



**‘EUROPEAN BEYOND-BORDERS BARGAINING’ AND ‘LAW
DEPENDENCE’: A NEW FRAMEWORK FOR ANALYSING COLLECTIVE
AUTONOMY IN EUROPE**

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‘European beyond-borders bargaining’ and ‘law dependence’: a new framework for analysing collective autonomy in Europe*

1. Introduction

One of the legacies of the so-called ‘Laval quartet’¹ is a deep rift in European labour law with regard to the development of collective bargaining dynamics in a cross-border dimension. The exercise of the economic freedoms of establishment and of providing services seems indeed to have a problematic coexistence with the exercise of the fundamental rights to collective bargaining and collective action in the European market. By privileging the former in its rulings, the Court of Justice of the EU classified collective agreements and collective actions as obstacles to the economic freedoms of undertakings to cross national borders in order to perform economic activities and gain competitive advantages through decreased labour costs. Therefore, the crucial tension between an economically-oriented and a socially-oriented European integration develops mainly in the cross-border dimension in which the exercise of economic freedoms is allowed, but where the exercise of fundamental collective labour rights is limited, or even prevented.

In order to stress the relevance acquired by the cross-border exercise of collective labour rights, however, there is a need to redefine the commonly adopted classification of collective labour relations in the EU. Moreover, the elaboration of theoretical approaches which are able to highlight the relationship between law and collective labour relations is also needed, since the achievements reached in the labour field in the 20th century risk being eroded by the intervention of the supranational power represented by the judicial and legislative bodies of the EU. This approach aims thus at developing a framework for the analysis of collective autonomy as spontaneous and voluntary relations between labour market parties.

Based on these premises, this paper aims at contributing to the development of the legal analysis of collective labour relations in the European market by introducing the concept of ‘European beyond-

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¹ Including Case C-438/05, *Viking Line*, Case C-341/05 *Laval un Partneri utd*, Case C-346/06 *Riffert*, Case C319/06 *Commission v. Gran Duchy of Luxembourg*. Also Case C-271/08, *Commission v. Germany* can be added to the ‘band’ which therefore will become a ‘quintet’.

borders bargaining’ and a theoretical approach – ‘the law dependence’ – based on the study of the relationship between law and collective labour relations from the perspective of ‘dependence’.

The ‘European beyond-borders bargaining’ concept is intended as a model that encompasses the different practices of collective labour relations transcending national borders and comprises a three-dimensional structure of the supranational, the transnational and the cross-border dimensions. On the other side, the ‘law dependence’ approach is a new perspective based on the theory of path dependence: it aims at observing the evolving relationship between statutory regulation and case law on the one hand, and collective labour relations on the other hand, to highlight the degree of autonomy of labour market parties – by evaluating the interferences generated by public bodies such as courts or legislators.

In this paper, the term ‘collective labour relations’ is adopted as a general definition including various industrial relations practices, such as bargaining, negotiations and conflicts, and which are participated in by different labour market parties, such as trade unions, federations of trade unions, employees’ representative bodies, employers’ associations, single-company management and so forth. On the other hand, by defining the market as ‘European’, the intention is to underline the multi-dimensional feature of the market as the space where EU and national institutional frameworks interact and where international, European and national legal sources interplay.

The aspects of the present paper belong to an on-going doctoral research project which aims at exploring the emergence of a cross-border dimension of collective autonomy and collective bargaining. This project is based on the study of the national and European notions of collective autonomy, and its component of collective bargaining, using a ‘bottom-up’ comparative approach involving the analysis of Italian, Swedish and English law on collective bargaining.

The paper is structured as follows: the second section briefly describes the basic premises, aims and research questions of the research project concerned; the third section is dedicated to introducing and describing the concept of ‘European beyond-borders bargaining’, which is based on the ‘geographical feature’ of the scope of application of the outcomes stemming from collective labour relations having a beyond borders character. The fourth section presents the new theoretical approach of ‘law dependence’. Based on the theory of path dependence, the ‘law dependence’ approach will be used to study the development of the relationship between law and collective labour relations from a perspective intended to highlight the degree of autonomy of the latter and, conversely, the degree of intervention that judicial and legislative powers have in shaping collective labour relations.

Following these convergent tracks, the conclusions outline a new framework for analysis of the evolving relationship between law and collective autonomy in the European market.

2. *The research project: a brief description*

Both the ‘European beyond-borders bargaining’ concept and ‘law dependence’ are being developed within an on-going doctoral research project whose general theme involves collective autonomy in the cross-border dimension of the European market. In particular, the project addresses collective bargaining – one of the expressions of collective autonomy – which already has a *de jure* and *de facto* existence in the European market itself. By following a reasoning which considers collective bargaining as one of the pillars of labour law (the others being collective organisation and collective action),² it may be affirmed that collective bargaining (and collective action) does not enjoy a complete recognition within the realm of EU labour law. The exclusion of collective labour rights from the regulatory competences of the EU (Art. 153.5 TFEU) confines the dynamics of collective bargaining mainly within national legal frameworks and boundaries.³ The acknowledgement *de jure* of their status of fundamental rights, stated by both the case law of the CJEU⁴ and by the TFEU, which gives legally binding value to the EU Charter of Fundamental Rights (and therefore to its Art. 28 on rights to collective bargaining and collective action), does not sufficiently protect *de facto* such collective dynamics from the application of EU law, as recently experienced through the ‘Laval quartet’ cases.

In this context, the project aims at comparing the national and European notions of collective autonomy through its fundamental feature represented by collective bargaining, in order to explore its emerging cross-border dimension in the European market. The focus on collective bargaining is due to an understanding of this dynamic as the core expression of collective autonomy, as it addresses the goal of setting employment and working conditions, as well as also rules for regulating the relationship between collective labour parties, through autonomous negotiations leading to conclusion and enforcement of collective agreements.⁵

The overall research aims are as follows: first, to understand whether it is possible to deal with a European definition of collective bargaining, which demonstrates peculiar features deriving from a concept of ‘beyond-borders’ collective autonomy; second, to explore whether collective bargaining as a social dynamic regulating the labour market can develop in a multi-dimensional context that lacks a defined legal framework.

These aims will be pursued by addressing three specific research questions: first, the differences between national and EU law in dealing with the notion of collective autonomy and collective bargaining will be described and analysed; second, the type of role given by national and EU law to

² In agreement with Supiot, collective bargaining shall be deemed as one of the fundamental legal institutions on which a legal system needs to rest on in order to channel power relations into well-balanced legal forms and to create a mechanism for metabolising the potential sources of violence in society. See Supiot A., *The Spirit of Philadelphia. Social Justice vs. the Total Market*, London: Verso, 2012.

³ *Ibid.*, 112.

⁴ In both the *Laval* and the *Viking* cases, the CJEU recognises the right to collective bargaining and the right to collective action as fundamental rights of the EU legal system; see points 91 and 46 respectively of *Laval* and *Viking* rulings.

⁵ Bruun N., *The autonomy of collective agreement*, Rapport till the VII European Regional Congress of the International Society for Labour Law and Social Security, Stockholm, 2002, 5.

collective bargaining as a labour-market regulatory mechanism will be highlighted and analysed; third, in the light of the findings achieved through the previous two questions, attention will be focused on analysing whether or not the differences between national and EU law would prevent the emergence of a cross-border dimension of collective autonomy and collective bargaining, considered as necessary tools for completing the European market.

The countries selected as objects of the comparative analysis are Italy, Sweden and the UK. The choice is essentially grounded on the fact that these countries have a strong and rooted tradition of collective autonomy, which nevertheless has taken different paths and patterns in each of country. The models and the development of industrial relations systems in these countries have been shaped by the differences in national social and political models, historical constitutionalisation processes and the relationship with statutory law.⁶ Therefore, by reflex, the notions of collective autonomy and the functioning of collective bargaining systems in relation to the legal structure have developed differently within each of the three countries considered. The common denominator is the tendency towards the abstention of legislative powers in intervening in the field of industrial relations.

3. *European Beyond-Borders Bargaining*

3.1. Introduction

In order to introduce the concept of ‘European beyond-borders bargaining’, the first step is to describe the commonly used, three-level structure identified by the literature as regards collective labour relations in the EU. Such a structure has usually been described as formed by the cross-sectoral, the sectoral, and the transnational levels,⁷ whose definition tends to include both the negotiations within multinational companies⁸ and collective labour dynamics related to the overcoming of national borders.⁹

The first two levels concern the collective labour relations established at EU level in the form of social dialogue. On the one hand, the cross-sectoral level of negotiations is pursued between the cross-industry trade union confederation (the ETUC)¹⁰ and the counterpart on the employers’ side

⁶ See Jacobs A., Collective labour relations, in Hepple B. / Veneziani B. (eds.), *The Transformation of Labour Law in Europe. A comparative study of 15 countries 1945 – 2004*, Portland: Hart Publishing, 2009, 201 – 232.

⁷ For a schematic description of these definitions, see Gennard J., Developments of transnational collective bargaining in Europe, in *Employee Relations*, no. 4/2009, 341 - 346

⁸ Ales E. / Dufresne A., Transnational collective bargaining: Another (problematic) fragment of the European multi-level industrial relations system, in *European Journal of Industrial Relations*, no. 2/2012, 95 – 105.

⁹ See for instance Warneck W., Transnational collective action – Already a reality?, in Dorsemont F. / Jaspers T. / van Hoek A. (eds.), *Cross-border collective actions in Europe, a legal challenge: A study of the legal aspects of transnational collective actions, from a labour law and private international law perspective*, Antwerpen: Intersentia, 2007, 75 – 84.

¹⁰ The ETUC also represents the two professional and managerial organisations EUROCADRES and CEC; see Barnard C., *EU Employment Law. 4th edition*, Oxford: University Press, 2012, 73.

(BusinessEurope for the private sector, CEEP for the public one and UEAPME for the small and medium enterprises).¹¹ The sectoral level, on the other hand, includes the negotiations between the European Industry Federations and the sectoral employers' associations, often occurring within Sectoral Social Dialogue Committees established by the European Commission in 1998.¹²

Historically, attempts to establish a supranational dialogue between social partners date back to the 60's and 70's, especially at sectoral level.¹³ Nevertheless, the path for the institutionalisation of a European level of social dialogue started in the mid-80's, in conjunction with the strengthening of the competences of the European Community for the establishment of a common market, achieved through the European Single Act (ESA, 1986).¹⁴ At the time when the European Union with the Treaty of Maastricht was created (1992), the provision of the ESA resulted in involvement of the European social partners within the institutional framework and rule-making process of the EU with regard to social issues, although this was only stated in the Agreement on Social Policy attached to the Treaty.¹⁵ The current Treaty on the Functioning of the EU (TFEU, introduced by the Lisbon Treaty, 2009) has received those provisions in Arts. 153, 154 and 155 TFEU, which therefore ensure that the European social partners have a primary role as a source of European labour law.¹⁶ Furthermore, the TFEU also contains a novelty: the legal acknowledgement of the European social partners (Art. 152 TFEU) which seems definitely to welcome those actors within the EU institutional framework without differentiating between cross-sectoral and sectoral levels.¹⁷

On the basis of Art. 154 TFEU, in the field of social policy, the Commission shall consult the European social partners both on the opportunity to submit a proposal and on the contents of such a proposal. During this phase the European social partners can inform the Commission of their wish to initiate the process of negotiations described in Art. 155 TFEU. The period of negotiations shall not exceed nine months, unless the Commission and the European social partners jointly agree to do otherwise (Art. 154.4 TFEU). According to Art. 155 TFEU, the outcomes of the social dialogue at EU level can be implemented in two ways: either via the so-called 'autonomous

¹¹ The fact that only those organisations fall within the Treaty's definitions of 'management and labour' has been already contested by Franssen and Jacobs in the wake of the *UEAPME* case (Case T-135/96), see Frassner E. / Jacobs T.J.M., The question of representativity in the European Social Dialogue, in *Common Market Law Review*, no. 1998, 1295 – 1312. The issue of representativity has been also dealt with by Bercusson for questioning the real democratic legitimacy of the actors participating to the European social dialogue; see Bercusson B., Democratic legitimacy and European labour law, in *Industrial Law Journal*, no. 2/1999, 153 – 170.

¹² Commission Decision 98/500/EC on the establishment of Sectoral Dialogue Committees promoting the dialogue between the Social Partners at European level, see Barnard C., fn. 10, 85.

¹³ Marginson P., Industrial relations at European sectoral level: The weak link?, in *Economic and Industrial Democracy* no. 4/2005, 511 – 540, 513 – 514.

¹⁴ Art. 118B of the ESA provided for a new role for the Commission in promoting the relations between social partners at European level. This innovation was the outcome of a dialogue between the European social partners which started a few years before the adoption of the ESA, and it was mainly due to the personal commitment towards an improvement of the social dimension of the integration held by the then President of the European Commission Delors.

¹⁵ For an assessment of the provisions of the Agreement on Social Policy, see Bercusson B., Maastricht: a fundamental change in European labour law, in *Industrial Relations Journal*, no. 3/1992, 177 – 190. For a detailed outline of the historical process leading to the Treaty's provisions on social dialogue, see Welz C., *The European Social Dialogue*, Alphen den Rijn: Kluwer Law International, 2008, 244 ff.

¹⁶ Bercusson B., Threats and challenges to and the future of the European social dialogue, in Bercusson B., *European Labour Law. 2nd edition*, Cambridge: Cambridge University Press, 2009, 607 – 636.

¹⁷ Weiss M., The European Social Dialogue, in *European Labour Law Journal*, no. 2/2011, 155 – 165.

implementation' in accordance with national procedures and practices of collective negotiations,¹⁸ or, if jointly requested by the parties and only on the matters covered by Art. 153 TFEU,¹⁹ via the Council's decision through the adoption of a directive reproducing the contents of the agreement reached by the European social partners.²⁰

Although its contours are often blurred (see below), the description of the transnational level pivots around the subjects represented by the managements of multinational companies and employees' representative bodies.²¹ These bodies may assume different forms; however, the most common one is constituted by the European Works Councils, which nevertheless lack regulatory and negotiating prerogatives on the basis of the directive establishing them.²² As a matter of fact, Art. 1 of the original Directive 94/45 as well as Art. 1 of the revising Directive 2009/38 provide that the purpose of the directive(s) (and therefore of the establishment of EWCs) is 'to improve the right to information and to consultation of employees in Community-scale undertakings and Community-scale groups of undertakings'. The scope of the directive(s) is therefore transnational,²³ although it only provides for negotiations which are finalised for the set-up of EWCs in the framework of information and consultation rights of the employees, not contemplating any further negotiating competence for the EWCs as being de facto established.²⁴ Thus, according to the directive, negotiations occur only before the establishment of the EWCs, between the central management and the 'special negotiating body' (SNB), which is an employee representation body formed by representatives elected or appointed according to the rules determined on a national basis (Art. 5.2(b) Dir. 2009/38). Such negotiations are finalised only to reach a written agreement setting the scope, composition, functions and terms of the EWC (as defined in Art. 6 Dir. 2009/38). In case of failure of the negotiations, a mandatory procedure based on national legislations shall apply for the establishment of information and consultation procedures (Art. 7 Dir. 2009/38).²⁵ EWCs have therefore been conceived in the EU system as an instrument of employee involvement in the management of the companies,²⁶ in the light of the rights of information and consultation of workers within the undertakings (Art. 27 EU Charter), which is also one of the fields of social policy

¹⁸ See Blanpain R., *European Labour Law*, 12th edition. Alphen aan der Rijn: Kluwer Law International, 2010, 170 – 172.

¹⁹ This means that, for instance, collective bargaining, collective action, freedom of association and pay cannot be included in an agreement implemented through a Council's decision. See Bercusson B., *The European social dialogue: from dynamism to benign neglect 1993 – 2008*, in Bercusson B., *European Labour Law*. 2nd edition, Cambridge: Cambridge University Press, 2009, 521 – 562.

²⁰ See Barnard C., fn. 10, 74 – 77.

²¹ See Marginson P. / Meardi G., *Multinational companies and collective bargaining*, Dublin: Eurofound, 2009.

²² Jagodzinski R., *Involving European Works Councils in transnational negotiations – A positive functional advance in their operation or trespassing?*, in *Industrielle Beziehungen*, no. 4/2007, 320 – 321.

²³ Blanpain R., *European Works Councils. The European directive 2009/38/EC of May 2009*, Alphen aan den Rijn: Kluwer Law International, 2009, 31 ff.

²⁴ See Alaimo A., *The new directive on European Works Councils: Innovations and omissions*, in *The International Journal of Comparative Labour Law and Industrial Relations*, no. 2/2010, 217 – 230.

²⁵ See Barnard C., fn. 10, 666 – 668.

²⁶ Platzer H.-W., *Approaching and theorising European Works Councils: comments on the emergence of a European multi-level structure of employee involvement and participation*, in Hertwig M. / Pries L. / Rampeltshammer L., *European Works Councils in a complementary perspective*, Brussels: ETUI, 2009, 47 – 70.

included in Art. 153.1 TFEU.²⁷ Nevertheless, EWCs have acquired a substantial relevance in practice, as actors negotiating with the managements of multinationals, in spite of their legal basis.²⁸

The transnational aspects of collective labour law have also been extensively debated in the wake of the ‘Laval quartet’ case law, even though not systemically in relation to the other forms of collective negotiations mentioned. The focus has been more oriented towards the issue of cross-border collective action, rather than towards that of cross-border collective bargaining and negotiations as shelter against the ‘race to the bottom’ of wages and labour standards.²⁹ Moreover, the transnational dimension of the right to take collective action has been considered from a supranational perspective, thus focusing on the relationship between that right and the economic freedoms within the EU legal order.³⁰ One of the reasons may be that the Laval case law has been analysed mainly in relation to collective labour law of the Member States.³¹ Therefore it has been mostly addressed as challenging national social models and labour legislations³² rather than as impeding the development of collective bargaining dynamics in a beyond-borders dimension. The impact of these rulings has been evaluated in the view of national legal frameworks by attempting to foresee the potential consequences of an application of the Laval case law in the different national contexts,³³ or it has reinvigorated the study of national legal protection of the right to take collective action.³⁴

From an overall perspective, the progressive emergence of locations for development of collective labour relations, belonging to the EU legal and institutional frameworks has been considered as a process favoured by the European integration. The complexity and peculiarity of the EU system and of the process of integration have led to the development of the concept of ‘multi-level governance’ as a way of describing the interaction between national and EU institutions within the emerging and expanding EU polity.³⁵ Similarly, the establishment of practices of social dialogue and collective negotiations at EU level, parallel with the industrial relations systems established at national level

²⁷ Art. 2.1(f) and (g) Dir. 2009/38 provide for definitions of information and consultation, respectively: “information’ means transmission of data by the employer to the employees’ representatives in order to enable them to acquaint themselves with the subject matter and to examine it; whereas “consultation’ means the establishment of dialogue and exchange of views between employees’ representatives and central management’.

²⁸ Telljhoan V., The European Works Councils – a role beyond the EC Directive?, in *Transfer*, no. 1/2005, 81 – 96.

²⁹ See for instance Davies A.C.L., One step forward, two steps back? The *Viking* and *Laval* cases in the ECJ, in *Industrial Law Journal*, no. 2/2008, 126 – 148.

³⁰ Inter alia, Dorsemont F., The right to take collective action v. fundamental economic freedoms in the aftermath of *Laval* and *Viking*. Foes are forever!, in De Vos M. (ed.) *European Union internal market and labour law: Friends or foes?*, Antwerp: Intersentia, 2009, 45 – 104.

³¹ Van Peipe T., Collective labour law after *Viking*, *Laval*, *Rijffert* and *Commission v. Luxembourg*, in *The International Journal of Comparative Labour Law and Industrial Relations*, no. 2/2009, 81 – 107.

³² See, inter alia, Malmberg J. / Sigeman T., Industrial action and EU economic freedoms: The autonomous collective bargaining model curtailed by the European Court of Justice, in *Common Market Law Review*, 2008, 1115 – 1146.

³³ See for instance van Peijpe T., If Vaxholm were in Holland: Interest conflicts and EU labour law in a comparative perspective, in Rönmmar M., *EU industrial relations v. national industrial relations. A comparative and interdisciplinary perspective*, Alphen aan den Rijn: Kluwer Law International, 2008, 193 – 216; or also the different contributions in Vimercati A., *Il conflitto sbilanciato. Libertà economiche e autonomia collettiva tra ordinamento comunitario e ordinamenti nazionali*, Bari: Cacucci, 2009.

³⁴ See the reports in Bücken A. / Warneck W. (eds.), *Reconciling fundamental social rights and economic freedoms after Viking, Laval and Rijffert*, Baden Baden: Nomos, 2011.

³⁵ See Benz A., The European Union as a loosely coupled multi-level system, and Rittmberg B., Multi-level governance and parliaments in the European Union, in Enderlein H. / Wälty S. / Zürn M. (eds.), *Handbook on multi-level governance*, Cheltenham: Edward Elgar Publishing, 2010.

and reciprocally influencing each other, has been described as ‘intrinsically linked to the multi-level system of governance that the EU has produced’.³⁶

3.2. The criteria for identifying the three dimensions

The above-mentioned classification seems to take into consideration only those processes of collective labour negotiation which can be defined as ‘institutionalised’, as these are pursued along predetermined tracks. Moreover, it fails to highlight the presence of a level of collective labour relations which pertains to the exercise of the economic freedoms of establishment and of providing services like it stems from the EU Treaty, because some analysis includes this level within the transnational concept rather than as a distinct level on its own.

In order to define the dimensions of ‘European beyond-borders bargaining’, there is the need for outlining specific criteria of analysis. The ‘methodological’ starting point is to adopt a reliable criterion for identifying the different forms and layers of the practices of collective labour relations occurring within the European market. This criterion can be found in the definition of collective bargaining set out in Art. 2 of ILO Convention no. 154 (1981) on Collective Bargaining, which states that collective bargaining concerns ‘all negotiations which take place between an employer, a group of employers or one or more employers’ organisations, on the one hand, and one or more workers’ organisations on the other, for a) determining working conditions and terms of employment and/or; b) regulating relations between employers and workers and/or; c) between employers or their organisations and a workers’ organisation or workers’ organisations’.

By taking this definition as the cornerstone, various practices of collective labour relations occurring in the European market can be included: first, the European Social Dialogue pursued by the European social partners, at cross-sectoral and sectoral levels, according to Art. 155 TFEU; second, the negotiations occurring within multinational companies or groups; third, the collective labour relations established in the case of economic activities crossing national borders; and fourth, the collective labour relations at national level, as either collective bargaining or social dialogue, which shall be considered because of their relevance within the cross-border dimension.

The practices highlighted are not necessarily hierarchically coordinated, even though they are reciprocally influential. Each of those dimensions thus enjoys a high degree of independence from the others, even though dynamics of reciprocal influence and interaction exist. In this sense, it seems appropriate to talk about the ‘multi-dimensional feature’ of the European market as regards the practices of collective labour relations.

³⁶ Marginson P. / Sisson K., *European integration and industrial relations. Multi-level governance in the making*, Basingstoke: Palgrave Macmillan, 2006 (2004), 290.

The crucial aspect for defining the three dimensions of ‘European beyond-borders bargaining’ consists in identifying the ‘beyond-borders’ element. This means that the different layers of collective labour relations identified within the European market shall be assessed according to their impact transcending national borders and national legal frameworks. In this sense, the basic approach is to consider the scope of application of the outcomes,³⁷ which nevertheless shall not be limited to the agreements, but must also include the conflicts in the light of a classical definition of the collective agreements as industrial peace treaties signed in order to self-establish rules and procedures constraining the social powers.³⁸ Thus, agreements as well as conflicts are considered as outcomes of collective labour relations. The ‘beyond-borders’ aspect concerns the fact that such outcomes do not belong to a purely national setting or national legal framework. Rather, they have a ‘geographical feature’ which transcends national borders and can concern the actors involved –not purely domestic actors – as well as the space where the outcomes are intended to produce effects, which does not necessarily correspond with national boundaries. According to these criteria, the European cross-sectoral and sectoral social dialogues are unified in the same dimension, i.e. the supranational one; the multinational company/group level comprises the transnational dimension; and lastly, the collective labour relations occurring in the case of economic activities crossing national borders constitute the cross-border dimension.

3.3. The supranational dimension: unified cross-sectoral and sectoral levels of the European social dialogue

In the concept of ‘European beyond-borders bargaining’, the cross-sectoral and the sectoral European social dialogue are considered as jointly forming the supranational dimension. From the geographical aspect of the outcomes, they indeed share similar features, because the scope of application is supposed to coincide with the entire European market for both the cross-sectoral and sectoral European social dialogue. Moreover, similarities can also be recognised as regards the nature of the actors involved and the problems related to the implementation of the outcomes. Perhaps it can be said that they share those problems *because* they share the nature of the negotiating actors.

On the basis of the procedure for the European social dialogue set by the TFEU, seven framework agreements have been signed so far by the European social partners at cross-sectoral level: three of them have been then transposed into a Council directive,³⁹ whereas the other four have been

³⁷ Comandè D., La dinamiche collettive nello spazio giuridico europeo: il paradigma dell'autonomia, Working Paper C.S.D.L.E. Massimo D'Antona, INT – 76/2010.

³⁸ Kahn-Freund O., *Labour and the Law*, London: Stevens, 1975, 95.

³⁹ The European Framework Agreement on parental leave (1995, transformed into Directive 96/34); the European Framework Agreement on part-time work (1997, transformed into Directive 97/81); the European Framework Agreement on fixed-term work (1999, transformed into Directive 1999/70), see <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/frameworkagreements.htm>. However, the framework agreement on parental leave was revised in 2009 and the new contents have been incorporated into Directive 2010/18, see

implemented through the ‘autonomous track’.⁴⁰ At sectoral level, in addition to the large number of joint texts,⁴¹ twelve framework agreements have been signed: six implemented via the Council directive⁴² and six via the autonomous implementation.⁴³

The cross-sectoral and sectoral European social dialogue has been progressively institutionalised and this has changed the nature of both the negotiating actors and the outcomes. This change has been criticised from an industrial relations perspective because it entails a switch from the classical activities of negotiating and bargaining to joint lobbying activities aimed at EU institutions.⁴⁴ At cross-sectoral level in particular, different factors can be identified as influencing this process: first, a scant interest in negotiating proper, on the employers’ side;⁴⁵ second, the very limited possibility to ensure the proper implementation of the outcomes throughout the European market,⁴⁶ which forces the European social partners to rely on the public intervention of the EU institutions;⁴⁷ and third, the actors’ unclear representativity and accountability, which have repercussions on the legitimacy of the entire system of European social dialogue.⁴⁸ A lobbyist attitude has also been noticed at sectoral level as a result of the progressive increase and institutionalisation of sectoral social committees.⁴⁹ On the employers’ side, the lobby-like features of the organisations concerned, at cross-sectoral and sectoral level, appear less controversial; such organisations have been set up for the precise task of

<http://www.worker-participation.eu/EU-Social-Dialogue/Interprofessional-ESD/Outcomes/Framework-agreements/Revised-Framework-agreement-on-parental-leave-2009>.

⁴⁰ The European Framework Agreement on telework (2002); the European Framework Agreement on work-related stress (2004); the European Framework Agreement on harassment and violence at work (2007); the European Framework Agreement on inclusive labour markets (2010).

⁴¹ See the fact sheets realised by the ETUI at <http://www.worker-participation.eu>.

⁴² Framework agreement on prevention from sharp injuries in the hospital and healthcare sector (2010, transformed into Directive 2010/32); Framework agreement on the Maritime Labour Convention (2006, transformed into Directive 2009/13); Framework agreement on certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services in the railway sector (2005, transposed into Directive 2005/47); Framework agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation (2000, transposed into Directive 2009/79); Framework agreement on the organisation of working time of seafarers (1999, transposed into Directive 1999/63); Framework agreement on some aspects of working time of rail workers (1998); see Marginson P. / Keune M., European social dialogue as multi-level governance: Towards more autonomy and new dependencies, European Integration on-line Papers (EIoP), issue no. 1/2012, 12.

⁴³ Framework agreement on competence profiles in the chemicals industry (2011); Framework agreement on the implementation of European hairdressing certificates (2009); Framework agreement on the reduction of workers’ exposure to the risk of work-related musculo-skeletal disorders in agriculture (2006); Framework agreement on workers’ health protection through the good handling and use of crystalline silica and products containing it, in 14 industrial sectors (2006); Framework agreement on the European licence for drivers carrying out a cross-border inter-operability service (2004); European agreement on vocational training in agriculture (2002). *Ibid.*, 12.

⁴⁴ Degryse C. / Pochet P., Has the European sectoral dialogue improved since the establishment of SSDCs in 1998?, in *Transfer* no. 2/2011, 145 – 158.

⁴⁵ Glassner V. / Pochet P., Why trade unions seek to coordinate wages and collective bargaining in the Eurozone: past developments and future prospects, Brussels: ETUI Working Paper, 03/2011.

⁴⁶ Deinert O., Mode of implementing European collective agreements and their impact of collective autonomy, in *Industrial Law Journal*, no. 4/2003, 317 – 325.

⁴⁷ Smismans S., The European social dialogue in the shadow of hierarchy, in *Journal of Public Policy* no. 4/2008, 161 – 180.

⁴⁸ Novitz T. / Syrpis P., Assessing legitimate structures for the making of transnational labour law: the durability of corporatism, in *Industrial Law Journal*, no. 4/2006, 367 – 394.

⁴⁹ Pochet P., Sectoral social dialogue? A quantitative analysis, in *Transfer*, no. 3/2005, 313 – 322.

promoting affiliates' interests at EU level⁵⁰ and only incidentally and reluctantly has this developed towards a role in social dialogue processes.⁵¹

This switch seems to correspond with an accompanying switch in the nature and contents of the texts produced. The so-called 'new generation texts',⁵² including a wide range and variety of documents, have mostly replaced the proper framework collective agreements.⁵³ The focus of negotiations switched from the classical 'hard' issues, such as wages or working hours, to 'softer', less controversial and more consensual issues, such as health and safety or non-discrimination.⁵⁴ The evolution of the European social dialogue – cross-sectoral as well as sectoral – towards the adoption of soft instruments has been interpreted as reflecting the need for 'freeing' this practice from the enforcing intervention of the EU legislator;⁵⁵ however, it may be also related to the relevance progressively acquired by the soft-law procedures driving the constitutionalisation process of social aspects of the EU.⁵⁶

The crucial issue seems to concern the implementation and enforcement procedures of the documents signed by the cross-sectoral and sectoral European social partners. In truth, the results from the perspective of the binding effects of the outcomes have been considered rather poor.⁵⁷ The problematic enforcement of the outcomes, however, has its roots in the 'procedural dimension' of the autonomy of the European social dialogue: it has been observed that real autonomy is indeed experienced by the cross-sectoral and sectoral European social partners, but only in the phase of implementation of the agreements, because a consultative phase involving the European Commission usually takes place during the drafting.⁵⁸

This has repercussions also within the 'European beyond-borders bargaining' concept. The 'beyond-borders' element of the cross-sectoral and sectoral European social dialogue refers to the conclusion of agreements in a dimension not belonging to national frameworks, and to the application of these agreements throughout the European market. However, the latter is ensured, via 'autonomous implementation', through the instruments provided by the national frameworks, i.e. 'within borders' instruments. A distinctive trait of the supranational dimension is therefore that, as in the implementation and enforcement process of the EU legislations, the 'beyond-borders' element in

⁵⁰ Welz C., fn. 15, 149 ff.

⁵¹ Arcq E. / Dufresne A. / Pochet P., The employers: the hidden face of European industrial relations, in *Transfer*, no. 2/2003, 302 – 321.

⁵² Marginson P., fn. 13, 516.

⁵³ Léonard E., European Sectoral Social Dialogue: An analytical framework, in *European Journal of Industrial Relations*, no. 4/2008, 402 – 419.

⁵⁴ Keller B. / Webber S., Sectoral social dialogue at EU level: Problems and prospects of implementations, in *European Journal of Industrial Relations*, no. 3/2011, 227 - 243

⁵⁵ Branch A., The evolution of the European social dialogue towards greater autonomy: Challenges and potential benefits, in *The International Journal of Comparative Labour Law and Industrial Relations*, no. 2/2005, 321 – 346.

⁵⁶ Sciarra S., La costituzionalizzazione dell' Europa sociale. Diritti fondamentali e procedure di soft law, Working Paper C.S.D.L.E. Massimo D'Antona, INT – 16/2003.

⁵⁷ Vigneu C., The future of European social dialogue, in Moreau M.-A. (ed.), *Before and after the economic crisis. What implications for the 'European Social Model'?*, Cheltenham,: Edward Elgar, 2011, 270 – 284, 275.

⁵⁸ Peruzzi M., Autonomy in European Social Dialogue, in *The International Journal of Comparative Labour Law and Industrial Relations*, no. 1/2011, 3 – 21.

not present in the actual process of implementation and enforcement of the contents of the outcomes.

3.4. The transnational dimension: collective labour relations within multinationals

The company-based collective labour relations occurring within multinational groups or companies operating in Europe constitute the transnational dimension of the proposed classification. Nevertheless, clarity is needed, as the term ‘transnational’ and the term ‘cross-border’ have very often been used almost as synonyms for generally defining the collective labour dynamics not confined within national boundaries.⁵⁹ An illustrative example is the proposal for a so-called Monti II Regulation, whose Art. 3 speaks about ‘transnational situations or situations having a cross-border character in the context of the exercise of the freedom of establishment or the freedom to provide services’.⁶⁰

Unlike the European social dialogue, the transnational dimension of ‘European beyond-borders bargaining’ has no legal framework to which it can refer, because Directive 2009/38 does not give EWCs a negotiating role.⁶¹ However, the issue of a legal framework for transnational collective bargaining has been investigated by a group of scholars on request of the European Commission.⁶² In recognising the existence of a gap between the unclear status of legal sources for transnational collective negotiations and the presence of a variety of actors de facto pursuing such negotiations, the report suggests adopting a directive on the basis of Art. 115 TFEU; this directive would provide for an optional framework for transnational collective negotiations, aiming at creating a link between the European social dialogue and the negotiations at multinational company level.⁶³

The transnational dimension presented here is represented by the collective labour relations pursued between the management of the multinational companies or groups on one side, and the organised employees of the company or group concerned, on the other. The actors are the management and the employees’ representatives. The collective labour relations established in this context are intended to produce effects limited to the plants belonging to the multinationals, i.e. the

⁵⁹ An example in the labour law field is given in Bercusson B., Implementation and monitoring of cross-border agreements: The potential role of cross-border collective industrial action, in Papadakis K. (ed.), *Cross-border social dialogue and agreements: An emerging global industrial relations framework?*, Geneva: International Labour Office, 2008, 131 – 157; as regards the industrial relations field, see Arrowsmith J. / Marginson P., The European cross-border dimension of collective bargaining in multinational companies, in *European Journal of Industrial Relations* no. 3/2006, 245 – 266.

⁶⁰ COM (2012) 130 final. For an analysis of the proposed regulation, see Bruun N. / Bucker A. / Dorssemont F., Balancing fundamental social rights and economic freedoms: Can the Monti II initiative solve the EU dilemma?, in *The International Journal of Comparative Labour Law and Industrial Relations*, issue 3/2012, 279 – 306.

⁶¹ See Sobczak A., Ensuring the effective implementation of transnational company agreements, in *European Journal of Industrial Relations*, no. 2/2012, 139 – 151.

⁶² Ales E. et al., Transnational collective bargaining in Europe: past, present and future, report for the European Commission, 2006.

⁶³ *Ibid.*, 35 ff.

workplace(s). Therefore, the ‘beyond-borders’ element consists of the fact that the outcomes are limited to the closed space of the workplace(s), which therefore does not correspond to the entire national space of the State’s territory where the plant is established. In this sense, the transnational dimension of ‘European beyond-borders bargaining’ refers only to collective labour relations occurring within multinational groups or companies, and does not include other forms of collective labour relations producing effects outside the limited space of such workplace(s).⁶⁴

The definition of the transnational dimension proposed here is not limited to the negotiations ending with a framework agreement uniformly applicable within the multinational company.⁶⁵ Rather, it also includes collective labour relations which do not necessarily result in agreements, but which involve one company’s management and different employees’ or workers’ representatives in more than one State.⁶⁶ Furthermore, since the focus is on bilateral processes of bargaining, negotiations and conflicts, practices related to the field of corporate social responsibility, such as codes of conduct, are excluded from the concept of ‘European beyond-borders bargaining’. Despite such practices having been recognised as producing normative effects and their inclusion in emerging forms of transnational labour governance,⁶⁷ they have a unilateral character which does not imply a process of negotiation between management and employees.⁶⁸

Collective labour relations occurring between EWCs and managements are instead included. Despite the fact that practices of employees participation shall be differentiated from the proper dynamics of collective bargaining,⁶⁹ the diffusion of EWCs in Europe has led the European Industry Federations to use them as a tool for bringing negotiating activities directly into multinational companies.⁷⁰ Therefore, against the limitation of their role in negotiation processes on the legal basis of Directive 2009/38, EWCs are the most common form of multinational companies’ employees organising in

⁶⁴ For instance, those forms of collective labour relations classified in Ales E. / Verrecchia G., Transnational: the emerging multifaced dimension of industrial relations, in Leonardi S. Et alia (eds.), *Euroactca final report. European Action on Transnational Company Agreements: A stepping stone towards a real internationalisation of industrial relations?*, Istituto di Ricerche Economiche e Sociali IRES, Rapporto di Ricerca no. 2/2012, 35 – 45.

⁶⁵ Alaimo a., Transnational company agreements and sectoral social dialogue: parallel lines, no convergence?, in Leonardi S. Et alia (eds.), *Euroactca final report. European Action on Transnational Company Agreements: A stepping stone towards a real internationalisation of industrial relations?*, Istituto di Ricerche Economiche e Sociali IRES, Rapporto di Ricerca no. 2/2012, 53 – 66.

⁶⁶ See for instance the case of GM in Europe in Pulignano V., Going national or European? Local trade union politics within transnational business context in Europe, in Bronfenbrenner K (ed.), *Global unions. Challenging transnational capital through cross-border campaigns*, New York: Cornell University Press, 2007, 137 – 154.

⁶⁷ García-Munoz Alhambra M.A. / ter Haar B. / Kun A., Soft on the inside, hard on the outside: an analysis of the legal nature of new forms of International Labour Law, in *The International Journal of Comparative Labour Law and Industrial Relations*, no. 4/2011, 337 – 363; Telljhoan V., The implementation of the Global Labour Relations Charter at Volkswagen, in Leonardi S. Et alia (eds.), *Euroactca final report. European Action on Transnational Company Agreements: A stepping stone towards a real internationalisation of industrial relations?*, Istituto di Ricerche Economiche e Sociali IRES, Rapporto di Ricerca no. 2/2012, 79 – 88.

⁶⁸ On the unilateral nature of such practices, which differ from proper collective labour negotiations, see Schomann I. et al., Codes of conduct and international framework agreements: New forms of governance at company level, Dublin: Eurofound, 2008.

⁶⁹ Ales E., Transnational collective bargaining in Europe: The case for legislative action at EU level, in *International Labour Review*, no. 1-2/2009, 149 – 162, 157.

⁷⁰ Müller T. / Platzer H.-W. / Rüb S., Transnational company policy and coordination of collective bargaining – new challenges and roles for European industry federations, in *Transfer*, no. 4/2010, 509 – 524, 514.

Europe, and therefore EWCs are central actors in the transnational dimension of ‘beyond-borders bargaining’ in Europe.

Yet EWCs are not the only actors on the workers’ side involved in negotiations in the transnational dimension. Although the European Commission itself has recognised them as the leading actor at company level,⁷¹ the variety of workers’ representative actors involved is wider: it includes European Industry Federations, Global Union Federations and national trade unions.⁷² For this reason, the so-called International Framework Agreements, signed by the Global Union Federations, are included within the transnational dimension, since their scope of application is ‘transnational’ in the terms adopted here. These agreements produce effects in the workplaces or plants belonging to global multinationals located in the territory of one or more EU Member States.⁷³

Against the indeterminacy of the employees’ side, a more homogenous feature is recognisable on the employers’ side: as a matter of fact, the employer actor in transnational collective bargaining is always the management of the multinational company or group concerned.⁷⁴ In other words, the employer’s side appears as the most reliable benchmark for identifying the transnational dimension of ‘European beyond-borders bargaining’. The ‘beyond-borders’ element of the transnational dimension thus refers to the multinational companies and groups having their plants and establishments within the territories of more than one EU Member State, as that entails the extension of collective bargaining dynamics ‘beyond the boundaries of nationally-based arrangements’.⁷⁵

3.5. The cross-border dimension: collective labour dynamics in the context of the exercise of cross-border economic freedoms

In the field of industrial relations, the definition ‘cross-border’ has mainly been applied to describe the trade unions’ unilateral attempts to coordinate collective bargaining strategies between trade unions of different countries.⁷⁶ In particular, ‘cross-border’, and thus de-centralised, trade union

⁷¹ See *The role of transnational company agreements in the context of increasing international integration - Commission Staff Working Document*, SEC (2008) 2155, 2.7.2008.

⁷² Hammer N., International Framework Agreements: global industrial relations between rights and bargaining, in *Transfer*, no. 4/2005, 511 – 530.

⁷³ In this sense also Telljohann et al., European and international framework agreements: new tools of transnational industrial relations, in *Transfer*, no. 3-4/2009, 505 – 525, 508.

⁷⁴ See Welz C., A qualitative analysis of international framework agreements: Implementation and impact, in Papadakis K. (ed.), *Shaping global industrial relations: The impact of international framework agreements*, Geneva: ILO, 2011, 38 – 60.

⁷⁵ Marginson P. / Meardi G., fn. 21, 18.

⁷⁶ Hammer N., Cross-border cooperation under asymmetry: The case of an Interregional Trade Union Council, in *European Journal of Industrial Relations*, no. 4/2010, 351 – 367.

strategies have been juxtaposed with the centralised approach typical of the European social dialogue, in the context of the establishment of a European system of industrial relations.⁷⁷ From a labour law perspective, the term has been used mainly for defining situations involving two different jurisdictions with regard to the application of the employment contract, in the case of transfer of undertakings⁷⁸ as well as of posting of workers.⁷⁹ Despite attention focused on individual labour law issues mainly related to workers crossing the border,⁸⁰ both situations highlight the involvement of collective labour law issues, such as the application of national collective agreements to foreign workers and the maintenance of collective agreements in case of cross-border transfer of undertakings or outsourcing. Furthermore, as mentioned earlier, the term ‘cross-border’ has been widely used in the context of analysing ‘Laval quartet’, as regards the issue of cross-border employment regulation in cases of posting of workers⁸¹ as well as the issue of cross-border conflict and strike actions.

A common denominator of these uses of the term is that the displacement of economic activities across national borders implies the involvement of collective labour dynamics. This represents the core of the cross-border dimension of ‘European beyond-borders bargaining’. The intention, however, is to reverse the angle of observation by focusing on enterprises moving across national borders to perform economic activities. The assumption behind this operation involves considering movement of capital (broadly conceived) across States’ borders as a very strong challenge to labour law, which is still too territorialised within the national States and anchored to the national legal frameworks.⁸² The ability of capital to cross national borders therefore allows the enterprises to escape rigid regulations on labour set by national legal frameworks.⁸³

In the context of the European market, this challenge arises within the framework of the interpretation given by the CJEU on the EU provisions as regards the economic freedoms of establishment (Art. 49 TFEU) and of providing services (Art. 56 TFEU). Indeed, one of the consequences of the ‘Laval quartet’ case law concerns the uneven exercise of collective labour rights against economic freedoms in the context of the free market. In other words, on the one side, those rulings place hard restrictions on trade unions’ room for manoeuvre in counteracting economic activities of outsourcing and delocalisation; on the other side they show an understanding of collective labour rights and practices as potential obstacles to the free movement of capital and services.

⁷⁷ Glassner V. / Pochet P., fn. 45.

⁷⁸ See for instance, Hepple B., *Labour Law and Global Trade*, Oxford: Hart Publishing, 2005, 172 ff.

⁷⁹ Evju S., Cross-border services, posting of workers, and jurisdictional alternation, in *European Labour Law Journal* no./2010, 89 – 98.

⁸⁰ Verschueren H., Cross-border workers in the European internal market: Trojan horse for Member States’ labour and social security law?, in *The International Journal of Comparative Labour Law and Industrial Relations*, no. 2/2008, 167 – 199.

⁸¹ Van Peijpe T., Collective Labour Law after *Viking, Laval, Riffert* and *Commission v. Luxembourg*, in *The International Journal of Comparative Labour Law and Industrial Relations*, no. 2/2009, 81 – 107.

⁸² Mundlak G., De-territorializing labour law, in *Law & Ethics of Human Rights*, vol. 3/2009, 188 – 222.

⁸³ Lo Faro A., “Turisti e vagabondi”: riflessioni sulla mobilità internazionale dei lavoratori nell’impresa senza confini, in *Lavoro e Diritto* issue 3/2005, 437 – 473.

The presence of an enterprise operating within the European market by crossing national borders in order to perform an economic activity represents the criterion for identifying the cross-border dimension of ‘European beyond-borders bargaining’. The relevance of this dimension is well-demonstrated by the ‘Laval quartet’ cases: The *Viking Line* case involves a Finnish ferry provider delocalising in Estonia, which provoked a collective action by Finnish maritime workers union backed up by the International Transport Workers’ Federation; the *Laval* case concerns a collective action jointly taken by the Swedish trade unions of construction and electrician workers against a Latvian company posting workers to Sweden in order to provide construction services; the *Riffert* case, similarly, concerns a Polish construction company which was posting workers to Germany, but which was not applying the local collective agreement signed with the local branch of the national trade union in the construction sector; whereas, more generally, the *Commission v. Luxembourg* case entails the understanding of the entire national labour legislation – statutory regulation and collective agreements – as obstacle to the cross-border movement of enterprises in the territory of the Grand Duchy of Luxembourg.⁸⁴ However, those are just a few examples of cases in which collective labour relations are established in a cross-border dimension; other cases can be found in different countries in Europe, mainly involving outsourcing and delocalisation as well as the cross-border provision of services.⁸⁵

Generally speaking, the main feature of the cross-border dimension of collective labour relations is thus constituted by the presence of an enterprise operating across national borders, in order to perform or relocate an economic activity within the European market which falls under the EU provisions on the exercise of the economic freedoms of establishment and of providing services. When this enterprise moves from its State of origin towards a different State, there are different actors with different and conflicting interests involved: on the one hand, the enterprise itself, which aims at gaining competitiveness by applying working and employment conditions to their employees which are lower than those applied by national enterprises; on the other hand, the national workers and trade unions which aim instead at ensuring that the enterprise applies the same conditions as those for the national workers, in order not to experience the risk of a race to the bottom of social and labour standards – i.e. social dumping.⁸⁶ Therefore, the collective labour relations established between these two subjects are built around the request of entering into negotiations, either for applying national, collectively agreed working and employment conditions, or for bargaining for new conditions to be applied to the employees of the enterprise, and who are in the middle of that relationship but not directly part of it.

⁸⁴ For an overview of the cases, see Hendrickx F., *Beyond Viking and Laval: The evolving European context*, in *Comparative Labor Law & Policy Journal*, no. 4/2011, 1055 – 1077.

⁸⁵ See for instance some cases in the UK regarding strikes against enterprises posting workers in the British territory; described in Ryan B., *Transnationalism and labour law: the ‘British jobs’ protests of 2009*, in in Moreau M.-A. (ed.), *Before and after the economic crisis. What implications for the ‘European Social Model’?*, Cheltenham; Edward Elgar, 2011, 72 – 88.

⁸⁶ Intended 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’, as defined in Bernaciak M., *Social dumping: Political catchphrase or threat to labour standards?*, ETUI Working Papers 2012.06, 25.

In conclusion, the ‘beyond-borders’ element comprises the movement of an undertaking across national borders. As regards the scope of application, these collective labour relations are intended to be pursued in the territory of the State where the enterprise performs its activity, or even in the workplace.

4. *The theoretical approach of ‘law dependence’*

4.1. Collective autonomy: the interaction between law and collective labour relations

The discourse concerning the theoretical approach of ‘law dependence’ developed here relates to the model of collective autonomy. Without entering into the details, the model of collective autonomy is based on a conception of industrial relations systems as an autonomous system in which the law of the State provides a legal framework establishing the conditions for labour market parties to autonomously regulate terms and conditions of employment as well as their reciprocal relationships.⁸⁷ In other words, the presence of internal instruments for producing substantive and procedural norms, as well as self-sanctioning mechanisms for the violations of those norms, permits us to consider this system as autonomous.⁸⁸ Nevertheless, the intervention of the legislative power is needed in order to create, through the production of ‘auxiliary legislation’, the right conditions to permit – or even to force – the two parties to enter into negotiations, but not necessarily to agree.⁸⁹ Therefore, the role of the State is to set positive norms aimed at rebalancing the intrinsically unbalanced relationship between the social powers represented by the labour market parties.⁹⁰ The industrial relations system can hence enjoy a high degree of autonomy, but only if the legislative and judicial powers intervene by establishing a legal framework equalising the positions of the parties in the negotiations and providing broad protection for the self-sanctioning mechanisms, such as collective action and strike.

The model described here finds a legal translation in some international and European legal sources. The set of rules established through ILO Conventions no. 87 (1948) and 98 (1949), on Freedom of Association and Protection of the Right to Organise and on the Right to Organise and the Right to Collective Bargaining, respectively, provides for an obligation to promote a legislation ensuring the free exercise of the right to organise (Art. 11 ILO Conv. No. 87); this set of rules also states that public authorities shall refrain from intervening through imposing restrictions (Art. 3.2 ILO Conv.

⁸⁷ Kahn-Freund O., fn. 38, 24 ff.

⁸⁸ Giugni G., *Introduzione allo studio dell'autonomia collettiva*, Milano: Giuffrè, 1960, 47 ff.

⁸⁹ Kahn-Freund O., fn. 38, 25.

⁹⁰ Schmitt F., *Industrial Relations and the law*, Stockholm: Almqvist & Wiksell International, 1977, 14.

No. 87). On the other hand, appropriate measures shall be taken to encourage and promote development and use of voluntary negotiations (Art. 3 ILO Conv. No. 98), and for ensuring adequate protection against acts of control or domination from the employers' side and directed at workers' organisations (Art. 2.2 ILO Conv. No. 98). Moreover, Convention no. 154 (1981) on Collective Bargaining provides for the necessity to adopt adequate measures for promoting collective bargaining in all branches of economic activity, and at both establishing procedural rules for the relationship between labour market parties and setting substantive norms related to working and employment conditions (Art. 5). On the individual level, ILO Convention no. 135 on Workers' Representatives states that workers' representatives in the undertaking shall enjoy effective protection against any act prejudicial to their activity, including dismissal (Art. 1).⁹¹

The European Social Charter also contains provisions prohibiting the Contracting Parties from undertaking legislation which impairs the right to organise (Art. 5 ESC), and requiring them to promote both joint consultations between workers and employers and the establishment and use of 'appropriate machinery' for voluntary consultations and settlement of disputes (Art. 6 ESC).⁹²

With regard to the protection of self-sanctioning mechanisms, although the ILO Conventions do not mention the right to strike,⁹³ collective or industrial action has been considered by the supervisory bodies of the ILO as an integral part of the freedom of association and the right to organise; therefore, most efforts have been addressed towards defining the limits to its exercise.⁹⁴ The ESC, instead, provides in its Art. 6.2 for the protection of the right to take collective action, including the right to strike, which can be subject to obligations arising out of collective agreements. A contribution on this aspect has recently come from the European Court of Human Rights, which, in interpreting Art. 11 ECHR on the freedom of assembly and association has stated that collective bargaining as well as collective action shall be included in its scope. In *Demir and Baykara*⁹⁵ and *Enerji Yap-Sol Sen*,⁹⁶ the Court refers to collective labour rights as integral aspects of the freedom of association from a human rights perspective as well, thus placing the national legislations not adequately protecting employees in the exercise of those rights in non-compliance with the ECHR. Protection of the rights to collective bargaining and collective action at EU level is also granted by Art. 28 of the EU Charter on Fundamental Rights. Nevertheless, their acknowledgment as

⁹¹ On the ILO framework for the exercise of collective bargaining, see Rojot J., The right to bargain collectively: an international perspective on its extent and relevance, in *The International Journal of Comparative Labour Law and Industrial Relations*, no. 4/2005, 513 – 532, 515.

⁹² See Swiatkowski a., *Charter of Social Rights of the Council of Europe*, Alphen aan den Rijn: Kluwer Law International, 2007, 191 ff.

⁹³ This is mainly due, in the early stages of the organisation, to matters of international politics and, in particular, to the refusal of the workers' representatives to insert the right to strike into the Conventions because of the risk of experiencing a progressive restriction on the exercise of that right; see Novitz T., *International and European Protection of the Right to Strike*, Oxford: University Press, 2003, 111 ff.

⁹⁴ *Ibid.*, 192 ff.

⁹⁵ Case no. 34503/97 *Demir and Baykara II*, 12 November 2008.

⁹⁶ Case no. 68959/01 *Enerji Yapı-Yol Sen*, 21 April 2009.

fundamental rights of the EU has led the CJEU to include them within the scope of application of the provisions on economic freedoms.⁹⁷

This framework of provisions thus describes a system of industrial relations founded on the limited role of States' laws in establishing rules and procedures which allow a full, free and autonomous industrial relations system by equalising the unbalanced relationship between the social powers.

4.2. The path dependence theory: at the roots of the process

While far from exhaustive, this section of the article presents the foundation of the 'law dependence' approach, which is the theory of path dependence. Despite the wide range of application fields, this theory has a common theoretical ground constituted by the focus on the dynamic processes of phenomena development.⁹⁸ In particular, it deals with the processes that cause the progressive establishment and reinforcement of specific paths for the developments of political, social, economic and cultural phenomena. The peculiar feature of this theory concerns the importance granted to the decisions made in the early stages of formation of the phenomena concerned, and of the historical sequence of these stages.⁹⁹ Thus, in order to explain the final outcomes, timing and sequence are crucial in the theory of path dependence.

The path dependence theory attributes extreme importance to historical development,¹⁰⁰ and this has been expressed by the catchphrase 'history matters'.¹⁰¹ The aim is to observe specific phenomena under the lens of development: instead of focusing on a particular and thus partial 'snapshot', which could miss some aspects of the reality, a path dependence analysis would return a better understanding of the reinforcement process which leads to the establishment of a phenomenon, in spite of other and perhaps better alternative paths it could have taken.¹⁰² The application of path dependence has been used to demonstrate the reasons why development of specific phenomena has followed certain paths resulting in the establishment of sub-optimal equilibria, which from a strictly classical economic perspective appear inefficient and therefore irrational.

This theory has been then widely applied in the field of research investigating the role of institutions. In particular, path dependence arguments have been sustained against the traditional functionalist

⁹⁷ On the issue, Barnard C., *Viking and Laval: An introduction*, in 10 *Cambridge Yearbook on European Legal Studies*, 2008, 463 – 492.

⁹⁸ Page S.E., Path Dependence, in *Quarterly Journal of Political Science*, no. 1/2006, 87 – 115.

⁹⁹ Pierson P., Increasing returns, path dependence, and the study of politics, in *American Political Science Review*, no. 2/2000, 251 – 267.

¹⁰⁰ Greener I., The potential of path dependence in political studies, in *Politics*, no. 1/2005, 62 – 72.

¹⁰¹ Pierson P., fn, 99, 252.

¹⁰² Pierson P., *Politics in time: history, institutions, and social analysis*, Princeton N.J. : Princeton University Press, 2004, 47 – 48.

approach as regards the origins of institutions.¹⁰³ Whereas functionalists theorise that institutions are created and evolve in order to respond to particular needs of society in the most rational way possible, path dependence supporters argue instead that the self-reinforcement process that institutions experience in their evolution depends only on the choices made at the beginning of the process, and thus it is not necessarily a rational evolution.¹⁰⁴

However, shortcomings of the path dependence approach to institutional origin and development have been highlighted in dealing with change. The risks identified concern highly deterministic analysis and the underestimation of power relations in the formation process.¹⁰⁵ To consider the equilibrium achieved in the evolution of a certain institution as the only possible one, on the basis of the previous stages, may lead to not exploring the 'hidden alternatives' to the path taken; in addition, it ultimately eliminates any role for agents shaping the path.¹⁰⁶ In this regard, alternative approaches to a rigid use of path dependence in the study of institutional origin and evolution have been developed, particularly concerning the issue of change. Path dependent arguments have been thus included in the different explanations for institutional change, as a way to emphasise the reasons for the resulting sub-optimal efficiency.¹⁰⁷

The issue of change has been explored by developing the concept of 'critical junctures': precise moments arising in the evolution process, which open opportunities for different continuations of the path, be it the switch to another path, the reinforcement of the same path or the emergence of a new institution.¹⁰⁸ Following this reasoning, the concept of path shaping has been seen as explaining the interaction of social, political and economic forces in the formation of new institutions, from the perspective of change in existent ones.¹⁰⁹

Institutional change in the context of path dependence is thus the framework needed in order to understand the development and evolution of industrial relations as dependent on the relationship between law and collective labour relations.

4.3. Path dependence and industrial relations

The classical definition developed by North describes the institutions as the set of norms and rules which make playing the game possible; the organisations are instead the players of that game.¹¹⁰ This

¹⁰³ Pierson P., The limits of design: Explaining institutional origins and change, in *Governance: An International Journal of Policy and Administration*, no. 4/2000, 475 – 499.

¹⁰⁴ *Ibid.*, 492.

¹⁰⁵ Crouch C. / Farrel H., Breaking the path of institutional development? Alternatives to the new determinism, in *Rationality and Society*, no. 1/2004, 5 – 43.

¹⁰⁶ *Ibid.*, 20.

¹⁰⁷ North D.C., *Institutions, institutional change, and economic performance*, Cambridge: University Press, 1990.

¹⁰⁸ Ebbinghaus B., Can path dependence explain institutional change? Two approaches applied to welfare state reform, MPIfG Discussion Paper 05/2, 2005.

¹⁰⁹ Torfing J., Towards a Schumpeterian workfare postnational regime: path-shaping and path-dependency in Danish welfare state reform, in *Economy and Society*, no. 3/1999, 369 – 402, 389 ff.

¹¹⁰ North, fn. 107, 7 ff.

definition constitutes the basis for study of industrial relations in the context of path dependence and institutional change.

An example is given by the research project conducted by Murhem, as regards the Swedish regime of industrial relations.¹¹¹ Murhem adopted a neo-institutionalist approach in dealing with changes in the industrial relations system determined by liberalisation, internationalisation and the decline of large-scale enterprises. The conclusions highlight that the changes in the industrial relations regime have been governed by path-dependent dynamics, because of the influence that the previously established system has had on the responses to those challenges.¹¹² In terms of the evolution of institutional aspects of industrial relations systems, especially in a comparative perspective, the path-dependent argument seems to be the dominant one.¹¹³

Similarly, but in the field of comparative political economy, Hall and Soskice conducted a comparative study among the largest OECD countries. They have included industrial relations among the institutions influencing the distinction between coordinated and liberal market economies.¹¹⁴ The study resulted in arguments in favour of considering the institutions of industrial relations as path-dependent on a national basis rather than convergent in a cross-national perspective. The issues of path dependence and institutional change in collective labour relations have been addressed from a quantitative perspective as well: Traxler, Blanschke and Kittel have conducted a cross-national empirical study based on data collection from 20 OECD countries, demonstrating that the internationalisation of market has produced responses from the collective labour relations systems based on path-dependent rather than convergent modalities.¹¹⁵ Moreover, Baccaro and Howell have shown, on the basis of quantitative indicators from fifteen advanced countries and six European case studies, that even when a common path of convergence is recognisable, this is limited to the function that the industrial relations systems play in each country, whereas as institutions experience a path-dependent evolution.¹¹⁶ From an overall perspective, Baglioni has noticed that the progressive establishment and reinforcement of industrial relations systems modelled on neo-corporatism have favoured the application of path dependence; thus, the institutional change analysis is very valuable because of the institutionalisation that those systems experience in such processes.¹¹⁷

¹¹¹ Murhem S., *Turning to Europe. A new Swedish industrial relations regime in the 1990s*, Acta Universitatis Upsaliensis, Uppsala Studies in Economic History 68, Uppsala, 2003.

¹¹² Ibid., 46 – 48.

¹¹³ Marginson P. / Sisson K., fn. 36, 18 – 21.

¹¹⁴ Hall P.A. / Soskice D. An introduction to varieties of capitalism, in Hall P.A. / Soskice D., *Varieties of Capitalism. The institutional foundations of comparative advantage*, Oxford: University Press, 2001, 7.

¹¹⁵ Traxler F. / Blanschke S. / Kittel B., *National labour relations in internationalized markets. A comparative study of institutions, change and performance*, Oxford: University Press, 2001.

¹¹⁶ Baccaro L. / Howell C. A common neoliberal trajectory: The transformation of industrial relations in advanced capitalism, in *Politics & Society*, 4/2011, 521 – 563.

¹¹⁷ Baglioni M., Path dependency and research on labour relations, in Garibaldi F. / Baglioni M. / Casey C. / Telljohann V., *Workers, Citizens, Governance. Socio-cultural Innovation at Work*. Frankfurt am Main: Peter Lang, 2012, 49 – 62.

In the labour law field, the fifteen-country European comparative study led by Hepple and Veneziani has dealt with the issue of change in a path dependence perspective.¹¹⁸ In particular, the study has highlighted that alongside a path-dependent development, the transformations experienced in different areas of labour law in the aftermath of the World War II have also followed a logic of ‘path departure’, when laws and policies have been adopted to react to new substantive changes in societies.¹¹⁹ In this sense, the study reinforces the thesis of a previous study involving nine countries in Europe, focused on the dynamics of establishment of labour law during the era of industrialisation.¹²⁰ The thesis pointed out in this study concerns the understanding of process dynamics and evolution of labour legislations that have resulted from power relationships and social change, in opposition to a purely functional approach theorising that the making of labour law in Europe was a response to the demands of industrialisation.¹²¹

4.4. Autonomy v. interference: the ‘law dependence’ approach

A neo-institutionalist understanding of the relationship between statutory legislation and case law on the one hand and collective labour relations on the other is also the basis for developing the approach of ‘law dependence’. The industrial relations system can be considered as the result of the interaction between the norms produced by legislative and judicial powers and labour relations collectively established between labour market parties. Observing the evolution of this relationship is the core goal of the ‘law dependence’ approach.

The historical peculiarities of the relationship between law and the dynamics of collective bargaining, including collective actions, have indeed favoured – or perhaps forced – collective labour relations, and by consequence entire industrial relations systems, to take specific patterns for their development.¹²² Therefore, the ‘law dependence’ perspective can be a useful instrument of analysis, and can be applied in different contexts to understand the general modalities of those developments.

In the light of the path dependence theory, the focus of ‘law dependence’ is on the early stages in the formation and establishment processes of industrial relations systems. However, the relationship between law and collective labour relations has been changing over time. In this sense, by following the non-deterministic interpretation of path dependence, the ‘law dependence’ approach intends to

¹¹⁸ Hepple B. / Veneziani B., *The transformation of labour law in Europe. A comparative study of 15 countries 1945 – 2004*, Oxford: Hart Publishing, 2009.

¹¹⁹ *Ibid.*, 21.

¹²⁰ Hepple B. (ed.), *The making of labour law in Europe. A comparative study of nine countries up to 1945*, Oxford: Hart Publishing, 2010 (first edition 1986).

¹²¹ Hepple B., Introduction, in *Ibid.*, 5.

¹²² An example of this dynamic as regards England is given in Brown W. / Oxenbridge S., Trade unions and collective bargaining: Law and the future of collectivism, in Barnard C. / Deakin S. / Morris G., *The future of labour law. Liber amicorum Bob Hepple QC*, Oxford: Hart Publishing, 2004, 63 – 78.

observe the evolution of that relationship with the aim of identifying ‘critical junctures’ which have produced – or potentially could have produced – a switch in the path.

The basic premise for adopting a perspective highlighting the changing relationship between law and collective labour relations derives from the assumption that collective organising, collective bargaining and collective action, deemed as expressions of collective autonomy, are social phenomena whose existence is not, in theory, dependent on the law.¹²³ Rather, they are social phenomena that 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.¹²⁴ The lack, the presence, or the manner in which the law regulating those issues is implemented, determine different outcomes as regards the formation and evolution of collective labour relations in society.¹²⁵ Within the theoretical approach of ‘law dependence’, there are two situations: on the one hand, a relationship between collective labour relations and law founded on the guarantee of an autonomous development ensured by the latter towards the former; and on the other hand, a situation in which statutory regulation and case law interfere with the autonomous development of collective labour relations, directing their evolution and controlling their development and outcomes. The first situation is constituted by the collective autonomy as it has been sketched above; the other situation refers to the interferences deriving from the action of legislative or judicial power through statutory regulations and case law respectively. In these cases collective labour relations would experience a limitation in the autonomy of the labour market parties. For these reasons a discourse on the State’s role in defining collective labour relations cannot be limited to the opportunity for an abstentionist or interventionist attitude of the legislators in providing the adequate legal framework for negotiations.¹²⁶ The discourse must go further, considering the overall attitude of the public bodies, court and legislators, in examining the social phenomenon of collective labour relations. In this sense, the ‘law dependence’ approach considers the evolution of this relationship from the perspective of collective labour relations’ dependence on the legal system comprising statutory regulation and case law.

Both interventions and abstentions of the legislative and of the judicial powers have the potential to alter the equilibrium between the labour market parties. They can regard different levels and can target different goals: from the degree of extension of protection of individuals in their exercise of the right to collective action, to the attribution of peculiar prerogatives to the organised parties, which can cause an alteration of power relations in the bargaining process, to the definition of limits to the collective exercise of the right to collective bargaining and collective action, such as excluding some categories of workers or some subjects due to the recognition of precise specificities.

In any case, the result of an intervention or of an abstention on the part of a legislative or judicial power would determine a particular path of development: if certain types of strikes are not included

¹²³ Kahn-Freund O., Trade unions, the law, and society, in *The Modern Law Review*, no. 3/1970, 241 – 267.

¹²⁴ Jacobs A., fn. 6.

¹²⁵ Kahn-Freund O., Industrial relations and the law – Retrospect and prospect, in *British Journal of Industrial Relations*, no. 3/1969, 301 – 316.

¹²⁶ Lo Faro A., Bargaining in the shadow of ‘optional frameworks’? The rise of transnational collective agreements and EU law, in *European Journal of Industrial Relations*, no. 2/2012, 153 – 165.

in the scope of the right to take collective action, or if negotiations in certain situations are not allowed, collective labour relations would take a specific path, since employees could not undertake that specific form of strike, which might have been particularly effective, or they would not have any bargaining power in those situations excluded by law.¹²⁷ Similarly, a weak protection against dismissal for trade union activities or the lawful possibility to substitute strikers would undermine the bargaining positions of the workers, and therefore the counterpart would have a stronger position. In this sense, the catchphrase summarising the meaning of the theory of path dependence can be reformulated here as ‘law matters’.

By following the general features of path dependence, the relationship between law and collective labour relations can be observed in an evolution and development perspective. The aim is to highlight the critical moments – or junctures – which have determined a switch in the path. The response of the State’s bodies to the social questions that arise in the field of labour relations has been the engine permitting the evolution of labour legislation, and consequently the improvement of working and employment conditions.¹²⁸ The issue of the intervention of public authorities in the field of collective labour relations is thus central in understanding society’s development as regards labour issues and the role that the polity of a country grants to collective social powers. The purpose that can be achieved by applying ‘the law dependence’ approach is precisely to highlight the degree of autonomy of collective labour relations and the degree of interference generated by legislative and judicial powers.

5. To conclude: a new framework of analysis for the European collective autonomy

This paper has presented a concept and a theoretical approach aiming at constituting a new framework for the analysis of collective autonomy in Europe. On the one hand, the ‘European beyond-borders bargaining’ concept proposes a re-configured, three-dimensional structure for classifying collective labour relations in Europe, by highlighting the different dimensions in which labour relations are pursued within the European market. On the other hand, the ‘law dependence’ approach offers the possibility to observe the progressive evolution of the relationship between law and collective labour relations that forms the institution of collective autonomy, in understanding the extent to which law shapes collective labour relations.

The ‘European beyond-borders bargaining’ concept outlines a three-dimensional structure of collective labour relations which do not pertain to national frameworks. This can be useful for an assessment of those practices from different perspectives. The concept has its roots in the debate triggered by the ‘Laval quartet’ case law: what has perhaps been overlooked in that debate is the

¹²⁷ See for instance the reconstruction of the early stages of English trade unionism in relation to the law; described in Kahn-Freund O., The illegality of a trade union, in *The Modern Law Review*, no. 4/1944, 192 – 205.

¹²⁸ Hepple B., fn. 120, 6 ff.

effect that case law has had in definitely stopping any possible process of integration of collective labour dynamics and excluding collective bargaining from the European project. These rulings have had the effect of erecting stronger barriers against the Europeanisation of collective labour relations through injecting fears about the disruption of national social models. In the elaboration of the 'European beyond-borders bargaining' concept, the intention is to move in the opposite direction by defining a model capable of illustrating and encompassing all the different collective labour relations practices which have an impact beyond national borders. The most urgent aim is to highlight a cross-border dimension of these practices, as the most peculiar scenario of the European market.

Although its original aim is to emphasize the relevance the cross-border dimension of collective labour relations has acquired, related to the exercise of economic freedoms of establishment and of providing services, the concept offers the possibility to deal with the supranational, transnational and cross-border dimensions, either singularly or as a structure. In this sense, the model allows both the observation of one dimension in relation to external factors, and the analysis of reciprocal influences among the dimensions within the structure itself. In other words, the 'European beyond-borders bargaining' concept can be useful for analysing the relationships between the different dimensions as well as those between the latter and the national level of collective labour relations. For instance, from a labour law perspective, it can be possible to observe the impact of fragmentation of national practices and procedures on the development of the cross-border dimension or on the implementation of outcomes reached in the supranational dimension.¹²⁹ Furthermore, it may be possible to highlight the positive influences that the supranational or the transnational dimension has on the developments of collective labour practices within national contexts.¹³⁰ The structure of 'European beyond-borders bargaining' offers the possibility to relate the cross-border dimension with the other two, as well as with the national dimension, in order to underline the potentially constraining effects that the supranational, transnational and national dimensions may have on development of purely cross-border collective labour relations.¹³¹ In conclusion, the model permits us to detach the cross-border dimension from a dimension strictly connected with national legal frameworks, and at the same time allows us to highlight the different scenarios of collective labour relations in Europe with the aim of analysing the European development of collective autonomy related to the unique features of the European market.

On the other hand, the 'law dependence' approach affords the opportunity to observe in different contexts whether or not the legal framework provides the autonomy needed by labour market parties to pursue their relations freely and in equal positions. Conversely, through its application, possible interferences generated by legislative and judicial powers may emerge. The perspective modelled on the theory of path dependence permits observation of the relationship between law and

¹²⁹ Keller / Webber, Sectoral social dialogue at EU level: Problems and prospects of implementations, in *European Journal of Industrial Relations*, no. 3/2011, 227 – 243.

¹³⁰ Larsen T.P. / Kaj Andersen S., A new mode of European regulation? The implementation of the autonomous framework agreement of telework in five countries, in *European Journal of Industrial relations*, no. 2/2007, 181 – 198.

¹³¹ Such relationships have been highlighted from an industrial relations perspective, although mainly separately and with a focus on trade unions' strategies; see Glassner V. / Pochet P., fn. 45; Marginson P., fn. 13; Hann D., The continuing tensions between European Works Councils and trade unions: a comparative study of the financial sector, in *Transfer* no. 4/2010, 525 – 540;

collective labour relations in evolution, thus highlighting moments of change or reinforcement of certain attitudes of legislative and judicial actors towards the social phenomenon of collective labour relations. The applicability of this theoretical approach is permitted through a neo-institutionalist understanding of collective autonomy as formed by norms produced by judicial and legislative actors on the one hand, and labour relations established between labour market parties on the other. In the light of the collective autonomy, the 'law dependence' approach can therefore provide a means to emphasise any interventions of judicial and legislative powers in the free and autonomous development of the system. Due to the changing approach of EU institutions towards collective labour rights, the 'law dependence' approach is also useful in understanding European developments in collective labour dynamics and, from an overall perspective, the evolution of the conflicting social and economic projects of European integration.

In the aftermath of the 'Laval quartet', a combined use of the two elements permits the establishment of a new framework with which to analyse European collective autonomy, focused on the restrictions that the case law of the CJEU has imposed on free and autonomous development of the cross-border dimension of collective labour relations within the European market.