

The EU and the Industrial Relations Systems – A Critical Appraisal*

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1. Law in books and law in action.

At a quick and rather impressionistic glance, the sources of what can be defined as 'European Union (EU) industrial relations law'⁴⁵² may appear to disclose a quite strong promotional institutional framework. EU law, at least at first sight, features a number of institutional – and properly promotional – principles concerning the role of social partners and, in particular, of European-level collective bargaining. From a comparative perspective, and even assuming as a point of reference those Member States' constitutional systems that the 'variety of capitalism' approach classifies as 'coordinated market economies',⁴⁵³ such promotional institutional infrastructure is indeed quite unique. Commenting on the EU legal framework consolidated in the Treaty of Lisbon, Bruno Veneziani defined it as an 'institutional ideal type of auxiliary legislation',⁴⁵⁴ identifying – in the provisions on the role of the social partners within EU institutional mechanisms – at least the seeds of a model of pluralist and participative democracy based on the constitutional guarantee of collective autonomy.⁴⁵⁵

By virtue of the innovative provisions contained in the Treaty of Lisbon, the framework of primary law sources of such promotional pattern is based today mainly on Article 152 of the Treaty on the Functioning of the European Union (TFEU), which obliges the EU – and no longer the European Commission only – to promote dialogue between the social partners, including at a European level, while 'respecting their autonomy'.⁴⁵⁶ Such provision – which is linked to Article 11 of the Treaty on European Union (TEU), inspired by the principle of participative democracy – is strengthened and complemented, from a subjective perspective, by Article 28 of the EU Charter of Fundamental Rights. Such provision grants workers and employers, or their respective organisations, 'the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action'.

The legislative framework specifically governing European-level collective bargaining is even richer (and more complex), as it is based on several different sources that are prescriptive in nature: from the abovementioned constitutional-level provisions of the TFEU and the EU Charter of Fundamental Rights, to the interpretative communications of the European Commission and the Interinstitutional Agreement on Better Law-Making of 2003.⁴⁵⁷ The pillars of such promotional system, since the conclusion in 1991 of the Agreement on Social Policy annexed to the Protocol

⁴⁵² '*Diritto sindacale unitario*' is the definition suggested by M. Magnani, *Diritto sindacale europeo e comparato*, Torino, 2017, p. XIX.

⁴⁵³ As is known, the reference model of such systems can be found in Germany and in the Nordic countries: cf. P.A. Hall, D. Soskice, *An Introduction to Varieties of Capitalism*, in Idd. (eds.), *Varieties of Capitalism. The Institutional Foundations of Comparative Advantage*, Oxford, 2001, pp. 1 ff., particularly pp. 21 ff., and more recently K. Thelen, *Varieties of Liberalization and the New Politics of Social Solidarity*, Cambridge, 2014, pp. 5 ff. The present chapter, and particularly the conclusions, will focus once again on the issues raised nowadays, in terms of EU industrial relations, by the comparative political economy approach in the light of the important critical contribution by L. Baccaro and C. Howell, *Trajectories of Neoliberal Transformation. European Industrial Relations since the 1970s*, Cambridge, 2017.

⁴⁵⁴ B. Veneziani, *Austerity Measures, Democracy and Social Policy in the EU*, in N. Bruun, K. Lörcher, I. Schömann (eds.), *The Economic and Financial Crisis and Collective Labour Law in Europe*, Oxford and Portland, OR (USA), 2014, pp. 109 ff., here p. 135.

⁴⁵⁵ *Ibid.*, pp. 123 ff.

⁴⁵⁶ As stated by B. Veneziani, *L'art. 152 del Trattato di Lisbona: quale futuro per i social partners?*, in *Rivista giuridica del lavoro*, 2011, 1, pp. 256 ff., 'the failure to define the areas in which the Union will carry out its promotional function in favour of the social partners suggests that it is not limited to the social policy area as per Title X, Part II, or to the one referred to in Article 153 TFEU'.

⁴⁵⁷ The relevance of such agreement is outlined by M. Peruzzi, *L'autonomia nel dialogo sociale europeo*, Bologna, 2011, pp. 177 ff.

on Social Policy of the TEU, can be found in the provisions contained in Articles 154 and 155 TFEU. Article 154, which sets out the obligation upon the European Commission to take 'any relevant measure' to facilitate dialogue between the social partners by ensuring balanced support for them, envisages the suspension of the ordinary legislative procedure in case the social partners intend to start negotiations on the contents of the proposal submitted by the European Commission 'in the social policy field', in the framework of the mandatory consultation procedure. Article 155 reiterates that, 'Should management and labour so desire, the dialogue between them at Union level may lead to contractual relations, including agreements'; this provision thus outlines the two alternative paths through which such agreements – since as early as the entry into force of the TEU – can be implemented:⁴⁵⁸ 'in accordance with the procedures and practices specific to management and labour and the Member States' (so-called 'voluntary route'), on the one hand; and 'by a Council decision on a proposal from the European Commission' in matters covered by Article 153, and at the joint request of the signatory parties (so-called 'legislative route'), on the other. In both cases, also in accordance with the amendment introduced by the Treaty of Lisbon with the aim of codifying a practice already implemented at institutional level, 'The European Parliament shall be informed'; such perspective confirms that the social partners are assigned a role 'of functional substitute for the traditional institutions and bodies involved in European governance in social policy'.⁴⁵⁹ And if attention is paid to the fact that such provisions, which expressly promote social dialogue and European-level collective bargaining, fall within a context of values and goals that is ambitiously aimed at reshaping the traditional legislative principles of 20th-century social constitutionalism,⁴⁶⁰ the early-stage interpretation of the EU institutional framework as 'institutional architecture in which democracy and pluralism compose the inner essence of a democratic state'⁴⁶¹ can be easily confirmed.

However, as soon as the focus is shifted from such core of provisions of the formal constitution of the EU (the 'law in books', as we could say) to the actual functioning of the European industrial relations system, and in particular of social dialogue and sectoral collective bargaining, the first impression is replaced by a more complex and undoubtedly more problematic vision concerning the material constitution of EU industrial relations law 'in action'. Such focus shift clearly sheds light on the internal contradictions of the same formal institutional framework, which still expressly excludes pay, the right of association, the right to strike, or the right to impose lock-outs

⁴⁵⁸ Based on the way of implementation chosen, European collective bargaining is classified either as 'institutional', 'strong', or 'strengthened' (if it is channelled through the legislative route), or as 'autonomous', 'weak', or 'free' (if it is implemented through the voluntary route); cf. more recently M. Magnani, *Diritto sindacale*, cit., pp. 13 ff.; B. Caruso, A. Alaimo, *Il contratto collettivo nell'ordinamento dell'Unione europea*, WP CSDLE Massimo D'Antona, INT.87/2011, available online; M. Peruzzi, *L'autonomia*, cit., pp. 205 ff. Previously, cf. at least T. Treu, *European Collective Bargaining Levels and the Competences of the Social Partners*, in P. Davies et al. (eds.), *European Community Labour Law: Principles and Perspectives. Liber Amicorum Lord Wedderburn of Charlton*, Oxford, 1996, pp. 169 ff.; S. Sciarra, *Collective Agreements in the Hierarchy of European Community Sources*, *ibid.*, pp. 189 ff.; F. Guarriello, *Ordinamento comunitario e autonomia collettiva. Il dialogo sociale*, Milano, 1992; A. Lo Faro, *Funzioni e finzioni della contrattazione collettiva comunitaria*, Milano, 1999; R. Nunin, *Il dialogo sociale europeo*, Milano, 2001.

⁴⁵⁹ B. Veneziani, *Austerity Measures*, cit., p. 124.

⁴⁶⁰ Such principles stretch from the values common to Member States 'in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail' (Article 2 TEU), to the consecration of the goal of 'a highly competitive social market economy, aiming at full employment and social progress' (Article 3(3) TEU).

⁴⁶¹ B. Veneziani, *Austerity Measures*, cit., p. 135.

– i.e. the hard core of any industrial relations law system whatsoever – from the legislative competence of the EU (Article 153(5) TFEU).⁴⁶² On the other hand, in spite of Article 28 of the EU Charter of Fundamental Rights, ‘an institutional hurdle to the consolidation of EU-level bargaining is represented by the uncertainty about the legal status of strike action at European level.’⁴⁶³

This chapter will focus on the clumsy interaction between the formal and the material constitution of EU industrial relations law, outlining the ambiguities and contradictions that have marked the EU’s institutional role in the frail European industrial relations system that has gradually emerged along the lines of the abovementioned set of formal constitutional provisions. We will argue that the initial phase of support for the so-called ‘institutional’ bargaining and, to a certain extent, of sectoral social dialogue has gradually overlapped with – and been replaced by – the reversal of the promotional role played by supranational institutions.⁴⁶⁴ Such reversal, triggered by the economic and financial crisis started in 2008,⁴⁶⁵ undoubtedly favoured – in a context of creeping renationalisation – the trajectory of neoliberal rationalisation of national industrial relations systems that has been analysed by Lucio Baccaro and Chris Howell in their powerful historical and comparative analysis.⁴⁶⁶

2. The European social dialogue: the institutional framework.

The types of agreements that the social partners can enter into at European level are usually classified based on whether the negotiation phase has or has not been triggered by a previous consultation initiative and thus by a proposal from the European Commission, or based on the procedure chosen by the social partners to implement the agreement.⁴⁶⁷ The evolution of social dialogue reveals that the institutional ‘trigger’ represents a necessary step in European-level negotiation processes, also in the development phase following the Laeken summit of 2001,⁴⁶⁸ characterised by the thinning-out of the ‘shadow of the law’,⁴⁶⁹ gradually replaced with soft-law institutional interventions, as well as by the social partners’ consequential preference – albeit on different grounds – for autonomous bargaining.⁴⁷⁰ It is not by chance that the agreements entered

⁴⁶² Concerning such contradiction, cf. only Lord Wedderburn, *Freedom and Frontiers of Labour Law*, in Id., *Labour Law and Freedom. Further Essays in Labour Law*, London, 1995, pp. 350 ff.

⁴⁶³ T. Treu, *La contrattazione collettiva in Europa*, in *Diritto delle relazioni industriali*, 2018, pp. 371 ff., here p. 397. On this issue, cf. mainly G. Orlandini, *Diritto di sciopero, azioni collettive transnazionali e mercato interno dei servizi: nuovi dilemmi e nuovi scenari per il diritto sociale europeo*, in *Europa e diritto privato*, 2006, 3, pp. 947 ff., and more recently F. Dorsemont, *Collective Action Against Austerity Measures*, in N. Bruun, K. Lörcher, I. Schömann (eds.), *The Economic and Financial Crisis*, cit., pp. 153 ff.

⁴⁶⁴ Cf. R. Hyman, *Trade Unions, Lisbon and Europe 2020: from Dream to Nightmare*, in *International Journal of Comparative Labour Law and Industrial Relations*, 2012, 28, 1, pp. 5 ff.

⁴⁶⁵ Among the first critical analyses, cf. C. Barnard, *The Financial Crisis and the Euro Plus Pact: A Labour Lawyer’s Perspective*, in *Industrial Law Journal*, 2012, 41, 1, pp. 98 ff. Similarly and more recently, cf. L. Bordogna, R. Pedersini, *What Kind of Europeanization? How EMU Is Changing National Industrial Relations in Europe*, in *Giornale di diritto del lavoro e di relazioni industriali*, 2015, 146, pp. 183 ff.

⁴⁶⁶ *Supra*, footnote 2.

⁴⁶⁷ Cf. S. Smismans, *The European Social Dialogue in the Shadow of Hierarchy*, in *Journal of Public Policy*, 2008, 28, 1, pp. 161 ff.

⁴⁶⁸ Concerning the relevance of the Laeken summit in the promotion of a more autonomous social dialogue (to overcome the phase of support for macro-bargaining with a quasi-legislative purpose, occurred in the 1990s), cf. M. Peruzzi, *L’autonomia*, cit., pp. 33 ff., as well as R. Dukes, C. Cannon, *The Role of Social Partners*, in A. Bogg, C. Costello, A.C.L. Davies (eds.), *Research Handbook on EU Labour Law*, Cheltenham (United Kingdom) and Northampton, MA (USA), 2016, pp. 89 ff., particularly p. 94.

⁴⁶⁹ B. Bercusson, *The Dynamic of European Labour Law after Maastricht*, in *Industrial Law Journal*, 1994, 23, 1, pp. 1 ff.

⁴⁷⁰ A. Dufresne, P. Pochet, *Introduction*, in A. Dufresne et al. (eds.), *The European Sectoral Social Dialogue*, Brussels, 2006, pp. 49 ff.

into without a previous proposal by the European Commission can be found only at sectoral level, where the institutional 'shadow' is guaranteed by the negotiation framework itself (the Sectoral Dialogue Committees set up pursuant to Commission Decision 98/500/EC), and the European Commission's intervention often makes it possible to overcome decision-making deadlocks affecting the social partners.

The relevance and impact of the institutional trigger do not emerge in the driving phase only. If the negotiation process starts after a consultation phase, this brings about the suspension of the legislative proposal pursuant to Article 154 TFEU and, as explained by the European Commission in a 2004 communication, the existence of such institutional self-restraint justifies the two-fold supervision role played by the European Commission itself in relation to all agreements that have been 'triggered', including the autonomous ones.⁴⁷¹ The European Commission assumes the role of carrying out an *ex ante* assessment 'as it does for [...] agreements to be implemented by Council decision', thus verifying – based on a 1993 communication⁴⁷² and on the *UEAPME* judgment issued by the Court of First Instance in 1998 –⁴⁷³ the representativeness of the signatory parties, their negotiating mandate, the functional representation of interests of small and medium-sized enterprises (SMEs), as well as the validity of the content of the agreement itself. On the other hand, it assesses the sufficiently representative status of the signatory parties 'with respect to the substantive scope of the framework agreement'.⁴⁷⁴

The extension of such assessment to the autonomous agreements that have been 'triggered', raises a question on the possibility of considering also such sources as 'institutional agreements'.⁴⁷⁵ In the abovementioned *UEAPME* judgment, the *ex ante* assessment of the agreement is justified inasmuch as it represents an alternative tool to ensure compliance with 'the principle of democracy on which the Union is founded',⁴⁷⁶ which is necessary when 'endowing an agreement concluded between management and labour with a Community foundation of a legislative character, without recourse to the classic procedures provided for under the Treaty for the preparation of legislation, which entail the participation of the European Parliament'.⁴⁷⁷

When applying to autonomous agreements the same instrument aimed at protecting the principle of democracy, a reasonable question comes up: can such agreements be considered as an EU legislative source (albeit not directly binding by nature), more precisely as a 'spontaneous production' soft-law source?⁴⁷⁸ All of this refers to the problematic coordination with the regulative methods as outlined by the Interinstitutional Agreement on Better Law-Making of 2003, notably with the notions of 'self-regulation' and 'co-regulation' adopted thereby.⁴⁷⁹ The qualification of

⁴⁷¹ COM(2004) 557 final.

⁴⁷² COM(93) 600 final.

⁴⁷³ Court of First Instance, 17 June 1998, *UEAPME*, case T-135/96.

⁴⁷⁴ Point 91 of the judgment quoted in the previous footnote.

⁴⁷⁵ According to the European Commission, 'the development of the European social dialogue raises the question of European collective agreements as sources of law', COM(2002) 341 final, para. 2.4.2.

⁴⁷⁶ Point 89 of the judgment quoted in footnote 22.

⁴⁷⁷ Point 88 of the judgment quoted in footnote 22.

⁴⁷⁸ G. De Minico, *La soft law: nostalgie e anticipazioni*, in F. Bassanini, G. Tiberi (eds.), *Le nuove istituzioni europee. Commento al Trattato di Lisbona*, Bologna, 2008, pp. 327 ff.

⁴⁷⁹ Cf. B. Veneziani, *Il ruolo delle parti sociali nella Costituzione europea*, in *Rivista giuridica del lavoro*, 2006, 1, pp. 471 ff.

the autonomous social dialogue as an expression of the principle of democracy on which the EU is founded – and particularly as a specification of the principle of participative democracy – is confirmed in, *inter alia*, Article 152 TFEU, read in conjunction with Article 11(2,3) TEU.⁴⁸⁰

The institutional monitoring on the 'triggered' agreements is not carried out only at the moment of their conclusion, but also during the implementation phase, should the European Commission 'conclude that either management or labour are delaying the pursuit of Community objectives', as well as *ex post*. The European Commission evaluates, in particular, the extent to which the agreement has 'contributed to the achievement of the Community's objectives', considering – in case of a negative assessment – the possibility of putting forward, if necessary, a proposal for a legislative act or, during the implementation phase, the possibility of exercising 'its right of initiative'. The social partners' choice to opt for the implementation of the agreement via voluntary route is definitely not immune from institutional encroachments. The European Commission holds that 'preference should be given to implementation by Council decision', both 'where fundamental rights or important political options are at stake, or in situations where the rules must be applied in a uniform fashion in all Member States and coverage must be complete', and in case of 'revision of previously existing directives adopted by the Council and European Parliament through the normal legislative procedure'.⁴⁸¹

We do not intend to focus on the broad discretionary power assumed by the European Commission when linking its own decision to vague and arbitrarily defined conditions. It is important to stress that such criteria more easily orient towards institutional outcomes, that type of bargaining – at both inter-branch and sectoral level – that is most suitable for the implementation of functions being somehow ancillary or complementary to those typical of EU legislation.

As concerns the inter-branch dimension, the need to review the directives currently in force requires the implementation – via legislative route – of, *inter alia*, the amended framework agreement on parental leave (Council Directive 2010/18/EU). With regard to sectoral bargaining, the importance of the political option – reference can be made to trade unions' response at European level to the (partly unresolved) issues raised by the *Viking* case law – and the need for uniform application of legislation justify the institutional implementation of the agreements applying to the maritime (2009) and fisheries (2012) sectors, aimed at implementing, respectively, International Labour Organization (ILO) Maritime Labour Convention No. 196 of 2006 and ILO Convention No. 188 of 2007. The same need justified the implementation by Council decision (or, rather, directive) of some agreements entailing derogations to the application of Council Directive 93/104/EEC on working time in some sectors, pursuant to its Article 14: this is the case, for instance, of the agreement dated 15 February 2012 applying to the inland waterways sector, as well as of the previously concluded agreements applying to cross-border traffic by rail, civil aviation, and seafarers.⁴⁸²

As anticipated, the European Commission influences the social partners' autonomy in choosing the way of implementation, not only upstream – whenever it deems the institutional option to be preferable (however, the interinstitutional agreement sets out a proper obligation in this re-

⁴⁸⁰ Cf. U. Villani, *La politica sociale nel Trattato di Lisbona*, in *Rivista giuridica del lavoro*, 2012, 1, pp. 25 ff.

⁴⁸¹ COM(2004) 557 final.

⁴⁸² Council Directives 2005/47/EC, 2000/79/EC, and 1999/63/EC.

gard) –, but also downstream; this occurs if a negative assessment has been provided of the autonomous agreement, and the European Commission, deeming that the Community goals have not been achieved properly, decides to present a proposal for a legislative act. The European Commission's *ex post* supervision touches upon two issues: on the one hand, which regulatory mechanisms better guarantee the implementation of autonomous agreements; on the other, which parameters allow for an assessment of the results and potentialities of the autonomous social dialogue.

3. Autonomous agreements.

For the first time, the European Commission, in the abovementioned 2004 communication,⁴⁸³ refers to the agreements implemented via voluntary route as 'autonomous agreements'.⁴⁸⁴ Such qualification was then adopted by the social partners themselves already through the 2007 framework agreement on harassment and violence at work, replacing the previous wording according to which such agreements were referred to as 'voluntary'. In the classification elaborated by the European Commission, the autonomous agreements fall under the broader category of 'new generation' texts, which is used to refer to the outputs of social dialogue whose implementation is the responsibility of the social partners themselves.

The difference between the agreements under analysis and the so-called 'process-oriented texts' lies in the fixing of a 'date by which implementation of the various objectives must be accomplished', whereas process-oriented texts are considered as mere 'recommendations to their members':⁴⁸⁵ 'The essential difference is that agreements are to be implemented and monitored by a given date, whereas the second kind entail a more process-oriented approach, involving regular reporting on progress made in following-up the objectives of the texts.'⁴⁸⁶

More recently, the European Commission has clarified that the autonomous agreements are binding 'only for the signatories and their affiliates'.⁴⁸⁷ They 'commit signatories and their national affiliates to implementation through national arrangements at their initiative (legislation, collective agreements, codes of conduct, joint promotion of tools etc.). The obligation to follow up is even stronger when social partners decide to negotiate an agreement that results in a Commission legislative proposal being suspended'; this implies an investment in monitoring processes and the development of assessment indicators.⁴⁸⁸

The analysis of the numerous autonomous agreements entered into so far outlines that, generally, at inter-sectoral level, the process concerning the implementation and follow-up over time has not undergone any specific evolution since the first agreement on telework onwards. Besides

⁴⁸³ *Supra*, footnote 20.

⁴⁸⁴ This paragraph draws from the arguments dealt with in further detail in S. Giubboni, M. Peruzzi, *La contrattazione collettiva di livello europeo al tempo della crisi*, in M. Carrieri, T. Treu (eds.), *Verso nuove relazioni industriali*, Bologna, 2013, pp. 131 ff., particularly pp. 140 ff.

⁴⁸⁵ COM(2004) 557 final, Annex 2, p. 18.

⁴⁸⁶ *Ibid.*, para. 3.2.1.

⁴⁸⁷ Sec(2010) 964 final, p. 13.

⁴⁸⁸ *Ibid.*, p. 17.

the abovementioned change of denomination (from 'voluntary' to 'autonomous'), the only relevant modification can be found in the last agreement on inclusive labour markets, which sets out the obligation upon the social partners to promote the agreement (in addition to implementing it). As explained by the interpretation guide of the European Trade Union Confederation (ETUC): 'it was learned from experiences with former agreements that the dissemination of and awareness raising on the framework agreements forms a pivotal step in ensuring an effective implementation of it'.⁴⁸⁹

Any attempt to verify the effectiveness of the autonomous social dialogue should consider the still valid suggestions provided by Gérard Lyon-Caen in the mid-1970s: 'if we want at any cost [...] to put forward at international level the legal pattern that we have called "collective bargaining" in each of our countries, we will fail. [This should not discourage us from making] an effort to consider that trade union-related issues could and should be treated in the future from a perspective other than a merely national one'.⁴⁹⁰ If the internal paradigms of collective bargaining are used as a reference and assessment benchmark, the European social dialogue will progressively 'decline'.⁴⁹¹ As pointed out by the European Commission, it is not even possible to harmonise the process of implementation of autonomous agreements, on the one hand, and the transposition of directives, on the other: 'uniform outcomes cannot be expected. Any assessment of the implementation of autonomous agreements has to take account of their specific character and national industrial relations systems in general'.⁴⁹²

The impossibility of reshaping European collective bargaining as the top level of internal contractual patterns, on the one hand, and its hybridisation with the soft regulatory dimension tested at institutional level, on the other, undoubtedly lay the basis for the identification of new parameters in the assessment of outcomes and potentialities of the European social dialogue. In this regard, the benchmarking method used in the most recent academic writings – in line with the assessment reports published by the European Commission – makes a distinction between *de jure* implementation indicators (aimed at verifying the implementation of the agreements from a procedural point of view) and *de facto* implementation indicators (which concern the substantial effects the agreements under analysis have on the national labour law systems).⁴⁹³

From a procedural perspective, the assessment is aimed at verifying whether the agreements have been implemented before the expiry of the applicable deadline (three years from the signature), as well as to what extent the implementation has complied with 'the procedures and practices specific to management and labour and the Member States', pursuant to Article 155 TFEU. In this regard, it is interesting to point out that the abovementioned provision of the TFEU does not specify whether the agreement always needs to be transposed into the national system, or

⁴⁸⁹ ETUC, *An ETUC Interpretation Guide*, p. 20, available online at:

http://resourcecentre.etuc.org/spaw_uploads/files/CES_travail%20inclusif_GB_BAT.PDF.

⁴⁹⁰ G. Lyon-Caen, *Alla ricerca del contratto collettivo europeo*, in *La contrattazione collettiva: crisi e prospettive*, Milano, 1976, p. 119.

⁴⁹¹ P. Marginson, K. Sisson, *European Integration and Industrial Relations. Multi-level Governance in the Making*, Basingstoke, 2004, p. 90.

⁴⁹² Sec(2008) 2178 final, p. 48.

⁴⁹³ T. Prosser, *The Implementation of the Telework and Work-related Stress Agreements: European Social Dialogue Through Soft Law?*, in *European Journal of Industrial Relations*, 2011, 17, 3, pp. 245 ff.

can be implemented through other procedural solutions, as envisaged, for instance, by the agreement on crystalline silica. As per the wording adopted in the English version ('shall be implemented'), the provision seems to set an obligation upon national trade unions to act. However, such obligation cannot be considered as a proper obligation to re-bargain, which would infringe upon the freedom of association (and collective autonomy) enshrined in Member States' constitutions,⁴⁹⁴ as well as in Article 152 TFEU and Article 28 of the EU Charter of Fundamental Rights.

Finally, the provision targets two types of subjects, the social partners and the Member States, without explaining the role played by the latter in the implementation of the agreement.⁴⁹⁵ While in the inter-sectoral autonomous agreements concluded so far, the signatory organisations have modified the phrasing into 'in accordance with the procedures and practices specific to management and labour in the Member States', thus identifying the affiliated parties as the only subjects the commitment applies to, the actual ways of implementation of these agreements confirm that the legislative instrument is generally binding and concerns both the Member States and the social partners. Drawing from the extremely broad range of legislative patterns implemented (from legally binding rules, which are however seldom adopted, to forms of soft or even 'liquid law'⁴⁹⁶), the national organisations – in their implementation reports – point to the frequent implementation of coordinated and synergic action between the social partners and public authorities, which encompasses legislative interventions at national level and tripartite concertation.

The outcomes and conclusions that can be drawn from the analysis of the indicators on the procedural implementation of the agreements on telework and work-related stress are rather similar: 'With few exceptions, the implementation instruments [...] are similar, despite the different nature of the agreements.'⁴⁹⁷ The assessment of such outcomes is instead more complex. If one adopts as a parameter the implementation of the agreement in any procedural form whatsoever within the prescribed deadline, the assessment will be positive. If, instead, the phrase 'practices and procedures' means the regulatory patterns traditionally adopted by the social partners in each Member State, the assessment of the outcomes proves to be more complex.

In the United Kingdom, for instance, where the decentralised social dialogue is combined with the use of legislative instruments, the drafting of non-binding guidelines at inter-sectoral level (on telework in 2003, and on work-related stress in 2005) cannot be regarded as an effective solution for the implementation of European framework agreements. The impact of such guidelines, in view of both their non-binding nature and the lack of coordination between the various levels of bargaining, has been rather limited at sectoral and firm level. This is the case of Denmark, where the agreements are not adequately transposed at sectoral level, within a national system whose structure is based on such bargaining dimension.⁴⁹⁸

⁴⁹⁴ Cf. F. Carinci, *Dal dialogo sociale al negoziato europeo: gli interventi degli Stati e delle Parti sociali*, in *Protocollo sociale di Maastricht: realtà e prospettive*, supplement to *Notiziario di giurisprudenza del lavoro*, Roma, 1995, pp. 81 ff., particularly p. 92.

⁴⁹⁵ Cf. in this regard the joint declaration of the signatory parties of the Agreement on Social Policy (then re-annexed to the Treaty of Amsterdam), which states that there is 'no obligation on the Member States to apply the agreements directly or to work out rules for their transposition, nor any obligation to amend national legislation in force to facilitate their implementation'.

⁴⁹⁶ R. Blanpain, *Introductory Remarks*, in Id. (ed.), *European Framework Agreements and Telework: Law and Practice, a European and Comparative Study*, Zuidpoolsingel (Netherlands), 2007, p. 6.

⁴⁹⁷ Sec(2011) 241 final, p. 30.

⁴⁹⁸ T. Prosser, *The implementation*, cit., p. 267.

The analysis of the procedural indicators also points out another interesting aspect: the existence of a well-developed inter-sectoral political forum represents a pivotal precondition for the effective implementation of such European agreements. This confirms the hypothesis that the outcomes of the implementation stage are weaker in those countries featuring patterns of social dialogue that are more decentralised.⁴⁹⁹

If the assessment of the two agreements is targeted at analysing the substantial effects on the internal protection standard, it leads to different outcomes. In the evaluation carried out by the European Commission, the difference appears to be strong. As to the agreement on telework, 'It has achieved the specific objectives set by the Commission (and shared by the social partners) and has clearly contributed to the Lisbon goals of modernising labour markets and achieving a more dynamic knowledge-based economy'.⁵⁰⁰ The implementation of the agreement on work-related stress, instead, 'has not yet ensured a minimum degree of effective protection for workers from work-related stress throughout the EU. It shows that all stakeholders need to consider further initiatives to ensure that this goal is achieved'.⁵⁰¹

The fact that the agreement on telework has been successful, whereas the one on work-related stress has not, can be explained by two factors: i) the agreement on telework featured a broader scope for the improvement of the applicable protection standard, inasmuch as it was a field that had not yet been regulated in many countries and sectors; and ii) the provisions of the agreement on work-related stress featured a very low level of prescriptiveness. In this regard, the commentary drafted by ETUC points out that the mainly descriptive – rather than prescriptive – nature of the agreement on work-related stress stems from a difficult round of negotiations on this issue and, in particular, from the gap between the union side (which intended to frame the regulation of the phenomenon within its collective and organisational dimension) and the employer side's interest in keeping the relevance of such regulation at a merely individual and subjective level, as well as in avoiding any explicit links with Council Directive 89/391/EEC.

The impasse stemming from these conflicting positions was overcome through the adoption of a purposely generic definition of stress, which is vague from a scientific point of view, not linked to the working environment, as well as strongly focused on each individual situation: 'reading the European agreement, the wish for prescriptive certainty remains unsatisfied'.⁵⁰² As pointed out by the European Commission, the problematic compromise solution reached during the negotiation round at European level has engendered several doubts as to the interpretation of the agreement when it comes to implementing it at national level. Because of its uncertainties, the text was not considered by the actors involved in the implementation phase as a useful reference point: 'Some thought it was not binding enough, many that it was not exhaustive enough, or that it did not add value to existing regulatory and guiding instruments'.⁵⁰³

The assessment of the agreement on harassment and violence at work of 2007 has led to a dif-

⁴⁹⁹ Ibid., p. 257; cf. also B. Keller, *Social Dialogues – The State of the Art a Decade after Maastricht*, in *Industrial Relations Journal*, 2003, 34, 5, pp. 411 ff.

⁵⁰⁰ Sec(2008) 2178 final, p. 3.

⁵⁰¹ Sec(2011) 241 final, p. 32.

⁵⁰² L. Calafà, *Nuovi rischi e nuovi strumenti di prevenzione nelle Pubbliche Amministrazioni*, in G. Zilio Grandi (ed.), *Il lavoro negli enti locali: verso la riforma Brunetta*, Torino, 2009, p. 190.

⁵⁰³ Sec(2011) 241 final, p. 29.

ferent outcome: on the one hand, the existence of a more or less consolidated legislative standard on the issue has oriented the internal stakeholders towards a better definition of the applicable legislative framework or of previous interventions, rather than to the adoption of new instruments; on the other hand, the fact that the negotiating text is structured based on broad notions and formulations, although bringing about – once again – several difficulties in the implementation phase, has represented a useful element of flexibility, which has made it possible to devise national solutions tailored to the internal specific context.

The social partners, however, finalise the assessment of the outcomes by framing them within an interesting analytical perspective, which is more strongly emphasised than in relation to the previous agreement on work-related stress. The social partners stress that 'the outcome is not the only important element, but also the process to arrive at this point. The discussions that took place between national social partners have helped to forge a better understanding of each others' needs and the employers and workers they represent, in terms of tackling harassment and violence at work. It has also helped in generating more experience in social dialogue processes, which is useful for the future':⁵⁰⁴ this occurred not only upon the conclusion of internal agreements, but also in the translation of the agreement into various languages and in the assessment of the applicable legislation. The implementation of the agreement has provided important data on the presence of gaps in the reporting activity, suggesting adequate actions for improvement, as envisaged at a later stage in the 2012-2014 work plan, under the goal *Better implementation and impact of social dialogue instruments*.

The reflection of the social partners on the implementation of the 2007 agreement promotes an analytical perspective that is aimed at fostering the development of the autonomous social dialogue. Such perspective does not hinge as much upon the abovementioned result indicators (against which a definitely negative assessment should be provided inasmuch as the types of governance entailed have yielded disappointing outcomes in the opinion of those who wish to have adequate levels of substantial labour protection in Europe),⁵⁰⁵ but rather upon the gradual consolidation of the procedural trends triggered by it. From such perspective, autonomous collective bargaining could be described, in its potential development, as a path being parallel and complementary to the open method of coordination, from which it differs in the enhancement of the social partners' autonomy, both at European and at national level, in the promotion of a 'bottom-up process of softer sectoral governance'.⁵⁰⁶ The autonomy, both in the negotiation and in the implementation phases, can thus be considered as a regulatory dimension targeted at promoting a multilevel bottom-up action for the coordination of internal social policies. Such action ensures the involvement of the national social partners not as subjects that attain a set of goals established by someone else, but as decentralised decision-making hubs acting in the framework of their freedom of association, also favouring the Europeanisation of internal industrial relations systems, particularly as concerns the strong heterogeneity stemming from the enlargement of the EU.

⁵⁰⁴ Final Joint Report on the Implementation of the European Autonomous Framework Agreement on Harassment and Violence at Work, adopted on 27 October 2011, p. 36.

⁵⁰⁵ Cf., in this regard, T. Prosser, *The implementation*, cit., p. 258.

⁵⁰⁶ S. Smismans, *The European Social Dialogue*, cit., p. 170.

The assessment on the efficiency and effectiveness of European collective bargaining focuses, from this perspective, on its capacity not just to stand as a top level that is binding, but also to function as a 'system of action' and a social construct.⁵⁰⁷ Once again, much depends on the benchmark: if it consists of a supranational collective bargaining system that leads to the conclusion of binding agreements, social dialogue shall be considered 'a travesty of the real thing'.⁵⁰⁸ If the benchmark is instead made up of the various national labour market regimes, its outcomes can be assessed positively (at least in part) in view of its capacity to open up to a new European-level regulatory dimension aimed at the coordination of developments at national level.

In any case, although we adopt the perspective chosen by Lyon-Caen at a time when a form of European-level collective bargaining appeared to be an unattainable goal,⁵⁰⁹ it should be noted that an assessment carried out based on specific criteria (*i.e.* aimed at avoiding that the practice is improperly treated on the same footing as the phenomenon of collective autonomy as emerged over time in the various national industrial relations systems) is expected to point out the innate weakness of the autonomous social dialogue.

4. Inborn weakness of the autonomous social dialogue (and the relentless decline of the institutional social dialogue).

At the moment of the entry into force of the Treaty of Lisbon, some commentators had already regarded the provision contained in Article 152 TFEU as a driver for increased autonomy in the European social dialogue. From this 'light' perspective, the provision could have led 'towards increased autonomy and independence from dialogue as codified in Article 154 TFEU, [with] gradual emancipation [...] from the forms of social actors' participation in EU law making in the social field, institutionalised by the latter provision'.⁵¹⁰ Some other scholars had pointed out that the synergy between Article 152 TFEU and the inclusion of fundamental social rights into EU primary legislation would lead to dealing with the paradox of the exclusion of competence, as per Article 153(5), encouraging an institutional intervention to support collective bargaining 'as a reliable and uniform source of transnational autonomous regulation', for instance with a view to promoting the conclusion of 'a framework agreement on actors' representativeness, conflict rules, or pay'.⁵¹¹

However, none of this occurred and, as stated by the European Commission itself in the last synthesis report on the state of industrial relations in Europe, 'the development of the financial and economic crisis impacted industrial relations in many Member States and this has left clear marks in the quality and dynamism of social dialogue at EU level'.⁵¹² The lack of relevant developments in the autonomous sectoral social dialogue during the years of the crisis is thus acknowledged by

⁵⁰⁷ E. Léonard, *European Sectoral Social Dialogue: An Analytical Framework*, in *International Journal of Industrial Relations*, 2008, 14, 4, pp. 409 ff. A similar interpretation was provided also by F. Alacevich, *Promuovere il dialogo sociale. Le conseguenze dell'Europa sulla regolazione del lavoro*, Firenze, 2004.

⁵⁰⁸ P. Marginson, K. Sisson, *European Integration*, cit., p. 103.

⁵⁰⁹ *Supra*, footnote 39.

⁵¹⁰ B. Caruso, A. Alaimo, *Il contratto collettivo*, cit., p. 13.

⁵¹¹ B. Veneziani, *L'art. 152*, cit., p. 258.

⁵¹² European Commission, *Industrial Relations in Europe 2014*, Luxembourg, 2015, p. 135.

the European Commission itself, which however keeps being rather optimistic about the future of such dialogue.⁵¹³

It is right to believe that also such optimism is unjustified.⁵¹⁴ The employer side traditionally opposes any institutional intervention aimed at modifying the applicable legislative framework and the system within which the European social dialogue takes place.⁵¹⁵ The pattern of autonomous social dialogue that has consolidated so far, beyond the drawbacks occurred in recent years, is still based on a weak form of Europeanisation, with industrial relations almost lacking any relevance within the EU, which mostly features the use of a 'soft type of regulations and the non binding character of the majority of its products, with consequent problems of implementation'.⁵¹⁶

The economic and financial crisis – as well as the responses provided by the EU, which mainly hinged upon austerity principles – has discouraged the weak attempts made to coordinate wage policies.⁵¹⁷ Such interventions remained limited from the geographical and sectoral point of view, in addition to proving mostly ineffective.⁵¹⁸ They appear to be curbed since the onset by the macroeconomic scenario of the Eurozone, which redoubles gaps and divergences affecting competition patterns of national economies (between northern 'creditor' countries and southern 'debtor' countries, as well as between eastern Europe and western Europe), thus providing incentives actually against the implementation of forms of supranational coordination of collective wage bargaining.⁵¹⁹ The Euro Plus Pact, a sort of *summa* of neoliberal (and ordoliberal) precepts,⁵²⁰ recommends the decentralisation of wage bargaining at the level at which productivity increases are measured (in order to bring pay patterns in line with them). By doing so, it sets goals being just the opposite of those that can be achieved by European coordination processes with at least a minimum level of relevance.⁵²¹

⁵¹³ Such optimism can be found, albeit rather superficially, also in the so-called 'European Pillar of Social Rights': cf. COM(2017) 250 final, which, as is known, is at the basis of the political process that led to the solemn inter-institutional proclamation of Gothenburg in November 2017 (cf. S. Giubboni, *Appunti e disappunti sul pilastro europeo dei diritti sociali*, in *Quaderni costituzionali*, 2017, 4, pp. 953 ff.). It should be noted that, in spite of such seemingly promotional approach, the European Commission, with a letter dated 5 March 2018 and addressed to the signatory parties, unexpectedly decided not to meet the joint request by the social partners themselves to implement, by Council 'decision', the framework agreement on information and consultation rights of public employees in Europe of 21 December 2015, which represents one of the few examples of somehow relevant sectoral social dialogue in recent years.

⁵¹⁴ For a different assessment, cf. S. Sciarra, *Solidarity and Conflict. European Social Law in Crisis*, Cambridge, 2018, p. 22.

⁵¹⁵ Concerns about institutional interference in the excluded matters, in particular in the framework of pay, are expressed also by ETUC, which has reiterated on several occasions that 'Wage setting is to remain a national matter and be dealt with according to national practices and industrial relations systems' (*A Social Compact for Europe*, resolution adopted by the Executive Committee at its meeting on 5-6 June 2012).

⁵¹⁶ L. Bordogna, R. Pedersini, *What Kind of Europeanization?*, cit., p. 201.

⁵¹⁷ *Ibid.*, p. 197.

⁵¹⁸ *Ibid.*, p. 200.

⁵¹⁹ Cf. S. Deakin, *Social Policy, Economic Governance and EMU. Alternatives to Austerity*, in N. Bruun, K. Lörcher, I. Schömann (eds.), *The Economic and Financial Crisis*, cit., pp. 83 ff.

⁵²⁰ Cf. the excellent analysis by L. Oberndorfer, *A New Economic Governance through Secondary Legislation? Analysis and Constitutional Assessment: From New Constitutionalism, via Authoritarian Constitutionalism, to Progressive Constitutionalism*, in N. Bruun, K. Lörcher, I. Schömann (eds.), *The Economic and Financial Crisis*, cit., pp. 25 ff.

⁵²¹ Cf. once again S. Deakin, *Social Policy*, cit., pp. 92 ff., according to whom the inter-governmental agreement of March 2011 crystallised austerity policies with regard to wage bargaining, with an internal competitive devaluation strategy recommended above all by the 'debtor' countries of the European periphery as the only way to recover competitiveness within the EU. Cf. also S. Sciarra, *Solidarity and Conflict*, cit., pp. 32 ff.

In this context, the future of institutional collective macro-bargaining, governed by Articles 154 and 155 TFEU, looks similar. Such bargaining has indeed been affected by the same seemingly relentless decline that was experienced by EU social legislation through directives, a process of decline that gathered momentum following the EU's biggest enlargement started in 2004.⁵²² This pattern of dialogue between the social partners at supranational level is indeed a key instrument for social legislation. This 'regulatory resource' of the EU legislative framework –⁵²³ a form of 'institutional' bargaining inasmuch as it is necessary for the supranational legislative process – has been struck by the crisis, which has affected the harmonisation pattern by means of directives, no longer adopted by EU institutions, as recently confirmed by the so-called 'European Pillar of Social Rights'.⁵²⁴

After an initial, relatively successful phase, marked by the two directives on atypical work, adopted in the second half of the 1990s,⁵²⁵ also social dialogue and inter-sectoral collective macro-bargaining at pan-European level have experienced a relentless decline, ending in a stalemate. Once the European Commission's default legislative initiative has been eliminated, employers' organisations are not so incentivised to negotiate; from their part, trade unions, which acted as a relatively united and homogeneous front until the enlargement, are now torn apart by internal rifts and conflicts reflecting the numerous dividing lines brought about by the crisis.

What Paul Craig – when analysing the new 'liquid hierarchy'⁵²⁶ of EU law sources – aptly defined as 'the shift from legislation to contract'⁵²⁷ is undoubtedly a far different phenomenon from the goal of enhancing quasi-legislative collective bargaining, initially set in the Agreement on Social Policy annexed to the Protocol on Social Policy of the TEU. The phenomenon identified by Craig rather concerns the displacement of the sources that can be linked to the traditional Community method, and the emergence of sources characterised by the prevalence – in the framework of the EU's new economic governance – of post-democratic regulatory patterns of an intergovernmental and asymmetrical nature. Such patterns are to be found mainly outside the channels of EU rule of law (as in the case of the so-called 'memoranda of understanding'), thus falling outside the supervision by, on the one hand, the European Parliament and, on the other, the Court of Justice of the European Union (CJEU).⁵²⁸

⁵²² Cf. S. Giubboni, *The Rise and Fall of EU Labour Law*, in *European Law Journal*, 2018, 1, pp. 1 ff.

⁵²³ Cf. A. Lo Faro, *Funzioni e finzioni della contrattazione collettiva comunitaria*, cit., pp. 237 ff.

⁵²⁴ The 'comatose state' of European institutionalised collective macro-bargaining is harshly criticised by A. Lo Faro, *Bargaining in the Shadow of Optional Framework? The Rise of Transnational Collective Agreements and EU Law*, in *European Journal of Industrial Relations*, 2012, 18, 2, pp. 153 ff., here p. 154.

⁵²⁵ R. Dukes, C. Cannon, *The Role of Social Partners*, cit., pp. 93 ff., identified three evolution – or rather involution – steps of the European social dialogue, highlighting the stalemate that has affected quasi-legislative collective bargaining mainly since 2010.

⁵²⁶ The metaphor, undoubtedly inspired by Bauman, was provided by F. Martelloni, *Gerarchia "liquida" delle fonti del diritto del lavoro*, in L. Nogler, L. Corazza (eds.), *Risistemare il diritto del lavoro. Liber Amicorum Marcello Pedrazzoli*, Milano, 2012, pp. 433 ff.

⁵²⁷ P. Craig, *Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications*, in M. Adams, F. Fabbrini, P. Larouche (eds.), *The Constitutionalization of European Budgetary Constraints*, Oxford and Portland, OR (USA), 2014, pp. 19 ff., here p. 29.

⁵²⁸ In this regard, cf. in detail L. Oberndorfer, *A New Economic Governance*, cit., pp. 29 ff., as well as I. Schömann, *Changes in the General European Legal Framework*, in N. Bruun, K. Lörcher, I. Schömann (eds.), *The Economic and Financial Crisis*, cit., pp. 11 ff.

5. New economic and financial governance, and common 'neoliberal trajectories'.

The global financial crisis has had – and continues to have – a rather uneven impact on EU Member States' economies, worsening the progressively diverging trends that still pose a potential threat to the Eurozone. Also the impact on the various industrial relations systems of EU Member States, and of Eurozone countries in particular, has been extremely uneven; however, in this regard too, it is possible to identify some features, or at least some basic trends or trajectories, that seem to be common to all the national contexts during the crisis.

One of the most evident features – which is perhaps also the most significant aspect of what Baccaro and Howel have defined as the common neoliberal trajectory of industrial relations systems in Europe –⁵²⁹ is undoubtedly the gradual erosion of multiemployer collective bargaining and notably of the role (already pivotal in the main economies of the Eurozone) of branch-specific or sectoral collective agreements. The crisis has certainly strengthened the tendency, already in place for a long time, towards the gradual weakening of centralised wage bargaining, mainly in terms of coverage,⁵³⁰ while reinforcing the role of decentralised bargaining (mainly the firm-level one). It is not by chance that the rather heterogeneous, albeit increasingly pervasive, constellation of different guidelines, recommendations, 'constraints' that is usually referred to as 'new European economic governance' (of which the abovementioned Euro Plus Pact represents a particularly symbolic example) is more and more explicitly in favour of decentralised bargaining.

The case of Germany – the reluctant and selfish economic hegemon of the EU – provides an important example as concerns the impressive scope of such tendency towards businesses' gradual withdrawal from sectoral bargaining (which, in just a few years, has indeed experienced a significant reduction in terms of coverage, thanks to the massive introduction of opt-out clauses), as well as towards a symmetrical enhancement of the relevance of decentralised bargaining.⁵³¹ However, Germany is not a one-off case, although it proves exceptionally relevant in view of the country's economic hegemony and of the extremely rapid and profound change that has affected the whole tradition of industrial relations. A measure like the statutory minimum wage, which – as is known – was introduced as of January 2015, could not have been implemented (regardless of the specific conditions of the political context that promoted it) without so significant a change in that country's industrial relations system.

Obviously, each system has followed the common neoliberal trajectory in a different way; the path undertaken by the countries that – like Greece, Portugal, or Spain – have 'benefitted' from the EU's 'conditional' financial assistance (in very different ways and amounts, as well as at very different times) features a strong national character (in addition to an evident acceleration triggered by the intervention of supranational authorities, embodied by the Troika).⁵³² However, the direction of change towards a generalised extension of employers' discretionary power – leading,

⁵²⁹ *Supra*, footnote 2.

⁵³⁰ Cf. also A. Jacobs, *Decentralisation of Labour Law Standard Setting and the Financial Crisis*, in N. Bruun, K. Lörcher, I. Schömann (eds.), *The Economic and Financial Crisis*, cit., pp. 171 ff.

⁵³¹ As to decentralised collective bargaining in Germany, cf. T. Haipeter, S. Lehndorff, *Decentralisation of Collective Bargaining in Germany: Fragmentation, Coordination and Revitalisation*, in *Economia & Lavoro*, 2014, 1, pp. 45 ff.

⁵³² Cf. the comparative analysis by F. Guarriello, *Legge e contrattazione collettiva in Europa: verso nuovi equilibri?*, in *Giornale di diritto del lavoro e di relazioni industriali*, 2017, 153, pp. 97 ff.

in the most blatant cases (such as the UK one), to the proper de-collectivisation of industrial relations – is very clear and supports Baccaro and Howell's argument for the existence of a common neoliberal trajectory, although, as is obvious, going along different institutional paths.⁵³³

The global financial crisis has thus undoubtedly strengthened such processes, which were already going on within the national systems, without however triggering proper processes of Europeanisation of collective and contractual relations. In many respects, the crisis has instead strengthened the push for differentiation – or even polarisation in extreme cases (as in the opposite economic poles of Greece and Germany) – based on competitive re-nationalisation approaches in relation to collective actors' responses concerning mainly (but not only) wages. Nor have collective bargaining systems remained immune from the 'competitiveness trap',⁵³⁴ which – under strong pressure from fiscal consolidation and labour market 'structural reforms' recommended (and sometimes imposed) in the framework of the European economic governance – has pushed the various national systems into adopting competitive adjustment strategies often of a 'beggar-thy-neighbour' type, with 'increasing risks of downward competition'.⁵³⁵

On the other hand, also because of inaction by trade unions themselves,⁵³⁶ there has been a substantial lack of that 'supranational oxygen' that, according to renowned scholars,⁵³⁷ could have mitigated (at least partially) the increasing difficulties faced within the various industrial relations systems,⁵³⁸ favouring the adoption of coordinated responses attempting at identifying common collective interests at European level. But such interest, which should have been driven by an inexistent European solidarity,⁵³⁹ has actually not emerged; instead, as already observed, the push for the strengthening of dividing lines and fragmentation on a national basis has gathered momentum.

To continue with the metaphor, European economic and financial governance mechanisms – which have consolidated and become stronger and stronger as a response to the crisis, notably with the Six Pack, the Two Pack, and the Treaty on Stability, Coordination and Governance in the

⁵³³ As effectively epitomised by the two authors, the argument is that 'institutions may change in a neoliberal direction while remaining allomorphic' (L. Baccaro, C. Howell, *Trajectories of Neoliberal Transformation*, cit., p. 14). The fact that the industrial relations systems have reacted in different ways, and in particular that 'some centre and northern countries have shown a high level of resilience (as observed by T. Treu, *La contrattazione collettiva in Europa*, cit., p. 403), does not refute the argument, as the impact of the crisis, as well as supranational influences themselves, has been strongly asymmetrical in nature, thus engendering divergences and polarisation between the two groups of countries. However, the direction of change is always the same, although it concerns different levels of resilience and capacity to adapt to the pressure from the political economy of the new European governance.

⁵³⁴ L. Gallino, *La lotta di classe dopo la lotta di classe. Intervista a cura di P. Borgna*, Roma and Bari, 2012, p. 81.

⁵³⁵ M. Carrieri, T. Treu, *Le relazioni industriali italiane ed europee: innovazioni da completare e convergenze da affinare*, in Idd., *Verso nuove relazioni industriali*, cit., pp. 7 ff., here p. 23. As to the internal competitive devaluation strategies implemented by EU Member States, in accordance with the austerity policies deployed through the European governance, cf. C. Crouch, *Entrenching Neoliberalism: The Current Agenda of European Social Policy*, in N. Countouris, M. Freedland (eds.), *Resocialising Europe in a Time of Crisis*, Cambridge, 2013, pp. 35 ff.; W. Streeck, *Buying Time. The Delayed Crisis of democratic Capitalism*, London, 2013, pp. 97 ff.

⁵³⁶ Trade unions are extremely reluctant to delegate actual decision powers to the European level.

⁵³⁷ G. Cella, *Difficoltà crescenti per le relazioni industriali europee ed italiane*, in *Stato e Mercato*, 2012, 94, 1, pp. 29 ff.

⁵³⁸ Cf. once again G. Cella, *Quale futuro per la contrattazione collettiva?*, in *Giornale di diritto del lavoro e di relazioni industriali*, 2016, 150, pp. 217 ff., as well as C. Crouch, *Il declino delle relazioni industriali nell'odierno capitalismo*, in *Stato e Mercato*, 2012, 1, pp. 55 ff.

⁵³⁹ S. Sciarra, *Solidarity and Conflict*, cit., pp. 133 ff.

Economic and Monetary Union –⁵⁴⁰ have deprived trade unions of ‘supranational oxygen’; trade unions, from their part, have experienced a gradual marginalisation of their role as institutional stakeholders, in spite of the general provision contained in Article 152 TFEU.⁵⁴¹ Whereas the so-called ‘macroeconomic dialogue’, set up in 1999 with the involvement of trade unions, has actually become less and less relevant,⁵⁴² ‘the European Semester has progressively ignored the involvement of social partners’.⁵⁴³

However, without an active and actual involvement of trade unions in the European Semester, the provision contained in Article 152 TFEU and, above all, the so-called ‘horizontal social clause’ as per Article 9 will remain an empty shell, in which the pluralistic and participative tenets and the principle of respect for the social partners’ collective autonomy have nothing but a mockingly rhetoric meaning. For this reason, Bruno Veneziani has called for the full enforcement of TFEU provisions, with the involvement of the social partners in the European Semester since the preparatory phase of the drafting, by the European Commission, of the annual report.⁵⁴⁴

The path towards re-launching the social dialogue in Europe should not consist of an abstract list of rights already enshrined in the EU’s formal constitution, as has been the case with the inter-institutional proclamation of the Gothenburg European Pillar of Social Rights. It should instead be actually based on new European effective economic and public policies,⁵⁴⁵ with the goal of reversing the disruptive and – in the long run – self-destructive drift of the ordoliberal austerity approach.⁵⁴⁶

⁵⁴⁰ Cf. e.g. F. Fabbrini, *Economic Governance in Europe*, Oxford, 2016; S. Cafaro, *L’Unione economica e monetaria dopo la crisi*, Napoli, 2017; N. Maccabiani, *The Effectiveness of Social Rights in the EU. Social Inclusion and European Governance*, Milano, 2018.

⁵⁴¹ Cf. the harshly critical comments by F. Dorsemont, *Collective Action*, cit., p. 154.

⁵⁴² Cf. L. Bordogna, R. Pedersini, *What Kind of Europeanization?*, cit., pp. 200-201.

⁵⁴³ S. Sciarra, *Solidarity and Conflict*, cit., p. 30.

⁵⁴⁴ Cf. B. Veneziani, *Austerity Measures*, cit., p. 141.

⁵⁴⁵ Cf. S. Deakin, *Social Policy*, cit., pp. 104-105.

⁵⁴⁶ Cf. J. Hien, C. Joerges (eds.), *Ordoliberalism, Law and the Rule of Economics*, Oxford and Portland, OR (USA), 2017, pp. 1 ff.