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The evolution of the national collective bargaining models and the innovative features of collective agreements

Abstract

The purpose of work is to make an illustrated presentation of the recent evolutions in three national collective bargaining models – France, Germany and the UK. The analysis of the national literature on the development of these models reveals some common trends and characteristics in a set that is widely divergent such as national collective bargaining structures. I intend to defend in the following lines that this evolution consists in two cardinal points, the decentralisation of collective bargaining and the development of a partnership culture at the level of the company. I consider that European Law on employee participation has had a great impact on causing and modelling this evolution. The paper will be illustrated with some evidence from the Agire case studies.

1. Introduction

One of the most intensely debated themes in collective bargaining research over the last 20 years has been the increasing and constant trend towards the decentralisation of collective bargaining ((Katz 1993)). This trend intends to translate the growing relevance that the representatives of the employees at the level of the company have gained in social dialogue with management, to the detriment of trade unions. This is a fascinating field of study not only because it is a very modern phenomenon but also because it demands from the scholar a research not only of the evolution of the *formal* structures of bargaining (i.e. the black-letter law) but also of the actual *application of the law* and the *concrete results* of the negotiations.

This is however a field of study filled with difficulties: *firstly*, there is the difficulty of making a comparison; considering that the national collective bargaining structures have evolved at distinct stages and in accordance with national cultures,

economical conditions and politics, it is quite demanding to find a common logic underpinning a comparison and the method of *country-report* is in the majority of the situations unavoidable. *Secondly*, there is a difficulty to dig out the actual causes of the evolution. The diversity of national countries poses an obstacle to this because the causes for the decentralisation in one country are not the same as for the subsequent country.

Despite the difficulties, I decided to embark on an attempt to compare the decentralisation of collective bargaining in three distinct jurisdictions – Germany, France and the UK. I have chosen these jurisdictions because they serve as models for the remaining *satellite jurisdictions* throughout Europe (and to some extent the world) and because they are set on widely despair grounds, despite their geographical proximity and the fact that they are all European countries. I have managed to identify some *common trends* and *techniques* for decentralisation by means of a procedure that I coined as *controlled decentralisation*. The major influence for this evolution was, in my view, *European Law*, which set out the basic guidelines according to which all future social dialogue in Europe is expected to function. Given the disparity of the individual regulations, the method of the country report was unavoidable, although I make an effort to set it out within a broader context. The innovation that I will attempt to bring in this report in relation to a former working paper that I presented in Madrid consists in an illustration of the actual evolution with some evidence taken from the *Agire* cases. I will try to demonstrate in each specific situation that my assumptions can be supported by elements retrieved from the studies made in the context of the *Agire* project.

2. The influence of European Law

2.1. In order to understand the common trends in the evolution of the national collective bargaining structures, one must begin by analysing European law. The relevant European instruments are the well known *Directives on employee participation*: Directives **98/59**, *on collective redundancies*; **2001/23**, *on the transfer of undertakings*; **94/94**, *on the European Works Council* (henceforward *EWC*); **2001/86**, *on employee participation in the European Company* (henceforward *SED*); **2002/14**, *establishing a general framework for the information and consultation of employees* (henceforward

Framework directive).¹ (for each one of these directives see the very good studies of (Brors 2004), (Seitz 2004) and (Seitz 2004)). I will defend in the following lines that **(1) the evolution of the Directives**, **(2) the actors** and **(3) the procedures** has triggered the evolution of national collective bargaining structures by means of what I will name as a *spill-over effect*.

2.2. If one attempts to have a global look at these directives, one can immediately perceive a clear line of evolution. This *line of evolution* can be seen in different dimensions and it allows us to make a primary classification of the directives, between those which I will name as the *reactive* Directives and the *proactive directives*. The first group is composed by the *collective redundancies* and the *transfer of undertakings Directives*; the second, by the *EWC*, *SED* and the *Framework Directive*. This reasons underpinning this classification can be synthesised in the following lines:

Firstly, if one considers the different *scope of application* of the Directives, one can see several differences. The *reactive directives* intended to provide an answer to a *particular situation* and are limited in their scope to the situations in which the European legislator understood that there should be mandatory employee information and consultation; the *proactive directives* are set out a much broader scope: they are not intended to provide an answer to a particular crisis situation but to create a mechanisms for the *promotion of permanent social dialogue at the level of the company*, achieve *risk anticipation* and *involve employees in the long term strategy of the company and restructuring*. Therefore, they do not have a strict scope of application (e.g: a collective redundancy or the transfer of the undertaking) but are potentially applicable to all situations liable to have an impact in the strategy of the company. They are not intended to a particular situation but to involve employees in the global strategy of the company.

Secondly, the *legal bases* underpinning the Directives are also indicative of the objectives that the European legislator intended to achieve with them. The *reactive Directives* are based upon the provisions of the common market and lie under the traditional technique of *harmonisation*, in order to avoid market distortions caused by different national social models; the *proactive directives* are, on their turn, based upon

¹ The Directives are set out in chronological order; considering that the *collective redundancies* and the *transfer of undertakings* directives were made the object of a revision, I opted to refer to them by the number of the revision Directives.

the *different social provisions* of the Treaty,² revealing that they are not so much concerned with ensuring the correct functioning of the common market but with *economic and social cohesion*. This is a very important point, because the choice of the legal basis by the European legislator is strongly indicative of the aims it intended to achieve with the measure. The reactive directives are destined to create a *level playing field*, in order to avoid that the different national regulations in such a sensitive matter as labour law would allow for other situations such as the one occurred in the restructuring of the AKZO group,³ which led to the emanation of the collective redundancies directive. The proactive directives are, on their turn, based on the viewpoint that the construction of Europe should entail active measures for the improvement of the rights and living conditions of workers and not simply expect that they would emanate as the result of the integration of the national markets. They obey a certain philosophy consisting of an *integrative view* of the company, set upon *social dialogue* and *understanding* in order to improve the competitiveness of the company and facilitate an agreed restructuring.

Thirdly, in terms of the *legislative technique*, the directives also have considerable differences; the *reactive directives* can also be named as *static directives* because they provide for a rigid procedure establishing minimum rights to information and consultation from which member states could only deviate in the event that they wished to provide for more favourable provisions; the proactive directives can on their turn be named as *dynamic directives*, because they do not provide themselves for a rigid information and consultation procedure but rather for a *procedure for the reaching of an autonomous participation agreement*; i.e the parties themselves are granted the power to bargain the solution which best fits their information and consultation needs. The distinction is more than self-evident: the reactive directives lie upon the traditional technique of harmonisation; the proactive directives lie upon the new technique of

² Which are, respectively: **EWC** – Protocol n°14 on social policy; **Framework Directive** – art.137(2) of the ECT; **SED** – art.308 of the ECT. Although art.308 is hardly a social provision of the Treaty, a reading of the preliminary points reveals that the intention of the legislator was strongly influenced by it; on the one hand, to avoid the escape from co-determination; on the other, to promote social dialogue at the level of the company (§§3 and 6 SED). See **Davies, Paul L.**, “*Employee involvement in the European Company*”, VVAA, La Société Européenne – organization juridique et fiscale, intérêts, perspectives, Dalloz, 2003, pp.67-79

³ AKZO was a group of companies active in several European countries. In 1973 it decided to engage in a restructuring procedure which would dismiss 5000 people. It decided to study the different costs of collective redundancies in the countries in which it was operating and dismiss people where they were *cheaper*, independently of the viability of the undertaking. This meant that perfectly liable undertakings could be closed in order to save less profitable ones simply because the costs of redundancies was cheaper. See Gomes, J. (2007).

harmonisation by means of *reflexive law*. This is even so within the context of the framework directive, because art.5 of the framework Directive empowers member states to take the option of allowing the relevant information and consultation procedures to be determined by means of an *agreement* between management and labour, as long as the minimum requirements of the Directive are respected. This is a great change in orientation because this means that the legislation is not so much concerned with ensuring a *level playing field* between member states (*i.e* that the *costs* of information and consultation would weight equally to the companies of all member states) but with ensuring *social dialogue at the level of the company*.

Finally, all of this was accompanied by an evolution of the *objectives underlying the information and consultation procedures*. As I have said, the reactive directives have *equal burdens* as an objective, by imposing the legislation of the socially most sensible countries upon other less socio-democratic countries. Although the employees in some member states might have benefited to a great extent from the powers granted to them by the Directives, the political objective of the Directives was not so much to protect employees but to ensure equal competition between undertakings. The proactive directives have another strategy; they must be understood within the context of the idea of the construction of a social Europe introduced by the Maastricht Treaty. The most convincing statement of the objectives underpinning the proactive directives is contained in §§ 1, 7, 8 and 9 of the Framework Directive, where the European legislator clearly states that its purpose is to “*promote social dialogue between management and labour*” and that “*There is a need, in particular, to promote and enhance information and consultation on the situation and likely development of employment within the undertaking and, where the employer's evaluation suggests that employment within the undertaking may be under threat, the possible anticipatory measures envisaged, (...) with a view to offsetting the negative developments or their consequences and increasing the employability and adaptability of the employees likely to be affected.*”

I believe that at this point it is important to retain three very important points regarding the evolution of the Directives; *firstly*, there was an enlargement of the scope of application of the Directives. This means that the number of subject-matters capable of being covered by social dialogue greatly increased from the already far-reaching *reactive/static directives* (because their scope of application was not determined by the *cause* but by the *effect*) towards the *proactive/dynamic directives* (in which the subject-matters of information and consultation were agreed by the parties). *Secondly*, the legal

bases of the Directives reveal that the action of the EU was no longer conditioned to the failure of the common market but to the promotion of a genuine social model as the one set out in the Treaties. *Finally*, the change in the regulatory technique allows for the extraction of two conclusions: one, that there was a willingness to enlarge the number of subject-matters covered by collective bargaining; two, that the legislator limited itself to providing the parties concerned with the necessary mechanisms for them to reach the optimal solution (reflexive law); three, that the political objectives underlying the Directives bet upon the construction of *permanent and integrative social dialogue at the level of the company*.

2.3. A second very important point consists in the **actors** of the Directives. The Directives (both *reactive* and *proactive*) depend on the existence of a structure for the representation of the interests of the employees at the level of the company ((*European Commission 2006*) pp.59). This structure may either be *expressly* demanded (such as in the EWC and SED) or *implicitly* conceived (in all the others). The only Directive providing for direct information and consultation of employees is the Transfer of Undertakings Directive, in its art.7(6). This possibility is to be applicable in the event of the non-existence of an employee representation body by “no fault of their own” [of the employees].

Where the existence of the staff-representation body is *express* (EWC and SED), the management and the employee representatives are under the legal duty to set it up according to certain rules of procedure and observing a certain composition. There are sanctions for the event that the management is not cooperative: there is the application of *subsidiary requirements* both in the EWC and the SED, which consists in a very generous alternative information and consultation procedure applicable in the event that the parties do not reach an agreement; in the SED, besides the application of the subsidiary requirements, the SE cannot be registered without an actual determination of the conditions of employee participation (even if it is merely to evidence that the subsidiary requirements will be applicable because there was no agreement). As I will demonstrate further, it is curious that the situations where the existence of a staff-representation body is *express* coincides with the situations in which it has more power (the bargaining of the applicable information and consultation procedure); this reveals the confidence that EU law places on company level bargaining.

The existence of staff-representation at the level of the company is also expressed in the *health and safety directives*, where the involvement of the workforce in health and safety matters in the workplace is demanded (**Directive 89/391**).

Where the existence of employee representation is *implicit*, this means that the application of the Directives depends on a mechanism for employee representation at the level of the company, in accordance with national law. National law is, in principle, sovereign in this particular subject-matter. But sovereignty does not mean unlimited freedom; the ECJ has, over the years, developed a constant and very consistent case-law destined to preserve the effectiveness of employee representation at the level of the company. The most important ruling was **Commission vs UK** (C-383/92), which struck a blow on the secular UK *system of recognition* ((Hall 1996, 2006)). The ECJ decided that this system stood against the collective redundancies directive because it would deprive employees of rights granted to them in the Directive and provoked a revolution in employee representation in the UK. I will explain below the intricacies of this system and the impact of the judgement. The most important thing to retain is that *the Directives grant employees the right to have the possibility to set up a body for the representation of the employees at the level of the company which must be recognised by the employees at least for the situations provided for in the Directives*.

2.4. The third important point consists in the **procedures** provided for in the Directives. Both **reactive** and **proactive** directives depend on the existence of an *information and consultation procedure*. *Participation* (in the sense of co-determination [*Mitbestimmung*]) is referred to only in the SED and is applicable only in the event that it is agreed or when the companies were previously subject to co-determination rules. This means that European Law supports social dialogue but does not impose any kind of co-determination of the workforce.

Information and consultation is a procedure common to all directives. The only definition of both of the terms is contained in the **Framework Directive**, which classifies **information** as “*transmission to the employer to the employees’ representatives of data in order to enable them to acquaint themselves with the subject matter and to examine it*” and **consultation** as “*the exchange of views and establishment of dialogue between the employees’ representatives and the employer*”. Curiously, art.7 of the Framework Directive excludes its application to the remaining Directives.

However, an analysis of the individual regulations reveals that this definition is perfectly suitable to describe their regime.

The content of each one of these obligations deserves a further analysis. The content of the *obligation of information* was made more precise in the directives; each directive enumerated the *minimum information* which had to be mandatorily transmitted to the employee representatives, according to the subject matter at stake. However, it is clear that it consists simply of the transmission of certain data that the employees should be aware of in order to conduct the negotiations.

The content of the *obligation of consultation* is not so straightforward however. The **reactive directives** contain no definition of consultation; they simply mention that the employer has this obligation to initiate a consultative procedure *with a view to reaching an agreement*. The **proactive directives** are more imaginative, defining consultation with formulae such as “*the exchange of views and establishment of dialogue between employees’ representatives and central management or any more appropriate level of management*” (**EWC**), “*the establishment of dialogue and exchange of views between the body representative of the employees (...) and the competent organ of the SE, at a time, in a manner and with a content which allows the employee representatives, on the basis of the information provided, to express an opinion on the measures envisaged by the competent organ which may be taken into account in the decision-making process within the SE*” (**SED**) and “*the exchange of views and establishment of dialogue between the employee representatives and the employer*” (**Framework Directive**).. The evolution shows us that in the subject matter of consultation there is an increased emphasis in the *establishment of permanent dialogue* but not so much on the *obligation to reach an agreement*. The only exception lies in **art.4, n°.4, e)** of the Framework Directive, which considers that there is an *obligation to reach an agreement on decisions (within the scope of the powers of the employer) likely to lead to substantial changes in work organisation and contractual relations* – including those emanated in the collective redundancies and transfer of undertakings directives. A teleological reading of the Directives also indicates that the *precise content of the obligation* might be different in the two cases: as I described above, the reactive directives were emanated under the auspices of harmonisation and were destined to replicate the costs that companies that were subject to co-determination faced in their restructuring procedures; on the other hand, their application is limited to certain very circumscribed events in time (collective redundancies and the transfer of

undertakings), where the stress is placed on the reaching of a *consensual solution*. The ruling *Junk vs Kühnel* (C-188/03) simply confirmed in a clear way the *consensual character* of the procedure that the collective redundancies directive provided. The *proactive directives* were made under a distinct philosophy; their intention was to create incentives for the establishment of *permanent social dialogue* at the level of the company; the obligation to reach an agreement in each individual situation which did not result either in a collective redundancy or the transfer of an undertaking could be seen as too burdensome and a dissimulated way to introduce *co-determination* in Europe, a solution to which the majority of member states always opposed. I believe that it is defensible that the *obligation to reach an agreement* does not exist in the *proactive directives* (with the exception of the specific case of the framework directive) and that the content of the obligation of information is in this way distinct in both sets of Directives.

A final very relevant point is connected with the *legal technique*. I already mentioned in the evolution of the Directives (point 2.2) the radically different legal techniques used. The *reactive directives* are set upon a *rigid information and consultation procedure*, from which member states may deviate only by means of more favourable provisions; the *proactive directives* are set upon the *autonomy of the parties*. They do not establish themselves the procedure for information and consultation but only a procedure for the reaching of an autonomously bargained information and consultation agreement at the level of the company. The underpinning idea is to reach an *optimal harmonisation of the interests of both parties at the level of the company*. This is a very important feature because the establishment of a EWC and of a SE depends on the agreement of a procedure for determining the arrangements for information and consultation, in which the parties are not only free to determine the arrangements which best fits their needs as they are also *obliged* to reach an agreement on certain very important points concerning the course of the procedure, such as the *scope* of the procedure, the *powers* of the representative body and the *frequency* of the meetings. The only limit to the will of the parties is the achievement of the objectives of the Directive, which may not be compromised. The powers of the parties are, however, greater in the EWC and the SED than in the Framework Directive, where the employee representatives only intervene in the event that the state decided not to transpose the directive by means of state regulation.

The significance of this approach should not be underestimated. It was made in the context of the European Social Dialogue, in which the Commission bets on a policy of no-intervention and the transfer of regulatory competences to a different level, in order to reach *pragmatic, balanced and sustainable* regulation. The *procedural and voluntaristic* conceptions of the directives are meant to presuppose and determine very little and create incentives for the development of *fit-to-size* solutions and dialogue between management and labour. The idea is to create trigger a regulatory competition of agreements by means of their divulgation and create *reference points* of optimal solutions for information and consultation for some sectors of activity or companies of a certain size (Brors 2004). This is a strategy of *legal deconstruction* and *social reconstruction* guided by the *procedure of the law*. The dangers of downgrading the participation levels may be objected by means of a *standard-procedure* to be subsidiarily applicable in the event that there is no agreement. A sub-optimal regulation for all sides would lead the parties to be more willing to reach an agreement, since no one will desire the application of the subsidiary regulations and this creates an incentive for the an agreement. This, in my view, did not occur, because the subsidiary provisions are so generous that they create no incentives for the employees to reach other solutions. The only exception is art.6, n°.3 of the EWC, which safeguards pre-existing information and participation agreements and dispenses the company from the obligation to set up a EWC.

2.5. I believe that at this point it will be possible to venture to present some preliminary conclusions about the model of European Law I have been presenting. The analyses of the *evolution and structure (actors and agreements)* of the directives reveal that the EU has actively and persistently insisted on the promotion of social dialogue at the level of the company. This is not a means to achieve the equalisation of burdens but to enforce an *integrative view of the company* under a political ideal of *economic democracy*. This can be seen in the *strengthening of the position of the actors at the level of the firm*, the *enlargement of the coverage* of the Directives and the increased bet on *self-regulation of the actors*, in order to achieve *harmonisation* by means of *reflexive law*. Social dialogue at the level of the company is more than ever part of the European Social Model and a reality in European companies, as I will demonstrate further.

3. The evolution of national regulations

3.1. general trends – the decentralisation of collective bargaining has been a topic repeatedly discussed on the national literature of all national regulations covered – Germany, France and the UK – although its *exact meaning, configuration and extent* vary to a great deal between countries. I have been able to identify some common trends in the *decentralisation movement* covering all regulations under study, which consists in the reinforcement of the *powers of the actors at the level of the company* and a *change in the attitude of the actors*, moving from *distributive* to *cooperative bargaining* under a model of *partnership at the level of the company*.

In order to understand this trend, one must begin by making some conceptual clarifications. Traditionally, trade unions were external actors concerned with granting employees a bigger share of the profits of the company and ensuring a *level playing field* between undertakings, because competition in terms of labour costs was seen as undesirable to both parties. This was the model of *distributive bargaining*. *Decentralisation* means the general trend of loss-of-power of trade unions in the subject of collective bargaining towards *actors located at the level of the company*. This trend towards the reinforcement of the actors at the level of the company was accompanied by a change in their attitude, towards a *partnership model*. *Partnership* is understood as a *participatory process leading to high-trust, cooperation and compromise between management and labour leading to the engagement of employees in the success of the company – instead of simply demanding more pay and better working conditions – and to their active involvement as stakeholders in the policy of the company* ((Frege 2002)). This was not made however erroneously but always under the *supervision of trade unions*, under a process which I coined as *controlled decentralisation* (also (Schulze-Doll 2006)). This was a process strongly influenced in its configuration and outcomes by European Law, as I will attempt to demonstrate during the course of my exposition.

3.2. Actors – my study will begin with a description of the evolution of the actors at the level of the company in all regulations. This study will allow us to analyse in a comparative perspective the evolution of the identities and strategies of the actors and attempt to extract some general conclusions. Considering the diversity of national regulations and the need for clarification in the text, I will use the method of *country analysis* followed by a *general conclusion*.

Germany – the first country in my study will be Germany. Germany is a country whose co-determination model has long fascinated all those who dedicate themselves to the study of collective labour relations, especially with its *co-determination model* (*Mitbestimmung*) which compulsorily engages employees in the running of the affairs of the company by making some managerial decisions dependent on the consent of the works council (*Betriebsrat* - elected body representative of the employees). The evolution of the model has been characterised by means of an *evolution in continuity*, in which *the actors at the level of the company have gained greater bargaining strength not by a fundamental modification of the legal framework but by a modification of the strategy of the actors* ((Artus 2003)). I will begin by a synthetic description of the model in order to provide the reader with the necessary conceptual framework and proceed to a description of the evolution.

Characteristics of the German model - In dogmatic terms, the German model can be classified as a *strict dualistic model* ((Biagi 2003)): the function of representation of employees is carried out by two distinct bodies, the *trade union* (*Gewerkschaft*) and the *works council* (*Betriebsrat*). *Trade unions* are actors exterior to the company (in-house unions are forbidden) and have the duty to represent employees *as a whole* in their bargaining activity and not merely their associates. They have a very important role in German labour relations because the German Constitution *delegated* to trade unions and individual employers or employers' associations the task of regulating the labour market. Although the constitutional basis of the trade union is the general *freedom of association* (§9 German Constitution), the constitutional court has demanded that trade unions prove their *capacity to exert pressure* (*sozialmacht, drückausübendfähigkeit*) upon the social opponent (the employers) in order to be recognised as such. This led to a model of *unitary trade union* per sector (*Einheitsgewerkschaft*) ((Fuchs 2004b)), pp.14). Their activity is generally characterised as *distributive bargaining* and is exercised by means of *collective agreements* (*Tarifverträge*), which can be celebrated either with a single employer or with an employers' association. *Works councils*, on the other hand, are elected bodies representative of the employees in the workplace. They can be set up in every undertaking employing at least 5 workers. They are independent from trade unions in every aspect: they cannot call for industrial action; their activity must be limited to the borders of the internal affairs company. Their function is to engage employees in the management of the internal affairs of the company by means of extensive *information*

and consultation procedures and, most importantly, *co-determination procedures*, in which the enforcement of certain decisions of the employer is made dependant of the acceptance of the works council and, in *ultima ratio*, a decision of an arbitration board (*Einigungsstelle*). There are provisions regulating the procedure for the negotiation with the works council and the recourse to the arbitration board. Works councils may also enter into collective agreements (*Betriebsvereinbarung*, which means *understanding within the company*) with the employer. The relationship between collective agreements celebrated by trade unions and those celebrated by works councils is regulated in §77(3) of the *Betriebsverfassungsgesetz* (Statute regulating the Constitution of the company). A clear prevalence is given to collective agreements celebrated by trade unions. As long as they regulate *remuneration and other conditions of work* (*Arbeitsentgelte und sonstige arbeitsbedingungen*) they may not be derogated by collective agreements celebrated by works councils, *unless* (1) the collective agreement celebrated by the trade union expressly authorises it to do so or (2) they bring more favourable conditions to the employees. In all other situations the *Tarifvertrag* has full precedence. This is in line with the view of *distributive bargaining* of trade unions; they ensure the level playing field and the works council may only bargain more favourable provisions. *Shop-stewards* (*Gewerkschaftliche vertrauensleute*) have only a marginal role in German Labour Law, because trade unions are usually perceived as actors exterior to the company; the prevalence for employee representation inside the company is attributed in full to works councils. (for German Collective Labour Law, see (Schaub 1996).

This strict dualistic approach has been in question in the last few years in terms that some people have even talked about an *erosion of the system* ((Hassel 1999)), pp.483-505). Industrial relations studies have witnessed an evolution of the relationship between trade unions and works councils in terms of what may be named as the *coordination of strategies between trade unions and works councils*. This trend consists in the *engagement of the activity of works councils in the overall strategy of the unions*; their negotiation would have in mind not only the *internal affairs of the company* but also the general trade union policy; the trade unions, in their turn, would have in mind the *needs of specific companies* and the *pressure for derogation of the collectively agreed terms and conditions of work* in their bargaining activity in order to allow companies *to survive, to maintain occupational levels or to readjust to an environment of increased competition*.

Cooperation between trade unions and works councils – the cooperation between trade unions and works councils has become a central point in the functioning of the German collective labour relations system ((Frege 2002) and (Artus 2003)). This cooperation has had the merit of impacting upon the *behaviour of the actors*, introducing an element of change in the general collective labour relations system without introducing modifications to the *formal structure* of collective bargaining, which continues to prevail untouched. I will now proceed to analyse the *close links and interrelationships between trade unions and works councils*.

To begin with, it is often the case that works council members are also members of a trade union. Around 2/3 of all works council members are also members of a trade union (Waas Bernd in (VVAA 2006)). There is no statutory demand for this to occur, because works councils in Germany are composed exclusively of employees working in the company and not *tripartite bodies*, such as the ones found in France. In practice, works council members often feel “*safer*” when belonging to a trade union or having trade union backing, because they will often have some kind of support (legal or consultative) arising from their membership status of the trade union. This is a first factor which provides trade union with the power to influence the strategy of the works council at the level of the company, because the *unionisation* of its members will provide the trade union with the possibility of influencing – by means of training and providing legal support – the activity of the works council.

Secondly, some research ((Artus 2003)) has highlighted the *complementarities* between the *trade-union orientation* of the works council and the *bargaining relationships within the company* between the works council and the management. This relationship possesses three dimensions – (a) the attitude of the *management*; (b) the attitude of the *works council* towards the trade union and (c) the attitude of the *trade union* towards the works council - and allows us to draw up two distinct patterns of collaboration between works councils and trade unions: (1) *strict cooperation* (*Kooperative verschränkung*) between trade unions and works councils, which was interpreted as a *reciprocal relationship of use* (*beiderseitiges nutzenverhältnis*); (2) *dependency* (*Abhängigkeit*) of the works council, consisting in a dependency of the services of the trade union as the compensation for the inferiority of the bargaining position within the company caused by the strict separation of tasks between the trade union and the works council.

(1) The *strict cooperation* (*Kooperative verschränkung*) consists in a *functional differentiation* between trade unions and works councils. Each side knows what they want and what they have from the other side and they accept their borders. *They fight separately but strike together*. They are quite normal in companies with stable relations with trade unions; normally, the trade union members are also members of the works council, the trade union membership in the company does not exceed the circle of the persons actively engaged in the works council and there are no doubts about the intensity of the contacts between the works council. However, this does not mean that the works council is the “*prolongation of the trade union within the company*”; there is a strict separation of tasks between the trade union and the works council. The concept of cooperation is perfectly descriptive of the relationship between both parties because it defines a *relationship of interchange* between two separate entities. The works council however has a clear knowledge that its function may not be performed correctly without the assistance of the trade union, especially in terms of the provision of services of the trade union in terms of training and specialized counselling. The trade union sees the works council as a chance to have more affiliates, gain information about the actual life of companies and use the activity of the works council in order to train them to enforce their policy at the level of the company. Another type of cooperative relationship between the works council and the trade union which fits this category consists in the delegation to the works council of the task of applying *framework collective agreements, opening clauses* and *hardship clauses* at the level of the individual company. These are clauses contained in collective agreements celebrated by trade unions (hence *Tarifverträge*) which take into consideration the specific needs of the company in its application and allow for a *margin of discretionarity* in the application of the collective agreement (in the case of framework agreements) or a *deviation from its provisions* (in the case of *hardship clauses* and *opening clauses*). I will discuss these clauses further on, when I analyse the innovative features of agreements.

(2) The **dependency** (*Abhängigkeit*) of the trade union from the works council consists in the unilateral conditioning of the setting up of and functioning of the works council to the support of the trade union. The conditions of work of the works council are very precarious and it cannot subsist without the trade union. They are quite normal in companies gifted with an authoritarian management, rigid hierarchies and high pressure to deliver value. The general environment in the company is one of fear and the works council often feels the lack of support of the rank and file. The works council

turns to the trade union is search for help and dependency against a strong organisation which is not so keen on social dialogue and a rank and file frightened for loosing their jobs. The provision of services of the trade union is fundamental for the dependency of the works council; it provides it with intensive protection; partially the trade union sets up a person to occupy itself of the internal affairs of the company; the members of the works council participate massively on the life of the trade union as a compensation for the lack of effectiveness of their activity in the company; instead of a cooperation one can speak about a dependency because the works council is unable to subsist without the support of the trade union, it has no life not policy of its own. The trade union sees in this kind of structure a path to the intervention within the life of the company, manipulating the works council in accordance with their policy. This is also the kind of intervention that reveals that there may be social dialogue even in companies offering the most unfavourable conditions for it to occur. This is normally a *transitory situation*, because it is normally a preliminary stage to the introduction of social dialogue in the company and is maintained until it reaches enough autonomy for the works council to stand by itself and develop its own policy at the level of the company. The relationship then evolves towards the *strict cooperation model*, in which the trade union is limited to providing the works council with support and a *general policy orientation*.

Evidence: *Fehrer, Ruhr Kristal Glass and GE Energy Products* – these three cases, which should be analysed together, are very interesting cases because they illustrate a pattern of decentralisation in an individual regulation – Germany. This decentralisation was achieved by means of the coordination of the strategies of trade unions and works councils (Artus 2003), which is of extreme importance in the bargaining of (1) company-level business oriented collective agreements and (3) flexibilisation agreements. The redactors of the cases have evidenced in all three reports the importance of the cooperation between trade unions and the works councils during the negotiation procedure. This can be observed in several circumstances: firstly, the trade unions were not bargaining at the sector but at the company-level, by means of company-specific collective agreements that intended to provide the company with sufficient financial margin to undertake the restructuring with as little redundancies as possible. Secondly, the bargaining within the company – namely the bargaining of the plan for the harmonisation of interests (*Interessenausgleich*) – was firstly agreed with the trade unions, who set the bases for the company to achieve the agreement which best safeguarded the interests of both parties. This can be observed particularly in *Ruhr Kristal Glass and GE Energy Products*: in the former case, the trade unions (1) celebrated a company-level

agreements providing for an opening clause (*Öffnungsklausel*), (2) advised the works council to celebrate an agreement waiving certain elements of their wages in order to cut costs and (3) referred the works council to consultants to celebrate the most adequate plan. In fact, the consultants even referred in the Ruhr report that “The negotiations were a bilateral dialogue between the works council and the union on one side and the Italian ownership on the other side”; in the latter case, the trade union attempted to preserve as many jobs as possible within the company by means of a company-level agreement which provided for a social compensation plan to be bargained by the works council, supported by the trade union! This means that the trade union had set the framework within which the bargaining of the works council should occur. Thirdly, in all three cases the reporters evidenced the intensive communication between trade unions and works councils, each attempting to provide as much information to the other in order for both of them to reach the best result – the preservation of employment in the company. This is nothing but the decentralisation of collective bargaining towards the level of the company, made exclusively by means of the behaviour of the parties and without a change in the legal structure! But the most important point to stress is the increased relevance that the works council achieved in this procedure. The works council was the central actor and not only because they provided the trade unions with the necessary information to celebrate the company-level agreements but also because these agreements empowered the works councils to take some very far-reaching decisions – namely to deviate from collective agreements – in order to preserve employment within the undertaking. The company is the central concern of collective bargaining and the company-level actors have the main role. The trade union served as a supporting force, delegating the main bargaining to the works council, providing the framework within which the bargaining of the works council should occur and setting out its limits

This typology of cooperation between works councils and trade unions allows us to extract some preliminary conclusions about the evolution registered. *First*, it is interesting to observe that there was no modification of the formal structures of collective bargaining; the evolution was registered in the behaviour of the actors. *Secondly*, where the system formally provided for a separation of the tasks of the actors (the trade unions defended the employees as a whole and stood outside the door of the company; the works council defends the employees of the company and ignores what goes on outside) there was an evolution towards a *complementarity* of the roles of the parties. The trade unions actively support the setting up of works councils and their activity within the company but always respecting as far as possible their autonomy in order not to be accused of unionising the life of the company. The intervention in the

life of the works council is limited to providing it with counselling and training and orienting them in the general policy of the trade union. On the other hand, the trade union benefits from the information received about the internal life of the companies in order to be able to better adapt their policy to the best needs of works councils. Social dialogue comes out reinforced with this cooperation. The analysis of the agreements in point will provide a further insight into this cooperation.

France – France is also one of the most interesting case-studies in terms of collective labour relations because not only its legal scholarship has served as a model for collective labour relations in what is generally known as the *Latin-model* but also because the evolution was made by means of a mix between *legislative intervention* and *collective bargaining*. If one analyses the evolution of the collective labour relations in France, it is more than clear that there has been an attempt to introduce *social dialogue at the level of the company* but never touching upon the *managerial prerogative*. Although there is no such thing as a co-determination model, the powers of the actors at the level of the company have increased exponentially; trade unions have been aware of this growth and have attempted to control social dialogue at the level of the company in order for it not to undermine its powers. I will proceed with a short explanation of the French model and demonstrate the evolution of the actors.

Actors - Like in Germany, France may also be characterized as a dualist model, although with a very distinct configuration. The most important actor outside the company is the trade union; within the company, one has a number of actors – the *works council* and the *staff-delegate (délégué du personnel)* are the *elected representatives*; the *shop-steward (délégué syndicale)* and the *trade union section (section syndicale)* are representatives *designated* by trade unions. Trade unions enjoy an enormous strength within French companies.

Freedom of coalition is a constitutional right in France. Any employee is free to colligate with others to set up a trade union or join/leave a pre-existing trade union. This means that, unlike in Germany, there is in France no doctrine of the *capacity to exert pressure (druckausübendfähigkeit)* in order for a trade union to be recognised. However, in order to avoid an excessive fragmentation of the unionism, the French legislator took the following very original option: it recognised a *basic set of rights* to all trade unions; it granted a *specific set of rights* to the most representative (Pélissier et al. 2002) and (Ray 2006). This idea of *trade union representativeness (représentativité syndicale)* is

fundamental to understand French collective bargaining: *representativeness* means *the aptitude recognised to a trade union of representing the interests of the workforce (both unionised and non-unionised) and of promoting their interests*. The representativeness may be either *presumed* or *proved*; it is *presumed* if the trade union is affiliated to one of the five peak organisations recognised as representative; it is *proved* if it fulfils a number of criteria set out in L-133-2 of the *Code du Travail*. The representative trade unions enjoy a specific set of rights: they enjoy the monopoly of bargaining collective agreements; they enjoy a monopoly of presenting the candidates to the first round of the election of the *staff-delegates (délégés du personnel)* and the *delegates to the work council (members du Comité d'Entreprise)*; they enjoy a *right of opposition* to the celebration of derogatory agreements.

The *works council* is a tripartite body, composed by the *employer*, the *representatives of the employees* and the *representatives of the (representative) trade unions*. Therefore, it is quite different from the German works council because the French works council is intended to ensure an *immediate and oral dialogue* between all the parties (Ray, J. (2006), pp.459). It enjoys *social* and *economical* competences: the *social competences* are considered to be *any non legally mandatory activity performed essentially at the benefit of the personnel of the company*; the *economic competences* are intended to *ensure a collective expression of the employees and to allow for the permanent taking into account of their interests in the decisions relative to the management, economical and financial evolution of the company, work organisation, professional training and productive techniques*. It is important to stress that *the managerial prerogatives remain unquestioned; the power granted to the works council is merely consultative and the works council has no other rights than to be informed and consulted (in the sense of the right to emanate a reasoned opinion) of any subject matter concerning employment in the undertaking*.

The *staff-delegates (délégué du personnel)* are persons elected directly by the personnel. It composes with the *works council* the second elected body in French collective labour law. As I will demonstrate further on, in recent years it gained a great importance in companies deprived of a works council to the point that nowadays it is one of the most important bodies in French companies. It has two types of functions, its *own functions (fonctions propres)* and *replacement functions (fonctions de remplacement)*: its *own function* consists in serving as an interlocutor between the management and the workforce; its *replacement function* consists in the attribution to

the staff-delegates of the tasks that the law attributes to other organs. A *staff-delegate* may **cumulate** the functions of the *works council*, *shop-stewards* and the *committee for health and safety*. This is a very important innovation because it allowed for the setting up of an *easy social dialogue* in small and medium companies, because they would not be overburdened with representative structures.

The remaining structures are *designated structures* because they are set up by trade unions. They represent the intervention of trade unions in the life of the company. The *trade union section (section syndicale)* consists in the prolongation of the trade union into the company and it is a body destined to represent the interests of the members of that particular trade union; the *shop-steward (délégué syndical)* consists in a person designated by the trade union to represent it in the company. They have the function of negotiating with the employer because they are the privileged interlocutors of the trade union within the company.

The relationship between company-level agreements and sector-level agreements was traditionally ruled by the *principle of favourability*; company-level agreements could only improve the sector-level. However, since this principle had a turn-around in 2004, I will discuss it further on.

Having finished this small *croquis* of French collective labour law, one must analyse in what terms one can speak of *decentralisation of collective bargaining* in France. This decentralisation was achieved by means of a complicated procedure which mixed *legislation* and *inter-sectoral collective agreements* and intended to achieve a compromise between the *refusal of the loss of power of the trade unions* and *the need for more social dialogue at the level of the company*. This final result was a complicated scheme which intends to *grant trade unions the power to control the application of labour law at the level of the company*.

The Auroux Laws (1982) – the obligation to negotiate – the first relevant step in the decentralisation of collective bargaining in France was made by the *lois Auroux* in 1982. These laws introduced the *obligation to negotiate at the level of the company* in the subject-matters of *wages*, *working time* and *work organisation*. After 1989 the employer also had the obligation to negotiate in the subject-matter of equality between man and women and, in some companies, a *provisional management of employment*, which consisted in the negotiation of planned collective redundancies and the admission of people in the company with atypical labour contracts. The law intended to introduce

social dialogue at the level of the company, in order to engage the representatives of the employees in the decision-making process of the employer.

The obligation lay upon the employer who should address the *shop-stewards* or, in their absence, the *staff-delegates* in order to reach an agreement in those subject-matters. The shop-stewards who the employer should consult were the ones affiliated to the *representative trade unions*; although the employer is not kept from negotiating with minority trade unions, it is not obliged to do so. One can observe here that the legislation kept in track with the system of *trade union monopoly* in collective bargaining, by giving preference to the trade unions in the negotiation of the internal life of the company.

The system of the trade union agent (mandataire syndical) – the second relevant step in the evolution of the actors was the creation of the system of the *trade union agent (mandataire syndical)*. This system was set up in the *national intersectoral agreement of 31.10.1995* and consisted in the following logic: taking account of the *absence* and *need* of shop-stewards in numerous companies and having in mind the valuable terrain for collective bargaining that the company-level offered, the social partners reached the following system for developing collective bargaining at the level of the company. A *sectoral agreement* should determine the *themes* which could be the subject-matter of collective bargaining at the level of the company, the *limits* of the *derogation* which could be made and the *modalities* of *election* and *protection* of the employee responsible for the negotiation. The company-level agreement could be celebrated by any of the *elected representatives of the personnel (works council and staff-delegates)* who had not been previously designated by a representative trade union to exert the functions of shop-steward. This agreement had the same value as a company-level collective agreement; it should, however, be subject to the approval of a *paritary sectoral commission*, without which it would not be effective. Another possibility is the one of *agency (mandatement syndical)*: the company level collective agreement could be celebrated by one employee (independently of the fact that it was an elected representative of the personnel) which enjoyed a *mandate* from a representative trade union to that effect. The agreement was presumed valid but it was subject for a short period of time to its destruction by means of the exercise of a *right of opposition* by a majority trade union. This same system was made a law in 1996 and applied to the *Aubry Laws* concerning the reduction of working time (35h week).

The fundamental idea behind this scheme was not to bypass union power but to compensate for their absence in numerous companies. This was a *compromise strategy* destined to harmonise the interests of all the parties, of the *trade unions* – who wanted to keep control of company-level negotiations, in order for them not to undermine sectoral bargaining - and of the *employers* – who do not welcome very much union representation within the company and prefer social dialogue directly with the employees of the company, whose jobs are at stake and who know the situation better. This was a great step towards company level social dialogue which was taken back in the law of 4 May 2004. I will complete the picture when I analyse the agreements further on.

Replacement functions of staff-delegates and the system of single delegation –

I have mentioned the number of representative structures existent in French Law – the *works council*, the *staff-delegate*, the *shop-steward*, the *trade union section at the company* and the *committee for health and safety at work*. Since all of these representative structures are costly, the employer has an incentive not to set up these representative structures and deprive employees of the rights they intend to ensure. This is particularly worrisome in small and medium companies (between 11 and 100 employees) because that is where a great part of the population works. The *Auroux Law* provided that in companies where there these bodies were absent, the staff-delegate would automatically inherit the competences of these bodies.

This was once again a very important evolution, because the *simplification* of the representative structures led to their exponential growth in *coverage*, spreading within small and medium sized companies. The political objective of the solution was also laudable; since the staff-delegate is an employee of the company and a person legitimated by a direct election of the employees of that same company, it is a person who will know very well all the different aspects of the company and is in a privileged position to negotiate with the employer. The fact that it is still the same person can also provide an added value, because it will allow for the development of a *relational culture* between the parties. This *amalgamation of competences* in the same person provided a great contribution for social dialogue at the level of the company.

A point of great importance was the *economic competences of the works council*, which are exercised by the staff-delegate under these conditions. The works council has a great role to play in the consultation procedure for collective redundancies; in

companies with *more than 11 employees*, that procedure is made by the staff-delegate. The French legislation was recently made the object of a ruling of the European Court of Justice about the method to calculate the size of the workforce. The ECJ ruled about some provisions of the *contrat premier embauche*, which allowed companies not to take account of employees aged under 26 in the size of the workforce. The practical effect of the measure was that in the event that the company worker with more than 20 employees, of whom less than 11 were aged 26 or over, the employer would not have to set up a staff-delegate and could engage in a collective redundancy without recurring to the necessary consultative procedure. This legislation was declared contrary to the *information and consultation* and *collective redundancies directives*, because it would deprive *employees as a whole* of the rights granted under those directives. This reveals the importance given by the ECJ to effective company-level representation (Mestre 2007).

The provisional management of the employment in the company – another innovation introduced in the French legislation in 2005 consisted in the duty to bargain the employment in the company for each period of three years. This duty is incumbent in companies and groups of companies of more than 300 employees and groups of companies of European dimension (defined in accordance with the *Societas Europaea* criteria) and comprises three distinct obligations: (1) information and consultation of the representatives of the workforce on the strategy of the company and foreseeable effects on employment and wages, (2) the provisional management of the employment (*gestion prévisionnelle des emplois et des compétences* – GPEC – which comprises supporting measures of employability) and (3) an optional *plan of safeguard of employment* (which consists in a *method agreement*). This procedure is underpinned in three distinct pillars: (1) it strengthens the role of bargaining in the procedure by means of reinforcement of the information to be transmitted and the procedures to be followed with the representatives of the employees; (2) it activates the role of the internal labour market within companies and facilitates voluntary dismissals; (3) it opens another road for the method agreements.

This innovation in French legislation was introduced with the intention to facilitate the adjustment to the globalisation of the economy by granting companies with an instrument to reach the necessary changes to their workforce by means of a procedure destined to each an agreement. It was intended to work as a stimulus for a

cultural change by creating incentives to enter into bargaining arrangements in order to facilitate adjustment to change. Although the *duty to bargain* is not synonymous with the *will to bargain* (and to reach an agreement), the mere fact that it obliges the parties to negotiate is expected to work as a sufficient incentive to convince the parties of the benefits of bargained arrangements and function as the seed of a further partnership culture. It is underpinned in ideas of *anticipation*, *prevention* and *compromise*, as opposed to *reaction* and *conflict*.

There have been some agreements signed under the *loi de cohésion sociale* of 2005, which introduced this procedure. The agreements signed have, in general, the following contents: (1) they make clearer the content and deadlines of the procedure (e.g: which information should be transmitted and when), (2) they create or enhance the role of human resource management departments, (3) they create incentives for early retirement and (4) they contain provisions for the agreement on plans of safeguard of employment. As regards this last point, although in general trade unions see the provisional management of jobs as a euphemism for a plan of safeguard of employment, the law clearly intends to distinguish both of them and consider that the plan should be an *ultima ratio* measure, when all other options are unviable. There are even court decisions that paralysed the enforcement of plans of safeguard of employment because they were not preceded by the provisional management of jobs, which puts in a clear tone that the latter has precedence over the first (Rouilleault 2007).

Rouilleault (Rouilleault 2007) has defined the provisional management of employment as a procedure (1) destined to manage the human resources in an anticipative and preventive way, (2) in accordance with the economical environment and the strategies of the group, (3) adapted to the specificities of the company and (4) destined to engage all the actors working within the company in a spirit of cooperation. It also considered that the procedure should function as an experience to increase social dialogue in companies below the threshold of 300 employees by means of a future procedure adapted to the specificities of these companies.

The provisional management of employment is a very important innovation that is expected to change the social dialogue and culture within French companies in the event that it proves successful. The persistent refusal by French scholars and managers of the introduction of German style co-management (*Mitbestimmung*) practices within companies has led the legislator to create more imaginative solutions for the introduction of social dialogue at company level. The provisional management of

employment comes in a line of evolution that has been persistently attempting to bring the parties to dialogue and compromise but without imposing more draconian measures. This is also nothing but the reinforcement of the powers and responsibilities of the actors at the level of the company.

Evidence: Dexia and ST Microelectronics - two other very important cases were Dexia and ST Microelectronics. These cases not only provide further evidence of the tendency for the decentralisation of collective bargaining but above that the importance that the actors at the level of the company have in that process. In Dexia, the trade unions agreed on a method agreement that (1) obliged the employer to engage in bargaining with the representatives of the employees at the level of the company in order to reduce the negative impact that the restructuring procedure could have on the employment; it is worthwhile mentioning that the method agreement was celebrated with the trade unions and bound the employer to engage in collective bargaining with company-level representatives; (2) on the other hand, the method agreement also trusted the company-level employee representatives with the task of managing a job-center, which consisted in an internal reallocation program destined to avoid redundancies. The report heavily stresses the success of this reallocation program, taking into account the small number of redundancies effectively made in comparison with the project. ST Microelectronics also provided several evidences of the reinforcement of the powers of the actors at the level of the company. Although this report concerns an Italian case, the same lesson to be drawn from the French experience may be applied to the Italian situation. Firstly, the bargaining with the trade unions was brought down from the regional to the site level (and not company; each site was an independent bargaining unit); employees of the company composed the unitary trade union representation (Reppresentanza Sindicale Unitaria), which reinforced the legitimacy of the bargaining because the people most directly affected had the bargaining power. Secondly, the bargaining was made with a technical committee at the site-level. This committee consists in an atypical French style works council type body sitting at the same table the representatives of the trade unions and the management. Thirdly, the decisions of the technical committee were subject to the ballot of the workers affected, which consisted in an absolute novelty in Italian collective bargaining. This ballot helped to reinforce the legitimacy of the decisions agreed by the technical committee.

I believe that one can sum up the evolution of the actors in French collective labour relations. One can observe that the legislation has attributed a great relevance to company level representation. The diversity of actors and their overlapping functions reveal the preoccupation to ensure effective dialogue at the level of the company.

However, unlike what happened in Germany, this was made by means of a modification of the existing legal framework. *Firstly*, the *obligation to negotiate* was introduced in the legislation, an alien element in a culture in which the managerial prerogative is still unquestioned. *Secondly*, the preoccupation of *simplification* of the existing representation structures and of *ensuring* their actual *viability* on the ground, also reveal the relevance given to social dialogue at the level of the company in the legislation. A *third* very important point worth mentioning concerns the control exercised by trade unions; unlike what happens in Germany, trade unions exert a great deal of influence in the internal life of French companies. One feels that the legislation intends to provide the trade union with the function of a *watchdog* of social dialogue at the level of the company; it does not actively interfere (the bargaining is always made by employees of the company) but ensures that it is not used to *undermine* their position and *deprive employees* of their protection. This picture will be completed when I describe further on the *right of opposition* in the signature of derogatory agreements.

United Kingdom – The United Kingdom is the third country covered in my analysis and is perhaps the one in which EC Law has given a great contribution to social dialogue at the level of the company (Addison and Siebert 2002). The British system of collective bargaining is a fascinating field of study because it is in many ways quite the opposite of the European continental tradition of collective bargaining. However, the recent evolution of the system has increasingly brought it closer to the continental system, allowing one to wonder if in fact the system is not in a period of *transformation of its fundamental features* allowing for the development of a continental style *culture of collective bargaining and social dialogue*. Like I did in the previous countries, I will proceed to a short description of the system and explain the evolution of the actors.

There are two concepts fundamental to understand the functioning of the British system of collective bargaining: *single-channel* and *voluntarism*. As regards the first concept, the representation of employees in collective labour relations was made in the UK exclusively by *trade unions*, which had the task of defending the interests of the employees by means of shop-floor negotiations. This means that there was no complementary *works council* such as in Germany and in France, distinguishing the interests of the employees as a *class* and their interests and as *stakeholders* of the company. All of this was made by one body – the trade union – which had the monopoly of worker representation and the task of bargaining with individual

companies to defend by means of *shop-floor agreements* the interests of the employees both as *stakeholders* and as a *class*. The only level of bargaining was the company-level and, in the event of collective labour agreements celebrated by employers associations, there were no rules regulating the prevalence of the agreements.

The second concept is *voluntarism*, which has two distinct meanings: it intends to translate both the *abstention of the state* in the task of regulating the labour market and in the absence of any *enforceable obligation* arising from collective bargaining. The legal framework regulating collective bargaining is almost non-existent because the whole system was built upon the initiative of the parties. Even today when the state intervention in collective bargaining is growing exponentially, the intervention of the law remains punctual and makes an effort not to interfere in any way with the autonomy of the parties (Catherine Barnard in VVAA 2006). *Secondly*, there is both no legal obligation to enter into dialogue with a trade union nor collective agreements are legally enforceable (Deakin 2005). The entry into dialogue with a trade union is made by means of a *voluntary* act of *recognition*, according to which the employer recognises a specific trade union for the purposes of collective bargaining and accepts to engage in negotiations with them. *Collective agreements* are *gentlemen's agreements* providing for no legally enforceable obligations for the parties. Therefore, collective agreements in the UK do not have a *procedural* or a *normative* effect. The only way to make the obligations legally enforceable is to expressly provide the agreement with the characteristics of a binding contract (which is seldom made) and by means of a *voluntary incorporation* of the agreed terms and conditions into the individual contracts of employment. The *incorporation* presupposes a renegotiation of the contract between the employer and the employee with the purpose of including in it the provisions of the collective agreement and any legally enforceable pretension may be based only on the individual contract of employment.

The only means to force the employer into a negotiation and to enforce the provisions contained in a collective agreement which were not incorporated into a contract of employment is by means of *industrial action*. The *nature* of the labour relations is *conflictual* and industrial action is a *neuralgic point* in the system.

The British system of collective bargaining suffered a fatal blow with the judgement of the ECJ **Commission vs. UK** (C-383/92). This ruling judged upon the conformity of the *principle of voluntarism* with the *Directives on collective redundancies and the transfer of undertakings* which, as I have attempted to

demonstrate in point 2, depend on a representative body set up at the level of the company in order to be effective. The ECJ declared that this system stood against the information and consultation procedure enacted by the Directive because it made the rights granted by the Directives to workers dependent of a *voluntary act* of the employer (Hall 1996).

This ruling triggered a revolution in the British system of collective bargaining. In the last few years, the legal scholarship has stressed an evolution in the British system - caused especially by the pressure of EU Law – in the *actors* and in the *nature* of the system. The *actors* have diversified up to a point in which some even speak about the genesis of a *dual system of representation* in the UK (Gollan 2006); the *nature* of the system has become less conflictual and more concerned with *partnership* at the *level of the company* (which is different from the *shop-floor level*). I will analyse each one of these developments in detail:

Actors – the most important evolutions in terms of the actors were the *statutory procedure for recognition* and the setting up of *atypical works council type bodies* within the company. I will attempt to demonstrate the *content* of these evolutions and how they have provided for a significant contribution to social dialogue at the level of the company.

Statutory procedure for recognition – *recognition* means *the acknowledgement of an employer or two or more associated employers of a trade union, to any extent for the purposes of collective bargaining*. Recognition was traditionally a voluntary act of an employer; commentators declared that the employer had recognised a particular trade union for the purposes of collective bargaining when *there was an express or implied agreement between the employer and the trade union to negotiate over one or more of the specified matters* (Deakin 2005). Where a union had been recognised there was no statutory constraint on the employer to vary the scope of the recognition or to withdraw it altogether. Even when there was an agreement it was considered a collective agreement and hence a (non-enforceable) *gentleman's agreement*. There was also no mechanism to control the employers' *choice of union*. There was nothing to prevent an employer from recognising a minority trade union and prevent the access of the members of the majority union to the decision making process. The only means that the trade union could coerce the employer into this agreement was by means of a *threat* or *actual engagement* into industrial action.

As a reaction to the judgement *Commission vs UK*, the British Government introduced the *statutory procedure for recognition* in 1999 (with amendments in 2004). This is a procedure which allows trade unions to obtain *mandatory recognition by employers* for a period of three years. The trade union must begin the procedure at the *Central Arbitration Committee* (CAC), which has the competence to order the recognition. That procedure must be preceded by an *unsuccessful* attempt of the trade union to obtain recognition from the employer. The procedure is judged inadmissible *in limine* in any of the following grounds: the employer is bound to a pre-existing collective bargaining agreement; the union does not gather sufficient support among the workforce; more than one union applies *separately* for recognition (they may apply together); there was a successful application for the same bargaining unit in the previous three years.

In the event that the CAC declares that the trade union is recognised, the parties have 30 days to reach an agreement over the *method* by means of which they will conduct collective bargaining. The CAC may assist the parties as a mediator in the reaching of an agreement; if the parties still do not reach an agreement, the CAC is competent to unilaterally impose a method which may be substituted by an agreed method of the parties at any time. This *method* consists in a legally enforceable duty to *meet and talk* and try to reach an agreement (but there is no obligation to reach an agreement ((Deakin 2005)). The standard procedure enforced by the CAC in the absence of an agreement provides for the existence of a *joint negotiating body* in the negotiation in the company. The CAC may order recognition only for the subject-matters of *pay, working time and holidays*; in the event that the parties agree on other subject-matters during the course of the procedure, it will not be covered by the mandatory force of the decision. The most important effect of the declaration of recognition is that the employer may not derecognise the union for a period of three years and is bound to the obligations contained in the method for that period. This means that the employer is under a legally enforceable duty to meet and talk for a period of three years. The only chance for *derecognition* during that period is by means of an *agreement* with the trade union. After that period, the employer is free to derecognise the union; in the event that it refuses to enter again into social dialogue, the trade union may have resource to another recognition procedure.

The practical consequence of this measure is easy to guess although its precise impact is difficult to estimate. In order to abide for the obligations imposed by EU Law,

the British Government introduced a measure to *oblige the employers to engage in dialogue with the trade unions*. This is a revolution in a system traditionally characterised by the secular *voluntarist approach*, in which any kind of statutory intervention and obligation was unwelcome by both parties. The fact that it is enforceable for a period of three years, there is no obligation to reach an agreement and it concerns only core subject matters of collective bargaining reveals that its intention was to set up *permanent social dialogue* at the level of the company. This is in line with the same policy orientation contained in the *proactive directives* and in the *Lois Auroux* I described above.

Beginnings of a dual channel of representation – Besides the establishment of a statutory recognition procedure, whose main purpose is to subject the employer to a permanent social dialogue at the level of the company, the British collective bargaining panorama also witnessed the coming into life of a number of actors which are increasingly putting at stake the trade union monopoly in the subject matter of employee representation and defence. This development is due absolutely to the influence of EC Law and it would not have occurred without it: I am referring to the *representatives of the employees* in the procedures for *collective redundancies*, *transfer of undertakings*, *information and consultation* and *health and safety matters*.

If one analyses any of the procedures mentioned in the former paragraph, one can perceive that the regulations provide for the *specifically elected representatives*. These are the persons to be consulted in any of the procedures in the event that there is no recognised trade union or the recognition agreement with the union does not cover the entire workforce. In that situation, the employer is under a statutory obligation to invite the affected employees to hold an election to designate *representatives* (who must also be an employee affected by the measure triggering the procedure) to consult on the measure. The number of representatives is to be autonomously decided by the employer having in mind the variety of interests affected. In the event that the employees fail to do so, the courts and the legal thinking have considered that the employer is under the duty to inform each of the employees of the measure but not to consult them individually. Considering that the employer is free to determine the number of representatives, there is no obligation that the elected employee be independent from the employer. Therefore, an employee holding a managerial role (what, in the German legal thinking is named as “*leitende angestellte*”) might be elected. The only remedy for the

affected employees is to complain to an employment tribunal about the *appropriateness* of the representatives.

The role of these *specifically elected representatives* is pasted from the representative structures within the company found in Continental Europe. Although they are limited to *information and consultation* requirements, the scope of application of the Framework Directive is likely to grant them a role much larger than the one they enjoy under the collective redundancies and transfer of undertakings regulations. The procedure grants them a right to be informed and consulted *with a view to reaching an agreement* on any of the subject-matters of the regulations. Since these are bodies normally independent from trade unions – because they are applicable only in the event that no union has been recognised – they establish for the first time in the history of British labour relations a channel for the direct representation of the interests of employees at the level of the firm. The impact of these measures has been intensely studied and debated in the last few years (see, as an example, *Hall 1996* with contradictory results. The only certain feature is that at least to some extent it has changed the structure of British industrial relations because it introduced an element of dialogue and non-union representation in the legislation and practice.

If one attempts to sketch some preliminary conclusions concerning the evolution of the actors in British system of labour relations, there are two distinguishing features: **(1)** the *statutory recognition procedure* and **(2)** the *introduction of the dual channel*. An overall analysis of these features reveals that, also in the UK, there has been an attempt to introduce social dialogue at the level of the company. The revolution was more violent than in the previous regulations because it actually brought a modification to the existing structure (unlike in Germany, where the modification was in the attitude of the actors, leaving the structure untouched). The revolution consisted in obliging employers to enter into dialogue with trade unions at least for a period of three years in the core subjects of collective bargaining (being strongly reminiscent of the Auroux Laws) and in introducing other bodies for dialogue (directly elected by the employees) rather than trade unions, limited to defending the interests of the employees of the undertaking as *stakeholders*. The fact prevalence is given to negotiated agreements between the parties and the subsidiarity of the intervention of the *works council type* bodies (they are conditioned to the inexistence of a recognised trade union) helps to preserve as far as

possible the voluntarist and single-channel traditions of the UK. The only winner is social dialogue, which happens in any circumstance.

Special case: Dinosol – although Spain is not a country analysed in this report, it witnessed a very curious case that contains in itself all the elements of decentralisation of collective bargaining that I have been putting forward in this report in a body that is atypical in Spanish legislation: a National Council. The case described the restructuring of a supermarket chain that had undertakings all over the country. The Spanish legislation applicable to the sector did not provide for the setting up of national works councils, representing all the undertakings in the country; all the collective bargaining is promoted at the provincial level with the provincial works councils. The objective of the new body was to negotiate a country-wide restructuring plan, which should take account of all the needs of the individual councils, and supervise the enforcement of the plan at the provincial level. It was a French style works council, sitting at the same table the representatives of the employer, employees and trade unions. The characteristics of the movement of decentralisation of collective bargaining and, in particular, of the influence of the EC Law (EWC (Directive 94/95CE) and Societas Europaeae (Directive 2001/86)) are more than evident here. This national works council was freely set up by the parties; its configuration was not predetermined by national legislation but was the result of an agreement; it was destined to serve as a body representative of all the parts of the company (the provincial works councils); it was destined to coordinate and supervise the enforcement of the plan of the company at the provincial level; it comprised representatives of trade unions, which represented the interests of the employees as a class in the process. This case reveals that the model of the European company (Moreau 2007) is growing and expanding into countries where the implementation of social dialogue at the level of the company has traditionally been more difficult, namely in southern Europe. The greatest interest of this case lies in the confirmation of the potentialities offered by the model of the company (a participatory company, based upon the representation of employees as stakeholders in the process) present in the Labour Law Directives: opponents of participation mechanisms often claim that there is no participation unless the law requires it to do so; the voluntary character of this procedure and the evident influence of EU Law is a sign of expansion of the model of decentralised collective bargaining imposed by the Directives by means of a spill-over effect, i. e. the virtues of the participatory mechanisms and the tradition of dialogue are recognised to such an extent that they are beginning to be applied in areas where the setting up of those participatory mechanisms is not demanded.

Preliminary conclusion: I believe that one can dare to conclude that there is sufficient evidence in the cases to confirm the first part of my thesis; that the powers of the actors at the level of the company have grown exponentially in all the regulations under study. Dinosol is the most astonishing case because it consists in the setting up of a EWC type body in a situation where the law did not provide for it. The impact and influence of European Law is more than evident in it; one can consider it as the recognition of the virtues of the *European model* of the company which underpins the EWC. The participation of trade unions in the process is also worth mentioning, providing another contribution to my description of their role as supervisors of the process of decentralisation.

Nevertheless, I concede that it is not entirely correct to draw general conclusions from an isolated case. This is where the remaining cases may assist in supporting my conclusion. *Fehrer*, *Ruhr Kristal Glass* and *GE Energy Products* are illustrative of a pattern of decentralisation occurred in a single country, Germany. This decentralisation was undertaken by means of the *cooperation* between trade unions and works councils and a redefinition of their role in collective bargaining. Trade unions are not only much more company-centered (as the number of *single-employer agreements* reveals) but they also chose to limit their negotiations to the definition of the margin of negotiation (*Handlungsspielraum*) delegated to the works council. The works council assumes the main role in contemporary collective bargaining, in order to seek for company-specific solutions to ever changing circumstances, and the trade unions simply guarantee that the employer does not take advantage of the structural weakness of the works council to undermine sectoral collective agreements. The picture is completed with *Dexia* and *ST Microelectronics*: in *Dexia*, the method agreement celebrated with the trade unions clearly gave the employee representatives the dominant role in the management of the job-centre and the permanent information and consultation procedures which should be undertaken with management. It is worth mentioning that *Dexia* is an example of a very successful socially responsible restructuring which exemplifies the possibilities of social dialogue. In *ST Microelectronics*, the bargaining was brought down from the regional to the site (and not company) levels in a round table gathering employee representatives, trade unions and management (the *technical committee*).

I believe that all of these cases reveal the trend towards the decentralisation of collective bargaining and the reinforcement of the powers of the actors at the level of the company. The major difficulty may be to frame the cases in the context of their

national regulations; if we manage to make this effort, we can conclude without doubt that the future actors of collective bargaining are located at the level of the company.

3.3. Agreements – after having studied the actors, my study will proceed to an analysis of the evolution of the agreements in all the regulations under study. This is a natural step because since collective bargaining is made by means of agreements, after the description of the actors one must study their actual activity in order to understand the depth of the trend in decentralisation. As one will see during the course of the exposition, this chapter must be read together with the preceding one (the actors) in order to understand fully the evolution I have been describing.

There are several types of agreements bringing a novelty into national systems of collective bargaining. I mentioned in the introduction to this chapter that the traditional function of collective bargaining was to ensure a *level playing field* between the undertakings operating in a given market. Although this traditional function is still dominant, the evolution (in the actors) has opened room for new types of agreements. I have attempted a classification of these new agreements into three big categories: *flexibilisation agreements*, *procedural agreements* and *partnership agreements*.

a) flexibilisation agreements – *flexibilisation agreements* can be defined as *agreements establishing a deviation at the level of the company from standards set out in the law or in a collective agreement*. These deviations are normally made in a *negative way* (i.e. *in pejus*, establishing less favourable conditions than the ones set out in the standard) and are subject to a certain control. This control is normally made by the trade unions, normally by means of the *actors* I described in the preceding paragraph. I will proceed to analyse two types of these agreements, the opening clauses (*Öffnungsklauseln*) in Germany and the *derogatory agreements* (*accords dérogatoires*) in France. I purposely left the UK out of this analysis because collective bargaining in this country is normally made only at the level of the company; there are almost no sectoral collective agreements and there are no rules of articulation between the levels (because they are *gentleman's agreements*), because the regulatory framework is based upon *voluntarism*. Therefore there is no sense I talking about *flexibilisation agreements*, because the need for flexibility in the companies is achieved by a simple renegotiation of the collective agreement with the trade union.

Opening clauses (Öffnungsklauseln) – “*opening clauses*” is an umbrella concept describing a number of clauses inserted in collective agreements that empower plant-level actors to negotiate about issues that are normally dealt with by the sectoral collective agreement (*Hassel 1999*). Given the division of tasks between the trade union and the works council in the strict dual-channel system of representation I described above, the opening clause can be interpreted as a *delegation* of the regulation of the terms and conditions of work to actors located at the level of the company. This delegation is made by means of the insertion of a clause in the agreement, which normally sets out the limits of the powers granted to the company-level actors. In the event that nothing is said in the agreement, the collective agreement will have precedence over any other determination contained in the company-level agreement about wages and other conditions of work which is not more favourable (§77 of the *Betriebsverfassungsgesetz*). This form of *delegation* to the company-level can be named “*controlled decentralisation*” because it grants to the actors located at the level of the company the power to regulate a solution they did not want to regulate at the central level while setting out the limits to the margin of discretion granted to those actors.

There are several types of *opening clauses*. *Hassel* (op.cit. pp.496-501) identified the following typology:

a) *Opening clauses for working time arrangements* – this type of agreement grants companies the possibility of setting out their own working time arrangements by means of a company-level agreement as long as they respect the limits set out in the sectoral agreement. Whereas the standard working week would be 40h, companies were granted the possibility of establishing company-specific deviations as long as the average number of hours worked over a reference period would equal 40h/week.

b) *Working time reduction without compensation in pay* – this type of agreement grants companies the possibility of reducing working time down to 30h and the correspondent wages by means of an agreement with the works council as long as it proves that it is necessary to save labour posts.

c) *Hardship and exemption clauses* – this type of agreements is intended for companies which are close to entering into a bankruptcy procedure. As long as the company proves that it is encountering economical difficulties and has a plan describing the strategy for

its viability, it can be exempted by means of an agreement with the works council from the obligations contained in the collective agreement, *maxime* in terms of wages.

d) Company-specific agreements – the individual employer has the capacity to celebrate collective agreements (*Tariffähigkeit*) in Germany. Given the *rules of precedence* between competing collective agreements (*Tarifkonkurrenz*) developed by the Federal Labour Court in Germany, the rules of company-level collective agreements take precedence over sectoral-level agreements. Decentralized bargaining by concluding company level collective bargaining agreements is possible only however, if the employer finds a trade union that is willing to enter into such agreement. Most activities and branches in Germany, however, are covered by a single trade union, the majority of unions forming part of the German Federation of Trade Unions. The situation becomes a bit similar to the British one, in which one dominant trade union ensures the level playing field by concluding company specific agreements which take into account the specific needs of companies and ensures equal burdens as far as possible. In this case, the celebration of the company-level agreement (and the deviation from the sector-level agreement) will be justified on account of the difficulties facing companies. In recent years, however, a couple of smaller trade unions have established themselves partly as the result of certain discontent among employees relating to the bargaining policy of the big trade unions. In some cases these little trade unions have offered themselves as partners of company-level agreements with the provisions of these agreements pushing aside the provisions of the concurring association-wide agreement (Bernd Waas in VVAA 2006, pp.33). Considering that the number of company-level agreements are nowadays almost half of the collective agreements celebrated in Germany (Fuchs 2004b, pp.64) there are fears that this will lead to a fragmentation of the trade unions in Germany and a weakening of the social power (*Sozialmacht*) of trade unions.

e) Framework agreements – framework agreements consist in a modification of the legal technique of collective agreements. On certain key issues, those agreements no longer provide either specific stipulations or binding minima; rather, they define *parameters for plant-level bargaining* which must be adapted to the individual situation of the company by means of an agreement with the works council. This is a very clear example of the introduction of a more decentralized bargaining structure resulting from

changes in the sectoral collective bargaining agreements without a modification in the formal structure of collective bargaining.

I believe that it is possible to observe the intention of these clauses. Given that the one *size fits all* solutions were no longer adequate to the situation of individual companies (because the question is not so much how to grant employees a bigger share of the pie but to preserve their jobs and ensure the viability of the company) the agreements had to adapt and recognise the different needs of companies. The solution was a compromise between the need of *flexibility* and the need to *prevent wild deregulation* and ensure a *level playing field*. The standards would still be contained in collective agreements, which would themselves allow under certain conditions for *deviations* by means of company-level agreements. The *pre-conditions* and *limits* for these deviations were contained in the agreements themselves. This also brings us back to the question of the *coordination* between *trade unions* and *works councils* I analysed a few pages above; this is also a strategy of *coordination*, because the margin of discretionarity granted to works councils is limited by the provisions of the collective agreement.

Evidence: Ruhr Kristall Glass and Finger & Pelz - *The cases Ruhr Kristall Glass and Finger & Pelz provide for examples of this type of flexibilisation agreements in Germany. Ruhr Kristall Glass provides us with an example of the functioning of an opening-clause; the competent trade union in the sector acknowledged the difficult situation of the company and celebrated a single-employer agreement containing an opening-clause, which allowed for the works council to agree with the management on the deviation from the wages set out in the collective agreement under certain limits. It is very important to point out that (1) this undermining of the wages set out in the collective agreement was made with the purpose of preserving employment levels and (2) that the actual determination of the amount of wages to be paid was made by means of an agreement with the works council, within the limits set out in the agreement. In order to understand the importance of this kind of agreement, one has to take into account §§ 77 of the German Law on the Constitution of Companies (Betriebsverfassungsgesetz), which says that trade unions have in principle an exclusive competence to determine wages and the general conditions of work. This means that the law considered a strict separation between the tasks of the works council and the trade unions; with this opening clause – a legal technique which is being increasingly used in Germany – this separation is being increasingly blurred, obliging to a redefinition of the traditional roles performed by the fundamental social actors, the trade unions and the works councils. Finger &*

Pelz, on the other hand, gives us an example of the possibilities of decentralisation offered by single-employer bargaining. Finger & Pelz concerned a situation in which a company was restructured from insolvency by means of employee share ownership. The report stressed the major role that the trade union played in the restructuring procedure; the single-employer collective agreement signed – which provided for extensive wage cuts in relation to the sector and a substantial increase in working time – was custom made to provide the company with sufficient financial margin to undertake the restructuring procedure successfully. It is easy to understand the role and function of these flexibilisation agreements. These agreements are destined to preserve the occupational levels of the company by allowing for the adaptation of its labour costs to fluctuating economical circumstances. The danger of undermining the conditions of competition in the sector is controlled either by setting limits to the possibilities of deviation (such as the opening clauses) or by negotiating the deviation with the trade unions themselves, who will judge the existence and extent of the need to deviate. The fact that Germany follows the model of one trade union per sector helped to control this deviation of sectoral collective agreements, by trusting upon unions the duty to ensure that company-level collective bargaining obey a public interest (such as the safeguard of occupational levels) and that they are not used to achieve competitive advantages by undermining the sectoral terms and conditions of work.

Derogatory clauses (Accords derogatoires) – one of the most important evolutions in French collective labour relations was the modification of the relationship between the *different levels of bargaining*, which provided a great impulse to collective bargaining at the level of the company. This modification was intended to provide a great impulse to *company-level bargaining*, which should become - together with the sector-level agreement - the dominant field of negotiation ((Mazeaud 2006)).

Traditionally, the articulation between the levels of bargaining in France was made in accordance with the *principle of the favourability*: the rules established at the lower level could not contradict those established at a higher level unless they brought more favourable provisions. This was the notion of *ordre publique*, according to which each level of negotiation should provide for some *minima* which could only be improved upon by the other levels. The law of 4 May 2004 revolutionised this scheme by means of a profound change to the relationship between the different levels, destined to give a push to social dialogue at the level of the company. *Nowadays, the collective agreement celebrated at the level of the company may derogate the collective agreement celebrated at the sector-level unless the collective agreement expressly prohibits its*

derogation. The principle is that the company or plant agreement can include provisions different to the ones in the branch level (or professional or inter-professional), including less favourable provisions for the employees. *The old system will be applied only if the upper-level agreement clearly says the company agreement cannot do so*. The old system became an exception. With this text, *the emphasis is clearly placed at the company (or plant) level, whereas it used to be at the branch level*. Now, in case of conflict between the different levels (company and branch), this is the decentralized text that will be applied, whether it is more or less favourable for the employees. The only *exceptions* to this rule are contained in article L. 132-23 of the Code du Travail: firstly, this concerns some mechanisms functioning at a wider area than the company: mutual benefit insurance systems financed by funds collected for vocational training, collective guarantees concerning contingency, etc; secondly, the professional classification or minimum wages – here too, the company agreement cannot contain provisions departing from the branch (or professional or inter-professional) agreement. French law shifted from a *positive list system* (general prohibition with exceptions where deviations were allowed) to a *negative list system* (generally allowed, except for some specific subjects).

This modification of the relationship between the levels of bargaining must be linked to the persons who can sign the agreement. The idea here is the one of the *majoritarian principle*, which has two dimensions – a *positive* and a *negative*. According to the positive dimension, the validity of the collective agreement is conditioned to it being signed / approved by the trade unions gathering at least half of the votes expressed in the last elections to the works council. In the event that the agreement is celebrated by a shop-steward designated by a minority trade union or by an *elected* or *mandated* employee it is conditioned to the *absence* of a declaration of *opposition* from the majority trade union. This means that a majority trade union may *paralyse* the enforcement of an agreement in the event that it is signed by a shop-steward designated by a minority trade union or one of the persons habilitated to celebrate company-level agreements in the absence of a shop-steward. (Mazeaud 2006; Ray 2006).

b) Procedural agreements – another type of agreements which have been spreading throughout the regulations under study are the *procedural agreements*. These agreements have *distinct names* across the regulations – *accords de méthode* in France

(Petrovski and Paucard); *rationalisierungsschutzabkommen* in Germany; *information and consultation agreements* in the UK - and are applied in a *variety of circumstances*, *maxime* collective redundancies but also provisional information and consultation, anticipation of change, negotiation of productive procedures, etc. I will attempt in this point to bring out the distinct configurations of these agreements and try to sketch a typology.

The common point in these agreements is that they set out *a detailed procedure for information and consultation of the representatives of the employees*. The objective of this procedure is to determine the *calendar* and *stages* to be observed in a certain subject-matter (e.g. : collective redundancies) and attempt to reach a *negotiated solution* with the representatives of the employees in that same subject-matter. The contribution of this procedure in relation to the legal framework is that it allows the parties to specify the points that are of greater interest to them and adapt them to their specific needs and interests. It consists in a negotiated procedure for information and consultation, attempting to reach an *optimal harmonisation* of the interests of both parties (the employer and the representatives of the employees) by means of an *autonomous agreement* in a certain subject-matter. Legislation is seen as *undesirable* and *subsidiary* by both parties, because the standard procedure set out there is seen as not fit to their specific needs and interests. It is a phenomenon of *self-regulation*, similar in everything to the ones I described in the EWC and SED. They also gave implicitly accepted that autonomous social dialogue at the level of the company is the better way to solve conflicts of interest and allow for the readaptation of companies to changed circumstances.

There are *two types* of procedural agreements, which I coined as *pure procedural agreements* and *agreements establishing a permanent procedure for consultation and strategic anticipation of change*.

Pure procedural agreements - the pure procedural agreements might be defined as agreements determining the conditions under which the employee representatives will be *informed and consulted on the economical and financial situation of the company and be given the opportunity to formulate alternative proposals (and receive a reasoned answer) to an economic plan originating the reorganisation of a company with an impact over the employment*. Sometimes, these agreements subject the conclusion of the procedure to the reaching of an agreement over

the *social measures* (i.e. measures with an impact over the rank and file of the company) to be adapted in that specific context.

These agreements have two distinct characteristics:

(1) *They are agreements subject to a specific event in time* – these agreements do not intend to establish permanent dialogue at the level of the company; they are intended for a specific situation and are not triggered if that situation does not occur. These agreements intend to regulate the consultative procedure to be enforced during the course of subject-matter they are intended to; that is the reason why they are above all used in the context of collective redundancies and the transfer of undertakings, because the situations in which EU law establishes a consultative procedure to occur.

(2) *The agreements regulate the stages of the procedure* – these agreements are intended to regulate the concrete steps that must be taken in order for the procedure to reach a successful conclusion. The parties implicitly agree that the legal framework does not suit best their needs and agree on a procedure that intends to harmonise to the greatest extent possible the interests of both parties in that specific subject-matter. This creates an interest of both parties to abide by the agreed terms and conditions, because its negotiated character leads to the creation of interest of any of the parties in reaching the conclusion of the procedure.

Some scholarship has attempted a classification of these agreements (Petrovski and Paucard). There are three types of procedural agreements:

(1) *Agreements at the benefit of the employer* – these are agreements which have as a main provision the engagement of the signatory parties to the deadline of the procedure, and whose object is to determine the date from which the planned measure may be enforced. This is nothing but the acceptance of the parties of the legislation and an agreement of the parties to abide by the provisions in the legislation. The only originality might consist in the agreement of the parties not to pronounce collective redundancies before the termination of the procedure. Each step of the legal regulation of the procedure is made object of a densification by the parties and adaptation to their needs but never derogating or contributing substantially to its modification.

(2) *Agreements of mutual guarantee* – this model describes the type of agreements which condition the agreement on the calendar of the procedure to the guarantee of the social measures provided for in the agreement. The management of the deadlines of the procedure are associated to a substantial advantage to the employees. The parties attempt to negotiate the social advantage to be granted to the employees in the

beginning of the procedure in order to prevent greater posterior conflicts. The representatives of the employees will accept the pre-defined calendar presenting all the advantages to the employer in exchange for the engagement on the enforcement of the several social measures agreed in the beginning of the procedure. Any future social measures will be subordinated to this initial agreement.

(3) *Pure procedural agreements* – this model of agreement consists in a trade-off between the social measures provided for in the agreement and the management of the deadline of the procedure. There is an acceptance of both parties of the interests of the other party to the procedure; the employees recognise that the employer does not want long, burdensome and indeterminate procedures for the negotiation of an agreement; the employer recognises that the acceptance of the employees of the need to engage in a restructuring must be subordinate to any kind of *social measure of accompaniment*, something that may serve as a compensation for the acceptance of the procedure. The parties begin the procedure by looking for a solution considered legitimate and acceptable by both in order to terminate the controversy and subordinate the conclusion of the procedure to the reaching of an agreement in that specific subject-matter of great importance to the employees. Normally, the passage of one stage of the procedure to the other is subordinate to the reaching of an agreement in the previous stage. It is a procedure that carries risks for both parties; the employees might be tempted to demand excessively and see the procedure terminated without an agreement and the redundancies declared without a compensation; the employer might want to terminate the procedure quickly and agree on something that does not exactly best serve the interests of all parties.

A sum-up of this type of agreements reveals that they are agreements intended to establish a self-regulated procedure for a successful measure. Their main purpose is to reach an agreement on compensation and search for alternatives to the planned measure for restructuring. The typology reveals that there is a kind of *trade-off* between the reaching of an agreement and the termination of the procedure; they are distinct types of harmonising the interests of both parties in the concrete restructuring measure, balancing the calendar and the termination of the procedure with the bargaining over the social measures. They are not intended to establish a permanent type of social dialogue nor engage employees in the success of the company, but only to regulate the terms and conditions of participation of the workforce in a restructuring measure.

Evidence: ABN AMRO, Alcatel and Thomson Video Glass – these three cases, which should be analysed together, concern a very important instrument of collective bargaining contained in French legislation, the method agreements (accords de méthode). We can read in the ABN AMRO report that the method agreement was intended to develop social dialogue at the level of the company under an idea of compromise and commitment, attempting at a maximum to avoid conflicts, which were seen as undesirable to both parties. They imply that both parties acknowledge the need to take into account the interests of the other (i.e: the need for competitiveness and the need to safeguard employment) in the conformation of the working relations within the company and establish a procedure to reach a composition of the interests of both parties in the running of the affairs of the company. It is an autonomous procedure based upon the recognition of the employees as stakeholders of the company and the need to reach consensus. One should mention that the reports in ABN AMRO and Alcatel provide a highly successful picture of the functioning of method agreements, since the company managed to achieve its restructuring plan with far fewer redundancies than initially expected. It is also interesting to notice that the method agreements are celebrated with the trade unions, although the employee representatives at the level of the company are the ones who are competent to engage in the dialogue. This is nothing but the confirmation of the thesis I put forward in the beginning of my paper, of the reinforcement of the powers of the actors at the level of the company – maintaining the trade unions as supervisors - and the development of autonomous procedures of dialogue with those same actors.

Agreements establishing a permanent procedure for consultation and (strategic) anticipation of change - this is a distinct type of procedure, rather different from the one I analysed before. Whereas the former types of agreement intended to regulate the procedure for information and consultation in a specific subject-matter – and hence the pressure to reach an agreement and the social measures of accompaniment are the dominant themes throughout the procedure – this type of agreements is much closer to the information and consultation agreements I described in the proactive directives. These are agreements which go a step further than the former and accept social dialogue as an integrating part of the company; the object of these agreements are the information and consultation provisions over several subject-matters which are liable to have an impact over employment in the undertaking. They are no longer subject to a *specific subject-matter* and are more *anticipatory* and *strategic* in their character.

The best example of these agreements is the *information and consultation agreements* arising from the British experience of the transposition of the Framework Directive. The British Government avoided from the beginning *one-size-fits-all solutions* and bet upon the technique of *reflexive law* to introduce permanent company-level bargaining (Deakin 2005). Reflexive law consists in a legal technique according to which the substantive legal provisions are not made directly by the law but by means of an agreement between the parties. The object of the legislation should be to create the *conditions* (i.e. procedure) for the parties to reach an agreement and ensure that their agreement does not jeopardize the objectives of the legislation. Individual organisations should be able to develop their own information and consultation arrangements tailored to their specific circumstances by means of *voluntary agreements*.

The subject-matter of the procedure is set out in such broad terms (*a*) *recent and probable developments of the activities of the undertaking and economic situation; b*) *the situation, structure and probable development of employment within the undertaking and on any anticipatory measures envisaged, in particular when there is a threat to employment within the undertaking; c*) *decisions likely to lead to changes in work organisation and contractual relations*) that it is not possible to determine with precision in which situations there is a duty to consult (Schäfer 2005). The objective is to establish permanent social dialogue at the level of the company and achieve with it an anticipation of change, an acceptance of the need for companies to readapt and the actual engagement of the employees in that process.

Evidence: Novelis – *Novelis is also a very interesting case because it reveals the possibilities that the proceduralisation of the information and consultation procedures have. Novelis is a case where the participation mechanisms were proceduralised with the trade union! The management of the company – which was under foreign ownership and subject to the philosophy of the American style shareholder value – agreed with the trade union in addition to the Betriebsverfassungsgesetz on a voluntary agreement setting out the diverse stages of the process and compromising to take into account of the interests of the employees in that process. This voluntary agreement (I stress the voluntary character of the agreement and its binding value, since it was contained in a single-employer collective agreement) contained a series of mechanisms coordinating the behaviour of all the parties involved in the restructuring – the management, the works council and the trade union – and was intended to achieve the harmonisation of interests of the parties throughout the procedure; it was set up under the principle of “redundancies as ultima ratio”, meaning that the purpose of the procedure was to*

enforce the restructuring but always trying to achieve alternatives to redundancies. This is a case which reveals the potentialities of the proceduralisation of company-level dialogue and the involvement of employee representatives in restructuring procedures, even in an environment where the management had little room for manoeuvre (they essentially followed orders from the Canadian headquarters) and the country had far-reaching participation rights in its labour legislation. If one attempts to contextualise it within the framework of the paper, there are three distinctive features of the case worth mentioning: (1) the voluntary participation agreement was celebrated with the trade union at the level of the company (i.e: it was a single employer agreement); (2) it was destined to coordinate the actions of the management, trade union and works council and (3) the major role in the procedure was attributed to the works council, which had the backing of the legislation and the agreement. This case also contains the three elements of my thesis, (a) the decentralisation of collective bargaining, (b) the autonomous conformation of the participation procedures and (c) the reinforcement of the powers of the actors at the level of the company.

c) Partnership agreements - a final type of innovative agreements can be named as *partnership agreements*. I defined above *partnership* as *a participatory process leading to high-trust, cooperation and compromise between management and labour leading to the engagement of employees in the success of the company – instead of simply demanding more pay and better working conditions – and to their active involvement as stakeholders in the policy of the company* (Frege 2002). These are agreements intended for the engagement of the employees in the success and change of the company. These agreements are usually named “*pacts for employment and competitiveness*” (PEC) and can be defined as *mutual accords between management and workforce representatives to resolve company-specific problems related to employment and competition. Works councils cooperate in order to cut costs and boost productivity. In return, the employers generally promise to forgo planned dismissals, protect threatened jobs or even create additional ones, and to preserve or even expand the production site affected* (Seifert and Massa-Wirth 2005). They are agreements which combine three distinct elements: *employment security, competitiveness and partnership* ((Davies and Freedland 2004)). I will now proceed to a brief description of these pacts.

One should begin by stating that these agreements can be used both in *prosperous* and in *ailing* companies. Although the precise measures that are likely to be adopted in each situation are distinct, both types of companies can engage in such agreements. The objective of the agreements is normally to achieve *internal flexibility*

of the workforce, understood as a more *dynamic* and *company specific* use of the internal human resources. Several studies (Rehder 2003) have attempted a classification of these agreements and have come up with distinct typologies. Berthold et al. (2003) distinguished between two distinct types of pacts, “*pacts for adaptation*” and “*pacts for prevention*”. The first type of pacts was usually bargained by ailing companies and composed a set of measures destined to *reduce labour costs* and achieve *internal readjustment* (e.g. : reduction of wages, non-paid working time, lay-offs) without engaging in a procedure for collective redundancy. The second type of pacts was used by prosperous companies and were destined either to *prevent future difficulties* or to *boost the competitiveness* of the company. The instruments of *internal flexibility* used in pacts for prevention consisted in *profit-sharing instruments* and *flexible working time accounts*. Rehder (2003) followed another typology based upon the existence of compensation reduction. He considered that there could be *a) pacts with compensation reduction* (subdivided between “*pacts for investment and compensation reduction*” and “*pacts for employment and compensation reduction*”) and *b) pacts without compensation reduction* (subdivided between “*pacts for investment and productivity enhancement*” and “*pacts for employment and worksharing*”). “*Pacts for investment*” and “*pacts for employment*” stand as proxies for “*pacts for prevention*” and “*pacts for adaptation*”. Therefore, for Rehder, the deciding criterion was not the *adaptive / preventive* character of the measure but whether it had been achieved with a cut in wages.

The *internal flexibility measures* used by the partnership agreements deal with four key themes: wages, working time, organisation adjustments and early retirement. Since the majority of these measures are normally burdensome for the employees and are translated in a degradation of the terms and conditions of work (Bispink and Schulten 2003), it is normal that they are offset by some kind of guarantee from the employer. The incentives offered by the management for the employees to engage in a partnership agreement are normally a *compromise not to engage in a collective redundancy or a plant closure or even a detailed plan sketching future investment and justifying the reasons for the sacrifices asked from the employees*. Even in companies under prosperous conditions, one can expect to find instruments for wage freezing and working time extensions because these measures allow firms to respond quickly to rising product or service demand without having to make capital investments or having to hire additional staff in the short term. The more intensive use of the existing capital

stock lowers capital costs per unit of output (Seifert and Massa-Wirth 2005). Partnership agreements, in this sense, essentially ask employees to make a trade-off between *job stability* and a *reduction in wages*.

Therefore, partnership agreements are not the result of a unilateral managerial decision but of a bilateral (and often multilateral, because trade unions and employers associations are normally present at the meetings as advisors to the parties) bargaining between the representatives of the employees and the employer. They must be interpreted as a *compromise* between the employer and the rank and file, recognising that both parties have a *common interest* in the functioning and prosperity of the company and that both are willing to make a contribution to that effect.

The legal instruments used to set partnership agreements are quite variable. The normal instrument is by means of a *company-level agreement* as defined in the regulation (*Betriebsvereinbarung, accord d'entreprise*). In some situations they are made by a collective agreement celebrated with an individual employer. There are also situations in which the partnership agreement takes the form of an *atypical agreement* in the regulation (*Regelungsabrede, accord atypique, workforce agreement*). The irrelevance of the legal form reinforces the idea that the agreement takes the form of a *compromise / understanding* between management and labour in which each one of the parties is interested. It is a phenomenon of self-regulation and agreed anticipation.

Their main advantages of partnership agreements are the *adaptation of companies to changing circumstances*, the *strengthening of the role of the employee representatives in company decision-making*, the *encouragement of integrative bargaining* and the *decentralisation of collective bargaining*. However, they result from a *precarious compromise* between employee representatives and trade unions and are the result of *a unique set of circumstances specific to each organisation*; they are not likely to be transferable as a whole from one company to another.

If one attempts to sum up the main lesson to be taken from the study of the evolution of the agreements, one can easily understand that the national structures of collective agreements have been evolving and there has also been in the agreements an evolution towards company-level bargaining. The same considerations one made in respect of each individual regulation for the actors are applicable; the evolution in Germany has been made by means of the autonomy of the actors without a modification of formal structures; the evolution in France has been made by means of legislative intervention

and a compromise of the social partners; the evolution in the UK has been made by means of the pressure of EU Law but always maintaining as far as possible their voluntarist traditions. A global look at the evolution reveals that the trend towards company level bargaining has been achieved by three paths: **(1)** by means of allowing for the derogation of the sector-level collective agreements. The traditional function of collective bargaining (ensuring a level playing field) is maintained and the derogation agreements simply allow for a correction; **(2)** by means of regulating at the level of the company the necessary (information) and consultation procedures; **(3)** by means of engaging the employees in the success of the company. There is a clear line of evolution in these agreements, from *distributive* to *integrative* bargaining; there is an increasing acceptance by all the parties concerned of the *need* and *possibilities* of social dialogue at the level of the company. This is in line with the partnership approach I enunciated at the beginning of the text.

***Evidence: IBM FRANCE** – IBM FRANCE is a very important example of partnership agreement in the form of a pact for employment and competitiveness. The company has a long history of restructurings, being well embedded within the culture of the company. It is mentioned in the report that it could be correct to say that the company was in a constant restructuring. This fact was no secret to anyone and the renovation of the staff was permanent. Therefore, the employees could expect redundancies as a normal part of the life of the company. The trade unions and the management agreed on a method agreement containing a clause for the provisional management of employment, which was set up to establish ad hoc information and consultation procedures within the company in order to achieve risk anticipation. The agreement had two clauses of great important importance: one set up mechanisms to help the employees of the company achieve employment outside the company in the event that they were made redundant; this mechanism consisted in a network of contacts destined to grant an opportunity to the employees to sell their skills on the labour market; it is connected with the specificities of the sector, in which there is a great demand for skilled labour and there is recognition of the quality of the staff engaged in IBM. The other consisted in the internalisation of the costs of the restructuring, for the employees that did not want to leave the company, normally by means of mobility within the group. The company tended to see this internalisation of the costs as an investment that would be more than compensated by the profits arising from the restructuring. Therefore, employees knew with what they could count when they entered IBM. Job tenure was low but there was the expectation that the value of the firm specific skills that they get in the company will be compensated in the labour market. IBM set up its human*

resource management in obedience to this idea, promoting the training and the constant renovation of the staff and setting up mechanisms destined to help employees achieve the transition to other companies. Employees that were not made redundant were kept within the company but the profits arising from the restructuring were compensated by costs of their maintenance. This was the technique that the company used to achieve quick and permanent restructurings.

3.4 conclusions

I believe that it is possible to attempt to draw some preliminary conclusions regarding the evolution of national collective labour relations. I have been trying to describe a general movement of *decentralisation of collective labour relations* in all the jurisdictions under study. This movement was performed by means of the *strengthening* of the position of the actors at the level of the firm and by means of the *modification* of the *function* of collective labour agreements. The strengthening of the actors was achieved in Germany by means of *cooperation* between the trade unions and the works councils; in France by means of a *simplification* of the representative structures and the introduction of the duty to engage in social dialogue; in the UK by means of the *statutory procedure for recognition* and the coming into life of *non-union bodies* of employee representation. The evolution of the agreements was achieved by means of allowing for the *derogation* of the sector level agreements, the *self-regulation* of the mandatory procedures for information and consultation and the *engagement* of the employees in the success of the company.

I believe that the *links* between the evolution of the actors and the evolution of the agreements is more than evident. *The strengthening of the position of the actors was a means to achieve the flexibilisation and the innovation of the agreements.* Without the cooperation between works councils and trade unions and the simplification of representative structures there would be no room for *derogatory* or *innovative* agreements; without the strengthening of the position of non-union employee representation bodies there would be no room for *innovative agreements* because they presuppose a reinforcement of their role in the company.

The influence of European Law in this evolution is more than evident. I tried to reveal above the evolution of the instruments of European Law on worker participation. I tried to bring out the evolution of the directives - (1) from an application on certain specific situations destined to create a level playing field towards a much more general

and indeterminate application destined to incentive social dialogue; (2) from the *implicit* demand of structures for the representation of employees to the *explicit* provision of works councils; (3) from a *static* information and consultation procedure towards the *delegation* of the actual determination of the consultative procedures to the parties at the level of the company in order to reach harmonisation by means of *reflexive law* – and explain how this evolution had an underlying consistent and persistent intention of *promoting permanent social dialogue at the level of the company*. The evolution in the national regulations was more than similar. In all the jurisdictions under study the actors at the level of the company gained an immense relevance; the procedures of information and consultation became more dynamic (in the sense that they were agreed by the parties themselves); the field of coverage of social dialogue became much more ample covering every aspect of work organisation. I believe that I am not exaggerated to state that *permanent social dialogue* is increasingly becoming a part of the life of European companies.

The most curious fact is the role of trade unions throughout the process. It is understandable that trade unions are fearful of the movement of decentralisation of collective bargaining because that is able to make their role secondary and there is the danger that the employer would control the trade union and use company-level bargaining to undermine the collectively agreed terms and conditions of work with the trade union. Trade unions seem to have gained a new role in this process: whereas their role and strategy is still to a large extent base upon the idea of crating a *level playing field* between undertakings, they seem to have assumed the position of a *watchdog*; they seem to have taken the responsibility of ensuring that company-level bargaining is not a means of eroding collective agreements but a response to a true public interest, which is to ensure the competitiveness of the undertakings and the maintenance of occupational levels. In this sense, the cooperation between trade unions and works councils is indissociable from opening clauses and the innovative agreements (the trade unions themselves might instruct the works councils of this possibility and on how to conduct the negotiations); the simplification of employee representative structures at the level of the firm and the new relationship between collective agreements is indissociable from the right of opposition recognised to representative and majoritary trade unions; the beginnings of a dual channel system of representation in the UK is indissociable from the statutory recognition procedure (because they only operate in the event that the employer did not recognise any trade union). This is the reason why I decided to coin

this evolution as *controlled decentralisation*: because it is made always under the auspices of a trade union.

4. Conditions for the evolution

4.1. Up to this point I have been describing the evolution of the regulations. However, it is more than evident that between the letter of the law and the actual facts of life there is a great distance. There is also the danger that one takes up isolated cases of successful social dialogue and attempt to draw general conclusions from them, blurring the whole picture. Since collective labour law is to a large extent procedural, in the sense that it does not determine the content of the agreements itself but merely provides a framework for the parties to reach the optimal solution for both, its application cannot be made by means of legislative act because it depends on the willingness of the actors to actually engage in social dialogue. Therefore, this article would no be complete without the reference to some sociological studies undertaken which bring out the favourable conditions for the development of social dialogue and what can be expected from the actors evolved.

Carola M. Frege (Frege 2002) has taken advantage of the field research conducted by H. Kotthoff on the actual dynamic of the actors within the firm and attempted to draw a typology of the functioning of works councils. The main contribution of Kotthoff's research consisted in highlighting that the behaviour of the parties is entirely predetermined by rational interests but is also shaped by the social encounters of the actors in the workplace. Kotthoff conceptualised the social interactions between the actors at the level of the firm as an *organisational social order* (*Sozialordnung*), which includes rational strategies on both sides as well as the symbolic, affective dimensions of the daily interactions of the actors. The organisation is a lived entity which evokes patterns that influence to a great extent the politics of the actors. Frege conceptualises that the organisational social order might range between two poles, **(1)** the *integrative community* and **(2)** the *instrumental market relations between the actors*: the first highlights the extreme importance that personal relations between the actors takes place within the firm; the second stresses the absence of group identity and the strategic human resource management character of the company.

The main contribution of this theory is the perception that the *social order* of a given company shapes in a deciding way the dynamics of the actors located at the level of the firm. The strategy and the relationship of the relationship between the

management and the works council is influenced in an overwhelming way by the social order of a company. This means that the enforcement of collective bargaining at the level of the company and the actual impact of the laws pressing towards this result is not dependent of the legal technique but on the strategy between the actors.

Based upon this idea, Frege drew up a typology of works councils. In companies where the social order is of an *instrumental market relational type*, one can find three types of works council: **(1)** the *ignored* works council; **(2)** the *isolated* works council; **(3)** the works council as *part of the management* (i.e. subordinated to management). In countries where the social order is of an *integrative type*, one can find three types of works council: **(1)** the respected regulator works council; **(2)** the respected steady works council; **(3)** the works council as a co-operative counter power.

Frege also cited one curious study from Kotthoff reporting the evolution of the works councils from instrumental market relational companies to integrative companies. This was achieved by means of abandoning the strategy of the *class-conflict* ideology towards the *organisational citizenship ideology* (*Betriebsbürgerstatus*). This implied a change in the attitude of the employee representatives from a *vindictive approach* (more, more, more, never enough) towards an *identity approach*, in which the employees would perceive themselves as *citizens of the company* and comprehend that their success and welfare would be bound to the success of the firm. However this implies that the management accepts employees as citizens of the firm and is willing to enter into dialogue with them in order to engage them into the success of the company. This *marriage of interests* between both parties is a precondition for cooperative relations within the firm to be established.

4.2. This leads me to the question of determining which factors may influence the development of this *integrative social order* within the firm. I have been able to identify the following factors:

Factors unfavourable to the development of social dialogue – there are several factors which might pose difficulties to the development of social dialogue within the company.

(1) Foreign anglo-saxon ownership – foreign Anglo-American investors are not exactly enthusiastic about social dialogue, because they perceive it as a threat to their *managerial prerogative*. The general idea of investors about labour relations is that

employees are part of the assets of the firm and that social dialogue is a conflictual and burdensome process. The firm is the *property* of the shareholders and the shareholders are the only entities to whom they should account. Wages are the only consideration for the investment that employees make in the firm.

(2) Dismantling of the company – the dismantling of the company, especially by means of a network of contracts, that social dialogue an increasingly difficult task. Since managerial decisions are frequently taken abroad, without providing the managers of the subsidiary with any kind of possibility to influence it (the managers of the subsidiary are nothing but the “*puppets*” of the upper level management, frequently knowing the managerial decision taken at the upper level at the same time that the works council is informed) any attempt to introduce social dialogue in this kind of subsidiaries is fictional.

(3) Unwillingness of the parties to cooperate – the parties to the social dialogue are frequently influenced to a great extent by conflictual ideologies that make social dialogue an extremely difficult task. Their bargaining position is irrefutable and leaves no other alternative for the other party than to accept the proposal or enter into industrial action (what we would call in Portugal “*a dialogue of deaf people*”).

Evidence: FU, VE and Alcan Singen – these three cases, which should be analysed together, all contain examples of how an uncooperative management may jeopardise all attempts to establish a more participative structure at the level of the company. It is evident in **FU** that the traditional culture of consensus and bargaining existing in Dutch companies was not appealing to the management of the company. Following the reorganisation of the company along the international business line model, the Dutch management felt that it had no kind of autonomy in the strategic decision-making of the company. The strategic decisions were taken in the UK office by UK managers, who felt that they did not have to account to employees and had fiduciary duties merely in relation to the shareholders. The Dutch management also lost its autonomy in relation to the management of the company; whereas they had been autonomous until the restructuring, serving the local market and having power to take all the necessary decisions, the strategy of the company then became defined at the central level. The management saw itself in a situation similar to that of the employees, without any substantive knowledge of the strategy that was drawn at the central level. The works council also saw its task increasingly difficult because the distance between the site level and the decision-making level became greater. **VE** is a case that has some similarities with the former case. The implementation of the international business line model meant that the lower layers of

*management had no knowledge of the strategy of the company, which was drawn up at the central-office level. In order to make things worse, the philosophy of management of the company was configured under the idea of American shareholder-value paradigm, which meant that the concern of the management was to deliver rapid profits and increase share prices. The restructurings of the company – and it had a record of several – were essentially undertaken by means of reduction in force, which is a euphemism for redundancies. Plans for redundancies were normally well received with an increase in share prices. There were no mechanisms of communication and transmission of information within the firm and the lower levels of management had no idea of the plans for restructuring undertaken at the upper levels of management. **Alcan Singen** consists a case that comes in the line of the former. The Canadian group was dominated by the ideas of prioritising short-term shareholder value and decided to reorganise its production sites in accordance with the idea of setting up strategic business units. The management at the local level existed merely for legal reasons and had no more autonomy than the employees of the company. The strategy was drawn at the central level and the local management merely enforced it. The central management was adverse to social dialogue. This setting conditioned the possibilities of action of the works council that merely undertook a reactive role, negotiating the compensation of the redundancies because it felt that it had no power to influence the strategic decision-making of the company. These cases also reveal the structures of companies also influence the possibility to develop more participative structures. This is particularly evident in multinational companies. I attempted to evidence in the former cases (FU, VE and Alcan Singen) that the position of the management at the site level is not very different from the position of the employees; the Alcan Singen report clearly mentions that the local management only existed for legal reasons and it merely followed orders from the upper levels of management, who had the control of the company and were not keen on social dialogue. This is a very difficult reality to fight, since national legislation in this process is ineffective. This is a problem that can only be addressed at the international level. Corporate Social Responsibility might be a strategy to fight this problem, although it struggles with the difficulties of the enforcement of soft law.*

Factors favourable to the development of social dialogue – there are on the other hand numerous factors which might contribute to a great extent the development of a bargaining culture at the level of the company.

(1) Acceptance by all the actors involved of the need for change and willingness to enter into a dialogue – this is the necessary consequence of the integrative social order I mentioned above. There are usually five main arguments that might influence the decision of the parties to enter into social dialogue (Bryson et al.

2006). **(a)** it reduces the costs of hiring and firing and allows to preserve and create incentives for firm-specific investments on the part of the employees; **(b)** it increases trust and cooperation between the management and the workforce and prevents both sides from deviating towards selfish short-term interest; **(c)** social dialogue increases the information flow between management and labour and reduces the information asymmetries between both parties. More information creates a more informed decision process and allows for the reaching of new and better solutions. The disclosure of information on behalf of the management helps employees understand the reasons underpinning the managerial decision; the disclosure of information on behalf of the employees helps the management to understand the situation of the workforce and devise a solution which will preserve firm-specific investment and reduce the costs of hiring and firing; **(d)** the works council may support the diffusion of best practice; **(e)** the works council may foster industrial upgrading, by influencing the management to consider human capital and help the company to position itself in higher quality markets.

(2) Strong cohesion of trade unions – I attempted to highlight above the intervention of trade unions in the *decentralisation process*, by means of what I coined as *controlled decentralisation*. The dangers of a fragmentation of trade unions were evident in the French panorama, which led the legislator to introduce first, the idea of *representativity* and secondly, the idea of *majority*. A strong cohesion of trade unions is a necessary precondition for any successful decentralised collective bargaining to occur because trade unions will no longer be centred in fighting for more power but in ensuring that decentralised bargaining does not result in the undermining of their power.

(3) Possibility of agreements turned towards the business – trade unions, besides united, also need to be mindful of the conditions of this brave new world. In an age of structural unemployment, emergence of new markets and insuperable cost-competition from the far-east, the idea of collective bargaining must evolve from an idea of *distributive bargaining* towards an idea of integrative bargaining, intended to preserve the competitiveness of the company. This means that collective agreements must recognise the needs for flexibility of modern companies and try to find a level of equilibrium within those demands in order to preserve social peace and employment. Opening clauses are an example of this recognition.

Evidence: (several cases) - the most important element in achieving sound social dialogue at the level of the company consists in the acceptance by all the actors of the need and advantages of engaging in social dialogue. The cases where this is more evident are Dinosol, ST Microelectronics and the German cases (Ruhr Kristall Glass, Fehrer and GE Energy Products). These cases have in common the perception of the parties that they have a common interest in the company and that cooperative (as opposed to conflictual) collective bargaining is the best solution for their difficulties. Since I analysed them in another context within this paper I will not repeat them here. The autonomy of local management is also a useful strategy for the development of social dialogue that could be of great relevance and importance in multinational companies is the one we can find in Novellis GbmH. We can read in the report that the strategy of the central management was to provide the local management with the furthest extent possible of autonomy, in order for the company to imbed itself in the local framework of industrial relations and develop the strategies it saw fitter for the achieving of the success of the company. This is a favourable condition for the development of a sound culture of industrial relations, provided that the management is willing to engage in social dialogue.

5. Conclusions

I believe that it is possible to sum up the main ideas of my exposition and attempt to provide the thesis underlying the whole text.

(1) the recent panorama of collective bargaining has shown an increasing trend of *decentralisation* of collective bargaining towards the level of the firm. This trend is performed by means of an evolution in the *identity* and *attitudes* of the actors. The actors at the level of the company have gained an increased relevance and position in the whole panorama of collective bargaining. This is made by means of *cooperation between trade unions and works councils* (Germany) and the *coming into life of new actors at the level of the firm* (France and the UK). European Law was a great influence in this evolution because several directives impose, either implicitly or expressly, the existence of representative structures at the level of the company. The attitude of the actors has also changed a great deal from a *vindictive* towards a *cooperative* attitude. Trade unions serve as *watchdogs*, disposing of several mechanisms to avoid that company level bargaining is used as a means of deregulation and undermining of their position.

(2) the agreements have also changed a great deal. Traditionally, collective agreements were destined to regulate terms and conditions of employment and ensure a level playing field between undertakings. Company-level agreements were marginal and

reduced to the interests of the workforce within the company. The recent evolution has also revealed a change to in the agreements. *Firstly*, collective agreements are more sensitive to the needs of companies and provide for mechanisms for the preservation of the competitiveness of companies; *secondly*, collective agreements open room for company-level bargaining by allowing a margin of discretionarity to the actors at the level of the undertaking (always under the control of trade unions). Company level collective agreements have also gained a great relevance, multiplying procedures for information and consultation which go from adapting the legal procedures to the needs of companies to establishing permanent social dialogue at the level of the company and even engaging the employees in the success of the company. Once again, EU law provided a great impulse to this evolution: the reactive directives had a strict procedure of information and consultation destined to equalise burdens; the proactive directives were set out to a much broader scope, under a political will to promote dialogue at the level of the company. This was achieved by means of reflexive law, providing the parties with all the necessary conditions for them to reach the optimal bargained solution. This is also evident in the innovative agreements because they were all voluntarily celebrated by management and employees under the same political orientation – the acceptance of the benefits of social dialogue at the level of the company.

(3) Innovations are not made by legislation. Although regulation might be helpful to provide an impulse to the development of social dialogue, the *attitude* of the parties is perhaps the deciding factor. Successful social dialogue at the level of the company depends of an *integrative social order*, which is entirely dependent of the parties. There are several factors conditioning this development that one should have in mind when trying judging the impact of the legislation.

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