

Trade union and collective bargaining in multinationals

From international legal framework
to empirical research

edited by Fausta Guarriello
and Claudio Stanzani



**Sociologia
del lavoro**

FrancoAngeli

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Foreword

by *Tiziano Treu*^{*}

The study presented in this publication should be commended, for it proves that attention is now being paid to the topic of transnational collective bargaining. This topic is still not high on the list of priorities in Italy, either for analysts or experts, for they still focus their efforts prevalently on national issues.

A group of researchers from the International Society for Labour and Social Security Law were appointed to work on the issue and they were presented their final report, edited by Fausta Guarriello, at the Global Congress in Turin (4-7 September 2018).

The research study is also noteworthy as it focusses on the monitoring procedures for and implementation of different types of Transnational Company Agreements (TCAs). As the numerous papers in this publication have admirably shown through their analysis, this aspect remains the weak point of the TCAs and may even be considered the Achilles' heel of transnational industrial relations as a whole (Leonardi-Zito).

The study also provides detailed analysis of the agreements to pinpoint useful elements which might help us bridge the gap between the terms of the agreements and their impact in practice (Stanzani).

The numerous contributions to this publication reveal that the collective bargaining arena is currently very lively and growing.

The study examines agreements concluded with large multinational enterprises which are therefore deemed company agreements due to their scope and nature. The proliferation of these agreements confirms that this is a crucial level of bargaining, in the effort to build a system of transnational industrial relations, which is deemed preferable to agreements at the sectoral level. The significance and spread of these company agreements has been further boosted by the decentralisation of production and bargaining procedures, a process that has taken place in all national systems, including those traditionally based on sectoral or multiemployer agreements.¹

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¹ As a result of the growing trend towards decentralisation and the divergence of systems, not only in industrial relations, the way in which competencies are currently shared between

The tendency towards decentralisation has also been addressed by legislators in several European countries, albeit in different ways and with varying effects. Spanish legislators reversed the levels in the bargaining hierarchy, preferring to govern the main aspects of employment contracts via company agreements, rather than sectoral ones. The French law of 2016, although less radical in its changes, nonetheless granted decentralised bargaining the power to rule on all issues, except those over which higher levels of law retain competence.

The 1994 European Directive on European Works Councils promoted the establishment of these councils and thereby, indirectly, the spread of decentralised collective bargaining.

The results presented in the paper by Rehfeldt demonstrate that Transnational Company Agreements have multiplied since 1994 when the Directive entered into force, and particularly after 2000. As Fausta Guarriello reminds us, “*The recently revised OECD Guidelines for Multinational Enterprises, the ILO’s MNE Declaration updated in 2017, the 2000 Global Compact and the 2011 United Nations Guiding Principles on Human Rights have all served as sources of inspiration for these agreements.*”

These trends dispel the widely held opinion, including among experts, that collective bargaining would suffer an inevitable decline under the combined pressure of new technologies and globalisation. While these trends are clear, the verdict is still out on how the shift from national to company level in industrial relations will affect the quality of working conditions and the system as a whole.

Comparative studies, including those from non-union sources such as the OECD’s Employment Outlook 2018, reveal that balanced governance of industrial relations, with its positive impact on employment, employment quality, and a fair increase in wages, can only be achieved through a “regulated” system of decentralised bargaining, based on efficient coordination between the different levels.

To return to the topic in hand, many of the reports, including Rehfeldt’s map, stress the importance of the fact that transnational collective bargaining has been implemented in a relatively consistent way, including during the extended period of global economic crisis.

It is also useful to consider how the content of these agreements has evolved, becoming sharper and more assertive, and extending to encompass decentralised company activities – suppliers and subcontractors included.

the levels of bargaining in central European countries has become unworkable. Here, national agreements play the central role in governing sectoral labour relations in the broad sense, while company-level bargaining ensures that the rules, particularly those relating to labour organisation, are customised and applied in a way suited to the company in question, and that pay is improved proportionately to reflect the level of company profits.

Further, the content has changed according to the changing context. For example, there has been a dramatic decline in the number of agreements which cover restructuring, company crises and the adoption of crisis anticipation procedures. No agreements of this kind have been concluded since 2013, reflecting the diminishing effects of the crisis.

I also find it remarkable that the terms of the agreements, although they cover a rather broad variety of topics (from workplace safety to corporate social responsibility, working time to vocational training, and even trade union rights) pay special attention to fundamental labour rights, especially those enshrined in the International Labour Organisation (ILO) Declarations and Conventions.

The understandable and vital aim of this was to promote the effectiveness of ILO standards: although institutionally it is the ILO's Member Countries which are held to comply with the core standards, they are also addressed to multinational enterprises. Their scope extends to national operations and to global supply chains, where compliance with decent working conditions is more likely to be undermined.

Given this aim, it is hardly surprising that these documents mainly take the form of framework agreements and that much of their content focusses on procedural matters.

This procedural content, being coherent with the primary goal of the agreements, is not in itself a sign of weakness. Quite the contrary: the procedural nature of the agreements may be the most effective and realistic way of entering into an arena – that of supranational agreements – which is new both in its scope and due to the nature of the parties involved. Laying down procedural aspects may help pave the way for further steps forward, made possible by the improved dialogue between those involved and the mutual trust which develops from dialogue, before tackling other important and more controversial topics.

Nevertheless, the usefulness of the procedures can only be assessed by looking at how well the procedures are implemented and how effectively the enforcement provisions ensure compliance.

As amply demonstrated in the introduction by Fausta Guarriello, the enforcement tools supporting the evaluation and monitoring procedures and conflict resolution mechanisms have also been fine-tuned over the years. Not only are workers' representatives usually involved in these procedures, but some of them go far beyond the simple conciliatory measures of traditional agreements, including the social clauses of international trade agreements, even going so far as to take on an arbitration role.

Numerous positive results have been recorded, particularly in companies with the most experience (Scarponi). In these companies, trade union organisations can make use of pertinent supervisory measures. For instance,

they retain the right to report violations of the agreement to joint committees and to carry out workplace inspections.

Nevertheless, these novel elements are not widespread and have been difficult to implement in practice.

It has also become more difficult to implement these agreements due to the growing distance between the decisions of multinational groups, with their increasingly centralised group management, and local practices.

Several contributions indicate that this distance, along with the complexity of the issues at stake, weigh down the relations between the parties involved at different levels, leading to ineffective and even frustrating outcomes for both sides: not just workers' representatives but local managers too, who are often excluded from important decisions (Leonardi - Zito). That is why Fausta Guarriello emphasises the need to involve local players, not only in raising awareness of the agreements and disseminating the information at all levels, but also in reporting and dealing with complaints.

The study also highlights another important element, relating to the nature and role of the parties involved in transnational bargaining. It confirms that European Works Councils (EWCs) continue to play a crucial role both in drawing up and monitoring these agreements, and more generally in creating a favourable environment for transnational bargaining.

Despite an increase in the number of agreements drawn up in partnership with trade union organisations in Europe, agreements concluded by multinational enterprises with EWCs still make up the lion's share of the existing number. The increase was driven by a dedicated directive produced by the European Metalworkers' Federation (EMF) in 2006, after which other federations followed suit. Guarriello remarks that the renewed proactivity of trade unions reflects a fear of greater company control over EWCs, as well as a desire to keep workers' participation separate from negotiation.

One aspect I would like to highlight, as I believe it is relevant across the board, is the importance of both the environment for social dialogue which is developed in companies, particularly by the parent company (Guarriello), and the national context of industrial relations in which the transnational agreements are drawn up. This is relevant both for the parties involved in the agreement and the content of the texts themselves.

The agreements drawn up by German multinationals reflect the country's codetermination model, which emphasises the central role of Works Councils in monitoring company labour relations and negotiating many aspects of the labour relationship. French multinationals, on the other hand, prefer to negotiate with trade union representatives rather than with company workers' representative bodies, the composition of which, incidentally, in France vary considerably from company to company.

It remains to be seen how the tendencies reported in this study of agreements concluded over the past few years will evolve, following the

recently introduced French regulation strengthening the role of company trade union representatives, but only in consultative roles. The question of how bargaining tasks are to be shared out and how much influence trade unions have over the appointment of workers' representatives has, however, been left unanswered.

This issue is particularly pertinent as the same piece of French legislation has granted more space for decentralised collective bargaining, albeit according to a rather ambiguous set of rules and standards. The aim was in fact to strengthen negotiating practices by making it compulsory to negotiate on a series of specific topics at both national and local levels.

The direction taken by multinationals in the UK has also been considerably affected by the national context. The role of Works Councils has been interpreted in a minimalist way, these bodies being seen simply as recipients of information and possessing purely consultative rights.

The regulatory context has a broader impact than solely its effects on the specific content of agreements. It is no coincidence that most of these agreements are concluded with European multinationals and are influenced, however indirectly, by the European social model. However, as Guarriello reports, the experience of the EWCs in practice reveals that it is not possible to anticipate major changes across multinational companies by looking at the European dimension alone.

On the other hand, the content and interpretation of the agreements do reflect the actions and approaches of the individual national governments, as demonstrated by several contributions to this and other studies.

National governments in Europe have become increasingly interventionist in recent years, including in areas such as industrial relations which are traditionally resistant to heteronomous interventions.²

These interventionist trends in the different countries do not resemble each other but for a few common points. For the most part, they have accentuated the regulatory and policy divergences, including in the relatively homogenous areas in which the European Union has been trying to create convergence for some time now; and this has led to unprecedented nationalist tendencies in the social domain as well.

More generally, several comparative studies confirm that the role of the State, although weakened by globalisation, remains pertinent partly because globalisation has not fostered the emergence of supranational public organisations equipped with regulatory powers on a par with national ones (see the report delivered by J. Cruz to the ISLSSL Global Congress in Turin at www.ISLSSLTorino2018.org).

² See T. Treu, *La contrattazione collettiva in Europa*, DRI, 2018, p. 388 ff.

Just as State intervention has a decisive effect on the context in which (transnational) company agreements are concluded, it also has an impact on how their effectiveness is assessed and enforced.

Guarriello reminds us that governments have a duty to provide support for the implementation of the OECD Guidelines for Multinational Enterprises. They must commit to promoting them effectively by setting up national contact points tasked with disseminating information about the content of the agreements, ensuring their correct interpretation, and resolving any questions raised by stakeholders (trade unions, NGOs or individuals). The ILO makes similar demands, requesting that equivalent procedures be established for the “confidential” resolution of conflicts (although these are not currently shored up by arbitration procedures as requested by the trade unions).

In addition to the fact that their contents are not always binding, another reason for the weakness in the agreements’ implementation procedures is that they are not based on a common, supranational legal statute, and therefore do not have an unambiguous legal foundation to rest upon.

In other words, the transnational agreements need to generate their own legal standing since, beyond national borders, the agreements only possess the legal force granted to them by the negotiating parties (Stanzani).

Company agreements can envisage specific obligations for each party, in particular for the company signing the agreement. For this reason, they have an advantage over collective sectoral agreements concluded between associations representing the parties.

It is no coincidence that sectoral trade union federations themselves emphasise the importance of dialogue with multinational companies when drawing up European and international framework agreements (F. Guarriello).

Company agreements can have a direct effect on the governance of individual relationships with employees, when these companies take decisions as part of their management tasks, as long as they still comply with the obligations enshrined in the agreement.

However, even this advantage is an uncertain one: if a company’s management fails to comply with its obligations, it cannot be legally obliged to do so, for there are no provisions for legal enforceability.

Certain clauses in the agreements referred to in the publication, which recognise the exclusive legal competence of a given national court, are significant, since they suggest that there is a clear awareness of the fact that these agreements urgently need a legal basis to rest upon. However, this is still not enough, because national courts are reluctant to rule on issues whose scope extends beyond national borders.

The decision of some European trade union federations to request a negotiating mandate on behalf of their national affiliated organisations (Rehfeldt) is another significant step forward.

The value of this mandate, however, will depend on the wording used to describe it, i.e. its scope and precise details. In any case, it is only effective within trade unions and even then only grants the authority to call upon non-compliant organisations to fulfil their internal responsibilities: it would be unlikely that any authority would act to ensure compliance.

The mandate is not binding in the external legal arena, in a similar way to the obligations taken on by multinational companies in agreements with their partners, whether these are works councils or trade unions.

In the current international legal context, the issue can only be resolved at the national level, if individual national governments decide to do so. In other words, the effectiveness of these transnational agreements, just like other international sources of legislation, such as social clauses in trade agreements, cannot rest on any other legal basis than the national legal systems where the agreements are to be implemented. Only the individual State can grant them the power of law in their own national legal system.

No significant decisions in this regard have yet been adopted, but there are legal avenues available for taking them, as I have tried to explain in my report to the International Congress in Turin.

Many national legal orders, not just in Europe, grant external authority (*erga omnes*) to collective agreements drawn up by the social partners concerned. Recognising the legal status of agreements drawn up by supranational organisations for the national associations belonging to them and their associates would be a different form of application, but nonetheless justifiable if deemed useful for governing relations involving the members of the concluding parties, although they may be operating in different national contexts.

Such actions would also ensure that supranational regulations are more effective than what can be achieved when international organisations attempt to exercise their (weak) influence over the national associations belonging to them.

Company agreements concluded by multinationals could also benefit from the support of national legislation if such agreements are deemed to be binding for the signatories, in particular with regard to the obligations undertaken by multinational companies. How effective this recognition is, and how the terms of the agreement are enforced, will depend on the specific national laws which may be worded and structured in a variety of ways. Dedicated legal analyses are needed to explore these avenues further.

National support could also be provided upstream of the bargaining process, and some governments have already adopted this approach, i.e.

granting workers' representative bodies negotiating and participatory rights akin to those described in the German codetermination regulations.

The studies in this publication reveal further opportunities for investigating the future of transnational collective bargaining and, more generally, the supranational governance of industrial relations, particularly when major issues are at stake.

The interaction between the global and local levels of industrial relations is more decisive than ever for the future of this domain (as Guarriello underlines).

Quite simply, it is vital to tackle and overcome the divide between the action of trade unions, which remains local, and that of multinational groups, who operate on the global scale. This difference also reflects an asymmetrical capacity for mobility and power between the workers, whose roots are in their local area, and the actions of companies, whose operations have no boundaries.

Attempting to redress these asymmetries is tantamount to tackling the most critical issue in the current panorama of national industrial relations.

To succeed, joint action by the institutions and social partners at both national and supranational levels is needed.

We need to work together to establish a joint commitment to achieve this goal: it will take time and effort, but it is the only way forward for the future of industrial relations.

In order for such a commitment to be successful, the stakeholders, and in particular the trade unions, must from the outset strengthen their own supranational operations and equip themselves with new and different tools from those developed during the century of national trade unionism.

Transnational agreements, especially those pertaining to company groups, are just one such tool.

Although they are far from perfect and not legally binding, they are important above all in that they promote respect for international labour standards within the shifting confines of multinational groups, including their increasingly complex supply chains. These agreements could in fact gain legal support if we link them to the current trends in national legislations which recognise corporate groups as having a single legal personality, to ensure that the parent company takes on responsibility, in some form, for the actions of companies within its group. As Guarriello reminds us, the French law of 2017 is significant in this regard, as the parent company or group leader is obliged to be on the lookout for violations of human rights and environmental protection laws perpetrated by its subsidiaries and suppliers, including those operating outside its national borders.

Not surprisingly, one of the few cases of a collective agreement being effectively enforced transnationally concerns a company dispute triggered when a Korean trade union appealed against their company's attempt to lay

off employees, violating the collective company agreement. This appeal was lodged against the American parent company of the Korean subsidiary. The New York judge claimed competency and acknowledged that the collective company agreement had indeed been violated. Furthermore, the parent company was deemed to have unduly interfered in local management, although the judge did not go so far as to reaffirm the responsibility of the parent company, citing a special exception.

If this trend were confirmed, the single legal liability of corporate groups, already recognised by court rulings on some specific issues, including in Italy, would be extended beyond national borders.

However, the direction that we see being pursued in existing experiences, including those described here, confirms that in the absence of a supranational authority, a plethora of different strategies and implementation tools are needed to ensure effective social governance of global relations.

These tools can be put in place either by public authorities, national and international institutions, each according to the legal form that is their prerogative – treaties, conventions, regulations – or by social partner organisations with codes of conduct, guidelines and collective agreements.

The current weakness of international organisations competent over social issues restricts their capacity to contribute to the social governance of globalisation. That is why it is important to make the best possible use of the existing tools, to further by conventional means the convergence and international observance of fundamental values and social standards, as a bare minimum.

States must play a decisive role here by using the legal avenues described above, and more generally by complying with their monitoring duties, which draw them into the arena of supervising the activities of multinational companies, thereby strengthening the agreements concluded between parties (Guarriello).

Part I

Multinational companies' framework agreements: towards global industrial relations?

1. Learning by doing: negotiating (without rules) in the global dimension

by *Fausta Guarriello*

1. Introduction

The dynamic evolution of International Framework Agreements (IFAs), concluded between the management of a multinational enterprise and one or more entities representing the workers – primarily sectoral federations, European or international, but also European Works Councils or one or more national trade unions – has increased and become more widespread since the year 2000. These are voluntary agreements, entered into without the benefit of a binding legal framework, either European or international, in the absence of clear provisions defining the rules by which they are to be implemented (i.e., which subjects are legitimately entitled to sign them, the mandate, the form, the effectiveness of the agreement itself, as well as the tools by which their implementation is to be monitored and overseen, the provisions for dispute resolution in the absence of a relevant legal framework and also of national regulations governing the domestic effects of agreements negotiated at a transnational level). In other words, agreements like these are operating in a legal void, in which the only binding power lies in the level of obligation that the negotiating partners have decided to give to the commitments they signed up for in the agreement.

The situation of legal uncertainty in which this kind of agreement develops should not be overestimated: these agreements possess the legal effectiveness of a contract which, both in the common law tradition and in civil law legal orders, has the full force of law between the Parties (Van Hoeck, 2017). Actually, it is the Parties themselves that define the scope of application, the rights and obligations of each Party, duration and renewal terms, procedures for monitoring and supervising implementation. These are procedural rules that are typical of the compulsory part of a collective labor agreement, the purpose of which is to establish jointly the rules and procedures that the Parties agree to abide by during the negotiation and the implementation of the transnational agreement. At this current stage in the evolution of transnational negotiations (over 173 International Framework Agreements have been concluded), what is especially interesting is the attention devoted to their actual implementation, which until now had always been the Achilles' heel of these procedures (Daugareilh, 2017). The rules on

transparency and providing information on the content of the agreements to all corporate subsidiaries and local trade unions are being strengthened, especially in terms of: joint implementation monitoring, bottom-up procedures to handle complaints, joint training exercises, mechanisms providing for periodical reporting and inspections in local subsidiaries. Furthermore, there is a marked tendency to include in the transnational agreement's scope of application the entire supply chain and subcontractors used by the multinational company, as well as laying down sanctioning mechanisms for infringements by third party companies in fulfilling their contractual obligations: this highlights the procedural and institutional dimension of these agreements, even suggesting that the intention may be to establish a core system of transnational industrial relations.

There is a considerable variety of sources which, albeit indirectly, have contributed to the shaping of this new system. First of all, Directive no. 38/2009 on European Works Councils (EWCs), which updated Directive no. 45/1994 establishing the EWCs and strengthened the rights to information and consultation of workers' representatives in transnational corporations, and acted as the driving force for collective bargaining in agreements with multinationals (see below: Zito), as well as promoting the voluntary extension of workers' representation to non-European subsidiaries, through the establishment of Global Works Councils. The existence of the EWCs in the European Union and the practice of regular periodical exchanges and social dialogue between the corporate management and the EWCs have favoured the development of bargaining practices *praeter legem* – that are not regulated by law – especially in multinationals under European control and management, which account for the vast majority of companies that have concluded International Framework Agreements (see below: Rehfeldt). And this can hardly be a coincidence.

Secondly, among the international sources underpinning International Framework Agreements, we need to mention the following: the OECD Guidelines on Multinational Enterprises (1976), recently revised and strengthened especially in terms of States' obligations to supervise the activities of multinational enterprises; the ILO Tripartite Declaration on Multinationals (1977), revised and updated in 2017 in order to include the concept of due diligence in contractual relations with third companies, the promotion of the Decent Work Agenda, and the respect of human rights throughout global supply chains (see below: Papadakis); the 2000 Global Compact and the 2011 United Nations Guiding Principles on Business and Human Rights. Although these are all instruments of non-binding soft law, these sources have promoted the development of a culture of social dialogue. They have also encouraged multinationals to endorse conventions on fundamental rights, including through the adoption of Corporate Social Responsibility (CSR) programmes, entailing tools such as charters and codes

of conduct, which these ‘new generation’ International Framework Agreements appear to have developed out of (see below: Gottardi, Daugareilh).

The contents of International Framework Agreements show a fair amount of continuity with CSR practices: IFAs are based on the ILO core conventions set out in the 1998 Declaration (on freedom of association and the right to collective bargaining, on prohibition of forced labor, child labor and any form of discrimination), but also on other principles, including the protection of health and safety in the workplace, the rights of migrant workers, the right to a decent wage, including for employees of suppliers and subcontractors; on training, gender equality, data protection and even in some cases on linking certain wage items to corporate performance at the global level. In the development from unilateral CSR protocols to framework agreements negotiated with Global Union Federations (GUFs), the substance of the agreements has become the object of more detailed negotiations; with auditing procedures supervising the implementation of agreements requiring a more contractual form, including full and compulsory compliance with the clauses and – at least in principle – a more stringent practical implementation. The implementation is to be overseen by the Global Union Federations through their local affiliates, and jointly by the multinational’s central management exercising its influence over the company’s local management.

Due to their very nature of framework agreements, IFAs are incomplete and require additional conditions, achieved through negotiations or directives handed down by central management which the company’s local management is obliged to comply with, in order for the contents of the agreement to be properly implemented and for the inclusion of procedures to handle complaints and sanction infringements. It is therefore especially in the implementation stage that it is necessary for the trade union involved to have strong local connections, if it is to ensure that the agreement is managed effectively. It is at this stage that most critical difficulties occur: both because the trade union’s mandate is not recognized at a local level (this is problematic in many developing countries, but also in several parts of the United States) and because of the need to oversee local suppliers and subcontractors are in compliance with the conditions agreed in the framework agreement, especially since the local suppliers or subcontractors are frequently small or very small companies. One positive element needs to be highlighted: International Framework Agreements clearly establish that observance of ILO conventions on freedom of association, as well as on the right of collective bargaining, is a crucial aspect of any agreement, since these principles are indispensable prerequisites for the correct functioning of monitoring mechanisms overseeing the successful implementation of IFAs. Where these monitoring and supervision procedures are properly