

## Decentralised Social Pacts, Trade unions and collective bargaining (how Labour Law is changing)\*

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## 1. Introduction.

The focus of this essay is the variegated phenomenon of social pacts, a term currently used to refer to a range of widely differing practices involving different places (the firm, the territory, the State), but that derive from the same inspiration or strategy which, for lack of a more evocative term, can be defined as partnership. The spread of practices based on the concept of partnership is such that in the meta-language of European Community institutions the term is gradually replacing what was once referred to by the glorious expression “social dialogue”<sup>1</sup>.

The analysis that follows will deliberately gloss over agreements at a macro level, that is, the national-level social pacts (social pacts in the real sense according to the terminology of the European Foundation) that spread throughout Europe in the 1990s (above all in Italy, Spain, Greece, Finland, Holland, Portugal and Ireland) and, towards the end of the second millennium, even proposed, albeit on as yet weak grounds, in a refractory country like the UK<sup>2</sup>. The focus of the paper

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<sup>1</sup> The Community document in which clear reference is made to partnership is “Commission of the European Communities, Green Paper - Partnership for a new organisation of work”, COM (97) 128 Final (April 1997). In important previous documents the predominant reference is to social dialogue, v. “Commission of the European Communities, Green Paper – European Social Policy - Options for the Union”, COM (93) 551 Final (November 1993) at 71-75 § IIIC5, despite a far-sighted reference to the setting up of networks and partnerships as an alternative to legislation in the process of evolution towards globalism *Id.* at 82-84, § IIIC9; and above all the 1994 White Paper, “Commission of the European Communities, European Social Policy – A Way Forward for the Union – A White Paper”, COM (94) 333 Final (July 1994), part A at 55-58 § VIII, part B at 15-17 § 78-85. For references to social dialogue, see also “Commission of the European Communities, Commission Communication concerning the Development of the Social Dialogue at Community level”, COM (96) 448 Final (September 1996); European Parliament, Resolution on the Commission communication concerning the development of the social dialogue in “European dialogue at Community level”, O.J. C 286/338 (1997). Starting with the Green Paper quoted above, there has been an increasing number of documents in which reference to partnership is prevalent, cf. “European Parliament, Resolution on the Commission Green Paper 'Partnership for a new organization of work'”, O.J. C 14/34 (1998); Economic and Social Committee, Opinion on 'Cooperation with charitable associations as economic and social partners in the field of social welfare', O.J. C 73/92 (1998); Economic and Social Committee, Opinion on the 'Green Paper - Partnership for a new organization of work', O.J. C 73/122 (1998); Commission of the European Communities, “Communication from the Commission - Social action programme (1998-2000)”, COM (98) 259 Final (April 1998) at 5 § III; Commission of the European Communities, “Communication from the Commission adapting and promoting the social dialogue at Community level”, COM (98) 322 Final (May 1998) at 19-21 § 6.2-6.4; Commission of the European Communities, Commission discussion paper ‘The Commission and non-governmental organisations: building a stronger partnership’, COM (2000) 11 Final (January 2000). Reference to partnership is also to be found in official speeches made by authoritative members of the Commission: “Social Partnership in Action”, Speech by Commissioner Padraig Flynn, Leicester, 10.9.1998, <[http://europa.eu.int/comm/dgs/employment\\_social/speeches/980910pf.html](http://europa.eu.int/comm/dgs/employment_social/speeches/980910pf.html)>; “European social model - social dialogue; New challenges: Global economy, enlargement”, Address by Allan Larsson, Director General - DG Employment and Social Affairs, Austrian Presidency Conference, Vienna, 9-10.11.1998, <[http://europa.eu.int/comm/dgs/employment\\_social/speeches/981110al.html](http://europa.eu.int/comm/dgs/employment_social/speeches/981110al.html)>; “Cooperative modernisation: role of the social partners”, Address by Allan Larsson, Director General - DG Employment and Social Affairs, Hans Bockler and Bertelsmann Foundations and ETUI, Brussels, 28.4.1999, <[http://europa.eu.int/comm/dgs/employment\\_social/speeches/990428al.html](http://europa.eu.int/comm/dgs/employment_social/speeches/990428al.html)>; “Modernisation of Europe and the role of social partners”, Speech by Allan Larsson, Director General - DG Employment and Social Affairs, Presidency Conference on the Social Dialogue, Helsinki, 2.11.1999, <[http://www.europa.eu.int/comm/dgs/employment\\_social/speeches/991102al.pdf](http://www.europa.eu.int/comm/dgs/employment_social/speeches/991102al.pdf)>; “The Social Partners and the modernisation of work organisation”, Speech by Allan Larsson, Director General - DG Employment and Social Affairs, Conference on the Future of Workers' Co-determination in the Netherlands in a European context, The Hague, 6.4.2000, <[http://www.europa.eu.int/comm/dgs/employment\\_social/speeches/000406al.pdf](http://www.europa.eu.int/comm/dgs/employment_social/speeches/000406al.pdf)>.

<sup>2</sup> There is a vast amount of literature regarding social pacts and it in part coincides with that on social concertation: the reader is referred to G. Fertag and P. Pochet (eds.), *Social Pacts in Europe - New Dynamics*, ETUI/OSE, 2000; for slight hints at hypotheses of concertation in legislative processes in the UK, above all due to the necessity of adapting to Community directives, for example as regards working hours, see W. Brown, “Putting Partnership into Practice in Britain”, *BJIR*, vol. 38, n. 2, 2000, pp. 299-316. G. Ricci “L’orario di lavoro in Gran Bretagna”, to be published in B. Caruso – R. De Luca Tamajo (eds.), *Il diritto del lavoro nell’Unione Europea. Francia, Germania, Gran Bretagna, Spagna*, Vol II, *Regimi di orario e lavori atipici*, ESI, 2001. A more marked trend towards new

will be on the meso and micro levels (regional or local as far as territory is concerned, sector or plant level as regards the traditional workplace).

At these levels, innovations in practices based on the concept of partnership and their impact on labour law and industrial relations systems seem to be more significant and represent an aspect on which little light has as yet been shed<sup>3</sup>.

More specifically, the attempt will be to show that, terminological uncertainty apart, the “social partnership” or social pact label is often a blanket term used to refer to widely differing practices presenting varying degrees of innovation as compared with traditional bilateral contractual relationships at the plant or industry-wide level.

Following an analysis of the diversity of partnership practices that are common in Europe, the final part of the essay will give indications of a number of new research prospects that suggest themselves to labour law scholars who wish to investigate their impact on conventional contractual relationships and traditional models of trade union representation. They also end up by touching a problem that is an old but still topical one for labour law scholars: the complex framework of the sources of the discipline and the mutual relationships between the various regulatory subsystems.

## 2. Regulation via social pacts: the various levels.

In the Commission’s first report on industrial relations the philosophy of concertation (and models of governance based on social partnership) are explicitly recognised as a “strategic” regulatory initiative in the era of globalisation<sup>4</sup>.

From the launch of a common European employment policy (Council of Essen, 1994)<sup>5</sup> up to the above-mentioned report, the Commission made constant reference to regulation via partnership, a concept poised somewhere between a prescriptive indication issued to governments and social partners and recognition of actual models based on this strategy operating in various guises throughout Europe.

That social partnership has become a model towards which the various European national systems are uniformly converging, and which above all represents a response in terms of domestic stability, is, however, a hypothesis about which several doubts have been expressed<sup>6</sup>.

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practices based on partnership in public authorities has been seen above all since the Labour Party came to power; cf. I. Roper, “Quality management and Trade Union in local services”, *ER*, vol 22, n. 5, 2000 pp.442-466; also N. Heaton, B. Mason, J. Morgan, “Trade unions and partnership in the health service” *ER*, vol. 22, n. 4, 2000, pp. 315-333.

<sup>3</sup> See H. Collins, “Regulating the Employment Relation for Competitiveness” in *ILJ*, vol. 30, issue 1, 2001, 49-71; A. Hyde, “Employee Identity Caucuses in Silicon Valley: Can they Transcend the Boundaries of the Firm?”, in *LLJ*, August 1997, 491-97; K.V.V. Stone, “Employment Regulation in a Boundaryless Workplace”, paper presented at V Intell Conference, Toronto, September 2000.

<sup>4</sup> COM(2000) 113 final REPORT, Industrial relations in Europe – 2000, p. 7.

<sup>5</sup> For a recent reconstruction of Community employment policies, see M. Barbera, *Dopo Amsterdam. I nuovi confini del diritto sociale comunitario*, Brescia, PIE, 2000, pp. 101 ff.

<sup>6</sup> See M. Regini, “Social pacts in the EC Report on Industrial Relations in Europe”, in this volume. Id., “Between Deregulation and Social pacts: The Responses of European Economies to Globalisation”, *P&S*, Vol. 28, March 2000, 5-33.

It appears clear, however, that of the basic regulation strategies – regulation via the state (of a hierarchic or political nature) where the State structures conflicts, distributes resources and coordinates groups and activities, market-controlled regulation, and regulation via co-operation/reciprocity based on values, norms and identities, including agreements between large interest groups<sup>7</sup> – the Community has definitely decided to promote the latter.

The choice does not appear to have been made by chance: it is strategically consistent with the European social model of Neo-voluntarism<sup>8</sup>, which is considered to be the most adequate response to the pressure of global competition and the need for the functional specialisation of production systems<sup>9</sup>. It is also in line with domestic trends in national systems towards new forms of concertation as an alternative to the neo-corporative practices of the 80s<sup>10</sup>, practices based on organised decentralisation<sup>11</sup> in which the method of concertation is shifted from the centre to the periphery, in terms of both territory and enterprise, where regulation has a greater freedom of movement but still remains within the framework of objectives laid out by central authorities<sup>12</sup>.

It seems, however, appropriate to analyse the phenomenon from different angles.

Although regulation via social pacts is a phenomenon that has spread throughout Europe, it is important to stress that it reflects converging but different trends.

With reference to the *traditional system of industrial relations* of the bilateral kind, the spread of social pacts in Europe is authoritatively viewed<sup>13</sup> as being a symptom, perhaps the most evident one, of a readjustment of industrial relations in co-operative terms in order to cope with the pressure of international competition: an endogenous response to the system of industrial relations made by social partners to face external constraints and tension, a readjustment of industrial relations with the aim of achieving *competitive* and *productive* advantage and not a *protective* and *re-distributive* trend<sup>14</sup>.

With reference to the *institutional sphere* of relations between public actors and the system of industrial relations (at a national level), the rise of social pacts represents something else if not something different: according to the typology of state intervention in industrial relations and the

<sup>7</sup> P. La Galès, "La nuova *political economy* delle città e delle regioni", *S&M*, n. 52, April 1998, p. 58.

<sup>8</sup> W. Streeck, "Neo-voluntarism: A New European Social Policy Regime?", *ELJ*, Vol. 1, n.1, pp. 31-59.

<sup>9</sup> F. Traxler, "The logic of Social Pacts" in G. Fajertag and P. Pochet, *Social Pacts in Europe*, Brussels, ETUI, 1997, p. 29. F. Traxler and B. Woitech, "Transnational Investment and National Labour Market Regimes: A case of 'Regime Shopping' ", *EJIR*, vol. 6, n., 2000, pp. 141-159. C. Crouch, "The Globalised Economy: An End to the Age of Industrial Citizenship" in T. Wiltshagen (ed.) *Advancing theory in labour law and industrial relations in a global context*, 1998, Amsterdam; North Holland.

<sup>10</sup> M. Regini, "Between deregulation", cit. in n. 6; J. Visser, "Two Cheers for Corporatism, One for the Market: Industrial Relations, Wage Moderation and Job Growth in the Netherlands", *BJIR*, v. 36, n. 2, June 1998, pp. 262-292.

<sup>11</sup> F. Traxler, "Farewell to Labour Market Associations? Organised versus Disorganised Decentralisation as a Map for Industrial Relations", in C. Crouch and F. Traxler, *Organised Industrial Relations in Europe: What Future?* Aldershot, Avebury, 1995. P. Margisson and K. Sisson, "European Collective Bargaining: A Virtual Prospect?", *JCMS*, vol. 36, n. 4, p. 511 ff.

<sup>12</sup> G. Fajertag and P. Pochet, *Social Pacts in Europe*, cit. in n. 2. Chapter 1; also P. Pochet, "Les pactes sociaux dans le années 1990", *ST*, n. 2, 1998, pp. 173-190.

<sup>13</sup> Here again there is a large amount of literature. See P. Cappelli, *The New Deal at Work*, Boston, Harvard, Business School Press, 1999. H. C. Katz and O. Darbishire, *Converging Divergences, Worldwide Changes in Employment Systems*, Ithaca, ILR Press, 2000; S.J. Frenkel – M. Korczynski- K. A. Shire – M. Tam, *On the Front Line, Organization of Work in the Information Economy*, Ithaca and London, ILR Press., 1999.

<sup>14</sup> W. Streeck, "Il modello sociale europeo: dalla redistribuzione alla solidarietà competitiva", *SM*, n.59, 2000, p. 13.

labour market proposed by Cella and Bordogna<sup>15</sup>, the logic behind social pacts is no longer that of promoting industrial relations (and interest groups), but correcting and defining the objectives of the collective bargaining systems and the practices of the actors involved, in relation to internal and external economic and budget constraints: thus a consensual, not directly regulatory, definition and/or correction of objectives, without the exchange of political advantages and resources that was typical of concertation settlements in the 80s, based on the philosophy of redistribution in which the participants were rewarded with institutional accreditation and legitimacy<sup>16</sup>.

Lastly, with reference to the (*supranational*) *sphere of the European social model*, the promotion of territorial social pacts, which accompanies the attempt to govern institutional social policies launched in Maastricht, is one of the most significant tools, and at the same time one of the symptoms, of the polycentric and horizontal, rather than hierarchical and vertical, Europeanisation of social systems. This polycentric Europeanisation would appear to represent an alternative to the birth of a unified European social model, that is, a strategy of co-ordination rather than harmonisation of national diversities<sup>17</sup>.

In this strategy, the organised decentralisation of industrial relations, and above all their territorial organisation by means of second-generation social pacts, bring new protagonists to the forefront (local actors, even of an institutional nature such as chambers of commerce, universities, autonomous local bodies, interest groups and environmental protection groups), as well as regulatory strategies and techniques. The latter, although new, always reproduce parts of past strategies due to a peculiar mechanism of “self-referential resistance” that old systems possess<sup>18</sup>.

Empirical research anyway does not confirm the systematic prevalence of new post-Fordist industrial relations based on partnership over the old model based on conflictual relations oriented towards the redistribution of productivity at the plant level<sup>19</sup>. However, their experimental relevance and introduction in several Continental European countries stress their value as a significant trend, signalling a possible transition towards new industrial relations which justifies an analysis of their innovative features.

Finally, it should be added that the phenomena of diversification and specialisation facing modern economies (industrial districts, niche enterprise and production, regional and sectorial economic vocations) and the consequent deregulation processes will probably strengthen the process of “converging divergences”<sup>20</sup> of industrial relations systems (that is, the convergence and, at the same time, internal diversification, of national systems).

<sup>15</sup> L. Bordogna and G.P. Cella, “Admission, exclusion, correction: the changing role of the state in industrial relations”, *Transfer*, 1-2, 1999, p. 21 ff. In general see also F. Traxler, “The state in industrial relations: A cross-national analysis of developments and socio-economic effects”, *EJPR*, vol. 36, 1999, pp. 55-85.

<sup>16</sup> With reference to Italy, see M. Regini “Le implicazioni teoriche della concertazione italiana” *GDLRI*, n.72, 1996, pp. 729-743.

<sup>17</sup> W. Streeck, “Il modello europeo” cit. in n. 13, p. 11,

<sup>18</sup> G. Sapelli, “Le relazioni industriali europee: riflessioni sulle linee di tendenze per l’elaborazione di uno schema interpretativo”, manuscript to be published, 2000, p. 6; W. K. Roche, “The End of New Industrial Relations?”, *EJIR*, vol. 6, n. 3, 2000, pp. 261-282; in general about the ‘false novelty’ of flexible work, R., Sennet, *The corrosion of character. The personal consequences of Work in the New Capitalism*, New York - London, Norton & Company, 1999.

<sup>19</sup> In this sense, see above all W.K. Roche, “The End of New Industrial Relations?”, cit. in n.18.

<sup>20</sup> H. C. Katz and O. Darbshire, *Converging Divergences*, cit. in n. 13; P. Margisson and K. Sisson, “European Collective Bargaining”, cit. in n. 11.

As a consequence, the “contingent”<sup>21</sup> spread of partnership agreements within the various national systems will favour (or will very probably become the main instrument of) internal diversification in systems of industrial relations, affecting national regulatory uniformity represented by the two pillars of labour law: labour law legislation which generally cannot be derogated and standard national agreements, which are likely to become more varied and diversified in proportion to their inherent binding effect, depending on the domestic political and institutional situation.

It seems quite plausible, in fact, to posit a direct correlation between the de-regulatory and re-regulatory capacity of social pacts (and their spread) and institutional reform in national states in the direction of federalism, accompanied by processes of decentralisation of the systems of contractual relations.

### 3. Social partnership at the plant and territorial level.

If this is the general trend, however, theoretical studies and empirical investigations into social pacts would seem to point to a need for definition, so as to distinguish between what is really new in this new concept of “social partnership” and what amounts to *déjà vu*.

It is, however, obviously not only a problem of definition: for labour law scholars dealing with social pacts as related to legal norms and the institutional actors involved, the need to distinguish between typologies and models is necessary and heuristically profitable in the attempt to follow the tortuous, and at times highly refined, paths taken by regulatory diversification and systemic complexity.

In studies on industrial relations it also appears necessary to distinguish between the various models of social pacts, not only to focalise observation of this social phenomenon, but also to gain a clearer understanding of the regulatory strategies in various national contexts, in relation to the role of the state and other public actors<sup>22</sup>.

So, focusing on social pacts at an intermediate and local level there seems to be a clear distinction, even on the terminological plane, between *Territorial Employment Pacts* (henceforward referred to as TEPs) and *Pacts for Employment and Competitiveness* (PECs)<sup>23</sup>. From a functional viewpoint both aim to use the method of concertation for the controlled introduction of various forms of microeconomic flexibility in both the internal and external labour markets. On the regulatory plane, both seem to result in de-standardisation and a consequent regulatory differentiation.

Both types of pact therefore re-propose an updated version of social partnership with a common objective: how to reconcile competitiveness on the part of entrepreneurial and territorial systems with the right to work, seen as security and stability for workers in a context of greater mobility and flexibility, and as an increase in job opportunities for the weaker social groups (the long-term unemployed, the young, women, immigrants, etc.). Both follow the three guiding principles of

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<sup>21</sup> W. K. Roche “The End of New Industrial Relations?”, cit. in n. 18, 275 –6.

<sup>22</sup> M. Regini “Social pacts”, cit. in n. 6. L. Bordogna and G.P. Cella, “Admission, exclusion, correction”, cit. in n. 15.

<sup>23</sup> See the documents of the European Foundation for the Improvement of Living and Working Conditions: K. Sisson and A. Martin Articles “Handling Restructuring Collective Agreements on Employment and Competitiveness”, Dublin 2000; S. Zagelmeyer “Innovative Agreements on Employment and Competitiveness in the European Union and Norway, Dublin, 2000. K. Sisson, J. Freyssinet, H. Krieger, K. O’Kelly. C. Schnabel, H. Siefert, “Pacts for Employment and Competitiveness Concepts and Issues”, Dublin 1999.

the social and economic policy in post-Fordist economies, at least in its European version: flexibility, competitiveness, and job security.

However, besides these common macro-objectives the two types of pact seem to present different dynamics as regards the logic of the action of the actors involved; and equally different are the problems they raise regarding their relationship with the system regulating employment relationships, in both contractual and legislative terms.

#### 4. Are pacts for employment and competitiveness (PEC) a new model of collective bargaining?

In the form outlined in a study by the European Foundation<sup>24</sup>, Pacts for Employment and Competitiveness reflect well-known institutional dynamics, such that it appears at times difficult to make out, as far as the actors and contents are concerned, how this model of collaborative non-adversarial bargaining differs from the concession and/or solidarity-based bargaining that was introduced as an absolute novelty in the 80s, at a time when big companies were restructuring the Fordist organisation of work and job design<sup>25</sup>.

According to the authors of the European Foundation study, however, PECs differ from the concession bargaining typical of the 80s in two ways: the disappearance of the unilateral nature of the exchange<sup>26</sup> and the compensation they offer in terms of employment opportunities or improvements in job quality (safeguarding and at times increasing existing employment, protecting weak groups such as the young, women and the long-term unemployed, and introducing vocational and in-service training schemes).

However, this distinguishing feature seems in many respects to be disputable: only if the American notion<sup>27</sup> of concession bargaining is assumed is it possible to speak of innovation. If the only innovative element as compared with the concession bargaining of the 80s were the introduction of bilateral, reciprocal exchange instead of the unilateral nature of trade union concessions, it would not, in the ultimate analysis, amount to much. As the Foundation report acknowledges, the European model of concession negotiation in the 80s contemplated types of contract in which there was always an element of compensatory exchange (for example, forgoing acquired or future benefits in exchange for an increase in employment, and above all a reduction in or freeze on collective dismissals)<sup>28</sup>. If we exclude Great Britain, merely unilateral concession bargaining was seldom present in Europe.

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<sup>24</sup> Besides the research carried out by the European Dublin Foundation referred to in n. 23, cf. H. Krieger, "A Vote of Confidence for Collective Bargaining in Europe: New Developments in Company Level Employment Pacts" in this volume; EIRO *Annual Review 1999*, Dublin, 2000. A. Ferner & R. Hyman (eds.), *Changing Industrial Relations in Europe*, Oxford, Blackwell, 1998.

<sup>25</sup> K. Sisson and A. Martin Artiles "Handling Restructuring Collective Agreements on Employment and Competitiveness" op. cit. in n. 23, p. 6.

<sup>26</sup> The concession bargaining that spread in the USA in the '80s was substantially trade union ratification of unilateral management decisions; cf. P. Cappelli, "Plant Level Concession Bargaining, *ILRR*, vol.38, n. 3, 1985, pp. 90 ss.; P. Cappelli – R.B. McKersie, "Labor and the Crisis in Collective Bargaining", in *Challenges and Choices facing American Labor*, edited by T.A. Kochan, Cambridge, The MIT Press, 1985.

<sup>27</sup> Giving up acquired advantages in exchange for job protection is an element of the notion of concession bargaining inserted in the *European Employment and Industrial Relations Glossary: France*, edited by A. Lyon, Caen, London, Sweet & Maxwell, n. 524.

<sup>28</sup> For the Italian experience, see B. Caruso, *Rappresentanza sindacale e consenso*, Milano, Angeli, 1992, pp. 153 ff.

It appears evident from the Foundation study, however, that PECs are of great strategic importance; unlike the concession bargaining of the 80s, they do not seem to be a contingent, defensive response to occupational and organisational upheavals caused by the conversion and restructuring of large Tayloristic firms or to the constraints of “the management of uncertainty”<sup>29</sup>.

On the contrary, PECs seem to introduce a model of industrial relations that is structurally more stable and far-sighted, based on partnership in which the pacts do not lay down regulations governing employment but rather construct a network of institutions and processes that are capable of continually adapting pre-existing rules and introducing new, shared ones that allow for the flexible management of labour oriented towards a common goal of increasing competitiveness, reducing costs and protecting employment and job quality.

Given their specific functional characteristics, PECs therefore signal a trend towards transformation of industrial relations systems with reference to the logic, structure and contents of traditional collective bargaining of the distributive or acquisitive kind; at this stage, however, the transformation does not seem to entail a radical upheaval of the conventional system of industrial relations (and rules)<sup>30</sup>. On the contrary, PECs would appear to go alongside traditional collective agreements and not necessarily replace them, with a view to integrating the system but with different objectives.

It is quite clear, however, that PECs represent a distinct difference as compared with a period dominated by essentially distributive bargaining, for at least three reasons which are summarised below.

A) The first reason refers to their main *contents* and the *more steadily co-operative and less conflictual role of trade unions and work councils*: PECs concentrate on the idea of competitiveness and production efficiency based on a philosophy of great collaboration between management, workers and their representatives in view of future benefits instead of the conflictual distribution of productivity results already achieved. In terms of industrial relations theory, this is equivalent to passing from zero-sum distributive bargaining to positive-sum integrative bargaining in which all the actors involved will benefit by the advantages typical of micro-concertation protecting the interests of each component inside the enterprise (labour and managerial technocracy), perhaps in conflict with similar but opposing external interests (in the case of large multinational companies or groups of firms, for example, competition could arise between units belonging to the same group)<sup>31</sup>.

B) The second reason typically refers to *managerial strategies*: in these contractual practices management would take on an increasingly prominent role, no longer being subject to trade union demands as it was under distributive bargaining, but taking a more active part in the dialogue.

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<sup>29</sup> W. Streeck “The uncertainties of management in the management of uncertainty: employers, labour relations and industrial adjustment in the 1980s”, Berlin: Wissenschaftszentrum, 1986.

<sup>30</sup> H. Krieger, “A Vote of Confidence for Collective Bargaining in Europe ...” op. cit. in n. 24, p. 13, for data on the spread of PECs.

<sup>31</sup> K. Sisson, J. Freyssinet, H. Krieger, K. O’Kelly, C. Schnabel, H. Sefert, “Pacts for Employment and Competitiveness Concepts and Issues”, op. cit. in n 23, pp. 36-37; K. Sisson and A. Martin Artiles “Handling Restructuring Collective Agreements on Employment and Competitiveness” op. cit. in n. 23, p. 7.

This further innovative aspect is directly connected with the organisational transformations affecting enterprise, especially larger companies, due to divisionalisation, the provision of autonomous budgets for peripheral units, or overseas units in the case of multinational companies, and the decentralisation of operations<sup>32</sup>, with the assumption of a management philosophy based on management *by performance* rather than *by task*. All this implies the possibility of splitting up the models of industrial relations in the various sectors involved and the various production units of groups of firms or multinational companies, as well as greater management autonomy: management would no longer be homogeneous throughout a big company, but by virtuous use of human resources and relations with trade unions and workers' representatives would contribute to the possibility of success in "internal competition".

C) The third reason refers to the *role of public actors* in industrial relations. In this respect, PECs represent, in general, a trend towards the pursuing of public employment policies through bilateral negotiation (collective private autonomy), a policy which was not unknown in Italy in the 80s<sup>33</sup>.

In the case of PECs (unlike territorial employment pacts, see *infra*) the role of the public actors involved seems, however, to be more "reactive" than "active", that is, focusing more on reacting to and conditioning proposals, inclinations and aims coming from the social partners, than on imposing their own<sup>34</sup>. The role of many public authorities, in fact, is confined to that of "selectively policing" the financial incentives to be distributed and acting as a "hidden supporter", external to pacts aiming at increasing competitiveness and protecting employment. The European Foundation study summarises the functions of public actors in PECs by referring to them as *monitors* of the effectively co-operative nature of the agreements, as "honest brokers" ensuring that the agreements are drawn up through the normal public mediation channels (for example, ANACT - *Agence Nationale pour l'Amelioration des Conditions du Travail* - in France, and ACAS in the UK) and as financing measures to facilitate PECs, to create a favourable context for the negotiation process.

In short, this new model of collective bargaining differs from the traditional one in that it aims at increasing a company's competitiveness, seen as an objective common to all those taking part in the agreement (including workers' representatives), a common objective that affects its contents, the dynamic of relations between the actors, and the regulatory mechanisms.

It therefore seems evident that the significance of PECs goes beyond the fact that it is in harmony with the aims of work organisation and production in the post-Fordist era.

It is, in fact, possible to identify further innovative elements of a more fundamental importance, relating to both 1) the overall transformation of industrial relations and 2) the traditional labour law regulation mechanisms.

<sup>32</sup> In general, cf. H. Collins, "Flexibility and Empowerment", in T. Wilthagen (ed.) *Advancing theory in labour law and industrial relations in a global context*, Amsterdam, North Holland, 1998, pp. 120 ff.

<sup>33</sup> See M. D'Antona, "Pubblici poteri nel mercato del lavoro, amministrazioni e contrattazione collettiva nella legislazione recente" (1987) now in *Massimo D'Antona Opere*, edited by B. Caruso and S. Sciarra, Milan, Giuffrè, vol. III, Book 2, pp. 669-736.

<sup>34</sup> M.R. Damaska, *I volti della giustizia e del potere*, Bologna, Il Mulino, 1991, pp. 49 ff.

1) As far as the first point is concerned, PECs seem to be able to reconcile what in the current debate regarding the “new industrial relations” appears to many observers to be irreconcilable<sup>35</sup>: that is, a) on the one hand, legitimisation of collective bargaining as a method of joint regulation of employment relations, which shows an increasing tendency to resemble the participatory approach : thus a single method that goes beyond the tendential dualism between participation and bargaining and the consequent recognition and institutionalisation of the role of trade unions and work councils (where supported by law); b) on the other hand, personnel management methods based on the philosophy of Human Management Relations (HMR), which are normally considered to be incompatible with trade union bargaining in that they come under the unilateral jurisdiction of management.

In other words, the alchemy of PECs lies in their use of the partnership method to insert, within a framework of concerted rules, managerial initiatives that provide for the individual involvement of workers in the organisation of production processes, in sharing the greater productivity and financial wealth resulting from their participation and in the improvement of services offered to internal and external clients and users (above all in the privatised public service sector: airlines, banks, postal services etc.).

2) As far as the effects on labour law are concerned, PECs are the most appropriate instruments to overcome varying degrees of legal and contractual rigidity (depending on the national system concerned) and to base derogation or flexible adaptation of standard rules of employment protection, both legal and conventional, on the mutual consent of those directly involved. This applies both where the statute law explicitly hands the task over to trade unions<sup>36</sup> and where it does not explicitly provide for any derogation<sup>37</sup>. This refers to the specific requirements of local and/or company markets, providing the opportunity to create differentiated regimes on a contractual basis.

It should be pointed out that even in systems where the constraints of statute laws or standard collective agreements do not appear to be so rigid as to force management to have recourse to consensual agreements in order to implement strategies of flexibility, PECs have been introduced because of the disadvantages of potentially conflict-generating unilateral decisions (which are unacceptable given the complexity and rigidity of competitive company planning)<sup>38</sup>. Besides this, unilateral decisions, not blessed with consensual legitimacy, are not appropriate when human resource management methods aim at a high degree of personnel involvement (team work, performance-related pay, profit-sharing options, ESOPs, investment in professional capabilities, identification with management strategies, etc.).

PECs can thus be considered a response, as far as collective norms are concerned, to the general crisis affecting hard law in an era of globalisation, that does not only affect statutory labour law

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<sup>35</sup> W. K. Roche, “The End of New Industrial Relations?”, cit. in n. 18. p 268 ff.

<sup>36</sup> As happens, for example, in Italy, Sweden or Germany, cf. Sisson and A. Martin Artiles “Handling Restructuring Collective Agreements...” op. cit. in n. 23, p. 61.

<sup>37</sup> For the case of the Veneto districts in Italy, see the analysis by M. Contarino, “Concertational and Free-Market Paths To Successful Territorial Economic Adjustment: Labour Unions and Adjustment in the 1990s”, *BJIR*, vol. 36, March, 1998, 27-41.

<sup>38</sup> See the analysis of PECs in the UK and Ireland in Sisson and A. Martin Artiles op. cit. in n. 23, p. 61.

as laid down by the state but also conventional labour law: that is, the collectively-negotiated version of the process of deformalisation and soft, flexible specialisation of the law. In this way, in conventional labour law, partnership agreements like PECs allow standard norms to interact with diversification in territorial and internal labour markets, resulting in a diversification of conventional regulatory structures at the plant level governing employment relationships, along completely new lines. What is envisaged is a system of collective negotiation of “opportunities”<sup>39</sup>: the provision of mechanisms and instruments of co-operation (joint commissions etc.) creates a multiplicity of company-level or sectorial co-operative set-ups that could correspond to a “massive retreat on the part of government and public law regimes” and regulation via standard, general collective agreements that constitute a prelude to a continuous process of future action based on exchange and co-operative collaboration<sup>40</sup>.

The real and potential effects of the development of PECs, not only on traditional models of collective bargaining but also on highly protective labour law systems based on legal and conventional norms that do not allow for derogation, are therefore considerable.

#### 4.1 The contents: the diversification of standard labour rules via PECs.

As far as the specific *contents* of PECs are concerned, this type of contract leads to a functional diversification of the standard rules, as pointed out previously, in relation to the specific requirements of internal markets and external constraints. At a sub-sectorial level, in fact, PECs often alter the *standardising function* of higher-level collective agreements (that is, at the industry, sector or branch level).

As has emerged from the European Foundation study<sup>41</sup>, these agreements do not only adapt contractual norms regarding a certain sector or industry to a specific context, but also introduce, albeit within the framework of higher-level norms, a degree of individualisation (and flexibility) of the collective terms, above all as regards working hours and pay,<sup>42</sup> but also pension plans and profit sharing options<sup>43</sup>. The aims are different but convergent: greater individual flexibility, adaptation of the individual worker to company requirements, an increase in his/her productivity but also greater involvement in the productive goals of the company.

The same negotiated rules also introduce a completely new role for individual autonomy and contracts: it is as if the collective provision were “committing suicide” to be reborn in the guise

<sup>39</sup> Cf. M.R. Ferrarese, *Le istituzioni della globalizzazione, diritto e diritti nella società transnazionale*, Bologna, Il Mulino, 2000, pp. 57 ff. and 151 ff.

<sup>40</sup> G. Teubner, *Diritto policontesturale: prospettive giuridiche della pluralizzazione dei mondi sociali*, Napoli, La città del sole, 1999, quoted by Ferrarese in n. 39, p. 151.

<sup>41</sup> K. Sisson and A. Martin Artiles “Handling Restructuring” op. cit. in n. 23, passim.

<sup>42</sup> For the phenomenon of the de-collectivisation of pay, cf. J. Filella, J. and A. Hegewisch, ‘European Experiments With Pay and Benefits Policies’, in C. Brewster and A. Hegewisch (eds), *Policy and Practice in European Human Resource Management: The Price Waterhouse Cranfield Survey*, London: Routledge, 1994, pp. 89-106. In the USA the effects of pay differentiation are particularly evident, not least due to the prevalent model of industrial relations: cf. P. Cappelli, *The New Deal at Work*, op. cit. in n. 13, pp. 10 and 148 ff. Contrary to the association between new industrial relations and new individual pay schemes is W. K. Roche, “The End of New Industrial Relations?”, op. cit. in n. 19.

<sup>43</sup> For examples of such agreements, see the reports of the European Foundation, Dublin, op. cit. in nn. 23 and 24.

of individualised regulation<sup>44</sup>.

The effect of PECs on the relationship between collective regulation and individual employment relationships also shows that through collective agreements it is possible to promote alternative forms of employment (temporary contracts, fixed-term contracts, training contracts, - 'dependent self-employed', i.e. 'parasubordination'), at times overcoming the limits imposed by law (for example, Art. 2094 of the Italian Civil Code). In this case, a collective agreement increases the fragmentation of work in order to enlarge its sphere of jurisdiction (beyond the boundaries of standard permanent employment relationships); but by so doing it jeopardises its traditional function of establishing and regulating a uniform, compact type of standard employment relationship.

Still with regard to their contents, PECs rarely but significantly<sup>45</sup> also affect the *minimum wage function* of collective agreements at a national or industry-wide level in that, given the rewards in terms of employment or other aims (in Italy, for example, the regularisation of the hidden economy), they establish salaries that are lower than the minimum levels laid down by these agreements or the temporary suspension of already negotiated pay increases, or again diversified adjustments in relation to the size of a company, or even pay increases reserved for certain groups of workers<sup>46</sup>.

On the whole, however, PECs do not aim at reducing labour costs by acting directly on the basic pay, but rather complementary elements (such as overtime and shift indemnities and various other kinds of benefits), or other aspects. More common clauses, for example, refer to starting wages (lower than standard) for young workers taken on under training contracts, where the below-standard pay is only temporary. Another widespread feature is a reduction in working hours and consequently pay.

Besides these effects as regards the contents of individual employment relationships, all PECs have the collective aim of protecting the right to work, normally for insiders and occasionally for outsiders (that is, the maintenance of existing employment rather than an increase)<sup>47</sup>; and thus a recurrent feature is the concertation of measures aiming at strengthening future stability for insiders through the concession of greater functional and organisational flexibility and improvement of professional skills by investing in training schemes: a sort of privatisation of public policy on employability<sup>48</sup>.

<sup>44</sup> On the new dynamics between collective and individual bargaining, cf. R. Huiskamp, "Diversity of Employment Relations: Collective Bargaining Regenerates (in the Netherlands), but does Industrial Relations Theory?" in T. Wilthagen. (ed.), *Advancing theory in labour law*, op. cit. in n. 32, pp. 143-150.

<sup>45</sup> H. Krieger, op. cit. in n. 24.

<sup>46</sup> For an analysis of the abandonment of sector-level contracts in bargaining in Germany, due to the withdrawal of the entrepreneur from the employers' association that originally signed the agreement, cf. R. Dombois, "Verso un nuovo modello nel rapporto di lavoro? L'erosione di normali rapporti di lavoro e le nuove strategie", in *Il lavoro nei paesi d'Europa; un'analisi comparativa*, F. Bianchi and P. Giovannini (eds.), Milano, Angeli, 1999. Also H. Kotthoff, "Work councils and economic restructuring Betriebsräte zwischen Beteiligungsofferten und gnadenlosem Kostensenkungsdiktat" in IRRA, *Developing competitiveness and social justice: the interplay between institution and social partners*, XI World Congress, Bologna, 1998; R. Bispinck, Reinhard „Deregulierung, Differenzierung und Dezentralisierung des Flächentarifvertrags. Eine Bestandsaufnahme neuer Entwicklungstendenzen der Tarifpolitik“ WSI Mitteilungen, vol. 50, n. 8, 1997 pp. 551-560.

<sup>47</sup> According to the study carried out by the European Foundation, Dublin, op. cit. in nn. 23 and 24, an increase in employment was achieved via a reduction in the working week in France, while in Spain agreements containing clauses to stabilise temporary jobs are more frequent.

<sup>48</sup> H. Krieger op. cit. in n. 24.

There are also provisions for improving the situation of disadvantaged groups of outsiders (women, the young, the long-term unemployed and ethnic minorities). But it is evident that PECs, by their very nature as bilateral agreements and by the basic philosophy supporting them (partnership and mediation between job protection and competitiveness), can be appreciated more as new strategies for the protection of insiders than as experiments in social policies to safeguard weak interests located outside the boundaries of an enterprise.

It is, however, a fact that PECs represent a new trend towards collective relations that also support new individual relations in which the element of trust and mutual reliance (between management, trade unions and workers, with public authorities acting as monitors) takes on a central role. Along lines that are completely different from previous employment relationship models where the exchange was based on job stability and slow but steady progress in pay and career within an enterprise.

This new central position taken by trust and mutual reliance as a basis for negotiation causes an implicit rewriting of the psychological pact underlying an employment contract, whether it be collective or individual; the reciprocal expectations do not focus on assets, compensation and individual performance that will remain certain and stable, as well as quantitatively measurable, across time, so much as a common negotiated programme focusing on the ways and instruments considered to be necessary for the achievement of shared objectives (for example, new rules to make employment flexible as a function of competitiveness); while the exchange of mutual and bilateral obligations only remains in the background.

In this way collective and individual agreements take on a new organisational dimension; their economic and social function, as opposed to the exchange of material benefits or assets, can be seen as a new psychological pact based on trust, collaboration and mutual reliance in terms of the willingness to accept new rules and procedures for the organisation of production and work, with a view to achieving a high level of competitiveness and job security<sup>49</sup>.

This new trust-based organisational dimension of negotiated exchange also affects the instruments of traditional collective bargaining. One example is the right to information. The information rights that corroborate and support the new pacts take on a different function in which great importance is attached to the psychological perception of the mutual reliance involved, with management forgoing unilateral decisions to reduce personnel and workers and their representatives forgoing conflictual claims and hostile attitudes towards the entrepreneurial requirements of flexibility and competitiveness.

The development of these information rights (traditionally considered to be instrumental to the basic rights connected with distributive bargaining), must not be seen against the traditional logic of an increase in trade union (or work council) control over the sources of information that are at the heart of the power and authority of an enterprise; it is not a step towards industrial democracy, but much more prosaically and functionally, its spread is connected with the objective need to circulate any information that is useful for the involvement of the receivers, with a view to increasing competitiveness and improving performance.

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<sup>49</sup> On the crisis and psychological and organisational transformation of the so-called relational contract, see K.V.V. Stone, "Employment Regulation in a Boundaryless Workplace", *op. cit.* in n. 3; S. Deakin, "The Many Futures of the Contract of Employment", paper presented at V Intell Conference, Toronto, September 2000.

What changes is the psychological and functional approach to the exercise of the right to information. As the information involved is connected with a shared programme, in which the active involvement of both the individual workers and their collective representatives is fundamental, the flow of information and communications ceases to be passive and top-down (as a duty for the employer ) and is transformed into a shared, reactive circuit (the right not only to receive information but also to require, seek and exchange information with the aim of greater involvement and in reference to common organisational plans)<sup>50</sup>. Evocatively defined as an "obsession with communication"<sup>51</sup>, it refers to information seen as a strategic political resource for co-operative relations.

Some scholars have understandably raised the problem of how to stabilise and institutionalise this right to communication, not least with reference to the role of work councils, in relation to the complex question of the *if* and *how* of legislative intervention in support of this practice of mutual reliance<sup>52</sup>.

The question is a delicate one and the few precedents of legislative institutionalisation of workers' rights of expression (the Auroux laws in France) have not given particularly significant results. A much more interesting experience, according to some observers, not least due to the soft (as opposed to hard) regulatory model it proposes, is the application in various national contexts of the directive regarding EWCs<sup>53</sup>.

The new regulation models being discussed are located on a difficult, narrow ridge between purportedly collaborative relations, in which behavioural dynamics are left as far as possible to mutual reliance and spontaneous, informal initiatives by both parties, with a necessarily high degree of flexibility and constant adaptability; and normative measures which, although envisaged to strengthen and support the model, may, especially if endowed with sanctionary mechanisms, have the counter-effect of making the behaviour more rigid, misrepresenting its aims and/or making it ineffective due to the well-known trap of regulatory trilemma: an incongruence of law and society with law becoming ineffective; an over-legalisation of society, that is, the juridification of social systems and an over-socialisation of law with instrumental use of law in politics<sup>54</sup>.

#### 4.2 Transformation of the function of the law: from supporting to orienting collective bargaining.

It is of interest to point out that the specific contents of some PECs, for example in France (agreements on flexible working time accompanied by a reduction in hours and an increase in jobs) and

<sup>50</sup> In a traditionally "adversarial" perspective, cf. F. Scarpelli "Diritti di Informazione individuali e Collettivi: l'incidenza sulla configurazione del contratto di lavoro", *RGL*, n.2, 2000, pp. 271-287.

<sup>51</sup> H. Knudsen, *Employee Participation in Europe*, London, Sage, 1995, quoted by M. Martinez Lucio and S. Weston, "European Works Councils and 'Flexible Regulation': The Politics of Intervention" *EJIR*, v. 6, n. 2, 2000, p. 209.

<sup>52</sup> H. Collins "Regulating...", op. cit. in n. 3, p. 10.

<sup>53</sup> M. Martinez Lucio and S. Weston, "European Work Councils and 'Flexible Regulation', op. cit. a n. 52; W. Streeck "Industrial citizenship under regime competition: the case of European work councils, *JEPP*, v. 4, n.4, 1997, pp. 643-664. For detailed empirical analyses of how EWCs work, cf. the *European Work Councils Bulletin*.

<sup>54</sup> G. Teubner, "After Legal Instrumentalism? Strategic Model of Post-Regulatory Law" in G. Teubner, *Dilemmas of Law in the Welfare State*, Berlin, De Gruyter, 1986, p. 311. It would seem that the proposal by Collins falls into the same trap, see Collins, "Regulating..." cit. in n. 3, on the model of *default rules* relating to workers' representation institutions and sanctions against employers who do not obey them, p. 17 typescript.

agreements for the stabilisation of temporary and fixed-term employment in Spain, were to some extent determined by legislative trends or national social pacts that aimed at promoting and selecting specific social objectives, using decentralised collective bargaining (an increase in employment and a reduction in temporary jobs by turning them into permanent employment); the consensus resources of the bargaining method, and the diffusive and differentiating capacity of peripheral and territorial bargaining have been made functional in these cases to objectives previously determined by the centre, that is, by legislators (France) or social partners (Spain)<sup>55</sup>.

The novelty here does not lie in the support that legislative provisions or negotiated clauses in centralised pacts have handed over to decentralised collective bargaining<sup>56</sup>, but rather in the guiding function of legal sources and central pacts, above all by the selective granting of financial incentives, towards predetermined, binding objectives of adaptability, flexibility and protection (the correcting function of the statute law or centralised pact, as mentioned previously).

Here again we have confirmation of the trend towards the organised decentralisation of collective bargaining, as well as functionalisation of contractual methods to objectives predetermined by central governments (or autonomous communities in federal systems)<sup>57</sup>, extending almost isomorphically from European social dialogue to national contractual systems<sup>58</sup>.

### 5. Are the main partners in PECs new?

Pacts for employment and competitiveness at the enterprise level do not present any significant innovations as far as the actors involved are concerned. As pointed out previously, public actors play a key role, but not a particularly visible one, rather like ghosts at the bargaining table: so their part is basically external and “discreet” (more one of orientation than active direction and/or intervention). It is this position on the sidelines, where public actors are never formal subscribers to the agreements, that distinguishes PECs from Territorial Employment Pacts, which will be discussed infra.

Management, on the other hand, takes on an unusually prominent role, a proactive attitude, in relation to the decentralisation of decisional powers resulting from modifications in the organisational and managerial set-ups and the dissemination of responsibilities connected with the competitive results of the various production units into which enterprises are structured.

<sup>55</sup> For an analysis of these agreements see the reports of the European Foundation, Dublin, cit. in n. 23, and also S. Jefferys, “A ‘Copernican Revolution’ in French Industrial Relations: Are The Times Changing?” *BJIR*, vol. 38, 2, 2000, pp. 241-260. P. Auvergnon, “Work-time Reduction in France: the Role of Collective Bargaining in Implementing the Law”, *IJCLIR*, Vol. 16, n. 3, 2000, p. 201 ss; P.H. Antonmattei, “Le temps dans la négociation 35 heures”, in *DS*, n. 3, 2000, p. 305 ff. On the contents of Spanish social pacts, see M. R. Alarcon Caracuel, “Cuatro lustros de derecho del trabajo en España: entre la consagración del Estado Social y el efecto de las crisis económicas”, in *El trabajo ante el cambio de siglo: un tratamiento multidisciplinar*, Marcial Pons, Madrid - Barcelona, 2000, especially p. 26 ff. A. Montoya Melgar, “Estabilidad en el empleo y nuevas propuestas de fomento de la contratación indefinita”, *DL*, 1999, especially p. 22 ff.

<sup>56</sup> This has been a recurrent phenomenon in Italy since the '80s.

<sup>57</sup> See, for example, the case of Catalonia, A. Lopez, “Il pacte per a l’ocupació a Catalunya 1998-2000: verso una strategia locale per l’occupazione?”, *DRI*, n. 4/X, 2000, pp. 501-506.

<sup>58</sup> G. Falkner, “European Works Councils and the Maastricht Agreement: Towards a New Policy Style”, *JEPP*, v. 3, n. 2, 1996, 192-208.

The role and composition of workers' representations appears quite clear: according to the European Foundation research, workers' organisations in PECs follow the internal traditions of the single national systems<sup>59</sup>.

It is, however, undeniable that there is a certain amount of latent tension that can in a sense be considered structural. In PECs, in fact, the dialectical "us and them" typical of traditional collective bargaining tends to feature new subjects: the management and workers of single production units versus the high-level management of a big company or the managers, workers and representatives of other production units, perhaps located beyond the national boundaries. PECs are therefore the result of co-operative relations regarding interests (employment and competitiveness) that are assumed to be shared by management, trade unions and workers in local production units, through a method that involves participation rather than bargaining. Hence, from both the theoretical and practical viewpoint more space is given in industrial relations to joint committees, as a direct expression of inner interests, than to traditional trade unions, which are agents above all at an industry-wide or sectorial level and traditional defenders of broader community interests<sup>60</sup>. This scenario could also revitalise the double channel model of representation through trade unions and the workers' direct representatives.

This reevaluation of the specific, irreplaceable, renewed function of work councils in industrial relations in the era of the 'knowledge-driven economy'<sup>61</sup> has been criticised as regards the ineffectiveness and precarious nature of models of workers' representation that do not contemplate the strong, deep-rooted presence of trade union organisations<sup>62</sup>.

These criticisms apart, the problem remains of whether traditional forms of trade union representation (even in systems featuring a double channel, but with trade union control of workers' organisations) are the most suitable to handle the new participatory relations within an enterprise.

It is certainly true that, as the experience of German work councils shows, it is often not an easy task to trace the dividing line between bargaining and participation, because reality frequently presents hybrids of the two methods<sup>63</sup>; it should, however, be recognised that bodies for the direct representation of workers are more suitable structures for co-operative participatory relations.

This is even more true in plant-level partnership practices where participation is not the result of trade union demands for involvement in management prerogatives, with the consequent control or limitation of these prerogatives, but, on the contrary, of a management initiative in order to obtain from the workers and their organisations consensual legitimisation of their strategies of flexibility and competition which would otherwise be conducted unilaterally.

It is also true, as shown by experience in the industrial districts in Italy and in German work councils, that a trade union inspired by strong participatory ideals, willing to be involved in partnership

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<sup>59</sup> K. Sisson and A. Martin Artiles "Handling Restructuring" op. cit. in n. 23, p. 51.

<sup>60</sup> H. Collins, "Flexibility and Empowerment", cit. in n. 32.

<sup>61</sup> H. Collins cit. in n. 3.

<sup>62</sup> M. Terry, "System of collective employees representation in non-union firms in the UK", *IRJ*, v. 30, n. 1, 1999, pp. 16-30.

<sup>63</sup> G. Strauss "Collective Bargaining, Unions, and Participation", in *Organizational participation myth and reality*, F. Heller, E. Pusic, G. Strauss and B. Wilpert, Oxford, OUP, 1999, 105.

initiatives, can support or directly manage partnership relationships, taking on the role which in other contexts is peculiar to work councils.

The fact remains that changes in the contents of partnership agreements connected with the new models of individual worker involvement (not only in quality-oriented labour reorganisation processes but also in the very objectives of the enterprise), lead to a chain of adaptive modifications in the system of relations within a company: as was to be expected, the adaptation of the bargaining method on a co-operative basis determines a need to redefine the mechanisms and agents for workers' representation, to find an alternative to the adversarial approach of trade union representation.

Partnership relations in the new economy will probably lead to an objective need to define new types of representation (or re-orient the old ones), in such a way that they can combine the need to broaden the channels of co-operative communication between workers and management, and also deal with problems of technical, organisational and financial management (for example pension funds).

It cannot be excluded that the evolution of PECs will produce a diversification of the representation institutions beyond classical monistic or dualistic schemes: a proliferation of types of representation whose diversity of tasks and functions as compared with traditional distributive bargaining corresponds to a structural diversification, and thus a change in its legitimisation criteria (not necessarily all elective and democratic but also based on expertise).

A diversification of strategies of industrial relations (from distributive bargaining to flexibility and employment through social partnership) thus poses the problem of governing the process of diversification/adaptation of patterns of workers' representation, also via supporting legislation.

It is no coincidence that although Community legislation concerning health and safety referred to national practice, it intended to promote specific, differentiated workers' representatives whose *raison d'être* lay in their expertise, criteria of technical legitimisation and involvement in management. Community legislators, that is, were sending out a signal that was not always received by national legislators and trade unions: a diversification of models of representation in both a structural and a functional sense.

## 6. Territorial Employment Pacts vs. Pacts for Employment and Competitiveness: how they differ.

The concept of trilateral partnership has a more prominent role in Territorial Employment Pacts (TEPs)<sup>64</sup> than in PECs. From a formal viewpoint, the main feature of TEPs is the direct involvement

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<sup>64</sup> In this essay the reference to Territorial Employment Pact is not of a technical and formal nature, as in the Italian system, where territorial pacts respond to a regulatory logic governing local social and economic planning through precise legal provisions. For a social analysis of the Italian experience of TEPs, see A. Bonomi – G. De Rita, *Manifesto per lo sviluppo locale: dall'azione di comunità ai Patti territoriali*, Torino, Bollati Boringhieri, 1998; for a legal analysis, cf. G.P. Manzella "Patti Territoriali: vicende di un istituto di programmazione negoziata", *RGM*, n. 3, 1997, pp. 789-844; M. Zoccatelli, "I patti territoriali e i contratti d'area: genesi, realizzazioni e questioni irrisolte", *Le istituzioni del federalismo*, n. 1-2, 1998, pp. 261-283. For the Community policy guidelines for TEPs in acting locally for employment, cf. O. Quentin "The Role of Local and Regional Authorities in the draft Employment Guidelines", Dublin Castle, Ireland, October, 2000.

of various public actors (local authorities, chambers of commerce, banks, research institutes, universities, professional associations, *third sector associations*, etc.)<sup>65</sup>. In TEPs, in fact, public authorities directly accept certain commitments, often in a solemn, written form. These commitments concern not only the granting of financial resources but also forward-looking planning (e.g. investments in infrastructures, providing services for enterprises, administrative efficiency, public order measures, etc.). Given the agreement on times and methods, the commitments of the various partners assume the *form* typical of a private negotial exchange.

This evidently makes TEPs more institutionalised than PECs, pointing to a logic based on trilateral concerted participation that is closer to the models of national social pacts. In Italy, for example, the introduction of three kinds of territorial pacts – *Territorial pacts* in the technical sense, *Contratti d'area* and *Contratti di Programma*, has coincided with the policy favoured by central government and the numerous actors taking part in the national social pact (Christmas Pact dated 23<sup>rd</sup> December, 98) to give full institutional legitimacy to local concertation, so as to involve decentralised institutional actors in the bottom-up planning of economic development, thus going far beyond the limits of labour and industrial relations policy in a strict sense.

Given this function, in a technical sense territorial pacts have taken on an institutional significance at a European level as well (albeit with the limited purpose of funding initial handling of the pacts – the Commission's so-called "accompanying strategy"). In a more general sense, European Community employment policies and the planned management of social funding (Agenda 2000) seem to have been inspired by the idea of actively promoting local partnership through territorial pacts in a technical sense and other forms of partnership.

The relevant literature has widely demonstrated that global competition and the increased territorial mobility of enterprise, which is one of its effects, make territorial resources a strategic issue: competition arises not only between companies but also between territories, in relation to the material and immaterial competitive advantages that external economies can offer companies (infrastructures, services, social networks, trust, skills and tacit knowledge<sup>66</sup>).

As Carlo Trigilia states, this leads to a sort of paradox: globalisation increases the territorial mobility of enterprises but at the same time it increases the potential influence of the territorial dimension on local development processes<sup>67</sup>.

In a broad sense, then, territorial pacts involve a wide range of policies and significant public interests, from territorial government (not only urban and environmental planning but also public order and safety issues<sup>68</sup>) to industrial policy. They are one of the most significant examples of

<sup>65</sup> M. Regini, "Social pacts in the EC Report", op. cit. in n. 6.

<sup>66</sup> On the notion of social capital, see C. Trigilia "Capitale sociale e sviluppo locale", *S&M*, n. 57, 1999, pp. 419-440. In general on the new economic relevance of the territory in the context of global competition, see P. Perulli (ed.) *Neoregionalismo, l'economia arcipelago*, Torino, Bollati Boringhieri, 1998; J. L. Laville – L. Gardin, *Le iniziative locali in Europa*, Torino, Bollati Boringhieri 1999; A. Magnaghi, *Il progetto locale*, Torino, Bollati Boringhieri, 2000.

<sup>67</sup> "The development of a territory depends more on the capacity of local actors (individual and collective, public and private) to cooperate in increasing external economies and thus in building up solid local benefits for companies (i.e. not merely cost benefits)": C. Trigilia "Regolazione territoriale e azione sindacale", *Lavori.QRS*, v. 1, n.3, 2000, p. 8.

<sup>68</sup> R. Selmini "Sicurezza urbana e prevenzione della criminalità: il caso italiano", *Polis*, v. 13, n. 1, 1999, pp. 121-141.

the process of explicit (as opposed to informal or hidden) "contractualisation" of public policies<sup>69</sup>. This process was a feature of changes in territorial governance that occurred in the '90s in a context of decentralised planning and concertation, giving rise to a new season of neo-institutionalism (new rules within institutions, and between institutions, society and the enterprise system)<sup>70</sup>.

In their vision of global territorial governance, however, territorial pacts also involve labour market policies and, thanks to a particular capacity for penetration, have insinuated themselves into companies' internal labour markets (affecting company systems of industrial relations and personnel management), even reaching the threshold of territorial welfare policies, which were traditionally the preserve of the state and local authorities (the creation of innovative welfare and reception services, family support, the protection of weak social groups such as the elderly, the disabled, the underprivileged, immigrants, minors, etc.), and proposing policies to support the social economy (co-operation, non-profit organisations, voluntary work)<sup>71</sup>. Territorial social pacts, that is, have also been used to implement new policies for inclusion in social citizenship<sup>72</sup>.

As a general remark, it is worthwhile pointing out that the salient feature of territorial pacts is not the bilateral bargaining typical of private contracts in public administration (where the principal/agent relationship prevails), but rather the natural plurality of the actors involved in negotiations; however, the fragmentation of the parties involved is balanced by the pursuit of a shared aim, which leads to co-operation, originally voluntary but subsequently forced (not least due to the political responsibility pursuant to an agreement that has been publicly announced but not reached, or even legal responsibility – for example, the loss of planned funding in certain cases)<sup>73</sup>.

It is, however, clear that the complexity of the circular bargaining relationships inherent in this kind of contractual co-operation inevitably causes an increase in the transaction costs of implementing public policies, and possibly slows down or even blocks decision-making processes. But it is also evident that the "contractualisation" of public policy represents something in between state and market. It is a way to solve public problems without recourse to the authority of the statute law, or through mere market mechanisms, but rather by conscious adjustment of the interests of the parties involved and the search for consensus regarding common objectives and instruments"<sup>74</sup>.

The following sections will outline the two functions that have the greatest impact on the labour law regulation system: the effects on governance of the labour market at a territorial level and on systems of contractual relations at the company level, with their repercussions on employment relationships and the relative de-standardisation processes. We will not deal with the aims

<sup>69</sup> L. Bobbio "Produzione di politiche a mezzo di contratti nella pubblica amministrazione" *S&M*, n. 58, 2000, p. 13.

<sup>70</sup> C. Carbon "Concertare e programmare in ambito regionale. Il caso delle Marche", *Lavori.QRS*, v. 1, n.3, 2000, pp. 62-63.

<sup>71</sup> For an initial conceptualisation of the varied contents of Territorial Pacts in Italy, see A. Viscomi, "Mercato regole diritti" paper presented at the Conference on "Employment and Competitiveness: what are the labour rules?" Benevento 16 June 2000.

<sup>72</sup> Cf. the disputed Milan Territorial Pact for employment in B. Caruso "Immigration Policies in Southern Europe: More State, Less Market?", in J. Conaghan, R. M. Fishl, K. Klare (ed.) *Labour Law in the Era of Transformation*, Oxford, OUP, forthcoming. M. Biagi, "Il patto Milano Lavoro: un'intesa pilota", *DRI*, n. 2, 2000, pp. 127-134; T. Treu "Il patto sul lavoro di Milano: un modello di concertazione in stile europeo", *DRI*, n. 2, 2000, pp. 123-126; M. Tiraboschi "Le politiche per l'occupazione tra crisi della contrattazione collettiva nazionale e spinte federalistiche", *D&PL*, n. 10, 2000, pp. 741-744; M. Bolocan Goldstein "La via milanese alla concertazione. Il patto per il lavoro" *Lavori.QRS*, v. 1, n.3, 2000, pp. 91-105. F. Scalpelli "Il patto Milano lavoro: le ragioni di un dissenso", *DRI*, n. 2, 2000, 135-140.

<sup>73</sup> L. Bobbio "Produzione di politiche a mezzo di contratti nella pubblica amministrazione", op. cit. in n.69, p. 122.

<sup>74</sup> L. Bobbio op. cit. p. 135.

of territorial and social governance, or the broader economic, industrial, development or welfare policies the pacts intend to pursue.

More specifically, the attention will be focused on the ways in which territorial bargaining has innovated existing models of industrial relations (especially in Italy), and the ways in which territorial agreements have been grafted onto traditional bargaining of the vertical type (at a company or industry level) typical of the Fordist era, producing problematic forms of interaction with conventional models of industrial or professional trade union representation.

### 7. Territorial pacts and internal/external labour market policies.

Territorial employment pacts differ from PECs not only in that they directly involve public actors in local agreements and have a more evident institutional significance, but also because they tend to affect a wide range of public policies, including the management and fluidification of local labour markets. The contents of territorial pacts, as regards both the planned and the immediate regulatory measures, make them tools for diversification of the standard rules governing labour law not only at a company level but at a territorial one as well.

Territorial employment pacts therefore respond to two requirements that need to be clearly stated:

a) *Functionally*, social pacts have the task of adapting and modulating, at a micro (territorial) level, the at times excessively rigid macro policies of centralised social pacts, which often seem unable, without further intervention, to extend the advantages of bargaining at a macro level (pay agreements, a low rate of inflation and safeguarding of the welfare system) to certain excluded and marginalised social groups. Centralised social pacts, that is, appear to be incapable of coping with territorial and social inequalities and differences in development and unemployment rates<sup>75</sup>.

b) *Structurally*, territorial pacts propose the involvement of social partners in the institutional government of the labour market, fully exploiting the resources of the contractual method, but at a territorial rather than company level (as in the case of PECs). Through territorial social pacts the collective bargaining method, with its resources of consensus and flexibility, leaves the confines of the single company and is extended to the territory. It is as if collective bargaining had reinvented itself to become a practice of territorial labour policy concertation, thus not only enlarging its traditional jurisdiction (even dealing with active labour policies) but also conquering new spheres of institutional legitimacy.

It should be pointed out, however, that the involvement of social partners in the concerted management of the labour market is not a totally unknown institutional practice. The 70s and 80s in Italy, for example, experienced widespread trade union participation in a myriad of tripartite institutions bureaucratically and administratively responsible for management of the labour market (the so-called "*amministrazione per collegi*"): from a public national employment service to regional employment commissions and agencies<sup>76</sup>.

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<sup>75</sup> C. Trigilia, "Regolazione territoriale e azione sindacale", op. cit. in n. 67.

<sup>76</sup> G. Pino "Decentramento e intervento pubblico sul mercato del lavoro: dalle commissioni regionali per l'impiego, alle nuove commissioni permanenti, *RGL*, v. 50, n. pp. 31-91.

The difference between this institutional model and Territorial Pacts is that the social partners were previously involved *within* the public sphere working according to the legal framework of administrative law. With Territorial Pacts, on the contrary, institutional involvement in the handling of public labour policies lies *outside* the administrative bodies, and follows a logic typical of private law and bargaining, the sinuosity and flexibility of which are capable of adapting tools and policies to different local contexts.

In practice, territorial pacts differ according to the level of economic, social and institutional development of the area they refer to.

The local level, which TEPs privilege, inevitably extends the object of negotiated exchange to the labour market and employment relationships, thus making the dynamics of the exchange more complex than they are in PECs. The aims of greater flexibility in handling employment relationships (derogation from limitations on the use of atypical employment contracts, flexible pay and working hours, etc.) and a reduction in labour costs<sup>77</sup> are becoming more acceptable to trade union organisations because they enable them to obtain a better deal, not only safeguarding insider employment, as in PECs, but also strengthening the potential for economic development and thus job opportunities, above all for outsiders, in the territory involved.

The contents of agreements negotiated via TEPs, in fact, largely reflect the four pillars of European Community employment policy: besides investments in infrastructures, the strengthening of mechanisms to support employability and entrepreneurship, (policies and resources for in-service and external training, the monitoring of local labour markets, the introduction and development of employment agencies, the provision of territorial funds for workers temporarily unemployed in certain sectors, the provision of advanced services to enterprise, simplification of administrative procedures, tax incentives for the creation of permanent jobs, measures against the hidden economy, etc.); and also flexibility in the handling of employment relationships (adaptability) and equal opportunities.

Of particular significance in this respect is the evolution of territorial bargaining in the so-called economy of “districts” in Italy<sup>78</sup>, which often correspond to sectors traditionally featuring small firms or craftsmen (textiles, furniture, building, tourism)<sup>79</sup>. In these sectors and territories (which have given rise to specific regional and sub-regional models: the Emilia Romagna model, the Veneto model, the Prato model in Tuscany, etc.), collective bargaining has followed the same strategy as PECs: bilateral partnership but at a territorial rather than industry or plant level, to support the competitiveness of micro firms by injecting a heavy dose of flexibility (as regards working hours, wages and geographical location) into both the internal and external labour market. These

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<sup>77</sup> On the results for employment of the so-called “zones franches urbaines” in France, see G. Cahin, “Le zones franches urbaines”, *AJDA*, v. 65, n. 6, 1999, pp. 467-477; E. Larpin, Le zones franches n’ont pas fait de miracle pour l’emploi, *Liason sociale Mensuel*, n.1, 1999, 40-42.

<sup>78</sup> Here again the relevant literature is vast: G. Becattini, *Dal distretto industriale allo sviluppo locale*, Torino, Bollati Boringhieri, 2000.

<sup>79</sup> M. Giaccone, “Contrattazione territoriale come infrastruttura dello sviluppo locale” *Lavori.QRS*, v. 1, n.3, 2000, pp. 13-45; L. Bellardi – L. Bordogna, *Relazioni industriali e contrattazione aziendale: continuità e riforma nell’esperienza italiana recente*, Milano, Angeli, 1997.

measures are almost always accompanied by others supporting income levels if not permanent employment security<sup>80</sup>.

This type of bilateral bargaining at a territorial level, which has followed cyclic trends, does not differ from PECs as regards its functions and structure (here again based on partnership) so much as the *territorial*, as opposed to *plant-level*, significance of its sphere of operations. It is a sort of territorial PEC that still enjoys great favour, as is demonstrated by the recent national agreement relating to the trade sector in Italy<sup>81</sup>. Due to its features as a bilateral territorial partnership (a subspecies of a PEC) this model of negotiated partnership does not come under the broad notion of a TEP as the public actor is absent from the formal exchange.

Since the mid 90s, however, there has been a trend towards transforming the PECs of territorial districts into actual forms of territorial concertation (TEPs). This has occurred above all in areas where traditional bilateral territorial bargaining had reached a crisis. In order to broaden the contractual contents of this model of territorial bargaining, bilateral district bargaining has been transformed into multilateral territorial bargaining. The legal institutional sign of this transformation has been given by the leading role taken in the negotiated agreements by public actors (above all local authorities)<sup>82</sup>.

Intervention by public actors has not been confined to mediation but has aimed at building up a framework of general mutual convenience that would promote trade union concessions regarding flexibility and labour costs: investments in infrastructures, tax incentives, the provision of services to enterprises. Beyond the specific example of the evolution of territorial bargaining in Italian districts, the new dynamic of territorial pacts has also affected urban and metropolitan areas with varying degrees of social and economic development in various national contexts.

In the more developed urban areas<sup>83</sup>, the primary intent of TEPs is to reduce exclusion and social discrimination through measures aimed to promote the employment of immigrants and the long-term unemployed, to re-insert former convicts and prostitutes, and to reduce juvenile employment). In economically underdeveloped or declining urban areas, on the other hand, the TEPs have tended to promote employment in general, especially for young people<sup>84</sup>.

<sup>80</sup> Supplementary welfare measures on a voluntary or contributive basis via the institution of bilateral management organisms that have in time transformed from instruments for the administration of collective bargaining into proper institutions in charge of regulating the local labour market.

<sup>81</sup> In the trade sector, although this type of territorial partnership is strongly supported at a national level, it has become a widespread tool for the introduction of massive doses of flexibility at a company level (longer opening hours, job sharing, weekend jobs, atypical forms of employment, post maternity-leave part-time jobs, an increase in the legitimacy of fixed-term contracts, allowances for temporary and apprenticeship contracts, etc. ), see G. Ludovico 2000, "Il rilancio della bilateralità, la flessibilità e il decentramento nel rinnovo contrattuale del commercio", *DRI*, n. 2, 2000, pp. 269-275.

<sup>82</sup> For example, the 1997 "Territorial Pact for Development and Employment in the Province of Prato" and then the 1999 "*Patto di programma*", which was also signed by local authorities and the Chamber of Commerce; cf. M. Giaccone op. cit. in n. 79, pp. 34 ff.

<sup>83</sup> Besides the Milan Pact cit. in n. 72, we can also mention the pact for the metropolitan area of Vienna, "Social partners cooperate to improve Vienna's labour market" *Eironline*, June 1999; the Brussels Territorial Pact, "Brussels-Capital Territorial Employment Pact examined, *Eironline*, May, 2000. On the effects for employment of Territorial Pacts, see "Territorial employment pacts boast 55,000 new jobs", *ESP*, n. 101, 1999, p. 10.

<sup>84</sup> For example, the Territorial Pact for Zeitz, a town in the former DDR, "Territorial employment pacts in Germany, the example of Zeitz" *Eironline*, July 1998, or the Ferrara Territorial Pact, in M. Biagi "Il contratto di prima esperienza nel patto territoriale di Ferrara",

If, however, one were to make an internal typological differentiation between TEPs, it would not concern the identification of categories of previously excluded workers to be re-inserted into the labour market so much as the varying degrees of specificity of the measures aiming at flexibility in standard work relationships offered in return for institutional commitment to intervene proactively in the labour market. This is therefore a differentiation concerning their regulatory structure and the extent to which their clauses and commitments are legally binding.

Several TEPs, for example, contain policy provisions, at times not particularly innovative ones, that refer to existing regulatory frameworks or at most try to rationalise them. (These provisions therefore require a further plant-level bargaining stage and can be considered as a sort of framework Territorial Pact viz. the recent Catania Territorial Pact)<sup>85</sup>. Although other Pacts largely contain provisions that entail complex management, monitoring and subsequent implementation, they do, however, aim to introduce employment relationship flexibility that is already directly applicable; measures that firms operating in the territory and signatories to the agreements can handle directly without further negotiation delays<sup>86</sup>.

## 8. Effects of the spread of Territorial Employment Pacts.

a) the crisis of the national agreement as the mainstay of the collective bargaining system

For some time now, centralised bargaining systems in Europe have been put under great pressure due to the process of decentralisation. This pressure is due above all to management initiatives relating to company reorganisation. The decentralisation of bargaining systems is therefore largely determined by an endogenous drive towards reorganisation of companies' production processes and financial administration.

The most attentive observers have, however, noticed that TEPs may well signal a decentralisation trend featuring factors that are exogenous to the contractual system, of an institutional nature: TEPs, that is, would seem to confirm the irresistible rise of federalism in Europe, extending its influence from the structure of the state to that most classical of social systems – collective bargaining<sup>87</sup> – and impacting greatly upon it.

This judgement is probably not supported by clear empirical evidence. The fact remains, however, that throughout a large part of Europe the collective industry-wide or plant-level agreement, the cornerstone of trade union relations in the Fordist organisation, is going through a period of crisis<sup>88</sup>.

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*Guida al lavoro Il sole 24 ore*, n. 31, 2000, pp. 19-22. P. L. Also, Minicucci "I 'contratti di prima esperienza': un nuovo strumento di flessibilità contrattata", *Lavori.QRS*, v. 1, n. 3, 2000, p. 199-203.

<sup>85</sup> To be found on <http://www.lasiciliaweb.com/>

<sup>86</sup> For the Locri area, Manfredonia and Crotona Pacts, for example, see the overview by A. Viscomi "Flessibilità contrattuale in quattro contratti d'area", *DML*, v. 1, n.2, pp. 381-392.

<sup>87</sup> T. Treu, "Il patto sul lavoro di Milano", op. cit. in n. 72, pp. 123-124.

<sup>88</sup> A. Ferner & R. Hyman (eds.), *Changing Industrial Relations in Europe*, op. cit. in n. 24.

Following this line of thought, both the upward thrust, at a European level<sup>89</sup>, and the downward thrust, of which TEPs are but one example, would seem to question the central role of national agreements, even in their last remaining strongholds (e.g. Italy).

It seems, however, methodologically incorrect to posit a mechanical causal connection between federalistic modifications of the institutional framework and transformations in the structure of collective bargaining, whereby a certain legal input due to accentuation of institutional legal federalism would correspond to a certain social output (linear adaptation of the bargaining structure, for example, with a shift from industry-level national agreements to regional agreements following institutional reform inspired by the principles of constitutional regionalism).

The interference between the new federalism-oriented legal systems and social systems (the structure of collective bargaining) is probably more complex and subtle than would be suggested by a vertical, linear logic that sees legal input as directly affecting social systems<sup>90</sup>.

It is, however, undeniable that the more the powers of central state authority are delegated to peripheral territorial authorities, with reference to institutional responsibilities that directly or indirectly affect and differentiate between labour costs, and the labour market (tax and public service charges policy, welfare<sup>91</sup>, income protection, flexibility), the weaker the collective national contract's regulatory, standardising and egalitarian capacity becomes.

The risk of an ideological, "symbolic" defence of the national collective agreement, as seems to prevail in certain areas of Italian trade unionism, is to progressively weaken its regulatory capacity and sphere of application. It is thus the risk of a slow, not officially declared, death (that is, not by abandonment, but by progressive replacement with tools of differentiation and de-standardisation such as PECs and TEPs and the consequent disappearance of its topical function – the regulation of standard or minimum pay)<sup>92</sup>.

The alternative to this slow disintegration of the regulatory capacity of national agreements is strong legislative support for centralised bargaining (as has happened in France with dubious results, or in Italy with specific, rather than general, state intervention)<sup>93</sup>.

It would, however, be a paradox if trade unions like the Italian ones, for whom voluntarism in industrial relations and legislative abstentionism are a sort of cultural identity, should need to have recourse to the statute law to re-affirm the central and irreplaceable standardisation function of collective agreements.

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<sup>89</sup> P. Margisson and K. Sisson, "European Collective Bargaining", cit. in n. 11; B. Keller B. Sörries "Sectorial social dialogues: new opportunities or more impasses?" IRJ, v. 30, n. 4, pp.330-344. A. Martin "Wage Bargaining under Emu: Europeanization, Re-Nationalization or Americanisation?" WP Centre for European Studies, Harvard University, April, 1999, pp. 3-36. P. Pochet, "Renegotiating the Social Contract in the Shadow of EMU: Decentralisation, Europeanization, or Re-nationalization?" WP, European Centre of Harvard University, 1998.

<sup>90</sup> B. Caruso, "Strutture contrattuali e riforme federaliste: si condizionano reciprocamente?" forthcoming in LD.

<sup>91</sup> G. Balandi "Lavoro e diritto alla protezione sociale", LD, v. 13, n.1, pp. 125-149.

<sup>92</sup> The risk is that of making collective bargaining ineffective, as happened in Germany, where the trade unions were recently forced to authorise derogation of national agreements at plant level: see the authors cit. in n. 46.

<sup>93</sup> As has happened recently in Italy regarding part-time jobs. The legal provisions that prevented decentralised bargaining from disregarding the clauses of national agreements as regards supplementary work were subsequently repealed: see A. Lo Faro, "Occupazione 'adattabile' e autonomia negoziale privata nella riforma del part-time," forthcoming in *GDLRI*. The legal norm whereby national collective contracts cannot be derogated by the so-called *contratti d'area* is, however, still in force: Art. 203, statute of 23<sup>rd</sup> December 1996, n. 662.

Moreover, by virtue of their very structure and function, national sector agreements are closely connected with the Fordist industrial production cycle; at their most elastic and flexible, they may cover company-level welfare problems and the internal labour market, besides setting labour costs and stabilising power relationships between the two countervailing parts: their canonical function is still regulation of the basic elements of standard permanent employment – pay, hours and job evaluation systems.

National collective agreements, however, do not have the capacity to deal with new issues such as social exclusion within the “external” labour market, outside the plant. Nor can they re-organise the individual careers of permanent employees or freelance workers in a knowledge-driven economy and post-Fordist job design, where careers are no longer based on a vertical rise up through a company’s labour market, but connected with territorial mobility in the “boundaryless workplaces” of industrial districts<sup>94</sup>.

National collective agreements, that is, have no dynamic impact on the external labour market because their regulatory (and protective) logic is vertical, not horizontal.

It is therefore possible that TEPs will have a greater destabilising effect than PECs on consolidated bargaining structures (in Italy the bargaining structure laid down by the Social Pact signed on 23<sup>rd</sup> July, 1993, the so-called Ciampi Protocol).

It is therefore evident that their spread may lead to a resumption of measures to reform the collective bargaining structure and the re-writing of norms that establish the centrality and prevalence of national collective agreements, as they do in Italy.

Making a major contribution to the destabilising spread of TEPs and at the same time ignoring the effects this will have on the stability of a system based on national collective agreements leaves trade unions a choice between two metaphors: they can either play the ostrich and bury their heads in the sand or become sorcerer’s apprentices.

How to connect horizontal territorial bargaining and vertical bargaining at various levels, with respect to the distribution of responsibilities for contents, the actors involved, and the norms regulating the resolution of potential regulatory conflict, will in the near future be a key issue in the reform of bargaining structures.

#### b) The transformation of trade union representation

The spread of TEPs has also affected consolidated models of trade union representation and has weakened the already debatable notion of representativeness, above all in systems like the Italian one where, with the notable exception of the civil service<sup>95</sup>, it is empirically inferred by the bargaining power of the protagonists of traditional vertical bargaining (at an industry or plant level).

Just as PECs resume the apparently settled dialectic between trade unions and company-level workers’ representatives (see *supra*), the spread of territorial concertation via TEPs proposes a significant, if not central, role for a horizontal territorial trade union model that is uncommon in

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<sup>94</sup> K.V.V. Stone, “Employment Regulation in a Boundaryless Workplace”, *op. cit.* in n. 3.

<sup>95</sup> B. Caruso “Rappresentanza e rappresentatività nel pubblico impiego riformato: ‘l’interramento del cratere’”, *LPA*, v. 2, n.2, pp. 225-262.

Europe, but was politically re-dimensioned in the Fordist era even in countries such as Italy where it had historically been the dominant model.

If and when trade unions extend their sphere of action beyond the boundaries of the single firm to follow concerted territorial policies for access to employment and local development and also to regulate labour spread over the territory, it is evident that the traditional model of industrial representation based on vertical bargaining (always within the rigid confines of the enterprise, whether at a plant or at an industry-wide level) will be insufficient to express the new complexity of the interests being safeguarded and the policies pursued<sup>96</sup>.

In this way, one of the canonical functions of trade union representation is undermined: the task of selecting, aggregating and representing interests – albeit increasingly less homogeneous and uniform ones, even in a Tayloristic work organisation – which had as precise points of reference the stable boundaries of permanent employment relationship within a firm. and not a differentiated sequence of types of work and interests spread over a whole territory.

In TEPs, trade unions have to forego their traditional task of safeguarding the specific professional interests of a homogeneous group typical of the craft unionism model, as well as their responsibility for aggregating and focusing the diverse interests of their traditional members on a single dominant interest, as was characteristic of industrial trade unionism in Continental Europe from the Fordist era to post-industrialism<sup>97</sup>.

In territorial concertation through TEPs, trade union organisations are forced to mediate between general, particular and differentiated interests that are often not only conflicting but even antagonistic, and refer not only to permanent employees but to a broad spectrum of workers that reflects the social fragmentation and new range of jobs and interests of a post-industrial society.

For example, if – as is provided for by specific measures of Territorial Pacts signed in Italy – the aim is to contribute towards increasing the economic development of areas especially suited to tourism, it will be necessary to accept working time policies that meet the flexibility requirements of trading (supermarkets and department stores ) and at the same time safeguard the interests of smaller businesses, protecting workers by not allowing unregulated flexibility and an unlimited amount of temporary jobs. If the aim is to promote access to employment for weaker, underprivileged social groups, it will be necessary, even transitorily, to de-standardise wages; something which might clash, at least in theory, with the principle of formal parity<sup>98</sup>. If the aim is to pursue environmental and urban renewal policies, it will be necessary to mediate and oppose interests that would be legitimately defensible and harshly defended by a vertical industrial trade union (e.g. the protection of employment in factories that are obsolete or a source of pollution,) etc.

This new function of trade union representation thus stresses political mediation as opposed to mediation and protection via bargaining of professional interests. It emphasises the trade union's role as an institutional political interlocutor, as opposed to that of representing partial interests. It throws trade unions into the cold mire of the political decision-making involved in territorial concertation, but it also forces them, rather schizophrenically, to contaminate their historic

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<sup>96</sup> See B. Caruso "Il sindacato nel terzo millennio: tra crisi e rifondazione della rappresentanza", forthcoming in *RGL*.

<sup>97</sup> A. Accornero, *La parabola del sindacato: ascesa e declino di una cultura*, Bologna, Il Mulino, 1992.

<sup>98</sup> B. Caruso, *Immigration Policies in Southern Europe: More State, Less Market?*, op. cit. in n. 72.

model of representation with models taken from other social experiences (environmentalism, voluntary associations, youth associations – everything that comes under the varied phenomenon of aggregation deriving from a generic, rather nihilistic, opposition to globalisation).

In this way, however, the trade union movement undermines the foundations of its original representative legitimacy, its material grounds as well as the technical or formal criteria on which its mandate is based.

Nevertheless, the trade union still remains an organisation of interests; the criteria, both formal/legal and political/institutional, on which its representativeness is based refer as always to presumed or actual consensus of an electoral or associative nature received from its permanent rank and file.

The erosion of its traditional membership thus inevitably forces the trade union to try to broaden its sphere of action at both a territorial level (TEPs) and a plant level (PECs).

To the extent that the trade union tries to provide services rather than simply protecting the interests of employees, thus putting roots down in the territory and governing the external labour market together with other private and institutional actors, its classical point of reference and the measure of its representativeness change.

Who is to have greater voice in the pursuance of territorial pact policy? The trade unions that represent the new contingent workers, the new underprivileged social classes, the so-called “Grey Panthers” (pensioners) whose union membership has grown enormously in Italy thanks to successful territorial service policies, or rather the traditional vertical representation of a declining number of industrial workers?<sup>99</sup> How is the representativeness of the various trade unions to be measured, compared, weighed? Is the weighting merely political and institutional or are there other parameters involved? Does the political synthesis needed for this type of concertation of interests have anything at all to do with trade union legitimacy based on associative or electoral consensus and thus on representativeness? The apparent paradox (and not such an unaccountable one) is that the method of concertation – which the European Commission is trying to shift from the centre to the periphery – seems to combine its strong points with the vagueness and difficulty of the criteria used to estimate the representativeness of trade unions that are typical of concertation at a European Community level<sup>100</sup>.

Besides the specific issues of the criteria and context used to measure the representativeness of trade unions, it is evident that the greater their institutional involvement, the greater their top-down legitimisation, the weaker their representative legitimisation through consensus (bottom-up); but the consensus deriving from their capacity to select and pursue policies to protect the interests of socially identified groups is the very *raison d’être* of this historic social institution that played such a prominent role in the short century.

It is too early to say whether this is a symptom of an inevitable, irreversible decline or the difficult beginnings of a process of renewal and radical transformation of an “ugly duckling” into a swan: the debate is still open.

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<sup>99</sup> F. Piu “Lo Spi: una categoria generale nel territorio” *Lavori.QRS*, v. 1, n. 3, 2000, pp. 83-90.

<sup>100</sup> A. Lo Faro *Funzioni e finzioni della contrattazione collettiva comunitaria*, Milano, Giuffrè, 1999, pp. 125 ff.; F. Guarriello “Spunti critici in tema di rappresentanza sindacale europea” *D&L*, v. 9, n. 1, pp. 23-29.

## 9. Conclusion.

The purpose of this essay has been to create some sort of order in the variety of practices that go by the name of social partnership. These practices are spreading, albeit in an unbalanced way, throughout Europe and are to some extent indicative of new trends.

There are two broad categories of decentralised social pacts, Pacts for Employment and Competitiveness (PECs) and Territorial Employment Pacts (TEPs). In each of these two categories there are significant differences in the tools used and aims pursued, but this does not prevent single pacts from being classified as belonging to one or the other of the categories.

Although both types of Pact come under a general phenomenon of decentralisation of bargaining systems, they respond to two distinct forms of logic relating to collective relations, as is confirmed by their different formal and legal slants: PECs are essentially bilateral agreements in which public actors do not take a formal part, confining their role to that of external guarantors. PECs differ, however, from traditional distributive collective bargaining at a company level in their emphasis on the participatory method which in a sense seems to re-propose, albeit on a new basis, the dualism between trade unions and workers' representatives. As far as contents are concerned, the basic aim of PECs is flexibility in exchange for employment protection (especially for insiders); but another feature is the extension of their contents to include issues normally handled unilaterally by management (human resource policies, individual incentives, etc.).

The distinguishing formal and legal feature of TEPs, on the other hand, is the direct, active participation of public actors, both at the moment of signing the pacts and in the subsequent implementation stages. As far as their contents are concerned, TEPs feature a wide range of public policies (the labour policies usually reflecting the four pillars of Community employment policy). TEPs show two general trends: in legal systems where public action is based on principles of administrative law, TEPs are among the most evident signs of the impact of economic globalisation on legal systems, with a consequent shift of state and sub-state administration from public law towards a more contract-oriented kind of action, even in pursuing general interests. But TEPs also show a trend towards decentralisation of social concertation, which may be attributed to the irresistible rise of institutional federalism in several European countries. They are a sort of anticipation of the scenarios for possible transformations in the basic structures of labour law, (traditionally laid down at a national level), which is undergoing a certain amount of pressure due to federalism-oriented institutional change.

Finally, TEPs confirm the difficulty of uniform regulation via national collective agreements and the insufficiency of the representative role of trade unions, relegated within the evaporating confines of single firms and classical standard employment.

Both TEPs and PECs have destabilising effects on social systems (industrial relations systems) and legal systems (labour law regulations), also affecting relationships between the sources of labour

law, above all in those systems where the equilibrium has been traditionally based on the principle of the inderogability of statutory and contractual labour law; effects that labour lawyers have been forced to deal with for some time now<sup>101</sup>.

These phenomena are to some extent representative of the crisis facing the four fundamental pillars of post-war labour law, above all in Continental Europe (the nation state, the large Fordist firm, full employment, general trade union representation)<sup>102</sup>. But they also reflect the great capacity for adaptation of labour law: they are the most evident sign of how labour law, embedded in the basic structure of the state, has succeeded in developing in a cultural humus, that of legal pluralism (and the related social practices) that is still its ultimate essence and the sense of its lasting vitality.

If it is true that it is perhaps more complicated than it appeared to be a few years ago for labour law scholars to understand the best way to use the law to combat unemployment and not only to consolidate the protection of standard employment<sup>103</sup>, it is also true that labour law's capacity to reinvent itself and its instruments (to rediscover, for example, the effectiveness of contracts and consensus to regulate the labour market) is a tangible sign of its enduring capacity to keep up not only with modernity but also with what is to come.

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<sup>101</sup> Among many others, A. Supiot, "Transformation du travail et devenir du droit du travail in Europe", *DS* n. 5, 1999, pp. 431-437. H. Collins "Is There a Third Way in Labour Law?" typescript; H. Arthurs "Landscape and Memory: Labour Law, Legal Pluralism and Globalization", in T. Wilthagen. (ed.), *Advancing theory in labour law*, op. cit. in n. 32, pp. 21-34; S. Simitis "Il diritto del lavoro ha ancora un futuro?", *GDRLI*, n. 76, 1997, pp. 609-641; B. Caruso, "Gli esiti della globalizzazione: disintegrazione o trasformazione del diritto del lavoro?" paper presented at the Trento Conference on "Globalizzazione e diritto del lavoro. Il ruolo degli ordinamenti sopranazionali" 22-23 November 2000, in *ILLeJ* <http://www.labourlawjournal.it/index.htm>

<sup>102</sup> M. D'Antona "Diritto del lavoro di fine secolo: una crisi di identità" (1998) now in *Opere* edited by B. Caruso and S. Sciarra, now in *M. D'Antona Opere* edited by B. Caruso and S. Sciarra, Milan Giuffrè, 2000, vol. I, p. 221 ss.

<sup>103</sup> A. Supiot «De bon usage des lois en materie d'emploi», *DS*, n. 11, 1997, pp. 249-242.