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Collective Exit Strategies: New Ideas in Transnational Labour Law

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COLLECTIVE EXIT STRATEGIES: NEW IDEAS IN TRANSNATIONAL LABOUR LAW

By Silvana Sciarra*

Abstract

The metaphor ‘exit strategy’ is often used in current European discussions, in connection with the impact of the economic and financial crisis. This chapter adapts the same metaphor to the role of collective actors. An accentuated mobility of companies and labour generates new transnational collective interests and challenges traditional ideas in labour law. Hierarchies of sources are frequently dismantled and denationalization takes place in regimes of standard setting. Transnational juridification of new social spheres occurs in a very open and unstructured way. Solidarity addresses issues of differentiation, rather than integration, following the needs of the most vulnerable ones, badly hit by the crisis. In this scenario, labour law is searching new answers to questions of legitimacy and power. Thus, theories of democratic representation need to be reset, facing the spreading of new transnational collective actors.

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1. A short preface on transnational juridification

This paper discusses new ideas related to labour law (LL), its functions and its consistency as a legal discipline, in the framework of European and transnational developments. A shift in the emphasis put in previous comparative research is required. After elaborating on the autonomy of LL, its ‘boundaries and frontiers’,¹ attention is now concentrated on how LL captures new transnational demands. LL’s embedding in national legal systems is put into question by an accentuated mobility of companies and labour. Furthermore, LL is influenced by the effects of an unprecedented economic and financial crisis. In responding to new emergencies, national and supranational institutions should not be left with contingent and temporary answers. They should rather elaborate on long-term trends, in order to forge new ideas in LL.

The question to be asked is whether, because of a dominant transnational dimension, emphasized by the need to address the crisis and its impact at a global level, long-established LL measures are at risk of marginalization. This may be due to various reasons. The very high number of jobs lost as a consequence of the crisis threatens recognized regulatory techniques and gives rise to dissimilar regimes of solidarity. As a result of economic uncertainties, standardized guarantees are broken into multiple systems of norms, running parallel to each other and addressed to different groups of workers, each of them driven by different expectations.

National governments should refrain from taking independent initiatives, whenever major sectors of productive activities are hit by the crisis, yet the temptation to act in a protectionist mood may be real. Thus, supranational institutions – both political and financial – become crucial in establishing objective and transparent criteria. Non-state actors become involved in considerable ways in the interstices of institutional dialogues, either on their own initiative, or when solicited by other actors. Their role is viewed as a quasi-institutional one, because they deal with matters relevant in the public sphere and, not least, because they put into effect their own normative power. Scholarship in international relations takes an interest in this process of ‘constitutionalization’, occurring whenever acknowledgment is made of the evolving ‘social

¹ G Davidov and B Langille (eds), *Boundaries and Frontiers of Labour Law* (Hart Publishing, Oxford 2006).

power' in the international system.² Legitimacy beyond the state thus becomes a goal to be achieved, in parallel with the recognition of new sources characterised by a transnational scope.

Furthermore, mobility of companies and labour gives rise to potential conflicts of law and to the enforceability of variable standards. Protectionist answers emerging from national legal systems are counter intuitive to the expansion of global markets. Nonetheless, they may be originated by the fear that internal balances of rights be destroyed and national social partners be disempowered. The danger perceived at national level has to do with the progressive weakening of organised groups participating in the law-making process. The perception of such deep and unsettling changes is mainly oriented towards collective bargaining, by tradition a source of cooperative knowledge and a creator of consensus within national legal orders. A 'network failure'³ of this kind could end up breaking robust chains of obligations and promises, well-designed for the functioning of domestic legal systems and yet capable, if necessary, to release the pressure put by external actors and establish links with them.

In this unstable scenario hierarchies of sources are dismantled into multiple systems of norm-setting, beyond national borders. Hybridization of state and voluntary sources occurs without experiencing a prior clarification on powers and legitimacy of the organized groups, active in managing the consequences of the crisis. On the one hand collective uncertainties may engender protectionist behaviour, leaving cross-border solidarities outside the scope of collective actions. On the other hand, lack of resources and losses of jobs may provoke asymmetric collective answers, tailored around urgent – and at times temporary – prospects, for both management and labour.

It is argued in this paper that collective LL can still provide 'exit strategies' to all actors dealing with the effects of the crisis, somehow re-inventing the scope of what used to be a self-inclusive national legal discipline. It is also suggested that a deeper understanding of changes taking place at national and supranational level should foster new theoretical definitions of existing hybrid systems of norms.

Processes of transnational standard-setting could progressively disentangle LL from its national roots and weaken the authority of legal points of view. Therefore, states could feel the

² J Steffek, Sources of Legitimacy Beyond the State: a View from International Relations, in C Joerges and others (eds), *Transnational Governance and Constitutionalism* (Hart Publishing, Oxford 2004) 81 and 101.

³ G Teubner, 'And if I Beelzebub cast out Devils,...': an Essay on the Diabolics of Network Failure, (10 German Law Journal 2009) 395

urgency to regain their role as regulators and support transnational private orders, so to enhance new dimensions of social justice. Since the collective interests in question are supranational and so are the targets to be reached, states are forced to proceed within a network of obligations towards and among other states. At the same time, states feel compelled to defend essential parts of their sovereignty on key policy issues, particularly when priorities must be set in managing national budgets.

Against this articulate background, labour lawyers should undertake a new comparative evaluation of what I suggest to describe as ‘transnational juridification’.⁴ Broad transnational trends in the evolution of LL should engender new ideas and shake existing hierarchies of sources. Transnational juridification in LL is characterised by a tendency to connect with different regimes of fundamental rights. The European Union sets a good example for this ongoing process, when it creates links among national constitutional traditions and supranational rights and principles.⁵ Furthermore, transnational juridification interferes with sub-systems of norms in the social spheres, most significantly with groups representing employers and labour. As we shall see further on in this paper these autonomous social spheres are now, more noticeably than in the past, torn in between national and supranational goals. They seek independency from national LL systems, in order to establish themselves as authoritative sources of supranational regulation in the global sphere. However, they continue to be related to national legal orders and must return to their constituencies whenever they need to build up legitimacy and report back to their members.

LL’s patterns of regulation are coherent with recent theoretical investigations on open processes of juridification. They imply the interaction of national and transnational systems of norms. For example, fundamental social rights exercised collectively – right to bargain, right to information and consultation – are part of the yet unfinished process of constitutionalization within the EU, giving rise to ‘re-institutionalization’.⁶ Traditional deliberative bodies within the framework of collective bargaining are re-institutionalized through juridification of their

⁴ Seminal comparative research in LL is presented in G Teubner (ed), *Juridification of Social Spheres* (de Gruyter, Berlin-New York 1987).

⁵ Art. 6 TUE recognizes the ‘same legal value as the Treaties’ to the Charter of Fundamental Rights of the EU. It also provides for the EU’s accession to the ECHR. Fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the member states ‘shall constitute general principles of the Union’s law’.

⁶ F Snyder, ‘The Unfinished Constitution of the European Union: Principles, Processes and Culture’ in J H H Weiler and M Wind (eds), *European Constitutionalism Beyond the State* (CUP, Cambridge 2003) 65.

collective behaviour, namely by setting new, widely recognized transnational goals and by creating new bonds of representation.

In formulating constitutional questions, theories on fundamental rights and principles, typically embedded in national LL, need to be re-framed within evolving trends of transnational juridification. The concept of ‘societal constitutionalism’ takes into account the fact that there is no global state behind the construction of a global constitution. Hence, attention must be paid to the evolution of all actors contributing to the de-nationalization of deliberative processes, taking place in the ‘peripheries of law, at the boundaries with other sectors of world society, and no longer in the existing centres of law-making’.⁷

In the following pages some examples will be offered in order to prove that new ideas in LL go into the direction of re-formulating institutional balances of power and re-designing theories of democratic representation within an incomplete world legal order.

2. A war of messages and measures

‘Exit strategy’ is an expression borrowed from the military jargon, often utilized as a metaphor in discussing possible ways to react to the economic and financial crisis. Arguments adopted in wars, as well as in economic and financial downturns, indicate that, whenever there is a need to act, at least one option must be left open, so to abandon the battle field. It is remarkable how often this expression penetrates current European discourses, both in circles of independent policy making and in official documents produced by European institutions.

Research carried on in a Brussels based independent think tank shows that emergencies may lead to abuses in government interventions. Exit strategies are thus evoked to deal with macroeconomic issues, such as fiscal and monetary policies, to allow for better competition and diminish state control on institutions of the financial market.⁸

In analysing the early stage of the Greek crisis, exit strategies were foreseen, suggesting that the IMF should be involved and act jointly with EU institutions. A reform of art. 143 of the Lisbon Treaty (TFEU) was also envisaged, arguing for loans to be granted to euro area member states, as well as to those with ‘a derogation’, namely those staying outside of the euro area.

⁷ G Teubner, ‘Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?’ in C Joerges and others (eds), *Transnational Governance and Constitutionalism* (Hart Publishing, Oxford 2004) 17.

⁸ N Veron, Will governments overreach in their crisis interventions?, (http://www.bruegel.org/uploads/tx_btbbreugel/op-ed_nvdecember.pdf 2009).

Market integration must, whenever possible, pursue inclusion, rather than exclusion of states undergoing economic difficulties. The lack of effective sanctions to be enforced against member states not complying with economic policy guidelines suggests, therefore, that the European Commission should act for preventing unbalances, through better surveillance mechanisms.⁹ These arguments are coherent with theoretical definitions of ‘legitimate governance beyond the state’ and indicate rational ways of achieving consensus around shared values within the EU.¹⁰

In the above mentioned policy analysis attention is paid to governments’ capacities to monitor their own internal competitiveness, for example through wage guidelines and buffer funds. Experiments carried on in Belgium and Finland in the Nineteen Nineties are recalled for their significant contribution to coordination of wage policies, with a view to preventing negative impacts in the adoption of the single currency. These examples are relevant to the arguments developed in this paper, inasmuch as they prove the efficiency of collective measures in dealing with the effects of the crisis.

Policy-makers have also gone as far as suggesting that a ‘social stability pact’ should be the new regulatory tool in the attempt to overcome problems of competing welfare states, in the absence of a European level coordination. This analysis relies on collective bargaining or on legislation to set minimum wages, linked to economic productivity and measured on a percentage of national average wage levels.¹¹

Mention to exit strategies has been made in recent European Council’s meetings. Under the Swedish Presidency measures were encouraged, while waiting for the implementation of ‘sustainable recovery’, through economic reforms, affecting the financial sector and employment. The implications of exit strategies were all related to the most vulnerable individuals hit by the crisis.¹²

⁹ B Marzinotto and others, Two Crisis, two responses, (<http://www.bruegel.org/publications/show.html> 2010).

¹⁰ See supra at 2. On 29-30 October 2010 the European Council expressed the intention to promote secondary legislation for the implementation of new ‘surveillance arrangements’ to strengthen EMU. This should aim at establishing a ‘permanent crisis mechanism’ which may imply a ‘limited Treaty change’.

¹¹ B Hacker, Discussion Paper: A European Social Stability Pact (Friedrich Ebert Foundation, International Policy analysis www.fes.de/pa Berlin, December 2008).

¹² EU Presidency Conclusions 1 December 2009, sections 27-28.

http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/110889.pdf

The recent ‘EU 2020 strategy’, launched by the Commission as a follow up to the Lisbon strategy, has similar contingent characteristics.¹³ As a response to the failure of the Lisbon agenda, aggravated by the current crisis, the Commission seeks the collaboration of national governments in setting common priorities. There is a sign of repetitiveness – and yet of urgency – in announcing knowledge as one key factor in the upsurge of growth and recovery. There is some novelty in indicating the green economy as a connecting factor for revitalizing several sectors of production, as well as education and research. Along these lines, the European Council recommends exit strategies in its integrated guidelines for the economic policies, arguing for ‘smart’, ‘sustainable’ and ‘inclusive’ growth.¹⁴

After the launching of a renewed Lisbon agenda, during the first Barroso’s presidency of the Commission, principles of flexicurity were incorporated into the Guidelines for growth and jobs. Financial support to the Lisbon strategy was first envisaged in the work of experts groups and is now materializing in specific proposals.¹⁵ Structural funds thus become a significant support for weaker economies and should transform the whole process of coordinating employment policies into a more pragmatic exercise, supporting innovative legislation and finalizing financial help towards most efficient outcomes. Monitoring of all such practices still remains a difficult exercise, in particular with regard to the implementation of the agreed measures. However, a virtuous circle of praising good performances could be started. Whenever financial resources are offered to support LL measures, new collective exit strategies should consist in practising good governance of the resources. The setting up of independent internal monitoring too should be part of a new auxiliary kind of legislation which keeps the state active in exercising control.

A new path in employment policies must be considered with some attention, since it could prompt new ideas in LL. The visible decline in soft law coordination, the way it had been

¹³ Communication from the Commission, *Europe 2020. A strategy for smart, sustainable and inclusive growth*, 3 May 2010, COM (2010) 2020, 3.3.2010. The European Council adopted ‘Europe 2020’ in the session held on 25-26 March 2010. <http://register.consilium.europa.eu/pdf/en/10/st00/st000007.en10.pdf>

¹⁴ Council Recommendation of 27.4.2010 on broad guidelines for the economic policies of the Member States and of the Union, Part I of the Europe 2020 Integrated Guidelines, SEC(2010) 488 final, section 7-10 Member States seem so far reluctant to accept supranational targets, even when it comes to setting aside 3% of GNP for research and development.

¹⁵ M Heidenreich, The open method of coordination, in M Eidenreich and J Zeitlin (eds), *Changing European Employment and Welfare Regimes*, (Routledge, London and New York 2009), referring to the European taskforce on employment, chaired by W Kok, who produced the Report ‘Jobs, jobs, jobs. Creating more employment in Europe’, November 2003

conceived during the early days of the Lisbon employment strategy, is a critical issue, aggravated by the crisis. Unsatisfactory results of that method lead policy-makers towards new exit strategies, based on selective incentives. The availability of resources may change the overall scenario and even shape new collective interests, thus empowering again collective actors.

The recurring metaphor of exit strategies can also be applied to the closing down of business, followed by mass dismissals. Governments announcing exceptional measures, when the crisis spreads globally, inevitably need to link up domestic financial support with broader strategies of recovery.

One of the latest examples is offered in the automotive industry. The announcement that Opel would close down the Antwerp plant in Belgium followed the indications of the US parent company General Motors to cut down jobs in Europe. The point to underline in this case is that a ‘collective exit strategy’ is pursued by the so called European Employee Forum, made out of the European Metalworkers’ Federation and General Motors Europe’s works councils. The alternative solution to closing down is to find a new investor for the Antwerp plant, while, at the same time, drafting a ‘social plan’ for workers, which offers early retirement schemes and individual pay outs. All these solutions, put to the vote of the majority of Belgian unions membership at plant level, have been agreed in April 2010. Meanwhile, the Flemish regional government backs the so called ‘conversion group’ in the search of new investors.¹⁶

As one can see from this example, a world-wide strategy practised by a multinational finds its outcome in a deliberation endorsed by a national government. Representatives of management and labour face the challenge of enforcing the collective rights to information and to bargain collectively, pursuing democratic accountability. A national political decision should follow in a convergent way, so to accompany the collective deliberation taken at plant level. Hybridization of sources is a visible product of all such messages and measures. The well functioning of national private orders and the democratic accountability of the same are pre-conditions for constitutionalizing collective rights. Collective exit strategies are contingent and yet functional to the construction of a supranational network of obligations among private and public actors.

¹⁶ V Telljohann, General Motors announces Europe-wide restructuring plans, (Eironline 24 May 2010); M Carley, Opel/Vauxhall reaches Europe-wide restructuring agreement, (European Employment Review June 2010). The closure of the Fiat plant at Termini Imerese was announced in late 2009 and is still under discussion. A short list of new investors, sponsored by the Sicilian regional authorities should have been evaluated by the Italian government in September 2010. In November 2010 new investments were announced by the Region with the intention to continue the manufacturing of cars.

Many similar examples in the automotive industry can be quoted. Innovative collective agreements dealing with workers in more than one country range over solutions aimed at ‘spreading the load’ of job losses throughout Europe (GM); guaranteeing hiring priorities within companies of the same manufacturer (Ford); granting training for ‘reconversion and reclassification’ of workers within the group (Renault).¹⁷ All this confirms a widespread scope of transnational negotiations, leading either to decentralised agreements at company level, or to shared commitments among several employers, enforceable according to varying market demands. It also makes the metaphor of collective exit strategies even more powerful and yet dramatic, whenever the strategy materialises in the reduction of jobs.

A gateway to support workers hit by such events is provided by the European globalisation adjustment fund. First entered into force in 2006, the Fund has been updated in 2009. In order to be eligible, in a highly formal and competitive procedure, Member States applying to the Fund must put forward ‘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’.¹⁸ It also recommends emergency measures to provide immediate help to workers who have lost their jobs as a ‘direct result of the global financial and economic crisis’.¹⁹

The underpinning rationale in the Regulation is that selective support can be granted to EU workers, whenever a causal bond can be established between global market outcomes and the exercise of managerial prerogatives. Different notions of solidarity can thus be envisaged, shaped around uncertain circumstances.²⁰ Solutions to such inextricable problems depend on exit strategies, planned to overcome the effects of global trade or the consequences of the economic and financial crisis.

On a different and yet interrelated level, increasing attention is paid to the training of workers whose employment is at risk. Field research shows that skill needs prompted by the green economy should be framed within an ‘holistic’ paradigm, implying a more multidisciplinary combination of professionals coming from different backgrounds. The specific

¹⁷ References to the agreements in P Loire, J-J Paris, T Ward, C Weis, Comprehensive analysis of the evolution of the automotive sector in Europe, Alpha Metrics Report April 2008

¹⁸ Regulation 546/2009 of the European Parliament and of the Council of 18 June 2009, amending Regulation 1927/2006 on establishing the European Globalisation Adjustment Fund, art. 1.4, replacing art. 5(2)(a), (OJ [2009] L 167/26).

¹⁹ Regulation 546/2009, *supra*, art. 1.1.

²⁰ S Sciarra, Notions of Solidarity in Times of Economic Uncertainty, (39 Industrial Law Journal 2010)

skills required will not be so different from the previous ones and yet they will need to be adapted to new productions.²¹

Collective exit strategies in this case can be twofold. Social dialogue may provide the perfect set up for the definition of new training schemes and for their exportability to different environments. It is even suggested that ‘energy assessors’ should certify these new requirements in education. At EU level a compensation fund for ‘going green’, similar to the previously mentioned Globalisation Fund, should provide financial assistance to those who lose their jobs.²²

In this latter example, intentionally chosen to expand the metaphor of exit strategies, the suggestion is that selective support is the foreseeable outcome in innovative forms of standard setting. Instead of following traditional negotiating patterns, embedded in national collective bargaining, it is argued that new criteria for the description and evaluation of skills are more efficiently defined at a transnational level. The aim is to make them recognisable across national borders, therefore ‘portable’ for potentially mobile workers, who will thus become employable all through the green economy. The new envisaged Fund should enforce selective criteria in choosing the addressees of financial support. The selection of weaker workers, most in need of support, should take place against the background of markets’ transnational interdependence. The challenge here consists in converting into transnational skilled labour those who lost their jobs because of restructuring.

Both the language and the ideas emerging from this recent policy document have strong resemblances with the outcomes of comparative work on varieties of capitalism. General skills – as opposed to firm specific and industry specific skills – allow better mobility of the workforce and should enhance better investments. On the contrary, specific skills are protected by collective bargaining within the productive sectors in which they are needed. Wages’ guarantees incrementally reinforce employment protection and call for a strong coordination of collective bargaining.²³ This circle of reciprocal benefits – firms with specific needs and workers with specific skills – is corroborated by the idea that workers should stay as long as possible in that particular employment, enjoying well established rights, both individual and collective.

²¹ Cedefop Research Paper, Future skill needs for the green economy (Publications Office of the EU, Luxembourg 2009) 91

²² Cedefop, *supra*, 92

²³ P Hall, D Soskice, *Varieties of Capitalism: the Institutional Foundation of Comparative Advantage* (Oxford University Press, Oxford 2001) 150-153.

The other side of the coin is to enhance portable skills, which will favour responsiveness and dynamism in investments and make innovative productions possible. This theory puts an emphasis on the active role of firms, rather than on welfare states. It also presupposes a significant change in the horizon of political choices and a redistribution of power towards actors different from the strong collective organizations of management and labour. In other words, there is an indication that national systems of collective bargaining gain strength from political systems, thus perpetuating institutions and policies.²⁴

In his very articulate criticism of neo-institutionalism, Crouch argued for a more diversified analysis, so to prove that actors are not kept in ‘an iron cage of institutions, which they cannot change’. Changes occur whenever actors are exposed to a variety of institutions and strategies.²⁵

It is submitted here that changes of this kind are underway in transnational collective bargaining, up to the point of breaking institutional cages. Changes are such to require a new understanding of means and ends in collective processes of standard setting. Private orders operating as regulators in the elaboration and in the enforcement of standards are re-establishing their own autonomous role, while keeping their dialogue open with state institutions.

Collective exit strategies prove indispensable even in the re-definition of skills requirements. The hybridization of LL sources in this case is the consequence of widespread market demands, counterbalanced by different functions assigned to national and supranational private orders. National social partners take on board the re-drafting of professional qualifications resulting from a world re-distribution of productions. We shall see in the next section how collective answers are formulated to counteract other world-wide productive strategies. Even when based on apparently frail procedural machineries, apt to producing non-normative standards, private orders occupy a significant role between states and supranational institutions. They set examples for theoretical definitions of collective learning and for clarifications of ‘reflexive governance beyond the State’ , particularly when it comes to conceiving new forms of non-state regulations.²⁶

²⁴ Supra 182-183.

²⁵ C Crouch, *Capitalist diversity and change*, (Oxford University Press, Oxford 2005) 2-3.

²⁶ C Scott, Reflexive Governance, Regulation and Meta-Regulation: Control or Learning?, in O De Schutter and J Lenoble (eds), *Reflexive Governance. Redefining the Public Interest in a Pluralistic World*, Hart Publishing, Oxford 2010, 54, 59).

3. Beyond the State. Consensual strategies at a global level

Crouch's critique of too deterministic approaches brought about in neo-institutionalism is relevant to the present analysis, insofar as its constructive proposal assigns importance to institutional innovations. The metaphor of collective exit strategies focuses on alternative solutions and consequently on new ideas in LL, arguing that 'institutional heterogeneity' facilitates novelties.²⁷

In the European tradition employers and labour organizations are mostly inclined to bring in innovative solutions and to force institutions towards new outcomes. They generate dynamic systems of collective bargaining, the expansion of which typically prompts interconnections with statute law. Hence, mutual hybridization of legal and voluntary sources has constant implications in determining the normative function of private sources.

This synergy among LL regulatory techniques cannot be taken for granted at a transnational level. Whenever exposed to transnational strategies and to new ways of representing collective interests, collective bargaining operates beyond state sovereignty. To do so, it often takes advantage of domestic legitimizing processes for reaching external purposes. Transnational collective bargaining also generates new empowering mechanisms for the negotiators, mixing together different actors – supranational, national or company representatives – within the bargaining delegation.

Employers and labour organizations, acting as collective regulators within well defined private orders – be they national or transnational – facilitate major transformations of the state. They may contribute to 'denationalisation of political authority' whenever they gain spaces of legitimacy for their own autonomous interventions. However, even in pursuing their autonomy, they continue to trust states as centres of authority, confirming the prevailing function of political and democratic institutions.²⁸ Whereas international organizations may not always be able to provide for full participation of individuals and for transparency in decision making, states cannot abandon these tasks. This is why, in the end, the spreading of transnational non state actors confirms a return to states as 'managers of political authority'.²⁹

²⁷ C Crouch, *supra* at 22, 126

²⁸ P Genschel, B Zangl, *Transformations of the State – From Monopolist to Manager of Political Authority* (TranState WP 76, Universität Bremen <http://www.staatlichkeit.uni-bremen.de> 2008, 6).

²⁹ *Supra* 15-16. For a similar point of view in LL scholarship see A Baylos, Un instrumento de regulación: Empresas transnacionales y acuerdos marco globales, 27 *Quaderno de Relaciones Laborales* 2009, 108

In the ongoing interaction among new transnational actors and states we observe profound changes taking place within national legal orders. Transnational organized groups open up to demands generated beyond the state, while still providing support to their national membership, exposed to the uncertainties of not yet fully typified collective behaviour. They also raise new expectations towards states, pressed to intervene actively and take in hand the consequences of transnational competition.

For example, codes of conduct or labelling adopted by transnational non state actors lack the enforceability of state sources. Consequently, they are assisted by transnational monitoring, outside traditional judicial control. In all these cases, occurring even outside of the EU, notions of independence and power in administering justice are called into question.³⁰ This is yet another example of a latent marginalization of strictly legal points of view, giving way to rule-making within private orders and consequently to the issuing of private sanctions.

In European companies organised into subcontracting networks a new generation of codes of conduct is implemented, whereby labour standards are extended by the hub company towards all other companies affected by the main economic activity. Problems of legitimacy are raised with regard to monitoring, since subcontractors are forced to comply with unilaterally extended sources.³¹ The European Parliament too has recommended ways of raising awareness in production chains, establishing principles of liability to increase transparency for socially responsible sub-contracting.³²

Other examples of transnational consensus building within the EU have to do with regime competition. LO Sweden and LBAS (Free trade union Confederation of Latvia) signed an agreement on cooperation on 13 October 2005 for the prevention of social dumping. As a consequence, the Latvian Construction Workers' Union should refuse to work at lower wages for the company Laval's Swedish Layers. This example is viewed by commentators as an

³⁰ M Barenberg, *Sustaining workers' bargaining power in an age of globalization*, (EPI Briefing Paper, Washington DC 2009); 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 University Press, Oxford, 2001) 47.

³¹ A Sobczak, 'Codes of conduct in subcontracting networks. A labour law perspective' (Journal of Business Ethics 2003, 225). It is worth mentioning at this regard a recent agreement signed on 16 September 2009 by employers' organisations and trade unions, involving the network of Tuscan subcontractors within the Gucci group, with the aim of 'supporting' Italian know how and avoiding reduction in employment, through the enforcement of common quality standards.

³² EP Resolution 26 March 2009 Social Responsibility of Subcontracting Undertakings in Production Chains (2008/224 (INI)).

opportunity to improve and strengthen communication among unions in different countries and to search solutions which can anticipate and avoid conflict.³³ Reciprocity here is to be interpreted as a moral sanction, as well as a social norm of cooperation, in the attempt to avoid potentially negative consequences and introduce new regulatory functions.³⁴

On 14 January 2010 an agreement on ‘Draft rules of procedure for the European sectoral social dialogue committee in the sector of the metal engineering and technology based industries’ was signed by the relevant collective organizations on both sides of industry. This document is significant for its procedural scope, since it enables other collective parties to sign agreements at EU level, with special attention being paid to measures for workers hit by the crisis, ranging at around 10 million in the sector. Here again, rather than relying on normative standards, consensus is built around expectations, in the search of solutions alternative to dismissals. Once more a supranational private order is sending signals to other decentralised negotiators, dealing with differentiated regimes of non- normative standard- setting.

In February 2010 a world-wide agreement was reached at GDF Suez, a multinational in the energy and utilities sector, setting broad guidelines on health and safety for the prevention of risks and introducing measures for monitoring and training. These are all examples of procedural rules, consistently enforceable at a global level through private monitoring mechanisms .³⁵

A Europe wide agreement is also part of the deal. Its main scope is the safeguarding of employment, through career development schemes and mobility within the group. ‘Anticipating changes’ is the expression adopted, whenever measures are agreed in view of expected negative outcomes, such as reduction of the workforce. The technique described as ‘forward looking management’ of jobs and skills is put in practice via social dialogue, rather than through unilateral actions. Attention is paid to trade unions and employee representatives, with a view to promoting consensual solutions and dialogue at each company level, even when it is established that the European Works Council (EWC) is the interlocutor of the general management.

³³ K Gajewska, *Transnational labour solidarity*, (Routledge London-New York 2009, 69-70)

³⁴ *Supra*, 156-157. With regard to the construction and the metalworkers’ unions, a consensual approach towards wage coordination since the Nineteen Nineties is reported by R Erne, *European Unions. Labor’s Quest for a Transnational Democracy* (Cornell University Press, Ithaca and London 2008, 86-95).

³⁵ M Carley, *International: Post-merger EWC agreed at GDF Suez*, EER 425, 18.6.2009.

The European agreement at GDF Suez has been praised for providing the best enforcement of the new principles enshrined in the recast Directive on EWCs.³⁶ Part of the renewed Lisbon agenda, the Directive occupies a significant place in transnational juridification processes, in particular for its implications with transnational agreements on company restructuring. In compliance with art. 27 of the Charter of Fundamental Rights of the European Union, it is a relevant source in constitutionalizing rights to information and consultation

The revised Directive aims at improving the effectiveness of such rights, putting forward criteria that are mainly procedural. EWCs give an opinion to the undertaking in a ‘timely fashion’ and make sure that information and consultation take place ‘at the relevant level of management and representation, according to the subject under discussion’ (recital 14 and 15). The transnational ‘potential effects’ of managerial decisions must be considered by EWCs, fulfilling their duty to report back to the employees they represent (recital 33).

Article 10.1 refers to a collective representation of the employees’ interests, ‘without prejudice to the competence of other bodies or organisations’. 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).

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. The GDF Suez agreement deals with this issue providing for information and consultation on transnational matters, namely those affecting the group as a whole or at least two of its undertakings located in two different countries covered by the agreement. Decisions having a potential impact on the European workforce are also considered. Furthermore, the agreement covers companies in which GDF Suez has a controlling interest, holding more than 50 % of the shares, or having a special dominating position for strategic reasons.

³⁶ 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.

Transnational juridification is well exemplified by looking at the EWC recast Directive and by reading the first transnational agreements inspired by the same. European secondary law is, in this case, supportive of increasingly widespread social systems materializing into transnational collective agreements. Although the Directive does not specifically mention bargaining powers as part of the EWC's entitlements, they are in practice becoming a prerogative of such bodies, whenever transnational matters come to the fore.

The Commission is not unaware of all this, as it appears from its survey, listing 147 'joint transnational texts' in 89 companies since 2000.³⁷ 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. The question to be asked when private collective actors enter transnational agreements of this sort is how they are empowered and what their aim is in designing the coverage of the texts they draw. In fact, when economic uncertainties are foreseen, it is not straightforward nor intuitive to reach a balance of powers in norm-setting. It may be necessary to rethink bargaining powers and reconsider forms of democratic accountability within organised groups. The acquisition of transnational legitimacy should become a prerequisite for the bargaining agents, whenever collective agreements cross national frontiers.

The most interesting examples of transnational procedures oriented towards consensus building can thus be found in a *de facto* expansion of EWCs' negotiating powers. A majority of agreements are signed in the automotive industry, characterised by strict interdependence of products and markets. At *Chrysler*, ever since 1998 a transnational trade union network has been active. It paved the way to the establishment in 2002 of a World Works Council, in addition to the one provided for by the European Directive. At *Volkswagen* a similar tradition goes back to the Nineteen Sixties, although a World Works Council only saw the light in 1999.

In some cases international trade unions appear on the negotiating scene. In the sector of technologies the *Thales* agreement, signed in June 2009, saw the European metalworkers union determined to negotiate on skills' development, arguing for workers' international mobility within the group, particularly for highly skilled workers. In other cases negotiators prefer to build up a 'global employee forum', as in the Norway based multinational DNV, where the existing

³⁷ European Commission Staff Working Document, *The role of transnational company agreements in the context of increasing international integration* (Brussels, 2 July 2008, SEC (2008) 2155).

EWC continues to operate within European companies. The DNV forum, set up in 2009, has seven employee representatives, two from Norway, two from EWC outside of Norway, two representing the Asia-Pacific region and one the Americas and Africa.

Even a US based multinational, such as RR Donnelley, a world provider of print and other related services, signed an agreement in May 2009, establishing a EWC in line with the recast Directive. Here the number of representatives from different countries follows the percentage of the workforce employed. At AXA, a France-based multinational providing financial services, the agreement on EWC revised in June 2009 relies entirely on EU law, rather than on French law, and also provides for the enforcement of international standards throughout its European undertakings.

All these examples are taken from the world of facts. They confirm the spreading of a new transnational law in action which is mainly customary, albeit attached to an auxiliary legal measure, if we consider that transnational or world agreements, such as the ones previously mentioned, are indirectly originated by an expanded scope attributed by the negotiators to the EWC Directive.

The notion of auxiliary legislation, part of a widely acknowledged European legal scholarship,³⁸ was thought of as a mean to the end of strengthening the autonomy of collective bargaining and enhancing ‘collective *laissez faire*’. It can now be re-visited and adapted to new ideas in LL if we name it ‘transnational auxiliary legislation’. In this new facet, auxiliary measures should serve the purpose of re-empowering national systems of standard-setting and open them up to a world-wide scenario. Even when non-normative agreements are produced and merely procedural machineries are operated, new forms of guarantees emerge for labour. This can be said for transnational collective agreements and for employment policies, when supranational support is intertwined with specific national measures, be they oriented towards training, the planning of skills’ requirements, company restructuring, or other alternative solutions to the loss of jobs.

Financial support granted from European institutions on selective grounds and on a temporary basis could represent a novelty in shaping transnational auxiliary measures which offer concrete answers to otherwise unclear expectations.

³⁸ O Kahn-Freund, *Labour and the Law*, (Stevens & Sons, London 1977 II ed) 46-47

4. Concluding remarks

New ideas in LL elaborated in this paper rotate around an open process of transnational juridification in which non-state collective actors occupy a significant place. Such ideas should help building bridges among private and state sources, ascertaining that the primacy of legal points of view is not completely lost.

Transnational juridification is confronted with untraditional structural coupling between politics and LL. In absorbing different regimes of standard setting within its own web of rules, it enhances synergies among them. However, this process is imperfect as well as incomplete, since it still lacks specific and efficient sanctions. The active and even dominant role gained by private actors may imperil the functions of welfare states. Not only the latter are distressed by economic deficits; they are also at constant risk of losing political accountability, when they are unable to fulfil expected redistributive policies.

Voices of weaker and marginal groups may not be heard, if traditional channels of social protest are progressively dried out. However, recourse to conventional forms of industrial action may prove less accessible than in the past and even less efficient, whenever collective interests to represent are fragmented and even dispersed across national boundaries. Because of the unsettled performances of welfare states and the absence of a supranational level of coordination, transnational juridification may insinuate perverse consequences and even facilitate unbalances in the exercise of collective social rights, facing the expansion of economic freedoms.

For all these reasons, issues of legitimacy beyond the State are persistently raised within national legal systems. There are no meaningful answers to such queries, because the nation state's regulatory crisis calls into question traditional notions of efficiency in the enforcement of legislation. LL measures, challenged by the urgency to meet supranational targets, cannot be based on exclusively national parameters. Yet the choice to compete on the transnational scene and to adopt the necessary means towards this end is national and structurally coupled with politics.

Arguments developed in this paper signify that whereas in the last century national welfare states had a dominant role in shaping innovative LL, transnational social systems are now the bearers of new ideas.³⁹ Collective labour law should thus empower a variety of collective actors

³⁹ An authoritative point of view on this in J Habermas, *The Postnational Constellation. Political Essays*, (Cambridge, Polity Press 2001) 57 ff

and deal with fragmented notions of collective interests, taking on board phenomena related to an increased mobility of business and labour. It should also re-consider balances between economic freedoms and collective social rights, particularly when it comes to acknowledging the lack of traditional legal sanctions in the new worldwide scenario of private ordering.

In discussing the interrelation and mutual hybridization among LL's regulatory techniques, it can be argued that discourses on governance in the EU prompted a redefinition of the role played by law-makers, leading, in the long run, to the weakening of 'internal' legal points of view.⁴⁰ Closer links with civil society, advocated as a sign of openness and transparency of the supranational legal order, may generate ambiguous solutions on the transnational scene, when legitimacy of social sub-systems becomes an essential prerequisite. It is submitted in this paper that this tendency be counterbalanced by strengthening 'external' legal points of view, characterised by transnational scopes.

Such authoritative legal points of view should lead to rediscovering the function of transnationally binding legal principles and to ascertaining the effectiveness of legal sanctions. New forms of legitimacy beyond the State and transparency in standard-setting, operating at a transnational level, should prepare the ground for overcoming potential conflicts of law and facilitating the interpretation of transnational sources.

⁴⁰ A recent documented analysis in M R Ferrarese, *La governance tra politica e diritto* (il Mulino Bologna 2010) 36 ff