contents of the agreements rather than as a legal framework for the negotiations.[42] In this sense, the context of transnational collective bargaining – or better, de-nationalised collective bargaining – resembles the context in which labour organising and the ensuing collective bargaining dynamics emerged: a non-

[40] According to Clover, the new processes of economy redefine, for instance, the material expression of conflict within society, leading to a defusing of the impact of strikes, see Joshua Clover, *Riot. Strike. Riot. The New Era of Uprisings* (Verso 2016).

[41] Stone (2007) 566.

[42] Iossa (2016) 49.

regulated space in which power relations in the labour market play the most prominent role.[43]

Unlike the context for the negotiations of International Framework Agreements, the cross-border dimension of the EU internal market appears as a heavily regulated context. Here, the regulation of cross-border economic freedoms overlaps and clashes with the regulation of the exercise of collective labour rights, which is set both at national and EU level. At the same time, it is also affected by the relevance of the other international and European labour law sources. The present study has conducted an integrated analysis of three perspectives, the results of which have highlighted how industrial relations and collective labour law develop hand in hand. A change in one sphere influences the other, creating dynamics of evolution. The law is a responsive factor that evolves in accordance to social dynamics. Yet it is also true that a change in the field of law might produce an evolution in the social sphere, as in the case of the regulation of cross-border economic freedoms and its impact on industrial relations.

The present work has defined the cross-border dimension of the EU internal market as the interplay between the national framework of collective labour law and industrial relations and the EU legal framework for the exercise of the economic freedoms of establishment and providing services. It has argued that this interplay produces a transformation in the features of collective autonomy, which has been reconstructed by looking at its conceptual roots and at its expression in the national contexts. The ensuing argument was that the cross-border dimension of the EU internal market constitutes a 'dimension in the making' for collective autonomy. A cross-border collective autonomy is 'in the making' because of the still nationalised legal frameworks that regulate collective labour rights and collective bargaining, despite the relevance of international law sources, which clash with the Europeanised regulation of economic freedoms.

The industrial relations sphere is exposed both to socio-economic changes and to legal evolution. Industrial relations research conducted in the construction sector has shown how the globalisation of the economy, including transformations in the labour market via migration, as well as the regulation of cross-border posting of workers, have affected the internal compositions, actions and interactions of the labour market parties.[44] Collective autonomy evolves accordingly and legal research

[43] Also, the 'labour-rights-as-human-rights' discourse is not entirely applicable in this context: the International Framework Agreements are often adopted in order to implement the labour rights set at international level through the ILO Conventions. Further, the obligations of human rights law bind the State, but not the multinational companies, see Renée-Claude Drouin, "Promoting Fundamental Labor Rights through International Framework Agreements: Practical Outcomes and Present Challenges" (2009–2010) 31 *Comparative Labor Law & Policy Journal*, 591–636.

[44] Stuart Rosewarne, "The Internationalisation of Construction Capital and Labour Force Formation: Union Responses in the Transnational Enterprise" (2013) 55 *Journal of Industrial Relations*, 277–97; Ines Wagner, "Rule Enactment in a pan-European Labour Market: Transnational Posted Work in the German Construction Sector" (2015) 53 *British Journal of Industrial Relations*, 692–710.

must keep pace with sociological research; the labour law researcher has to cross-pollinate her work with elements of industrial relations and drive legal scholarship further. In 1964, Gino Giugni published a study on *L'evoluzione della contrattazione collettiva nelle industrie siderurgica e mineraria, 1953–1963*[45] in which he studied the functioning of industrial relations in the mine and metallurgic sectors on the basis of his definition of collective autonomy as *ordinamento intersindacale*. Those sectors were at the core of the economic system at that time: they were the most emblematic sectors of the Industrial Revolution and of the production growth in the 1950s, especially in Europe. In the current time of economic globalisation and borderless markets, the engine of economic development seems to be the circulation of goods and services favoured by the absence of economic borders in Europe and fostered by the labour cost differentials between the locus of production and the locus of consumption. These dynamics underscore the relevance of the cross-border dimension in the current economic system – which, as Dukes notes, is still the capitalist economic system in which industrial relations (and therefore collective autonomy) emerged.[46]

This study has addressed an analysis of collective autonomy with a view to better understanding its unique features and challenges. The analysis has combined aspects of labour law and industrial relations in order to highlight the transformation that collective autonomy has undergone in the EU internal market. In sum, collective autonomy emerges as a socio-economic phenomenon based on collective organising, collective bargaining, and collective action. It is a practice of labour market regulation but also a legal principle, which has its foundation within national contexts and in a cross-border context. This thesis has contributed to advancing the understanding of the foundations of collective autonomy and to exploring its operations beyond national borders. Collective autonomy evolves by following the socio-economic dynamics. In a borderless context – or in a Stateless economy – collective autonomy will continue to constitute the primary method through which collective social power will try to reconcile the conflict of collective interests they bear. The functioning of key economic sectors currently relies on cross-border dynamics;[47] this does not eliminate industrial relations, nor does it downplay the essential roles played by collective autonomy. Rather, in a Stateless context, collective autonomy dynamics might even be amplified by the absence of the State's legislative authority. Ultimately, this thesis provides an analytical framework for

[45] Gino Giugni, *L'evoluzione della contrattazione collettiva nelle industrie siderurgica e mineraria* (Giuffrè 1964).

[46] Dukes (2014) 215.

[47] An illustrative example is represented by the logistics sector, see Deborah Cowen, *The Deadly Life of Logistics: Mapping Violence in Global Trade* (University of Minnesota Press 2014); see also Andrea Broughton et al., "Employment Conditions in the International Road Haulage Sector" (Study for the EU Parliament, Committee on Employment and Social Affairs 2015).

understanding collective autonomy in sectors whose dynamics exist primarily outside the State's borders.

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Collective Autonomy in the European Union

This thesis explores the question of collective autonomy by investigating the relationship between collective bargaining and legal regulation. It argues that collective autonomy and collective bargaining in contemporary Europe present challenges that alter their basic features. To this intent, 'Collective Autonomy in the European Union' undertakes a multifaceted analysis integrating three perspectives: a theoretical perspective analysing the conceptual elements of collective autonomy and collective bargaining as defined in industrial relations theories, labour law theories, and in the discourses on global labour rights; a comparative perspective analysing how collective autonomy and collective bargaining have found legal regulation in the Italian and Swedish contexts; a cross-border perspective examining how the EU regulation of the internal market freedoms of establishment and to provide services impacts on the features of collective autonomy and collective bargaining. Eventually, collective autonomy and collective bargaining emerge as socio-economic mechanisms having a normative power, whose functioning is influenced by legal dynamics and whose features are challenged by the processes of company-level decentralisation and by the dynamics of the cross-border scenarios in the EU internal market.

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