

Transnational and European Ways Forward for Collective Bargaining*

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1. Solidarities in Times of Uncertainty

Most European labour lawyers are currently engaged in a sharp war of words regarding fundamental social rights and their respective roles and functions in the coming new phase of European integration. Two main directions can be identified in the attempt to clarify the content of this debate and in order to look to the future as to new developments.

The first has to do with the impact of the controversial rulings of the Court of Justice dealing with collective social rights. The enforcement of these judgments falls into the dangerous trap of proportionality principles and opens up difficult scenarios for judges and social partners alike at the national level when faced with overriding market freedoms.³⁹⁸ Some member states are already active in establishing new rules for the game in compliance with the Court's judgments, while still preserving the autonomy of collective bargaining.³⁹⁹

The second direction is imposed by the economic and financial crisis. The word 'solidarity' appears in recent European sources, referring either to urgent measures that need to be adopted,⁴⁰⁰ or as a derogation of previous sources to provide immediate help to workers who have lost their jobs as a 'direct result of the global financial and economic crisis'.⁴⁰¹

These two directions run parallel to each other, as collective social rights are, in the best consolidated European tradition, pivotal to the achievement of solidarity and social justice.

The Commission has recently been thinking along these lines when aiming at consolidating and improving all sources potentially suitable in anticipating and managing changes. We see this approach in the Commission's Social Agenda,⁴⁰² as well as in a document specifically related to transnational company agreements.⁴⁰³ Furthermore, amendments have been introduced to the revised Directive on European Works Councils (EWC)⁴⁰⁴ in order to emphasize the transnational competence of such bodies at the relevant level of company or group of companies, according to the issue under discussion.

In all such cases, solidarity among workers acquires new dimensions, mainly linked to uncertain circumstances. It is uncertain what will happen to workers posted to a host country to provide services and, in a more challenging manner, how workers in the receiving country will react when

³⁹⁸ The literature on *Viking*, *Laval*, *Rüffert* and *Luxembourg* cases is vast. A stimulating summary, in the light of recent developments in the UK, is offered by C. Kilpatrick, *British Jobs for British Workers? UK Industrial Action and Free Movement of Services in EU Law*, LSE Working Paper 16/2009 and by the same author *The ECJ and Labour Law: a 2008 Retrospective*, ILJ 2009, 180.

³⁹⁹ Further on see section 3.

⁴⁰⁰ Commission of the European Communities, Communication from the Commission to the European Council, *A European Economic Recovery Plan*, 26 November 2008, COM (2008) 800 final.

⁴⁰¹ Regulation (EC) n. 546/2009 of the European Parliament and of the Council of 18 June 2009, amending Regulation n. 1927/2006 on establishing the European Globalisation Adjustment Fund, art. 1.1.

⁴⁰² Communication of the Commission '*Renewed Social Agenda: Opportunities, access and solidarity in 21st Century Europe*', Brussels, 2 July 2008, COM (2008) 412.

⁴⁰³ Commission Staff Working Document, *The role of transnational company agreements in the context of increasing international integration*, Brussels, 2 July 2008, SEC (2008) 2155.

⁴⁰⁴ Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 *on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees*, OJ L 122/28, 16 May 2009.

facing potential social dumping. The same can be maintained for workers whose fundamental social rights come into collision with an equally fundamental market freedom, such as freedom of establishment.

The result of the economic and financial crisis is uncertain as to its terms in losses of jobs and/or relocation of jobs to other countries, both within and outside the EU. The revised European Globalization Adjustment Fund (EGAF), one of the most innovative responses provided in recent years, suggests taking into account 'a reasoned analysis of the link between the redundancies and major structural changes in world trade patterns or the financial and economic crisis, a demonstration of the number of redundancies, and an explanation of the unforeseen nature of those redundancies'.⁴⁰⁵

It is equally uncertain how company restructuring – a phenomenon carefully monitored by European institutions over the years – will evolve in present times and whether existing tools to counteract managerial strategies will prove efficient. Empirical data is required⁴⁰⁶ in order to detect the complex reality behind managerial strategies whenever they interact with transnational collective interests, both on the side of employers and of workers. This learning process is underway, requiring a deeper understanding of current practices in conjunction with a rigorous interpretation of the law. However, it would be wrong to argue that uncertainty comes as the most direct effect of the free provision of services, freedom of establishment and transnational restructuring. The rise of finance – in the broad sense currently attributed to this word – has revealed serious weaknesses in collective bargaining systems. The latter are framed within political and economic systems and, despite their claim for autonomy, at times can be hit by unforeseen circumstances.⁴⁰⁷

Company restructuring is very often the result of global manoeuvres, leading to mergers and acquisitions. Frequent changes in production systems affect work organisation and skill requirements in a significantly rapid way. Collective bargaining cannot intervene with traditional tools in this fluid process. Information regarding changes – both financial and organizational – thus becomes integral to bargaining collectively and to anticipating issues of relevance for both sides within the negotiations.

One of the purposes of this paper is to investigate whether uncertainties caused by economic and financial downturns are aggravated by the fact that a vague notion of solidarity is taking shape. Such an indistinct steering principle could slowly weaken traditions deeply rooted in labour law.

⁴⁰⁵ Regulation (EC) 546/2009 at fn. 4, art. 1.4, replacing art. 5(2)(a).

⁴⁰⁶ See, for example, the large interdisciplinary project coordinated by M.A. Moreau Agire, *Anticiper pour une gestion innovante des restructurations en Europe*, www.fse-agire.com, and the special issue, *Restructurations en Europe*, Semaine Social Lamy, Supplément n. 1376, 24 November 2008. See also M.A. Moreau, S. Negrelli, P. Pochet, *Building anticipation of restructuring in Europe*, PIE Peter Lang 2009. The Commission started to be active as to these issues in the late 1990s, following the Report of a High Level Group chaired by Pehr Gyllenhammar. Monitoring of major restructuring operations has been carried on by Eurofound, see in particular European Monitoring Centre on Change (EMCC) and European Restructuring Monitor (ERM), www.eurofound.europa.eu/emcc. Setting criteria to measure job losses due to restructuring is not an easy task, see within the framework of the Eurofound project, D. Storrie, *Restructuring and employment in the EU: concepts measurement and evidence*, Luxembourg, OOEPEC 2006.

⁴⁰⁷ S. M. Jacoby, *Finance and Labor: Perspectives on risk, inequality, and democracy*, CLLPJ 2008, 17 ff.; S. Deakin, *The rise of finance: what is it, what is driving it, what might stop it?*, CLLPJ 2008, 67 ff., commenting on Jacoby's paper. See also, for a future prognosis, Lord Wedderburn, *Labour Law 2008: 40 years on*, in ILJ 2007, 397 ff.

Collective actors could, as a result, find themselves lacking the necessary legitimacy to face global challenges.

One way to address issues of uncertainty linked to the above described phenomena of job shortages and social dumping is to rethink the notion of solidarity as a driving force behind collective bargaining. Solidarity, framed within the potentially expanding transnational scope of collective agreements, needs to adapt to the volatility of managerial strategies and constantly changing demands for new skills and professional qualifications.⁴⁰⁸

Thus, solidarities – in the plural – become starting points for differentiation, rather than for overall and encompassing processes of standard setting. Solidarities should emerge as a result of new legitimacies; they should mirror processes of changes within companies and adapt to them, constantly opening new levels of negotiations.

One starting point is to look at company restructuring and evaluate the legal nature of company agreements dealing with matters related to structural changes, affecting both the quality and quantity of jobs. We shall then examine other negotiated texts at the international and European level, in an attempt to draw a picture of existing voluntary sources, all characterised by issues of 'transnationality'.

2. Restructuring, Company Agreements and Global Challenges

The approach to restructuring within the framework of the Commission's Renewed Social Agenda⁴⁰⁹ is to favour, more explicitly than before, a coordination of existing policies and a profitable exchange of data on mass dismissals.⁴¹⁰ On one hand, there is a need to enhance employment policies as defined in the 'new' strategy pursued by Barroso, ensuring that National Reform Programs (NRP) include effective measures on flexicurity. The latter are expected to tackle both internal and external flexibility, while guaranteeing more proactive measures through efficient labour market institutions.⁴¹¹

On the other hand, regional and sector analyses should be pursued, in order to favour policies tailored for local labour markets and for specific economic activities. The example of Canada is

⁴⁰⁸ Cedefop - European Foundation for the Improvement of Living and Working Conditions, *Future skill needs in Europe. Medium-term Forecast*, Luxembourg, OOEPEC 2008. A recent survey covering 27 Member States and Norway stresses the centrality of collective bargaining: Cedefop, *Contribution of collective bargaining to continuing vocational training*, Dublin 2009. The Commission Communication, *Recovery*, at fn. 3, p. 11 discusses how to 'improve the monitoring and matching of skills development and upgrading with anticipated and existing job vacancies'. Recent findings in Investing in SEOR Erasmus University Rotterdam, TNO Netherlands Organisation for Applied Scientific Research, ZSI Centre for Social Innovation, Study conducted on behalf of the European Commission, Employment, Social Affairs and Equal Opportunities DG, *The Future of Jobs and Skills - Scenarios, implications and options in anticipation of future skills and knowledge needs*, 2009.

⁴⁰⁹ See fn. 5

⁴¹⁰ Commission Staff Working Paper, *Restructuring and employment the contribution of the European Union*, Brussels, 2 July 2008, SEC (2008) 2154.

⁴¹¹ For a discussion as to the changes occurring in employment policies under the Barroso presidency of the Commission, see S. Sciarra, *Is Flexicurity a European Policy?*, in R. Eklund, R. Hager, J. Kleineman, H.-Å. Wängberg (eds.), *Skrifter till Anders Victorins minne*, Iustus Förlag, Uppsala, 2009, 447 ff., also appearing in URGE Working Paper n. 4/2008, www.urge.it/files/papers/2_wpurge4_2008.pdf. See also J. Kenner, *New frontiers in EU labour law: from flexicurity to flex-security*, in M. Dougan, S. Currie (eds.), *50 years of the European treaties*, Oxford, Hart Publishing 2009, 279 ff.

pertinent, whereby 'sector employment and qualifications councils' are set up for the coordination of training needs related to potential job shortages. This idea of anticipation relies on the active participation of social partners, in accordance with local authorities and in particular with institutions devoted to training.⁴¹²

As seen, solidarity is underpinned by different values. In flexicurity policies, the combination of law and collective agreements is indispensable to meeting the needs of both companies and workers. This is part of the employment policies at the national level. Thus, solidarity can be linked to more general and abstract principles, as in legislation auxiliary to collective bargaining. This 'model' legislation is still part of the European tradition, particularly in the Scandinavian countries, and should be set as an example of mutual adaptability among regulatory sources.⁴¹³

It is asserted that the state, whenever possible, should not interfere with managerial strategic choices in company restructuring, leaving ample space for negotiations between the social partners. However, national governments have been asked to intervene when large productive sectors have recently been hit by the crisis. Seeking solutions compatible with European law⁴¹⁴ should be part of the forward-looking initiatives of the social partners. Auxiliary measures, such as socially responsible investments, support for new consumer demands and for the creation of European infrastructures, should not be perceived as obstacles to autonomous collective bargaining.

Solidarity can be built around more circumscribed goals, for example, having to do with the obligation to retrain a certain number of redundant workers with the view of keeping them employed. The alternative option, to relocate them within the same company or outside it, could still be the outcome of a joint decision between management and labour. The latter is another example of solidarity, originated by a concession agreement, having as its main goal the continuation of employment, albeit with uncertain outcomes as to where and when.

In these latter cases, restructuring depicts a notion of selective solidarity. It is based on a distribution of sacrifices and losses among workers, sometimes in view of creating chances and opportunities. Selectivity refers particularly to the choice of keeping some workers employed, whereas others, for objective reasons, are left outside of employment, in search of alternative solutions that may or may not be the outcome of the company's restructuring strategies. The EGAF has previously been mentioned as the most recent support provided by European law, albeit to restricted numbers of workers.

Furthermore, local tripartite pacts – often described as social pacts – can originate from solidarity within given local communities, characterised by shared economic activities, such as in clusters

⁴¹² Commission Staff Working Paper, SEC (2008) 2154, at fn. 13, p. 10.

⁴¹³ S. Sciarra, *The evolution of labour law (1992 – 2003)*, General Report, vol. I, Luxembourg, OOEPEC 2005, 38 ff. on the concept of semi-mandatory law. More specifically see N. Bruun, J. Malmberg, *National Report on Denmark, Finland and Sweden (1992 – 2003)* in *The Evolution of labour law, National reports of 15 countries*, Vol. 2, Luxembourg, OOEPEC 2005.

⁴¹⁴ See, for example, the proposal addressed to the automobile industry for a 'European green cars initiative', to be funded by the Community, the EIB, industry and Member States, in Commission Communication, *Recovery*, at fn. 3, p. 16. Further details in COM (2009) 104 final, *Responding to the crisis in the European automotive sector*, 25 February 2009, and in www.anticipationofchange.eu/index.php?id=346.

of companies or industrial districts. They can call upon the active involvement of public local authorities, co-opted to various degrees within a scheme of mutual promises and obligations.⁴¹⁵ When national governments are asked to intervene, solidarity becomes the product of a political decision and is once more selective, attached as it is to options among different available priorities.

In all such cases, an 'objective' notion of solidarity should be elaborated, since redistributive effects should always be attached to transparent and non-discriminatory selective criteria. We ought to be guided by the best traditions in European labour law, whereby business necessities are measured against the guarantee of individual and collective fundamental rights.

Yet, we can see that the spreading of the current crisis reveals growing inequalities, also due to the failure of collective bargaining in controlling global financial strategies. The search for selective and yet objective criteria of solidarity thus becomes a dramatic task that should be based on political accountability and, when it comes to the roles played by private governments, on a strengthened legitimacy of the bargaining agents.

It can be argued that processes legitimizing negotiators should be equally selective and provide for specific mandates, reflecting the specific contents under discussion. This debate is still undefined at the European level, fluctuating among the enforcement of existing secondary legislation, above all the revised EWC Directive, and the introduction of new measures to support transnational collective agreements.⁴¹⁶

A complex spectrum of observation is offered by company agreements on restructuring. Here the catchy phrase 'anticipation and management of changes' is frequently linked to the exercise of collective rights to information and consultation, thus falling under the scope of the EWC Directive. The interesting point to underscore is that whenever such rights are effectively exercised, there is a tendency to open up bargaining opportunities and even to reach agreements beyond the letter of the law.⁴¹⁷

Nonetheless, there are dark sides to the enforcement of the EWC Directive. In 1997, when the closure of the Renault plant at Vilvoorde in Belgium occurred, failure to respect management's obligations prompted the European Commission to propose a new Directive on information and consultation of employees.⁴¹⁸ It is noteworthy that this latter source should now be subject to

⁴¹⁵ This practice is not unfamiliar in comparative labour law. See S. Sciarra, *The evolution of collective bargaining: observations on a comparison in the countries of the European Union*, CLLPJ 2007, 8; B. Caruso, *Changes in the workplace and the dialogue of labor scholars in the 'global village'*, CLLPJ 2007, 530 ff.

⁴¹⁶ See the proposals by the groups of experts appointed by the Commission, E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, J. F. Valdes, *Transnational collective bargaining: past, present and future. Final Report*, 2006, available at <http://ec.europa.eu/social/BlobServlet?docId=2897&langId=en>. Comments on the 'Ales Report' in A. Lo Faro, *La contrattazione collettiva transnazionale: prove di ripresa del dialogo sociale in Europa?* *Giornale di diritto del lavoro e di relazioni industriali* 2007, 551 ff.

⁴¹⁷ This ongoing practice is underlined in the Ales Report, *infra* fn. 19, section 3.2. See also M. Carley, M. Hall, *European Works Councils and Transnational Restructuring*, *European Foundation for the improvement of living and working conditions*, Luxembourg, OOPC 2006; A. Alaimo, *Il coinvolgimento dei lavoratori nell'impresa: informazione, consultazione e partecipazione*, in S. Sciarra e B. Caruso (eds), *Il lavoro subordinato*, Trattato di diritto privato di diritto europeo, Torino Giappichelli, 2009, 659 ff.

⁴¹⁸ Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 *establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation*, in OJ L 80/29, 23 March 2002. For an analysis of the critical enforcement of the Directive in

coordination with other parallel sources within the framework of the revised EWC Directive. Failures to enforce rights to information and consultation have, in fact, continued to be at the origins of highly controversial cases, such as the recent announcement to move Nokia's businesses from Germany to Romania.⁴¹⁹

Company restructuring follows, as one can see, unpredictable paths. It cannot be stopped, nor limited, when the mobility of capital and company assets are at stake and economic efficiency must be pursued. This is why observers of such complex phenomena should be looking at all available options whenever transnational economic initiatives challenge traditional collective bargaining.

2.1 Joint Transnational Texts

The Commission has listed 147 'joint transnational texts' in 89 companies since 2000.⁴²⁰ The breadth of this phenomenon calls into question the compatibility of national – both legal and voluntary – sources, whenever the transnational scope of these new operations needs to be addressed.

A clarification is needed in legal terms, following the Commission's own words: 'Texts intended to apply in more than one Member State and which have been concluded by companies and workers' representatives are referred to by the generic term transnational texts'.⁴²¹ No confusion should be made with collective bargaining in national legal systems, its levels and functions. Furthermore, showing a meticulous linguistic approach, the Commission clarifies that negotiations – 'an interactive process leading ultimately to a compromise' – are nothing but a 'generic term', again not to be confused with collective bargaining.⁴²²

The Commission's suggestion tests the social partners' intention to structure transnational texts around certain formal requirements. The need to preserve autonomous collective bargaining at the national level cannot ignore the *de facto* uprising of new formulas. Companies eager to attach concrete legal results to restructuring are plausibly those interested in promoting settlements and in doing so by involving worker representatives.

Transnational collective interests, following the Commission's hesitant words, are generated by the simple practical implication that 'texts' are valid in more than one Member State. Transnational managerial decisions open opportunities for 'compromises', binding on the negotiators, albeit not in the same way as collective agreements are in national legal systems.

the UK, see P. Taylor, C. Baldry, A. Danford, P. Stewart, *Corporate restructuring, redundancy and the effectiveness of ICE Regulations*, Relations Industrielles/Industrial Relations 2009, 27 ff.

⁴¹⁹ *Nokia closes its Bochum plant*, in European restructuring monitor quarterly 2008, n. 1, 11 www.eurofound.europa.eu/publications/2008/37/en/1/ef0837en.pdf. Interesting developments, relevant for arguments used in this paper, are in the application filed to the EGAF for some 1300 German workers made redundant at Nokia. This was announced in Brussels, 31 July 2009.

See the press release in www.lex.unict.it:80/eurolabor/documentazione/comunicati_stampa.htm.

⁴²⁰ Commission Staff Working Document, SEC (2008) 2155, at fn. 6, 3.

⁴²¹ Commission Staff Working Document, SEC (2008) 2155, at fn. 6, 5.

⁴²² *Ibidem*.

2.2 Codes of Conduct and International Framework Agreements

Let us now look outside the EU. For quite a long time, codes of conduct have been adopted by international organizations and large transnational companies as leading sources to enforce fundamental rights, hence recognizing the counterparty's significant role, despite the fact that their unilateral adoption did not imply negotiations, nor the signature of agreements.⁴²³ Codes of conduct are part of a 'soft' approach to labour rights, mainly because they are not, in a strict sense, legally binding. They provide the right jargon for governance of transnational companies, often in conjunction with the adoption of good practices, dealing with Corporate Social Responsibility (CSR).

Recent research shows that these practices have been progressively turned into proper negotiations, leading to the signature of International Framework Agreements (IFA).⁴²⁴ In this new framework of collective and mutual obligations, 'global responsibility' constitutes the correct way ahead and should be consistently pursued through organizational learning, a more dynamic and interactive process than CSR.⁴²⁵ Rather than becoming an alternative, or even a way to escape labour law and collective bargaining, CSR and corporate codes of conduct should supplement legal and voluntary sources and be better equipped in providing effective monitoring, seeking, when necessary, institutional support.⁴²⁶

The ongoing transformation of codes of conduct into negotiated texts raises several questions relevant to the discussion in this paper. The search for more structured and binding sources is instructive insofar as it challenges both parties in proving their legitimacy. The setting of standards within bilateral negotiations presupposes that all levels of decision-making within the company are made responsible and that all workers are included within the scope of the agreement. The potential impact of this new regulatory framework is extraordinary when it affects subcontractors and companies over which control is exercised, thus expanding the coverage towards a vast number of workers.⁴²⁷

In this new scheme of action, solidarity interlinks the national and transnational levels. While broad issues, such as respect for fundamental social rights, continue to be dealt with, health and

⁴²³ H. Arthurs, *Private ordering and workers' rights in the global economy: corporate codes of conduct as a regime of labour market regulation* in J. Conaghan, K. Klare, M. Fischl (eds.), *Transformative labour law in the era of globalization*, Oxford, OUP 2001, 471 ff.; B. Hepple, *Labour laws and global trade*, Oxford, Hart Publishing 2005, 69 ff.; M.A. Moreau, *Normes sociales, Droit du travail et Mondialisation*, Dalloz 2006 ; A. Sobczak, *Réseaux de sociétés et codes de conduite : un nouveau modèle de régulation des relations de travail pour les entreprises européennes*, Paris, L.G.D.J. 2002.

⁴²⁴ European Foundation for the Improvement of Living and Working Conditions, *Codes of conduct and international framework agreements: New forms of governance at company level*, Luxembourg, OPEC 2008; K. Papadakis (ed.), *Cross-border social dialogue and agreements: an emerging global industrial relations framework*, ILO-IILS Geneva 2008 and in particular the chapter by A. Sobczak, *Legal dimensions of international framework agreements in the field of corporate social responsibility*, 115 ff. The ILO research looks at 62 IFAs, enforced in 2007 and points out that the number would grow considerably if agreements informally signed by CAEs in European groups of companies should be included in the field research.

⁴²⁵ A. B. Antal, A. Sobczak, *Beyond CSR: organisational learning for global responsibility*, *Journal of general management* 2004, 77 ff. The authors refer, among other examples, to 'global compact', an experiment launched in 2004 by Kofi Annan at the UN (89 ff.). See www.unglobalcompact.org.

⁴²⁶ L. Compa, *Corporate social responsibility and workers' rights*, CLLP 2008, 1 ff.

⁴²⁷ A. Sobczak, *Codes of conduct in subcontracting networks. A labour law perspective*, *Journal of Business Ethics* 2003, 225 ff.

safety is at stake in a large percentage of IFAs (85%), as are wages (70%), referring back to national law and collective agreements for specific applicable standards.⁴²⁸ The novelty is the creation of new collective actors: the International Trade Union Confederation (ITUC), Global Union Federations (GUF), active at the sector level, and the International Organization of Employers, active in providing training for managers. The examples explored so far prove that the most innovative experimentations are those tested by the social partners, whenever a transnational dimension of collective interests is at stake.

ILO research shows that Framework Agreements are considered international even when GUFs have a single employer, not an association, as a counterparty. Relevance is assigned to the international scope of the agreement, namely the building up of cross-border solidarity.

An equally significant outcome is the agreement reached by the European Community Ship Owners' Associations (ECSA) and the European Transport Workers' Federation (ETF), following the Court of Justice's ruling in *Viking*.⁴²⁹ Here the transnational weight of the agreement is no doubt related to the mobility of ship owners in exercising freedom of establishment within the EU. The origins of the agreement, becoming a proposal for a Council Directive, in force of art. 139.2 of the TEC,⁴³⁰ lie in the potentially explosive contradiction among different aspects of collective interests, should the ship owner be left free to fly flags of convenience. This European sector agreement, originally inspired by the relevant 2006 ILO Convention,⁴³¹ still in the process of ratification, shows an interesting contamination among legal sources, all intended to set transnational standards. The result is the coverage of large number of workers, through legally binding sources of regulation, for the guarantee of labour standards within an entire economic sector.

The same result cannot be taken for granted in IFAs and company agreements on restructuring. However, interpretative criteria are emerging from the practice of transnational agreements and should be further explored by the social partners, in view of building up their transnational legitimacy.

2.3 The Revised EWC Directive

The lack of effectiveness as to the right of informing and consulting EWCs in cases of restructuring

⁴²⁸ A. Sobczak, *Legal dimensions* at fn. 27.

⁴²⁹ Judgment of the Court of 11 December 2007, *International Transport Workers' Federation (ITWF) and Finnish Seamen's Union (FSU) v. Viking Line ABP and OÜ Viking Line Eesti*, C-438/05.

⁴³⁰ Communication from the Commission under Art 138(2) of the EC Treaty on the strengthening of maritime labour standards, COM(2006) 287 final, 15 June 2006. The Commission consulted the social partners in order to reach a framework agreement for the transposition into European law of some principles enshrined in the ILO Convention. See *EU social partners: agreement reached on implementing ILO maritime labour convention*, European Employment Review, 13 December 2007 (no. 407). Proposal for a Council Directive implementing the agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention 2006 and amending Directive 1999/63/EC, 2 July 2008, COM (2008) 422 final. Positive comments on these original developments in N. Lillie, *The ILO Maritime Labour Convention 2006: a New Paradigm for Global Labour Rights Implementation*, in K. Papadakis (ed.), *Cross-Border Social Dialogue and Agreements: an Emerging Global Industrial Relations Framework*, Geneva, ILO 2008, 191 ff.; S. Sciarra, *Viking and Laval: Collective labour rights and market freedoms in the enlarged EU*, in C. Barnard (ed.), *The Cambridge Yearbook of European Legal Studies 2007-2008*, vol. 10, Hart Publishing, Oxford 2008, 563 ff.

⁴³¹ ILO, *Maritime Labour Convention, MLC (C186)*, adopted on 23 February 2006, available at [www.ilo.org/ilolex/english/
con-
vdisp1.htm](http://www.ilo.org/ilolex/english/con-
vdisp1.htm).

is mentioned by the Commission in its Proposal for amending the 94/45 Directive. In fact, an incomplete success story lies in the origins of the proposal. During fifteen years, 820 EWCs were set up for the purpose of being informed and consulted, representing 14.5 million employees. They cover only 36 % of the undertakings falling under the coverage of the Directive. Furthermore, interpretative problems have arisen in cases of mergers and acquisitions and whenever rights to information and consultation had to be exercised at the national and transnational levels.⁴³² The proposal is part of the renewed Lisbon agenda; it interacts with the ongoing discussion on restructuring and transnational company level agreements; it ensures respect of art. 27 of the Charter of Fundamental Rights of the European Union.

Drafters of the 94/45 Directive were aware that concentrations of companies, through cross-border mergers and take-overs, are phenomena originated in the functioning of the internal market. The revised Directive has the objective of improving the effectiveness of information and consultation rights, setting criteria that are mainly procedural. One way is by the opportunity offered to the EWC to give an opinion to the undertaking in a 'timely fashion', an expression echoing a similar provision in the Collective Redundancies Directive 98/59.⁴³³ The other novelty lies in the clarification that information and consultation should take place 'at the relevant level of management and representation, according to the subject under discussion' (recital 14 and 15).

Transnational matters are identified in a more sophisticated way than previously. Such are determined by 'both the scope of its potential effects, and the level of management and representation that it involves' (recital 16). The distinction from the merely national enforcement of information and consultation rights raises the issue of coordination among these two levels. In this, as in other new facets of the revised Directive, agreements on the establishment and functioning of the EWCs will be crucial in choosing innovative ways forward and in setting the preconditions for clear legitimacy tests. A well balanced structure in the composition of EWCs will, for example, facilitate the search for real ways to seek 'anticipation and management of changes' in restructuring. It will also clarify a new transnational level of solidarity in parallel with the transnational 'potential effects' of managerial decisions. EWCs have in fact a duty to report back to the employees they represent (recital 33).

It seems appropriate, therefore, to emphasize the language adopted in the revised article 10, where reference is made to a collective representation of the employees' interests, 'without prejudice to the competence of other bodies or organisations' (art. 10.1). It is also specified that EWCs have a duty to inform 'the representatives of the employees of the establishments or of the undertakings' and, in their absence, 'the workforce as a whole' (art. 10.2). The importance attached to this crucial passage is also confirmed by other detailed provisions, such as access to training without any loss of wages, for both members of the negotiating body and the EWC, whenever this is deemed 'necessary for the exercise of their representative duties in an international environment' (art. 10.4).

⁴³² Proposal for a European Parliament and Council Directive, COM (2008) 419 final, 2008/0141, (COD), presented by the Commission, p. 2, sections 3 and 4.

⁴³³ 'Where an employer is contemplating collective redundancies, he shall begin consultations with the workers' representatives *in good time* with a view to reaching an agreement', Directive 98/59/EC of 20 July 1998 *on the approximation of the laws of the Member States relating to collective redundancies*, in OJ L 225/16, 12 August 1998.

A most relevant innovation, despite its potentially difficult enforcement, rests on the idea that EWCs should adapt to 'significant' changes in the structure of the undertaking or group of undertakings. Here again agreements establishing EWCs (art. 6) should intervene with strong clauses, guaranteeing links with national representation bodies. However, even in the absence of an agreement, existing EWCs must continue to operate, seeking to reach a new agreement on the necessary adaptations (art.12).

Empirical research shows that several International Framework Agreements have been signed by EWCs, jointly with international and national unions. It is worth recalling that this is by now a consolidated practice, originating in an unequivocal interest on both sides. Furthermore, even when EWCs do not directly sign the agreements themselves, leaving the floor to international and national trade unions, consensus on the negotiated issues is reached within the EWC.⁴³⁴

In light of the novelties brought about by the revised Directive, it is possible to argue that EWCs are legitimate collective actors in both promoting transnational agreements and even in signing them. They are linked to different representation bodies at other levels; they can be the voice of the employees 'as a whole' within the boundaries of the transnational companies; they are promoters of new solidarities derived by transnational collective interests. There is now, more clearly than in the past, a solid ground to build up a transnational legitimacy test at a purely voluntary level. Detailed solutions are in the hands of the social partners.

3. Protectionism versus Social Dumping

Recent controversial ECJ rulings were mentioned at the beginning of this article with the intent of investigating their impact on national and transnational notions of solidarity. After analysing current practices in transnational collective bargaining, it was then suggested that solidarities in the plural would be a better way to approach the description of collective interests lying behind a constantly changing phenomenon of standard setting. The Court's rulings reveal a different and yet parallel scenario.

The Court's decision in *Viking* has already been mentioned for its immediate impact on European sector social dialogue, leading to a proposal for a directive.⁴³⁵ It is also reassuring that the litigation ended as the case was settled in March 2008.⁴³⁶ However, commentators cannot ignore the pressure provoked by *Viking* within the Finnish legal system, shaken by the ECJ's intrusive intervention on matters relating to the autonomy of national collective bargaining. Despite the fact that the right to strike is an *ultima ratio* measure in Finland and was, even on that occasion, exercised in close correlation with the signature of a collective agreement, the Court found it to be

⁴³⁴ The Ales Report, at fn. 19, quotes all relevant agreements at section 3.2. See also the website of the International Metalworkers' Federation (IMF) www.imfmetal.org/index.cfm?c=10266&l=2 for further references to recent agreements.

⁴³⁵ See fn. 33 *infra*.

⁴³⁶ N. Bruun, *Finland: ECJ and the Challenge of Understanding Collective Bargaining*, in R. Blanpain, A. M. Świątkowski (eds.), *The Laval and Viking Cases: Freedom of Services and Establishment v. Industrial Conflict in the European Union*, Kluwer Law International 2009, 51.

in breach of art. 43 TEC.⁴³⁷ The Court rejected any public policy reasons that would have allowed a restriction on freedom of establishment.⁴³⁸

The Court questioned whether collective bargaining and the right to strike are values underpinning national public policy. For example, in addressing issues of proportionality, national judges will have to take into account whether collective industrial action is lawful whenever it aims at maintaining employment that otherwise would be jeopardised by the exercise of market freedoms. This would have been a likely outcome for the ferry operator intending to pursue a reflagging of its ferry in Estonia.⁴³⁹

For the purposes of the present paper, it is useful to underline that this judgment confirms the points put forward before, namely the search for new solidarities in times of uncertainty. Here solidarities in the plural signify that while safeguarding the function of industrial action, the eradication of social dumping must be addressed at some level of policymaking. Strikes called for the protection of jobs, otherwise endangered by a practice of social dumping, should not be deemed illegal following the proportionality principle. Nonetheless, a challenging proportionality test arises whenever economic freedoms are at stake. *Viking* proves the uneasiness of the ECJ in selecting matters of public interest related to the 'protection' of workers. The choice of priorities, together with ways of addressing solidarities in the plural, should remain a prerogative of the collective parties involved in the dispute.

This plea for self-regulation is in line with the choice made by the European social partners signing the agreement – to become a directive in due time – addressed to the entire maritime sector.⁴⁴⁰ The flexible structure of European framework agreements, as the one in question, is such to indicate binding principles to be adopted in individual contracts of employment, for example in health and safety issues. It also includes criteria for the calculation of wages, not the definite setting of salaries, thus overcoming the problem of wages excluded from TEC's competence.⁴⁴¹

In *Laval*,⁴⁴² competitive advantages brought about by social dumping may have an even less stable outcome. We cannot enter into the detailed implications of this case within the scope of the present paper. The points to underline here have to do with the potentially disruptive effect of the Court's ruling on a 'model' system of collective bargaining.⁴⁴³ Thus, solutions that should be

⁴³⁷ *Viking*, para. 36.

⁴³⁸ *Viking*, para. 75.

⁴³⁹ This could be argued reading the closing para. 90 in *Viking*. One of the points addressed in this case has to do with the enforcement of a peace obligation clause. However, this obligation has a 'relative' value, since it applies only to matters included in the collective agreement. For this clarification, see N. Bruun, *Finnish labour law report*, in F. Dorsssemont, T. Jaspers, A. van Hoek (eds.), *Cross-border collective actions in Europe*, Antwerpen, Oxford Intersentia 2007, 105.

⁴⁴⁰ A similar controversy in the Irish ferries dispute found a consensual solution in the signing of an agreement on 14 December 2005 and the case was not litigated. References in T. Novitz, 'Labour rights as human rights: implications for employers' free movement in an enlarged European Union', *CYELS* (2006–2007), vol. 9, 359.

⁴⁴¹ Proposal for a Council Directive, at fn. 33, Standard A2.1, sections 1-4.

⁴⁴² Judgment of the Court of 18 December 2007, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, C- 341/05. Critical comments by R. Eklund, *A Swedish perspective on Laval*, CLLPJ 2008, 551 ff.

⁴⁴³ This 'model' is now portrayed in R. Eklund, T. Sigeman, L. Carlson, *Swedish Labour and Employment Law: Cases and Materials*, Uppsala, Lustus Förlag 2008.

elaborated in the future may become a paradigm illustration, beyond Sweden, on how to regain and even enhance the autonomy of national collective bargaining. This should be the lesson to learn, if challenges posed by transnational collective interests – as in the posting of workers to host countries – become part of the agenda of national unions. The alternative would be protectionism, a perspective as alien to European traditions as social dumping.⁴⁴⁴

A committee appointed by the Swedish government in April 2008 delivered a Report in December of that same year.⁴⁴⁵ This inquiry, the result of detailed consultations with the social partners, the Nordic labour law academic community and the Swedish Work Environment Authority, is valuable from a comparative perspective. One of the ideas put forward by the Report is the comparability of labour standards applied in the country of origin by the service provider. The latter should openly disclose such information to Swedish trade unions for the purpose of comparing them with the hard core provisions in art. 3.1 of Directive 86/71. This is a first step to take in view of evaluating recourse to industrial action.

A similar orientation – namely the attempt to avoid controversies over issues potentially related to social dumping – inspires the proposal to revise the law transposing the Directive on posted workers, in consideration of the non enforceability *erga omnes* of collective agreements in the Swedish legal system and in anticipation of what could be too ample a reference to binding applicable norms. Infringing art. 49 TCE should in such a way be avoided by a preliminary and attentive interpretation of public policy issues, as in art. 3.10 of the Directive.

From a comparative perspective, the three 'components' suggested in the Report for ascertaining a lawful recourse to industrial action are informative. The first component refers to the vexed question of levels of bargaining, indicating that the national level should be the most relevant. Agreements at this level are binding for all workers in the specific sector of economic activities. Furthermore, following a practice – familiar to an Italian labour lawyer such as the present author – agreements are extended by employers even to workers not associated to the signatory unions. The assumption is that *erga omnes* should be interpreted in the light of national mechanisms in extending the coverage of collective agreements.

As for the second component, national collective agreements should be the reference point for the Directive's hard-core provisions. However, collective bargaining typically brings about improvements of legal standards, for example, paid holidays and rest periods. Even more complex is the overall calculation of wages when it comes to including special remuneration for overtime, shift work and inconvenient working hours including night work. Compensation can also be associated with different tasks assigned to workers and thus be at the origin of objective differentiations related to experience, competence and responsibility. In the absence of minimum wage legislation, the calculation of overall salaries, with or without the inclusion of all such detailed elements, must be considered a prerogative of the country receiving the services, taking into account that in collective bargaining, such choices follow objective criteria.

⁴⁴⁴ The alarming case of British workers striking unofficially for 'British jobs' at the 'Lindsey Oil' refinery is discussed by C. Kilpatrick, at fn. 1.

⁴⁴⁵ References are to the English summary: C. Stråth, *Action in response to the Laval judgment*, Swedish Government Official Reports, SOU 2008:123, Stockholm 2008.

The third component looks at the country of origin's standards, enforced for workers to be posted. Industrial action will be considered unlawful if it is proved that normative standards, not inferior to the ones enforceable under Swedish collective agreements, are applicable to posted workers in the country of origin. For a foreign observer, some ambiguity is entrenched in this third component. When comparisons are made with weaker economic systems, one ought to take into consideration standards effectively enforced and wage policies *de facto* adopted. Here comparative analysis may reveal profound differences in national systems of collective bargaining, also due to highly different percentages of union membership. One could speculate that space should be left for cross-border negotiations among the social partners, hence for solidarities in the plural.⁴⁴⁶ It could even be contemplated that objectively grounded differentiations in wages, if adopted for limited periods of time, could be used as a starting point towards subsequent increases.

It is useful to stress from a comparative perspective the proposals put forward in the Report in the view of enhancing the role of the Swedish Work Environment Authority. This body should become a better equipped liaison office – as under art. 4 of the Directive – and provide detailed and timely disclosure of information to providers wishing to offer their services. It should also evaluate the compatibility of a voluntary system of collective bargaining within European law, in a prior examination of the collective agreements that the social partners intend to enforce for posted workers.

The Report is also attentive to the issue of employers not members of the associations that are signatories to the collective agreements. This typical facet of a purely voluntary system of collective bargaining is addressed, suggesting that standard agreements in different economic sectors should be made available and become applicable to posted workers, provided that the above mentioned Authority finds them compatible with the Directive 96/71.

Examples of the active roles played by national legislatures in the aftermath of the Court's rulings reveal an interesting, developing trend. In Denmark, a government appointed committee suggested changes to the national legislation implementing the Posted Workers Directive, with an eye to preserving the main characteristics of the Danish voluntary system of collective bargaining. The new law came into force on January 1st 2009.⁴⁴⁷ Industrial action is lawfully exercised against foreign service providers if aimed at achieving salaries equivalent to those of Danish workers, for jobs with equal professional contents.

The Danish Committee, following *Laval*, also suggested that transparent information should be released, because of the non enforceability *erga omnes* of Danish collective agreements. In com-

⁴⁴⁶ Cooperation agreements aimed at preventing social dumping were reached among Baltic trade unions and neighbouring Nordic countries, especially in the construction industry. See EIRR, August 2006, 3. Suggestions on establishing transnational collective bargaining having minimum wage as a mandatory subject within cross border provisions of service in A. Lo Faro, Is a decent wage part of a decent job? Answers from an enlarged Europe, WP C.S.D.L.E Massimo D'Antona, INT 64/2008.

⁴⁴⁷ The Danish Commission appointed by government published its report in June 2008. References in R. Nielsen, *Denmark: The Viking Line and Laval Cases Seen from a Danish Perspective*, in R. Blanpain, A.M. Świątkowski (eds.), at fn. 39.

pliance with art. 3.8 of the Directive, Danish law now requires that lawful recourse to strikes implies that reference should be made to wages determined in collective agreements signed by most representative unions and employers associations.

In Germany, following the ECJ's decision in *Rüffert*,⁴⁴⁸ the legislature in Lower Saxony redrafted the provisions on the award of public contracts in the building sector. Contractors must specify in writing their intention to enter collective agreements that are enforceable locally, as soon as they open the procedure for subcontracting and further on when the contract enters into force. These new formalities will prove full compliance with art. 3.8 of Directive 96/71, which refers to *erga omnes* collective agreements. The change in legislation implies that the procedure for extending the coverage of collective agreements, first an option for the parties signatories to them, is now compulsory, for the sake of avoiding infringement of European law.⁴⁴⁹

All these very different examples prove that protectionist reactions do not provide the right answers to new and potentially conflicting solidarities. They also prove that the spreading of social dumping can only be stopped by joint initiatives of the social partners.

It is asserted that foreign investments tailored to an exploitation of low wages do not create employment, based as they often are on very high levels of productivity. Furthermore, the need for rapid technological innovations may favour the off-shoring of services and employment outside of the EU. These are all good reasons to believe that forward looking initiatives in the service sector as well as in manufacturing will need to enhance training and fair wages, rather than adopt social dumping.⁴⁵⁰ ILO research confirms that unbalanced results occur when the search for lower wages is the main outcome expected in business mobility.⁴⁵¹ The global phenomena of outsourcing can only be efficiently counterbalanced by new innovative principles of 'market governance'.⁴⁵²

4. Concluding Remarks. New Developments for Transnational Collective Bargaining

An objective of this paper was to initiate a discussion regarding the assumption that 'transnationality' is taking shape both as a concept and as a practice. Based essentially in customary law – as we ought to consider recent developments of European social dialogue and the practice of international cross-border dialogue – it is not extraneous to secondary European legislation.⁴⁵³

⁴⁴⁸ Judgment of the Court of 3 April 2008, *Dirk Rüffert v Land Niedersachsen*, C- 346/06.

⁴⁴⁹ Art. 3, law of the Land of Lower Saxony, 15 December 2008. I am grateful to Prof. M. Fuchs for this information. References to the extension of collective agreements in M. Fuchs, *National Report on Germany*, in S. Sciarra (ed.), *The evolving structure of collective bargaining in Europe*, <http://eprints.unifi.it/archive/00001160>.

⁴⁵⁰ Interesting indications on the EU as the largest importer and exporter of services, even after enlargement, in G. Kemekliene, H. Conolly, M. Keune, A. Watt, *Services employment in Europe*, ETUI-REHS 2007, 42 ff.

⁴⁵¹ *A fair globalization: creating opportunities for all*, Report of the World commission on the social dimension of globalization, ILO, Geneva 2004.

⁴⁵² G. Gereffi, *The new offshoring of jobs and global development*, ILO Social policy lectures, ILO, Geneva 2006, 41 ff.

⁴⁵³ See, for example, the Posted Workers Directive 96/71/EC of 16 December 1996, in OJ L 18, 21 January 1997, recital 6, talking of 'transnationalization' of the employment relationship; see also the references to the revised EWC Directive at section 2.3 above. Agency work offers interesting insights. See K. Ahlberg, B. Bercusson, N. Bruun, H. Kountouros, C. Vigneau, L. Zappalà, *Transnational Labour Regulation A case study of temporary Agency Work*, Brussels, P.I.E. Peter Lang 2008.

Voluntary transnational texts are developing on a *de facto* basis, proving once more the autonomy of collective bargaining.⁴⁵⁴ Rather than reducing state's sovereignty, transnational collective bargaining adds to the capacities of the state as regulator. The designation of new bargaining agents and the setting up of competences within trade unions and employer associations are all signs of collective autonomy. Nevertheless, the definition of new collective interests, shaped around solidarities in the plural, can force national legislatures into new frames of reference, for example into the direction of auxiliary legislation, in support of transnational collective autonomy. National legislatures, along with social partners, will learn that nothing but false promises can be generated by recourse to social dumping and by consequent protectionist answers.

Examples taken from the practice of transnational collective bargaining, both inside and outside the EU, show that a new transnational collective autonomy is slowly emerging and adapting to specific requirements of the negotiators. This is happening despite the weakness of collective social rights, such as rights to information and consultation. The hope is that other collective rights will not be weakened as a result of the previously mentioned case law. The idea put forward in this paper is that a positive and inventive reaction to recent ECJ's rulings could paradoxically enhance new synergies among the social partners.

The impetus to look to the future in this discussion comes from the present economic and financial crisis. Issues of social justice are more urgent than ever and so is the search for innovative ways to address solidarities in the plural. Transnational collective bargaining opens the ground to the enforceability of standards, whenever comparable working conditions apply.

An emphasis has been placed above on the legitimacy of the bargaining agents whenever transnational issues are at stake. Each time selective solidarity is the underlying principle in negotiations, specific mandates should be required for the negotiators. On the employer's side, it could be ascertained that a mandate relating to strategies of selective solidarity be issued by the controlling company. On the workers' side, one ought to look at constituencies within the companies, taking into account areas of the productive processes concretely affected by transnational strategies. Similar working conditions generate the notion of collective interest. The latter is, by all means, the starting point in transnational collective bargaining.

Restructuring and the EGAF pose the question of objective criteria to be adopted when jobs are lost and help is required. Access to European funds could be pivotal in new emerging dimensions of transnational interests.⁴⁵⁵ Employment policies on flexicurity, eligible, according to recent guidelines of the European Council, give support to the ESF. To take one of many examples, it could be maintained that a transnational collective interest to training, parallel to the request of new and differentiated skills, is inherent in most cases of restructuring.

This very broad discussion is also relevant in addressing once more problems of shared competences between the EU and Member States. The suggestion is that new approaches to 'variable geometry' should be pursued. Social partners and national legislators should be looking favoura-

⁴⁵⁴ The concept of autonomy from a comparative perspective is analysed in S. Sciarra, *The evolution of collective bargaining*, at fn. 18, p. 6 ff.

⁴⁵⁵ In *Responding to the crisis*, at fn. 17, p. 8 the Commission favours recourse to instruments to 'support the social cost of adjustment and to ensure that necessary skill levels required for the future competitiveness of industry are retained in the industry' for all sectors.

bly towards a European framework in which all existing initiatives based on transnational collective bargaining should evolve, setting aside fears of reciprocal interferences. Meanwhile, all actors, both public and private, cannot but acknowledge that transnationality is part of European law in action.